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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 9

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND FOR THE FIFTH JUDICIAL
CIRCUIT

-----X
MICHAEL L. PERRY and :
LONNIE L LONG, : C/A No.
 :
 Plaintiff(s), : 2023-CP-40-04072
 :
 vs. :
 :
AMERICAN INTERNATIONAL :
INDUSTRIES, et al., :
 :
 Defendant(s). :
-----X

Pre-Trial Hearing

BEFORE: HONORABLE JEAN H. TOAL

LOCATION: Richland County Judicial Center
 1701 Main Street
 Columbia, South Carolina 29201

DATE TAKEN: Tuesday, July 30, 2024

TIME BEGAN: 11:07 a.m.

TIME ENDED: 5:39 p.m.

REPORTED BY: Corinne J. Blair,
 Certified Real-Time Reporter
 Certified Court Reporter
 Registered Professional Reporter
 Certified Live-Note Reporter

 EveryWord, Inc.
 P.O. Box 1459
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1 (Hearing begins at 11:07 a.m.)

2

3 MS. McVEY: Your Honor, I believe you
4 remember Rachel Gross from the plaintiffs'
5 case?

6 THE COURT: Yes.

7 MS. McVEY: And Ben Adams, who tried the
8 Glenn case with us, is also here representing
9 the Perrys.

10 THE COURT: Very good.

11 And for the defense, Mr. Brown.

12 MR. BROWN: Mitch Brown, Nelson Mullins,
13 for the Johnson & Johnson defendants.

14 MS. PEPKE: Amy Pepke with Butler Snow of
15 the Johnson & Johnson defendants.

16 MR. COWAN: Chris Cowan, Your Honor, for
17 the Johnson & Johnson defendants.

18 MS. BUENO: Kim Bueno from Butler Snow for
19 Johnson & Johnson defendants.

20 THE COURT: Very good.

21 MR. McCONNELL: Your Honor, Steve
22 McConnell on behalf of defendant Vi-Jon.

23 THE COURT: All right.

24 MR. McCONNELL: Melissa Geist. She's with
25 Reed Smith.

1 MR. ROZELSKY: Kurt Rozelsky, Spencer,
2 Fane, local counsel for Vi-Jon.

3 THE COURT: All right. Now, before we
4 begin, Mr. Early --

5 MR. EARLY: PTI Royston.

6 THE COURT: Right. Mr. Early represents
7 PTI Royston, and I'd like to put on the record
8 the status of PTI Royston in this case at this
9 time. Mr. Early.

10 MR. EARLY: Yes, ma'am. Plaintiffs and I
11 have come to an agreement where I'm no longer
12 in the case.

13 THE COURT: Very good. So PTI Royston is
14 out of the case now.

15 MS. McVEY: And, Your Honor, that also
16 goes for Cosmetic Specialties; that they have
17 resolved, as well.

18 THE COURT: All right. Cosmetic
19 Specialties has resolved, so they're gone. So
20 now the case is Johnson & Johnson, Long's
21 Drugstore. Is that it?

22 MS. McVEY: And Vi-Jon.

23 THE COURT: And Vi-Jon.

24 MS. McVEY: And, Your Honor, there are a
25 couple of additional defendants, but we are

1 very close to resolution. They're represented
2 by Mr. Meriwether and Mr. Glenn.

3 THE COURT: Mr. Glenn, Mr. Meriwether,
4 welcome.

5 MR. MERIWETHER: Thank you, Your Honor.
6 We're delighted to be here for a very brief
7 period. We are virtually resolved.

8 THE COURT: Great. Now, Vi-Jon, if y'all
9 are going to participate, you need to be up
10 here at counsel table and not sitting in the
11 back. Y'all have got to figure out a way to
12 make everybody --

13 MS. McVEY: Your Honor, I was remiss in
14 not also mentioning that AII Clubman, is also
15 in this case. They're in default, as you
16 recall.

17 THE COURT: Right. AII Clubman is in
18 default. And so they would be in this case for
19 damages, only.

20 MS. McVEY: That's right.

21 THE COURT: And if everybody else
22 resolves, then we'll figure out a way to have a
23 damages hearing for them.

24 MS. McVEY: Okay. Thank you, Your Honor.

25 THE COURT: All right.

1 MS. BUENO: Your Honor, if I may, on
2 behalf of Johnson & Johnson, just so the record
3 is clear, there are four entities that we are
4 representing.

5 THE COURT: Right.

6 MS. BUENO: So Johnson & Johnson; Kenvue
7 Inc.; LLT Management, LLC; and Johnson &
8 Johnson Holdco (NA) Inc., just for the record.

9 THE COURT: Right. Okay.

10 MS. BUENO: Thank you.

11 THE COURT: Very good.

12 Okay. And, you know, what I understand to
13 be the situation now -- y'all can sit. You can
14 see how everybody is going to be...

15 Miss Flynn, you got something before we
16 get started?

17 MS. FLYNN: Yes, Your Honor. I'm here on
18 behalf of American International Industries. I
19 do have just a quick statement for the Court
20 whenever we get started.

21 THE COURT: Yeah. Is it something that
22 has to do with the status in the case?

23 MS. FLYNN: Your Honor, last evening we
24 filed a motion to stay, just based on the fact
25 that we've got a petition for a writ of cert

1 pending with the Supreme Court.

2 THE COURT: A writ of cert on this case?

3 MS. FLYNN: Your correct, Your Honor.

4 That's filed a few weeks ago. That's been
5 fully briefed. They've responded to it before
6 the Supreme Court. We've replied and that's
7 pending before the South Carolina Supreme Court
8 on this default issue.

9 So that's -- we just filed a motion to
10 stay last night. I know they haven't had a
11 chance to respond to it.

12 THE COURT: What is the basis -- before
13 I've done anything by way of a final ruling,
14 what's the basis for an appeal at this time?

15 MS. FLYNN: I believe the Court might be
16 aware of the basis for an appeal. It's that
17 the first amended complaint became the
18 operative complaint once it was filed. We
19 responded to the first amended complaint. The
20 second amended complaint was then filed. We
21 responded to that. We also, by virtue of our
22 responses to that, those became the operative
23 complaints and we obviated the default.

24 THE COURT: Right. I understand the
25 merits of the claim. How is that appealable

1 now?

2 MS. FLYNN: It's a novel issue that South
3 Carolina Courts have not ruled upon in an
4 appellate decision as to whether the filing of
5 the first submitted complaint moves to the
6 original complaint and becomes the operative
7 complaint.

8 THE COURT: I get all that, but let's
9 say -- let's put that question aside for a
10 moment. This matter has not concluded yet.
11 You've been placed in default, but then it gets
12 to be a default hearing. Tell me the reason of
13 appellate court proceedings that allows you at
14 this moment to appeal.

15 MS. FLYNN: We filed a petition for a writ
16 of cert so that the Court could address that
17 novel question and decide whether the case --

18 THE COURT: Yeah, but even a petition for
19 certiorari also has to await the conclusion of
20 the case. Your case isn't concluded yet. This
21 is the same thing that's driving me nuts about
22 the case that I spent all morning on, which is
23 this business of filing appeals before you can
24 file appeals.

25 So I simply say that by means of saying

1 this. You proceed at your peril. I don't know
2 how you're up there when we haven't concluded
3 your case here. All that's happened is you've
4 been placed in default. You can contest that
5 when the case is concluded. I don't understand
6 your basis for going up there now, and I don't
7 see that as staying the activities here, but I
8 may stand to be corrected by my betters. I'm
9 nothing but a simple judge. But I just say
10 that to you to let you know that you might not
11 want to stray too far from here.

12 MS. McVEY: And, Your Honor, just to be
13 clear, this is feeling a lot like Sarah Plant,
14 right, where they remove the case the morning
15 of trial; that they filed last night at
16 midnight, the day before this pretrial hearing
17 that they've known about for weeks or months or
18 however long, a motion to stay our case for a
19 living plaintiff.

20 Now, I expect, if you even entertain that,
21 you're going to deny it. And if you deny it, I
22 expect they're going to even want to appeal
23 that. And I have several court orders from
24 where a denial of a motion to stay has been
25 appealed by some of these asbestos defendants

1 which the Court of Appeals says is not
2 immediately appealable.

3 Now, I want to put on the record that if
4 anybody tries to stay our case or move our case
5 the morning at trial, whatever it is that has
6 happened in the past, recent past on this, we
7 will be moving for sanctions.

8 This is a living plaintiff. We've spent
9 money. Our experts are coming. So I just warn
10 everybody, because the writ of certiorari, this
11 extraordinary thing is about a default. (sic)
12 Can you imagine the Supreme Court granting a
13 writ of certiorari for every single default in
14 the state?

15 THE COURT: No, I cannot. And that's
16 simply what I'm saying; is I regard that as
17 something that is intended -- that is submitted
18 for purposes of delay, and we will deal with it
19 accordingly. But, you know, you do what you
20 got to do.

21 But it gets to be a point where the
22 sanctity of these rules aren't going to be
23 enforced. And people aren't going to do this
24 anymore. And clients need to be told, "Hey,
25 you can't do that in South Carolina." In some

1 states, they let all this stuff proceed with
2 appeal and everything. We're a small state
3 with a small bench and a small appellate court,
4 and we have various rules in that regard.

5 So I tell you that. I wouldn't stray far
6 from here if you're going to really insist upon
7 that. And if I were you, I would look at my
8 clients a little bit more strongly about
9 whether you proceed like this. This business
10 of last-minute attempts to stay proceedings in
11 this court have never been successful.

12 MS. FLYNN: Your Honor, if I may preface
13 it by saying we don't want to stay the case.
14 We want to participate in the case. That's
15 all --

16 THE COURT: But you want to stay your
17 situation in the case, for sure. And all
18 that -- all that means is just everybody else
19 would try it and then I'd have to come back
20 here and try your case with a plaintiff that
21 might or might not be alive at that time. No.

22 MS. FLYNN: What we want to do is avoid
23 that piecemeal approach. We want the entire
24 case to be tried once and for all --

25 THE COURT: Yeah, but it's not going to be

1 binding on you. You can't have a foot in both
2 camps. If you say you're on appeal now, it's
3 not going to bind you. If you have a
4 legitimate appeal, then you come back at some
5 later time and try your case. You see the bind
6 you're in?

7 MS. FLYNN: I understand, Your Honor.

8 THE COURT: All right. I just -- that's
9 how it is with me. I wouldn't stray far from
10 being involved in this case, but it's up to you
11 and your client.

12 MS. FLYNN: Yes, Your Honor.

13 THE COURT: The fact it is novel is not
14 going to make one piece of difference about
15 whether it's appealable or not at this time.
16 Okay.

17 Summary judgment. The first one is
18 Johnson & Johnson.

19 MR. BROWN: Your Honor, Mitch Brown. I
20 just want to introduce Ms. Pepke, who's going
21 to argue this. I did want to -- especially
22 since Ms. McVey mentioned what she did, I
23 wanted to bring up an issue so that we don't
24 run off any rails on this one, which is this is
25 an effort, as I understand it, to amalgamate

1 entities or otherwise blur entities or create
2 success reliability, which we understand -- and
3 if she agrees, it's not an issue -- but we
4 understand it to be an issue for the Court
5 because we believe that's an equitable issue.

6 THE COURT: I don't understand what --
7 you've got to give me a little background about
8 what you're talking about.

9 MR. BROWN: I'm talking about -- well,
10 maybe Ms. Pepke should argue the motions first,
11 but I'm giving you a clear indication here. I
12 just want to -- I want to give --

13 THE COURT: Are you trying to stop the
14 trial of this case?

15 MR. BROWN: I'm trying to give you some
16 forewarning, Your Honor, that we believe that
17 these issues about success reliability,
18 amalgamation, and things like that are matters
19 for the Court. They're not jury questions.
20 Now, if Ms. McVey agrees with that, then --

21 THE COURT: Oh, okay. I get what you're
22 saying.

23 MR. BROWN: That's what the issue is. I
24 just want to bring it --

25 THE COURT: I got you --

1 MR. BROWN: I don't want to surprise
2 anybody.

3 THE COURT: I'm following you now. I'm
4 tracking you.

5 MR. BROWN: Okay. Thank you. Ms. Pepke
6 will argue the motion.

7 MS. PEPKE: Good morning -- or actually,
8 good afternoon, Your Honor. I'm going -- we
9 have a lot of motions on the docket, so I am
10 going to do my best not to reargue what's not
11 briefed, and focus on the issue that really
12 needs to be decided considering the plaintiffs'
13 response.

14 (Clarification requested by the
15 official court reporter.)

16 THE COURT: She's going to pick you up a
17 lot better if you come there.

18 MS. PEPKE: How's this? Okay. Wave at
19 me. I will admit to having a tendency to get
20 excited and go fast. Just flag me down.

21 Again, good afternoon, Your Honor. We've
22 moved for summary judgment on four discrete
23 issues, although I will note, we have a
24 footnote on this success reliability issue. We
25 filed a motion to dismiss. Your Honor denied

1 that motion to dismiss. But we had
2 incorporated those arguments into our motion
3 for summary judgment. That's kind of where
4 Mr. Brown was going.

5 THE COURT: I get that. I was just not
6 tracking.

7 MS. PEPKE: There are a lot of parties and
8 a lot of issues. I'll focus on the four
9 substantive claims that we addressed in our
10 motion.

11 First was the negligence, per se. I
12 understand plaintiffs' response on that to
13 concede, in essence, that they are not pursuing
14 that anymore. They had no response. So I'm
15 not going to reargue those points unless they
16 contest that, but they had no section rebutting
17 our arguments for negligence, per se.

18 That takes us to our challenge to their
19 fraud and fraudulent misrepresentation claim.

20 As Your Honor is well aware, one of the
21 elements of those claims is reliance. In their
22 response, they, essentially, concede. They
23 have no evidence that Mr. Perry relied on any
24 misrepresentation by our client. They attached
25 a few exhibits. One, a guidebook that went to

1 a hospital, not to Mr. Perry. They attached an
2 ad from 1965, which is before he was born. No
3 evidence that he saw any of that.

4 What they argue in response isn't that
5 Mr. Perry relied on anything; they assert a
6 novel argument. I'm going to call it reliance
7 by proxy. They argue that representations that
8 the Johnson & Johnson defendants or Johnson &
9 Johnson made to the FDA was the fraud and the
10 misrepresentation. And that induced the FDA to
11 act, and I guess not requiring a warning label
12 or not pulling the product, or requesting that
13 the product be pulled, and that is what led to
14 Mr. Perry's injuries.

15 So they have -- they cite no case law for
16 this reliance by proxy argument. And I would
17 suggest, Your Honor, that what they really are
18 arguing is fraud on the FDA. And fraud on the
19 FDA, as I'm sure you're aware, is a claim that
20 is pre-empted under Buckman (ph) of the United
21 States Supreme Court. They simply have no case
22 law to support their position that this would
23 somehow satisfy the reliance element of their
24 fraud or fraudulent misrepresentation claim
25 and, therefore, it should be dismissed.

1 That takes us to our third issue, which is
2 the conspiracy to commit fraudulent
3 misrepresentation.

4 Obviously, Your Honor, it requires the
5 underlying claim of fraudulent
6 misrepresentation. If they do not have that,
7 they do not have conspiracy. In addition, they
8 have no evidence of -- of the actual
9 conspiracy, even if there was the underlying
10 fraudulent misrepresentation claim. They have
11 no overt act by Johnson & Johnson or any of the
12 J&J defendants, much less evidence that the
13 purpose of some conspiracy was to injure
14 Mr. Perry. And that is the Sky Dive Myrtle
15 Beach case, 426 South Carolina 175, 2019. The
16 plaintiff must prove defendant acted for the
17 purpose of injuring the plaintiff. They have
18 absolutely no evidence of that.

19 And, again, to the extent what they're
20 arguing is it was a conspiracy to submit and
21 persuade the FDA not to require a warning label
22 or not to act on the allegations of asbestos in
23 talc, that is, of course, a fraud on the FDA
24 argument, which is completely pre-empted under
25 Buckman.

1 The last claim that we addressed in our
2 motion for summary judgment was the loss of
3 consortium claim. At the time we filed, we had
4 not seen evidence of a marriage. Perhaps
5 before Mr. Long's deposition, we received a
6 copy of a marriage certificate from Ontario.
7 I'll be quite frank with Your Honor. I spent
8 quite a bit of time looking at this because it
9 was interesting and I wasn't sure what the
10 answer was.

11 At the time they were married in 2009,
12 same-sex marriage, of course, was not legal in
13 South Carolina. There was a statute and also a
14 constitutional provision that outlawed same-sex
15 marriage; that it was not recognized in South
16 Carolina at the time.

17 I could not determine what that meant for
18 the recognizing of marriage today, although I
19 did find, in full disclosure to the Court, a
20 district court opinion, the Braddocks case that
21 would seem to indicate that South Carolina
22 statute and the constitutional amendment were
23 invalid from the beginning.

24 And so I think that means that the
25 marriage is recognized now in South Carolina.

1 I just want to flag it, because I, quite
2 frankly, am not sure what the right answer is
3 on that.

4 And, of course, if the marriage is not
5 valid in South Carolina, then there is no
6 consortium claim under the statute. It must be
7 espoused.

8 THE COURT: Well, you argue that if the
9 marriage is not valid. South Carolina
10 certainly recognizes the validity of marriage
11 in other states. And sometimes other states
12 have different requirements for age, and so
13 forth, than South Carolina. And South
14 Carolina, nevertheless, recognizes marriages
15 from other states that might not have been
16 legal in this state.

17 And all states had to deal with that way,
18 way before we ever got into the current
19 situation of same-sex marriages. And the --
20 uniformly, it has been ruled that New York
21 statutory differences don't invalidate the
22 recognition of a marriage from a state where
23 they're different. Marriages would have been
24 illegal under South Carolina law, because they
25 offended some separate provision, such as

1 penniless marriages. It may be in a different
2 category, but for same-sex marriages that were
3 entered into in a jurisdiction where those
4 marriages were legal, my understanding is --
5 the few pieces of litigation I've seen is that
6 they would be recognized here.

7 MS. PEPKE: I believe that was the issue
8 in the Braddocks case.

9 THE COURT: Right. Exactly. And that's
10 one of ours.

11 MS. PEPKE: Well, it is out of the United
12 States District Court for --

13 THE COURT: Exactly. But Braddocks was
14 the influence upon the South Carolina Supreme
15 Court.

16 MS. PEPKE: Yes.

17 THE COURT: When we first dealt with the
18 issue, when it was brought to us by
19 Judge Condon, on the issue of whether to issue
20 a marriage license, and Braddocks, which dealt
21 with a different factor scenario, to wit, the
22 very thing we're talking about here, is
23 something I would certainly rely on to say the
24 marriage, if it is not otherwise the product of
25 some separate illegality, would be recognized

1 here.

2 MS. PEPKE: Understood, Your Honor. And
3 all I wanted to do was flag it and how I have,
4 um, kind of chased it down since we filed our
5 motion.

6 THE COURT: Yeah.

7 MS. PEPKE: Thank you, Your Honor.

8 Do you have any other questions for me
9 right now?

10 THE COURT: I don't.

11 MS. PEPKE: All right.

12 THE COURT: All right. Ms. McVey.

13 MS. McVEY: Thank you, Your Honor.

14 Let me just start with the marriage. It's
15 clearly valid. It's a clearly -- in their
16 motion, they just say we've not seen any
17 evidence that there was a marriage, although
18 they both testified extensively about their
19 marriage, their long and loving marriage.

20 Then we actually gave them -- by the way,
21 I've never had a defendant ask me for a
22 straight couple, a heterosexual couple, a
23 marriage license ever. Never. Never had that
24 happen. Never had to give one.

25 So when we did that, now we're going maybe

1 South Carolina doesn't recognize gay marriage.

2 THE COURT: I'm prepared to rule that the
3 marriage would be recognized under the
4 authority of the federal litigation and,
5 therefore, consortium could be solved.
6 Consortium damage could be solved. So I don't
7 think we need a whole big, long thing about it.

8 MS. McVEY: Thank you. And I just
9 footnote that to you, much like she did, to say
10 because this is a gay couple, there may be some
11 issues we need to address down the line so we
12 aren't inadvertently triggering something in
13 the jury, much like we would with an
14 interracial couple, that kind of thing. I just
15 want to flag it for the Court.

16 THE COURT: Yes, I'm sensitive to that. I
17 have no doubt but what Mr. Brown and his
18 co-counsel will be sensitive to that, as well,
19 and we will figure out some appropriate things
20 to do, if we need to, to be sure that the case
21 is fairly tried and that no untoward feelings
22 about this sort of thing and this sort of
23 marriage get in there that might be solved in
24 voir dire, or there might be some other way to
25 solve it. Simply by an instruction from me,

1 which is generally the way I try to deal with
2 these things, rather than have people be forced
3 to take positions about matters. But we'll
4 figure out a way to deal with that.

5 MS. McVEY: Thank you, Your Honor.

6 Just briefly, I know you've read all the
7 briefing. We extensively went through
8 Mr. Perry's use of Johnson & Johnson baby
9 powder. And he used it, he testified, from
10 1974 to 2019. He testified he was allergic to
11 deodorant, and he used Johnson & Johnson baby
12 powder from the time his mom taught him to use
13 it all the way up until 2019, and he would
14 apply it, as he said, from his neck down, under
15 his armpits, all down the body to his feet. He
16 testified he bought at least ten bottles every
17 year of Johnson & Johnson baby powder. So that
18 Mr. Johnson -- they do not dispute that Mr.
19 Johnson -- I'm sorry, Mr. Perry was exposed to
20 Johnson & Johnson baby powder extensively.
21 That's not where they go. I'm not going to go
22 into detail, but you know that he described
23 that when he used it what a mess it made. It
24 went everywhere. He had to clean it up. He
25 inhaled it. It was a white cloud. He

1 testified as to his - that his mom taught him
2 to use Johnson & Johnson baby powder from the
3 time he's a little guy all the way up, and that
4 he was around her when she was using Johnson &
5 Johnson baby powder.

6 He testified -- and this is important,
7 because they didn't mention this to you. He
8 testified that he and his family were brand
9 loyal to Johnson & Johnson. And he testified,
10 "We've always used it. We all touched it. We
11 all trusted it. That was part of our culture."
12 And they trusted it because of the
13 representations that Johnson & Johnson made to
14 the public, including Mr. Perry. Right. And
15 you'll see it; we put it in there, the
16 handbooks, the ads, "Mom, put this powder on
17 your babies, it's safe for them." He relied on
18 that.

19 And while Johnson & Johnson was making
20 these false representations about how safe it
21 was, Johnson & Johnson -- we have this in our
22 briefing -- knew for decades that the talc they
23 used to manufacture the body powder contained
24 asbestos, and they knew that beginning in 1949.

25 And, Your Honor, in our brief from pages

1 six to nine, we kind of outline all the
2 testing, decades worth of testing. And that's
3 not all of it. That's just in the brief.

4 Johnson & Johnson mislead and concealed
5 the known information from the public,
6 including Mr. Perry. They lied to regulatory
7 bodies, and courts. And why did they do that;
8 what was the motive? Well -- and we cite this
9 in all the exhibits in the paper -- they
10 describe their baby powder as the golden egg,
11 the flagship product, the sacred cow. Johnson
12 & Johnson sought to -- and you see it in their
13 documents -- to capitalize on the mother and
14 baby emotional bond, the trustworthiness
15 associated with the brand. And they noted it
16 would be very bad for business and damage
17 Johnson & Johnson's reputation if it ever came
18 out that the baby powder contained asbestos.
19 And we cite to that testimony.

20 Johnson & Johnson adopted a strategy over
21 decades of being ruthless. And you see that in
22 the Johnson & Johnson memo in the NIOSH study.

23 They were generating marginal scientific
24 data for national coverage for defending the
25 product. They were buying the science.

1 Johnson & Johnson memo from 1975 discusses
2 management authorizations for additional talc
3 safety studies. And they even started
4 attacking the public health community by
5 creating what they called enemies list. In
6 1972, that J&J had an antagonistic
7 personalities memo. (sic)

8 At the same time they were doing all this,
9 they knew all their testing; they were
10 promoting the purity of the brand and made
11 other claims to the public that Johnson &
12 Johnson knew it could not support.

13 THE COURT: Ms. McVey.

14 MS. McVEY: Yes.

15 THE COURT: I'm very familiar with your
16 filing on this. I have tried a good many
17 Johnson & Johnson cases. Very familiar with
18 the contentions that are made, both sides,
19 about the records of Johnson & Johnson.

20 I will deny the motion on the summary
21 judgment as to the negligence to the first
22 issue. So, all right.

23 What else do I have to --

24 MS. McVEY: Your Honor, they moved for a
25 summary judgment on the fraudulent

1 misrepresentation and the fraud.

2 THE COURT: Right.

3 MS. McVEY: And that's really what I was
4 going through, what Johnson & Johnson was
5 representing to the public and --

6 THE COURT: I've tried those cases before.
7 The fraud is -- the representations they made
8 to the public in the face of the testing that
9 they had done, that's clearly a contested
10 matter of fact. And, therefore, I will deny
11 summary judgment with respect to the fraud
12 count.

13 MS. McVEY: Thank you, Your Honor.

14 The last one, they moved to, is conspiracy
15 and we are going to withdraw our conspiracy
16 claim against Johnson & Johnson.

17 THE COURT: Very good.

18 Negligence, per se, challenges to fraud,
19 and the consortium would go -- yes, ma'am.

20 MS. McVEY: Pardon me, Your Honor. I just
21 wanted to address negligence, per se. They
22 said we didn't address it. That was
23 inadvertent.

24 We have a statute -- filing a statute in
25 South Carolina is, of course, evidence of

1 negligence, per se. And in this case, the
2 evidence that they violated a statute is a
3 strict liability statute, right?

4 THE COURT: That's right. I've tried
5 these cases many times and that's the basis for
6 it. Certainly, your projections are noted, and
7 your positions are protected.

8 MS. PEPKE: Thank you, Your Honor.

9 MS. McVEY: Thank you, Your Honor.

10 THE COURT: Okay. That summary moment is
11 Johnson & Johnson, et al.

12 MR. BROWN: Your Honor, may I mention one
13 other thing on this mode of trial issue before?
14 Just wanting to make sure, I understand Your
15 Honor just ruled, which is understandable and
16 we get that. It's the other entities that are
17 being locked in and Ms. Bueno listed out, and I
18 think they are asserting that all of them also
19 committed fraud or also committed things --

20 THE COURT: They are.

21 MR. BROWN: -- and if they are asserting
22 that they are mere continuations, they're
23 amalgamated, that type of thing --

24 THE COURT: Indicated.

25 MR. BROWN: -- our point is, it would be a

1 court matter, not a jury matter. That issue of
2 whether they should be disregarded as separate
3 would be not for a jury; it would be for the
4 Court. The only reason I bring it up is
5 because of what Ms. McVey said, especially
6 that's a mode of trial issue. If she wants it
7 to be in front of a jury -- I still don't know.
8 Maybe she doesn't. But if she wants that --

9 THE COURT: She wants it to be in front of
10 a jury. She wants the whole group to be for
11 the jury on the theory of amalgamation. And we
12 certainly -- that's certainly a recognized
13 platform in South Carolina. Kincaid comes to
14 mind.

15 MR. BROWN: Right. The -- I understand
16 that she would want them there --

17 THE COURT: Yeah.

18 MR. BROWN: -- for a jury determination.
19 The issue I'm raising, which I'm trying to be
20 clear here -- maybe not doing a good job -- is
21 the question of whether there should be success
22 reliability or --

23 THE COURT: I'm not going to have a trial
24 within a trial, or a trial before the trial,
25 Mr. Brown, on that issue. If I'm wrong about

1 it, your position on appeal will be protected,
2 but I intend to allow all parties to go
3 forward.

4 MR. BROWN: Understood.

5 THE COURT: If you got some other find
6 that you want to make to protect your position,
7 fine, but I'm not going to spend a whole lot of
8 time on having some kind of separate proceeding
9 before I try this case. This case is going to
10 be tried Monday. I'm not going -- y'all
11 sprunged this right at the last on me. I've
12 got this huge stack of boxes just recently with
13 all of your contentions on. I'm not going to
14 stop this thing and go through a brief
15 determination on that.

16 MR. BROWN: I don't think you need to stop
17 it, Your Honor. I just think it's the Court's
18 decision, not the jury's decision.

19 MS. McVEY: Your Honor, I'm sorry to
20 interrupt you, but I haven't seen any of your
21 briefing on this. I don't actually know what
22 you're talking about. I do know that she
23 denied the motion to dismiss, again --

24 THE COURT: That's correct.

25 MS. McVEY: -- and so we are going forward

1 with this, but I -- it's hard for me to make it
2 --

3 MR. BROWN: We'll file a brief on it. And
4 make -- I mean, there are a couple --

5 MS. McVEY: These are jury questions and
6 we need to know -- everybody goes on the jury
7 form --

8 THE COURT: Yes.

9 MS. McVEY: -- that you denied the motion
10 to dismiss. That's our expectation.

11 MR. BROWN: So we don't know until she
12 just tells us that all these issues of success
13 or -- reliability, amalgamation, are going to
14 be determined by the jury, if she wants them to
15 be, instead of Court. We're saying the Court
16 is the one that decides that, if they're not
17 genuine issues of material fact that are at
18 play. And I think --

19 THE COURT: Your contentions about that
20 will be noted when you are reduced to some sort
21 of briefing, Mr. Brown. But this is late in
22 the day to do that.

23 MR. BROWN: Understood.

24 THE COURT: I sometime ago denied the
25 motion to take these parties out of the case.

1 And this comes very late. And I probably will
2 simply deny it and let you preserve your
3 position going forward.

4 MR. BROWN: Okay. Your Honor, we'll file
5 something.

6 THE COURT: Very good.

7 MS. McVEY: Thank you.

8 THE COURT: I'm not trying to limit you in
9 what you file. I'm trying to preserve your
10 position, but my intention is just to move
11 forward.

12 MR. BROWN: Understood.

13 THE COURT: Okay. All right. Now, Long's
14 Drugstores.

15 MR. ADDISON: Afternoon, Judge. How are
16 you?

17 THE COURT: I'm fine.

18 MR. ADDISON: I'm not going to belabor too
19 much. I think you got my memo in front of you.
20 I don't think you need a whole lot of
21 information from me. Ms. McVey and I were
22 talking beforehand. Their response -- they're
23 actually revoking some information. Their
24 response that Mr. Long -- who testified that he
25 bought the product from my client, Long's

1 Drugstores -- their indication is that is not
2 accurate. There is no testimony from
3 Mr. Long's within his very long deposition --
4 four-day long deposition -- that he bought any
5 type of talc-containing materials from my
6 client.

7 THE COURT: Did you attend his deposition?

8 MR. ADDISON: No, ma'am. We were not a
9 party at the time.

10 THE COURT: When did you become a party?

11 MR. ADDISON: In the second amended
12 complaint in February.

13 THE COURT: All right. Have you asked
14 them for any information since that time about
15 this?

16 MR. ADDISON: We have. I talked to Ms.
17 McVey. Basically, Mr. Long --

18 THE COURT: I'm talking about
19 interrogatories --

20 MR. ADDISON: -- and Mr. Perry -- yes,
21 ma'am. We submitted all of that. Mr. Perry
22 has not submitted any kind of information to us
23 that he's ever purchased from Long's
24 Drugstores.

25 THE COURT: All right. Well, I'll see

1 what she has to stay.

2 MR. ADDISON: I'll rely on my brief. If
3 you need anything else, I'll answer --

4 THE COURT: Well, your brief is a rather
5 short thing. It just said we didn't do it.

6 All right. Ms. McVey.

7 MS. McVEY: Your Honor, thank you. And
8 let me be clear that I am incorporating our
9 brief in response -- our 19-page brief or 50
10 some exhibits, the corporate representative
11 testimony of Long's and others.

12 Mr. Addison is correct in that Mr. Perry
13 was deposed before Long's was a defendant in
14 the case. So the testimony we have is not --
15 we don't have anything from Mr. Perry that he
16 purchased from Long's. What we have, and our
17 basis for filing against Long's was that
18 Mr. Perry worked in the hotel business. He
19 traveled to Columbia often and there were
20 several hotels where he would come and stay in
21 Columbia. He did use the talcum powders in
22 Columbia, including Gold Bond. At the time,
23 Long's had three stores in Columbia. They -- I
24 think one or two had kind of small retail-like
25 places where they likely sold Gold Bond and

1 Johnson & Johnson. But he is correct that Mr.
2 Perry did not testify that he actually bought
3 the product from Long's Drugstore.

4 THE COURT: So what is your basis for
5 including them in? I know he says he purchased
6 Gold Bond when he was traveling, but his
7 deposition was taken before you added Long's.

8 What I'm trying to do is pick some piece
9 of evidence that you're going to put in that
10 shows that he actually made a purchase from
11 Long's, either by way of his testimony or
12 somebody else's. So tell me what that is.

13 MS. McVEY: I don't have that, Your Honor.
14 What I do have is that he bought talcum powder
15 here. He did not say that he bought it from
16 Long's.

17 THE COURT: All right. Very good.

18 MS. McVEY: Thank you, Your Honor.

19 THE COURT: I will grant the motion for
20 summary judgment as to Long's.

21 MR. ADDISON: Your Honor, we had --

22 THE COURT: Sir.

23 MR. ADDISON: There was several. We also
24 had consortium and -- all three counts you're
25 granting?

1 THE COURT: I'm granting you summary
2 judgment and letting you out of the case.

3 MR. ADDISON: That's what I'm asking.
4 Thank you. That's all I'm asking. I just
5 wanted to be clear.

6 THE COURT: All right. We're going to
7 file a Form 4 that just says your motion is
8 granted. I'm not going to spend any time on it
9 other than that.

10 All right. Vi-Jon.

11 MS. GEIST: Melissa Geist.

12 OFFICIAL COURT REPORTER: Spell your last
13 name.

14 MS. GEIST: G-E-I-S-T.

15 Justice Toal, good afternoon. May it
16 please the Court. Your Honor, I haven't had
17 the pleasure of being in front of you yet, so I
18 just wanted to introduce myself. Again, my
19 name is Melissa Geist. I represent Vi-Jon.

20 And, Your Honor, I think it's important to
21 just -- let me briefly introduce Vi-Jon and who
22 they are, just so Your Honor is generally
23 aware. So I think Your Honor had said a couple
24 of times, this is a small court, small
25 courtroom. Vi-Jon is a small company. They

1 have two manufacturing sites in Tennessee
2 and --

3 THE COURT: I'm familiar with Vi-Jon.
4 Vi-Jon makes Equate and Wal-Mart sells it,
5 right?

6 MS. GEIST: At certain points in time,
7 Your Honor.

8 THE COURT: I understand we're going to
9 talk about what those are. I'm not completely
10 unfamiliar. I know Equate.

11 MS. GEIST: Thank you. Thank you, Your
12 Honor. I was just going to say that Vi-Jon has
13 manufactured nail polish remover, mouthwash,
14 antibacterial soap, and, at times, you are
15 correct, Your Honor, Vi-Jon has manufactured
16 talcum powder products for retailers like
17 Wal-Mart at certain times. And we are here --
18 your Honor is correct -- because at times
19 Vi-Jon manufactured the Equate baby powder
20 product.

21 But, Your Honor, I'm standing in front of
22 you, again, seeking summary judgment and
23 dismissal of the case as to Vi-Jon, because
24 there is no evidence that would -- that would
25 permit this case to go forward.

1 Our position is Vi-Jon should not even be
2 here next week, Your Honor. And the reason, I
3 think, is very, very simple. Earlier today,
4 Your Honor, in connection with other arguments,
5 you said a couple of times, let's talk about
6 the heart and soul of the case. The heart and
7 soul of the case with respect to Vi-Jon, the
8 claims Mr. Perry has against Vi-Jon, is
9 plaintiffs must prove that Mr. Perry used the
10 Equate product and that it contained asbestos.

11 THE COURT: Right. Number 1.

12 MS. GEIST: Number 1 --

13 THE COURT: Excuse me.

14 MS. GEIST: Number 1, Your Honor, core
15 part of the case: Is there proof that there
16 was asbestos in the Equate --

17 THE COURT: Yeah, that -- that's -- hang
18 on for a minute.

19 MS. GEIST: Yes, Judge.

20 THE COURT: You say that y'all
21 manufactured talcum powder from July of 2016.
22 I don't know what the evidence will show about
23 that. Ms. McVey can tell us in a minute. But
24 he testified he used Equate from 2003 to 2018
25 or '19. That would encompass the period of

1 time when you say that Vi-Jon was manufacturing
2 Equate. So let's go on to talk about the
3 second half of it.

4 MS. GEIST: Okay. Well, the second half,
5 Your Honor --

6 THE COURT: Does it contain asbestos?

7 MS. GEIST: Well, the first part is, there
8 was no evidence of asbestos in the Equate
9 product. The primary testing expert on behalf
10 of plaintiffs --as I'm sure you're very
11 familiar -- is Dr. Longo.

12 Dr. Longo never tested a single bottle of
13 Equate. Dr. Longo is the primary testifying
14 expert for plaintiffs on testing. There is
15 nobody that is going to get up in the
16 plaintiffs' case and stand before the jury and
17 say that they tested a bottle of Equate and
18 found asbestos. There is no evidence of that
19 in this case.

20 THE COURT: All right. Other ways that
21 asbestos in a particular product is -- proves
22 by showing that the product used talc from
23 certain mines and showing that those mines
24 contained asbestos. So what's the deal about
25 that?

1 MS. GEIST: Well, Your Honor, we
2 understand, because we asked Dr. Longo at his
3 deposition, "Did you test the Equate product?"

4 "No."

5 THE COURT: Okay. He didn't test it.

6 MS. GEIST: He didn't test it, and he
7 doesn't intend to for purposes of this case.

8 THE COURT: Right. I got you.

9 MS. GEIST: And we understand -- although
10 we're guessing a little bit -- we understand
11 that plaintiff's counsel will ask hypothetical
12 questions of Dr. Longo in front of the jury and
13 ask questions like, you know, "Have you found
14 veins of asbestos in certain mines? Assuming
15 that Vi-Jon's talc used in the Equate brand
16 product came from those mines, can you conclude
17 that the product contained asbestos."

18 THE COURT: Right.

19 MS. GEIST: We assume that that is going
20 to be --

21 THE COURT: Okay. If it is, what evidence
22 have they got that as to what mines Equate got
23 its talc from?

24 MS. GEIST: Well, Your Honor, if we are at
25 trial here in front of Your Honor next week,

1 obviously, a Vi-Jon representative will testify
2 about the source of the talc that --

3 THE COURT: Well, they, obviously, have
4 deposed --

5 MS. GEIST: Well --

6 THE COURT: After I figure out whether
7 there will be any evidence that can be put
8 before the jury next week that shows that the
9 mines in which Equate produced its material
10 contained asbestos, is there some evidence
11 along those lines?

12 MS. GEIST: Well, Your Honor, my
13 understanding is that Dr. Longo has found,
14 through glass hole testing or otherwise, veins
15 of asbestos in certain mines.

16 THE COURT: And is there proof for which
17 mines Equate used to create its talc?

18 MS. GEIST: There will be evidence of
19 which mines Vi-Jon --

20 THE COURT: And is one of those mines a
21 mine that Longo says had asbestos in it?

22 MS. GEIST: That's correct, Your Honor.

23 THE COURT: Then that's all I need to
24 know.

25 MS. GEIST: Your Honor, can I just address

1 that point, though, because I am not aware of a
2 case, either under South Carolina precedent or
3 anywhere, that says just because there was a
4 finding of asbestos in certain areas of a mine
5 that the actual product that came out of those
6 mines was contaminated with asbestos. It's too
7 big of an evidentiary leap, Your Honor, and I'm
8 not aware of any precedential court finding,
9 ruling, that has said you don't actually have
10 to test the product.

11 THE COURT: That's not what I'm offering.
12 What I'm offering is that summary judgment is a
13 -- is a certain point in a case. And in
14 summary judgment, all inferences are looked at
15 in favor of the non-moving party, in this case,
16 the plaintiff. And if there is a scintilla of
17 evidence that will support their contention
18 that the mines that were used to create Equate
19 contain asbestos, then that's enough to get
20 them past summary judgment. Whether they're
21 going to have enough to prove it acceptably
22 enough for me to let Equate go to the jury, I
23 don't know at this time, but I'm at a very
24 preliminary stage, and they do have a little
25 bit of evidence about that.

1 MS. GEIST: And I appreciate that, Your
2 Honor, but I don't believe that that can be the
3 law going forward at this stage of the case. I
4 was thinking of an analogy, Your Honor. We
5 were thinking about this argument, thinking of
6 how I wanted to present it to the Court. And
7 it occurred to me that we often in -- you know,
8 in drug -- pharmaceutical litigation, you have
9 cases of contaminated medication, contaminated
10 pills, but it never means that you can assume
11 that every single product or pill that came out
12 of that pharmaceutical company was
13 contaminated. It's simply eliminates to a
14 batch or batches. And then, Your Honor, at the
15 end of the day, the plaintiff still needs to
16 prove that he or she ingested a pill that was
17 actually contaminated.

18 THE COURT: But here's what -- I probably
19 recited the wrong standard -- I know I did --
20 just a moment ago.

21 Scintilla is not the test. It's whether
22 there is a genuine issue of material fact. You
23 and I are debating right now this genuine issue
24 of material fact. QED. There is a genuine
25 issue of material fact, and, therefore, I'm not

1 going to grant summary judgment.

2 MS. GEIST: Your Honor, should I turn to
3 the second point? Because I think the second
4 point is, frankly, dispositive. Even if --
5 even if assuming -- let's assume, for purposes
6 of this argument, that there was asbestos found
7 in the Equate brand product. The second part
8 of our argument is that the exposure to
9 Mr. Perry does not meet the requirement --

10 THE COURT: The law passed --

11 MS. GEIST: -- under South Carolina law,
12 in the Henderson test. And, Your Honor, I
13 really, on this point --

14 THE COURT: I'm not going to make summary
15 judgment determinations. That's a huge
16 material issue of fact. It's going to depend
17 on what the experts say. This is always a
18 battle of the experts. But summary judgment
19 will not be warranted on that basis.

20 MS. GEIST: But, Your Honor, may I
21 approach, because I want to get to what the
22 expert has to say on that?

23 THE COURT: You can just tell me briefly,
24 but, see, I'm not in the business of weighing
25 the experts at this time. They're going to

1 have an expert that says one thing, and you're
2 going to have an expert that says another
3 thing. That's not what summary judgment is
4 about.

5 MS. GEIST: And, Your Honor, I agree with
6 you. And that, typically, is how cases
7 proceed. The expert for the plaintiff says one
8 thing; the expert for the defendant comes in
9 and says something, and the jury has to weigh
10 what those experts say and make a decision.
11 But here it is very rare when a plaintiff's
12 expert makes the argument for you, and that is
13 our position. Dr. Longo always does a dose
14 calculation and exposure calculation, and he
15 did it in this case.

16 And that's, Your Honor, what I would like
17 to hand up to you, if I may approach?

18 THE COURT: I'm not going to get into a
19 qualification of Longo in the connection with
20 this particular motion. We got a ways to go in
21 this hearing today. We've got a whole section
22 of it that's going to deal with whether these
23 experts can be allowed to testify. This is
24 always what happens with Longo. Frankly, it's
25 going to happen with y'all's experts, as well.

1 I've got a lot of questions in all kind of
2 ways. But, ma'am, let me just simplify this
3 thing. All of your position's completely
4 protected in your very excellent motion, your
5 brief, and your presentation, but I will deny
6 the motion on summary judgment.

7 MS. GEIST: Your Honor, just for the
8 record, can I just add one thing and then I
9 promise I will sit down?

10 THE COURT: All right.

11 MS. GEIST: All right. So you had said
12 something about you understand Dr. Longo's
13 calculation, and we all do. But in this
14 case -- this is why I'm trying to make the
15 point, Judge, because this is a different case
16 for a different company. Dr. Longo made that
17 calculation of dose, or exposure to the
18 products at issue for seven products. He could
19 not and did not make it for the Equate product
20 manufactured by Vi-Jon.

21 And when we asked him at his deposition:
22 Why didn't you do it, here on page 7 of his
23 notes that were produced before his deposition,
24 here are the dose calculations, exposure
25 calculations for seven other products, nothing

1 with the Equate brand product. And, Your
2 Honor, we asked him when he was being deposed
3 -- I think it was maybe a week ago, "Why didn't
4 you do it for Equate?" And he told us, quote,
5 I didn't really have enough information to do
6 that.

7 So it is an admission by the primary
8 expert on behalf of Mr. Perry that he could
9 not -- based on the testimony from Mr. Perry,
10 based on the evidence in the case to date, he
11 could not say how much exposure Mr. Perry had
12 with respect to the Equate product.

13 And what we know, Judge, in this case,
14 Mr. Perry never bought it. Never once; not a
15 single bottle. He never bought the product.

16 His testimony was when his spouse and he
17 would shower together and his spouse would get
18 out of the shower first and he would grab the
19 Equate, if that would happen, then he was
20 possibly also using the Equate brand product.
21 But we know from his spouse, Lonnie Long, who
22 testified last week, he said, "My spouse,
23 Mr. Perry, the plaintiff, used Johnson &
24 Johnson powder 95 percent of the time. The
25 other 5 percent are" --

1 THE COURT: Okay. I --

2 MS. GEIST: Maybe the Equate --

3 THE COURT: You made your --

4 MS. GEIST: -- products, Your Honor, but
5 how can -- how can that rise to the level of
6 what's required?

7 THE COURT: I understand. You made your
8 point.

9 MS. GEIST: Thank you, Judge.

10 THE COURT: All right. Ms. McVey.

11 MS. McVEY: Ms. Gross.

12 THE COURT: Ms. Gross.

13 MS. GROSS: Yes, Your Honor.

14 THE COURT: I mean, I want one sentence
15 here.

16 MS. GROSS: There may be two, but I'll be
17 fast, I promise.

18 So, first, of course, Mr. Perry used it on
19 himself. His husband purchased it.

20 THE COURT: I'm not worried about that.
21 All I'm concentrated on is whether there's
22 expert testimony --

23 MS. GROSS: Got it.

24 THE COURT: -- that Equate was made from
25 mines that contained asbestos.

1 MS. GROSS: Yes, ma'am. From two experts.
2 It's not just Dr. Longo. It's Mr. Bailey, as
3 well. Mr. Bailey has testified that --

4 THE COURT: Mark Bailey has testified.
5 Montana, Canada (sic), Vermont. And which mine
6 was Equate made from?

7 MS. GROSS: Equate was made during the
8 period at issue -- it was sold by Barretts. It
9 was made from Montana.

10 THE COURT: Montana. Okay. We all got
11 Montana -- testimony. That's all I need to
12 know at this time. Whether I'll let you go to
13 the jury with it is another question, but right
14 now, it's a genuine issue of material fact and
15 you got that.

16 MS. GROSS: And just for the record, it's
17 not just the money. It's actually hundreds of
18 bottles of products containing the Montana
19 talc. It could have been tested by both
20 Mr. Bailey and Dr. Longo. It's what's inside
21 of the bottle that counts. And I talked about
22 that. So just so the record's clear on that,
23 as well.

24 THE COURT: Thank you, ma'am.

25 MS. GROSS: Thank you.

1 THE COURT: All right. The motion is
2 denied.

3 All right. Plaintiffs' motion -- motions
4 in liminé.

5 All right. I hope plaintiffs and
6 defendants, that there's been some kind of
7 consultation about these things --

8 MS. McVEY: Your Honor, I was wondering --

9 THE COURT: -- examination of all my old
10 rulings, because I'm probably not going to hear
11 too much on those. I want to let people
12 preserve their positions, but Plant was one of
13 the latest in a series of talc cases I tried.
14 I will say this -- and y'all can chew on this.
15 I will take a break before we start this. But
16 the main thing that I want to concentrate on is
17 the expert testimony.

18 Plant was my latest examination of all of
19 this. And I must say to you that the impact of
20 more recent examination of the big issue, which
21 is, hey, crocidolite is the terrible bad
22 asbestos, but chrysotile is the good asbestos.
23 And by the way, it has these cleavage
24 fragments. The concept being those cleavage
25 fragments can't worm their way down into the

1 areas of the lung where mesothelioma is
2 created.

3 I'm going to be looking very carefully at
4 what experts can say to all of that. I am
5 particularly concerned about, on the defense
6 side, and it's Sanchez and McCrone. That's his
7 big bailiwick, but he cannot diagnose
8 mesothelioma, nor can a lot of these experts.

9 And the big takeaway from Plant is, I did
10 not allow these non-medical experts to testify
11 about what causes mesothelioma. They can
12 testify about deposits and that kind of thing,
13 but what causes mesothelioma has got to be
14 someone that's got some qualification.

15 A lot of these experts -- well, you had
16 one, particularly in the old days, who
17 testified all around that mesothelioma -- and
18 wanted to testify mesothelioma of the plaintiff
19 in the case was idiopathic or spontaneous.

20 Idiopathic simply means we don't know what
21 caused it. Spontaneous is not any kind of
22 medical diagnosis that has stood up to more
23 recent examination of this issue of the cause
24 of mesothelioma.

25 So, I'm going to -- what I'm going to be

1 doing is looking at these experts and just give
2 you all fair warning in advance. All the rest
3 of these routine motions that I have decided a
4 thousand times, I hope we can sail through and
5 concentrate our efforts on what kind of expert
6 testimony is going to be allowed and the ambit
7 of that.

8 I rarely knock experts out totally, even
9 though each side always wants me to knock out
10 the other side's expert completely. I don't do
11 that.

12 I think these toxic tort cases are the
13 battle of the experts, but I do put some
14 scrutiny on what those experts are qualified to
15 testify about. And so that's the way I'm going
16 to be driving with some of this.

17 Ms. McVey.

18 MS. McVEY: Your Honor, I think that makes
19 sense.

20 Just for the record -- and I know we gave
21 you copies -- we filed for everybody to have
22 their pretrial hearing transcripts in Plant,
23 Jolly, and Taylor. I think it captures almost
24 every --

25 THE COURT: It does. I looked back on

1 those and made notes.

2 MS. McVEY: So if we were to take a break,
3 I think I can check with somebody and see what
4 kind of agreement we have.

5 THE COURT: That would be so nice. The
6 Omnibus ones, it looks to me like you ought to
7 be able to check off pretty easily. And then
8 we can spend some time on the ones that are
9 really the very principle position taken.

10 Okay. It is now 1:00. How much time do
11 we need? The court reporter's the one we need
12 to give real mercy.

13 MS. McVEY: We're happy to do anything you
14 want. We're here to stay here to work if you
15 want. If people want to grab a little sandwich
16 so no one gets cranky, I'm good with that.

17 THE COURT: How about 1:15 or as close
18 thereof as we can get? Does that give you
19 enough time?

20 MS. McVEY: You said 1:15?

21 THE COURT: I mean -- excuse me. 2:15.
22 2:15.

23 (A luncheon recess was taken from
24 1:00 p.m. to 2:14 p.m.)

25 (Court resumed session at 2:14 p.m.)

1 THE COURT: All right. We're on
2 plaintiffs' motions in liminé. Okay.

3 MS. McVEY: And, Your Honor, the easiest
4 thing may be to start with the plaintiffs'
5 Omnibus, and we can tell you we've agreed on
6 some and some with a few caveats that we can --

7 THE COURT: All right.

8 MS. McVEY: -- probably just walk through.

9 THE COURT: Okay.

10 MS. McVEY: If you look at Omnibus,
11 starting with the first one, collateral source,
12 we agree to that one.

13 THE COURT: Hang on. Yeah, all right.
14 What about it?

15 MS. McVEY: We've agreed.

16 THE COURT: Agreed. Okay. On 1B,
17 circumstances of informal counsel.

18 MS. McVEY: Your Honor, my understanding
19 is we agreed to that one, as well.

20 MS. BUENO: Agreed.

21 THE COURT: All right. 1C, exposure to
22 substances other than talc or asbestos.

23 Ms. McVey?

24 MS. McVEY: We agreed to that one.

25 THE COURT: All right. Motion in liminé

1 1D, reference to or evidence of Dr. Longo's
2 address -- arrest.

3 MS. McVEY: Agreed.

4 THE COURT: Very good. All right.

5 Dr. Longo and the confederate flag.

6 MS. McVEY: Agreed.

7 THE COURT: Suggestion that defendants are
8 not held to the standards of an expert.

9 MS. McVEY: We agreed.

10 MS. BUENO: Agreed. Your Honor, we agreed
11 to follow the pattern instructions here that
12 Your Honor has given. We stand on our briefing
13 on other explanation.

14 THE COURT: Yeah. Well, y'all know what
15 my instructions are and that's what I'm going
16 to do.

17 1G, suggestion that the plaintiffs are
18 held to the standard of an expert.

19 MS. McVEY: We agree.

20 THE COURT: All right. Past or future
21 compromise settlement resolutions.

22 MS. McVEY: We agreed.

23 MS. BUENO: We agree with the caveat that
24 -- that the actual nexus of their motion kind
25 of bled over into our defendants' motion in

1 liminé number 9, about publishing parts of the
2 complaint.

3 THE COURT: Yeah. You know that I'm not
4 going to do that, so I understand you reserve
5 your right to argue that, with Smith versus
6 Tiffany and Mason versus Carasi (ph). Okay.

7 1H, past or future compromise resolutions.
8 Agreed. And statements by the courts.

9 MS. BUENO: We agree, Your Honor, as it
10 relates to witnesses that are in this trial.
11 If there are orders related to witnesses that
12 come up during examination of other experts, we
13 agree to approach before using those.

14 THE COURT: Yeah. I never allow it in
15 evidence. You can argue that as a piece of
16 support for whatever position you're taking in
17 legal arguments made, but I never allow that
18 kind of thing in evidence before the jury. So
19 just so you know.

20 MS. BUENO: Thank you.

21 THE COURT: All right. Motion in liminé
22 1J.

23 MS. McVEY: Your Honor, I think we need to
24 argue this one. This is --

25 THE COURT: All right. You go forward.

1 MS. McVEY: Thank you, Your Honor.

2 This really has to do with preventing
3 Johnson & Johnson, or Vi-Jon, but particularly
4 Johnson & Johnson, to come in and say, "This
5 company has always acted ethically. We've
6 always done the right thing by customers." And
7 if they're going to say that, then we believe
8 it opens the door to a lot of other bad stuff
9 that Johnson & Johnson's done, not just as it
10 relates to talc.

11 And we give you some examples in our
12 briefing, but, you know, that they were sued by
13 DOJ for illegal marketing of Risperdal; that
14 they've been subject to congressional
15 investigation. All of that stuff that would
16 not necessarily come in unless they were having
17 people vouch for what a great, safe, ethical
18 company Johnson & Johnson is. That's what
19 we're seeking to prevent.

20 THE COURT: All right. Counsel.

21 MS. PEPKE: Thank you, Your Honor.

22 We just wanted to be clear on this. We
23 agree that we're not going to vouch or bolster
24 as that is defined under South Carolina law.
25 We're not going to vouch for the credibility.

1 We personally believe in a witness or our
2 witnesses believe --

3 THE COURT: Well, if you specifically
4 address "We've always been ethical on this sort
5 of thing," you say that, you're going to open
6 the door.

7 MS. PEPKE: Agree, Your Honor, but we also
8 need to rebut anything that plaintiffs put on
9 in their case. They get up and --

10 THE COURT: Oh, sauce for the goose is
11 sauce for the gander. If they open the door,
12 it's always out there. So if they open the
13 door, then we'll talk about it.

14 MS. PEPKE: Okay. Thank you, Your Honor.

15 THE COURT: You're not precluded from
16 arguing, if they open the door, but I have
17 never seen it happen that it went that far with
18 any of the cases I've had.

19 MS. PEPKE: Thank you, Your Honor.

20 THE COURT: All right. Ms. McVey, so, all
21 right, we understand each other on vouching and
22 bolstering. We'll grant that.

23 Insincere use of apologies and other
24 similar unprofessional behavior.

25 What do you mean by that?

1 MS. McVEY: Here's what we mean. If --
2 what I want to avoid happening is that Johnson
3 & Johnson's lawyer goes up to Mr. Perry and
4 says, "We're just so sorry that you have this
5 mesothelioma." It just puts him in a very
6 awkward position in front of the jury. If they
7 want to apologize to him sitting at the table,
8 privately, I think that's totally valid if they
9 feel that way, personally. But just putting it
10 in front of the jury just feels like what is
11 Mr. Perry supposed to do with all that?
12 "That's okay. Don't worry about it." I just
13 think that doesn't need to be done in front of
14 a jury.

15 THE COURT: All right. Counsel.

16 MS. PEPKE: Your Honor, I was actually
17 surprised to find case law on this, but it is
18 completely appropriate for the defendants to
19 appropriately and in a limited fashion to
20 acknowledge Mr. Perry's unfortunate diagnosis.

21 THE COURT: Yes. She's talking about
22 something a little different, as I understand
23 it. Ms. McVey, listen to me on this.

24 MS. McVEY: I'm sorry.

25 THE COURT: What she's saying is she's

1 trying to prevent you from going up to the
2 plaintiff, or the plaintiff's husband, and
3 saying, "We're so sorry you're dying of
4 mesothelioma."

5 If in the -- in the course of the
6 testimony of your witness they say, "Our heart
7 goes out to Perry," or something of that
8 nature, you know, "you're suffering" or
9 something like that, that's often done. It
10 needs to be done with a dead pan (ph), I'm sure
11 y'all went through it that way. That, I have
12 no problem with. And I'll point Ms. McVey to,
13 she wants to avoid that awkward position of
14 putting this plaintiff and the plaintiff's
15 husband in the position of having to directly
16 confront that with them. You say you're not
17 going to do that, so I think we've resolved it.

18 MS. PEPKE: Well, I just want to be clear.
19 We have in the past, counsel, when, you know,
20 plaintiff takes the stand, perhaps a limited
21 acknowledgment that --

22 THE COURT: I will grant her motion, if
23 that's what you're going to do, because I'm not
24 going to let you put the plaintiff -- they're
25 emotional enough as it is. I'm not going to

1 put them in the awkward spot of having to say,
2 "Well, thank you so much for telling me how
3 sorry you are that I'm about to die." Just
4 don't do that.

5 MS. PEPKE: Understood, Your Honor.

6 THE COURT: But if your witness wants to
7 testify along those lines, you know, a brief
8 sort of thing, just representing Johnson &
9 Johnson, I don't have any problem with.

10 MS. PEPKE: We understand that. Thank
11 you.

12 THE COURT: All right. Very good. So
13 granted, with the limitations we've discussed.

14 All right. Mention of Clubman talc on
15 American International Industries.

16 MS. BUENO: Your Honor, this motion is
17 written very broadly. I think we've talked and
18 we have an understanding about what we are and
19 are not going to do regarding Clubman talc,
20 speaking on behalf of J&J defendants.

21 We understand that Clubman is in default.
22 And let me just be clear. It's defendant's
23 position that cosmetic talc did not cause
24 Mr. Perry's mesothelioma. So the last thing
25 we're going to do --

1 THE COURT: I know that's your position.

2 MS. BUENO: But it's relevant here, Your
3 Honor, because we're not going to point the
4 finger at Clubman talc.

5 THE COURT: You don't get to take up
6 Clubman talc, either, is what she's saying.

7 MS. BUENO: Correct. But what this motion
8 filed by plaintiff seeks to do so is to
9 eliminate any reference of it. All I want to
10 make sure we have the ability to do, as
11 defendants, is give the jury an accurate
12 portrait of Mr. Perry's talc use over time.
13 How many bottles of Johnson & Johnson talc he
14 said he used; how many bottles of Clubman,
15 Equate, and all the others. There's many, many
16 different talcs.

17 So we opposed this motion, which was any
18 mention of Clubman talc. And we opposed it
19 because --

20 THE COURT: Here's what she's trying to
21 avoid. And let me see if I can get some peace
22 going here. These people are in default. They
23 don't have the ability to say a darn thing.
24 They're in default, therefore, they're liable.
25 Their talc caused his injury. Period. So

1 Clubman is off base and American International
2 is off base to you.

3 On the other hand, you can't blame it all
4 on Clubman just because they're in default.

5 MS. BUENO: Understood. The only thing
6 that we seek to do, and the only evidence we'll
7 offer is to be able to talk to Mr. Perry about
8 his use over time to avoid the false impression
9 that Johnson's baby powder was the only talc he
10 was using.

11 THE COURT: That's legit.

12 MS. BUENO: Thank you.

13 THE COURT: All right. It's granted, with
14 the limitations that have been expressed.

15 Motion in limine 1M, exclude mention of
16 Long's previous lawsuits that are unrelated to
17 Michael Perry.

18 MS. McVEY: I think we agree on this. He
19 had a prior worker's compensation claim that we
20 just wanted to keep --

21 THE COURT: Well, I'll grant that.

22 Number 1N, exclude information in Michael
23 Perry's medical records unrelated to his cancer
24 diagnosis, specifically, Michael Perry's sexual
25 history.

1 MS. McVEY: Your Honor, there are some
2 comments in the records talking about sexual
3 history or sexual partners. And we don't think
4 that's probative of any issue here. And when
5 we were discussing it with Ms. Bueno, you know,
6 she made the comment if he's not going to
7 testify that "I've always been faithful or we
8 have a perfect marriage," then she won't use
9 those records. And if that's the deal, then I
10 think we're good.

11 THE COURT: Well, I wouldn't let that
12 happen if they were a man and a woman that's
13 married. I'm not going to let you get into
14 anybody's sexual history, don't care what. So
15 let me tell you that's off base. If they --
16 they will describe their marriage as a loving
17 marriage. And you don't get to refute that by
18 talking about his sexual history.

19 I'd say the same thing if it were
20 Mrs. Perry. Just because Mr. Perry will say
21 "Mrs. Perry and I have this long, loving
22 relationship," I don't let people bring up,
23 well, she's, he, "she's strayed a little bit on
24 him, didn't she?" That's not going to happen.

25 MS. BUENO: Understood, Your Honor. And

1 just so we're very clear about what the records
2 are here, this motion is very broad, as you
3 see. It seeks to exclude any evidence outside
4 of his cancer diagnosis that comes --

5 THE COURT: Yes, ma'am. And I'm going to
6 grant that motion.

7 MS. BUENO: And here's the concern: There
8 is a loss of consortium claim. And the sexual
9 history portion aside, there are discussions
10 about separation and divorce and issues in the
11 marriage that are appropriate when you have a
12 loss of consortium claim. Those are things
13 that should be fair game, depending on the
14 testimony. I do not intend to bring those in
15 affirmatively. But if there is --

16 THE COURT: They're going to testify they
17 have a loving relationship. Just count on
18 that. I am not going to allow you to get into
19 the problems with the marriage. I have never
20 allowed that in a loss of consortium case and,
21 frankly, most people are pretty sensitive to
22 just not getting into that, one way or another.
23 But I will tell you, if it comes to that, I
24 will not allow you to introduce any evidence of
25 the problems in the marriage or the sexual

1 history or anything like that.

2 MS. BUENO: Understood. And with that
3 understanding, Your Honor, as it relates to the
4 marriage and the sexual history, we ask for
5 your ruling on this motion to be limited to
6 that because it is broader. It's seeking to
7 exclude anything in the medical records outside
8 of his cancer diagnosis. There are other
9 things --

10 THE COURT: Well, what other things are we
11 talking about?

12 MS. BUENO: Well, for example, he had
13 prior accidents that affected quality of life
14 and caused -- he has mental health issues. I
15 don't know. The point is, depending on what
16 evidence comes --

17 THE COURT: I'm not going to -- I am very
18 unlikely to allow any of those things in.
19 We're talking about mesothelioma, which he got,
20 and what happened as a result of the
21 mesothelioma. His other medical history is not
22 pertinent as to whether it caused him to get
23 mesothelioma.

24 MS. BUENO: Understood. But we do have
25 claims by the plaintiffs about different

1 damages over time.

2 THE COURT: You'll have to prove it's
3 damages related to mesothelioma. You can't
4 undercut them by showing he had damages in
5 other things. I've never allowed that.

6 MS. BUENO: Understood. There's also
7 medical records about family history and other
8 issues for -- for a long period of time,
9 including mesothelioma.

10 THE COURT: I don't let that kind of stuff
11 in. Let me tell you, this case is all about
12 his mesothelioma; what caused it; what he has
13 suffered as a result of it. I will not allow
14 the material in.

15 MS. BUENO: Understood.

16 THE COURT: And your position on that is
17 preserved for later use. (sic)

18 MS. BUENO: Thank you. And to the extent
19 there is a medical record that is outside of
20 his cancer diagnosis that we wish to offer, I
21 will raise that with the Court in advance.

22 THE COURT: Certainly.

23 All right. Granted, with the caveats I
24 have put on it.

25 All right. That's the -- that's the --

1 that's the Omnibus; am I right?

2 MS. McVEY: Yes, ma'am.

3 THE COURT: Ms. McVey, so we come down to
4 number 2. This is plaintiffs motion in liminé
5 number 2: Misleading statements about the
6 FDA's regulatory authority and statements that
7 the talc is generally regarded as safe.

8 MS. McVEY: So, Your Honor, we discussed
9 this.

10 Johnson & Johnson agrees not to use that
11 graph that they made; generally regarded as
12 safe. I think they've agreed not to do that.

13 Where we really have a strong disagreement
14 is FDA's authority. And, as you know, you've
15 tried these cases now a bunch of times. The
16 FDA does not have -- we want to prevent them
17 from arguing that the FDA has approved talc or
18 found any level of asbestos to be safe in talc.
19 We want to make clear that the FDA authority
20 does not include -- let me say that backwards.

21 Talc can be sold without the FDA ever
22 approving it, right --

23 THE COURT: Right.

24 MS. McVEY: -- or testing it or any of
25 that stuff; that the FDA does not have ability

1 to issue a recall for talc. They can put
2 public safety out there. The only thing that
3 they can regulate -- and it's on their website
4 and you've heard it -- is its color additives.

5 So by allowing them to kind of wiggle room
6 with the FDA and suggest how the FDA approved
7 talc in products and said it was safe is what
8 we're trying to prevent them from doing.

9 THE COURT: Well, let me say a couple of
10 things about that.

11 Kind of going at it backwards. For years
12 it's been the good asbestos, and the bad
13 asbestos. Now, the FDA has put a kibosh on
14 chrysotile, crocidolite, amosite, tremolite and
15 all of them. And the very latest with what
16 they did with chrysotile. So, you know, you
17 don't --

18 MS. McVEY: That's the EPA.

19 THE COURT: I mean, that's the EPA, right.

20 MS. McVEY: So this is FDA and what I just
21 don't want them to do is say, "Look, the FDA
22 said this talc was safe and that if we let it
23 be sold, then whatever asbestos was in there is
24 perfectly fine." The FDA has no authority,
25 other than color additives, to regulate this

1 talc.

2 THE COURT: I agree.

3 MS. BUENO: Your Honor, so the motion, as
4 it's written, asks us not to argue that talc
5 has to be approved by the FDA. We know that.
6 That is not our argument. But as outlined in
7 our response brief, the FDA does have authority
8 to monitor cosmetic products. We outline that
9 with screen-shots from the FDA website that
10 talks about exactly what the FDA has authority
11 to do. And to the extent that evidence comes
12 in, it will be related, specifically, to what
13 the FDA can and cannot do.

14 THE COURT: How's that pertinent to this
15 case?

16 MS. BUENO: This is how it's pertinent:
17 Because one of the things the FDA does have the
18 ability to do is put a warning label on things.
19 And as Your Honor's well aware -- and we'll
20 talk about it later this afternoon -- there was
21 a citizen's petition, a variety of them, but
22 the one at issue asks the FDA to put a warning
23 label for asbestos on cosmetic talc. There was
24 a response letter saying, "We don't think
25 that's appropriate." That is evidence.

1 THE COURT: Well, if we're going to get
2 into that, we're going to impeach the CFTA and
3 all the shenanigans they went through to hide
4 the ball from the public to pressure the
5 governmental entities not to put -- to put out
6 the warnings they wanted to put out. I mean,
7 that's a slippery slope.

8 MS. BUENO: Well, I disagree, Your Honor,
9 with that characterization. I don't think that
10 what you just said is going to be in evidence,
11 because I don't think it's factual, but you are
12 correct that I am sure the plaintiffs will seek
13 to offer such evidence. But the evidence --

14 THE COURT: -- offered it before in cases
15 I've tried.

16 MS. BUENO: As defendants have offered
17 evidence about the FDA citizen's petitions and
18 responses and the like.

19 THE COURT: I'm not going to spend this
20 very limited amount of time we have with this
21 trial, and we talked about how long this trial
22 is going to be after awhile, but I'm not going
23 to spend it having a back and forth and back
24 and forth about the FDA and all that kind of
25 thing. EPA is something that is a little bit

1 more to the point, because they do regulate.

2 FDA does very little by way of
3 regulations. And, therefore, I'm not going to
4 get into a whole bunch of excitement. All the
5 FDA did was to say that if it's added to food,
6 it is generally regarded as safe.

7 MS. BUENO: That's not something that
8 we're seeking to offer. What we're seeking to
9 offer is a variety of evidence coming in at
10 every trial about what the FDA has done
11 regarding cosmetic talc.

12 THE COURT: Yeah, but the point of that is
13 to say, "Hey, we were well within what they
14 did," and so forth. The FDA didn't do anything
15 that said, "Hey, it's okay to put asbestos in
16 your talc."

17 MS. BUENO: Absolutely not. But the FDA
18 did testing in 1976. They considered a
19 citizen's petition in 1986. They held a talc
20 symposium in 1994.

21 THE COURT: So what -- what does that have
22 to do with this case?

23 MS. BUENO: Well, because they're going to
24 be offering evidence of state-of-the-art, what
25 was commonly known by the cosmetic industry.

1 (sic) That's all part of it. The FDA was
2 having symposia, where they were inviting
3 industry and they were inviting others to have
4 these conversations. That is evidence that's
5 relevant to deal with plaintiffs' claims that
6 J&J was doing something wrong. If they're
7 going to offer state-of-the-art evidence, what
8 the FDA was doing, testing, finding --

9 THE COURT: But what authority did they
10 have to do much of anything?

11 MS. BUENO: Well, you know what, they can
12 look at our brief, our response brief to this
13 motion. It's on page 3. There is a list of
14 exactly what the FDA has authority to do. It's
15 on the website now, and it's been consistent
16 over time. And the FDA says in the title on
17 this --

18 THE COURT: You can say it all day. I can
19 rule on every one of these things without
20 having to hear any arguments. I'm not going to
21 go back and forth all day long on this thing.

22 MS. BUENO: Understood. But the FDA --
23 look, I think we're at a closer agreement than
24 Your Honor thinks.

25 MS. McVEY: I think this will help. We

1 are not seeking to prevent you from using the
2 FDA testing. Right? We're just talking about
3 something different.

4 What we're talking about is that you can't
5 come in and say the FDA had authority to
6 regulate this talc or said the talc was safe,
7 because they didn't.

8 MS. BUENO: We are not going to say that
9 the FDA had the authority to recall; that the
10 FDA --

11 THE COURT: She's asking a specific
12 question. She's asking whether you're going to
13 say that the FDA had the authority to say talc
14 is safe.

15 MS. McVEY: And, therefore, it's salable.

16 THE COURT: And, therefore, it's okay to
17 sell.

18 MS. BUENO: I don't think the FDA has ever
19 said that.

20 THE COURT: But I don't want you to be
21 saying it at trial.

22 MS. BUENO: Well, what we're going to be
23 saying is what the FDA did. They tested it in
24 1976; here were their findings.

25 THE COURT: Yeah, you're going to say that

1 means it's safe.

2 MS. BUENO: No, I'm not going to say that
3 means it's safe. I'm going to say that's what
4 they found at that time. This is what they
5 said when they said, "We do not need a warning
6 label."

7 THE COURT: Right.

8 MS. BUENO: This is not a health hazard.

9 THE COURT: Then we're going to have to
10 get into a thing of why the testing that they
11 did was wrong, how it was influenced very much
12 by the cosmetic, talc, fragrance association
13 and all that other thing. I'm not going to
14 have a trial within a trial about something
15 this minor.

16 MS. BUENO: Okay. So this is not minor,
17 Your Honor, from defendant's perspective.

18 What the FDA was doing at the time that
19 the plaintiffs' accused us of the fraudulent
20 behavior, that is very significant; what the
21 FDA was doing to test; what the FDA was doing
22 to pull the industry together and have
23 conversations.

24 THE COURT: Okay. I -- I understand your
25 position. Ms. McVey.

1 MS. McVEY: Your Honor, it's a really
2 simple motion. All we're asking to do is
3 acknowledge that the FDA did not have the
4 authority to either issue any kind of recalls,
5 or regulate this talc, what asbestos goes in
6 talc; that it never said that talc was safe
7 with asbestos in it.

8 What they're going to do is they're going
9 to say the FDA did this and did that, and use
10 it for causation purposes, as if that has
11 anything to do with causation.

12 THE COURT: The way this thing is headed,
13 it talks about the FDA having limited power
14 over cosmetic product safety. And that is,
15 essentially, what this motion has addressed; am
16 I right?

17 MS. McVEY: That's right.

18 THE COURT: And so what you're asking is
19 that they be precluded from making misleading
20 statements about the FDA's regulatory authority
21 over cosmetic talcs or irrelevant arguments
22 that the FDA has declared talc to be GRAS. All
23 right. We solved GRAS. So you don't need
24 that.

25 But I am going to grant the motion that

1 the defendants be precluded from making
2 misleading statements about the FDA's
3 regulatory authority over cosmetic talcs. They
4 don't have any pre-market approval, sharing of
5 safety data on any of that other situation.
6 The fact that they did not put a warning label
7 on, to me, that's proof by the negative. I'm
8 not going to allow that.

9 MS. McVEY: Thank you, Your Honor.

10 THE COURT: All right. Where are we now?
11 Number 3. To Preclude Evidence About Talc
12 Pleurodesis.

13 MS. GROSS: Yes. So, Your Honor --

14 THE COURT: This is about sticking talc
15 inside somebody's lungs.

16 MS. GROSS: That's exactly it. It just
17 causes the one time --

18 THE COURT: Are you all in agreement about
19 this?

20 MS. GROSS: No. I don't think they wanted
21 to argue it.

22 THE COURT: Oh, okay. Well, I understand
23 you don't -- you don't want them to go into it,
24 but the one thing about pleurodesis is you
25 don't -- it specifically does not encompass

1 using talc that has asbestos in it, right?

2 MS. GROSS: Well, it, specifically, calls
3 for some pharmaceutical talc, but the bigger
4 picture is they want to use the fact that some
5 physicians still do this procedure where they
6 inject it once to cause a scarring reaction
7 when someone is already sick as evidence that
8 talc, in general, is safe.

9 THE COURT: Yeah. I understand it.

10 MS. GROSS: Yes. Okay.

11 THE COURT: Okay. Counsel.

12 MR. COWAN: Thank you, Your Honor.

13 Christopher Cowan, C-O-W-A-N.

14 It's nice to be in this courtroom. I've
15 never been here before. So, thank you.

16 I've heard you say two things, Your Honor:
17 One was that talc pleurodesis uses talc that
18 doesn't have asbestos.

19 THE COURT: Asbestos-free. That's what I
20 understand the procedure to be.

21 MR. COWAN: Well, not according to
22 plaintiffs' expert. So Dr. Longo has tested
23 talc that's used in talc pleurodesis and has
24 found exactly, according to Dr. Longo, the same
25 asbestos amount that is used and that he says

1 is in Johnson's baby powder. He found that
2 .001 percent to 2.002 percent asbestos in talc
3 pleurodesis --

4 THE COURT: So what? What is the
5 relevancy of this talc pleurodesis?

6 MR. COWAN: And I heard you say the other
7 thing was that -- I heard plaintiffs' counsel
8 say some doctors use it, right, and --

9 THE COURT: What's the pertinence of that
10 to whether Johnson & Johnson's baby powder had
11 asbestos that caused this problem?

12 MR. COWAN: So, if the amount of asbestos
13 -- assuming plaintiffs' experts are correct,
14 and the amount of asbestos in that talc that's
15 used in pleurodesis, it's the same as it is in
16 Johnson's baby powder. Okay. Let's just
17 assume that's true. Assume plaintiffs are
18 right. Then what has been going on for the
19 last 30- to 40 years is a human trial with talc
20 that contains a very small, ultra-trace amount
21 of asbestos.

22 THE COURT: So what? What does that have
23 to do with Johnson & Johnson's liability in
24 this case?

25 MR. COWAN: Because they are going to

1 argue that Johnson & Johnson has never
2 conducted any tests, and no tests are out there
3 for Johnson's Baby Powder or Johnson's talc.

4 THE COURT: What is the relevance of talc
5 pleurodesis with other doctors and so forth in
6 the 40-year history of using it to what Johnson
7 & Johnson's doing with its talc?

8 MR. COWAN: Because if plaintiffs' experts
9 are correct and the amount of asbestos in that
10 talc is the same as what they say is in
11 Johnson's Baby Powder, then there is a dose
12 problem and a causation problem for plaintiffs'
13 case.

14 THE COURT: I don't see that -- I mean, I
15 can't connect those dots. I don't see that.

16 MR. COWAN: I understand, Your Honor, and
17 I would just state one more thing: It's not
18 just some doctor. Dr. Gibney, who is
19 plaintiffs' thoracic surgeon, was deposed in
20 this case. They have subpoenaed him for trial.
21 He has -- and his colleagues routinely conduct
22 talc pleurodesis operations, and they are
23 unaware of any connection between that
24 procedure, which apparently, according to their
25 experts, has the exact same amount of asbestos

1 in it. They're unaware of that ever having
2 caused mesothelioma. That's -- that's the
3 point.

4 THE COURT: I am granting this motion.

5 MR. COWAN: Okay. Thank you, Your Honor.

6 THE COURT: Okay. Number 4, plaintiffs'
7 motion in liminé, precluding reference to or
8 introducing complaint, full caption, or settled
9 or dismissed defendants. All right. This is
10 Smith versus Tiffany; Mason versus Carasi.

11 Yes, ma'am. Ms. McVey. You're citing
12 those cases for the proposition that you can't
13 do this.

14 MS. McVEY: And you --

15 THE COURT: I ruled that every way in
16 every case I tried.

17 MS. PEPKE: And, Your Honor, this is the
18 part I want to clarify, and I have spent a lot
19 of time with Smith versus Tiffany and, also,
20 Edwards versus --

21 THE COURT: You can't imagine how much
22 time I've spent.

23 MS. PEPKE: You got me beat by a mile. I
24 have no doubt. And I've also read Your Honor's
25 prior rulings on this. And my -- I'm troubled

1 squaring the cases with 43G -- 43G on this
2 point.

3 I understand Your Honor's rulings about
4 the caption of the case. And what I think
5 you've said before is the defendants can't say
6 there were 40 defendants when this case started
7 and 38 have settled. But what we can say is we
8 think that there are 38 other corporations that
9 the evidence shows contributed to the
10 plaintiffs' injury. And what we want to say is
11 -- and plaintiffs said that, too. And we want
12 to do that in this case, because in the
13 complaint, he has paragraph allegations within
14 the body --

15 THE COURT: Here's what Smith versus
16 Tiffany and Mason versus Carasi say: The cases
17 of this type, because of the provisions of the
18 South Carolina Contribution Among the Joint
19 Tortfeasors Act, we don't allow you to refer to
20 other non-defendants on a potential
21 contribution to this case.

22 The case is tried on the basis of the
23 defendants that are in the case. And if a
24 verdict is rendered, then post-trial, the judge
25 allocates responsibility and allocates

1 contributions made by settling parties.

2 That is how the Legislature chose to set
3 this up, and that is how the South Carolina
4 Supreme Court ruled on this matter about what
5 can be said about non-present defendants,
6 defendants that settle, defendants who were in
7 the caption but are no longer. You can only
8 talk about those people that are in the case.
9 There's one exception to that, and one
10 exception, only. And that is the empty chair.
11 And the empty chair works like this:

12 You got to be able to show that the empty
13 chair is completely responsible for this,
14 despite all the badness I may have done; that
15 the intervening badness of the absent
16 defendant, the empty chair, is the cause of
17 plaintiff's injury.

18 That can't be shown in this case. I have
19 not seen a case in which it's been done. I
20 have had a couple of -- maybe one or two
21 defendants the whole time I've been doing this,
22 who tried the empty chair. Blew up in their
23 face.

24 But y'all are not trying this on the basis
25 of the empty chair. You are wanting to get

1 these captions in and everything to try to
2 suggest to the jury, "Well, we all bear some
3 responsibility in this, so keep in mind, cut
4 down what you would otherwise look to us for
5 because there's some other badness going on
6 here."

7 The Supreme Court has said that the
8 General Assembly cut that out when they passed
9 this Contributions Among Joint Tortfeasors.
10 And we may all have some concept about whether
11 that's the best way to do it.

12 That may work in wreck cases, but it
13 doesn't work in these sophisticated types of
14 tort.

15 I don't get to decide that, nor does the
16 Supreme Court. We've got to go by what the
17 Legislature put in this law.

18 South Carolina Supreme Courts interpret
19 it. I'm going to follow it. And, therefore,
20 you're not going to be able to get into any of
21 that.

22 MS. PEPKE: I agree, Your Honor. We have
23 preserved our objections. And I have read
24 Smith versus Tiffany very, very clearly on that
25 point. And my argument here is just a little

1 more nuanced.

2 The allegations in the complaint -- and
3 I'm going to read, like, the Court an example
4 of what I'm speaking about. Aren't even
5 directed at a certain defendant. This is how
6 we -- this is why Smith versus Tiffany is not
7 quite on point.

8 For example, plaintiff alleges in its
9 complaint, paragraph 11, that he was exposed to
10 asbestos-containing products at various times
11 throughout his life from non-occupational work
12 maintaining vehicles working on bricks.

13 We should be allowed, under 4 -- under
14 South Carolina Rule of Civil --

15 THE COURT: And what would be the end of
16 that? It's to shift the responsibility to
17 somebody else who's not in the case. We don't
18 do that in this state because of the
19 Contributions Among Joint Tortfeasors. So I
20 don't care what they say in the complaint.
21 That's not the basis for allowing an absent
22 defendant to be put into the middle of this
23 case.

24 MS. PEPKE: But, Your Honor, wouldn't it
25 be a basis if we can make it -- if we can get

1 there -- now, we have the burden to get there,
2 but wouldn't it be part of the dots that we
3 would connect for an empty chair --

4 THE COURT: You're just not going to be
5 able to connect those dots by putting in the
6 complaint. You're not going to be able to
7 connect those dots by just kind of having some
8 kind of general reference to this other thing.

9 If you have hard evidence that shows not
10 just that there was some bricks involved and
11 other things, but that despite all your
12 conduct, this, and this alone, would supersede
13 and intervene and cause an injury, then we
14 would look at that. But right now, I don't see
15 anything on the horizon like that, and,
16 therefore, I am not going to allow -- what you
17 asked for is a complaint full caption or a
18 settlement to dismiss the defendants. That's
19 what you asked for. Not going to allow the
20 complaint. Not going to allow this, the
21 settlement to dismiss the defendants for the
22 reasons I have stated.

23 MS. PEPKE: Thank you, Your Honor.

24 THE COURT: All right. Five: Plaintiffs'
25 motion in limine 5 to preclude defendants'

1 counsel and witnesses from making disparaging
2 remarks about the plaintiffs' counsel.

3 MS. McVEY: And, Your Honor, we have
4 largely agreed on that. This is just to
5 prevent anybody from saying that the talc
6 litigation is a plaintiff's attorney creation;
7 that we run out of people to sue and so we
8 started suing these talc defendants.

9 And I think, according to defendant, that
10 they're not going to do that.

11 THE COURT: There's no defense that is
12 going to be participating in any way by Mr.
13 Brown to allow any of that. So I'm completely
14 comfortable about that, and I caution you the
15 same way, Ms. McVey, that you can't disparage
16 them.

17 MS. McVEY: Agreed.

18 THE COURT: All right. Six, plaintiffs'
19 motion in limine to exclude evidence or
20 arguments related to Betty Bell related to
21 against American International Industries or to
22 any other individuals who were the subjects of
23 peer reviewed scientific studies.

24 Ms. McVey, or Ms. Gross.

25 MS. GROSS: This is one that we argued in

1 the Payne and Plant case last year, and you
2 granted pretty quickly without issue. You
3 said, "We're not going to have a trial within a
4 trial." I think they might want to argue it.
5 That's what I have in my notes, so...

6 THE COURT: This is the settlement
7 meetings of the workers' comp claims?

8 MS. GROSS: Yes. This is all part and
9 it's actually kind of lumped in with the next
10 MIL, which is trying to keep out evidence of
11 J&J suing the authors of those --

12 THE COURT: Yeah, I got you.

13 MS. BUENO: And the only thing I wanted to
14 mention is it's also wrapped in with Johnson &
15 Johnson's motion number 12. So we sought to
16 exclude, in their entirety, the two articles.
17 Actually, there was three articles: Two by
18 Dr. Moline and one by Dr. Emery that formed the
19 basis of these others.

20 My understanding is Your Honor has ruled
21 on that in the past and denied our --

22 THE COURT: Yeah. Let me just -- those
23 are reliance materials and there's sometimes an
24 examination that's made about reliance
25 materials, but I am not going to allow any

1 introduction of arguments, documents of
2 evidence on this workers' comp claim at
3 settlement meetings. I'm not going to allow
4 that.

5 MS. BUENO: Well, then I think that we
6 have then your rulings on plaintiffs' motion in
7 liminé 6 and 7. We are not opposing motion in
8 liminé number 7. So that one's agreed.

9 THE COURT: All right.

10 MS. BUENO: On number 6, then, I hear you
11 granting; is that correct, Your Honor?

12 THE COURT: What's that?

13 MS. BUENO: You just granted motion in
14 liminé --

15 THE COURT: I granted 6; that's correct.
16 And 7, I'll also grant.

17 MS. BUENO: Yes; 7 was agreed, Your Honor.

18 THE COURT: Yes. So we've got 8, exclude
19 arguments that workplace asbestos exposure
20 standards are proxy for "safe." All right.

21 MR. ADAMS: Yes, Your Honor. Ben Adams.
22 Good to see you, again. I was in the Glenn
23 trial. Thanks for having me here again.

24 The lawyers for Johnson & Johnson, they
25 sometimes bring an expert who says, "Well, if

1 you add up the exposure from Johnson's Baby
2 Powder, it would be below the OSHA workplace
3 exposure limits."

4 So the exposures from our product, if you
5 added them up, it would be below the OSHA
6 permissible exposure limits, and, therefore, it
7 must be safe. That's the argument that Johnson
8 & Johnson will make.

9 The problem is that the OSHA permissible
10 exposure levels have never been safe for the
11 disease mesothelioma. OSHA says that
12 themselves. That's number 1.

13 So OSHA says these levels, these
14 permissible exposure levels for in the
15 workplace, they're not safe for the disease of
16 mesothelioma. And so this -- this testimony
17 from the defendants' expert is unreliable
18 because OSHA, itself, in the very regulations
19 says these levels are not safe for the disease
20 mesothelioma.

21 It's also attenuated under 403, because
22 Mr. Perry never used talc as part of a
23 workplace exposure. He only -- it's only part
24 of his personal use. So Mr. Perry, he wasn't
25 occupationally exposed to industrial talc, you

1 know, in a factory or something. He only used
2 talc as part of his personal use.

3 So OSHA doesn't even apply, because he
4 wasn't exposed in the workplace. It was just
5 his personal use.

6 So for those two reasons, we believe the
7 Court should preclude argument or reference to
8 the OSHA permissible levels as evidence that
9 their talc powders were safe.

10 THE COURT: Okay. All right. Mr. Cowan.

11 MR. COWAN: Yes, Your Honor. I think
12 we're talking past each other, because I -- I
13 don't think that anybody is going to come in
14 and say the OSHA permissible exposure level,
15 .1 fibers per cc, is safe.

16 The fact that the OSHA permissible
17 exposure levels is .1 fibers per cc, however,
18 is incredibly relevant, because, number 1, the
19 plaintiffs' experts have actually injected this
20 issue into the case. They are relying on
21 studies, exposure studies that literally talk
22 about the .1 fibers per cc OSHA PEL. And, in
23 fact, one of the exposure consumer studies that
24 Dr. Longo is relying on, one of only four,
25 expressly compares their finding to the OSHA

1 PEL of .1 fibers per cc. That exposure study
2 did not say that .1 fibers per cc was safe, but
3 it did note that the hypothetical exposure to
4 asbestos and talc, assuming a sub-trace level,
5 would be a 107,000 times lower than .1 fibers
6 per cc.

7 THE COURT: Well, what is it you want to
8 tell the jury about .1 --

9 MR. COWAN: So, here's the point:

10 Number 1, I have to be able to
11 cross-examine Dr. Longo on OSHA, because it's
12 in the study that he is relying on, and he's
13 actually stating that the study itself -- and
14 the only way that I --

15 THE COURT: I will tell you, I will get
16 him -- I will tell you how we go about experts
17 in this court. I'm not having trials within a
18 trial, where we spend all our time talking
19 about reliance documents.

20 MR. COWAN: It's not going to be that,
21 sir -- or, ma'am, I'm sorry. It's not going to
22 be about going through a trial within a trial
23 of reliance materials. It really is about the
24 substance of his opinion, because it's --

25 THE COURT: But I allow these experts to

1 be cross-examined about the substance of their
2 opinion, and I don't allow experts to testify
3 about things that are outside their ability to
4 have an opinion about.

5 MR. COWAN: Absolutely.

6 THE COURT: I -- what she's asking and
7 what I'm inclined to agree with is not to use
8 this safe levels of exposure thing. You can
9 talk about OSHA limits. Just don't use that to
10 try to inject into it an opinion about OSHA as
11 to what's safe and what isn't.

12 MR. COWAN: Absolutely, Your Honor.

13 THE COURT: You see what I'm saying?

14 MR. COWAN: I do.

15 THE COURT: Okay. I don't want you
16 cross-examining. If Longo's got some things
17 about the OSHA standards, standards is one
18 thing. Elements of safe level is another one.
19 That's what she wants y'all to stay away from.

20 I will grant that, but that doesn't
21 preclude you from talking about OSHA levels of
22 exposure. And standards of exposure. That's
23 perfectly fair game. So, am I clear?

24 MR. COWAN: I think you are, Your Honor.

25 THE COURT: All right. Thank you. Let's

1 go on to 9: 9 is plaintiffs' motion in limine
2 to exclude hearsay opinions of Dr. Su.

3 MR. ADAMS: Yes, Your Honor. Dr. --

4 THE COURT: First of all, is Dr. Su even
5 going to be in this thing?

6 MR. ADAMS: No.

7 THE COURT: Well, then, we're passing
8 right over that. We don't need that. Dr. Su
9 isn't going to be in the picture.

10 MR. ADAMS: Well, actually, he's not an
11 expert who's going to come testify from the
12 witness stand. But they do try to get in an
13 affidavit that he signed that -- that that's
14 what the motion is targeted at.

15 THE COURT: Well, how are they going to
16 get his affidavit or his video in if he's not
17 going to be --

18 MR. ADAMS: I don't know.

19 THE COURT: Well, I can tell you I'm not
20 going to let it in. But I don't have to
21 otherwise deal with the content of his opinion
22 because he's not testifying, right?

23 MR. ADAMS: That's correct.

24 THE COURT: All right. Number 10, Exclude
25 Speculative Evidence of Alternative Asbestos

1 Exposure.

2 MS. GROSS: That one's me, Your Honor.

3 So we had a similar motion to this in the
4 Payne and Plant cases last year. In Perry,
5 there's two theoretical potential hypothetical
6 alternative exposures that we've touched on.
7 One is this: He was around -- or he could have
8 been around some work being done at hotels.

9 There's no expert on either side who's
10 going to say that it contributed to his disease
11 to a reasonable degree of medical certainty,
12 including defendants' own experts, of course.

13 The other is this brake work that's kind
14 of been glossed over. There's going to be no
15 expert on either side that's going to say that
16 his brake work would be the sole cause, much
17 that it could be this third-party chair --
18 empty chair defense that they might want to
19 utilize.

20 The other thing I want to make really
21 clear is you granted this motion in Payne and
22 Plant. And that if Your Honor recalls, which I
23 know you do, throughout the Plant trial, the
24 defendants kept trying to inject these possible
25 hypothetical exposures by cross-examining

1 Ms. Plant, cross-examining her mother.
2 Sometimes they talked to her about art
3 supplies.

4 So if Your Honor grants this motion, I'm
5 hoping that it's very clear on the record that
6 no alternative exposures can be discussed in
7 the trial with any of the witnesses, because
8 there is no expert on either side that is
9 either going to say it's the sole cause or to a
10 reasonable degree of medical certainty
11 contributed to his disease.

12 THE COURT: All right.

13 MS. GROSS: I summed it up real quick.

14 THE COURT: I understand.

15 All right. Yes, ma'am.

16 MS. BUENO: Your Honor, I am surprised by
17 the argument, which doesn't reflect what was in
18 the brief.

19 The brief, itself, filed by plaintiff,
20 seeks to exclude one type of alternative
21 exposure, which is alleged exposure from
22 hotels. But what I heard counsel just say was
23 that they're roping into this brake work, which
24 I think she said had been kind of glossed over,
25 which is also very surprising, Your Honor,

1 because Dr. Haber, the causation expert for
2 plaintiffs, was recently deposed, and he was
3 asked the question about his long and lengthy
4 opinion in his report about brake exposure and
5 friction work causing Mr. Perry's mesothelioma.
6 And he was asked, "If you take the talc and
7 cosmetic talc aside, if we say, hypothetically,
8 Mr. Perry was never exposed to cosmetic talc --
9 or asbestos in cosmetic talc, is it your
10 opinion that the brake work would have caused
11 his mesothelioma?" And Dr. Haber said, "Yes."
12 He said that the brake work that Mr. Perry
13 performed from 1984 to 1987 -- 72 brake jobs,
14 where he was blowing out and working on drum
15 brakes and grinding them down, Dr. Haber said
16 that was enough to cause his mesothelioma.

17 And I think it's notable that the motion
18 that's before you doesn't talk about brake work
19 at all, because each and every single one of
20 plaintiffs' experts has alleged that the brake
21 work, along with the talc exposure, that they
22 were all and both substantial factors in his
23 mesothelioma.

24 And so --

25 THE COURT: Okay. You don't like the bad

1 brake work. She mentioned brake work. You
2 don't like that. How about the hotel?

3 MS. BUENO: Hotels. So, well, let me tell
4 you what the evidence is and what the evidence
5 will be.

6 Mr. Perry was deposed at length. We've
7 got two different sets of circumstances. One,
8 all of the renovations that were done at his
9 hotels over the years. He worked at a variety
10 of different hotels, starting in Illinois --

11 THE COURT: Yeah, but the bottom line is
12 this: Whether the library or drywall or
13 anything else, there's no expert that says that
14 any of that had any effect on him. They can't
15 quantify any of it.

16 MS. BUENO: Well -- but here's why it
17 matters, separate and apart from causation.
18 Okay. It matters for this reason:

19 Mr. Perry testified, over and over again,
20 that when he was at the Embassy Suites, he was
21 told that the building next to him, which
22 happened to finally be the Hotel Venice -- it
23 was renovated. It was the old library building
24 -- that that was condemned because of asbestos.

25 THE COURT: So what? I'm not going to

1 allow any of that, because you haven't got any
2 expert that ties any of that to any of his
3 mesothelioma. We'll talk in a minute about
4 this brake work. That might be something
5 different.

6 Ms. Gross might have been a little bit
7 over-expansive when she did that, because the
8 thing I'm looking at right now says "hotels."
9 I am granting that.

10 MS. BUENO: Your Honor, and one other
11 thing, just -- just because I need to ask Your
12 Honor's thoughts on it.

13 When Mr. Perry was diagnosed with cancer
14 and he went to the medical university, he met
15 with two doctors there; one of whom is going to
16 be on the stand with us. And that doctor,
17 Dr. Gibney, asked him, "Have you been exposed
18 to any asbestos in your life?" And this was on
19 July the 11th of 2023. And Dr. Gibney's note
20 says, quote, Mr. Perry denies any direct
21 exposure; however, he did use a lot of talc
22 throughout his life as a swimmer. He also used
23 to work at the Embassy Suites, adjacent to the
24 old county library, which, apparently, had a
25 lot of asbestos in the walls.

1 The reason I point this out, Your Honor,
2 is because to the extent plaintiffs want to
3 stand up and cross-examine any of the witnesses
4 or talk to Dr. Gibney about statements in the
5 medical record where Mr. Perry attributed his
6 mesothelioma to talc use --

7 THE COURT: We're getting way off. I'm
8 not going to spend all day long on this. My
9 ruling is, he came into the hotel. On brake
10 work, that's not a part of this motion, so I'm
11 not going to get into any of the rest of that.
12 Okay?

13 MS. BUENO: Thank you.

14 THE COURT: Very good. All right.
15 Now, number 11.

16 MS. GROSS: So number 11 is one that we
17 didn't really have to engage with --

18 THE COURT: Is this the eggshell
19 plaintiff?

20 MS. GROSS: This is the eggshell
21 plaintiff, but I just want to be very clear
22 that it's that one, but it's also --

23 THE COURT: He doesn't have --

24 MS. GROSS: -- it's whatever genetic
25 mutations the defendants come up with --

1 THE COURT: He doesn't have a BAP-1
2 mutation, does he?

3 MS. GROSS: He doesn't have any mutations.

4 THE COURT: Well, then I'm granting it.

5 MS. GROSS: Great. Thank you.

6 THE COURT: Number 12. Motion in liminé
7 number 12, exclude evidence or argument that
8 asbestos markers must be present to diagnose
9 asbestos-induced mesothelioma.

10 Ms. McVey.

11 MS. McVEY: Your Honor, this is kind --
12 you heard this before that some of the defense
13 experts will say, without evidence of pleural
14 plaques or asbestosis, then you can't relate
15 it. That's not a scientifically valid theory.
16 There's no studies that support that.

17 And if you look at the Helsinki criteria,
18 which is, you know, kind of the gold standard
19 of association, it says, specifically,
20 "However, in the absence -- in the absence of
21 such markers, a history of significant
22 occupational domestic or environmental exposure
23 to asbestos will suffice for attribution."

24 Your Honor, so we just seek them to
25 prevent from saying, because he didn't have

1 pleural plaques or asbestosis, that meso is not
2 asbestos-related.

3 THE COURT: All right. Well, here's what
4 I'm going to do about that, Ms. McVey. I'm
5 going to deny your motion on this. That is
6 something you can impeach him on.

7 This thing has very questionable
8 scientific merit, but I'm sure you'll impeach
9 him with evidence. You can deal with that.

10 Number 13. Motion in limine Number 13,
11 preclude corporate representative hearsay.

12 I have ruled on this a million times. I
13 don't need a whole lot of going around the
14 bush.

15 The very nature of a 30(b)(6) witness is
16 that they, quite often, rely on information
17 from other sources, because you can't ever
18 have -- and, particularly, with Johnson &
19 Johnson, something like that, you can't have
20 one person that has personal knowledge about
21 this. They rely on the records and they are
22 enormous.

23 And I've known Dr. Hopkins, I've known
24 that many, many times. He's the 30(b)(6). I
25 don't know if you're going to use him now. He

1 used to be the one in all the cases I've tried.

2 And enormous volumes of material came in.
3 Memoranda and all kinds of things from Johnson
4 & Johnson. He was copied on a lot of it, but
5 not all of it. And he spoke from his knowledge
6 of -- he spoke for the corporation. His
7 knowledge was not just personal, but knowledge
8 gleaned from records and interviews and all
9 kinds of other things.

10 MS. McVEY: But there's one little
11 specific thing in here, real quick.

12 THE COURT: All right.

13 MS. McVEY: First, Judge, normally, you
14 grant -- normal hearsay rules apply. What we
15 mean by that, he can certainly read the records
16 into the record. He has personal knowledge
17 that he testified to that, but he can't tell a
18 story made up from these records somehow.
19 Somehow give a narrative to it. But this one's
20 even more specific, because it's Johnson &
21 Johnson specific. So I want Ms. Gross to talk
22 about this one piece.

23 MS. GROSS: It is very Johnson & Johnson
24 specific, and I'll make it really quick.

25 They have a relatively new corporate

1 representative. He became the corporate
2 representative in the spring of last year. His
3 name is Dr. Kuffner. He'll come here. You'll
4 see him. And what they try to do is they sort
5 of try to launder expert testimony in through
6 Dr. Kuffner, because he has a medical degree,
7 even though he's a corporate representative.
8 He's not an epidemiology degree. (sic) I don't
9 want to go into it too much, but what you need
10 to know is Dr. Kuffner has no personal
11 knowledge about anything about anything with
12 Johnson & Johnson before 2013. They want to
13 bring it -- typically, what they do is they try
14 to get 200 -- over 250 pages admitted through
15 Dr. Kuffner. It's called, "The Comprehensive
16 Report," and it includes information on topics,
17 honestly, they didn't seem to preclude it. It
18 includes information on awareness of cancer,
19 talc pleurodesis, which Your Honor just granted
20 that MIL. The geology section was written by a
21 Johnson & Johnson --

22 THE COURT: Who is Johnson talc baby
23 powder review written by?

24 MS. GROSS: It was sort of a group of
25 people. It --

1 THE COURT: -- internal Johnson & Johnson
2 document.

3 MS. GROSS: Yes, ma'am.

4 THE COURT: All right.

5 And this is Johnson & Johnson's cut on all
6 that stuff from their point of view.

7 MS. GROSS: Yes. And, you know, what they
8 try to do with Dr. Kuffner that makes it --

9 THE COURT: What I'm not going to allow is
10 Kuffner to start getting into what -- for
11 example, through Drew Van Orden from R.J. Lee
12 would say that it's his knowledge about what
13 Johnson & Johnson's factual situation is with
14 respect to sourcing of the quality of the
15 things and so forth. I'm not going to allow
16 that kind of thing to do.

17 I am not going to exclude him from
18 speaking from records to say what Johnson &
19 Johnson's factual situation is. He'll often be
20 doing that. But I'm not going to allow him to
21 get these opinions that are in like the -- I am
22 familiar with this document, and it's got stuff
23 in it. It's just plain all ordinary stuff from
24 the records of J&J, but then it's got a whole
25 bunch of experts and their opinions. And I'm

1 not going to let him be the conduit for
2 offering those opinions. But the corporate
3 records that relate to testing that and all
4 that kind of thing, perfectly okay.

5 MS. GROSS: The other thing they try to
6 have Dr. Kuffner -- and this is the last point
7 I would like to make for Your Honor, because
8 it's completely consistent with what you just
9 said.

10 They will try to have him testify at trial
11 about the opinions of Johnson's baby powder.
12 They do this by -- making a foundation for
13 historical documents and --

14 THE COURT: Well, he's not going to be
15 allowed to testify about his opinions. He's
16 not there to offer opinions. He is there to
17 testify about the records of Johnson & Johnson.

18 There's plenty in their records where they
19 say, "Don't tell them what we found."

20 It's the factual material that's generated
21 from their records is what he's going to be
22 testifying to, but he can't go off on a tangent
23 and start offering opinions. They got plenty
24 of other opinion good people, witnesses who can
25 do that.

1 MS. GROSS: Thank you, Your Honor.

2 THE COURT: All right. All right.

3 Fourteen -- so that's -- that's a denial
4 with some indication of granting the
5 restrictions on using it as an opinion-based
6 document for Kuffner to use. Okay.

7 So now we've got number 14, Plaintiffs' --
8 preclude discussion of "worst case scenario for
9 comparisons" and "no-observed adverse effects
10 level." This is Christy Barlow.

11 MR. ADAMS: This is Dr. Barlow, Your
12 Honor, who I'm sure you've seen before.

13 THE COURT: I've seen Dr. Barlow before.

14 MR. ADAMS: A question for you. The
15 gatekeeper question for an expert is: Are
16 their opinions reliable and do they assist the
17 trier of fact?

18 In this case, Dr. Barlow's opinions on
19 this specific topic are not just unreliable,
20 they're demonstrably false in Johnson &
21 Johnson's own documents.

22 Number 1, Dr. Barlow testifies 0.1 percent
23 asbestos in the product, itself, is the worst
24 case scenario, 0.1 percent asbestos in the
25 product. Except Johnson & Johnson's own

1 records, starting in 1972, said there was
2 0.5 percent asbestos in the product. So
3 Dr. Barlow used it. And by the way, Johnson &
4 Johnson never gave Dr. Barlow any of their
5 records. So Dr. Barlow makes an assumption
6 that's demonstrably false based on records that
7 Johnson & Johnson didn't give her. That's
8 number 1.

9 Number 2, Dr. Barlow makes a second
10 assumption about the amount of asbestos that
11 gets into the air when Johnson's Baby Powder is
12 used. She uses 0.1 percent of the -- this,
13 when you measure the fibers in the air.

14 THE COURT: Tell you what, let me just
15 kind of tell you what we're going to do here
16 from my perspective.

17 This is the battle of the experts. Now,
18 you're going to vigorously cross-examine her.
19 As she gets up there and says some of that
20 stuff, you're going to vigorously cross-examine
21 her and point out the error of her ways. If
22 that error is too severe, I'm going to strike
23 her testimony. So they go with danger and
24 warning signs all over the place. Some of this
25 stuff is highly-unreliable, not supported by

1 anything else in the scientific records, but I
2 am not going to preclude her from the worst
3 case scenario or no-observed adverse effects
4 level. But if she can't back that up by some
5 information that's going to -- in some cases,
6 she hasn't been able to do, I'm going to strike
7 her testimony.

8 MR. ADAMS: Yes, Your Honor.

9 THE COURT: Okay?

10 MR. ADAMS: Understood.

11 THE COURT: So denied with a big, huge red
12 star caveat.

13 Fifteen. Plaintiffs' motion in liminé to
14 exclude any speculative testimony that blames
15 lab contamination for the presence of asbestos
16 in the talc sample.

17 You know, I will just say one thing to you
18 people; that is that that's always the refuge
19 of scoundrels. It's this thing, when you can't
20 think of anything else to say, "Oh, it must
21 have been contaminated in the lab." And I have
22 seen some pretty outrageous things happen about
23 what they have seen might have been the
24 contamination when there's no way -- the thing
25 could have been contaminated. So I will just

1 say this to you, and it's a warning to both
2 sides. You get anything that starts talking
3 about laboratory contamination, you better have
4 some direct evidence there was laboratory
5 contamination.

6 This is often the way of attacking the
7 other side's experts. They say, "We tested
8 Johnson & Johnson baby powder and we found
9 asbestos." And they say, "Oh, it must have
10 been lab contamination of the slides that you
11 used," and all that kind of stuff.

12 I'm going to tell you, I'll listen to a
13 little bit of it, but if it's not supported by
14 something other than we just kind of speculate
15 that is, because we know our lab was so pure it
16 never had asbestos in it, I'm going to strike
17 it all, and I'm going to instruct the jury to
18 draw an adverse inference.

19 So you're playing with fire if you do
20 that. That's all I'm saying. So, I think my
21 views on expected testimony are clear. I'm
22 saying to you, counsel, that I sympathize with
23 your concern about blaming lab contamination on
24 every time they find the results, lab
25 contamination, and I say it, if they don't say

1 that, they better back it up, otherwise the
2 penalties are going to be severe.

3 MR. ADAMS: Understood, Your Honor. Thank
4 you.

5 THE COURT: Sixteen, plaintiffs' motion in
6 liminé to exclude the testimony of Dr. Matthew
7 Sanchez. I got a lot of questions here.

8 And I'll tell you another thing.
9 Dr. Sanchez, we're going to talk about how long
10 this trial's going to take. I spent four days
11 listening to McCrone and Dr. Matthew Sanchez.
12 I will never repeat that again. Yes, ma'am.

13 MS. GROSS: I'm going to try to go through
14 this as quickly as I can.

15 THE COURT: Yes, ma'am.

16 MS. GROSS: Okay. So our ask is that we
17 would like Your Honor to strike Dr. Sanchez in
18 his entirety. Not partially; entirely. For
19 these reasons that were outlined in our brief,
20 so I'm not going to hem and haw over them. I'm
21 just going to hit the high points.

22 The first is Dr. Sanchez cannot define
23 what his definition of asbestos is.

24 THE COURT: Yeah. He's an asbestiform
25 guy, and that is totally discredited as a means

1 of isolating asbestos from what I can tell in
2 this day and age.

3 MS. GROSS: And we're going to talk to you
4 about the two main points under that, but the
5 real main point under that is this whole
6 population requirement that I'm going to
7 explain to you in a minute.

8 THE COURT: I know --

9 MS. GROSS: You know --

10 THE COURT: I know this. I don't need to
11 have instruction. It's 3:15 and I don't need
12 to spend an hour on Dr. Sanchez.

13 MS. GROSS: The next is, he uses the bulk
14 building testing method, and sort of
15 extrapolates it to look at talc under a
16 microscope with a completely different
17 microscope and there's all -- we walked through
18 it all. There's all the peer review
19 publications that say you can't do that. It's
20 bad signs.

21 And then the third, and perhaps the most
22 damning, is when he applies his definition of
23 population asbestos as a ratio using this bulk
24 building method looking under the microscope
25 and looks at photos of raw tremolite, the raw

1 mix-standard tremolite, he says almost a
2 hundred percent of the time, it's not asbestos.

3 And then when you follow up with a
4 question, if you had a hundred of them that
5 look exactly like that, it's still not asbestos
6 for a variety of reasons. We put the whole
7 chart in there. I brought them to hand them to
8 Your Honor. It's kind of small. If you want
9 to see the photos blown up, I can hand them to
10 you. But what the Watson case --

11 THE COURT: But his definition of asbestos
12 in the final analysis, he's a geologist.

13 MS. GROSS: That's correct.

14 THE COURT: So his definition of asbestos
15 has nothing to do with the asbestos properties
16 that are identified by most experts. He says
17 that it's cleavage fragments versus
18 asbestiform. Everything is to be divided in
19 those two ways. I don't know of anybody else
20 that does it that way.

21 And he denominates -- he further
22 denominates, if you really want to drill him
23 down, that chrysotile is a cleavage
24 fragment-type asbestos, so it really isn't
25 asbestos.

1 The latest pronouncement from the EPA will
2 give life to that.

3 So I am very concerned about Sanchez,
4 about both his methodology and slides, but also
5 his ability to opine about what is asbestos,
6 and even worse, he also gets into what can
7 cause mesothelioma. He has no training in
8 that, whatsoever.

9 So I certainly will never let him testify
10 to that. That's not going to happen. But even
11 this very laborious thing that takes up
12 internal -- an eternal jury time is all about
13 the final analysis, if these cleavage fragments
14 are too thick in a form to worm their way into
15 the part of the lining of the mesothelia
16 lining, and cause mesothelioma. He bases that
17 on the geology that he uses. He has no
18 training, as a physician, to say for how things
19 worm their way into lined -- 25 years in
20 causing mesothelioma than the man on the street
21 does.

22 So that's what I'm concerned about, about
23 Dr. Sanchez.

24 So I'm telling you that I am close to
25 saying that Sanchez is going to be excluded.

1 And so what I'm going to do with you -- I
2 understand your argument. I've read all the
3 stuff. I lived through it. So let's see what
4 the other side has to say.

5 MS. GROSS: All right.

6 MR. COWAN: Thank you, Your Honor.

7 Dr. Sanchez is not going to testify that
8 anything causes mesothelioma. He's not a
9 medical doctor. He's not going to testify as
10 to causation. He is not going to testify as to
11 what can and cannot worm their way through a
12 lung.

13 His entire testimony will be focused on
14 what he found as a geologist in the bottles
15 that he has tested. And his -- his analysis of
16 the mine sources that are at issue in this
17 case.

18 THE COURT: But what does that have to do
19 with this case at all? I mean, he's a
20 geologist and he looked at these samples, and
21 he -- he won't have a say they're asbestos, but
22 yet he tries to discuss the more acknowledged
23 categories of asbestos, including, for example,
24 chrysotile, and say that these cleavage
25 fragments are chrysotile and it's not asbestos.

1 If that's what he's going to testify to, I'm
2 not going to allow them to testify.

3 MR. COWAN: Well, I would say the flip
4 side is the same then. What is the relevance
5 of Dr. Longo's testimony?

6 THE COURT: Well, we're not on Dr. Longo
7 right now.

8 MR. COWAN: I understand who we're dealing
9 with, but if a geologist and a microscopist,
10 his testimony about what he believes is and is
11 not asbestos within that bottle is not
12 relevant, simply because he does not think some
13 of the particles are not asbestos --

14 THE COURT: Well, that's the only basis
15 he's got for saying.

16 He's got this theory that he has put
17 forward that asbestos can only be asbestiform
18 fibers, and cleavage fragments cannot be
19 asbestos. That's his theory, based on his
20 geological observance of material.

21 MR. COWAN: It's also contingent with how
22 the EPA defines asbestos.

23 THE COURT: Was. Was.

24 MR. COWAN: I believe that that regulation
25 is still in place.

1 THE COURT: It might be. But everything
2 that's happened since then is a huge variance
3 with the concept that asbestiform, as Matthew
4 Sanchez defines it in these slides,
5 characterizing it that way as a comparison with
6 cleavage fragments, that's the other thing so
7 mind-boggling about this thing.

8 He kind of works backwards to it. He
9 takes these cleavage fragments. And he takes
10 these cleavage fragments, slaps them on
11 something, then he works back to it. These
12 other things, well, they got to be something
13 else. They're not cleavage fragments. Oh,
14 well, I guess they're asbestiform. Then he
15 goes through all this malarkey about how
16 asbestiform works.

17 MR. COWAN: I don't think that I will be
18 convincing Your Honor anything about
19 Dr. Sanchez today, but I will say that if
20 plaintiff believes there has been this c-change
21 (ph) in what is and what is not asbestos, then
22 they are more than capable of cross-examining
23 Dr. Sanchez on his -- on his opinions. And I
24 think I'll just leave it at that.

25 THE COURT: Okay.

1 MR. COWAN: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. GROSS: A couple of quick things: The
4 issue is with his methodology with how he got
5 there. And that methodology is unreliable.

6 You heard him. You heard counsel say that
7 he uses the EPA's definition. The EPA's
8 definition in the whole building analysis,
9 which has never been meant to be extrapolated
10 to use looking at cosmetic talc under a TEM --
11 a giant TEM microscope that they used
12 throughout the Plant trial. Countless peer
13 review publications have said that is improper
14 and is junk science --

15 THE COURT: That's this whole thing about
16 the kinds of microscopy we use, the JE --
17 whatever one, the TEM, all that kind of thing.
18 Well, that's the battle of the experts.

19 MS. GROSS: And we know his opinion -- his
20 method -- excuse me. We know his methodology
21 doesn't work. And we know his definitions
22 don't work, because he looks at raw asbestos
23 under a microscope and he says it's not
24 asbestos.

25 So we know that his methodology is

1 unreliable. We know the Court should exercise
2 its gatekeeping function.

3 Unless you have questions for me further,
4 I'm going to leave it at that, but I could go
5 on for hours.

6 THE COURT: Yeah, I understand. I'm very
7 shaky-shaky about Sanchez, because I -- you
8 know, that's the part of it that really bothers
9 me the worst, is you get stuff that's
10 acknowledged to be raw asbestos. He puts it
11 under a microscope and says it's not asbestos.

12 MS. GROSS: It's also been noted
13 throughout these peer review publications that
14 we cited in the brief that you read that if you
15 use this method that he says, like just looking
16 at the aspect ratio concept, unless it's
17 20-to-one, it doesn't count. You can say it's
18 not asbestos, right? If you look at the charts
19 that we included in one, I think it's in
20 Dr. Parker's article. It's on page 8 of our
21 motion. It talks about how, if you use
22 Dr. Sanchez's method, you miss a massive
23 amount. If you use this 20-to-one aspect ratio
24 minimum, you're going to find 13 percent of
25 fibers --

1 THE COURT: Yeah, 98 percent of raw
2 asbestos. Not asbestos, if you use Sanchez's
3 approach.

4 MS. GROSS: That's correct.

5 THE COURT: And the only question I got is
6 this, you know, it's the battle of the experts.
7 You know, they're going to be doing the same,
8 you know, attack on your experts.

9 I am -- as I say, I am very, very
10 questionable about Sanchez and this aspect
11 ratio is not supported now by anybody. McCrone
12 use to be -- they were the big defenders of
13 J&J. They came up with all this business.
14 It's now been thoroughly discounted by later
15 expert examination.

16 I don't know. I'm very hesitant about it.

17 MR. COWAN: Your Honor, may I at least
18 address the --

19 THE COURT: I mean, you know, one thing
20 that's said about Sanchez, if you're using PLM,
21 and you're using it in bulk materials, then his
22 thing may have some pertinence, but that's not
23 what we're talking about here. We're talking
24 about the much finer expert examination of
25 processed and marketed talcum powder and

1 whether it has asbestos in it. And his methods
2 simply don't get in the hemisphere of dealing
3 with the sophisticated determinations you have
4 to make in this thing. He's way back in the
5 geology of it and some kind of very basic, much
6 more basic world.

7 I mean, my family was in the sand-mining
8 business for many, many years. And so I am
9 sensitive to mining techniques and what you can
10 use to examine them.

11 We used a lot of sophisticated glass
12 capacitor and other kind of uses, because we
13 have very high ISO and very low FE. But the
14 way you examine those kind of minerals is about
15 the way he's examining this stuff, and it's a
16 much grosser examination to yield results.
17 And, you know, something like sand, even very
18 fine mill sand, then it is a sophistication it
19 takes to look at talc, and, particularly,
20 cosmetic talc.

21 And that's what's got me about taking this
22 very gross measuring device of Sanchez and
23 particularly taking up a bunch of court time
24 with all this nonsense when it really doesn't
25 have much ability to look at and tease out

1 whether there is or there isn't asbestos in
2 cosmetic talc. And particularly when you got a
3 guy who defines asbestos in a very different
4 way.

5 MR. COWAN: May I respond, Your Honor?

6 THE COURT: Yes, of course.

7 MR. COWAN: I'm not sure if you want me at
8 the --

9 MS. GROSS: I had a couple -- I had a
10 couple of quick points.

11 THE COURT: Let Mr. Cowan do it.

12 MR. COWAN: I'll be very brief.

13 THE COURT: Let him respond.

14 MR. COWAN: I don't think she needs to be
15 convincing you anymore. I think I need to get
16 up here for a moment.

17 Your Honor, I understand the point about
18 R-93 and your concerns there. The issue,
19 though, is that Dr. Sanchez does not just look
20 at these samples but the PLM, using that EPA
21 R-93. He uses XRD. He uses R-93 on the PLM.
22 He uses 22662-1 TEM. He used a different
23 methodology in his previous iterations of
24 reports, and then switched to the ISO.

25 Regardless, he is using all three.

1 THE COURT: He's using those various
2 devices. You're quite right about that,
3 Mr. Cowan. Here's what's got me worried about
4 this: He's got this mindset that about
5 98 percent of what the rest of the world will
6 say is asbestos, in his view, it's not
7 asbestos.

8 MR. COWAN: Well, I --

9 THE COURT: And that's -- that's what --
10 putting a guy like that in front of a jury to
11 take up a couple of hours with all this
12 malarkey. He gets into -- when the bottom line
13 is, he has got such a grossly different way of
14 defining the basic substance we're talking
15 about than anybody else that will testify.

16 MR. COWAN: I respectfully, obviously,
17 disagree with the statement that you just made.
18 However, at the end of the day, this is a
19 battle of the experts. I have problems with
20 Dr. Longo's methodologies, which we will be
21 discussing later. We'll be discussing that.

22 I have not tried to completely exclude
23 every opinion that he's ever had. I have an
24 issue with one portion of his PLM analysis.

25 But this is going to be a battle of the

1 experts. They, obviously, have ammo to use on
2 cross-examination. He has a Ph.D. in geology,
3 who has been studying national occurring
4 asbestos for the last 24 years. He is a
5 qualified expert that is actually using
6 published methodologies that you, sir, may --
7 ma'am, may disagree with. But at the end of
8 the day, they are still published
9 methodologies. And, in fact --

10 THE COURT: Well, I mean, there are a lot
11 of things published that now, in the light of
12 what we now know, just don't hold any water.
13 But, you know, I mean, I spent a fascinating
14 day about three years ago in the
15 newly-renovated Peabody Museum at Yale, which
16 is just one of my favorites in the world. My
17 husband and daughter went there and my sister
18 went to med school there, so I was up visiting.
19 And they have this whole exhibit on asbestos,
20 and it was absolutely fascinating to trace
21 through how these rocks were examined. This,
22 of course, asbestos is naturally occurring
23 among talc and other things. They had these
24 things and then they had the -- the examination
25 of what they look like as your examination got

1 more sophisticated and more sophisticated.
2 Looked at different kinds of light microscopy
3 and other ways of looking at these things. And
4 the progression that has been made since
5 McCrone landed on this theory of asbestiform
6 and non-asbestiform years and years ago is
7 staggering. And that's what I'm sensitive to.
8 The world has changed since they hatched up
9 this way of looking at things. And for a long
10 time, people bought it. But it has turned out
11 to not be a very believable thing in this day
12 and age.

13 MR. COWAN: I would just -- Your Honor, if
14 we're going to talk about how things have
15 changed, that Dr. Longo's methodology has been
16 around -- I mean, he use to --

17 THE COURT: Please don't get into
18 Dr. Longo. We don't --

19 MR. COWAN: Oh, I understand, but things
20 have changed. Methodologies have remained
21 relatively constant. And so I would just -- I
22 would say, and you, obviously -- I haven't been
23 to that museum. I'd like to go, but -- and you
24 may know more about this than I do at this
25 point. You've been doing this for awhile. But

1 as I see it --

2 THE COURT: That exhibit's probably long
3 since gone since I saw it.

4 MR. COWAN: But as I see it, this really
5 is an issue of weight versus admissibility.
6 There is no doubt that --

7 THE COURT: Watson versus Ford Motor
8 Company. And in that case, we said there comes
9 a time when it's so outside the mainstream that
10 even though you've got this highly-educated
11 expert, that expert can't offer opinions on
12 what that expert is being offered for.

13 In that case, it was a guy from -- he was
14 an expert in big naval engines, and he was
15 offered as an expert on cruise control. He
16 never looked at a cruise control or dealt with
17 it. Didn't know nothing about it.

18 So even though he was degreed and lettered
19 and brilliant about magnetic interference,
20 which is what he thought it was,
21 electromagnetic interference, turned out that
22 had nothing to do with the cruise control, and
23 we reversed that case for that reason.

24 And said the judge has got the
25 responsibility to look on the front-end and see

1 whether these opinions that are going to be
2 offered have really got the kind of scientific
3 acceptability to them. They've got to have
4 some basic ability.

5 And what this guy is, is a geologist, who
6 has rarely found asbestos in anything. And
7 that is light years away from the mainstream
8 from most people that have looked at these
9 materials over time.

10 MR. COWAN: Just so you know, he has found
11 asbestos in the bottle of Johnson's baby
12 powder.

13 THE COURT: Oh, wow. That's since I last
14 saw him.

15 MR. COWAN: Well, if he comes here, we'll
16 talk about it.

17 But regardless, I understand the Court's
18 gatekeeping rule, and I understand there are
19 factors that need to be addressed.

20 And one of those is, obviously, whether or
21 not the methodology is published. It is. And
22 one of them is whether or not the methodology
23 is testable. It is. And the fact that the
24 Court, I understand -- and I don't think I'm
25 going to convince you otherwise -- you don't,

1 Your Honor, agree with Dr. Sanchez --

2 THE COURT: I am sure of one thing; that
3 asbestos can include some fibers that are
4 little, strong, skinny fibers, and it can also
5 contain these --

6 MR. COWAN: Well --

7 THE COURT: -- fragments. But I am also
8 convinced that the majority opinion of people
9 who look at those -- this, that both of those
10 are asbestos.

11 MR. COWAN: Okay. There are many, many
12 publications that would disagree with you.

13 THE COURT: Oh, yeah. I know.

14 MR. COWAN: But regardless, that's kind of
15 the point.

16 THE COURT: Okay.

17 MR. COWAN: I mean, the fact that there is
18 a disagreement doesn't make it inadmissible.

19 THE COURT: All right.

20 MR. COWAN: Thank you.

21 MS. GROSS: One final point. There is no
22 methodology. There isn't. This R-93 thing,
23 R-93 is meant to be used as a PLM.

24 What Dr. Sanchez does, is he takes that
25 and he extrapolates it and he uses it with a

1 TEM, that giant microscope we put up for trial
2 last year. He completely misuses the testing
3 methods. There is no methodology. There is no
4 scientific publication or science on earth that
5 says what he's doing is good science. None.

6 Where I deposed Dr. Longo, and I know we
7 don't want to get into it, but because we
8 touched on the battle of the experts, I just
9 want to be clear. What Dr. Longo does is he
10 uses the methods prescribed by AHERA, ISO,
11 which Your Honor talked about. You know all
12 that. That's the difference.

13 THE COURT: I don't want to do that part.

14 MS. GROSS: Okay.

15 THE COURT: I, at the present time, am not
16 ready to rule Matthew Sanchez out completely,
17 so I am holding out on the motion to exclude
18 his testimony completely. But I am very, very
19 concerned, and the concerns I have voiced at
20 considerable length to all of you today. I
21 will see how things develop.

22 When Sanchez begins to testify, if there
23 isn't a proper foundation laid right to begin
24 with before getting into this mind-numbing
25 scenario that he goes through, I am going to

1 entertain a motion to exclude his testimony and
2 you're going to suffer the consequences of
3 having him in front of the jury, an expert
4 who's disqualified, because I think he is right
5 on the edge. And what we said in Watson versus
6 Ford Motor Company was outside of what all is
7 accepted.

8 So with that, I am denying the motion, but
9 it's with a lot of caveats.

10 Seventeen.

11 MS. GROSS: It may be easier for Your
12 Honor to argue the Diette and the Weill one at
13 the same time.

14 THE COURT: Diette and who?

15 MS. GROSS: Weill. Dr. Weill. It's
16 Number 21. Because we move to strike them for
17 the same reason -- partially strike them for
18 the same reason.

19 THE COURT: Well, let me just say this
20 about both of these to begin with: I'm not
21 allowing anybody to testify that Mr. Perry's
22 mesothelioma is spontaneous or idiopathic.

23 With respect to Diette, he is a
24 pulmonologist. I don't think he has got
25 enough -- he is a COPD man and an asthma man.

1 He doesn't have any background in mesothelioma,
2 as I understand it. I've limited him in the
3 Plant case and said that he could not give a
4 specific causation opinion about the
5 plaintiff's mesothelioma; that it was
6 spontaneous. And I did that with respect to
7 Dr. Diette, Dr. Weill, and Dr. Feingold. And
8 I'm going to make those same rulings today.

9 So if that helps, they are not going to be
10 allowed to opine on the cause of the
11 mesothelioma of Mr. Perry. They are not
12 qualified to do that.

13 Now, the only reason I let them in is that
14 I am so far confident that given the confidence
15 of defense attorneys -- and I'm relying,
16 particularly, on Mr. Brown in this regard, I
17 think they understand this ruling and will so
18 instruct their clients.

19 I had one witness that, despite all my
20 rulings -- that was Dr. Attanoos. Attanoos.
21 And Attanoos is so egotistical about what he
22 knew and what he didn't know that he would not
23 follow my instructions.

24 MS. GROSS: Dr. Feingold did it last year
25 in the Plant trial, as well.

1 THE COURT: Dr. Feingold did a little bit
2 of it in this very room. I'm not going to
3 permit that. I'm saying they cannot testify as
4 to the cause of his mesothelioma. Not only can
5 they not testify that it was spontaneous or
6 idiopathic; meaning, I don't know or it just
7 kind of happened, they are not going to be able
8 to testify to that. And if they now start
9 testifying that they know the cause of the
10 mesothelioma, I'll strike all the testimony.

11 So they need to be instructed to stay
12 between the guardrails. And that's how I'm
13 going to deal with this. So that ought to deal
14 with 17. That's Diette.

15 MS. GROSS: And 21.

16 THE COURT: Twenty-one?

17 MS. GROSS: Yes, ma'am.

18 THE COURT: That's --

19 MS. GROSS: Weill.

20 THE COURT: -- Weill. And the other one
21 is not being offered yet.

22 MS. GROSS: Feingold's not in this case.

23 THE COURT: Feingold's not in this case;
24 just Diette and Feingold.

25 MS. GROSS: Diette and Weill.

1 THE COURT: And Weill.

2 MS. GROSS: Yes, ma'am.

3 MS. BUENO: Your Honor, may I respond?

4 Understanding Your Honor's ruling, I do
5 think it's important for you to understand what
6 has happened in recent months leading up to
7 this trial.

8 THE COURT: All right.

9 MS. BUENO: I have right here your Order
10 in the Plant trial --

11 THE COURT: Yes, ma'am.

12 MS. BUENO: -- where you excluded these
13 two experts at issue, Dr. Diette and Dr. Weill.
14 And what you did is, you said, on the third
15 page, that they are able to testify, generally,
16 about the rates of mesothelioma cancer in
17 women, which are spontaneous or naturally
18 occurring, but you said they are excluded from
19 testifying about the specific plaintiff's
20 cause, and you explained why in great detail.
21 And you said, "The Court finds these doctors
22 have not made an attempt to determine the
23 products at issue contained asbestos at all."
24 You criticized them for not looking at fiber
25 type, for not reviewing any studies, for not

1 considering the presence or lack of presence of
2 asbestos in the products, and additional
3 deficiencies. And you, basically, said these
4 doctors cannot say that this was naturally
5 occurring, because they haven't considered the
6 potential exposure for this plaintiff.

7 So what we did is made a very concerted
8 effort to fix it, to fix these deficiencies.
9 And what Your Honor may not be aware of is that
10 in the reports that Dr. Diette and Dr. Weill
11 served in this case, which are attached as
12 exhibits to our response, they made an
13 exhaustive effort to review, in detail, all of
14 the materials that you criticized them for not
15 reviewing previously.

16 And I've got those reports here. I'm
17 looking, for example, at Dr. Weill's report.
18 And it starts on page 1 with the chart of
19 materials reviewed and it goes multiple pages.
20 He reviewed all of Dr. Longo's testing --

21 THE COURT: Let me just say this,
22 Ms. Bueno: Part of my problem with them is not
23 reviewing the specifics of Ms. Plant. But the
24 other part of my problem with those two is they
25 don't have any information about -- sufficient

1 to make a diagnosis of Ms. Plant's
2 mesothelioma.

3 So it's not just information about the
4 general thing. I have no confidence in the
5 opinion that these cancers are spontaneous and
6 these cancers are idiopathic. I would never
7 allow idiopathic to be put before a jury,
8 because that just means "I don't know."

9 Spontaneous occurrence of mesothelioma is
10 rare as hen's teeth. Mesothelioma is a
11 signature cancer, and it is almost invariably
12 caused by asbestos. And that is what troubles
13 me about these experts. They pretend to say
14 that there is actually data out there to
15 support the diagnosis of spontaneity, and even
16 go far enough to say that hers -- Ms. Perry's
17 is spontaneous or idiopathic, but they don't
18 have any scientific basis for that, because
19 this -- this opinion is -- the spontaneity
20 is -- we can't explain it any other way, so it
21 must have been spontaneous. Idiopathic is, we
22 just can't explain it at all. It's just
23 something that happens.

24 That's not a scientific diagnosis or a
25 scientific opinion, in my view. And I

1 absolutely will not let that go to a jury. I
2 don't care whether they have now done a whole
3 bunch of studies about asbestos or not. The
4 opinion they offer is not a scientifically
5 reliable opinion.

6 MS. BUENO: I think the opinion they offer
7 is a little different than what you're stating.
8 So let me explain to the Court exactly what
9 they testified to.

10 Here's what they testified to:

11 They said, we have reviewed -- both of
12 them independently -- reviewed these materials
13 that the Court has asked us to. We've looked
14 at the data. We've looked at Dr. Longo's
15 reports. We've looked at Dr. Bailey's reports.
16 Right? And we have now considered in our mind,
17 even if they are correct about the amount of
18 asbestos they say in talc, would that be enough
19 to have caused this patient's mesothelioma?
20 And they both have concluded that, based on
21 epidemiology and exposure assessments and
22 published literature and the like, they have
23 come to a conclusion that cosmetic talc was not
24 the cause.

25 Then they say -- both of them -- Dr. Weill

1 testified about this most recently in his depo.
2 He said, "Look, I have considered all of this,
3 and even if there is this sub ultra-trace
4 amount of asbestos that plaintiffs claim, it's
5 my opinion, to a reasonable degree of medical
6 certainty, it is not enough to cause
7 Mr. Perry's mesothelioma."

8 THE COURT: And yet they know nothing
9 about Mr. Perry. They haven't examined
10 Mr. Perry. They haven't examined Mr. Perry's
11 details about his lungs, or anything like that.
12 This is all based on their just kind of general
13 opinion that if you can't explain it, it's
14 spontaneous. Well, they may not be able to
15 explain it, but the doctors that have looked at
16 him do explain it. And it's not a proper
17 counter to the doctors who do explain it.

18 MS. BUENO: There is not a doctor --

19 THE COURT: There's no explanation for it.
20 It's spontaneous. That is not something I find
21 as justified in any scientific --

22 MS. BUENO: That's not what they're
23 saying. They're saying, if it was
24 asbestos-related, I know it's not talc for
25 these reasons. And so if it's not

1 asbestos-related, then I believe it's naturally
2 occurring, because there are cases of that.
3 That is their opinion. It's not talc. I don't
4 have enough --

5 THE COURT: How do they exclude talc?

6 MS. BUENO: Because they look at the
7 epidemiology. Like Dr. Diette goes into great
8 detail into the miners and millers studies and
9 how --

10 THE COURT: I'm not talking about any of
11 that stuff. I'm familiar with all of that old
12 stuff. Even Vogner appealed it at one point.
13 That's not enough.

14 MS. BUENO: They are epi --

15 THE COURT: I'm asking what they looked at
16 in Perry and in the products Perry used. They
17 didn't look at any of that.

18 MS. BUENO: Well, they looked at it. They
19 looked at all of the data that plaintiffs
20 allege related to asbestos content in the
21 products used.

22 THE COURT: I'm asking you a very specific
23 question, Ms. Bueno.

24 MS. BUENO: Yes.

25 THE COURT: They propose to say Perry's

1 mesothelioma cannot be caused by talc. They
2 want to make that opinion to the jury.

3 MS. BUENO: They want to say --

4 THE COURT: They are not qualified. They
5 don't know anything. They haven't examined
6 Perry. They haven't examined his lung slide or
7 anything like that. They don't have the
8 ability to do that. They're not trained in
9 that.

10 MS. BUENO: Then it would be the same for
11 Dr. Haber, who plaintiffs wish to put on the
12 stand and say the opposite.

13 THE COURT: You-all are going to be going
14 one expert after another. We're talking about
15 this expert.

16 MS. BUENO: Okay. This expert, both
17 Dr. Diette and Dr. Weill, are qualified,
18 according to you, in the Plant case to come to
19 the jury and say, there are a certain number of
20 cases where there has not been identified
21 asbestos exposure and plaintiffs have
22 mesothelioma, and those are called either
23 naturally-occurring or spontaneous, according
24 to the literature. They have said that. And
25 Dr. Brody, plaintiff's pathology expert, will

1 say that.

2 So then here is the point, then. They are
3 allowed to say there are a certain number of
4 cases --

5 THE COURT: They are not allowed to say
6 anything about the diagnosis of Mr. Perry,
7 because they're not qualified to do that.
8 That's my ruling. That's the same ruling I
9 made in Plant. And the fact that you may have
10 studied it at length and decided that you got
11 down on some other facets of the case makes no
12 difference in my ruling. I am not going to
13 allow them to express a medical opinion that
14 they're not qualified to express.

15 MS. BUENO: Is there anything for future
16 knowledge from Your Honor -- because we tried
17 to rectify the Plant situation by having them
18 review the material that you identified in your
19 order. Is there anything that a pulmonologist
20 can do to come and offer an opinion that
21 cosmetic talc is not to blame, having reviewed
22 the epidemiology and the medical literature,
23 the exposure studies, et cetera?

24 THE COURT: I am not going to rule in the
25 abstract on that.

1 MS. BUENO: Okay. Thank you.

2 THE COURT: All right. Where are we?

3 MS. McVEY: Number 18, I think, Your
4 Honor.

5 THE COURT: All right, 18. To preclude
6 defendants, and their lawyers, and their
7 witnesses from offering statements regarding
8 their personal use of talcum powder products.
9 All right. I will grant that.

10 MS. BUENO: Thank you, Your Honor.

11 THE COURT: Plaintiff -- motion in liminé
12 19, to exclude the 1986 letter from H.W.
13 Swanson to Phillippe Douillet.

14 MS. BUENO: Your Honor, may I respond to
15 this one, please?

16 THE COURT: I ruled, and then I guess it
17 just kind of passes over everybody.

18 MS. BUENO: Well, Your Honor, I think
19 that --

20 THE COURT: This goes back to Bell and all
21 that kind of stuff.

22 MS. BUENO: No, no, it does not. It does
23 not. And that's why I think it's important.
24 It actually overlaps with a motion you heard on
25 Dr. Barlow earlier. And so this is --

1 THE COURT: And I let Barlow in.

2 MS. BUENO: You did.

3 THE COURT: Barlow is not going to be the
4 wedge where you're going to get this Douillet
5 thing in.

6 MS. BUENO: Oh, no, no, no. It's the FDA
7 Citizen's Petition Response. That's what this
8 is, Your Honor.

9 So plaintiffs' motion in limine 19 is the
10 1986 FDA response to a citizen's petition that
11 outlined the worst-case scenario the FDA --

12 THE COURT: This isn't FDA. This is a
13 letter between two people, and I am not going
14 to allow it.

15 MS. BUENO: It is not. It is the FDA's
16 response to the citizen's petition. That's
17 exactly what it is. The title of it is --

18 THE COURT: And it contains false and
19 unreliable expert opinion that they just kind
20 of throw in there. It's not their opinion.
21 It's some other expert. And, therefore, its
22 probative value is strongly outweighed by its
23 prejudicial effect, in my view.

24 MS. BUENO: It can be offered for other
25 purposes, as well, as far as notice and other

1 issues, as well.

2 THE COURT: Well, you've got a lot of
3 other ways of proving that than that
4 Swanson/Douillet letter, so I'm not letting it
5 in.

6 All right, 20. Motion in liminé regarding
7 admissibility of documents without sponsoring
8 witnesses.

9 MS. McVEY: This is really simple. So
10 Johnson & Johnson has entered a stipulation
11 that certain documents within a Bates range are
12 both authentic and business records.

13 THE COURT: Right, right.

14 MS. McVEY: All right. And so, as you
15 know -- and I'm going to hand you what we
16 filed, and the defendants already have a
17 copy -- is our motion to pre-admit exhibits.

18 THE COURT: Yeah, yeah, yeah.

19 MS. McVEY: And you'll see -- we just want
20 them to follow the stipulation that they've
21 agreed to. In other words, if we put in a
22 Johnson & Johnson document that they have
23 agreed is authentic and a business record, it
24 should be admitted into evidence without having
25 to have a sponsor witness.

1 THE COURT: I agree. And that's going to
2 be resolved before we get to trial. I am not
3 going to get into a position where I've got to
4 interrupt a trial for a whole bunch of that
5 nonsense.

6 MS. McVEY: Your Honor, it's important
7 because we're going to move these cases fast,
8 as you know.

9 THE COURT: Right. If these are J&J
10 documents, they're coming in. Yes, ma'am.

11 MS. PEPKE: Your Honor, I think the point
12 is premature. Authenticity and business
13 records does not necessarily equal
14 admissibility. It will in most cases.

15 THE COURT: My friend, I rule on all these
16 things in advance. I don't have a bunch of
17 evidence fighting while I'm trying these cases.
18 Time is too precious to do that. I try to try
19 these cases in a week. We're going to talk
20 about what we're going to do with this case.
21 But I'm not spending a bit of time as a witness
22 is on the stand or when the documents are up.

23 We pre-admit in the cases I try. So she's
24 got a pre-admit list, and we're not going to
25 have any debate once trial starts. If it's a

1 Johnson & Johnson exhibit -- a Johnson &
2 Johnson record that has been given to y'all,
3 that y'all have given her, or she's got some
4 other places and you agree it's a J&J record,
5 it's coming in.

6 MS. PEPKE: Your Honor, I understand that
7 ruling. We just received that pre-admit list.
8 That wasn't with this motion. It came in
9 later. We haven't thoroughly reviewed it. If
10 we have an objection, for example, hearsay
11 within hearsay in that document --

12 THE COURT: Hearsay within hearsay is not
13 going to be the kind of thing that we will
14 knock out in a business record, but whatever.

15 MS. PEPKE: 403 and 401, that would also
16 be proper basis to object that are not covered
17 by authenticity or business record.

18 If we have objections to that list, all
19 we're saying is we want to be able to bring it
20 to you, not while a witness is on the stand.

21 THE COURT: Well, I'm not going, in the
22 middle of a trial, to go through a whole bunch
23 of nonsense about this. If you all -- if you
24 think that I will take a big thing like this
25 and have you object to it for all these various

1 reasons, and have me sit down and do that, I'm
2 not going to do that.

3 MS. PEPKE: Understood. If we have
4 specific ones in a very limited set, we would
5 like to approach you on that.

6 MS. McVEY: Your Honor, just to be quick.
7 I'm sorry. If you all would get us any
8 objections by Thursday to this list of
9 documents --

10 MS. PEPKE: That, we can do.

11 MS. McVEY: That way, we can identify --

12 THE COURT: I'll see what I can do.

13 MS. PEPKE: That's what we're asking.

14 THE COURT: Okay.

15 MS. McVEY: Thank you very much. Just so
16 I understand, y'all are going to get us
17 anything by Thursday?

18 THE COURT: That's good. Y'all are good.
19 All right. Twenty-one. That's Weill. We've
20 already dealt with that.

21 Twenty-two.

22 MS. McVEY: All right. Your Honor, 22 is
23 a spoliation motion that you heard in the
24 McBrayer case. And we argued that -- Ally
25 Brown came down from -- came down, and

1 Mr. Bernardo, and we argued about documents
2 that have been spoliated. And you entered an
3 order which Johnson & Johnson has. And I just
4 handed the order to you.

5 Nothing at all has changed since that
6 order was entered. So we would ask you to
7 enter the same order in the Perry case and give
8 the same spoliation charge.

9 MR. COWAN: Your Honor, I'm not going to
10 re-litigate this at all, but I would like to
11 put something on the record.

12 THE COURT: Do what?

13 MR. COWAN: I'm not going to re-litigate
14 this at all. I understand your prior order,
15 Your Honor. I just would like to put something
16 on the record just very briefly because --

17 THE COURT: Okay.

18 MR. COWAN: We understand the order.
19 Obviously, we respectfully disagree with the
20 order, but we've incorporated our McBrayer
21 briefing in our response we filed with the
22 Court. If the Court grants the relief,
23 however, if the Court signs the same order,
24 defendants note that the Court's order has
25 previously stated "requires plaintiff to inform

1 defense counsel of what tests plaintiff
2 contends are included in the scope of the
3 order." I think it's the last page of the
4 order, Your Honor.

5 And it requires that be done in a
6 sufficient time before trial. We are now less
7 than a week --

8 THE COURT: Hold on a minute. I'm
9 looking.

10 MR. COWAN: Yes, Your Honor.

11 THE COURT: Is what you're talking about,
12 "In addition, it is hereby ordered that Johnson
13 & Johnson and its lawyers and experts are
14 precluded from suggesting limitations to kinds
15 of testing due to lack of underlying data when
16 the underlying data does not exist because of
17 J&J's conduct"?

18 MR. COWAN: No. I believe it comes right
19 after that. If I could take a look at the
20 order you're looking at?

21 THE COURT: Oh, it's, "Finally, plaintiff
22 is instructed to inform defense counsel for
23 what tests plaintiff contends were included in
24 the scope of this or in a sufficient time
25 period to review before trial"?

1 MR. COWAN: Correct. So I'm referring to
2 that provision.

3 THE COURT: Right, right.

4 MR. COWAN: So that provision provides
5 that they need to provide notice of the tests
6 that they believe are within the scope of the
7 order.

8 McBrayer's order was signed and entered
9 nearly three years ago, obviously, before this
10 case was even filed. But it's fair to say that
11 when it got filed, this case, that plaintiff
12 was pretty sure they were going to be trying to
13 get this order, again, understandably, because
14 they were before the same judge.

15 So I would respectfully submit that, at a
16 minimum, they could have identified these tests
17 three weeks ago when they filed this motion for
18 entry of this order. We are now less than a
19 week away from trial and we have not been told
20 what tests that they believe are within the
21 scope of this order.

22 So my suggestion is that Your Honor --
23 that this order can be signed, but it's too
24 late. The time has elapsed. We don't have
25 enough time to be dealing with which tests are

1 you going to be claiming today, and, by the
2 way, what evidence are you going to be putting
3 on that proves that that particular underlying
4 data from McCrone, R.J. Lee, wherever it's
5 from, that we, Johnson & Johnson, ever had the
6 underlying data to begin to preserve --

7 THE COURT: Well, that's just an argument
8 against the whole law.

9 MR. COWAN: No, no. It's not, Your Honor,
10 because if we had enough time, they could tell
11 us what the evidence was. They could tell us
12 what the test was. And then we could have time
13 to prepare a response.

14 THE COURT: Well, let me tell you this:
15 This order, which is an order involving Johnson
16 & Johnson, was signed by me in --

17 MR. COWAN: 2021.

18 THE COURT: -- 2021. All right. Your
19 client has known about this for a very long
20 time. That's one.

21 Number 2, your client has jumped through
22 every hoop imaginable from the Texas two-step
23 to Lord knows what to put a stop on the trial
24 of Johnson & Johnson cases in state court, and
25 that includes in this court. Now, suddenly,

1 you come up at the last minute with an issue
2 that has been around a long time and try to put
3 it back on the plaintiff that you have been
4 surprised by what's going on here.

5 MR. COWAN: I'm not surprised at all. The
6 issue is --

7 THE COURT: Well, then, if you're not
8 surprised, I don't get the problem.

9 MR. COWAN: May I -- may I respond? The
10 problem is that it is plaintiff's burden under
11 that order to provide us the tests. They have
12 failed to do so.

13 THE COURT: I haven't signed the order
14 yet. That's the first thing.

15 MR. COWAN: I totally understand, but the
16 issue is that they sought the entry of this
17 order at the end of the -- right before the
18 beginning of trial.

19 THE COURT: Mr. Cowan, let me see what
20 Ms. McVey has to say about that.

21 MR. COWAN: Thank you, Your Honor.

22 MS. McVEY: Your Honor, they know exactly
23 what tests we're talking about. They answered
24 discovery where they said whether they got the
25 underlying data for each of these tests or not.

1 If they need to give you a list of the stuff
2 they've already provided to us, then I'm sure
3 we can do that. But this is not that kind of
4 issue. This order, by the way, was right
5 before they felt like this for the first time.
6 Do you remember that?

7 THE COURT: Yes, I do.

8 MS. McVEY: And so it's now been years
9 that they've known about this. It's not a
10 surprise what tests we're talking about, but
11 certainly if they need us to give them a list,
12 we'll give them a list. But they know. They
13 answered discovery.

14 THE COURT: Yeah. That's very much my
15 feeling about the matter.

16 MR. COWAN: Can we get a deadline by which
17 we can get that list?

18 MS. McVEY: We'll reproduce your discovery
19 responses to you on Thursday.

20 THE COURT: I'm not going back and forth
21 on this, Mr. Cowan. Really, this whole shock
22 and surprise of "they're treating us so bad,"
23 I'm frankly ashamed of you for making that kind
24 of argument here. Johnson & Johnson well knows
25 about this stuff. Y'all have been back and

1 forth about this stuff many a time. This is no
2 magic or mystery here going on.

3 MR. COWAN: Your Honor, I'll sit down.

4 THE COURT: Good.

5 Ms. McVey, get your order form. I'll sign
6 it --

7 MS. McVEY: Yes, ma'am.

8 THE COURT: -- and then provide the
9 materials for him as quickly as you can.

10 MS. McVEY: I will do that.

11 THE COURT: All right. Twenty-three, to
12 exclude expert hearsay opinions.

13 MS. McVEY: Your Honor, I think we agree
14 on that one.

15 MS. BUENO: We do.

16 THE COURT: All right. Now, what is 24?

17 MS. McVEY: That's it, Your Honor.

18 (A discussion was held
19 off-the-record.)

20 THE COURT: This is motion in liminé by
21 the defense now to exclude or partially exclude
22 certain opinions of Dr. Longo.

23 We're not going to spend all day on this.
24 I'm not going to do it. I'll send you a list
25 of my rulings.

1 MS. BUENO: Your Honor, there's just a few
2 that we think need to be argued. If you'd like
3 to rule on the papers on any of these, we're
4 happy to have you do that, or we can go
5 through --

6 THE COURT: Yeah, but I have to even go to
7 do that. That's my problem.

8 MS. BUENO: I apologize.

9 THE COURT: J&J Omnibus, Number 1, media
10 reports about talc litigation presence,
11 asbestos and talc.

12 All right. Yes, ma'am.

13 MS. BUENO: Your Honor, are we looking at
14 the same thing, Number 1A, the omnibus for J&J,
15 which is media reports and articles?

16 THE COURT: That's just what I read.

17 MS. BUENO: Okay. I apologize.

18 Yes, Your Honor. So this is -- this is a
19 motion that just seeks to exclude on hearsay
20 grounds articles about Johnson & Johnson. We
21 called out one, in particular, which is a
22 Reuters article from 2018. It attaches some
23 documents and other things that may, indeed,
24 come into evidence, but the article, itself, or
25 anything about a report or writing is

1 absolutely hearsay.

2 THE COURT: I'm familiar with the article.

3 Ms. McVey.

4 MS. McVEY: Your Honor, as to the Reuters
5 article itself --

6 THE COURT: Yes.

7 MS. McVEY: -- generally, we would agree
8 that it doesn't come in with this exception.
9 If they're going to say, "It's not like we
10 stopped selling talc because of safety concerns
11 or this news article."

12 THE COURT: They can open the door. I'm
13 going to grant this, but if they open the door
14 by saying that they didn't stop selling talc
15 because of safety concerns, then a whole lot of
16 stuff comes in.

17 MS. McVEY: I'm sorry. Just before you
18 get there with that, there's also prior news
19 articles that we believe would come in for
20 notice or knowledge or other things like that.
21 I don't know that they're seeking to exclude
22 those.

23 THE COURT: Well, prior knowledge is going
24 to come in, but it can come in in a variety of
25 different ways. I've been asked to look right

1 now at specific articles about what they knew
2 and what they didn't know.

3 MS. McVEY: And the only one that we're
4 agreeing that shouldn't come in for notice or
5 some other reason is that Reuters article, and
6 that's that 2018 one.

7 THE COURT: What are you saying about
8 other articles?

9 MS. McVEY: I'm saying that you shouldn't
10 grant the motion as to those other articles
11 because they could come in for other reasons.
12 They haven't identified any other articles
13 they're talking about.

14 THE COURT: That's fine. I'm just saying
15 I'm going to rule on Reuters. That's it.
16 That's the one that I've got in front of me.
17 Okay.

18 1B, motion to exclude any reference to the
19 Golden Rule and Reptile Theory and all that.

20 I always exclude any kind of reference of
21 that sort. So, yes, granted.

22 MS. McVEY: Judge, I'm sorry. We agreed
23 not to the Golden Rule. They take this Reptile
24 Theory to mean that you cannot ask any safety
25 questions.

1 THE COURT: The Reptile Theory is that
2 crazy thing that the defense invented as a
3 scare tactic, if you were going to talk about
4 the Reptile Theory.

5 MS. McVEY: Right. I can do it the way
6 the motion is written, if you're granting it.
7 We're allowed to ask safety questions,
8 obviously. Companies have duties to put out
9 safe products and do safe things. And so we
10 want to be able to ask those questions, which
11 you've allowed us to do in every case.

12 THE COURT: All I'm doing is ruling out
13 the Reptile Theory, which is the level of
14 reptilian bar that's appealed to by certain
15 arguments. That has nothing to do with safety.
16 Safety is always something you can ask about.

17 I grant it on the basis of the Reptile
18 Theory and Golden Rule. And our state enforces
19 the Golden Rule, and I do, too. All right.

20 Johnson & Johnson Motion in Liminé
21 Number 2, exclude each and every exposure from
22 cumulative dose, causation --

23 FEMALE SPEAKER: I think you skipped 1C.

24 THE COURT: Where?

25 MS. BUENO: 1C through G.

1 THE COURT: 1C, motion to exclude any
2 reference to counsel's personal beliefs.
3 Granted.

4 Motion to exclude evidence and argument
5 that J&J improperly marketed or targeted
6 consumer general practice, characteristics
7 warranty. Why should I grant that?

8 MS. BUENO: Your Honor, what we're talking
9 about here are different documents suggesting
10 that Johnson & Johnson targeted for either
11 racial groups or women instead of men. And
12 they've been portrayed by plaintiffs in the
13 past about racism and sexism within the
14 marketing department at Johnson & Johnson.

15 Mr. Perry is a man. He's a white man.
16 There's just no reason to be bringing race into
17 the equation.

18 THE COURT: I agree with that. I'll grant
19 it.

20 MS. McVEY: Your Honor, just briefly.
21 They've not identified what documents they're
22 talking about. So in a vacuum --

23 THE COURT: Exactly. I will rule that I'm
24 not going to let targeted consumers that would
25 introduce the topic of race or gender. I'll

1 agree with that. I don't know what demographic
2 characteristics means, so I'm not going to rule
3 on that. But race or gender and improper
4 marketing to the -- well, projected to those
5 particular groups, I'm going to grant that.

6 Motion to exclude evidence in reference to
7 other plaintiffs' lawsuits and verdicts. All
8 right. Granted.

9 MS. McVEY: Your Honor, just to clarify on
10 that one, we do have adverse event reports from
11 Johnson & Johnson. They're not claims, of
12 course, but it's like when they report on a bad
13 outcome.

14 THE COURT: Yeah. Adverse events are
15 always going to be admitted. This thing is
16 talking about other claims or lawsuits.

17 MS. McVEY: The only time that you've let
18 other lawsuits in is if it has been notice for
19 knowledge, right, the first time they were sued
20 in a case alleging asbestos in their talc?
21 You, typically, let that in for notice for
22 knowledge.

23 THE COURT: I agree. Things that go to
24 notice can come in, but drilling down the
25 details of other claims and other verdicts, no.

1 I will grant on that.

2 1F, motion to exclude evidence of foreign
3 proceedings, including any evidence of talc
4 screening assessment.

5 I don't even know what that is.

6 MS. BUENO: Your Honor, the Health Canada
7 assessment was a Canadian regulatory document
8 related to ovarian cancer and non-cancer lung
9 effects. It's irrelevant. It's been trying to
10 be used in other cases.

11 We're seeking in this motion to exclude
12 anything from a foreign regulatory or
13 proceedings perspective. Particularly Health
14 Canada was discussed.

15 THE COURT: Well, I don't know what other
16 foreign materials you're talking about, and I
17 don't know whether they would be pertinent or
18 not.

19 With respect to Health Canada, what have
20 you got to say, Ms. McVey?

21 MS. McVEY: Banning chrysotile --
22 chrysotile is banned in 80 or 90 countries.

23 THE COURT: Oh, yeah. I've permitted
24 testimony about the bans on chrysotile.

25 MS. BUENO: That's not our motion, Your

1 Honor. Our motion is about foreign
2 proceedings, regulatory investigations that,
3 specifically, calls out Health Canada and the
4 like. It does not talk about bans.

5 THE COURT: Well, I'll grant on that, but
6 I'm not going to grant on just kind of a
7 general universe of other kinds of regulatory
8 issues that relate to what chrysotile is not
9 permitted to be sold. We've already had in
10 many of these cases the information that the
11 USA moved very slowly in this area as opposed
12 to many other countries that banned any use of
13 asbestos. You know, that goes to notice, that
14 kind of thing. All right.

15 Three, Johnson & Johnson's excluding each
16 and every exposure, cumulative dose, causation
17 opinions.

18 Jolly.

19 MS. BUENO: 1G was agreed to, Your Honor.
20 This was a specific hearsay statement by
21 Mr. Perry about something that he had overheard
22 from an unknown medical doctor at an oyster
23 roast.

24 MS. McVEY: We agreed to that.

25 THE COURT: Very good. All right.

1 Now we come to each and every exposure. I
2 have dealt with this in Jolly. I have been
3 affirmed in Jolly. So, Mitch, I don't know
4 what you can say, but...

5 MR. BROWN: Here's what I would say, Your
6 Honor. The plaintiff cites in the Jolly
7 opinion and the Glenn opinion, but the most
8 recent looking at this issue was the state
9 Supreme Court in Scapa.

10 THE COURT: Scapa Waycross, I'm very
11 familiar. I was affirmed in that one, too.

12 MR. BROWN: You were affirmed, and the
13 Court of Appeals was affirmed, and the Supreme
14 Court affirmed the Court of Appeals in a very
15 relatively short -- I think I set a record for
16 how quick they affirmed your case on that one.

17 However, it's important because what the
18 plaintiffs do is they say, all right, we're not
19 going to talk about each and every exposure.
20 But then, in fact, that's what the nature of
21 their experts really do. So the things such as
22 this, omitting material facts, opinions that
23 talk about there's no safe level, opinions that
24 say they're in direct conflict with the
25 controlling legal standard -- which Your Honor

1 was part of the Henderson case that set the
2 controlling legal standard -- opinions that are
3 divorced of all context.

4 The Court of Appeals in the Scapa case
5 adopted David Norton's Haskin case. And they
6 also adopted this case from Texas and cited it
7 with approval, Merrell Dow Pharmaceuticals
8 versus Havner, for what is required to be
9 proven for specific causation. And it says the
10 plaintiff has to do more than simply introduce
11 into evidence epidemiological studies that show
12 a substantially elevated risk. It goes on to
13 say they have to prove that they are studies
14 where similarities between himself and
15 individuals in the study include proof that he
16 was exposed to the same toxin, exposure to the
17 dose level was comparable to those in the
18 study, exposure to the toxin occurred before
19 the onset of the injury, the latency period of
20 the injury is consistent with the individuals
21 in the study.

22 We are just wanting a ruling from Your
23 Honor that their experts' opinions have to be
24 consistent with that law. That is required
25 law. The case that I would ask the Court not

1 to follow, which the Supreme Court declined to
2 say whether they liked it or didn't like it,
3 specifically, is the Rost case from
4 Pennsylvania. I think, Your Honor, that that
5 case runs afoul of your Henderson opinion. I
6 can't remember if you actually wrote it. I
7 think you were on it. But that case runs afoul
8 of the Henderson opinion about regularity,
9 proximity, and the frequency, and strays over
10 into allowing -- well, it depends on what type
11 of disease it is, and we might allow brief
12 exposure to be good enough.

13 That's not the test. That's not the legal
14 standard. And, Your Honor, we would
15 respectfully request that the Court adhere to
16 the standards enunciated in the Edwards versus
17 Scapa Court of Appeals and Supreme Court case,
18 which is the latest and greatest on this topic.

19 The last thing I'll say is that there has
20 been this cumulative dose testimony that the
21 Supreme Court cleared up what was allowed. And
22 in their opinion, they have one sentence in
23 here.

24 THE COURT: Here's what they say. This
25 Court has -- this is Scapa. This Court has

1 recently refused the cumulative dose theory
2 within each and every exposure theory, which is
3 what you're trying to do right now, concluding
4 that an expert opinion which states that a
5 certain -- quote, A certain exposure
6 contributes to an individual's cumulative dose
7 does not espouse the view that each and every
8 breath of asbestos is substantially causative
9 of mesothelioma. Quoting Jolly. Rather, this
10 Court viewed testimony regarding plaintiff's
11 cumulative dose of background information
12 essential for the jury's understanding of
13 medical causation, which must be based on
14 science. Edwards.

15 Also, Gardner against ADCO. That was one
16 of Jerry Hill's cases. He understands this
17 area very well. Rejected the admissibility --
18 a challenge to admissibility of Brody's
19 testimony. Same sort of thing, each and every
20 exposure.

21 I've ruled on this. The Supreme Court's
22 ruled on it several times. Jolly and Scapa are
23 two of the best cases on the subject. So I'm
24 not going to spend a lot of time on this.

25 MR. BROWN: Understood.

1 THE COURT: I am going to deny it, Mr.
2 Brown. Your position is preserved. And if you
3 want to argue to the Supreme Court, if it comes
4 to that, you know, I think what these --
5 this -- you cherrypick one little point out of
6 here and call it the Scapa opinion. But this
7 opinion talks about everything that contributes
8 to it. It uses the Helsinki criteria and so
9 forth. I am certainly not going to exclude
10 that.

11 MR. BROWN: Understood.

12 THE COURT: Okay.

13 MR. BROWN: Your Honor, let me make this
14 one point: The cumulative dose, all right, the
15 Supreme Court stated in the Edwards case that
16 it was proper for Dr. Frank to explain to the
17 jury that the amount of asbestos accumulates in
18 the body; the likelihood to develop
19 mesothelioma increases.

20 THE COURT: The Court in Scapa did not buy
21 your argument in any respect, whatsoever. They
22 agreed that what I charged in Jolly was the
23 correct way to look at it. And the way that I
24 managed it in Scapa, which was the same way,
25 was also correct.

1 So I'm, again, not buying that there's
2 been some big change in Scapa. I think it
3 exactly tracks what I and Gary Hill have been
4 doing for a long time with that position.

5 THE COURT: Number 4. Johnson & Johnson
6 defendant's motion in liminé, number 3, to
7 exclude all evidence of -- this is number --
8 exclude all evidence in reference to the
9 bankruptcy proceedings.

10 MS. BUENO: Yes, Your Honor. We are
11 moving to exclude any reference to bankruptcy,
12 because it's irrelevant. The jury's going to
13 have to decide whether or not Johnson &
14 Johnson's talcum powder products was a
15 proximate cause of Mr. Perry's cancer. That's
16 why we're here. This bankruptcy has absolutely
17 nothing to do with it. It would be irrelevant
18 and it would take us down a huge rabbit hole
19 and cause undue delay and waste the jury's time
20 and the Court's time.

21 And there's no reason that plaintiffs want
22 to offer this evidence, except for the purposes
23 of suggesting that Johnson & Johnson is a bad
24 actor. And I filed a reply brief last night,
25 which I'm sure Your Honor doesn't have and

1 hasn't had a chance to read. I think it was
2 yesterday, actually. But we pointed out what I
3 think is very important.

4 Plaintiffs had filed a response to this
5 motion, and then they filed an amended
6 response. And what they did in their amended
7 response, I think, is very notable. And I've
8 got both of them here if Your Honor doesn't
9 have it in front of you.

10 THE COURT: I'm looking at one of them
11 right here.

12 MS. BUENO: Is it the one that says
13 "response" or "amended response"?

14 THE COURT: I got it.

15 MS. BUENO: Okay. Which one are you
16 looking at, Your Honor?

17 THE COURT: I'm looking at both of them.

18 MS. BUENO: Okay. Great. So if you'll
19 turn with me to the "response," the original
20 one that was filed, and go to page 6, there's a
21 section C with two paragraphs under it. And if
22 you look at the "amended response" and go to
23 page 6, you'll see there's just one paragraph.
24 Plaintiffs amended their response to get rid of
25 the paragraph at the bottom where they said,

1 quote, Given that all relevant evidence is
2 admissible, plaintiff asks this Court to allow
3 them to introduce evidence of LLT bankruptcy
4 proceedings only to explain historical context
5 relating to LLT's existence and liabilities and
6 its relevance in this litigation. Unless J&J
7 opens the door and calls into question the
8 purpose of LLT bankruptcy proceedings,
9 plaintiffs do not intend to introduce evidence
10 showing J&J orchestrated the corporate
11 restructuring, sham bankruptcies and subsequent
12 events to avoid and limit its talc liabilities.

13 In other words, plaintiffs seek to admit
14 evidence relating to LLT bankruptcy proceedings
15 only to provide context and explain to the jury
16 how and why LLT is liable, not to show J&J is a
17 bad actor. That is the way plaintiffs
18 initially responded, and then rescinded by
19 amending and taking --

20 THE COURT: Let me tell you what's going
21 to happen here. They sued -- you all are the
22 ones that created this monster with this
23 bankruptcy, that was later dismantled, and with
24 this Texas two-step and all the rest of it. So
25 you created all these other corporations;

1 therefore, they had to sue all of the other
2 ones or you would have tried to step out of it
3 on the basis that they didn't sue the real
4 responsible party. So they sued all of them.

5 Now you don't want them to tell the jury
6 anything about these corporations and what they
7 are and when they were created and why.

8 MS. BUENO: Two responses: First of all,
9 Johnson & Johnson has never sought to avoid
10 liability. We have been front and center in
11 every single trial.

12 THE COURT: I'm not even going there.

13 MS. BUENO: Every single trial that has
14 gone to trial has been Johnson & Johnson
15 involved, not just these other entities.

16 But, number 2, we are absolutely willing
17 to enter into a stipulation, as we've done in
18 other cases, including the one that the same
19 plaintiff's counsel just tried in Oregon called
20 the Lee case, where we entered into a
21 stipulation to read the jury about what LLT
22 was. And we worked on language of that to talk
23 about the corporate structure, when the company
24 was created, what the purpose of it was, why
25 the name change was, et cetera.

1 We're very willing to enter into a similar
2 stipulation to provide that information. And
3 that answer is exactly what plaintiffs had
4 originally responded about seeking to admit
5 evidence only to provide context to explain to
6 the jury how and why LLT is liable. We will
7 stipulate to those type of corporate
8 restructuring and things about LLT. There's no
9 reason not to do it.

10 What we're seeking to avoid by this motion
11 is a side show of argument about why Johnson &
12 Johnson engaged in this type of restructuring.

13 THE COURT: Well, why did they engage in
14 this type of restructuring? To avoid
15 liability. That's the only reason they did it.
16 I was here with a bunch of these J&J cases on
17 my docket when all of that came down. And all
18 of them were stopped and stayed by a bankruptcy
19 that turned out to be not legitimate. And then
20 we went through the Texas two-step. That
21 turned out not to be legitimate.

22 These -- these corporations weren't
23 established for some theoretical idea of
24 restructuring. They were structured to try to
25 throw all the liability into a corporation that

1 had no assets so J&J can go on their merry way
2 forward.

3 MS. BUENO: And, Your Honor, obviously,
4 Johnson & Johnson disagrees with that
5 characterization. We have it in our briefing.
6 I know you've read it. The bankruptcy was
7 created to bring some certainty.

8 THE COURT: Bring some certainty? It was
9 created to stop all the litigation.

10 MS. BUENO: To bring certainty --

11 THE COURT: If you call that a euphuism
12 for bring certainty, that's what it was -- the
13 certainty that they wouldn't have to try these
14 cases that had been pending on dockets all over
15 the country.

16 MS. BUENO: Obviously, we disagree.
17 Plaintiffs have a fraud claim here.

18 THE COURT: Yes.

19 MS. BUENO: Bankruptcies cannot form the
20 basis of a fraud claim.

21 THE COURT: Well, there's some exceptions
22 to that now. Legitimate bankruptcies cannot be
23 the basis of a fraud. This didn't turn out to
24 be in that conventional framework.

25 MS. BUENO: Well, as addressed in our

1 briefing -- and I know Your Honor has read the
2 Third Circuit opinion --

3 THE COURT: I have.

4 MS. BUENO: -- there was not a finding of
5 bad faith. The Third Circuit, specifically,
6 indicated that there was not such a bad faith
7 finding. And I'll remind the Court of the
8 Noerr-Pennington doctrine, which I'm sure
9 you're familiar with, as well.

10 THE COURT: Very.

11 MS. BUENO: That a person cannot be sued
12 in tort for exercising First Amendment rights,
13 including the right to seek redress of
14 grievances in litigation, including bankruptcy
15 like this.

16 So here's -- here's -- Your Honor's
17 personal thoughts on all of this aside, from an
18 evidentiary perspective, it is not relevant --
19 the bankruptcy, itself, is not relevant in this
20 case.

21 THE COURT: Well, if you say there's no
22 skin in it, then why isn't it relevant?
23 They've got to have some explanation as to what
24 these companies are about.

25 MS. BUENO: They have no expert witness

1 who's going to come here and talk about
2 bankruptcy and how it works. This is all going
3 to be attorney argument. That's what's going
4 to happen. It's going to be all attorney
5 argument about how we're bad actors. We have a
6 right to seek redress in bankruptcy court.

7 THE COURT: I'm not going to even get into
8 all that.

9 MS. BUENO: There's no reason to. There's
10 no reason to turn this trial, which I know Your
11 Honor wants to move along --

12 THE COURT: I do. I'm going to tell you
13 what I'm going to do about this. I am going to
14 deny this motion, as it's made to exclude all
15 evidence and reference to LLT Management and
16 bankruptcy proceedings. I'm going to deny
17 that.

18 They are a party in this case. They are a
19 party that you created. You made them a party
20 in this case.

21 But here's what I will do: I will be
22 happy to look at the stipulation that you
23 entered into your argument and receive whatever
24 comments that Ms. Gross and Ms. McVey would
25 like to make about that. And if I decide that

1 that's something that would be a way to solve
2 this matter, I will be glad to use that.

3 MS. BUENO: Understood. Thank you, Your
4 Honor.

5 And my last comment is that the LTL, which
6 it was called at that time, created in October
7 of 2021, had nothing -- that corporate
8 restructuring can be discussed without what
9 happened next, which is the bankruptcy. So we
10 can have the jury understand that timing of the
11 creation of LTL, and that the liability were
12 put there, and the creation of the new
13 entities. That is all fine. We are not
14 suggesting that needs to be excluded. But what
15 we're asking to be excluded is the bankruptcy,
16 itself, because that is the part --

17 THE COURT: And I'm denying that right
18 now, but I'll see what your stipulation says.

19 MS. BUENO: Thank you, Your Honor.

20 THE COURT: And if I can live with that,
21 that's what I'll do.

22 MS. BUENO: That's what we'll do. We'll
23 get that for you.

24 THE COURT: All right. Johnson & Johnson
25 Defendant's motion in liminé to preclude

1 reference to or reliance on defendant's net
2 worth and sales outside of South Carolina.

3 Well, I bifurcated these matters, so I
4 don't -- no reference is made at all until you
5 get to the punitive damages, if you get there.
6 And the way my bifurcation works is the way
7 most people's works. I have a verdict form,
8 and at the end of the verdict form, it says, if
9 you find -- essentially, if you find for the
10 plaintiff that the conduct was negligent,
11 then -- or whatever the formula works. If you
12 find for the plaintiff in that regard, then
13 answer this question: Was the conduct willful,
14 wanton and reckless? If they answer yes -- and
15 that's all I ask them to do; yes or no. If
16 they answer yes, then we go to the second
17 phase, which is the punitive phase. And when
18 the punitive phase comes, yes, we will give
19 them information, and I'll require y'all to
20 supply the information about all of these
21 corporations and their net worth and matters
22 and all that kind.

23 Sales outside South Carolina, I don't
24 generally deal with that. I've never been
25 asked or allowed the jury to discuss sales out

1 of South Carolina. But net worth, well,
2 certainly. Yes. If it's in the punitive
3 phase.

4 MS. PEPKE: The South Carolina piece was
5 an alternative argument. In the first
6 instance, you're right on. We're talking about
7 bifurcation, holding the financial net worth --

8 THE COURT: We're going to bifurcate. I
9 do that always.

10 MS. PEPKE: And for this Court to follow
11 Brown, the Brown case, about what financial
12 information is relevant. We actually just
13 deposed their economist --

14 THE COURT: I'm very familiar with the
15 Brown case.

16 MS. PEPKE: And we just want the
17 irrelevant financial information excluded that
18 he went through, which was like gross sales.
19 everything Brown said that can't be
20 mentioned --

21 THE COURT: Well, as I say, I am very
22 familiar with Brown.

23 MS. PEPKE: Thank you.

24 MS. McVEY: Your Honor, I told them that
25 we agreed to the net worth information only

1 comes in if there's a punitive finding. But
2 their motion goes much further and wants to
3 limit us to any out-of-state sales or conduct.
4 And, you know, when you look at BMW versus Gore
5 and State Farm versus Campbell, they don't
6 limit you to what happened.

7 THE COURT: Well, that's true.

8 MS. McVEY: You know, they really don't.
9 And, in fact, I think it was Gore that said
10 lawful out-of-state conduct may be probative
11 when it demonstrates that the deliberateness
12 and culpability of the defendant's actions in a
13 state where it is tortuous, but that conduct
14 must have a nexus to the specific harm suffered
15 by the plaintiff. And of course, here, it
16 would, right?

17 THE COURT: Yeah.

18 MS. McVEY: The powder contained asbestos,
19 which they sold, and they hid all this stuff.
20 All the other evidence is coming in because
21 we've got to prove reprehensibility to get a
22 punitive case, but, also, with regard to fraud.
23 And so the jury is going to be charged on that.
24 If it's just about the net worth number, we
25 agree that comes in later, but we don't agree

1 that we're limited just to net worth of sales
2 in South Carolina.

3 THE COURT: I understand your contention,
4 and certainly on fraud and reprehensibility.
5 Definitely find that would come in. That will
6 be subject to what it is you're actually going
7 to propose, and I have to look at that and see.

8 MS. McVEY: Yes, ma'am. Thank you.

9 THE COURT: All right.

10 Number 5, summary evidence. Exclude
11 plaintiffs' summary evidence chart. The
12 Decades of Evidence Chart, I've seen that many,
13 many times.

14 MR. COWAN: Your Honor, I have not seen a
15 ruling from this Court on that, if it's ever
16 been challenged before, but we do challenge it
17 here.

18 There are a number of issues. The first
19 and foremost at this point, Your Honor, is that
20 I have no idea which chart they're going to
21 use. There seem to be about four or five or
22 six different versions of the same thing.

23 THE COURT: Well, if we're talking
24 theoretically, then I'm not going to deal with
25 anything about that until I see what you're

1 talking about.

2 MR. COWAN: Okay.

3 THE COURT: Okay. I'm not -- I'm going to
4 deny the motion based on a theoretical
5 conversation. If you've got an actual chart
6 that you're fixing to offer, then it better be
7 discussed before we try the case is all I have
8 to say.

9 MR. COWAN: There is one on the current
10 motion to pre-admit that is different than any
11 motion I've ever seen, so --

12 THE COURT: Well, you're going to have to
13 bring it to my attention. And if you do, I'll
14 rule upon it.

15 MS. McVEY: And I'll move that they
16 pre-admit so they can see what we're going to
17 do. (sic)

18 THE COURT: Right, right.

19 Johnson & Johnson motion in liminé
20 number 6. Exclude all evidence of and
21 reference to alleged adverse reactions to
22 talcum powder not at issue, including ovarian
23 cancer.

24 MS. BUENO: Your Honor, this motion is
25 related to ovarian cancer, but also to infant

1 asphyxiation and other types of adverse events
2 related to -- allegedly related to talcum
3 powder use. I'll start with ovarian cancer,
4 because it forms the bulk of the motion.

5 We believe ovarian cancer related to talc
6 should be out for a variety of reasons. First,
7 there's a different mechanism of action that's
8 alleged between ovarian cancer and talc use,
9 and mesothelioma and talc use. It's a totally
10 different disease. Certainly Mr. Perry, as a
11 man, does not have ovarian cancer risk. It's a
12 different source, different science. All of
13 this is different. Part of our motion seeks to
14 exclude IR reclassification of talc recently
15 into group 2A, which was related to talc,
16 itself, not talc including or involving
17 asbestos.

18 And so the ovarian cancer science is very
19 different from that related to mesothelioma.

20 Courts routinely grant this motion and
21 include ovarian cancer, discussion, documents,
22 and allegations in cases involving
23 mesothelioma. We ask the Court to do the same
24 thing here, because it would be very unduly
25 prejudicial for plaintiffs to allege that talc

1 causes all these other diseases, including and
2 not limited to ovarian cancer.

3 It would also cause significant undue
4 delay if we had to get into rebutting plaintiff
5 experts on why there is no science to support
6 allegations of ovarian cancer.

7 Now, I'll share with Your Honor that
8 there's two case-specific issues that might
9 overlap with ovarian cancer in this case. And,
10 first, Mr. Perry has some testimony about
11 having concern about talc after seeing TV ads
12 related to ovarian cancer and talc. So that is
13 one way that this may come in. Another way
14 that plaintiffs may attempt to get it in is the
15 fact that some medical records have reference
16 to Mr. Perry's mother potentially having
17 ovarian cancer, which, through discovery, we
18 believe is not the case; that her cancer was
19 limited to lung cancer and, perhaps, uterine
20 cancer. But because it is in the medical
21 records, we have concern that there will be, at
22 least, a speculation and suggestion that his
23 mother used a lot of talc, too, and had ovarian
24 cancer.

25 So what we're seeking to do here is to

1 exclude ovarian cancer entirely from this
2 trial, because it is not relevant and it is
3 unduly prejudicial, but then also specific
4 references that have been discussed in
5 Mr. Perry's case.

6 THE COURT: Okay.

7 MS. BUENO: So that's ovarian. And then
8 there's also a second prong to that. Do you
9 want me to address that now or turn it over?

10 THE COURT: What second prong?

11 MS. BUENO: The second prong is exhibits
12 related to infant asphyxiation. And we
13 actually include three exhibits that are
14 attached, Exhibits H, I and J. H and I are
15 related to allegations and specific documents
16 that have to do with concerns about infants
17 breathing in the talc and having problems with
18 it. And there's -- Exhibit H is an e-mail from
19 a gentleman named Todd True that talks about
20 concerns with keeping Johnson's Baby Powder on
21 the baby aisle because of these infant
22 asphyxiations.

23 THE COURT: Well, that's one of J&J's only
24 documents.

25 MS. BUENO: It is. This is irrelevant,

1 prejudicial argument. It has nothing to do
2 with this case to be talking about infant
3 inhalation of powder.

4 THE COURT: You know, the touchstone of
5 liability in these type cases is based on
6 foreseeability. All this goes directly to
7 foreseeability.

8 MS. BUENO: Infant asphyxiation has
9 nothing to do with alleged asbestos.

10 THE COURT: Well, let's put infant
11 asphyxiation to the side for a minute. All the
12 rest of this stuff about ovarian cancer is very
13 directly related to foreseeability. This is --
14 the contention is -- and it's a contention
15 based out of your records that y'all knew for
16 years; that there are cases in which the
17 ovarian cancer was attributed to asbestos in
18 your products.

19 MS. BUENO: Well, that's the concern here,
20 is because the science and the allegations
21 right now related to ovarian cancer are not
22 asbestos-related, Your Honor. And we see that
23 in the IR reclassification that we attached as
24 Exhibit J and we're seeking to exclude.

25 The science here relates to talc not

1 containing asbestos, and allegations.

2 THE COURT: I mean, we're going to get
3 into a trial in a trial --

4 MS. BUENO: Exactly.

5 THE COURT: -- trying to show that y'all
6 have known the foreseeable risk of your
7 product, and that is relevant to their
8 arguments. That's kind of a foundational sort
9 of thing. And this is material right out of
10 your own records.

11 MS. BUENO: And, again, the argument here
12 is relevance to Mr. Perry, who's, obviously, a
13 male. Ovarian cancer issues are not relevant
14 and then it's also unduly prejudicial, as well
15 as undue delay, because it would create a trial
16 in a trial.

17 THE COURT: Shoot, if Mr. Perry was
18 Ms. Perry, you'd be making the same argument
19 about ovarian cancer. You just didn't want to
20 exclude it on the basis of sex. You wanted to
21 exclude it on the basis of it's
22 highly-prejudicial, and that's what you're
23 really saying.

24 MS. BUENO: Well, I think it would be
25 irrelevant in any case, regardless of the

1 plaintiff's gender. But I think here there's
2 an additional reason of relevance, certainly.

3 THE COURT: Okay. Well, I know Brown
4 versus Ford Motor Company very well, and I am
5 going to deny the motion.

6 All right. Johnson & Johnson's motion.
7 Defendants' motion in limine to preclude
8 reference to or reliance on inmate studies.

9 MS. McVEY: We agree on this one.

10 THE COURT: Agreed. Granted.

11 Johnson & Johnson, number 8, exclude
12 evidence and argument regarding certain
13 advertising campaigns that focused on babies
14 and the mother-infant bond.

15 MS. BUENO: Your Honor, this is also
16 relevance and a 403 argument.

17 We anticipate plaintiffs are going to show
18 the jury a lot of documents. In fact,
19 Plaintiff's Exhibit 1 on their exhibit list
20 that we got late last night is a Power Point
21 called Baby Camp that talks about the baby
22 franchise.

23 Mr. Perry never used Johnson's Baby Powder
24 or any other type of talc, for that matter, as
25 a child -- I mean, as an infant.

1 The evidence is he started using it in
2 1974 at the age of five. So we don't have a
3 situation here of a baby and mother type use.
4 Mr. Perry does not allege any use during
5 diapering of other babies.

6 It's simply irrelevant to have evidence
7 related to this alleged J&J effort to develop a
8 mother-baby bond. It's not relevant in this
9 case, and we ask for it to be excluded on that
10 basis.

11 THE COURT: I understand. Well, all
12 right. They contend that the foundation of
13 their branding approach was the mother-baby
14 image of Johnson's Baby Powder. And they say
15 that that appeal is a golden egg conceptual
16 table use, the essence of Johnson & Johnson's
17 marketing from the very beginning. Trust us
18 because we developed this for babies, the most
19 vulnerable that that can be. And that's why
20 they want to use it. And I think that's
21 legitimate. That is what the advertising
22 campaign was.

23 You say it's not relevant, because you
24 can't show he was a baby when he used it.
25 That's not the point. The point was what

1 projection and image did you put before the
2 public about the reliability and trust that you
3 can put in the product, when it turned out in
4 your internal records it was known for years it
5 had asbestos in it.

6 So -- and your own records say, we've got
7 to be sure this doesn't get out because our
8 image is the mother-child image that we are
9 projecting. You have internal records that say
10 that. They're going to be able to use that.

11 MS. BUENO: Your Honor, I hear you, and I
12 hear your ruling. I would disagree with the
13 fact that there is any document that says we
14 have to be careful this doesn't get out,
15 because Johnson & Johnson was not aware of
16 these allegations at that time. We were aware
17 of the allegations, but there is nothing to
18 suggest there was knowledge of asbestos in talc
19 that we were trying to hide or conceal. I know
20 Your Honor disagrees. I know Your Honor
21 disagrees.

22 THE COURT: It was brought to my attention
23 here, and in other cases I've tried, that talk
24 about that, specifically, in the internal
25 memos, about what to be sure is kept

1 confidential and what is not. And it's based
2 on not wanting the general public to have the
3 image of this is the safe baby company
4 interfered with by showing that there's
5 asbestos in this material.

6 Now, your projection all along is, well,
7 it's not enough to cause any problem, this kind
8 of thing, because it's changed over time. But
9 you are stuck with what the internal records
10 show. Dr. Hopkins had to deal with the very
11 same stuff. He was the expert of -- or the
12 corporate rep that y'all had. I am going to
13 deny that motion.

14 Motion number 9, publish pleadings to the
15 jury. Denied. Smith versus Till.

16 Motion number 10, exclude all reference to
17 the interagency working group on asbestos in
18 consumer products.

19 MR. COWAN: Your Honor, are you familiar
20 with the white paper on that?

21 THE COURT: Yes.

22 OFFICIAL COURT REPORTER: With the what?
23 I'm sorry.

24 THE COURT: The white paper.

25 MR. COWAN: I was asking if the Court was

1 aware of the white paper.

2 THE COURT: IWGACP, which is the
3 Interagency Working Group on Asbestos in
4 Consumer Products. They have minutes, and they
5 also have a white paper, and that's what he's
6 talking about.

7 MR. COWAN: Yes. Your Honor, so we would
8 seek to exclude reference to the white paper,
9 primarily as the plaintiff's experts are apt to
10 state -- or the plaintiff's counsel are apt to
11 argue that the white paper is somehow the
12 FDA's, or some other governmental agency's,
13 position. That is simply just not the case.
14 And it says so at the beginning of the
15 document.

16 And the other issue is that -- that it is
17 hearsay, and, therefore, it's not admissible
18 evidence. And it's certainly not a public
19 record, because no public agency has claimed
20 ownership of it. It is simply a working
21 document of potential recommendations from a
22 group of persons to agencies in the United
23 States, none of whom have adopted the
24 recommendations that are provided --

25 THE COURT: The Interagency Working Group

1 was created by whom?

2 MR. COWAN: A number of different agencies
3 provide their representative.

4 THE COURT: Federal agencies, correct?

5 MR. COWAN: Correct.

6 THE COURT: Created this working group,
7 and they issued a white paper?

8 MR. COWAN: That is correct.

9 THE COURT: And then the FDA got a lot of
10 importunate from everybody about this. And the
11 FDA said, Neither the executive summary nor any
12 of the presentations at the public meeting by
13 members of the working group represent the
14 proposed or preliminary recommendations of the
15 policies of the FDA or any other federal
16 agency.

17 MR. COWAN: That's correct.

18 THE COURT: Now, that's what they said
19 about it. That's certainly what can be said
20 about it if any reference is made to it here.
21 But, innocently, a study group, that is what it
22 is, a collection of agency personnel who looked
23 at certain issues and made a white paper
24 report, just like articles written that people
25 rely on for expressing opinions. I don't

1 get --

2 MR. COWAN: I understand, Your Honor. I
3 would push back a little bit here that this
4 white paper is not a published peer-reviewed
5 article. It has not gone, specifically,
6 through the peer review process yet. It has
7 yet to do so. And so, this is not a
8 peer-reviewed article, just like any other. It
9 is also not, as Your Honor stated, the position
10 of any --

11 THE COURT: -- of any kind. It is simply
12 a working group composed of a lot of different
13 agencies that got together and studied issues
14 and made a report.

15 MR. COWAN: And made a recommendation.

16 THE COURT: And made recommendations.

17 MR. COWAN: But that no federal agency
18 actually adopted.

19 THE COURT: Well, I think that can be made
20 clear if it's discussed with the jury. I would
21 not preclude any reference to it.

22 MR. COWAN: Well, I would suggest, at a
23 bare minimum, that it's not admissible
24 evidence, much like a published paper isn't
25 going to go back to the jury.

1 THE COURT: I don't agree with that. I
2 think they probably have witnesses that will
3 talk about it.

4 MR. COWAN: I think it's on their exhibit
5 list.

6 THE COURT: I will deny excluding any
7 reference to it or argument about it, but I'm
8 certainly not going to admit it into evidence.

9 MR. COWAN: Okay.

10 I think the last one --

11 MS. BUENO: Can I say something?

12 MR. COWAN: Go ahead.

13 MS. BUENO: Your Honor, this may be
14 inappropriate, and if it is, you'll tell me to
15 sit down. But in light of your ruling, I would
16 ask you to reconsider your ruling on
17 plaintiffs' motion in liminé, number 19, which
18 was the 1986 FDA citizen's petition, which is
19 similar to the Interagency Working Group, which
20 you just ruled is admissible, was not a
21 government endorsement, as we've discussed.

22 THE COURT: Wait a minute. Hold it. Hold
23 the phone. I don't even know what you're
24 talking about. Are you talking about the
25 Douillet --

1 MS. BUENO: I am. I am.

2 THE COURT: I said that couldn't come in.

3 MS. BUENO: You did. You did, but what
4 I'm doing is --

5 THE COURT: That's two people talking
6 about this issue.

7 MS. BUENO: It is not. And that's where I
8 think the Court doesn't understand what it is.

9 That was the title of the plaintiffs'
10 motion, but it was an FDA response to a
11 citizen's petition. It was written to the
12 person who -- who submitted the petition.

13 THE COURT: I'm real familiar with that
14 claim, and it's got more explanations on it.

15 MS. BUENO: Okay. I understood. I heard
16 what you just ruled about the white paper and
17 how it was not a government endorsement.

18 THE COURT: Yeah, and here I am trying to
19 give you a little something, and --

20 MS. BUENO: But you just allowed it to
21 come in against our request.

22 THE COURT: Yes, ma'am, with some caveats
23 that this couldn't -- it couldn't be viewed as
24 a government position on anything, which is the
25 real thing you would like said about it. And I

1 agree with that. It's simply a group of people
2 that got together and issued a white paper.
3 It's not coming into evidence, but it can be
4 relied upon by people when they talk about it.

5 Douiilet was an issue of having that not
6 come into evidence, that letter, and I said no.

7 MS. BUENO: But we also requested it to be
8 able to have people rely on it and talk about
9 it. And my understanding from your ruling --

10 THE COURT: I am not going to recover
11 covered ground.

12 MS. BUENO: Thank you, Your Honor.
13 Understood.

14 MR. COWAN: I believe number 11 is
15 region 9.

16 THE COURT: Excluded evidence of the
17 Region 9 response.

18 MR. COWAN: You're familiar with the
19 Eldorado story, Your Honor?

20 THE COURT: Yes.

21 MR. COWAN: Okay. This is the Region 9
22 response related to that story.

23 The EPA, as you know, has regional
24 offices. This is a 2006 response to an R.J.
25 Lee report or a response to the initial report.

1 It is -- it's -- plaintiff is expected to
2 offer it as a preliminary report written by
3 this office as evidence that the EPA --

4 THE COURT: What they're trying to do is
5 something we've talked about before. It's this
6 old business of these non-asbestiform cleavage
7 fragments versus asbestiform. And the EPA said
8 that they will distinguish --

9 MR. COWAN: Actually, the EPA never said
10 that. The EPA Region 9 office in 2006 said
11 that.

12 THE COURT: Well, whatever the Region 9
13 response is, the issue is whether evidence
14 about that can be put forward. I don't even
15 know what you're referring to. You're
16 referring to a document that you're trying to
17 exclude or a reference to it.

18 MR. COWAN: Yes, Your Honor. It's a --
19 it's a preliminary report --

20 THE COURT: You're talking about a
21 preliminary report, you don't want it to come
22 into evidence?

23 MR. COWAN: That's correct.

24 THE COURT: It's not going to come into
25 evidence. It can be referred to and I'm not

1 going to exclude that.

2 MR. COWAN: Thank you.

3 THE COURT: All right. Johnson & Johnson
4 motion in limine number 12, to preclude
5 references to or reliance on articles by
6 Drs. Moline, Emory, and Gordon.

7 MS. BUENO: Your Honor has ruled on this
8 and you've denied this motion --

9 THE COURT: That's correct.

10 MS. BUENO: -- in the past.

11 THE COURT: All right. Johnson &
12 Johnson's motion to partially exclude the
13 opinions of Dr. Haber.

14 MS. BUENO: Your Honor, Dr. Haber, as you
15 well know, is the pulmonology expert that
16 plaintiffs will offer. He is the one and only
17 expert who will give a causation opinion in
18 this case. He is qualified to give the
19 pulmonology opinions that are within his
20 wheelhouse. We are not seeking to exclude
21 anything that is within his specialty.

22 However, we do have objections to him
23 speaking about things that are entirely outside
24 of his qualifications.

25 What plaintiff seeks to do with Dr. Haber

1 is to use him as the expert who will be a
2 conduit for all company documents, as well as
3 the alleged -- or the story about alleged
4 asbestos in talc.

5 The Decades of Evidence Chart, which Your
6 Honor is so well familiar with, they seek to
7 offer that chart through Dr. Haber.

8 Dr. Haber has been excluded by another
9 court, as outlined in our brief, in Louisiana
10 State Court, where that Court held Dr. Haber
11 has no education, qualifications or experience
12 in testing and analyzing the content of talc
13 for contamination of asbestos. It would be
14 inappropriate to allow him to opine beyond his
15 qualifications.

16 We are asking Your Honor to make a very
17 similar ruling here, and to exclude Dr. Haber
18 from talking about testing and analyzing the
19 content of talc for contamination of asbestos.

20 Dr. Haber is admittedly someone who has
21 not used an XRD, SEM, TEM or PLM microscope.
22 He has never, personally, tested Johnson &
23 Johnson talcum powder or any other powder.

24 He's never, personally, looked at
25 materials to determine whether or not they

1 contained asbestos.

2 He's never used any of the different
3 microscopes that he will criticize in this case
4 and talk, specifically, about Johnson & Johnson
5 should have done this; should have done that;
6 should have looked at this; should have looked
7 at that, when he has no qualifications to offer
8 those opinions.

9 In fact, recently, he was asked about the
10 types of testing for asbestos, and his answer
11 to that was, "I'm not your guy to start telling
12 you what tests to do. I don't do those tests."
13 But yet despite his admitted lack of
14 qualifications, plaintiffs seek to offer him
15 for a variety of opinions, and, specifically,
16 on page 2 of our motion, we outline some of
17 those opinions, including, but not limited to,
18 the Decades of Evidence Chart.

19 The point here, Your Honor, is that
20 plaintiff has experts. Dr. Longo has done
21 testing. Dr. Bailey has done testing. They
22 have experts that will have qualifications to
23 allow them to opine on asbestos testing and
24 asbestos contamination. Dr. Haber just simply
25 is not that person. And he should be precluded

1 from testifying about different definitions of
2 asbestos, about different product sources,
3 asbestos content, and the list goes on and on.
4 And we know from recent trials, that's exactly
5 what plaintiffs seek to do with Dr. Haber.
6 With that, I'll stop unless you have any
7 questions.

8 THE COURT: Right.

9 MR. ADAMS: Your Honor?

10 THE COURT: Yes.

11 MR. ADAMS: Dr. Haber is our specific
12 medical causation expert. They like to refer
13 to him as a pulmonologist, but his designation
14 is our specific causation expert. And just
15 like the plaintiffs in this case, defense has a
16 specific causation expert, as well. And so
17 what happens --

18 THE COURT: Dr. Haber is a pulmonologist
19 who has treated people with mesothelioma; isn't
20 that correct?

21 MR. ADAMS: That is correct.

22 THE COURT: All right. And out of that
23 treatment experience, he is using information
24 about the occupational and exposure history.

25 MR. ADAMS: Absolutely.

1 THE COURT: And information about the
2 chemistry and geology and so forth to examine
3 whether a person has mesothelioma, right?

4 MR. ADAMS: As an occupational medicine
5 doctor who has to investigate --

6 THE COURT: Right, okay.

7 MR. ADAMS: -- the sources of the disease,
8 the cause of the disease, and the treatment for
9 that specific problem.

10 THE COURT: Right.

11 MR. ADAMS: Yes. He's relied on all those
12 specialties, just like a standard is routinely
13 done in cases like this.

14 THE COURT: Right.

15 MR. ADAMS: Their medical causation expert
16 relies on all the same things as Dr. Haber.

17 THE COURT: And the difference between
18 Dr. Haber, for example, and Mr. Sanchez, for
19 example, is that Mr. Sanchez knows nothing
20 about the treatment of patients who have
21 mesothelioma, right?

22 MR. ADAMS: Because he's not a medical
23 doctor.

24 THE COURT: And beyond that, has no
25 knowledge about the treatment of people with

1 mesothelioma; doesn't know anything about
2 mesothelioma. Haber's foundational knowledge
3 base is that and he relies on certain things to
4 diagnose and treat occupational mesothelioma
5 patients, correct?

6 MR. ADAMS: Correct. And he's published
7 on it, as well.

8 THE COURT: Yes, sir. And he's published
9 on it. And his field of knowledge that he
10 relies upon is a field of knowledge commonly
11 relied on by pulmonologists who treat
12 occupationally-contracted mesothelioma, right?

13 MR. ADAMS: That's correct.

14 THE COURT: All right.

15 MS. BUENO: Your Honor, Dr. Weill, you
16 excluded earlier his case-specific causation
17 opinions for Mr. Perry. Dr. Weill is also a
18 pulmonologist. Dr. Weill has also treated
19 patients with mesothelioma. He has observed
20 and considered their occupational and exposure
21 history, as well as their asbestos exposure.
22 All of the same things --

23 THE COURT: Why did I -- did I exclude
24 Weill totally? No. I simply said, Weill
25 cannot express an opinion about Mr. Perry's

1 condition and state that it is idiopathic or
2 spontaneous. Isn't that what I ruled?

3 MS. BUENO: You did, but here's the
4 problem with what --

5 THE COURT: I'm not going to get into
6 revisiting all my other rulings every time I
7 come to another one.

8 MS. BUENO: Dr. Haber has done nothing in
9 his analysis of this case that Dr. Weill didn't
10 do. He has no qualification that Dr. Weill
11 doesn't have. Both of them considered all the
12 same things --

13 THE COURT: Yes, but he is dealing with a
14 diagnosed mesothelioma. And he is simply
15 offering opinions about that diagnosed
16 mesothelioma born out of his experience
17 treating mesothelioma.

18 Dr. Weill is trying to express an opinion
19 that it's spontaneous or idiopathic, but he
20 knows nothing about that situation as it
21 affects Mr. Perry.

22 MS. BUENO: That's not true. Dr. Haber
23 and Dr. Weill know the exact same thing. They
24 both relied on reviewing deposition
25 transcripts. They both relied on and reviewed

1 the occupational history, the alleged asbestos
2 exposure, and Dr. Haber wants to come up on the
3 stand and say, "I have reviewed this and I
4 conclude it's caused by talcum powder."

5 THE COURT: Yes.

6 MS. BUENO: Dr. Weill wants to come and
7 say, "I've looked at all the same things --"

8 THE COURT: And I don't know what caused
9 it.

10 MS. BUENO: No. He's going to say --

11 THE COURT: I don't know what caused it.

12 MS. BUENO: -- I believe -- this is what
13 he said: He says, if it is asbestos-related,
14 it's not caused by talcum powder because
15 there's not a level of asbestos in talcum
16 powder, even believing plaintiffs that would be
17 causative. So if it's asbestos-related,
18 there's another source, or it could be
19 naturally occurring and I, Dr. Weill, have
20 treated patients who I have personally
21 diagnosed with naturally occurring
22 mesothelioma.

23 Dr. Weill has done that in his clinical
24 practice. He just testified about that at his
25 recent depo. And in those patients, he has

1 examined their occupational history. He's
2 looked for every exposure, and he hasn't
3 identified one, and he has made the same
4 conclusion: If you do not have an
5 asbestos-related mesothelioma, then I will lead
6 to a reasonable degree of medical certainty
7 that that is naturally occurring, because we
8 know it happens. And there's not a doctor who
9 gets up on the stand who's going to say, there
10 are not cases of naturally occurring
11 mesothelioma.

12 So, Your Honor, to allow Dr. Haber with
13 the same qualifications --

14 THE COURT: Okay. It's 5:00 now. I'm not
15 going to revisit my ruling of Dr. Weill.

16 MS. BUENO: This is on Dr. Haber.

17 THE COURT: This is on Dr. Haber now.

18 MS. BUENO: I seek to exclude a causation
19 opinion related to Mr. Perry by Dr. Haber,
20 because there's absolutely no reason he should
21 be able to say it's talcum powder related.

22 THE COURT: All right. I hear you.

23 MR. ADAMS: In response --

24 THE COURT: It's 5:00. We still got a
25 mountain of stuff to do. Now, come on.

1 MR. ADAMS: No, I'm good.

2 THE COURT: I deny the motion.

3 All right. The next thing I've got is
4 Vi-Jon. Have we already done that? Vi-Jon's
5 motion in liminé to exclude the testimony of
6 Lonnie Long's use of talcum powder. Did we
7 already do that?

8 MR. McCONNELL: No, Your Honor, we did
9 not. And, Your Honor, we also have another
10 dreaded Omnibus motion, but my proposal -- and
11 there's 35 subparts, but here's my proposal:
12 We talked with the plaintiff lawyers. We
13 agreed on a lot of them. And there's some --
14 I'm going to withdraw, and then I'm going to
15 try to make as few remaining as possible. And,
16 Your Honor, they are much simpler than what
17 you've been dealing with. And my proposal
18 would be to submit them to you with your
19 experience and knowledge. You will find them
20 very easy to rule on, and that's it. We'll
21 just go with it.

22 THE COURT: Hey, I like that.

23 MR. McCONNELL: Okay.

24 THE COURT: Let's just do it that way.

25 MR. McCONNELL: All right. So let me look

1 at our Omnibus motion.

2 MS. McVEY: Do you want to go through them
3 now or do you want to --

4 THE COURT: Do them now? I thought you
5 said you were going to --

6 MR. McCONNELL: I'm going to tell you now
7 which ones I'm withdrawing and that are agreed
8 to.

9 THE COURT: How about you all just --

10 MS. McVEY: Yeah. I'll --

11 MR. McCONNELL: That's fine.

12 THE COURT: How about you all just do that
13 and submit them to me and I'll --

14 MR. McCONNELL: That's fine. Yeah, let's
15 do that.

16 And then, Your Honor, in addition to the
17 Omnibus, and Your Honor was just starting to
18 mention the others, we had a motion to exclude
19 testimony of Lonnie Long's talc use outside the
20 presence of Michael Perry. And then we had the
21 motion to exclude Dr. Longo.

22 Your Honor, your ruling in denying our
23 motion for summary judgment, I believe, takes
24 care of --

25 THE COURT: Yes, it does.

1 MR. McCONNELL: -- of that motion, as
2 well.

3 And then we had a motion to exclude
4 evidence regarding duty-to-warn. That was just
5 premised on the notion that there's no evidence
6 that we ever knew there was asbestos in our
7 talc.

8 And then we have two other motions that
9 really go together, excluding products not
10 identified in discovery and excluding products
11 not at issue. That whole point is just of all
12 the various products we made that contain talc,
13 private label products, the only one at issue
14 in this case is Equate and we think it ought to
15 stay that way. That's it.

16 THE COURT: All right.

17 MR. McCONNELL: Thank you, Your Honor.

18 MS. McVEY: Just briefly in response to
19 that. If it were to come in, other products --
20 I don't know that it would -- we would need to
21 show notice of some defect (sic) if we had that
22 kind of evidence. I'm just not sure --

23 THE COURT: I don't either. You-all give
24 me a chart on that. Okay.

25 MR. McCONNELL: Thank you, Your Honor.

1 THE COURT: Now, all right. Now, is that
2 the end of it?

3 MS. BUENO: No, Your Honor. I think
4 there's three motions from Johnson & Johnson
5 that you might have overlooked. We have a
6 motion to exclude Dr. Madigan.

7 THE COURT: Hang on.

8 MS. BUENO: I think those came in later.
9 They were delivered by us. They were not part
10 of the original notebook.

11 (A discussion was held
12 off-the-record.)

13 THE COURT: All right. Dr. Madigan.

14 MS. BUENO: Okay. Dr. Madigan.

15 THE COURT: A little small thing like this
16 at 5:00 in the afternoon. I want you to
17 summarize this for me.

18 MS. BUENO: I'm going to summarize it
19 quickly, Your Honor. I'm assuming that you
20 have experience with Dr. Madigan?

21 THE COURT: Yes, I have.

22 MS. BUENO: He has a new opinion that is
23 relatively new to him. It's a general
24 causation opinion, which he previously did not
25 offer. You're aware of his prior testimony

1 regarding his probability assessment about
2 bottles. You're aware of his trends data.
3 We've moved on both of those. I'll stand on
4 the papers. The only issue I'd like to ask for
5 argument on relates to this general causation
6 opinion.

7 He is offering a general opinion that he
8 says, quote, There is sufficient evidence that
9 lifetime asbestos exposures, as found in
10 regular use of cosmetic talc, can cause or
11 contribute to the development of pleural and
12 peritoneal mesothelioma.

13 This opinion should be excluded first on
14 qualifications. Dr. Madigan is a statistician.
15 You just ruled that plaintiffs can bring
16 Dr. Haber to talk about causation. Dr. Madigan
17 does not have any reason to be coming as a
18 statistician and talking about causation. He's
19 not a medical doctor.

20 He also bases his opinion on two studies
21 that have problems. His opinion is based on
22 two asbestos exposure studies. Number 1,
23 Stephan (ph), which Your Honor's familiar with.
24 This is Dr. Longo's below-the-waist study.

25 Dr. Longo testified -- and I think Your

1 Honor might be surprised by this -- but
2 Dr. Longo testified he is not relying on his
3 below-the-waist study in this case. When asked
4 why, he said, "Because that relates to Italian
5 talc and that is not at issue in this case."

6 So, Dr. Longo is not relying on his own
7 study because of relevance. Dr. Madigan should
8 not either.

9 The second study that Dr. Madigan relies
10 on is the Gordon study. And low and behold
11 that is also Italian talc, which has its own
12 problems, based on the testing methodology that
13 I'm sure Your Honor has seen several times
14 before.

15 Both of these, Stephan and Gordon, which
16 Madigan relies for his general causation
17 opinion, are admittedly outlier studies. He
18 does not consider other studies with different
19 results. So, Your Honor, we've briefed this.
20 I know you've got a thick binder in front of
21 you and it's 5:00. I ask Your Honor to exclude
22 the general causation opinion of Dr. Madigan.
23 This is simply outside of his expertise.

24 THE COURT: All right.

25 MR. ADAMS: Quickly, Your Honor, it's not

1 outside Dr. Madigan's expertise to give the
2 general causation opinion, because he has
3 specialized knowledge and expertise in
4 epidemiology, which is closely linked to
5 statistics. He's published over 30 papers on
6 epidemiology. He's taught courses at the
7 college level on epidemiology, including at
8 Columbia, where he was the chief of the
9 Department of Statistics.

10 What his general causation opinion is, is
11 here are the published peer-reviewed studies on
12 the levels of asbestos released into the air
13 from the use of cosmetic talc, including the
14 talc used in Johnson's Baby Powder for over 70
15 years. Here's the air levels. And he compares
16 them to the level of asbestos in the air in
17 epidemiology literature -- over a dozen studies
18 -- that increases the risk of disease, and it
19 shows that the levels in the air are above the
20 levels in the epidemiological studies that
21 prove asbestos cause disease. That's the
22 general causation opinion. He's absolutely
23 qualified to give it.

24 It's false that Italian talc is not at
25 issue in this case, even though that is what

1 was measured in Gordon and Stephan, because
2 Johnson & Johnson used exclusively Italian talc
3 for seven months, between 1979 and 1980, when
4 there was a strike going on and they couldn't
5 use Vermont talc.

6 Mr. Perry was using Johnson's Baby Powder
7 every single day, multiple times a day, during
8 that entire seven-month period. And so Italian
9 talc is at issue in this case. Mr. Perry was
10 exposed to it and it did contribute to his
11 disease.

12 Unless you need to hear anything else --

13 THE COURT: All right. That's it.

14 Anything in reply?

15 MS. BUENO: Dr. Madigan is offering
16 testimony about epidemiology. He's done that
17 in the past. Your Honor's probably seen it,
18 where he talks about the power of different
19 studies. All of that's fair. That's fine for
20 him to talk about epidemiology.

21 Where I ask Your Honor to draw the line is
22 when he comes to an opinion -- like a medical
23 doctor would -- that there's sufficient
24 evidence that asbestos exposure is found in
25 regular use of talc caused or developed

1 mesothelioma. That's a step too far. He's a
2 statistician.

3 He can talk about what the epidemiology
4 says. He can talk about the powers of those
5 studies and everything else, as he's done in
6 the past, but this new opinion where he's
7 taking a leap, where he's now saying, "I can
8 opine on general causation," that's too far for
9 a statistician.

10 THE COURT: You know, I just don't see
11 this as some great big problem. I mean, the
12 majority of people that have looked at this
13 issue at any time in the recent past have come
14 to the conclusion that exposure to talc with
15 asbestos causes mesothelioma, or can cause
16 mesothelioma. And the question is levels of
17 exposure and how that increases the probability
18 or possibility that someone develops
19 mesothelioma. I don't see this as some great
20 big deal. That's kind of common knowledge now.

21 MS. BUENO: Well, I hear what Your Honor
22 is saying, but Dr. Madigan is a perfect
23 example, because what he relies on in his
24 charts and his report, do you know what they
25 are? They're asbestos studies. So I think it

1 is common knowledge. And I think nobody would
2 disagree that if you're exposed to asbestos --

3 THE COURT: Well, that's what he's being
4 asked to talk about.

5 MS. BUENO: It's different when you start
6 talking about cosmetic talc, because there's a
7 genuine disagreement. There is a genuine
8 disagreement --

9 THE COURT: Well, yes, ma'am, but there is
10 a vast amount of agreement -- there's a vast
11 amount of material, in which anyone can rely,
12 that says that talc does have asbestos in it.

13 You and J&J continue to insist that talc
14 does not have asbestos in it. It all has to do
15 with the way you define asbestos. And I get
16 all of that, but I am not going to exclude
17 Madigan's testimony.

18 MS. BUENO: Your Honor, we have
19 Dr. Longo's motion, and then a motion on tissue
20 testing and that would be it.

21 THE COURT: All right. Longo.

22 MR. COWAN: I will be very brief. The
23 papers -- may I approach?

24 THE COURT: Yeah.

25 MR. COWAN: The paper that we filed has

1 many exhibits. I'm trying to make this as
2 simple as possible. This is about specific
3 opinions that Dr. Longo has concerning his PLM
4 heavy liquid separation testing for chrysotile,
5 not for amphibole, not as TEM. It is specific
6 to his chrysotile findings and the methodology
7 that he is using, but not only that, but the
8 way he is applying the methodology.

9 THE COURT: What is different about this
10 argument from the argument I received in Plant
11 about this very same witness?

12 MR. COWAN: I have not seen your ruling on
13 Plant. I apologize if I did not see that.

14 THE COURT: Well, I moved that they --
15 every time Longo testifies, the defense always
16 says, he can't offer opinion about chrysotile.
17 We have a different opinion about chrysotile
18 that's different from crocidolite, et cetera,
19 et cetera. It's a basic split between defense
20 and plaintiff as to chrysotile.

21 Longo has his opinions. He's
22 cross-examined at length about them. I have
23 ruled in every case he's been on that he can
24 testify.

25 MR. COWAN: I'm going to sit down, Your

1 Honor. I did not know that you had ruled in
2 Plant. And Plant's counsel did not inform me
3 about it.

4 THE COURT: I've been down this road many
5 times in the past. I'm going to deny the
6 motion.

7 Now, what's the last one?

8 MS. BUENO: The last motion, Your Honor,
9 is a motion to exclude tissue testing in this
10 case.

11 There has not been any tissue testing
12 done, so you might be wondering why I'm sitting
13 here asking you to exclude it. Here's why:
14 You filed and you signed a motion, you may
15 recall, on July the 10th, ordering the division
16 of tissue in this case.

17 THE COURT: I don't know why this ends up
18 being one of the most contentious things I deal
19 with in these asbestos cases, and some of the
20 outrageous things that have been done about
21 this just defies the imagination.

22 MS. BUENO: Well, Your Honor, let me give
23 you a chance to set the scene here, because I
24 don't know what has happened in the past. I
25 just know what we've done in here.

1 We asked, on June the 20th, for
2 plaintiffs' assistance to get the tissue
3 divided. And it took us a while to get an
4 order to you. After diligence of defense
5 counsel, we have all sorts of correspondence
6 attached to the motion --

7 THE COURT: Right.

8 MS. BUENO: -- but we finally got an order
9 to Your Honor.

10 THE COURT: Yes, ma'am.

11 MS. BUENO: One of the reasons for delay
12 was because our expert, Dr. Roggli, who was
13 going to analyze the tissue for us, because of
14 the delay of getting an order and getting the
15 division, realized he wasn't going to be able
16 to get it done before trial. So we had to
17 find, in a very quick second, another expert to
18 analyze it.

19 Your Honor entered the order on July
20 the 10th, which is 20 days ago. Dr. Longo was
21 deposed on the 16th of July, I believe. 16th.
22 And he testified that he would be analyzing it
23 for plaintiffs, but it would take him two- to
24 three weeks to get any type of results because
25 it's a process, as our folks said, too.

1 The tissue was not divided by July
2 the 24th, which is when we filed this motion.
3 And our motion, basically, says we're out of
4 time. We don't have time to get this tissue
5 divided. That was July the 24th.

6 Now it's almost a week later and I was
7 informed today by plaintiffs' counsel that the
8 tissue has been divided and has been sent to
9 the respective experts. I have been unable to
10 even confirm that our expert even has it
11 in-hand. But we are asking Your Honor to just
12 exclude the tissue testing because we are;
13 we're out of time. We're less than a week from
14 trial. And it was our idea, I must say, to get
15 it done in the beginning. Plaintiffs did not
16 do any tissue testing. We asked for it. And
17 as soon we asked, they said, "Well, we want to
18 do it, too," but it hasn't been done.

19 Dr. Longo says it's going to take him two
20 or three weeks. It's not going to happen
21 before trial. And we can't get into a
22 situation where there's a surprise the morning
23 of opening statements about what this tissue
24 allegedly says or doesn't say. We would need
25 time for reports. We would need time for

1 depositions. We would need time for other
2 experts to analyze it. We're simply out of
3 time. So that was the basis for our motion.
4 And I understand plaintiffs oppose it.

5 THE COURT: Ms. McVey.

6 MS. McVEY: Your Honor, this is a much
7 different situation. You know, in Glenn, we
8 had a much different issue. We had an issue
9 where the tissue wasn't divided by an impartial
10 third-party --

11 THE COURT: Yes.

12 MS. McVEY: -- and it became a whole
13 thing. Here, we wanted to alleviate that. And
14 so Johnson & Johnson's counsel and plaintiffs'
15 counsel, we went back and forth trying to come
16 up with an order that we could send to MUSC, to
17 an independent third-party, to have tissue
18 divided. And it's the same order that we used
19 in the Mauze (ph) case, that you had signed.
20 That was the order that we sent to Johnson &
21 Johnson, initially. It's an order that you
22 already signed, having MUSC divide it.

23 Johnson & Johnson didn't like that order
24 exactly. They wanted to change it. So we went
25 back and forth to do that.

1 The morning that we all agreed on the
2 order that we would submit to you, Ms. Bueno
3 wrote and said, do not submit the order to you
4 now because Dr. Roggli doesn't have time to do
5 the testing. And I said to her then, that's
6 not my issue. Right? That's y'all's issue.

7 And so I wrote to you and I said, Look,
8 they said they don't have to. They don't have
9 an expert to do it. That's not really our
10 problem. We have an expert that can do it.

11 And then Ms. Bueno said we have an expert
12 now that can do it, too. Okay. This will work
13 for the judge, which is what we did, the
14 consent order. You signed it on the 10th.

15 On the 10th, that very day --

16 THE COURT: I signed it as soon as I got
17 it. If the implication is somehow or another
18 that it sat on my desk for awhile is not the
19 case.

20 MS. BUENO: No, that was not the
21 implication, Your Honor.

22 THE COURT: All right.

23 MS. McVEY: Well, the implication seems to
24 be that somehow we held this up. That's not
25 exactly at all what happened. What we did

1 immediately when we got your order, we sent
2 it -- we'd already been in touch with general
3 counsel and the pathologist's office and we
4 sent to them both saying, "The judge has signed
5 an order. Please split the tissue. And, by
6 the way, we have a trial coming up on
7 August 5th. We know time is of the essence."

8 After that order, we went -- we probably
9 -- and I can give you all the correspondence.
10 But between Mr. Adams, Ms. Gross and me, we
11 e-mailed or called them almost everyday to say,
12 "Where is it?"

13 Finally on Monday -- no. On Friday and
14 Saturday, we reached out and said, "We've got
15 to have it." Monday, I wrote general counsel
16 of MUSC and said, "You're in violation of a
17 court order, and we now have a hearing with
18 Chief Justice Toal tomorrow." This was
19 yesterday.

20 The fact that we're having it here today,
21 MUSC overnighted the tissue. They divided it
22 and they split it. And they sent to where
23 Johnson & Johnson told us to send it and we
24 sent it to our expert. FedEx shows that it was
25 delivered to both experts before 8:30 this

1 morning.

2 Dr. Longo's reviewed this digestion and
3 we'll make him available for a deposition. We
4 believe that we should be able to do the
5 digestion. Our expert can do it.

6 I'm sorry if their expert doesn't have the
7 time to do that, but this is not as a result of
8 our delay. It's MUSC's, if anybody's, and that
9 would penalize the plaintiffs. Because what
10 they're going to do -- and you've seen them do
11 it before. They did it in Plant. Why didn't
12 plaintiffs pass the tissue? And it becomes a
13 humongous thing.

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

16 MS. McVEY: And so, Your Honor, we believe
17 that we should be able to test the tissue. Our
18 expert can do it. I bet their expert can do
19 it, too.

20 THE COURT: That would be my bet.

21 MS. McVEY: But we believe we should go
22 forward. We did everything we could to get
23 this to you and to MUSC as soon as we could.

24 THE COURT: All right.

25 MS. BUENO: Last word, Your Honor.

1 There's no -- I'm not trying to point the
2 finger at anybody here for causing delay. It's
3 just where we are. We are less than a week
4 before trial. And to have a situation now
5 where we don't know -- we haven't talked to our
6 expert to see if this work can be done.

7 Dr. Longo, himself, testified under oath
8 that he needed two or three weeks and wouldn't
9 be able to do it any shorter. Now I hear
10 counsel saying otherwise. I'm not sure that
11 this can get done. And it --

12 THE COURT: Well, if it can't get done,
13 we'll revisit it, but I'm denying this motion.

14 MS. BUENO: And then we need probably an
15 opportunity to have reports, to get the
16 reports --

17 THE COURT: Ms. Bueno, I have seen
18 miracles accomplished when a trial date is in
19 prospect. And my guess is that something will
20 be done here. But I'm not going to rule on
21 things in the abstract. I did what I needed to
22 do to get this order out. Apparently, the
23 snafu was all along the line. I can't be
24 responsible for those, but now both sides have
25 the tissue samples and I'm not going to rule at

1 this time, even though they now have it, that
2 no tissue -- information can be put in at
3 trial. I deny the motion.

4 Okay. What else?

5 MS. McVEY: I think that's it for motions.
6 What I'd like to do is send an e-mail with just
7 some housekeeping things, and I'll do that
8 tomorrow morning.

9 We need to address the Clubman issue and
10 what the jury will be told about that, and some
11 other evidentiary issues. I think we can do it
12 via e-mail to the Court.

13 Our expectation, what we've told
14 everybody, is that this case will take two
15 weeks to try.

16 THE COURT: And as you know, I don't like
17 that.

18 MS. McVEY: I know, but you remember
19 what -- you can't get the trial done in a week.
20 Remember even with Plant, we had to kill
21 ourselves to get it done in eight trial days, I
22 guess.

23 THE COURT: Well, I don't function, and
24 y'all don't function well in this and we just
25 say, okay, it's going to be two weeks, and then

1 we yank it down at the very end. I want some
2 limitations on number of witnesses, number of
3 experts, amount of time each side has, how long
4 the experts' testimony is going to take, all of
5 that, like I always do.

6 MS. McVEY: Absolutely.

7 THE COURT: So here's what I want to have
8 happen:

9 I want y'all to immediately propose --
10 make specific proposals on how this case should
11 be tried; what witnesses are going to be used;
12 what the time frame is going to be for them,
13 and the like.

14 MS. McVEY: Yes, ma'am.

15 THE COURT: And submit those to me by --
16 what, today is Tuesday?

17 MS. McVEY: Yes, ma'am.

18 THE COURT: I need them by Thursday or
19 early Friday, because I have to be able to make
20 some rulings on them so y'all will know what's
21 going to happen.

22 MS. McVEY: Yes, ma'am.

23 THE COURT: So I would really like for you
24 to get together on this, if it's at all
25 possible. And I can tell you, I do not want to

1 jam it up for two weeks. I want everything to
2 be tried and ready to go to the jury within the
3 mid-point of the second week, so that we'll
4 have a day for the jury to be instructed, and
5 deliberate, and another day if they should need
6 it. I don't want this thing jammed down to
7 something that's going to be on a Friday and
8 the jury doesn't get the case until 3:00 in the
9 afternoon. I'm not going to do it that way.

10 MS. McVEY: And what we'll propose to do
11 and what we have done in the past, I send an
12 e-mail saying, here's the proposed time limits
13 for each witness: Direct, cross, redirect.
14 We'll keep it moving. I think the jury should
15 be told that it's going to go into a second
16 week.

17 THE COURT: I want to be able to tell the
18 jury that, but I also want to be able to tell
19 them that they have limitations in place that
20 will have it going to them so they don't have
21 to stay here on a Friday late.

22 MS. McVEY: A hundred percent. And we
23 don't have any duplicative witnesses. In other
24 words --

25 THE COURT: And I don't know, it may end

1 with the first verdict. Period. It may have
2 to go forward if there's some kind of need for
3 the second stage of bifurcation. It might end
4 with a defense verdict right up, as many of my
5 J&J cases have done. And that may happen. But
6 I want to allow the time for the longest case
7 scenario.

8 MS. McVEY: Absolutely.

9 THE COURT: And that doesn't happen unless
10 I get the case tried by early Wednesday, at the
11 latest. And I'll be trying to push it earlier
12 than that, if I possibly can.

13 MS. McVEY: I have been in many trials
14 with you. I know how hard you push. I'm
15 respectful of it and I appreciate you don't
16 want to waste the jury's time.

17 THE COURT: I have respect for the jury.
18 I don't keep them here till late at night.
19 Most days, I start promptly at 9:30. I have
20 them in their seats before that. You know, the
21 first day is always a waste, in some respects,
22 because the jury selection, as hard as I move,
23 still takes until the afternoon. And then
24 you've got opening statements, and you might be
25 able to get up one witness, if any. So I want

1 this thing to move along.

2 MS. McVEY: We are on the same page.

3 THE COURT: Now, also, I will want some
4 advance information about voir dire questions.
5 I'd like you to get those to me as soon as you
6 can. You probably already got those halfway
7 prepared anyway. I want you to get those to
8 me. If they come in tomorrow, that would be
9 good, so that I can look at these voir dire
10 questions, decide what I'm going to ask and so
11 forth. But please note, we don't have
12 lawyer-conducted voir dire. And I am rather
13 sparse in what I do about voir dire,
14 particularly as it gets into juror's special
15 opinions about matters. I just don't think
16 that's -- that's something I want to go to.

17 And that's why I -- Mitch knows how voir
18 dire works and he'll be able to guide you all.
19 You are as the second line a component on this
20 and will be able to guide your troops on that.
21 But I want all that to me --

22 MS. McVEY: Yes, ma'am.

23 THE COURT: -- so I'll be ready. If
24 you're going to have slide decks for those
25 opening arguments, I'm going to want those in

1 advance so that I can rule on them without
2 having false starts so if we get mad at each
3 other about what goes in and what goes out. I
4 want it to move smooth.

5 MS. McVEY: Excellent, Your Honor.

6 MS. BUENO: So what I heard you saying,
7 just for scheduling purposes, is that we're
8 going to be closing this case on Wednesday.

9 THE COURT: Trying to as hard as we can.

10 MS. BUENO: The 14th.

11 THE COURT: Yes, ma'am.

12 MS. BUENO: So when we were talking, I
13 just want to make sure I have that in mind when
14 we're scheduling our witnesses. So it sounds
15 to me that our witnesses will be early that
16 week, or Friday, even, of the first week.

17 THE COURT: That's correct. That's
18 correct.

19 MS. BUENO: Okay. And then, obviously, to
20 the extent there is witness scheduling issues,
21 we'll discuss that with plaintiffs and bring
22 any issues to your attention. There may be
23 somebody we have an issue with, but we can all
24 talk through that.

25 MS. McVEY: Absolutely.

1 MS. BUENO: I heard you say opening slides
2 that we would exchange in advance.

3 THE COURT: Yes. Exchange them in
4 advance.

5 MS. BUENO: And get them to you. And when
6 do you want those, knowing that we won't maybe
7 see them again until Monday? How do we submit
8 them and when?

9 THE COURT: Put them on my front doorstep.

10 MS. McVEY: I think, Judge, it may be
11 easier that we exchange them Sunday night.

12 THE COURT: Y'all can exchange them Sunday
13 night, see if you can come to some
14 understanding. Then I don't need it.

15 MS. McVEY: And then if we need something,
16 maybe Judge --

17 THE COURT: I can always come in early
18 enough to deal with the slide decks and things
19 of that nature before jury selection begins.

20 MS. McVEY: Perfect.

21 THE COURT: If not, while jury selection
22 is on, I can decide if there's some context
23 that I need to resolve. Hopefully, that won't
24 be the case.

25 MS. BUENO: And then on a regular basis,

1 we already talked about, you know, providing
2 information the night before for a witness,
3 demonstrative exhibits. We can bring them to
4 your attention.

5 THE COURT: Exactly.

6 MS. BUENO: Do you give us time in the
7 morning of a trial date to bring those issues
8 to your attention?

9 THE COURT: If I've got something that's
10 got to be decided, is bring you in at 8:30 or
11 something like that. Depending on how big or
12 lengthy the issue is.

13 MS. BUENO: Did you say how long you will
14 go in the day?

15 THE COURT: I try to let them out of here
16 by 5:30. And sometimes I can let them out a
17 little sooner. They've got home obligations
18 and I'm sensitive to that. And depending on
19 whether we have jurors that got childcare
20 obligations, I may let them go earlier. I just
21 have to see what kind of jury we've got.

22 MS. BUENO: And an hour for lunch?

23 THE COURT: Yeah, an hour to an hour 15
24 for lunch, and I take a break mid-morning and a
25 break mid-afternoon. And seeing how well it

1 goes, try to let them go between five and 5:30,
2 as I can.

3 MS. BUENO: Terrific. And we will submit
4 voir dire questions to you tomorrow. And then
5 do we need to submit any kind of joint
6 statement of the case or is that something --

7 MS. McVEY: I'll tell you what, can I
8 e-mail you and I'll give you a proposal of what
9 we've done in the past? And then we can give
10 it to you.

11 THE COURT: Yep. Yeah, yeah.

12 MS. BUENO: Do you have a length of time
13 for opening statements that you allow?

14 THE COURT: Generally, they are about 45
15 minutes. Forty to 45 minutes. Sometimes I
16 limit testimony to 30. I know TB (sic) always
17 wants one hour apiece. But I would like to
18 start with the concept it would be 45 minutes.

19 MS. McVEY: What we've typically done,
20 plaintiffs get an hour and defendants split an
21 hour. But we can visit that. You're going to
22 be so proud of how fast we move this case. I
23 don't want you to make any decisions right now.
24 Everybody's tired.

25 MS. BUENO: Do I assume correctly that you

1 do not allow exhibits to be used in opening, if
2 they haven't yet been offered into evidence?

3 THE COURT: I try to get you to pre-admit
4 everything and I look at this -- snafus, I
5 wouldn't want to see them. You don't have to
6 do in front of a jury.

7 MS. McVEY: So if it's pre-admitted, then
8 it would be used in open --

9 THE COURT: That's correct. Anything
10 that's got any question about it, then the
11 lawyers, generally, let me know. And if
12 there's some real question about it, depending
13 on what the witness says, I tell them, "Don't
14 refer to that in opening statement." But,
15 generally, we've got all that hashed out so you
16 know exactly what you can refer to.

17 MS. BUENO: Thank you.

18 THE COURT: I try to do it that way.

19 MS. BUENO: Okay. And then we'll talk
20 about other issues.

21 THE COURT: Right.

22 THE COURT: All right. Let's talk about
23 instructions to the jury to begin with. I try
24 to get all those resolved well before the close
25 of the trial. I then have them printed and I

1 give the jurors all copies of the charges. I
2 read them to the jury without them having it,
3 and then I give them each a copy of the charges
4 to take with them in the jury room as they
5 deliberate. I also allow jurors to take notes.
6 I don't require them to. And I give them an
7 instruction about, you know, that it's for
8 their benefit and can't be used in substitution
9 for their memory of events, et cetera, et
10 cetera. So I have a kind of standard thing I
11 tell them about note-taking.

12 When each expert comes, I remind them that
13 the experts are there because they're qualified
14 and we have a quick voir dire of
15 qualifications, and I qualify them in the areas
16 that they're being offered for. I tell the
17 jury that. And I also -- I always tell the
18 jury that you are the sole judges of the
19 credibility of the witnesses and you may
20 take -- you may make that judgment and take all
21 of what they say or none of what they say or
22 some of what they say. That is how I handle
23 the experts.

24 MS. McVEY: Your Honor, for jury charges,
25 what I plan to do is take the Sarah Plant

1 charge.

2 THE COURT: Yes, I've got -- Theile has
3 got a world of different charges that I've
4 made. I'm sure Mitch has got a bunch of them,
5 as well.

6 MS. McVEY: I'll just redline what I
7 changed.

8 THE COURT: Exactly. But y'all, I think
9 y'all can work off of that and come to
10 something. If there's a dispute that needs to
11 be resolved, I can resolve them. But I want to
12 do that in time to have them printed and ready
13 and go to the jury so everything will be ready
14 to give to the jury.

15 MS. McVEY: We'll take care of that.

16 THE COURT: That's fine.

17 MS. McVEY: And the verdict forms, as
18 well.

19 THE COURT: Yeah. Verdict forms are
20 another thing. Sometimes the parties do wait
21 until the trial has moved along a little bit.
22 But I like the verdict forms as soon as you can
23 get them to me, so we can know what we're
24 doing, what we're looking at as the trial
25 proceeds, adjust according to what happens in

1 the trial.

2 MS. McVEY: Thank you, Your Honor.

3 THE COURT: Okay. Anything else I need to
4 advise about? Any questions anybody has?

5 Now, Ms. Flynn.

6 MS. FLYNN: Yes, ma'am.

7 THE COURT: What in the world is this
8 about opinion?

9 MS. FLYNN: What I was going to say, I
10 think there was a disconnect maybe a little bit
11 earlier when we were having this discussion.

12 THE COURT: Yes.

13 MS. FLYNN: And what I was saying, we
14 filed a motion to stay. We filed a motion to
15 stay with this Court, with you, because we know
16 that you have jurisdiction. We filed a
17 petition for a writ of cert with the Supreme
18 Court, but they have not accepted it yet. But
19 that's just pending. So we know that the
20 jurisdiction is with you, this Court. That's
21 what we filed is a motion to stay with you. So
22 that's what's pending on the record. I wanted
23 to make sure that that was clear.

24 THE COURT: Okay. I was slightly
25 misinformed, although, again, I don't

1 understand a cert, when I haven't ruled on a --
2 or I have a default hearing. But be that as it
3 may, I was trying to sort through all of that.
4 But you will be here?

5 MS. FLYNN: Yes, Your Honor. We will
6 definitely be here. We also filed joinders --

7 THE COURT: Yes. Please let the record
8 reflect that you have joined in all of the
9 motions that any of the defense had, and the
10 rulings you have accepted to just as your
11 counterparts at the defense table has. So your
12 situation will be totally covered, Ms. Flynn.
13 If I need to craft a special order to that, I
14 will. We'll make sure you're protected about
15 all that.

16 MS. FLYNN: In terms of a motion to stay,
17 I assume that that is denied, right?

18 THE COURT: Yes, ma'am. I'll get Eva to
19 search it out. I haven't seen it, but --

20 MS. FLYNN: I do have copies with me.

21 THE COURT: That would be helpful.

22 MS. McVEY: And, Your Honor, I just -- for
23 the record, I'm objecting to the joint Clubman
24 or AAI joining any motions.

25 THE COURT: Oh, okay. I understand. All

1 right.

2 As for the defaulting party, they cannot
3 legitimately fuss with anything that's going to
4 be admitted in the liability portion of the
5 trial.

6 MS. McVEY: Right.

7 THE COURT: The damage portions, only.
8 But I'm not going to bifurcate in such a way
9 that they would have some special standing on
10 damages. I'm going to have to figure out how
11 that stands.

12 MS. McVEY: And I'm going to e-mail around
13 it, what I've been calling a charge. It's not
14 really a charge, but what the jury will be told
15 about Clubman to differentiate what's been
16 decided for Clubman versus what has not been
17 decided for Johnson & Johnson and others.

18 THE COURT: Yep. Yep. So we'll have to
19 figure that out.

20 MS. BUENO: Yes. And we'll comment on
21 that. I mean, I think it's important for the
22 jury to understand that it was a default as to
23 a finding of liability. And we'll talk about
24 that.

25 THE COURT: Well, you're going to get to

1 argue eventually. That's something I've got to
2 work out.

3 MS. BUENO: Oh, no. And I hope you don't
4 misunderstand. I'm not suggesting that we
5 would argue against them. I just think that
6 one of the questions that the jury's going to
7 have to decide is whether or not cosmetic talc
8 had anything to do with Mr. Perry's --

9 THE COURT: Right. And they don't get to
10 argue against that. For the purposes of them,
11 it is assumed that the terms of the complaint
12 are true and sound and they are bound by them,
13 because they defaulted.

14 MS. BUENO: Exactly. And something like
15 that is exactly what we were --

16 MS. McVEY: Listen to what she's saying.
17 This is interesting. What she wants you to
18 charge them, if it's a technical issue, is the
19 allegations that's been decided against them.
20 Now that it's been determined if their product
21 is unreasonably dangerous and ineffective.

22 THE COURT: And it has been determined
23 that. You deferred it. They defaulted.
24 Therefore, they're bound. But I'm going to
25 make it clear they don't get to hide behind all

1 of the evidence, a defective product, because
2 it's all of their fault. That influences
3 whether it's J&J fault.

4 MS. BUENO: Absolutely not.

5 THE COURT: So we'll figure out someday to
6 sort that out.

7 MS. BUENO: Okay. Thank you, Your Honor.

8 THE COURT: All right.

9 Okay. Court is it adjourned.

10 (Court is adjourned at 5:39 p.m.)

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1 CERTIFICATE

2 STATE OF NORTH CAROLINA)

3 COUNTY OF GUILFORD)

4

5 I, Corinne J. Blair, Certified Real-Time
6 Reporter, Certified Court Reporter, Registered
7 Professional Reporter, and Certified LiveNote
8 Reporter, certify that the foregoing transcript of the
9 proceedings taken at the July 29th, 2024 session of
10 Richmond County Superior Court is a true and accurate
11 transcript of said proceedings recorded by me, is
12 contained in one volume, and was transcribed by me.

13 I further certify that I am not a relative,
14 employee, attorney or counsel of any of the parties;
15 nor financially interested in the outcome of this
16 action.

17

18 This 31st day of July, 2024.

19

20

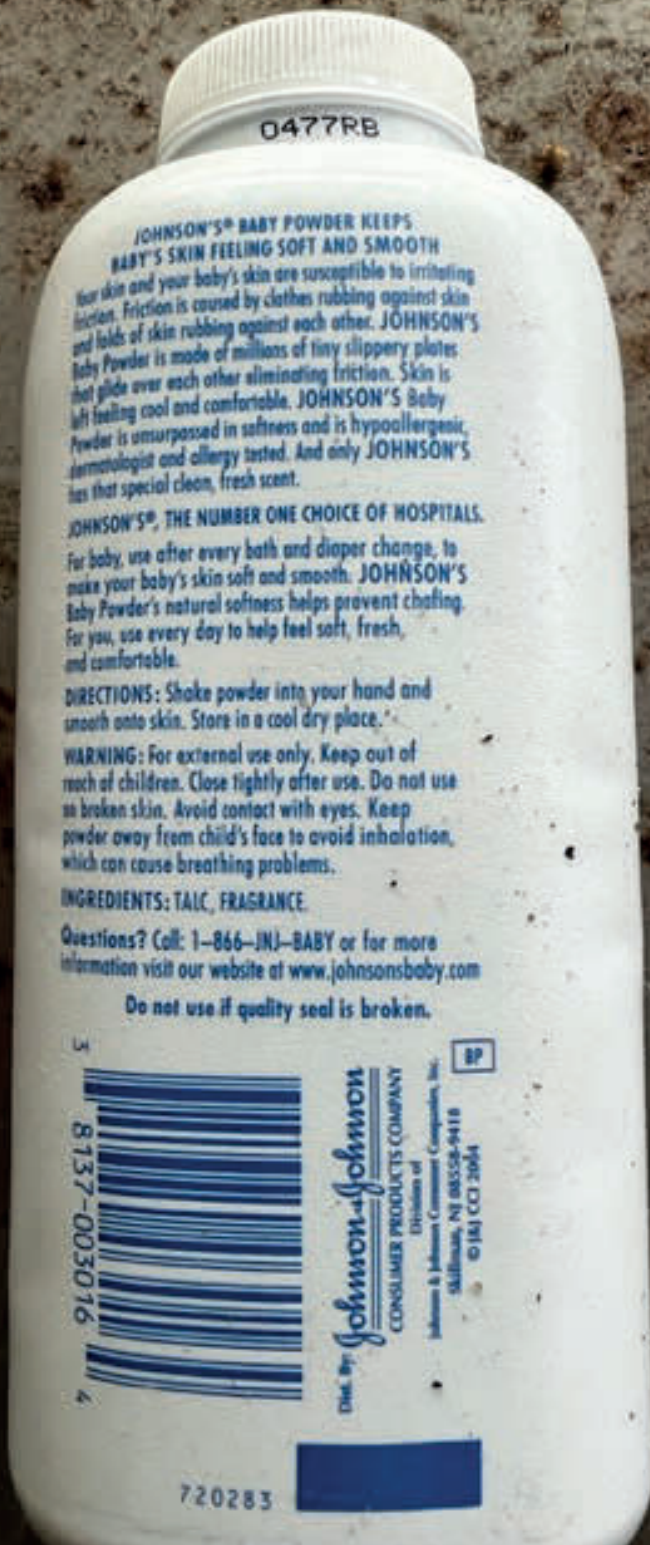
21 

22

Corinne J. Blair, CRR, CCR, RPR, CLR
23 Certified Real-Time Reporter
Certified Court Reporter
24 Registered Professional Reporter
Certified LiveNote Reporter

25

EXHIBIT 10





Johnson's
baby
powder



Keeps skin silky soft,
fresh & comfortable

Johnson & Johnson

NET WT 15 OZ (425g)

RoA_16297

724206



*It's a
feeling you never
outgrow.*

Pure, soft, silky powder.
For baby and adults.

FOR BABY:

Use after every bath and
diaper change. It's gentle,
soothing and comforting.
Adsorbs moisture. Helps
prevent chafing.

ADULTS:

Use every day to feel soft,
fresh and comfortable.

Ingredients:

talc, fragrance

Johnson & Johnson

BABY PRODUCTS COMPANY
SKILLMAN, NEW JERSEY 08558
MADE IN U.S.A. © 1971 J&J





RoA_16300

EXHIBIT 11

(STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Michael L Perry and Lonnie L Long,

Plaintiffs,

V.

Johnson & Johnson and American International Industries et al,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 2023-CP-40-04072

VERDICT FORM

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2024 AUG 19 AM 9:05

RICHLAND COUNTY
FILED

VERDICT FORM

NEGLIGENCE

1. We, the jury, find that Defendant the Johnson & Johnson entities were negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

✓ Yes

No

2. We, the jury, find that Defendant American International Industries (AII), was negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

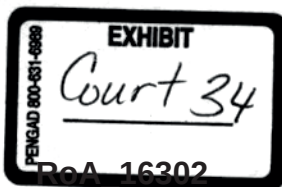
No

STRICT LIABILITY

3. We, the jury, find that Defendant the Johnson & Johnson entities are strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

✓ Yes

No



4. We, the jury, find that Defendant American International Industries (AII) is strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

☐ No

FRAUDULENT MISREPRESENTATION

5. We, the jury, find that Defendant the Johnson & Johnson entities engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

☐ Yes

☒ No

6. We, the jury, find that Defendant American International Industries (AII) engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

☐ No

DAMAGES

7. If you answered "Yes" to any of Questions 1-6, please state the amount of actual damages that have been proven by the greater weight of the evidence:

Michael Perry's economic loss (past & future) \$ 3,800,000

Michael Perry's other damages (past & future) \$ 19,237,500

Lonnie Long's loss of consortium damages (past & future) \$ 9,618,750

WILLFUL, WANTON OR RECKLESS CONDUCT

8. If you answered "Yes" to Questions 1, 2, 5, or 6, please answer this question as to any Defendant for which you answered "Yes." We, the jury, find by clear and convincing evidence that the conduct of the following Defendants was willful, wanton, or reckless:

Johnson & Johnson

☒ Yes

☐ No

American International Industries (AII)

☒ Yes

☐ No

Foreperson _____

August 15, 2024
Date

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Michael L Perry and Lonnie L Long,

Plaintiffs,

v.

American International Industries et al,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 2023-CP-40-04072

PLAINTIFFS' REQUESTED
JURY CHARGES

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2024 AUG 19 AM 9:08

RICHLAND COUNTY
FILED

PUNITIVE DAMAGES VERDICT FORM

1. As to Plaintiff Michael Perry's claims against Defendant Johnson & Johnson entities for punitive damages, we, the jury, by unanimous consent, find:

✓ for Michael Perry in the amount of \$ 30,000,000 punitive damages
(\$30 Million)

3. As to Plaintiff Michael Perry's claims against Defendant American International Industries for punitive damages, we, the jury, by unanimous consent, find:

✓ for Michael Perry in the amount of \$ 700,000 punitive damages

Foreperson

August 15, 2024
Date

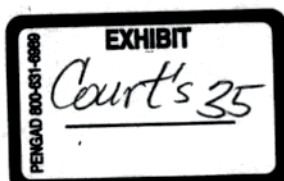


EXHIBIT 12

Decades of Evidence of Asbestos Content in Johnson & Johnson Products

Number	Date	Source of Information	What Was Evaluated	Results	Tally
1	10/6/48	US Public Health Service	Vermont	ASBESTOS	1
2	10/15/57	J&J Hired Lab (Battelle)	Italian	Amphiboles	2
3	5/9/58	J&J Hired Lab (Battelle)	Italian	Tremolite 24 samples	26
4	5/23/58	J&J Hired Lab (Battelle)	Italian	Tremolite 30 samples	56
5	7/31/59	J&J Hired Lab (Battelle)	Italian	Tremolite 63 samples	119
6	8/31/59	J&J Hired Lab (Battelle)	Italian	Tremolite 4 samples	123
7	9/15/59	J&J Hired Lab (Battelle)	Italian	Tremolite	124
8	12/31/59	J&J Hired Lab (Battelle)	Italian	Tremolite 25 samples	149
9	1/31/60	J&J Hired Lab (Battelle)	Italian	Tremolite 44 samples	193
10	3/8/60	J&J Hired Lab (Battelle)	Italian	Tremolite 7 samples	200
11	3/8/60	J&J Hired Lab (Battelle)	J&J Baby Powder	Tremolite	200
12	4/12/60	J&J Hired Lab (Battelle)	Italian	Tremolite 20 samples	220
13	6/6/61	J&J Hired Lab (Battelle)	Vermont	Altered Amphiboles (at least 2 samples)	222
14	8/25/61	J&J Hired Lab (Battelle)	Vermont	Amphibole - altered amphiboles 3 samples	225

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
15	10/13/61	J&J Hired Lab (Battelle)	J&J Baby Powder Standard	Tremolite & Amphiboles "usual contaminants" Trace amphiboles are part of J&J standard for Johnson's Baby Powder	225
16	5/27/63	J&J Hired Lab (Battelle)	Vermont	Amphibole	226
17	3/1964	Schimmel Briefs	Italian	"Tremolite is a mineral of fibrous character which is often present in talc." Tremolite is often an impurity in Italian talc.	226
18	4/7/66	J&J Hired Lab (Battelle)	Vermont	Serpentine Altered Amphibole	227
19	7/13/66	J&J	Johnson's Baby Powder	Tremolite	229
20	1/30/67	J&J	Competitor baby powder Italian Talc Vermont Talc	Tremolite Fibrous	230
21	11/1/67	J&J	Vermont Italian	Tremolite - 3 samples Serpentine - 2 samples	233
22	1/24/68	J&J Hired Lab (Battelle)	Italian	Tremolite 6 samples	239
23	12/4/70	J&J Hired Lab (Colorado School of Mines)	Vermont	Tremolite-Actinolite 8 samples	247
24	4/14/71	J&J Hired Lab (Colorado School of Mines)	Vermont Product Sample	Tremolite-Actinolite Needles 2 samples	249
25	5/14/71	Internal testing by Dr. Ashton	Johnson's Baby Powder (Lot 344-L) Vermont	ASBESTOS Tremolite-Actinolite Needles	250
26	6/30/71	J&J Hired Lab (Colorado School of Mines)	Johnson's Baby Powder (Lot 344-L) Vermont	ASBESTOS Tremolite-Actinolite	251

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
27	7/7/71	J&J Hired Lab (Colorado School of Mines)	Vermont	Tremolite/Actinolite 6 samples	257
28	7/8/71	J&J Hired Lab (Colorado School of Mines)	Vermont	Tremolite and Actinolite (less than 1%)	259
29	7/9/71	Mt Sinai (Dr. Langer)	Johnson's Baby Powder	ASBESTOS	260
30	7/23/71	J&J Hired Lab (Colorado School of Mines)	Vermont	Amphiboles	261
31	7/29/71	J&J letter Subject: Talc/Asbestos Reports testing from Colorado School of Mines (344-L)	Vermont	Tremolite/Actinolite Fibrous Minerals	262
32	8/6/71	J&J letter	Italian	Tremolite Actinolite Chrysotile	263
33	8/9/71	J&J letter	Johnson's Baby Powder	Fines in baby powder implicated in asbestos toxicology	264
34	8/9/71	J&J Admission	Johnson's Baby Powder	"It would seem more than appropriate that we upgrade the quality control on our talc and baby powder, particularly as to the potential asbestos content."	264
35	9/3/71	J&J Hired Lab (McCrone)	Johnson's Medicated Powder & Johnson's Shower to Shower	ASBESTOS Chrysotile	266
36	10/12/71	J&J Hired Lab "looking at problems of talc & asbestos minerals" (McCrone)	Johnson's Shower-to-Shower	Chrysotile	267
37	10/21/71	J&J Hired Lab (McCrone)	Vermont	Chrysotile suspected Substantial similarity to the morphology of Chrysotile Several Fibers	270

Decades of Evidence of Asbestos Content in Johnson & Johnson Products

Number	Date	Source of Information	What Was Evaluated	Results	Tally
38	11/10/71	Letter from Mt Sinai to J&J	Johnson's Baby Powder	ASBESTOS	271
39	1972	J&J admission + external lab confirmation	Johnson's Baby Powder	Tremolite repeatedly seen "This is not new"	273
40	1/1972	Article J&J Files	Johnson's Baby Powder	ASBESTOS	274
41	2/16/72	Turin Polytechnic	Italian	Asbestos minerals	275
42	4/27/72	NIOSH	Johnson's Baby Powder and Johnson's Medicated Powder	Fiber Count performed in standard manner used for asbestos samples 10,000s fibers per Mg. 2 samples	277
43	6/12/72	Outside ES Laboratories	Italian	ASBESTOS	278
44	8/3/72	FDA Testing Dr. Lewin - NYU	Johnson's Shower-to-Shower	ASBESTOS	279
45	8/9/1972 - 8/10/1972	Johnson & Johnson Internal Testing of FDA samples	Johnson's Shower-to-Shower	Tremolite Rods 4 samples	283
46	8/18/72	Letter from a Company (EMTAL) J&J bought	Vermont	ASBESTOS	287
47	8/24/72	J&J Letter Talc/Asbestos Sperry Rand Lab's Results (not hired or paid by J&J)	Shower-to-Shower (FDA/Lewin sample)	ASBESTOS	288
48	8/24/72	J&J Letter Talc/Asbestos J&J Scientist	Johnson's talc products	J&J admits tremolite fibers could be present in J&J Shower to Shower	288
49	8/31/72	Outside Lab (Sperry Rand) Expertise in examining Chrysotile Asbestos	Shower-to-Shower (FDA/Lewin sample)	Chrysotile fibers multiple fibers of chrysotile - provided J&J photographs of the fibers	289
50	9/5/72	Testing from a talc competitor to a Company (EMTAL) J&J bought	Vermont	Tremolite fibers	291
51	9/25/72	Johnson & Johnson Memo Asbestos in Talc Shower-to-Shower/Asbestos	Italian Mine	Tremolite	292
52	9/26/72	Dr. Lewin	Johnson's Baby Powder + Medicated Power + Shower to Shower	Over half the samples sold in J&J's cosmetic products were industrial grade talc	292
53	9/30/72	New York University	Italian Talc	Tremolite & Chrysotile	293
54	10/19/72	NYU (Lewin)	Johnson's Baby Powder Shower to Shower	Chrysotile & Tremolite	299

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
55	10/27/72	J&J Hired Lab (McCrone)	Johnson's Baby Powder (re-testing samples FDA/Lewin tested)	Tremolite Rods 2 samples 0.2 or .3% tremolite in sample 109T 0.5% tremolite in sample 108T	301
56	Nov 1972	J&J Hired Lab (University of Minnesota)	Johnson's Baby Powder + Shower to Shower (re-testing samples FDA/Lewin tested)	ASBESTOS 2 samples	303
57	2/26/73	J&J Hired Lab (Colorado School of Mines)	5 Talc Samples	Tremolite-Actinolite Anthophyllite Serpentine which may be chrysotile	306
58	3/14/73	J&J Mine	Vermont	Tremolite	308
59	4/2/73	J&J	Vermont	Chrysotile	309
60	4/6/73	Member of J&J industry group (Avon)	Italian Talc	1% Tremolite	310
61	4/17/73	Avon	Chinese	1-2% Tremolite ASBESTOS	311
62	4/19/73	J&J testing	Johnson's Baby Powder	Tremolite Fibers 4 samples	315
63	4/26/73	J&J Admissions	Johnson's Baby Powder	ASBESTOS repeatedly found in baby powder	317
64	4/27/73	Analysis of Johnson's Baby Powder	Johnson's Baby Powder (Lot 285-S, Lot 397-R, Lot 068-Z, Lot 086-Z)	Tremolite/Actinolite parallel sided rods .01-.001% by weight	321
65	4/30/73	Talco e Grafite (Dr. Stefano)	Italian	ASBESTOS 0.02%	322
66	5/1/73	J&J Admission	Vermont	Actinolite	323
67	5/8/73	J&J Admission	Vermont	Actinolite	325
68	5/16/73	Proposed Specs for Analyzing Talc for Asbestos (Pooley Method)	Vermont	ASBESTOS 0.05%	326
69	5/25/73	Testing from a talc competitor to a Company (Engelhard) that mined Vermont Talc	Vermont	ASBESTOS	330
70	6/4/73	J&J Admissions	Vermont	Tremolite	330

Decades of Evidence of Asbestos Content in Johnson & Johnson Products

Number	Date	Source of Information	What Was Evaluated	Results	Tally
71	6/12/73	Testing from a talc competitor to a Company (EMTAL) J&J bought	Vermont	ASBESTOS	334
72	7/31/73	FDA	Johnson & Johnson Consumer Talc products	Tremolite + a question about Chrysotile	336
73	8/28/73	Johns-Manville - another company's internal testing	Italian and Vermont	Chrysotile + suspect Tremolite	338
74	8/28/73	Johns-Manville - another company's internal testing	Johnson's Baby Powder	Chrysotile	339
75	9/4/73	Johns-Manville - another company's internal testing	Italian	Chrysotile 1880 f/mg	340
76	9/6/73	FDA (Stuart) Asbestos and other contaminants in talc	Johnson's Shower-to-Shower	Tremolite/Actinolite	341
77	9/13/73	J&J Consultant Dr. Pooley	Vermont	Actinolite	342
78	9/13/73	J&J Consultant Dr. Pooley	Italian	Tremolite	343
79	9/14/73	McCrone	Italian	ASBESTOS 0.1-2%	345
80	9/14/73	Columbia University	Italian	ASBESTOS 0.1-2%	347
81	10/29/73	Outside lab (not hired by J&J) Hazen Research, Inc.	Johnson's Baby Powder	Chrysotile	348
82	10/29/73	Outside lab (not hired by J&J) Hazen Research, Inc.	Italian	"Italian talc has an appreciable chrysotile content"	349
83	11/20/73	NY Lab hired by Talc Supplier - WCD	Italian	Chrysotile fibers (hundreds of thousands of fibers per gram) Amphibole fibers (millions of fibers per gram)	350
84	11/20/73	NY Lab hired by Talc Supplier - WCD	Vermont	Chrysotile fibers (hundreds of thousands of fibers per gram) Amphibole fibers (millions of fibers per gram)	351
85	12/13/73	J&J Letter Re: asbestos in baby powder Outside Testing	Johnson's Baby Powder (Italian)	ASBESTOS 2 samples	353
86	12/27/73	Colorado School of Mines (lab hired by J&J)	Vermont	Chrysotile & Tremolite	357

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
87	1974	NIOSH Sponsored Multi-lab research	Italian	"Commercial talc is generally not monomineralic material, but rather a mixture of mineral phases. Some of these minerals may pose occupational or even consumer risk of disease" Common mineral impurities: Major: Tremolite + Anthophyllite Minor: Actinolite + Chrysotile 4 samples "These minerals are known to have disease potential"	361
88	2/11/1974	J&J Hired Lab (McCrone)	J&J samples	Chrysotile	362
89	3/11/2014	J&J Hired Lab (McCrone)	Talc Sample for Johnson & Johnson Baby Products Co.	Chrysotile	363
90	4/4/74	J&J visit to outside lab - admissions (Colorado School of Mines)	Vermont	Fibrous Tremolite Fibrous Chrysotile Goal: "establish destruction of tremolite in presence of Vermont talc." + "establish destruction of chrysotile in presence of Vermont talc."	365
91	4/24/74	J&J Hired Lab (McCrone)	Vermont	Chrysotile 15 samples	380
92	4/24/74	J&J Hired Lab (McCrone)	Vermont	Amphiboles 4 samples	384
93	5/9/74	J&J Hired Lab (McCrone)	Vermont	Chrysotile fibers 2 samples	386
94	5/14/74	J&J Vermont Mine Confidential findings (McCrone)	Vermont	Chrysotile 4 samples Subject: use of system to attempt to remove chrysotile "The use of these systems is strongly urged by this writer, to provide the protection against what are currently considered to be materials presenting a severe health hazard and are potentially present in all talc ore in use at this time"	390
95	5/14/74	J&J Vermont Mine Confidential findings (Dartmouth College)	Vermont	Amphibole Minerals 8 samples	396
96	5/16/74	J&J Hired Lab (McCrone)	Vermont	ASBESTOS - Chrysotile 2 samples	398

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
97	7/8/74	J&J Hired Lab (McCrone)	Vermont	Chrysotile 6 samples	404
98	7/8/74	J&J Hired Lab (McCrone)	Vermont	ASBESTOS - Tremolite	405
99	7/17/74	J&J external lab (McCrone)	Talc Sample	Chrysotile	406
100	9/24/74	Confidential J&J Letter Re "damaging" talc/asbestos release on Italian talc (Societa Talco e Grafite)	Italian	ASBESTOS - Chrysotile	407
101	10/10/74	J&J Hired Lab (McCrone)	Vermont	Chrysotile Fibers ~ 0.006%	408
102	11/26/74	J&J	Vermont	Tremolite asbestos	409
103	12/9/74	J&J Hired Lab (McCrone)	Johnson & Johnson Baby Powder	ASBESTOS - Chrysotile	410
104	1/31/75	Member of J&J industry group (Avon)	Italian Talc	Tremolite	411
105	2/24/75	J&J Supplier discussing EPA findings	Vermont Talc	"The EPA claims talc from Windsor Minerals, obtained from various manufacturing plants, contains asbestos"	412
106	2/24/75	J&J Supplier's Findings	Vermont Talc	ASBESTOS repeatedly found Tremolite + possible Chrysotile Tremolite was mainly in massive form although "further processing would likely result in additional fibrous tremolite being liberated"	412
107	3/26/75	Member of J&J industry group (Avon)	Italian Talc	Chrysotile	413
108	4/30/75	Member of J&J industry group (Avon)	Italian Talc	Tremolite	414
109	6/11/75	J&J Hired Lab (McCrone)	Talc samples sent by J&J to be tested	Amphibole fibers/bundles 2 samples	416
110	7/1/75	J&J Hired Lab (McCrone)	Vermont	ASBESTOS 9 samples Low and Medium levels of confirmed asbestos	425

Decades of Evidence of Asbestos Content in Johnson & Johnson Products

Number	Date	Source of Information	What Was Evaluated	Results	Tally
111	9/9/75	Johnson & Johnson letter Langer's Findings	Johnson's Baby Powder + off-the-shelf talc products	Chrysotile + Amphiboles - tremolite & anthophyllite	426
112	9/9/75	Johnson & Johnson reaction to Langer findings	Johnson's Baby Powder + off-the-shelf talc products	The chrysotile finding contradicts what Dr. Pooley (one scientist) had reported - no claim it contradicts the finding about the tremolite or anthophyllite J&J immediate response: "refute the data" "prepare our strategy"	426
113	9/11/75	J&J Hired Lab (McCrone)	Vermont	Chrysotile	427
114	11/1/75	Competitor's Analysis of Italian Talc	Italian	Fibrous Tremolite 4 samples	431
115	11/5/75	J&J Hired Lab (McCrone)	Vermont	ASBESTOS 13 samples some are "rather high" most are "bundles" of fibers	444
116	11/19/75	J&J Hired Lab (McCrone)	Vermont	ASBESTIFORM - amphiboles 2 samples	446
117	3/1/76	Italian Researchers (Rubino, et al.)	Italian	Tremolite	447
118	3/30/76 - 7/16/92	Pfizer	Italian	Fibers and Bundles of Asbestos 115 samples TEM/SAED Individual samples had from 1 to 150 fibers	562
119	7/5/76	J&J Hired Lab (Colorado School of Mines)	Vermont	Amphibole Needles	564
120	2/23/77	Testing from Vermont Mining Company	Vermont	ASBESTOS	566
121	4/1/77	Geochemist Report to J&J + Certificate of Microanalysis for Asbestos (EMV Associates)	Talc Samples with new preparation and examination techniques	ASBESTOS - 4 samples "Tremolite is often present" including a bundle Composite sample: "both large and small fibrous tremolite particles found"	570
122	5/1977	NIOSH	J&J Product Vermont	Tremolite-actinolite	571
123	5/24/77	NIOSH	Vermont	Chrysotile	572

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
124	6/27/77	Testing from Vermont Mining Company done by J&J outside lab (McCrone)	Vermont	Asbestos - actinolite	573
125	8/18/77	Testing from Vermont Mining Company	Vermont	Actinolite-tremolite fibers	575
126	12/15/77	Outside Mineralogist for J&J's Vermont Mine Mountain States Research	Vermont	Tremolite-Actinolite long needles 2 samples	577
127	2/20/78	Report on Ore Reserves for Hammondsville Ore Body	Vermont	Actinolite needles	578
128	10/5/78	J&J Hired Lab (McCrone)	Vermont	CHRYSTOTILE 2 samples	580
129	10/27/78	Testing from Vermont Mining Company	Vermont	Asbestos Type Found in Sample included Chrysotile	581
130	11/14/78	J&J Hired Lab (McCrone)	Vermont	Chrysotile & Tremolite asbestos	582
131	2/1/79	Testing from Vermont Mining Company	Vermont	chrysotile	583
132	2/9/79	DOC Analytical Research Quality Control for Vermont Talc	Vermont	"found massive amphiboles" specifically Tremolite + Actinolite Samples may be "indicative of a coming problem"	584
133	3/23/79	Testing from Vermont Mining Company	Vermont	ASBESTOS	586
134	4/11/79	Testing from Vermont Mining Company	Vermont	ASBESTOS	586
135	4/30/79	Testing from Vermont Mining Company done by J&J outside lab (McCrone)	Vermont	Chrysotile 0.1%- 1% range of sample	587
136	5/17/79	Vermont Mining Company admission	Vermont	Vermont Talc: "Asbestos fiber is present."	587
137	5/22/79	Testing from Vermont Mining Company	Vermont	Chrysotile	591
138	7/17/79	Testing from Vermont Mining Company	Vermont	Asbestos	594
139	9/29/80	J&J Admission + external lab confirmation (McCrone)	Vermont	Chrysotile	595

Decades of Evidence of Asbestos Content in Johnson & Johnson Products

Number	Date	Source of Information	What Was Evaluated	Results	Tally
140	11/6/80	J&J external lab (McCrone)	Vermont	ASBESTOS - Chrysotile	596
141	3/11/82	Testing from Vermont Mining Company	Vermont	Asbestos	598
142	8/24/82	Mine Safety and Health Administration	Exposures to asbestos at the South Plainfield Mill (Italian)	ASBESTOS 14 samples	612
143	2/24/84	J&J Hired Lab (McCrone)	Composite Sample	ASBESTOS - Chrysotile 2 grids	614
144	5/15/84	Mine Safety and Health Administration	Air filter samples South Plainfield Mill (Italian)	ASBESTOS - Anthophyllite ~0.6% by weight	619
145	9/26/84	J&J letter Subject: Talc Asbestos Findings by Paoletti published by reputable organization in Italy + Paoletti article	Italian	ASBESTOS - Chrysotile 1 sample	620
146	9/26/84	J&J letter Subject: Talc Asbestos Findings by Paoletti published by reputable organization in Italy + Paoletti article	Italian	ASBESTOS - Tremolite 7 samples	627
147	11/2/84	J&J Hired Lab (McCrone)	Air filter samples	ASBESTOS - Chrysotile 4 sample	631
148	2/26/85	J&J	Chinese	Sample of Cosmetic Grade Talc Results "Asbestiforms Positive"	632
149	8/22/85	J&J Hired Lab (McCrone)	California	ASBESTOS - Chrysotile 2 samples Multiple asbestos fibers seen and counted. J&J to complain about the lab's failure to use "substantially different language" and "couch" results as in earlier reports. Report changed to claim testing "did not find any quantifiable amount of asbestiform minerals in any samples."	632
150	11/18/85	American Chemical Society (from J&J internal files)	Italian	Fibrous Amphiboles/Tremolite	633
151	1/30/87	Johnson & Johnson	Vermont + Johnson's Baby Powder	Amphiboles	634
152	3/30/87	Johnson & Johnson	Vermont	Amphiboles 23 samples	657

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
153	7/1/87	ES Labs	Vermont	Talc Analysis (ASBESTOS) Tremolite Less than 90% talc	658
154	10/1/87	Johnson & Johnson	Vermont	Hammondsville and Rainbow mines found Amphiboles 4 samples	662
155	3/14/88	J&J Hired Lab (RJ Lee)	Johnson's Baby Powder using Chinese Talc	Chrysotile: .0024% by weight Fibrous tremolite: .014% tremolite by weight	663
156	4/15/88	Skyline Laboratories	Vermont	Actinolite	665
157	10/13/88	Windsor Minerals (J&J's talc mine)	Vermont	Sub-trace Amphiboles found - passes industry standards	666
158	5/23/89	J&J Hired Lab (RJ Lee)	Talc Sample for Johnson & Johnson Baby Products Co.	Chrysotile	667
159	11/26/90	J&J Hired Lab (McCrone)	Talc Samples sent to Quality Control Manager for Vermont Mine	Anthophyllite fiber + Chrysotile fiber 2 samples Results verified in Bench sheets but claim "no quantifiable amounts of asbestiform minerals"	669
160	11/30/90	J&J Hired Lab (McCrone)	Talc Samples sent to J&J Consumer Products	Using Johnson & Johnson's Test Method 7024 No asbestos minerals were identified in the samples Bench sheet shows Anthophyllite Talc Fiber	670
161	1991	Peer Reviewed Published Paper (Dr. Alice Blount)	Johnson & Johnson's Vermont talc	(PUBLIC - Published Paper): Amphibole fibers are labeled either "needles" or "fibers" depending on how long they are but all are regulatory fibers (3:1 aspect ratio or larger) Sample i - both needles & fibers of amphiboles (KNOWN TO J&J - NOT IN THE PAPER) Sample i is Johnson & Johnson's Vermont talc	675
162	1991	Peer Reviewed Published Paper (Dr. Alice Blount)	Italian consumer-grade talc	(PUBLIC - Published Paper): Amphibole fibers are labeled either "needles" or "fibers" depending on how long they are but all are regulatory fibers (3:1 aspect ratio or larger) Sample h - found asbestos: needles of amphiboles (KNOWN TO J&J - NOT IN THE PAPER) Sample h is Italian Cosmetic-Grade talc	676
163	3/5/91	Microscopic Analysis for Amphiboles & Chrysotile	Vermont	Actinolite fibers 16 times	692
164	3/5/91	Microscopic Analysis for Amphiboles & Chrysotile	Vermont	Tremolite fibers	693

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
165	1/29/92	Johnson & Johnson's Talc Supplier (Cyprus Industrial Minerals)	Vermont	AMPHIBOLES 6 samples <0.1% to 2.3% by weight	699
166	2/10/92	J&J hired consultant (Dr. Alice Blount)	Johnson's Baby Powder	Industrial Hygenist reports all talc contains asbestos "individual deposits, the shape distribution and quantity [of asbestos] remains fairly constant over time"	699
167	3/25/92	Johnson & Johnson's Talc Supplier (Cyprus Industrial Minerals)	Vermont	"The other serious mineralogical contaminant in the talc ores of Vermont is the fibrous variety of the amphibole minerals, tremolite and actinolite... which has been classified as asbestiform minerals by OSHA and EPA." Visible tremolite and actinolite in deposits used for cosmetic talc - Hammondsville and Argonaut	701
168	4/1992	J&J Supplier's Findings	Vermont	Fibrous Tremolite & Actinolite minerals are ubiquitous and are deleterious minerals	703
169	5/21/92	Johnson & Johnson's Talc Supplier (Cyprus Industrial Minerals)	Vermont	Fibrous amphiboles (actinolite) dikes extending in places into the contacting talc ores	704
170	9/92	J&J supplier (Luzenac)	Vermont	Ore characterization for Argonaut Vermont Mine Ore destination includes cosmetics. Associated minerals include actinolite, which is listed as a detrimental mineral	704
171	11/4/92	J&J supplier (Luzenac)	Vermont	Actinolite (needles and blades) are known impurities present in all relevant Vermont deposits and while some locations are known to be avoided "it is impossible to get rid of accidental traces."	704
172	10/13/95	J&J Hired Lab (RJ Lee)	Johnson's Baby Powder	Tremolite	705
173	3/26/96	Johnson & Johnson testing information from its supplier	Composite sample from Vermont	Amphibole	706
174	12/4/97	Johnson & Johnson's Talc Supplier testing w/ an outside lab (Bain Environmental)	Vermont	Chrysotile	707

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
175	3/16/98	Geologist and Mineralogist hired by J&J	Johnson's Baby Powder	Dr. Blount has "written extensively on talc and asbestos contamination in commercial talc preparations." "In her opinion, commercial talcum powder preparations including Johnson & Johnson Baby Powder, contain trace amount of asbestos."	707
176	12/4/00	Johnson & Johnson's Talc Supplier testing w/ an outside lab (Bain Environmental)	Vermont	Asbestos Analysis had a "hit" of asbestos in monthly floated composite talc sample	708
177	11/2001-7/9/2005	Talc Supplier (Rio Tinto lab/Imerys)	Chinese	Chrysotile Estimate of 151 million fibers per gram + Amphibole asbestos near or in Chinese ore bodies	711
178	5/23/02	Johnson & Johnson's Talc Supplier's testing	Vermont	Fibrous Tremolite in waste rock in Argonaut mine	712
179	3/31/03	Johnson & Johnson's Talc Supplier's testing	Vermont	4% Tremolite in the Argonaut mine	713
180	1/5/04	Forensic Analytical (outside lab)	Johnson's Baby Powder	ASBESTOS - anthophyllite 0.20% by weight	714
181	2/26/04	Johnson & Johnson's Talc Supplier's testing	Vermont	Quarterly Composite Testing on Vermont Talc Summary Report for 2003 Found asbestos each quarter reported	717
182	2/26/04	Johnson & Johnson's Talc Supplier's testing	Vermont	Quarterly Composite Testing on Vermont Talc Summary Report for 2001 Found asbestos each quarter reported	720
183	2/27/04	Johnson & Johnson's Talc Supplier's testing	Vermont	Quarterly Composite Testing on Vermont Talc Summary Report for 2002 Found asbestos each quarter reported	724
184	3/11/04	Johnson & Johnson's Talc Supplier's testing	Vermont	Chrysotile 4 samples	728
185	4/10/08	Talc Supplier (Rio Tinto Minerals)	Chinese	"1/3 of Chinese production has some asbestos contamination." "Purchase of finished product from China now carries serious risk of asbestiform contamination."	728
186	4/29/08	Talc Supplier (Rio Tinto Minerals)	Vermont	Asbestiform tremolite-actinolite Argonaut Mine	729

Decades of Evidence of Asbestos Content in Johnson & Johnson Products					
Number	Date	Source of Information	What Was Evaluated	Results	Tally
187	4/3/09	Talc Supplier reporting findings from the Korean Food and Drug Administration	Chinese	Asbestos found in baby powders using Chinese talc.	739
188	5/14/09	J&J Admission	Chinese	ASBESTOS	740
189	5/15/09	J&J reporting on Chinese Authorities	J&J Talc	ASBESTOS	741
190	2/1/10	J&J supplier (Luzenac/Imerys)	Talc Ore Minerology for Chinese Cosmetic Talc	up to 5% tremolite + trace serpentine Talc is a "main ingredient of baby, body and foot powders (mainly a second and third world business) Sorting and floatation cannot eliminate fibrous minerals from talc	741
191	11/2/11	J&J	Chinese	Decline in high grade talc deposits in China "High-asbestos content in talc deposits/mines of China has also led to quality concerns from clients in cosmetic and pharmaceutical sectors"	741
192	2014	Peer Reviewed Published Paper (Gordon, et. al)	Italian North Carolina Montana	ASBESTOS anthophyllite, tremolite + chrysotile 50 samples 1,840 - 1,104,000 fibers per gram Air monitoring: 1.9 f/cc when using a talc bottle	791
193	5/22/14	Scientific Analytical Institute (Litigation Report)	Italian	Grade 1615 is from Val Chisone Italy in Piedmont. Geologically the talc formed from amphiboles. Labs testing confirmed ASBESTOS Anthophyllite, Tremolite + Chrysotile Asbestos	792
194	8/1/17	MVA Scientific (Litigation Report)	Italian	Lab reviewed 13 Italian samples collected by A. Segrave (expert used by mine owner) Asbestos anthophyllite + tremolite/actinolite 11 samples (85% of the samples) 0.00002% - 0.68% by weight 1.7 - 600 million fibers per gram	803

Decades of Evidence of Asbestos Content in Johnson & Johnson Products

Number	Date	Source of Information	What Was Evaluated	Results	Tally
195	2/2018-9/2021	Material Analytical Services (Litigation Report)	Johnson's Baby Powder + Shower to Shower (Vermont, Italian & Chinese)	ASBESTOS - Tremolite (Richterite), Actinolite + Anthophyllite 7,160-15.1 million fibers per gram 96 Samples	899
196	4/6/18	RJ Lee Litigation Report	Vermont	ASBESTOS - Chrysotile 2 samples	901
197	4/23/18	MVA Scientific (Litigation Report)	Vermont	Reviewed 15 samples collected by Mickey Gunter/RJ Lee from Argonaut mine in Vermont ASBESTOS anthophyllite + tremolite/actinolite 10 samples (67% of the samples) 0.00009% - 4.5% by weight 1.16 - 2,585 million fibers per gram	911
198	7/18/18	J3 Resources (Litigation report)	Johnson's Shower-to-Shower	ASBESTOS - Anthophyllite 11 samples (69% of the samples) 7,419 - 95,321 fibers/bundles per gram concentration + TEM	922
199	1/2019-9/2023	Material Analytical Services (Litigation Report)	Italian (Avon, Chanel, Colgate, Coty, Imerys, and Mennen)	ASBESTOS - Tremolite, Actinolite, Anthophyllite, Chrysotile 77 Samples	999
200	10/11/19	FDA AMA Analytical Services (testing done by an expert J&J recommended and expert)	Johnson's Baby Powder (Chinese)	ASBESTOS - Chrysotile 0.00002%	1000
201	10/29/19	J&J Announcement re lab results from RJ Lee	Johnson's Baby Powder (Chinese)	ASBESTOS 3 samples	1003
202	8/2020-11/2022	Material Analytical Services (Litigation Report)	Chinese (Avon, Chanel, and Imerys)	ASBESTOS - Chrysotile, Tremolite, Actinolite 80 Samples	1083
203	5/6/21	Asbestos TEM Laboratories (Litigation report)	Johnson's Baby Powder	Anthophyllite 52,000,000 fibers/gram	1084
204	5/20/21	Fitzgerald Analytical Consulting & Testing (Litigation report)	Johnson's Baby Powder	Anthophyllite asbestos 58,300,000 structures/gram	1085

EXHIBIT 3

Johnson & Johnson
BABY PRODUCTS COMPANY

April 26, 1973

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MAY 16 1973

UNITED STATES

SUBJECT: WINDSOR MINERALS AND TALC

To: D. D. Johnston

Bill Ashton and I visited with Roger Miller and Vernon Zeitz on April 18th. We covered a number of points of considerable concern.

1. It is our joint conclusion that we should not rely on the "Clean Mine" approach as a protective device for Baby Powder in the current Asbestos or Asbestos-Form controversy. We believe this mine to be very clean; however, we are also confident that fiber forming or fiber type minerals could be found. The usefulness of the "Clean Mine" approach for asbestos only is over.
2. It is possible that the technique of identification for asbestos or asbestos-form materials will be an optical approach. It probably will be some variation of the McCrone method. This method with appropriate concentrating techniques will permit a good laboratory to identify asbestos or tremolite in a talc sample.
3. The current medical research is confirming that it is particle shape, not chemical substance which is harmful as such fiber-like materials will be suspect. The argument rages as to whether an aspect ratio of 3/1, 5/1, or 10/1 will be adopted.
4. The problem then is two fold, one for Windsor and one for Baby Powder.
 - a. At Windsor the mine is currently under the jurisdiction of the Bureau of Mines. The inspections of the mine indicate that we are well within the limits presently accepted for non-fibrous dust. Roger Miller feels that they could live within the current TLV values for fibrous talc of 5 parts per million. We don't know the impact of a TLV of 2 fibers per cubic meter.

The May 8th meeting will primarily be an information meeting on mine and manufacturing safety. We would not expect standards to be set, however, there will be agitation probably by OSHA, NIOSH, and the Consumer Groups (Selikoff), to lower the standards for the industrial exposure to the same level as asbestos.

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Protected Document--Subject to Protective Order

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Windsor is currently cooperating heavily with the local Bureau of Mines man out of Albany and in fact teaching him how to use microscopic techniques to identify the presence or absence of fibers.

We recommend that Windsor have a representative at the May 8th meeting as observers and that no other J&J representation should be had at the Bureau of Mines meeting. We will review this strategy next week after a meeting with the Johns Manvill people.

- b. As for Baby Powder, the entire thrust of our communications with the FDA has concentrated on asbestos as harmful fiber-like material. Sophisticated techniques have been proposed to make sure that fiber-form materials present in samples were identified as being asbestos. The implication is that all other fiber-forms, if present, were talc or other minerals and these were safe. This posture will no longer be satisfactory. If the FDA Food Division, which is moving more rapidly than the Cosmetic Division, publishes a standard, it will probably be to ban asbestos-form or fibrous material in talc. That could eliminate the current uses of talc in packaging materials. These talcs contain widely varying amounts of tremolite or fibrous talc. Our Baby Powder contains talc fragments classifiable as fiber. Occasionally sub-trace quantities of tremolite or actinolite are identifiable (optical Microscope) and these might be classified as asbestos fiber.

5. We have been pursuing several alternatives to better protect our powder franchise. These include:

- a. An improvement in the flotation technique to better select platy talc, and perhaps reduce any tremolite or talc shards. The work is still in the lab and the timetable for commercialization is unknown. It is, however, a chemical procedure and therefore would probably not require major equipment change.
- b. A program investigating two different ways of removing a large portion of the very fine particles presently found in talc. We have demonstrated the feasibility of both approaches. The equipment and process development would take between 9 and 12 months on a crash basis. Other approaches which might be less expensive or more effective, have only been talked about. A crash engineering program could be

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undertaken with a good chance of success in this area. It should be cautioned, however, that no final product will ever be made which will be totally free from respirable particles. We are talking about a significant reduction in fine particle count but not 100% clean-up.

- c. Corn Starch is obviously another answer. The product by its very nature does not contain fibers. Furthermore, it is assimilated by the body.

We would recommend that items "a" and "c" receive top priority. The Corn Starch program is primarily one of merchandising and the development of explosion proof facilities. We would recommend this program be spearheaded by a task force under Jim Dettre.

The flotation program is currently being worked on at Windsor by Vernon Zeitz. We would propose a task force of Zeitz, Goodman, and Ashton and Rolle, to identify the opportunities in removing fiber-like materials from the beneficiated talc, with a recommendation to Management in 30 days.

6. If we are agreed with the above, then the Battelle Program should be restudied to include cells of animals on a, b, and c. We might wish these to be new cells, or to delete certain cells now in the program.

D. R. Petterson

DRP/mm

cc: W. Ashton
R. Miller
File .

J&J-0145687

EXHIBIT 14

CF

Johnson & Johnson
BABY PRODUCTS COMPANY

RARITAN, N.J. 08869

November 24, 1976

TO: Mr. George Lee

Attached is a copy of a disturbing proposal request which the FDA has currently made available to qualified bidders. The scope of the work is the Separation of Asbestos in Foods, Drugs and Talc for Identification and Determination.

I find this proposal more disturbing than other proposals up to now because it aims at separation and isolation of asbestos from a wide scope of products and animal tissues. Up to now, our main problems have had to do with identification, whereas, now it looks like the FDA is getting into separation and isolation methodology which will mean concentration procedures. As I have pointed out many times, there are many talcs on all markets which will be hard pressed in supporting purity claims, when ultra sophisticated assay separation and isolation techniques are applied. Chances are that this FDA proposal will open up new problem areas with asbestos and talc minerals.

I intend to keep tuned into the matter through my outside mineral friends who called the thing to my attention while I was at a fiber meeting in Montreal, November 8th and 9th.

Attachment

WHA:blb

WHA.
W. H. Ashton

BY

File

cc: Dr. D. R. Petterson, no attach.
Dr. B. Semple, no attach.

EXHIBIT 15

Johnson & Johnson

New Brunswick, N.J.
July 29, 1971

Subject: Talc/Asbestos

Mr. L. Foster

Please refer to your memo of July 26, 1971.

The talc used in JOHNSON'S Baby Powder is obtained from a selected mine in Vermont where the ore consists mainly of platy talc with only trace amounts of fibrous minerals (tremolite/actinolite). It is free of chrysotile fibers which may be called "pure asbestos" by the layman.

The ore undergoes a careful purifying process which includes a 36-step washing process to maximize its content of high lubricity platy talc and to remove or substantially reduce any traces of fibrous minerals which may be present in the unrefined ore. The resulting talc has been shown by three independent consulting laboratories* to contain negligible traces of fibrous minerals and no chrysotile fibers.

We will be receiving sometime next week a report from our consultant, Professor F. D. Pooley of the University College of Wales, Mineral Exploitation Section, Cardiff, Great Britain. He has completed an exhaustive examination of a sample of baby powder by electron microscopy and other sophisticated techniques. His oral report is that it contains no asbestos.

W. Nashed

WN/cw

- * 1. Colorado School of Mines Research Institute (CSMRI):
- a) June 30 report on JOHNSON'S Baby Powder sample Lot 344-L and 6 monthly samples of purified talc from the Vermont mine.
 - b) July 7 report on ore sample, tailings removed in the processing and finished purified talc.

The CSMRI analyses are based on standard petrographic and X-ray testing technique.

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JNJMX68_000004646

Mr. L. Foster

- 2 -

July 29, 1971

2. Report from McCrone Associates, Inc. (July 27, 1971)

reporting on their findings by electron microscopic and electron diffraction analysis of a Baby Powder sample.

3. Report from the Dartmouth College Geology Department (June 28, 1971)

reporting on their findings of no tremolite, garnet, or asbestos in a sample of purified talc from the Vermont mine.

EXHIBIT 16

MEMORANDUM

TO: Dick Wiles, John Shipp

FROM: Lenore McKenna

DATED: 10/16/97

RE: Coker v. Johnson & Johnson
54.2121
Mesothelioma/Talc Medical Research

According to the literature, most of the research done on mesothelioma closely links it to exposure to asbestos. However, mesothelioma was inducible in rats by intrapleural inoculation of nonasbestos fibrous materials such as synthetic aluminium silicate (ceramic fibers), fibrous glass and aramid. Although most patients with mesothelioma have had occupational exposure, spontaneous mesotheliomas do occur. (1) Since mesothelioma is considered to be closely related to exposure to asbestos, mortality from mesothelioma can be taken as an index of past exposure to asbestos in the population. (Lancet 1995 Mar 4;345(8949):535-9.). In fact, the incidence of mesothelioma in populations unexposed to asbestos is only 1-2 per million. (2)

Mesothelioma is usually malignant although it may be benign. Benign mesotheliomas are less frequent than malignant ones and they are not associated with asbestos exposure. (3) About 2/3 of all benign mesotheliomas occur in females. (3)

The majority of mesotheliomas are located in the pleura. (1) One study found that 72% of mesotheliomas were located in the pleura, 13% in the peritoneum and 11% in the lung. (1) This study also found that smoking was more prevalent in patients with mesothelioma of the peritoneum and lung compared with patients with mesothelioma of the pleura. (1)

Asbestos is divided into two main classes: the serpentines (chrysotile) and the amphiboles (crocidolite, amosite, anthophyllite, tremolite and actinolite). (2) The association between asbestos and both pleural and peritoneal mesothelioma has clearly been established since the 1960's. (2) Still, mesothelioma is an uncommon disease, even among asbestos-exposed populations. (2)

The carcinogenic effects of asbestos are related to the physical properties of size and shape of the fibers, and to their quantity. (2) In order for the fibers to cause mesothelioma, they must be less than 0.25 um in diameter and more than 5 um in length. (2) If the fiber is larger than 0.5 um in diameter and shorter than 5 um in length, then such fibers are not going to

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produce mesotheliomas. (1) It must be remembered that there is also a natural incidence of mesotheliomas of the pleura and the peritoneum in both humans and experimental animals. (1)

Some researchers have argued that it is only in very large quantities that chrysotile causes mesothelioma, however, others have suggested that it is only the amphibole contaminant in chrysotile (such as the tremolite in Canadian chrysotile deposits) that causes mesothelioma and that chrysotile itself is relatively harmless. (2) Still others have reached different conclusions. (2) The most recent literature suggests that uncontaminated chrysotile fibers will not cause mesotheliomas (although most chrysotile is contaminated with tremolite). (1)

In all occupationally exposed studies of mesotheliomas, none have occurred in patients where amphibole asbestos has never been used or detected. (2) Chrysotile asbestos has not been directly implicated in any cases of peritoneal mesothelioma although there is good evidence from lung studies that chrysotile alone can cause mesothelioma. (2) It is generally accepted that the numbers and length of fibers are much more relevant to the development of mesothelioma than particle counts or total dust collection levels. (2)

The relationship between exposure to asbestos and incidence of mesothelioma is uncertain, but there is a positive correlation between the dose of asbestos and the probability of contracting mesothelioma. (2) However, there have been isolated cases of mesothelioma in people whose only exposure appears to have been from buildings with asbestos insulation. (2)

Most reports of patients with mesothelioma contain a proportion of patients with no documented exposure to asbestos. However, later analysis of fiber counts in the patients' lungs showed the histories to be inaccurate. (2) Some mesotheliomas do occur in the absence of detectable fibers in the lungs and there are causes of mesothelioma other than asbestos. (2) That mesothelioma can be caused by nonoccupational exposure to mineral fibers is not in doubt and the highest documented incidence of mesothelioma in the world is in Karain in Turkey where naturally occurring erionite, a fibrous zeolite, has been used in building. (1) In addition, communities built around natural sources of tremolite have experienced incidence of the disease through nonoccupational exposure. (1) Erionite is considered the most potent mesothelioma producer followed by tremolite. (2) Although tremolite is a cause of mesothelioma, testing in animals has revealed that it was only the very fine tremolite (longer than 8.0 um and smaller than 0.25 um in diameter) that caused mesotheliomas. (1)

Mesothelioma may occur after brief or indirect exposure to asbestos. (2) Some studies have shown a longer latency period for peritoneal rather than pleural mesothelioma although others

J&J-0046951

have shown no difference. (2) In most reports, pleural mesothelioma remains the most prevalent with the pleural to peritoneal ratio at 3:1. (2) The high rate of peritoneal mesothelioma among insulation workers should be looked on as the exception. (2) An hereditary predisposition to mesothelioma has been suggested although most clustering of mesothelioma are linked to exposure to asbestos in the home. (2) Rare cases of mesothelioma may be related to therapeutic radiation or chronic pleuritis and fibrosis. (2)

Even with today's technology, there are still enormous problems in estimating actual levels of environmental exposure to asbestos.

Talc

Some studies made between asbestos and other fibers such as glass fibers, calcium phosphate, talc and kaolin show that they have similar effects to asbestos, but yet are not carcinogenic in humans. (2) However, in several mesothelioma patients studied, both talc fibers and tremolite were detected. (2) In fact, the majority of asbestos bodies isolated from the lungs of women in the general population have tremolite or anthophyllite and because tremolite and anthophyllite are known contaminants of talc, this data suggests that rare cases of mesothelioma among women with no other identifiable exposure might be related to exposure to cosmetic talc. ((2) at p. 215).

Possible Environmental Exposure to Asbestos

Environmental factors must be given the major consideration in the incidence of Mesothelioma. (1)

1. Cigarette manufacturers who used crocidolite for making filter-tips had extremely high cancer rates
2. Rochdale Textile Workers
3. Ontario Cement manufacturers
4. American insulations workers
5. Naval dockyard workers
6. Wittenoon crocidolite workers
7. Inhabitants of Karain, Turkey (erionite in local environment)
8. Asbestos
9. Household contact with asbestos workers
10. Living in the neighborhood of asbestos mines and factories (especially: Wittenoon, East London, Bohlig, Hain, Hamburg)
11. Areas with naturally occurring asbestos or asbestos-like deposits
12. Railroad workers
13. Manual laborers (plumbers, carpenters, electricians)
14. Vermiculite miners
15. Talc miners (tremolite asbestos is a known contaminant as some deposits of talc)
16. Mines in Turkey, Cyprus and Quebec

J&J-0046952

17. Auto mechanics (especially break repair)
18. School teachers (exposed to ceiling and pipe insulation over many years)

Some letters to the various journals also indicate that the following may be risk factors for the development of Mesothelioma:

1. Exposure to asbestos in dental practice (Lancet Vol 338, p. 696)
2. Clustering of Peritoneal Mesothelioma in the Midlands, UK (Lancet 1995 Jan 7;345:66-7)
3. Tremolite containing white-wash (Lancet 1987 Apr 25;1:965-7)
4. Diapers contaminated with asbestos (Lancet 1989 Apr 22;1:909-10)
5. Mesothelioma among sugar refinery workers (Lancet 1983 Dec 24-31;2:1503)
6. Chlorinated phenols (Lancet 1981 Jul 4;2:40)
7. Prenatal exposure to isoniazid (a medication) (Lancet 1980 Aug 16;2:362)
8. Mesothelioma among shoeworkers (Lancet 1980 Feb 2;1:259)

Other Possible Causes of Mesothelioma

1. Chronic inflammation and old pleural scars (may only be a risk for pleural mesothelioma)
2. Radiation treatment of Wilms' tumor in childhood
3. Erionite (a fibrous zeolite) used in building, especially in Karain in Turkey. (1)

Signs and Symptoms and Prognosis

Peritoneal mesothelioma usually presents late with dull pain, abdominal swelling, weight loss and ascites. (1) The outlook of malignant mesothelioma is poor with few patients living for 2 years; the time from diagnosis to death is usually about 6 months. (1) No chemotherapy has been of value and treatment remains symptomatic. (1)

J&J-0046953

1. The Mesothelial Cell and Mesothelioma, edited by Marie-Claude Jaurand, Jean Bignon, 1994
2. Malignant Mesothelioma, edited by Douglas W. Henderson, Keith B. Shilkin, Suzanne Le P. Langlois, Darrel Whitaker, 1992
3. Mesothelioma: Diagnosis and Management, edited by C. Frederick Kittle, 1987
4. Longo, D.L., Young, R.C.: Cosmetic Talc and Ovarian Cancer. Lancet 1979 Aug 18;2(8138):349-51
5. Philippe Chahinian, M.D., et al: Diffuse Malignant Mesothelioma. Ann Intern Med 1982 Jun;96(6 Pt 1):746-55

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EXHIBIT 17



Johnson & Johnson

New Brunswick, N. J.

April 15, 1969

Subject: ALTERNATE DOMESTIC TALC SOURCES

Project Code #101

Mr. W. H. Ashton:

Your inquiry of April 9th, 1969 addressed to Dr. G. Hildick-Smith has been referred to my attention for reply.

Over the years, I have reviewed the literature on the hazards relating to the inhalation of talc particles on several different occasions. In your memorandum, you indicate that Tremolite does have needle-type crystals and that our position has been that these could penetrate the skin and cause irritation. Actually, to the best of my knowledge, we have no factual information on this subject. It would seem logical that it could occur, although whether or not it would be of clinical significance would be conjectural.

We have been concerned to a much greater extent with regard to possible dangers relative to the inhalation of the talc with a spicule or needle-like crystalline structure as compared with the flat, platelet-type of crystalline structure. There are reports in the literature concerning talcosis which, as you know, is a form of pneumoconiosis attributed to the inhalation of talc. Reported studies have suggested that this does not occur in connection with the flat, platelet-type of talc, but does occur in connection with the spicule-type of crystalline structure characteristic of Tremolite. The reported instances have been extremely few but have, without exception, involved inhalations of high concentrations on an occupational basis of many years duration. Furthermore, we have occasionally received inquiries from various individuals, including General Johnson and several pediatricians, expressing concern over the possibility of the adverse effects on the lungs of babies or mothers who might inhale any substantial amounts of our talc formulations. In the past, we have replied to the effect that since our talc is essentially all of the platelet-type of crystalline structure, and is of a size which would not be likely to enter the pulmonary alveoli, we would not regard the usage of our powders as presenting any hazard. Obviously, if we do include Tremolite in more than unavoidable trace amounts, this sort of negation of such inquiries could no longer pertain.

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- 2 -

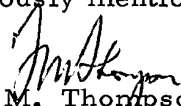
Mr. W. H. Ashton

April 15th, 1969

Upon various occasions we have discussed the possibility of carrying out studies on animals which might provide factual information with regard to whether or not variable exposures to talc suspended in the environmental atmosphere might be productive of fibrotic and/or inflammatory reactions in lungs. For a variety of reasons, these have never been carried out here.

Since pulmonary diseases, including inflammatory, fibroplastic, and neoplastic types, appear to be on the increase, it would seem to be prudent to limit any possible content of Tremolite in our powder formulations to an absolute minimum. To the best of my knowledge, we have never been faced with any litigation involving either skin or lung penetration by our talc formulations. Some years ago, we were faced with a more or less serious problem resulting from what we consider to have been an unjust accusation of danger due to the presence of a small amount of boric acid in our talc. This created such a furor that we were more or less compelled to remove boric acid from the formulation. It is conceivable that a similar situation might eventually arise if it became known that our talc formulations contained any significant amount of Tremolite. Since the usage of these products is so widespread, and the existence of pulmonary disease is increasing, it is not inconceivable that we could become involved in litigation in which pulmonary fibrosis or other changes might be rightfully or wrongfully attributed to inhalation of our powder formulations. It might be that someone in the Law Department should be consulted with regard to the defensibility of our position in the event that such a situation could ever arise.

It is my personal feeling that until we have at least substantial evidence, based on animal work, to the effect that the presence of Tremolite in our talc does not produce adverse effects, we should not extend its usage beyond an absolute minimum previously mentioned.


T. M. Thompson, M. D.

TMT:JAG

cc: Dr. R. A. Fuller
Dr. Gavin Hildick-Smith
Mr. W. J. Ryan
Dr. G. H. Lord
Dr. J. E. Willson
Dr. J. Bothwell

EXHIBIT 18

THE NEWARK MUSEUM

C. J. P. G.

February 10, 1992

Dr. Michele Refregier
Talc De Luzenac
B.P. 1162
3136 Toulouse Cedex
FRANCE

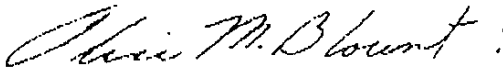
Dear Dr. Refregier:

Slim Thompson called recently about my paper in Environmental Health Perspectives. He said that you had been in contact with him. I am not trying to cause the talc industry any problems. I think lack of knowledge is a more serious problem. I have been told by the Industrial Hygienist that consults for this institution that all talc contains asbestos and we should not use any products containing talc.

The reason I have carried out this study is that I am asked to analyze very pure talcs for amphiboles. It takes a great deal of time to do 100 fields of view. Sometimes it is necessary to go to 1000 f.o.v. It is not fun! It seemed to me that there had to be an easier way, and to establish the validity of a method it is necessary to publish it for peer review. That is why the paper has appeared in print. Even if I use the old method, the new one is useful to give me an idea of how much effort will be needed to do the analysis to the accuracy required.

As I told Slim Thompson I have analyzed many talc samples (only a few reported) and often blind, in that I did not know their sources at the time the analyses were done. I do not believe I am misrepresenting these talcs. For individual deposits, the shape distribution and quantity remains fairly constant over time.

Sincerely yours,



Alice M. Blount

A Italian
B Willow Creek, MT
C Pfizer, MT
D North Carolina
E Alabama
F Willow Creek, MT
G Barretts, MT (floated in Alabama)
H Italian
I Windsor, VT - baby powder
J Vermont
K Vermont
L Vermont
M Vermont
N Steetley, Ontario
O Montana Talc Co., MT

*floated - one from
Whitman & Terry*

EXHIBIT 19

Johnson & Johnson
BABY PRODUCTS COMPANY

PISCATAWAY, N. J.
July 27, 1981

SUBJECT: JOHNSON'S Baby Powder -
Volume Contributions by Segment

M.S. Fink:

Attached is a chart detailing JOHNSON'S Baby Powder volume contributions by segment.

Methodology

1. Incidence: Adult female, male and female teen, children and infant incidences are based on the 1980 Omnibus Study. Adult male incidence is based upon the 1979 Gallup Study.
2. Frequency of Use: Frequency is based upon an average of the 1977 winter and summer seasonality studies, diary segment.
3. Consumption: Grams per usage was calculated based upon R&D inhalation studies. Adult and teen males: 6g.; adult and teen females: 4g.; children: 3g.; infants 2g.

While I believe that these calculations are the most accurate available, any improvements in the source data is desirable. In particular, I believe the grams per usage are most suspect because of the low number of participants in the study. If there is any way we can improve the quality of the consumption numbers, e.g., including a diary with a product test, which would not be of exorbitant cost, please suggest it.



Elliott S. Faxstein

ESF/bal

cc: M. McAllister (Y&R)
S.E. McGee
E.M. Schafer (Y&R)
S. Seltzer ✓
T. Yasuura

Attachment

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EXHIBIT 20

SUBJECT: JOHNSON'S* Baby Powder - Support
Project No. 2636.01

EXHIBIT I

TO: Dr. Paul La Rocca

Questionnaires regarding the usage of bar soaps and powder and the effects bar soaps have on facial skin were distributed at the Ortho building in Raritan and J & J Baby Products Company in Piscataway. The purpose of this survey was to obtain information on the powder users' application methods, areas of application and frequency of use. The data extracted from the one hundred and eighty-one questionnaires were tabulated and classified according to sex.

Results:

The data is summarized in the Tables.

Francina Bolden

Francina Bolden

jp

cc: Mr. J. Bogue
Mr. S. Falk
Dr. M. Goodman
Mr. C. LaRosa
Mr. P. Lonergan
Dr. J. Marshall
Ms. R. Merz
Dr. S. Seltzer
Dr. W. Sherman
File No. 2636.01

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1 of 1

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cc: Mr. N. M. Berlin
Mr. E. Faxstein
Mr. M. Vonarx
Mr. A. Marks
CIS

Johnson & Johnson
BABY PRODUCTS COMPANY

RARITAN, N.J. 08869

October 18, 1978

SUBJECT: JOHNSON'S BABY POWDER - General Support
Project: #2636.10

TO: Mr. S. Seiden

The purpose of this memorandum is to clarify and supplement JBP usage data submitted to you by Mr. Newman in his memoranda dated September 14 and 19.

Baby Products Company, R&D conducted a survey among employees to locate adult users of JBP, their method of application, frequency of application, and body areas powdered. The survey was conducted to identify prospective respondents for a usage study to be conducted at a motel by Clinical/Applied Research. A summary of this survey is attached, (Exhibit I).

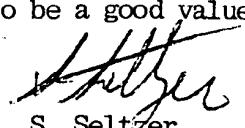
From this survey 60 panelists were identified as probably being "heavy users" of JBP and therefore were recruited for a home usage study. The purpose of this study was to quantify the amount of powder each subject used after bathing (to isolate the heaviest users), their frequency of usage, application method, and body areas powdered. The average amount of powder applied per application was 6.1 grams for males, 3.7 grams for females and 4.9 grams for the entire panel. A summary of this study is attached, (Exhibit II). These values represent our best estimate of consumption yet is probably biased on the high side.

Subsequently, ten males and ten females, who used the most powder and satisfied other protocol constraints were recruited for the first adult powdering study to be conducted at a motel. It was found that the men, women and combined panel used 13 grams, 8.2 grams, and 10.6 grams of JBP respectively per application.

A second "motel powdering study" was conducted in April, 1978 using twenty-four adult respondents. These adults were not company employees but were "typical" JBP users recruited from the outside. In this study the eleven women, thirteen men, and combined panel of twenty-four applied on the average 6.2 grams, 8.4 grams, and 7.4 grams respectively.

These two motel studies, therefore, involved 44 adults and the average usage per application after showering was 8.8 grams. Personally I believe that this value is too high for representing "average" consumption per application.

The average amount used per application by mothers on babies after bathing them was found to be 0.9 grams. This appears to be a good value for consumption predictions for this usage.


S. Seltzer

cm

Attachment (s)

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TABLE I

B. Powder Survey

Do you personally use JOHNSON'S Baby Powder? Yes 87% No 13% Base 180

Do you personally use any other brand of talc that is dispensed from a shaker top container? Yes 37% No 63% Base 181

How many times a week do you use the powder (any type)?

1 3% 2 4% 3 9% 4 4% 5 13% 6 3% 7 58%

More than 7 6% Base 154

How do you apply the powder? Base 207

- A. Shake powder directly from container onto your body 43%
- B. Shake powder in your hand and then rub it on your body 45%
- C. Shake powder on powder puff then dust powder on your body 11%
- D. Other 1 % Explain (shake powder into underwear; spray)

What area(s) do you use powder on? Base 541

To shoulders and arms 21%
 To back 17%
 To chest 23%
 To genital area 20%
 To feet and legs 17%
 To feet 1%
 To legs*
 To underarms 1%
 To neck*
 To face*

* Less than 1%

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Table III
Male
B. Powder Survey

Do you personally use JOHNSON'S Baby Powder? Yes 75% No 25% Base 48

Do you personally use any other brand of talc that is dispensed from a shaker top container? Yes 73% No 27% Base 48

How many times a week do you use the powder (any type)? Base 35
1 3% 2 3% 3 11% 4 3% 5 11% 6 3% 7 63% More than 7 3%

How do you apply the powder? Base 46

- A. Shake powder directly from container onto your body 40%
- B. Shake powder in your hand and then rub it on your body 55%
- C. Shake powder on powder puff then dust powder on your body 2%
- D. Other 2% Explain (Shake into underwear)

What area(s) do you use powder on? Base 114

To shoulders and arms	18%
To back	11%
To chest	23%
To genital area	28%
To feet and legs	18%
To face	1%
To neck	1%

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Table II
Female
B. Powder Survey

Do you personally use JOHNSON'S Baby Powder? Yes 92% No 8% Base 132

Do you personally use any other brand of talc that is dispensed from a shaker top container? Yes 41% No 59% Base 133

How many times a week do you use the powder (any time)? Base 119
1 3% 2 4% 3 8% 4 4% 5 13% 6 3% 7 57% More than 7 7%

How do you apply the powder? Base 160

- A. Shake powder directly from container onto your body 43%
- B. Shake powder in your hand and then rub it on your body 42%
- C. Shake powder on powder puff then dust powder on your body 14%
- D. Other 1% Explain (spray powder onto body)

What area(s) do you use powder on? Base 428

To shoulders and arms	22%
To back	18%
To chest	22%
To genital area	18%
To feet and legs	17%
To underarms	1%
To feet	1%
To legs*	
To neck*	

*less than 1%

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Johnson & Johnson
BABY PRODUCTS COMPANY

EXHIBIT II

RARITAN, N.J. 08869

December 15, 1976

SUBJECT: JOHNSON'S* Baby Powder - Support
JOHNSON'S* Baby Powder Home Usage Study
Project No. 2636.01

TO: Dr. Paul La Rocca

A sixty member in-house panel participated in a baby powder home usage study. These panelists were selected because they were heavy powder users, (for details see memo from F.B. to P.L., 12/8/76). The purpose of this study was to obtain information on the users' application methods, areas of application and frequency of daily use for a one-week period. Also, the average amount of JBP used for each application was calculated. The data extracted from the questionnaires were tabulated and classified as to sex and application methods.

Conclusion:

1. Males used significantly more talc than females. (Note: This may simply be a function of surface area.)
2. The method which used up the greatest amount of talc was application by hand.
3. On a ratio basis, males using a powder puff used more than twice the amount of powder as compared to females using a powder puff.

Results:

The results are presented in the Tables below.

TABLE I - USAGE PATTERNS OF JOHNSON'S BABY POWDER

	<u>Overall</u> <u>(base 60)</u>	<u>Female</u> <u>(base 49)</u>	<u>Male</u> <u>(base 11)</u>
A. <u>Application Method</u>			
Directly from Container	36%	40%	18% (2) *
From Hand	40%	41%	37% (4)
From Powder Puff	23%	19%	37% (4)
Other	1%	---	8% (1)
(*) % of Base			

	<u>Overall</u> <u>(base 60)</u>	<u>Female</u> <u>(base 49)</u>	<u>Male</u> <u>(base 11)</u>
B. Frequency of Use	11.1 times	11.3 times	10.9 times
C. Amount Used	4.9 grams	3.7 grams	6.1 grams

TABLE II - USE OF JBP AS RELATED TO APPLICATION METHODS AND SEX

<u>Application Method</u>	<u>Females</u>		<u>Males</u>	
	<u>Frequency</u> <u>of Use</u>	<u>Amount</u> <u>Used</u>	<u>Frequency</u> <u>of Use</u>	<u>Amount</u> <u>Used</u>
A. Directly from container	10.4 times	4.3 grams	9.5 times	5.4 grams
B. From Hand	11.6 times	4.4 grams	12.3 times	7.5 grams
C. From Powder Puff	12.0 times	2.5 grams	10.8 times	5.1 grams

Francina Bolden

Francina Bolden

jp

cc: Mr. J. Bogue
Mr. S. Falk
Dr. M. Goodman
Mr. J. Goren
Mr. C. LaRosa
Mr. P. Lonergan
Dr. J. Marshall
Ms. R. Merz
Dr. S. Seltzer
File No. 2636.01

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TUES. JULY 28, 1976				POWDER		DIAPER		DELIVERY		TOTAL MICROGRAMS		TOTAL		EXPOSURE		BABIES AGE & MOTHERS		MODE	
				TIME-SEC.		TIME-SEC.		GRAMS		COLLECTED - THREE TRIALS		LITERS		CONCENTRATION		OF POWDER APPLICATION			
														MG/M ³					
1.				8	60			0.72		0.5		2.52	0.20		3 MO.	POWDER ON HAND FIRST-THEN RUB ON BABY			
2.				8	47			1.06											
				10	44			0.80											
3.				6	20			0.29											
				8	22			0.31		0.1		1.10	0.09		9 MO.	DIRECTLY ON BABY			
				9	24			0.17											
4.				5	20			0.91											
				9	28			0.88		0.4		1.43	0.28		8 MO.	DIRECTLY ON BABY			
				10	38			0.75											
5.				4	47			0.50		0.2		2.37	0.08		9 MO.	DIRECTLY ON BABY - RUB ON SKIN			
				4	35			0.62											
				4	60			0.71											
6.				7	31			0.87		0.1		1.50	0.07		10 MO.	HAND FIRST			
				9	31			0.41											
				5	28			0.52											
7.				4	60			0.23		0.3		2.11	0.14		7 MO.	HAND FIRST			
				2	27			0.11											
				2	40			0.12											
8.				6	39			1.32		0.7		1.97	0.36		4 1/2 MO.	DIRECTLY ON BABY			
				4	34			1.24											
				3	45			1.62											
9.				4	30			0.95		0.3		1.47	0.20		14 MO.	DIRECTLY ON BABY			
				5	32			0.59											
				7	26			0.75											
10.				2	27			1.12		0.2		1.50	0.13		7 1/2 MO.	DIRECTLY ON BABY			
				2	32			1.37											
				2	32			1.34											
				7	32			0.34		0.3		1.65	0.10		1 MO.	DIRECTLY ON BABY			
				8	35			0.59											
				8	52			0.55											

Redacted:
Patient
Information

Special Talc Studies-Respirable Particle Measurements
Project #0503.01 Protocol #2636.01/06256.12

11.	4	24	0.74	0.3	1.30	0.23	7 MO. HAND FIRST
	4	26	0.69				
	3	28	0.48				
12.	5	36	0.91				2 MO. DIRECTLY ON BABY
	5	30	0.43	0.3	1.75	0.17	
	7	39	0.83				
13.	4	38	0.67				7 MO. DIRECTLY ON BABY
	3	31	0.38	0.2	1.65	0.12	
	5	30	0.49				
14.	4	27	1.45				15 MO. DIRECTLY ON BABY
	5	26	1.84	0.5	1.30	0.38	
	3	25	1.17				
3:00 PM JULY 28, 1976		TEMP. 75°F	RH. 48%				
15.	3	36	0.80				2 1/2 MO. APPLIED POWDER TO DIAPER ONLY
	4	22	0.54	0.3	1.60	0.19	
	6	38	0.77				
16.	3	23	0.53				12 MO. HAND FIRST
	3	19	0.40	0.2	1.08	0.18	
	2	23	0.76				
17.	4	54	1.46				8 1/2 MO. HAND FIRST
	4	34	2.07	0.4	2.17	0.18	
	5	42	1.40				4 MO. DIRECTLY ON BABY
18.	5	35	0.19				
	7	29	0.30	0.2	1.42	0.14	
	3	21	0.52				7 1/2 MO. DIRECTLY ON BABY
19.	3	25	0.39				
	5	24	0.33	0.2	1.22	0.16	
	4	24	0.28				

Redacted:
Patient
Information

Redacted:
Patient
Information

3:00 PM JULY 28, 1976

WEND. JULY 28, 1976

Special Talc Studies-Respirable Particle Measurements
Project #0503.01 Protocol #2636.01/06256.12

20.	4	22	0.93	0.2	1.07	7 wks. DIRECTLY ON BABY - ROB IN
	3	20	0.53			
	3	22	0.87			
21.	3	17	0.60			13 MO. DIRECTLY ON BABY
	2	20	0.60	0.3	0.88	
	2	16	0.70			
22.	3	26	1.04			10 MO. DIRECTLY ON BABY
	3	18	0.86	0.4	1.03	
	3	18	0.75		0.39	
23.	7	24	0.23			4 MO. DIRECTLY ON BABY
	3	23	0.30	0.2	1.28	
	3	30	0.30		0.16	
24.	6	42	2.10			14 MO. DIRECTLY ON BABY - INCLUDING CHEST AREA
	5	22	1.30	0.5	1.45	
	3	23	1.20		0.34	
3:30 PM JULY 28, 1976						
THUR. JULY 29, 1976						
25.	3	27	0.93			6 MO. DIRECTLY ON BABY
	3	26	1.48	0.3	1.35	
	3	28	1.08		0.22	
26.	4	17	0.50			7 MO. DIRECTLY ON BABY
	3	19	0.98	0.3	0.92	
	3	19	0.87		0.33	
27.	5	42	0.77			3 1/2 MO. DIRECTLY ON BABY - 2 APPLICATIONS
	4	38	0.97	0.4	2.0	
	4	39	0.74		0.20	
28.	6	26	0.21			8 1/2 MO. DIRECTLY ON BABY - 2 APPLICATIONS
	6	22	0.36	0.3	1.18	
	7	23	0.31		0.25	

Redacted:
Patient
Information

Redacted:
Patient
Information

Special Talc Studies-Respirable Particle Measurements
Project #0503.01 Protocol: #2636.01/06256.12

PAGE 4

29.	4	59	0.76	0.4	2.72	0.15	3 1/2 MO. DIRECTLY ON BABY
	4	54	0.66				
	4	50	0.98				
30.	9	43	0.25	0.3	2.00	0.15	3 wks. APPLIED TO HAND - RUB ON BABY - TWO APPLICATIONS
	5	36	0.25				
	6	42	0.36				
31.	3	28	0.39	0.2	1.60	0.13	7 1/2 MO. DIRECTLY ON BABY
	3	28	0.24				
	7	40	0.27				
32.	3	26	1.31	0.3	1.52	0.19	9 MO. DIRECTLY ON BABY
	4	32	1.19				
	9	35	0.92				
33.	5	25	1.03	0.4	1.35	0.29	14 MO. APPLIED ON BABY
	5	26	1.33				
	5	30	1.20				
34.	3	26	1.78	0.3	1.25	0.24	5 1/2 MO. APPLIED TO HAND FIRST - THEN RUB ON BABY
	2	24	1.55				
	2	25	1.92				
35.	4	27	0.67	0.2	1.93	0.16	6 1/2 MO. DIRECTLY ON BABY - 2 APPLICATIONS
	4	40	0.66				
	4	43	0.55				
2:30 PM JULY 29, 1976 TEMP. 75 R.H. 50%							
TEST CONDUCTED IN TESTING ROOM - BEAUTY SALON - BP RES. ORTHO.							
BACKGROUND CONCENTRATIONS:							
MONDAY JULY 26, 1976 - AFTERNOON - 0.017 μ g/L							
THURSDAY JULY 29, 1976 - AFTERNOON - 0.080 μ g/L							
(BACKGROUND COUNTS WERE NOT SUBTRACTED FROM THE ABOVE DATA.)							
R.S. RUSSELL 7/29/76							

JNJ000061180

Metadata

Custodian	Legacy 1	ORIGINAL
DateMod	7/29/1976 12:00 AM	ORIGINAL
DocExt	TIF	ORIGINAL
FileName	K000145556.TIF - K000145559.TIF	ORIGINAL
PgCount	4	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00004596	ORIGINAL

Protocol #2636.01/6429.12
January 1977
FINAL

EVALUATION FORM

Subject# 3

Subject Name Redacted: Patient Information

1) Length of showering time 5:47 minutes

2) Length of drying time (from end of shower to beginning of powdering) 3:15 minutes

3) Length of powdering time 1:39.3 ^{minutes}_{seconds}

4) Amount of powder (in grams) used per application: pre = 312.00 grams
post = 296.70 grams

Difference = 15.30 grams

5) Peak respirable concentration during powdering (in micrograms) 1/2 73.0 kg/L or mg/m

6) Total mass of respirable particles during powdering (in micrograms) 3.50 kg

7) Average concentration of exposure (in mg/m³/unit time) 2.12

Humidity = 18%

$$\begin{array}{r} 60 \overline{) 39.0} \\ \underline{360} \\ 30 \end{array}$$

$$\begin{array}{r} 165 \overline{) 350.0} \\ \underline{330} \\ 200 \\ \underline{165} \\ 35.0 \end{array}$$

JNJ000088176

Metadata

Custodian	Bill Ashton c/o Lorena Telofski	ORIGINAL
DocumentType	Physical	ORIGINAL
PgCount	2	ORIGINAL
Redacted	Yes	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00014475	ORIGINAL

Protocol #2636.01/6429.12
January 1977
FINAL

EVALUATION FORM

Subject# 11

Subject Name Redacted: Patient Information

- 1) Length of showering time 3' 43" minutes
- 2) Length of drying time (from end of shower to beginning of powdering) 1' 30" 3' 05" minutes
- 3) Length of powdering time 2' 21" seconds
- 4) Amount of powder (in grams) used per application: pre = 299.1 grams
post = 275.8 grams
Difference = 23.3 grams
- 5) Peak respirable concentration during powdering (in micrograms/L 2.7 kg/L or mg/M
- 6) Total mass of respirable particles during powdering (in micrograms) 4.8 kg
- 7) Average concentration of exposure (in mg/m³/unit time) 2.04

R.H. 4070

JNJ000088187

Metadata

Custodian	Bill Ashton c/o Lorena Telofski	ORIGINAL
DocumentType	Physical	ORIGINAL
PgCount	1	ORIGINAL
Redacted	Yes	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00014483	ORIGINAL

(3)

Protocol #2636.01/6429.12
January 1977
FINAL

SUBJECT QUESTIONNAIRE

(To be completed by J&J personnel prior to subject testing)

Subject # 31) Name Redacted: Patient Information2) Age 263) Height 5'5"4) Weight 125 lbs.5) Sex ☒ Female ☐ Male6) What is your normal brand of powder? ☒ JOHNSON'S Baby Powder
☐ Other: (list) _____7) How often do you usually powder? ☐ Less than once a day
☐ Approximately once a day
☒ More than once a day8) How do you normally apply the powder? ☐ Shake directly on body
☒ Shake into hand and rub on body
☐ Shake onto powder puff and dust on body
☐ Other: (List) _____9) When do you usually powder? ☒ In the morning
☐ Before Bed
☒ After bathing or showering
☐ Other: (list) _____10) How much of your body do you normally powder? ☒ Whole body
or
☐ Just selected areas: (list) _____11) What room do you usually powder in? ☐ Bathroom
☒ Bedroom
☐ Other: (list) _____

FOR JOHNSON & JOHNSON PERSONNEL:

Is subject fully qualified as per Protocol? Yes No

Signature _____ Date _____

JNJ000088212

Metadata

Custodian	Bill Ashton c/o Lorena Telofski	ORIGINAL
DocumentType	Physical	ORIGINAL
PgCount	1	ORIGINAL
Redacted	Yes	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00014501	ORIGINAL

Protocol #2636.01/6429.12

January 1977

FINAL

SUBJECT QUESTIONNAIRE

(To be completed by J&J personnel prior to subject testing)

Subject # 11**Redacted: Patient Information**

1) Name

2) Age 413) Height 5' 6 1/2"4) Weight 165

5) Sex

☐

Female

☒

Male

6) What is your normal brand of powder?

☒

JOHNSON'S Baby Powder

☐

Other: (list) _____

7) How often do you usually powder?

☐

Less than once a day

☒

Approximately once a day

☐

More than once a day

8) How do you normally apply the powder?

☒

Shake directly on body

☒

Shake into hand and rub on body

☐

Shake onto powder puff and dust on body

☐

Other: (List) _____

9) When do you usually powder?

☒

In the morning

☐

Before Bed

☐

After bathing or showering

☐

Other: (list) _____

10) How much of your body do you normally powder?

☒

Whole body

or

☐

Just selected areas: (list) _____

11) What room do you usually powder in?

☒

Bathroom

☐

Bedroom

☐

Other: (list) _____

FOR JOHNSON & JOHNSON PERSONNEL:

Is subject fully qualified as per Protocol?

Yes

No

Signature _____

Date _____

JNJ000088218

Metadata

Custodian	Bill Ashton c/o Lorena Telofski	ORIGINAL
DocumentType	Physical	ORIGINAL
PgCount	1	ORIGINAL
Redacted	Yes	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00014507	ORIGINAL

Johnson & Johnson

New Brunswick, N. J.

October 13, 1971

Subject: Johnson's* Baby Powder
Physical Data for Claim Support

Mr. K.R. Edwards

In response to your inquiry about physical data that could support the claims listed in your memorandum of October 6, 1971, following are my comments:

1. "Soft-pure-silky powder made from the finest talc known to Science."

"Soft" and "silky" are cosmetic claims and hence do not need physical data to support them. As far as "pure and finest talc known to Science" is concerned, it appears that comparative data pertaining to trace impurities in J&J talc and other competitive talcs may be necessary to support the above claim. You should refer to Dr. Sundberg for such data. We have conducted no studies that would support this claim.

2. "Dust powder liberally on the diaper itself for extra protection."

The claim is supportable on the basis of moisture absorbing capacity of baby powder and its ability to adsorb potential irritants such as ammonia from urine.

For substantiating moisture absorbing capacity of Johnson's* Baby Powder, sweat absorption studies reported by Mr. S.H. Seltzer (9/10/1970) can be used.

CENTRAL FILE

APR 10 1973

RECEIVED

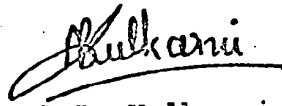
-2-

Capacity of Johnson's* Baby Powder to adsorb ammonia can be demonstrated from the results of the study conducted for the evaluation of deodorization characteristics of talc, starch and Johnson's* Baby Powder (8/5/1971) reported by A.B. Kulkarni.

3. "Johnson's* Baby Powder gets at the moisture your towel leaves behind."

The claim can be supported on the basis of moisture absorption capacity of Johnson's* Baby Powder. The support data is identical as for the first part of the previous claim.

The copies of the two pertinent reports are attached. If you have further questions, please let me know.


A.B. Kulkarni

jm

cc: Dr. L.L. Kaplan
Mr. J.T. Dettre
Mr. R.J. Howland
Dr. H.H. Hutchins
Mr. A.M. Marks ✓
Mr. A. Meares
Dr. S. Sawchuk
Mr. W.H. Steinberg

JNJ000236015

Metadata

Custodian	Legacy 1	ORIGINAL
DocumentType	Physical	ORIGINAL
PgCount	2	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00030339	ORIGINAL

Protocol #2636.01/6429.12
January 1977
FINAL

I. TITLE

Assessment of the amount of respirable talc particles (JOHNSON'S Baby Powder #499) available for inhalation to adults during post showering whole body powdering.

II. INVESTIGATOR

Robert S. Russell

III. SITE OF STUDY:

Gateway Motel
119 U.S. Highway #202
Raritan, N. J. 08869

IV. INSTITUTIONAL REVIEW COMMITTEE:

Not applicable.

V. BACKGROUND AND RATIONALE

In 1975, Battelle Northwest Laboratories demonstrated that chronic inhalation exposure of hamsters to prolonged, high concentrations of JOHNSON'S Baby Powder caused no adverse changes. In 1976, human studies were conducted by Baby Products Company to assess the amount of talc respirables (JOHNSON'S Baby Powder #499) available for inhalation to mothers and infants during normal diapering procedures (Protocols #2636.01/4303.12, #2636.01/4303.13 and #2636.01/6256.12).

Data from a 1976 study indicate that at least 50% of men and women use powder from a shakertop container at least once a day all year. Powder is most frequently used in the bathroom (84%) after bathing or showering (60%) and although 67% of the above apply powder only to selected areas, 33% powder their whole bodies. A recent survey of over 180 people confirmed that 52% use powder on a daily basis with the largest majority (45%) shaking the powder into their hands and rubbing it directly on their bodies. A 60 member in-house study showed that approximately 6 grams of powder were used when powder was applied to the hand before application to the body. Employing the most common usage patterns listed above, an adult study assessing the amount of talc particles available for inhalation with whole body powdering following showering will be conducted.

Protocol #2636.01/6429.12
January 1977
FINAL

VI. OBJECTIVES

This study has two objectives: determination of, a) the amount of powder applied and the whole body powdering time for each subject participating in the study, and b) the peak respirable concentration of JOHNSON'S Baby Powder #499 at the level of the subject's nose as well as the quantity of respirable powder available to the subject during the powdering procedure.

VII. DESIGN

This will be a controlled, single celled, non-crossover study involving 10 men and 10 women.

VIII. SUBJECT DEFINITION

Ten men and ten women who normally shake JOHNSON'S Baby Powder onto their hands and then rub it onto their whole bodies after daily showering will qualify as study participants.

IX. TREATMENT DEFINITION

The twenty qualified subjects (10 men and 10 women) will be asked to shower in their normal manner, towel dry and apply powder to their whole bodies by shaking the powder into their hands and then rubbing it on their bodies. After showering at least 5 minutes, subjects will then powder in a small adjacent ante-room. This will help assure a constant environment for the equipment which is sensitive to high levels of humidity as well as temperature and humidity fluctuations which could occur with the opening and closing of the bathroom door.

X. CONCURRENT MEASUREMENTS:

A Thermo Systems 3210 A detection/recording unit will be used during the powdering regimen. Samples will be collected through a 10 mm nylon cyclone pre-filter and delivered to the 3210 A mass monitor through a 3-foot length of Eastman 1/4" poly-flo tubing. Airflow will be maintained at 1.7 liters/minute.

The cyclone head will be attached to a "headband" and positioned at the level of the subject's nose. Using a stopwatch, the subject will time the duration of the powdering procedure from the first shake of the canister to the moment it is replaced on the counter top. The Thermo Systems operator is to keep thorough records of the amount of JOHNSON'S Baby Powder the subject is exposed to on both a rate (ug/l) and absolute (ug) basis for each whole body dusting procedure.

Protocol #2636.01/6429.12
January 1977
FINAL

XI. CLINICAL AND LABORATORY MEASUREMENT:

The following data will be collected on each subject:

- 1) Data from subject questionnaire -
 - a) Personal statistics
 - b) Normal brand of powder
 - c) Frequency of powder use
 - d) Mode of powder application
 - e) Time of day when powdering (situation)
 - f) Parts of body powdered
 - g) Room where powdering occurs
- 2) Data from evaluation form -
 - a) Length of showering - time in minutes
 - b) Length of drying - time in minutes
 - c) Length of powdering - time in seconds
 - d) Peak respirables concentration in micrograms
 - e) Total mass of respirables during powdering in micrograms
 - f) Average concentration of exposure in $\text{mg}/\text{m}^3/\text{unit time}$

XII. CRITERIA FOR EFFICACY AND SAFETY:

This is a measurement study - efficacy and safety are not criteria.

XIII. STATISTICAL PROCEDURES:

Appropriate non-parametric studies and comparisons to previous dusting studies on infants (Protocols #2636.01/4303.12, 2636.01/4303.13 and 2636.01/6256.12) will be carried out.

XIV. ADMINISTRATIVE PROCEDURES:

A. Test Conduct and Setting

- 1) The study will be conducted at the Gateway Motel on the Somerville, N.J. circle. The experiment will be carried out in a room capable of maintaining a constant humidity and temperature, with the instruments equilibrated at that temperature and humidity prior to initiation of the experiment.

Protocol #2636.01/6429.12
January 1977
FINAL

XIV. ADMINISTRATIVE PROCEDURES (Cont.)

- 2) Adequate supplies (20 canisters) of one lot of 9 oz. JOHNSON'S Baby Powder #499 will be available with note of the lot number being made.
- 3) There must be adequate setting for privacy with a screened-off area for disrobing and dressing, a secure place for valuables (purses, wallets, etc.) and a monitor of the same sex to take readings and adjust equipment. Every effort should be made to create a natural showering and powdering situation.

B. Forms and notations

- 1) Subject questionnaire and Evaluation Form
- 2) Laboratory notebook recording of parameters outlined under Section XI.

XI. SPECIAL INSTRUCTIONS:

None

XVI. SIGNATURES:

Robert S. Russell	Date
Investigator	

William T. Sherman	Date
Manager-Biomedical Evaluations	

JOHNSON & JOHNSON
Baby Products Company
Medical & Regulatory Affairs
Raritan, N. J. 08869

Ruth D. Merz	Date
Clinical Research Associate	

SUBJECT QUESTIONNAIRE

(To be completed by J&J personnel prior to subject testing)

Subject # _____

1) Name _____

2) Age _____

3) Height _____

4) Weight _____

5) Sex ☐ Female ☐ Male

6) What is your normal brand of powder? ☐ JOHNSON'S Baby Powder
☐ Other: (list) _____

7) How often do you usually powder? ☐ Less than once a day
☐ Approximately once a day
☐ More than once a day

8) How do you normally apply the powder? ☐ Shake directly on body
☐ Shake into hand and rub on body
☐ Shake onto powder puff and dust on body
☐ Other: (List) _____

9) When do you usually powder? ☐ In the morning
☐ Before Bed
☐ After bathing or showering
☐ Other: (list) _____

10) How much of your body do you normally powder? ☐ Whole body
or
☐ Just selected areas: (list) _____

11) What room do you usually powder in? ☐ Bathroom
☐ Bedroom
☐ Other: (list) _____

FOR JOHNSON & JOHNSON PERSONNEL:

Is subject fully qualified as per Protocol? Yes No

Signature _____

Date _____

Protocol #2636.01/6429.12
January 1977
FINAL

EVALUATION FORM

Subject# _____

Subject Name _____

- 1) Length of showering time _____ minutes
- 2) Length of drying time (from end of shower
to beginning of powdering) _____ minutes
- 3) Length of powdering time _____ seconds
- 4) Amount of powder (in grams) used per application: pre = _____ grams
post = _____ grams
Difference = _____ grams
- 5) Peak respirable concentration during powdering (in micrograms) _____ /g
- 6) Total mass of respirable particles during powdering (in micrograms) _____ /g
- 7) Average concentration of exposure (in mg/m³/unit time) _____

JNJ000251289

Metadata

Custodian	Legacy 1	ORIGINAL
DocumentType	Physical	ORIGINAL
PgCount	6	ORIGINAL
Trial_Ex_Number	Pltf_JNJ_00034957	ORIGINAL

EXHIBIT 21

Johnson & Johnson

BABY PRODUCTS COMPANY

RARITAN, N.J. 08869

February 8, 1977

SUBJECT: Special Talc Studies - JBP
Respirable Particle Measurements During Adult Usage
Project #0503.01

PROTOCOL: Adult Powdering Protocol
#2636.01/6429.12

TITLE: Assessment of the Amount of Respirable Particles Available
for Inhalation During After Shower Body Powdering with
JOHNSON'S Baby Powder

TO: Mr. G. Lee

Ten adult female and ten adult male users of JBP were tested. The amount of respirable airborne particles, to which they were exposed during their normal after shower body powdering procedure, was measured.

The measurement was accomplished by sampling the air with a 10mm nylon cyclone immediately adjacent to the nasal openings during the actual powdering procedure. The mass of respirable particles collected by the cyclone was measured with a Thermo Systems 3210A quartz crystal mass monitor. The summarized data is presented below. Detail data may be found in the attached appendix.

A. Powdering Time (Exposure)

This is the time during which the subject applied the powder. It is also the time during which the respirable particle concentration measurement was made, e.g., the exposure time.

B. Powder Used

This is the weight of powder in grams the subject used from a full 9 oz. container of JBP code 240G.

Special Talc Studies - JBP
Adult Powdering Protocol

G. Lee

C. Average Exposure - Concentration Mg/M^3

This is the average concentration of respirable airborne particles to which the subject was exposed during powdering. It is obtained by dividing the mass of the respirable particles collected, by the volume of air sampled.

D. Peak Exposure - Concentration Mg/M^3

This is the highest average concentration to which the subject was exposed during any 10 sec. interval of the total exposure time.

Summarized Data

	<u>10 WOMEN</u>		<u>10 MEN</u>		<u>COMBINED</u>	
	<u>Average</u>	<u>Median</u>	<u>Average</u>	<u>Median</u>	<u>Average</u>	<u>Median</u>
Powdering Time	87.1	95.0	72.2	58.0	79.7	87.0
Exposure-Seconds						
Powder Used-Grams	8.16	7.85	13.02	7.20	10.59	7.85
Average Exposure	1.27	1.10	1.94	1.29	1.61	1.14
Concentration Mg/M^3						
Peak Exposure	--*	<u>2.00</u>	--	<u>1.67</u>	--	<u>2.00</u>
Concentration Mg/M^3						

*Averages not possible since some readings exceeded the range maximum of $3.00 \text{ mg}/\text{M}^3$ on the TSI recorder.

Discussion of Data

1. The average adult exposure concentration ($1.61 \text{ mg}/\text{M}^3$) is about 8 times higher than that found for babies ($0.21 \text{ mg}/\text{M}^3$) during normal powdering and diapering. Also, the adults were exposed for a longer time period; 80 seconds as compared to 4.6 seconds for the babies.

Special Talc Studies - JBP
Adult Powdering Protocol

G. Lee

2. The men tended to powder in a shorter time, but used more powder and created higher airborne respirable particle concentrations, on an average, than the women.

A copy of this report is being submitted to J. Sivertson, with the request that he use the attached detail data to calculate estimates of the safety factors in the Battelle Studies when projected to adult usage.

R. S. Russell
R. S. Russell

/by
attachment - Appendix I

cc: W. H. Ashton
J. R. Marshall
R. Merz
S. Seltzer
B. Semple
W. Sherman
J. Sivertson - attachment - Appendix I & II
W. Waggoner
A. Kulkarni - Health Care - attachment - Appendix I & II

EXHIBIT 22

NIOSH Report

Note: This distribution list also
received Reference #6.

RoA_16391

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Preliminary Report

FIBER EXPOSURE
DURING
USE OF BABY POWDERS.

RECEIVED
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Tests Conducted By:

John M. Dement
Harold J. Mangin
Kenneth M. Wallingford
Patrick J. Shuler
Ralph D. Zumwalde

Report Prepared By:

John M. Dement
Patrick J. Shuler
Ralph D. Zumwalde

Environmental Investigations Branch
Division of Field Studies and Clinical Investigations
NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH
1014 Broadway
Cincinnati, Ohio 45202

July, 1972

RoA 16393

ABSTRACT

A number of investigators have found "asbestos bodies" in the lungs of persons who were not occupationally exposed to asbestos.¹ The use of talcum powders containing asbestos-type materials has been postulated as a possible source of these fibers.

In 1968, the U.S. Public Health Service examined 22 talcum products for the presence of fibrous materials and found a range of 8% and 22% by particle count.² No attempt was made to determine fiber exposure during the use of these products. In the present study nine commercially available baby powders were investigated for fiber and free SiO_2 content and a test conducted on each of these products to determine fiber exposure to both mother and baby during dusting. It was found that fiber concentrations reached a maximum during the first thirty seconds of powder use and diminished rapidly with time. Concentrations were found to range between 0-18 fibers greater than five microns in length per milliliter of air in the first thirty seconds of powder use. The percentage of free SiO_2 in the powders was found to range from 0.05% to 2.03% by weight. Further analysis of these powders will be necessary in order to properly identify the fibers which were observed.

INTRODUCTION

Concern about the presence of "asbestos bodies" in the lungs of persons not occupationally exposed to asbestos has brought about many studies to determine other possible modes of exposure. Microscopic examination of many commercially available talcum powders has revealed various quantities of what appears to be asbestos-type fibers.

Talc is a magnesium-silicate material belonging to the serpentine group. Other members of this group include picrolite and chrysotile. Talc is usually found with varying amounts of other mineral impurities such as tremolite, chlorite, magnetite, serpentine, dolomite, quartz, and in some cases chrysotile or anthophyllite. The impurities of major concern are chrysotile, anthophyllite, and tremolite since these are considered asbestos materials.

In order to investigate the presence of fibers in talcum products, nine commercially available baby powders were obtained. Bulk samples of each of the powders were examined for the presence of fibers and free SiO_2 . Two of these products were found to contain corn starch with no talc. A test was conducted with each of the remaining seven samples to determine potential baby and mother fiber exposure during a typical diaper change.

METHODS

A total of nine (9) baby powders were purchased from Walgreen Drugs on March 28, 1972 for these experiments. These powders are listed in Table 1.

These powders have been tested by three different methods to determine the fiber content of both the bulk powder and the airborne fraction. Free SiO_2 determinations were also made on each of the powder bulk samples.⁸

In the first experiment an attempt was made to estimate the number of fibers per milligram in each bulk sample.⁵ A known weight (0.1g) of each talcum sample was used. Each sample was mixed in 50 ml of distilled water and stirred with a magnetic stirrer for five minutes at a constant slow speed so as not to alter the physical characteristics of the particles. The sample was then filtered through an 0.8 μm Millipore AA cellulose-ester filter. An additional 20 ml of distilled water was used to wash the sample from the sides of the syphon. Filters were allowed to dry and a fiber count was performed in the standard manner used for analyzing samples for asbestos fibers.⁶

The second experiment which used the seven (7) talcum powders which had been analyzed in the first experiment and diagnosed as having varying amounts of fibrous talc,⁷ simulated a hypothetical exposure that might exist to a mother and child while changing a diaper.

The following is a step by step procedure used for each of these samples:

1. A doll was used in the experiment to simulate a baby. It was placed on its back with a diaper placed under it. (doll was 24" long)

2. A sample was collected at the breathing zone of the baby. This was accomplished with the use of a 37mm AA filter enclosed in a Millipore sampling head with a flow rate of 1.7 lpm. The distance between the breathing zone of the baby and the dusting of the talcum was about ten inches.

3. An identical sampling system was used on the individual who was putting the diaper on the doll. The sample was again collected at the breathing zone with a flow rate of 1.7 lpm.

4. Each talcum was dusted on the doll for a period of 15 seconds. The talcum was spread over the diaper area and then the diaper was pinned, achieving a total sampling time of two (2) minutes.

5. After using each sample the doll was washed and a clean diaper used. The experiment was performed in a test chamber (dimensions 4' x 5'10" x 7'7") with two sealed windows and a double door to insure that the area would be draft free. A sketch of the layout of the apparatus in the test chamber is shown in Figure 1.

6. A control filter was sampled in each location before each talcum was tested.

7. All samples were analyzed in the same manner specified for airborne asbestos samples.⁶ A hundred fields were counted since there was so few fibers on the filters due to the very short sampling time.

In the third and final experiment, an attempt was made again to simulate a hypothetical fiber exposure that might exist to a mother and child while changing a diaper. Modifications in experimental procedure were made from the previous test in all seven fibrous talcs tested. The modifications were as follows:

1. The flow rate was increased to 7.4 lpm in order to have a

larger volume of sample so that there would be more fibers on the filter and make the analysis by optically counting under phase contrast microscopy more accurate.

2. After each talcum was dusted on the doll, the powder was spread around until a total of one minute elapsed. The doll was undisturbed during the second minute of the test. In the third and final minute of the test the diaper was pinned on the doll.

3. A three minute sample was taken in the breathing zone of both the "baby" and "mother" to obtain an average airborne concentration for the total time period for each dusting test. In addition to the long running samples, filters were attached simultaneously for short intervals to a sampling site on the other side of the breathing zone of both "mother" and "baby" to obtain peak concentrations. The time intervals used were 0-30 seconds, 30-60 seconds, 60-120 seconds, and 120-180 seconds. With this procedure ten samples were taken for each dusting trial.

4. The above procedure was done for both a 15 second and a 5 second dusting time on the doll. Since seven powders were tested, a total of 14 dusting tests were performed in the third experiment.

Each of the seven powders which were found to contain talc were analyzed for free SiO_2 using the colorimetric method of Talvitie.⁸

RESULTS AND CONCLUSIONS

Table 2 contains the results of the second experiment in which the average exposure to both mother and baby over a two minute period for a 15 second dusting from each of the seven powders was determined. The highest concentration resulted from the use of powder number 2. All the powders produced similar concentrations of airborne fibers.

Tables 3 and 4 show the exposure levels which were obtained for both mother and baby for the 5 and 15 second dustings during the final experiment. Also shown in these tables are the results of the fiber counts on the bulk samples done in the first experiment. From these tables it is obvious that fiber levels were highest during the first 30 seconds in which the dusting took place and dropped off sharply during the rest of the diaper change. In a few instances, concentrations rose again in the third minute in which the diaper was placed on the baby indicating that some of the fibers which had settled became airborne during this motion. All powders which were tested showed some fiber exposure during the 15 second dusting; however, powders 4, 6, and 9 showed very few fibers during the 5 second dusting. For these powders only the three minute average is given in the tables. Some free SiO_2 was found in each of the seven powders containing talc.

From our analysis it appears that significant fiber exposures may occur during dusting of some baby powders (numbers 2, 7, and 9). It is

realistic to assume that most mothers would powder their babies for a period between 5 and 15 seconds, therefore, some exposure between the results found during these dusting periods would occur. If we assume that most infants need changing between 10 and 15 times per day, a cumulative exposure of 30 to 45 minutes per day would occur.

It must be emphasized that no positive identification of the fibers found in these powders has been made since the phase contrast microscope is not well suited for this purpose. Further work is needed to provide positive identification as to the nature of the fibers present.

RECOMMENDATIONS FOR FURTHER STUDIES

The work which has been carried out to date indicates possible asbestos fiber contamination of commercial baby powders. The method used to make this determination was phase contrast microscopy at 430X magnification. Further studies are indicated to provide more positive determination of the types of fibers present. The following are recommendations for further study:

1. Electron microscopy should be used to study the morphology of the fibers present. Chrysotile and tremolite should lend themselves to identification by this method.

2. Dispersion staining techniques should be investigated as possible means of identification of larger fibers ($>1\mu$). This method has been described by Julian and McCrone.³

3. Although X-ray diffraction methods are not sensitive to small percentages of asbestos in any sample (5% - 10%), it may be possible to concentrate fibers by a density gradient method.⁴ With this method it may be possible to give a semi-quantitative estimate of the different fibers present.

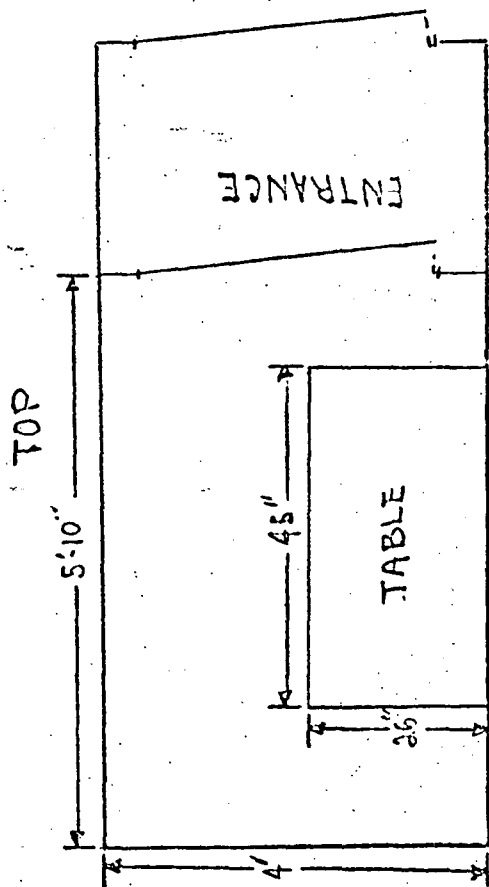
4. The electron microprobe should be investigated as a means of fiber identification. This method is of special use when relatively small amounts of material are present.⁴

5. Differential Thermal Analysis (DTA) should be investigated as a possible means of identifying and determining the weight percent of chrysotile, tremolite, and other impurities.

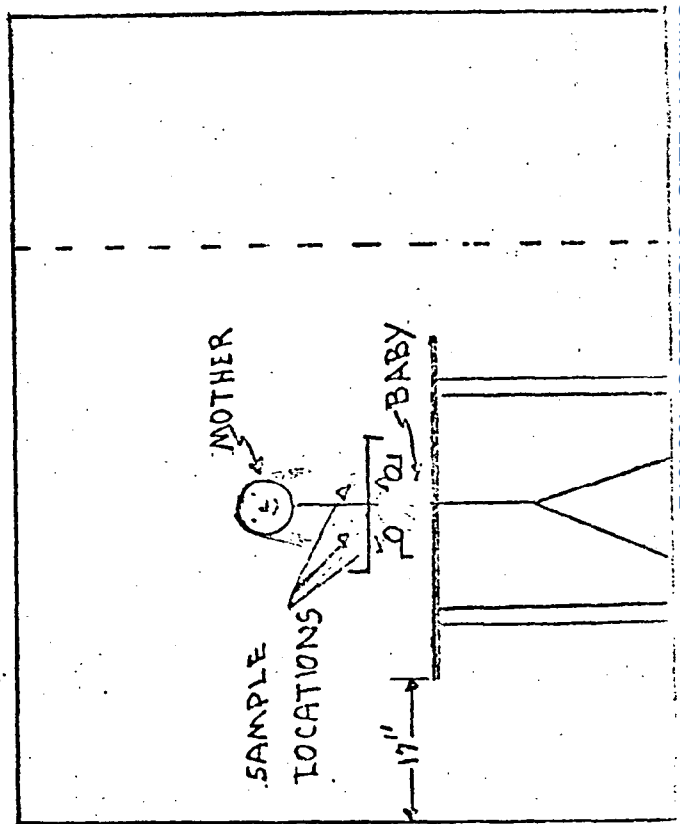
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FIGURE 1 SCHEMATIC OF TEST CHAMBER



SIDE



END

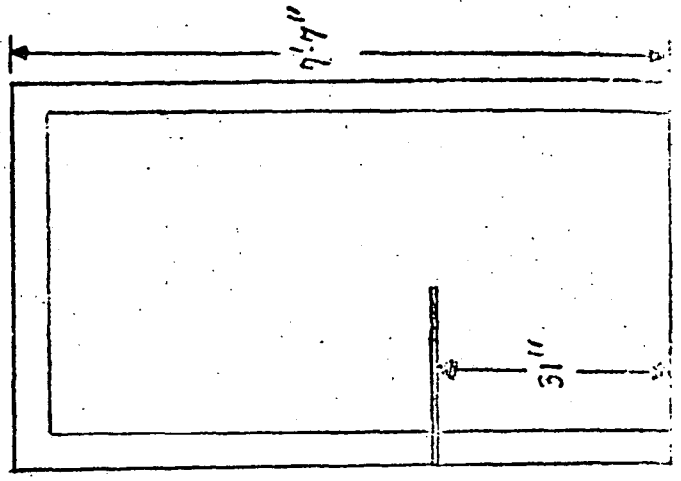


TABLE 1

BABY POWDER PURCHASED

FROM

WALGREEN DRUGS

March 28, 1972

<u>Order #</u>	<u>Brand Name</u>	<u>Manufacturer</u>	<u>Ingredients</u>	<u>Net Wt.</u>	<u>Price</u>
1	Vaseline Intensive Care	Cheesbrough Ponds Inc. New York, New York 10017	Petroleum Jelly, Talc	14 oz	\$1.03
2	Crib Age	Walgreen Co. Distributor Chicago, Ill. 60646	Talc	14 oz	.68
3	Mexsana	Plough, Inc. Memphis, Tenn. 38101	Cornstarch, Hexachlorophene, Kaolin, Zinc Oxide, Oil of Eucalyptus & Camphor	6.25oz	1.22
4	Johnson & Johnson Medicated Powder	Johnson & Johnson New Brunswick, N.J. 08903	Hexachlorophene, Talc	5.5 oz	.78
5	Diaparene	Breon Laboratories, Inc. New York, New York 10016 Subs. of Sterling Drug	Methylbenzethonium chloride, Cornstarch & Magnesium carbonate	9 oz	.94
6	Johnson Baby Powder	Johnson & Johnson New Brunswick, N.J. 08903	Talc	9 oz	.76
7	Baby Magic	Mennen Company Morristown, N.J.	Methylbenzethonium Chloride, Pure Talc	9 oz	.61
8	Desitin	Chas. Pfizer & Co., Inc. Leeming Division New York, New York 10017	Bi-endazel (Hexachlorophene, chloroxylenol) and Talcum	6.5 oz	.87
9	Caldesene	Pennwalt Corporation Rochester, N.Y. 14623	Calcium Undecylenate	2 oz	.94

TABLE 2

FIBER EXPOSURE

TO BOTH

MOTHER AND BABY DURING 15 SECOND DUSTING

(SECOND TALCUM POWDER EXPERIMENT)

Powder	Subject	Sample Time (Min)	FIBERS >5 μ m IN LENGTH	
			Average Fibers/Field	Conc. Fibers/cc
#1, Vaseline Intensive Care	Mother	2.0	.06	2.7
	Baby	2.0	.05	2.2
#2, Crib Age Powder	Mother	2.0	.10	4.5
	Baby	2.0	.12	5.4
#4, Johnson & Johnson Medicated	Mother	2.0	.04	1.8
	Baby	2.0	.02	0.9
#6, Johnson Baby Powder	Mother	2.0	.05	2.2
	Baby	2.0	.04	1.8
#7, Baby Magic	Mother	2.0	.05	2.2
	Baby	2.0	.04	1.8
#8, Desitin	Mother	2.0	.07	3.1
	Baby	2.0	.05	2.2
#9, Caldesene	Mother	2.0	.06	2.7
	Baby	2.0	.05	2.2

TABLE 3

MOTHER'S EXPOSURES DURING DIAPER CHANGE

FIBERS $\geq 5\mu\text{m}$ IN LENGTH PER MILLILITER

Powder	Bulk Sample Fibers 5 Per Mg	5 Second Dusting					15 Second Dusting				
		0-30*	30-60	60-120	120-180	0-3 Min	0-30	30-60	60-120	120-180	0-3 Min
Vaseline Intensive Care	19,000	2.9	2.0	0.5	0.2	0.6	2.9	1.2	0.8	2.5	0.6
Crib Age Powder	28,000	2.5	1.3	0.6	0.8	1.2	7.9	2.1	2.7	1.7	2.5
Johnson & Johnson Medicated	10,000	Few Fibers Seen				**	0.4	0.9	0.4	0.2	0.6
Johnson Baby Powder	18,000	Few Fibers Seen				0.3	3.3	1.2	0.8	2.3	0.6
Baby Magic	41,000	4.1	2.9	1.9	0.6	2.1	18.2	12.8	2.3	3.3	2.5
Desitin	14,000	Few Fibers Seen				0.1	1.7	1.7	1.2	1.2	0.6
Caldesene	-----	2.1	2.1	1.2	1.0	0.8	1.0	4.9	1.7	0.4	2.5
Diapers 3 & 5 were corn starch											

* Sample period in seconds

** Some fibers present; however, quantitative analysis not justified

TABLE 4

BABY'S EXPOSURES DURING DIAPER CHANGE
 FIBERS $\geq 5\mu$ m IN LENGTH PER MILLILITER

Powder	Bulk Sample Fibers $>5\mu$ Per Mg	5 Second Dusting					15 Second Dusting				
		0-30*	30-60	60-120	120-180	0-3 Min	0-30	30-60	60-120	120-180	0-3 Min
Vaseline Intensive Care	19,000	2.0	1.2	0.6	0.0	0.6	5.0	2.1	1.7	0.4	0.6
Crib Age Powder	28,000	2.8	1.2	1.4	0.8	0.5	12.0	4.5	2.9	0.8	2.3
Johnson & Johnson Medicated	10,000	Few Fibers Seen				**	1.2	0.8	0.2	0.0	0.5
Johnson Baby Powder	18,000	Few Fibers Seen				0.3	3.3	1.7	0.8	0.8	0.2
Baby Magic	41,000	5.4	2.9	1.4	0.8	0.9	15.7	12.8	0.8	3.5	3.0
Desitin	14,000	Few Fibers Seen				0.3	2.9	1.7	1.4	0.6	0.6
Caldesene	-----	3.3	2.5	1.2	1.0	0.6	8.3	8.3	1.7	1.7	4.3
Powers 3 & 5 were corn starch											

* Sample period in seconds

** Some fibers present; however, quantitative analysis not justified

TABLE 5

PERCENT FREE SiO_2 CONTENT BY WEIGHT
OF
COMMERCIAL BABY POWDERS TESTED

<i>Powder #</i>	<i>Powder Name</i>	<i>% Free SiO_2 By Weight</i>
1	Vaseline Intensive Care	0.05
2	Crib Age Powder	2.03
4	Johnson & Johnson Medicated	0.81
6	Johnson Baby Powder	0.82
7	Baby Magic	1.68
8	Desitin	0.70
9	Caldesene	0.20

EXHIBIT 23

Lewin Samples of Shower to Shower Aug 10, 1972

About 1 fiber or rod/needle every 500 particles

Approx. $\frac{1}{3}$ of these are tremolite - $\frac{2}{3}$ rolled talc or talc shards.

Several fibers observed which appear to be non mineralic (hairs or artificial fibers)

No crinkled fibers or small bundles of chrysotile asbestos were observed.

Sample mounted in Cargilles 1-60 n oil - under cover glass -

Observations made in plane polarized light, crossed nicols, and Nomarski Interference contrast - magnification 250 to 1000x.

Fiber resolution about $5\mu \times 0.2\mu$

Particle density: About 125,000 particles in an 18mm square area.

Zeiss Universal Stand 47-16-89

10X wide angle eyepieces - binocular

Planachromat Objectives -

Nomarski Interference Contrast ^{Attachment} Equipment

Observations made up to 1000 X in
Cargilles 1-60 N oil (250-1000 X)

EXHIBIT 24

Adding TEM to the Global Talc Specification

Timothy J McCarthy, PhD, DABT

Director, Toxicology

Baby R&D and Product Stewardship

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JNJTALC000964391

Currently Available Testing Methods for Asbestos in Talc

IR - Infrared

Lowest detection limit. In some Compendia requirements but of limited value.

XRD – X-ray Diffraction

Primary compendia method which is designed to identify potential asbestos form structures.

If suspect crystalline structures are detected, go to light microscopy for confirmation based on morphology.

OM and PLM – Optical Microscopy and Polarized Light Microscopy

Used to confirm if potential asbestos forms are actually asbestos.

PLM is the preferred method since it provides a higher level of crystalline structure discriminatory capability.

TEM – Transmission Electron Microscopy

Most sophisticated of the methodologies

Found only in specialized analytical laboratories.

Can see structures more clearly and can confirm chemical composition

Viewed as the “gold standard” by industry subject matter experts.

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RoA_16413

Analytical Detection Limits

Analytical Method	Detection Limit	Comment
XRD	0.1 – 1 %	Depends on particle size, matrix interference Cannot differentiate morphology
PLM	1% 100/Points Counted %	Visual estimation Variable, depends on the number of particles counted (i.e., 400 pts = 0.25%, 1000 pts = 0.1%) PLM limited to particles 0.5 – 1 µm and wider
TEM	0.01 – 0.1 %	May be much lower if matrix particles can be removed TEM limited to particles shorter than 50 µm or thinner than 5 – 10 µm

Data provided by RJ Lee

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RoA_16414

Raw Ore sampling

RJ Lee detected the presence of chrysotile fibers (NMT 6.5 ppm) in certain raw ore samples by Transmission Electron Microscopy (TEM).

No asbestos fibers were detected in J&J talc product samples.

No asbestos fibers were detected by using the pharmacopoeia compendia methods, X-Ray Diffraction (XRD) or Polarized Light Microscopy (PLM).

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RoA_16415

Hypothetical Consumer Exposure

- Compendia require asbestos to be “not detected” in consumer-use talc
- What does “not detect” mean when more sensitive methods supplement existing compendia testing?
- How much asbestos might a consumer be exposed were there asbestos in the talc ore below the compendia limits of detection?

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RoA_16416

Hypothetical Consumer Exposure

- During a body powdering event, how much airborne talc might a consumer be exposed?
- During that powdering event, how much hypothetical asbestos might a consumer be exposed, when the asbestos is below the compendia limits of detection? Assume 10 ppm by TEM.
- How does that compare with occupational exposure levels?
 - 8-hr work day
 - 30-min excursion (spike)

Parity with the occupational exposure limit is not considered an acceptable consumer exposure in this assessment.

(29CFR§1910.1001; DIRECTIVE 2009/148/EC)

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RoA_16417

Hypothetical Consumer Exposure

Hypothetical exposure during consumer body dusting event

- Adult 4.5 – 9.3 fibers
- Baby diapering 0.16-0.18 fibers

Normalizing to number of fibers potentially inhaled during the duration of the event

- The allowable 8-hour occupational exposures are at least **107,000 times higher** than the hypothetical consumer exposures
- The allowable 30-min excursion value at least **67,000 times higher** than the hypothetical consumer exposures, when.

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RoA_16418

Implications of Supplementing Compendia Specification with TEM

- No detectable asbestos was found using the compendia methods
- “not detectable” has diminished value when highly sensitive methods are added to existing specifications.
- The hypothetical consumer exposures result in respirable fibers several orders of magnitude lower than occupational exposure limits
- The trace level of chrysotile by TEM in certain raw ore samples does not pose a health hazard to the consumer.

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RoA_16419

JNJTALC000964391

Metadata

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Confidentiality	N	ORIGINAL
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FileName	J&J307 - Adding TEM to the Global Talc Spc. (McCarthy).pdf	ORIGINAL
FileSize	86405.00	ORIGINAL

EXHIBIT 25

JNJ000064649**Metadata**

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mccrone environmental services, inc.
200 OAKBROOK BUSINESS CENTER
5500 OAKBROOK PARKWAY
NORCROSS, GA 30093 • 404-449-8461

22 August 1985

Windsor Minerals, Inc.
P.O. Box 680
Windsor, Vermont 05089

Attention: Mr. Arthur J. LaPierre,
Safety, Health and Training Director

SUBJECT: Analysis of Seven Talc Samples for
Asbestos Mineral Content by
Transmission Electron Microscopy

Re: McCrone Project No. ME-1862

Dear Mr. LaPierre:

McCrone Environmental Services, Inc. of Norcross, Georgia,
has completed the analyses of the seven talc samples that we
received from your office on 25 July, 1985. The samples were
labelled as follows:

WMI 85-25 (1) *
WMI 85-26 (2)
WMI 85-27 (3)
WMI 85-28 (4)
WMI 85-29 (5)
WMI 85-30 (6)
WMI 85-31 (7)

* McCrone TEM Lab Number

The samples were prepared following our usual technique for
TEM bulk sample analysis. Small (about 10 mg.) representative
portions of each sample were weighed and suspended in 10 ml. of
nanopure water and ultrasonicated for 5 minutes. Drops (6.5
microliters) of the suspended samples were placed on electron

a subsidiary of walter c. mccrone associates, inc.
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J&J-0164224

RoA_16423

JNJ 000064649

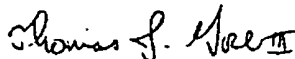
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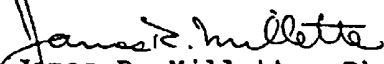
microscope grids and allowed to dry. The prepared sample grids were analyzed at 20,000x magnification. Ten grid squares per sample were analyzed. The presence of asbestos minerals was verified by selected area electron diffraction (SAED), energy dispersive X-ray analysis (EDX) and by morphology.

Chrysotile asbestos was detected only in the samples labelled WMI 85-28 and WMI 85-30. Because only a few fibers were detected in the portion of each sample analyzed, no accurate value of the weight percent of chrysotile asbestos could be calculated with statistical certainty. The data obtained from each sample analysis suggest that the amount of chrysotile asbestos in the samples labelled WMI 85-28 and WMI 85-30 is less than 0.0001 percent by weight.

Thank you for consulting McCrone Environmental Services, Inc. If you have any questions concerning these results, please contact our office.

Sincerely,


Thomas J. Gore III
Laboratory Microscopist


James R. Millette, Ph.D.
Manager, Electron Optics Group

TJG/JRM/arwp

cc: 1) Windsor Minerals, Inc.
Windsor VT
A) Mr. Arthur J. LaPierre,
Safety, Health and Training Director
Windsor Minerals, Inc.
Windsor VT

mcCrone environmental services, inc.

J&J-0164225

RoA_16424

JNJ 000064650



WINDSOR MINERALS INC.

P.O. Box 680 Windsor, Vermont 05089
Telephone (802) 484-7761

September 10, 1985

Mr. Ian Stewart
Walter McCrone Associates, Inc.
2820 South Michigan Avenue
Chicago, IL 60616

Dear Ian:

I am touching base with you on methodology and reports by your representatives on analysis of our products. I also want to complain on their failure to read our correspondence.

We submitted, on July 11, to Mark Palenik, seven samples for analysis with a specific note that the report be directed to me. We received, on August 22, the enclosed report on these samples mailed to another Company employee.

The August 22, report is couched in substantially different language than earlier reports. As I explained to you on my visit to Chicago it is very important that specific language be used.

I am admittedly unfamiliar with your field to argue, but I would appreciate your review and comments.

Yours very truly,

WINDSOR MINERALS, INC.

Roger N. Miller
President

RNM/rb
Enclosures

J&J-0164227



mccrone environmental services, inc.

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08 October 1985

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P. O. Box 680
Windsor, Vermont 05089

Attention: Mr. Roger N. Miller, President

Re: McCrone Project No. ME-1862

RECEIVED

OCT 16 1985

W. M. I.

Dear Mr. Miller:

Under you purchase order WS-17577 we received seven (7) talc samples for asbestos analysis. The samples were identified as WMI85-25 through WMI85-31. Examinations by transmission electron microscopy did not find any quantifiable amount of asbestiform minerals in any of the samples.

Sincerely,

Thomas J. Gore, III
Electron Microscopist

James R. Millette, Ph.D.
Manager, Electron Optics Group

TJG/JRM/jir

cc: ✓ Windsor Minerals, Inc.
Windsor VT

1) Mr. Roger N. Miller, President

a subsidiary of walter c. mccrone associates, inc.

2820 SOUTH MICHIGAN AVENUE • CHICAGO, ILLINOIS 60616 • 312-842-1700

J&J-0163917

RoA_16426

EXHIBIT 26



Dr. A. J. Goudie
Johnson and Johnson
Research Center
501 George Street
New Brunswick, New Jersey 08901

EXAMINATION
OF
JOHNSON AND JOHNSON'S BABY POWDER

Date: 27 October 1972
MA Number: 2546
Copy 1 of 4

DO NOT USE
THIS REPORT.
REPLACED BY
ANOTHER VERSION

walter c. macrone associates, inc.
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JNJ 000260833

1 of 3

Pltf_JNJ_00038325

RoA_16428

EXAMINATION OF JOHNSON AND JOHNSON'S BABY POWDER

Summary

Two samples of Johnson and Johnson's Baby Powder, batch number 108T and 109T, which correspond to the samples examined by Professor Seymour Z. Lewin of New York University on behalf of the FDA have been examined by x-ray diffraction, light microscopy, transmission electron microscopy and electron diffraction to determine whether they contain any asbestiform minerals.

Both samples contained an insignificant amount of tremolite ($< 0.5\%$). Neither sample contained chrysotile.

Introduction

On behalf of the FDA, Professor Seymour Z. Lewin of New York University is examining a number of commercial talcum powders for the presence of asbestiform minerals. Two of the samples which he has examined are samples of Johnson and Johnson's Baby Powder, batch number 108T and batch number 109T. Johnson and Johnson therefore requested Walter C. McCrone Associates to examine samples from the same batches to determine whether they contained any asbestiform minerals.

Materials and Method of Conducting Tests

Two samples were submitted, identified as Johnson and Johnson's Baby Powder, batch numbers 108T and 109T.

For x-ray diffraction examination, the samples were examined on a Phillips-Norelco verticle diffractometer using $\text{CuK}\alpha$ radiation and a scanning speed of 1° per minute. The dispersion staining technique was used for the light microscopical examination and the electron microscopy-electron diffraction examination was carried out using procedures previously described (MA report 2330-1; dated 10 August 1971).

walter c. mocrone associates, inc.

ResultsX-ray Diffraction

The diffractograms were carefully examined in the vicinity of the major peaks of chrysotile and tremolite. Neither mineral was present. The presence of peaks in the vicinity of $12.0-12.5^\circ 2\theta$, the region in which one of the principal lines of chrysotile may be found, was correlated with peaks in the vicinity of $6^\circ 2\theta$ and are thus attributable to chlorites. No significant peaks were observed in the 24° region which would be required were chrysotile present.

Light Microscopy

Using the dispersion staining technique and a liquid of refractive index 1.550, the samples were examined for chrysotile particles and fibers, but none could be found. Using a similar technique with a liquid of refractive index 1.605, the samples were similarly examined for the presence of tremolite and a few individual crystals were found, some rod shaped. The total tremolite content of the two samples would be approximately 0.5% for 108T and about 0.2-0.3% for 109T.

Electron Microscopy and Electron Diffraction

Several electron microscope grids from both samples were examined in their entirety and although some fibers were observed these were shown by electron diffraction to be shards of talc or rolled talc. No chrysotile fibers were found.

Conclusion

A detailed examination of two samples of Johnson and Johnson's Baby Powder, batch numbers 108T and 109T has shown this material to be substantially free of asbestiform minerals. A few tremolite rods were observed in both samples at a level less than 0.5%. No chrysotile has been detected.

Respectfully submitted,

Ian M. Stewart

Ian M. Stewart
Manager, Electron Optics Group

-2- walter c. mccrone associates, inc.



Dr. A. J. Goudie
Johnson and Johnson
Research Center
501 George Street
New Brunswick, New Jersey 08901

EXAMINATION
OF
JOHNSON AND JOHNSON'S BABY POWDER

Date: 27 October 1972

MA Number: 2546

Copy **2** of 4

walter c. mccrone associates, inc.
2820 SOUTH MICHIGAN AVENUE • CHICAGO, ILLINOIS 60616

EXAMINATION OF JOHNSON AND JOHNSON'S BABY POWDER

Summary

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Both samples contained an insignificant amount of tremolite — a few isolated crystals. Neither sample contained chrysotile.

Introduction

On behalf of the FDA, Professor Seymour Z. Lewin of New York University is examining a number of commercial talcum powders for the presence of asbestiform minerals. Two of the samples which he has examined are samples of Johnson and Johnson's Baby Powder, batch number 108T and batch number 109T. Johnson and Johnson therefore requested Walter C. McCrone Associates to examine samples from the same batches to determine whether they contained any asbestiform minerals.

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walter c. mccrone associates, inc.

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Electron Microscopy and Electron Diffraction

Several electron microscope grids from both samples were examined in their entirety and although some fibers were observed these were shown by electron diffraction to be shards of talc or rolled talc. No chrysotile fibers were found.

Conclusion

A detailed examination of two samples of Johnson and Johnson's Baby Powder, batch numbers 108T and 109T has shown this material to be substantially free of asbestiform minerals. A few tremolite rods were observed in both samples. No chrysotile has been detected.

Respectfully submitted,

Ian M. Stewart

Ian M. Stewart
Manager, Electron Optics Group

walter c. mc crone associates, inc.

JNJ000260840

Metadata

Attachment Count	0	SEMANTIC
Begin Family	JNJ 000260765	SEMANTIC
Confidentiality	N	SEMANTIC
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Date Modified	1972/10/27 12:00 am	SEMANTIC
End Family	JNJ 000260867	SEMANTIC
File Size	0	SEMANTIC
Filename	K000124217.TIF - K000124219.TIF	SEMANTIC
Page Count	3	SEMANTIC

EXHIBIT 27

What you want
to know about
JOHNSON'S
Baby Powder.



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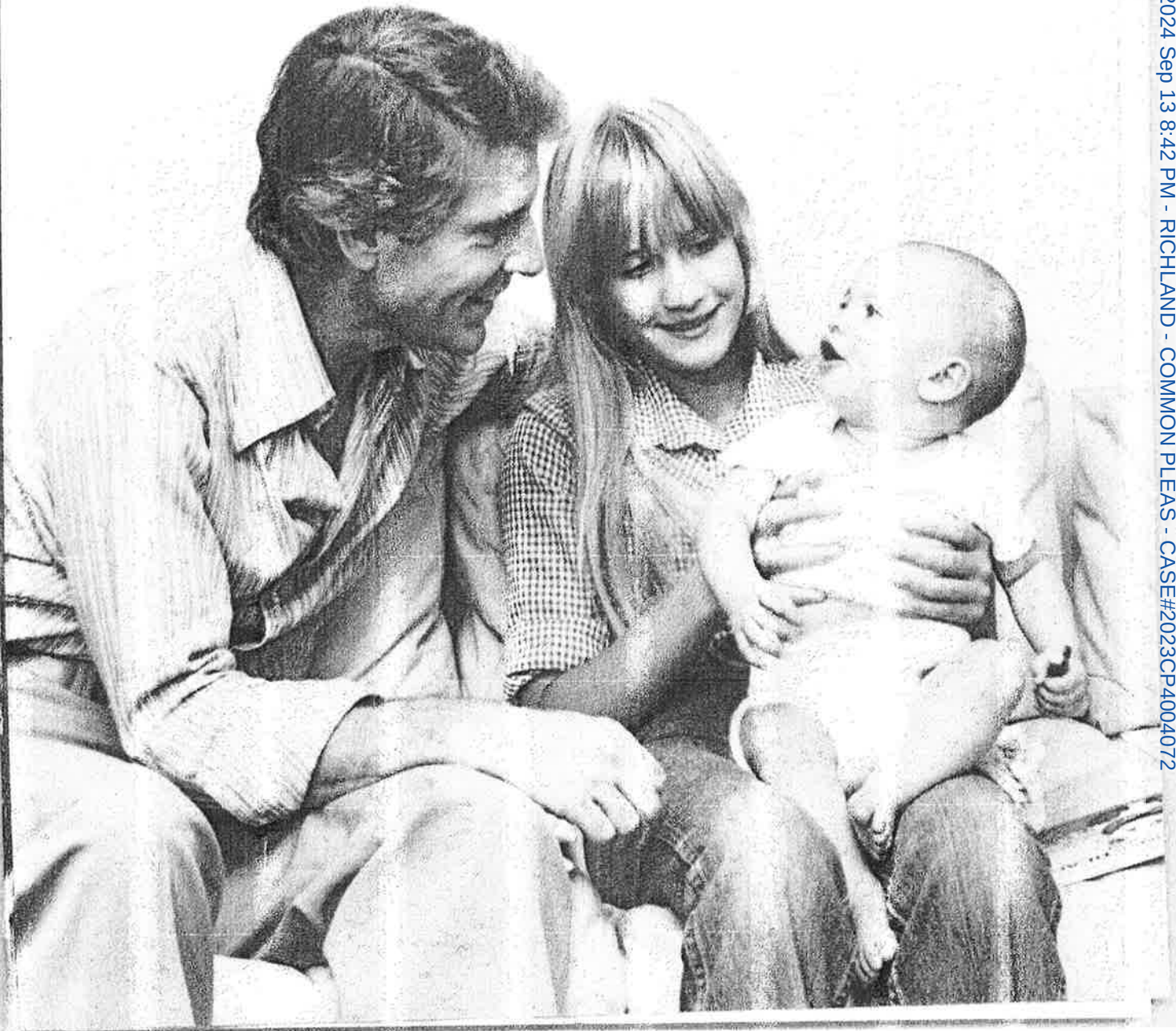
JNJ 000881819_0001

Today, more than ever, consumers are asking questions.

They want to know about products they use for themselves, their families, and...especially their babies.

More families are using JOHNSON'S Baby Powder than any other powder. So, more families are asking about JOHNSON'S Baby Powder.

Here are the questions asked most often, and the answers which come from over 75 years of experience.



About how it began

When did the idea of powdering baby start?

Women have always used some kind of powder to keep baby dry. Either rice flour, cornstarch, or adult talcum powder. Some ingenious New England mothers even collected powdered wood dust (which beetles made in wood floors) to use on baby's skin.

What was the first powder made just for babies?

In 1890, Johnson & Johnson developed a talcum powder especially designed for usage on a baby. It was then called a dusting powder.

When did JOHNSON'S Baby Powder originate?

In 1894, Fred B. Kilmer, the father of poet Joyce Kilmer, was in charge of the scientific laboratories at Johnson & Johnson. He decided that the maternity kit that was used by midwives and doctors needed a quality powder for new mothers and their babies. So, the new Johnson & Johnson powder was added to the kit. The following year, the name was changed to JOHNSON'S Baby Powder, and it was sold in pharmacies.

Has it ever changed?

Basically, no. Today, JOHNSON'S Baby Powder is practically the same as it was in 1890. No one has ever found a better way to make powder.

What ingredients are in JOHNSON'S Baby Powder?

The highest quality talc, and a light, fresh fragrance.

What is talc?

A soft, natural mineral that is mined from the earth.

Aren't all powders the same?

No. Because talcs are different. Johnson & Johnson owns its own talc mines in Vermont. These mines have an exceptionally high quality talc which is constantly checked to insure its safety and purity.

The talc has a minimum of impurities and a maximum of the platelet crystals that make talc smooth and adsorbent. You can feel the difference between other powders and the smoothness of JOHNSON'S Baby Powder.

How is it so pure?

Johnson & Johnson is one of the few companies in the United States that owns its own talc mines. We, therefore, have complete control over the quality of our talc. We mine only that talc which is most free of foreign matter. Yet, even that is not good enough for us. Before we use it in our products, we put the talc through an extensive purification process. This process includes a cleansing procedure known as "flotation". It consists of many separate operations of "washing" the talc.

How is JOHNSON'S Baby Powder tested for purity and safety?

It is checked regularly for purity with sophisticated scientific equipment. The final product is tested on both animals and man to insure it does not cause adverse effects. This testing is continuously being upgraded as newer research techniques become available.

Is there asbestos in JOHNSON'S Baby Powder?

No. JOHNSON'S Baby Powder has been examined by the foremost experts in mineral analysis. Working in independent laboratories in the U. S. and in other parts of the world, the experts have confirmed the absence of asbestos fibers in JOHNSON'S Baby Powder. And the product is also monitored regularly to continuously assure us of its purity.

What gives it that "silky" feeling?

The platelets—or crystals—in the talc. These platelets slip, or glide, over each other. You might say they act as a dry lubricant. JOHNSON'S Baby Powder has a very high proportion of these platelets. That's why JOHNSON'S Baby Powder helps prevent friction. It keeps your skin feeling smooth and "silky". Helps eliminate clothing chafing and sticking.

What gives it that baby smell?

The special JOHNSON'S Baby Powder scent. This well-known fragrance has been identified as the "clean baby" smell for generations. It has been formulated and clinically tested to ensure its mildness.

Why should I use JOHNSON'S Baby Powder on my baby?

Baby's world is a wet one. In the many folds and creases all over baby's body moisture can collect. Can irritate baby's

About what's in it

About using it on baby

tender skin. JOHNSON'S Baby Powder adsorbs the moisture. Helps keep your baby feeling dry and comfortable. It helps prevent chafing by acting as a body lubricant. And the clean baby smell reminds you that your baby is loved.

How does powdering show my baby that I love him?

Your baby knows you love him by what he sees and hears... and by what he feels. Your touch says "love" to your baby. So, making him physically comfortable tells your baby you love him. Touching with JOHNSON'S Baby Powder not only says that you are there taking care of him, it creates a world of comfort in which baby can feel secure. Caring and comfort. They feel like love to baby.

How is mother's touch related to baby's growth and development?

Your touch not only says "love", it may actually help your baby grow and develop. Studies show that baby's growth and development depend upon physical stimulation, including your touch. So, simply stated, the more you touch and caress your baby, the better. Massaging with JOHNSON'S Baby Powder not only helps keep baby dry and comfortable, but it also helps make those important moments of touch a lot more enjoyable. For both of you.

When should I begin using powder on my baby?

As soon as he's born. Many hospitals do.

Is it true that many teenagers use JOHNSON'S Baby Powder?

Very much so. Over half the teenagers who sprinkle on powder use JOHNSON'S Baby Powder.

Why?

Teenagers put a lot of emphasis on their physical appearance and good grooming. Self-confidence is often tied to how a teenager feels about his or her appearance. JOHNSON'S Baby Powder keeps them feeling dry and comfortable. And, its unique scent is a gentle reminder that they're clean and fresh. Teenagers are proof that JOHNSON'S Baby Powder is a feeling you never outgrow.

Wouldn't an adult talc work better?

Teenagers go for what's natural.

Powders made especially for adults very often contain additives and heavy perfumes.

When should a teenager use it?

After a shower or bath, or just to freshen up. It's also a neat idea to pack it in your beach bag. Makes it easier to give sand the brush off. Sprinkle it in sports clothes and shoes and you'll help keep that nice, fresh smell. And you can have a soft, silky looking complexion in a shake by using JOHNSON'S Baby Powder as a translucent face powder.

Aren't they using it because it's around the house?

Many teenagers buy their own. And, many got the idea of using JOHNSON'S Baby Powder from friends who use it.

What can a baby powder do for grown ups?

Helps keep them dry and comfortable. What makes JOHNSON'S Baby Powder the best for baby makes it the best for adults, too.

But what about that "baby" fragrance?

Many women enjoy that fragrance as much on themselves as they do on their babies. Yet, should she wear perfume, a woman knows that the light scent won't interfere with her perfume.

Isn't it smarter to save money on a cheaper brand?

Cheaper brands do not have the same clean fragrance or high quality talc. They may even cake and clump when they get damp. Women who have tried them often wind up with a powder they use once or twice and then throw away. That's not a savings. On the other hand, buying JOHNSON'S Baby Powder which the whole family can use, will probably turn out to be the most economical thing to do.

Does it really work for men?

Since moisture and chafing can be a bigger problem for men, the drying and soothing feelings of JOHNSON'S Baby Powder can be a real relief. Comfort is a feeling even a man never outgrows.

About adults using it

About teenagers using it

Johnson & Johnson

It's a feeling
you never
outgrow



Johnson & Johnson
BABY PRODUCTS COMPANY

© Johnson & Johnson, 1976
Baby Products Company.
New Brunswick, N.J. 08903

B-378 11/76

EXHIBIT 28

Johnson & Johnson

BABY PRODUCTS COMPANY

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LABEL CONTROL SPECIFICATION

SUBJECT: JOHNSON'S Baby Powder 24 oz.			LABEL CONTROL NO. 3027 CB
			ISSUE DATE 7/10/78
COMPONENT Container Label	SIZE 24 oz.	PRODUCT CODE 3027	RAW MATERIAL CODE N/A

Johnson's
baby
powder



Johnson & Johnson

NET WT. 24 OZ.

EFFECTIVE DATE Immediately	SUPERSEDES LABEL CONTROL NO. 3027 CA

FORM 752-18 NEW 4/76

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JNJMX68_000020266

RoA_16442

Perry
Plaintiff Exhibit
203

EXHIBIT 29

Johnson & Johnson
CONSUMER PRODUCTS, INC.

Page 1 of 7

SPEC NO: RM08006

DOC TYPE: RAW MATERIAL

SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC

LOCATION: Royston

REVISION	AUTHORIZATION	DESCRIPTION OF CHANGE
03/01/90	CR012001	Specification converted to CPI numbering system (was 8-006).
06/28/90	CR012201	Arsenic Content changed from NMT 2 ppm to NMT 2.5 ppm. PCA, Puerto Rico and Baby Lotion w/Powder deleted.
09/26/90	CR012330	Sec. 5, Acceptance, Hamm Mine (Windham) added. (V. McCluskey)
01/07/92	CR013276	Specification revised making IS76906 standard (R. Corder).

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J&J-0023847

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Perry
Plaintiff Exhibit
010

RoA_16444



Page 2 of 7

SPEC NO: RM08006

DOC TYPE: RAW MATERIAL

SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC

LOCATION: Royston

PRODUCT(S): BABY POWDER
BABY POWDER CORNSTARCH

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J&J-0023848

Johnson & Johnson
CONSUMER PRODUCTS, INC.

Page 3 of 7

SPEC NO: RM08006

DOC TYPE: RAW MATERIAL
SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC
LOCATION: Royston

1.0 DESCRIPTION

A hydrous magnesium silicate (also called magnesium acid metasilicate), a fine white lustrous powder, slippery, adherent to skin with no foreign odor or grittiness.

2.0 PROPERTIES & REQUIREMENTS

2.1 Asbestos (CTFA/J4-1) (TM7024)

None detected. Asbestos is defined to be the fibrous serpentine, chrysotile and the fibrous forms of the amphibole group as represented by amosite, anthophyllite, crocidolite, tremolite and actinolite.

2.2 Moisture (TM7164)

NMT 0.15%

2.3 Solubility by Acid (TM7165)

NMT 2.0%

2.4 Magnesite (MgCO₃)% (TM7171 or TM7077 or TM7716)

NMT 1.10% MgCO₃

2.5 Bulk Density (TM7166)

20.5 to 25.5 lb./cu. ft. or metric equivalent at Cyprus Windsor Minerals.

2.6 Color (TM7170 or TM7071)

White as compared to a previously accepted lot or minimum of 85.5 reflectance reading.

2.7 Fineness (TM7070 or TM7167)

Through 60 mesh, 100%. Through 100 mesh, at least 99.7%, through 200 mesh, at least 98.5%.

2.8 Heavy Metals (TM7168)

NMT 10 ppm

2.9 Arsenic (TM7169 or TM7717)

NMT 2.5 ppm

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J&J-0023849

Johnson & Johnson
CONSUMER PRODUCTS, INC.

Page 4 of 7

SPEC NO: RM08006

DOC TYPE: RAW MATERIAL
SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC
LOCATION: Royston

2.10 Water Soluble Iron (USP)

Pass Test

2.11 Microbial Requirement (TM7807)

Samples taken from Cyprus Windsor silos, trucks or bags shall contain no detectable harmful microorganisms and the total count shall be no greater than 50 microorganisms per gram of product. (See section 7 for details of testing)

3.0 CERTIFICATE OF ANALYSIS

A silo source analytical certificate will provide numerical analytical results required in Secs. 2.2, 2.3, 2.4, 2.5, 2.6, 2.7 and 2.11 of this specification. Secs. 2.8 and 2.10 will be reported as pass/fail. These results are obtained from a silo composite sample which is comprised from samples taken at eight hour intervals during the filling of the silo. The silo source analytical certificate will reference the railcar or trailer number (if a trailer is used to ship directly to Royston).

The certificate of analysis and the railcar/ or trailer seal log required as per SOP-B30 will accompany the preshipment samples to Royston and will be sent to the Royston Microbiology Laboratory.

The Certificate of Analysis is an Acceptance/Rejection criteria.

4.0 PACKING, MARKING & STORAGE

4.1 Packing

In suitable bags to protect contents from loss, contamination and deterioration in normal shipment and storage. Pallets of bagged material must be either stretch wrapped or covered with corrugated and secured with straps. Each bag shall contain 50 lbs. or metric equivalent. Bulk shipments will be made in CPI approved railcars and trailers.

4.2 Marking

Each bag shall be marked with:
Contents Name, Supplier
Name, Supplier Lot No.
Net Weights
Purchaser's Code

Bulk shipments are identified by the individual number of the particular trailer or railcar.

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J&J-0023850

Johnson & Johnson
CONSUMER PRODUCTS, INC.

Page 5 of 7

SPEC. NO: RM08006

DOC TYPE: RAW MATERIAL

SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC

LOCATION: Royston

4.3 Storage

If stored in bags, keep in dry area. Suitable bulk silos (for CPI): Buttler electro-fused polymer utilizing white flint-flex powder #531-7010 manufactured by DuPont.

5.0 ACCEPTANCE

There shall be no change in the supplier's process or composition of the material without prior notification to and approval of JOHNSON & JOHNSON. Any non-conformance to the specified Description/Properties & Requirements, shall be cause for rejection.

The following mine properties in Vermont are qualified and approved to provide ore for processing into Grade 66 talc: Hammondsville Mine, Argonaut Mine, Rainbow Mine, Hamm Mine (Windham).

6.0 RAILCAR LOADING & SAMPLING

Railcar loading, unloading and sampling shall be in accordance with the approved J&J Consumer Products Procedure SOP-B30.

7.0 FREQUENCY OF CHARACTERISTICS TO BE TESTED

<u>No.</u>	<u>Characteristic</u>	<u>T.M.</u>	<u>Frequency</u>
2.1	Asbestos(a)	CTFA/J4-1	Per Note 1A
2.1	(b)	TM7024	Per Note 1B
2.2	Moisture	TM7164	Certified per 2a
2.3	Solubility by Acid	TM7165	Certified per 2a
2.4	Magnesite (MgCO ₃)%	TM7171/TM7077/ TM7716	Certified per 2b
2.5	Bulk Density	TM7166	Certified per 2b
2.6	Color	TM7170 or TM7071	Certified per 2b
2.7	Fineness	TM7167 or TM7070	Certified per 2b
2.8	Heavy Metals	TM7168	Certified per 2a
2.9	Arsenic	TM7169 or TM7717	Certified per 2a
2.10	Water Soluble Iron	USP	Certified per 2a
2.11	Microbial Requirement	TM7807	Every silo-See 3a Every railcar 3b

J&J-0023851

Johnson & Johnson
CONSUMER PRODUCTS, INC.

Page 6 of 7

SPEC NO: RM08006

DOC TYPE: RAW MATERIAL
SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC
LOCATION: Royston

NOTE:

- 1A. A composite sample is made from every two completed silos, labeled with silo numbers and production dates and forwarded to J & J Consumer Products for x-ray diffraction. Results are reported to Windsor Minerals.
- 1B. Quarterly composite samples of above silo samples will be evaluated by TM 7024 by CPI and data reported to Windsor Minerals.
2. Certificates of Analysis are received from Windsor Minerals with each pre-shipment microbial sample. Analytical testing frequencies.
 - a. Tested on silo composite after each silo is filled.
 - b. Tested in two hour composite samples. Each silo is released on the average result of all the two hour composite sample results.
3. Microbial
 - a. Microbial testing performed on flash dried samples taken as the silo is being filled to represent a stratified sampling of at least 30 samples. (Royston is used as the testing lab.)
 - b. Microbial testing will be conducted on the pre-shipment composite sample of each railcar taken as per SOP-B30.

NOTE: TM7807 using only 1 gram for Aerobic Microorganism Enrichment Diagnostic testing.

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J&J-0023852

Johnson & Johnson
CONSUMER PRODUCTS, INC.

Page 7 of 7

SPEC NO: RM08006

DOC TYPE: RAW MATERIAL

SUBJECT: CYPRUS WINDSOR MINERALS CORPORATION GRADE 66 TALC

LOCATION: Royston

QUALITY ASSURANCE INFORMATION

1.0 FREQUENCY OF CHARACTERISTICS TO BE TESTED

<u>No.</u>	<u>Characteristic</u>	<u>T.M.</u>	<u>Frequency</u>
2.1	Asbestos (a)	CTFA/J4-1	Per Note 1A
2.1	(b)	TM7024	Per Note 1B
2.2	Moisture	TM7164	Certified per 2a
2.3	Solubility by Acid	TM7165	Certified per 2a
2.4	Magnesite (MgCO ₃)%	TM7171/TM7077/ TM7716	Certified per 2b
2.5	Bulk Density	TM7166	Certified per 2b
2.6	Color	TM7170 or TM7071	Certified per 2b
2.7	Fineness	TM7167 or TM7070	Certified per 2b
2.8	Heavy Metals	TM7168	Certified per 2a
2.9	Arsenic	TM7169 or TM7717	Certified per 2a
2.10	Water Soluble Iron	USP	Certified per 2a
2.11	Microbial Requirement	TM7807	Every silo-See 3a Every railcar 3b

NOTE:

- 1A. A composite sample is made from every two completed silos, labeled with silo numbers and production dates and forwarded to JJCPI for x-ray diffraction. Results are reported to Windsor Minerals.
- 1B. Quarterly composite samples of above silo samples will be evaluated by TM7024 by CPI and data reported to Windsor Minerals.
2. Certificates of Analysis are received from Windsor Minerals with each pre-shipment microbial sample. Analytical testing frequencies.
 - a. Tested on silo composite after each silo is filled.
 - b. Tested in 2 hour composite samples. Each silo is released on the average result of all the 2 hour composite sample results.
3. Microbial
 - a. Microbial testing performed on flash dried samples taken as the silo is being filled to represent a stratified sampling of at least 30 samples. (Royston is used as the testing lab.)
 - b. Microbial testing will be conducted on the pre-shipment composite sample of each railcar taken as per SOP-B30.
(NOTE: TM7807 using only 1 gram for Aerobic Microorganism Enrichment Diagnostic testing.)
4. JJCPI acceptable limit on samples taken from railcars or trucks at the receiving point is between 20.5 to 27.0 lb./cu. ft.
5. All tests should be accepted under Certificate of Analysis.

J&J-0023853

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EXHIBIT 30

Central
File
Johnson-Johnson

TMC
ANALYTICAL

what is cost of
each sample submitted
to machine
quicksen
New Brunswick, N.J. would be
January 3, 1974 about
\$50

Subject: PURCHASE OF A TRANSMISSION ELECTRON
MICROSCOPE PLUS ATTACHMENTS

Dr. ~~E. R. L. Gaughran~~
to
Dr. T. H. Shelley

Over the past three years, there seems to have been general agreement that Transmission Electron Microscopy is the only absolute proof with electron diffraction for the identification of asbestos in talc. We have elected to use outside laboratories since any results generated in-house were suspect. In view of the latest findings at Windsor Minerals, it appears wise that we maintain a closer surveillance on both the ore and finished product on an in-house basis.

The approximate cost of a T.E.M. plus accessories is \$175,000. I think it is something we perhaps should consider in the near future. Needless to say, it was not forecasted for 1974.

ac
A. J. Goudie

ab

cc: Mr. G. Lee
Dr. F. R. Rolle

EXHIBIT 31

JNJ000232679**Metadata**

BegAttach	JNJ 000232679	ORIGINAL
Confidentiality	Y	ORIGINAL
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TF
PROPOSED SPECS FOR ANALYZING
TALC FOR ASBESTOS

Johnson & Johnson

F

New Brunswick, N.J.
May 16, 1973

Subject:

Dr. F. R. Rolle

I am going to England Friday, May 25. I have been asked to bring along our proposed specs for analyzing talc for "asbestos."

Please get me copies of all reports, correspondence, etc., that are pertinent, plus a cover memo outlining our recommendations.

England is considering method of preconcentrating the asbestos so as to be able to analyze by X-ray. They find no "asbestos" by doing this with Italian talc. They find (Pooley) 0.05% of a tremolite-type in Vermont.



T. H. Shelley

mf

c: Dr. R. A. Fuller
Dr. A. J. Goudie
Dr. W. Nashed
Dr. D. R. Petterson

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MAY 18 1973
W. NASHED
JOHNSON & JOHNSON

Johnson & Johnson

New Brunswick, N.J.

May 22, 1973

Subject: PROPOSED SPECS FOR ANALYZING
TALC FOR ASBESTOS

Dr. T. H. Shelley

I. USP

II. Other Methods

Step Scanning X-Ray Diffractometry

Advantages

Disadvantages

Preconcentration of Asbestos (Pooley Method)

Differential Thermal Analysis

Microscopy

Electron Microscopy and Petrology

Dispersion Staining

III. Present Strategy

F. Robert Rolle

F. Robert Rolle, Ph.D.

ab

cc: Dr. A. J. Goudie
Dr. G. Hildick-Smith
Dr. W. Nashed
Dr. D. R. Petterson

RECEIVED

MAY 23 1973

W. NASHED
JOHNSON & JOHNSON

- 1 -

I. USP

We have been working on a preliminary draft with Mr. George Heinze on developing a USP method for the detection of asbestos in talc. Exhibit A is the USP XIX comment proof on X-ray diffraction. Exhibit B is our detailed procedure which has been submitted to Mr. Heinze, for determination of amphibole (such as, tremolite) and serpentine (such as, chrysotile) in talc by scanning X-ray diffractometry. Using this method on Italian Talc used in SHOWER TO SHOWER* Powder, we find a level of detectability of 1% for Tremolite and 5% Chrysotile.

II. Other Methods Which Have Been or Are Under Consideration for the Detection of Asbestos in Talc

Step Scanning X-Ray Diffractometry

Advantages: Level of detectability better than by scanning X-ray diffraction. For example, by this method we can detect 0.1% tremolite and 3% chrysotile in Italian talc (Exhibit C).

Disadvantage: Using the step scanning procedure, it takes one day per sample for analysis vs. a small fraction of a day for the scanning method.

*A Trademark of JOHNSON & JOHNSON.

- 2 -

Preconcentration of Asbestos followed by X-Ray Diffraction Analysis (Pooley Method)

Dr. Pooley has developed two techniques for preconcentration of chrysotile and tremolite in talc followed by X-ray diffraction analysis. For chrysotile (Exhibit D), his level of detectability is 0.05% and when this method is applied to Italian and Vermont talc, no chrysotile is detected. The second technique developed also by Dr. Pooley involves preconcentration of tremolite in talc (different procedure) followed by X-ray diffraction analysis. This technique has not been written up yet, but evidently when applied to Vermont talc, 0.05% of tremolite-type is found. The limitation of this method is that it may be too sensitive.

Differential Thermal Analysis (DTA)

DTA has proven to be a relatively fast and sensitive method (at least 1%) for detection of chrysotile in talc (Exhibit C). The DTA method is not applicable for the detection of tremolite in talc. At our suggestion, the FDA recently purchased a DTA unit, presumably to look into this method for detecting chrysotile.

- 3 -

MicroscopyA. Electron Microscopy and Petrology

The areas of electron microscopy and optical microscopy (petrology) have been thoroughly evaluated, but though, not without merit, they suffer from the following limitations:

- a) require a fair degree of expertise
- b) in the case of electron microscopy, we are dealing with an expensive instrument that few laboratories have.
- c) one is viewing a very small amount of material (μg) under the microscopy and one wonders how representative it is of the bulk material. Multiply sampling and viewing under the microscopy may eliminate this problem, but it results in consumption of a great deal of time.
- d) the level of detection really depends upon the amount of time spent with the microscope.
- e) quantification by particle counting is very time consuming and normally not done.

B. Dispersion Staining

The dispersion staining method championed by Dr. Walter McCrone looked initially very exciting as a quick, easy method for scanning talc for asbestos. However, it was found (Exhibit E) that certain non-asbestos minerals gave the same dispersion staining characteristics as the asbestos minerals. The method evidently lacks specificity when applied to talc.

- 4 -

III. Present Strategy

Present plans call for scanning X-ray diffraction for the detection of both amphibole and serpentine asbestos in talc. In the case of chrysotile (serpentine), Differential Thermal Analysis may be a good alternate method since it offers a level of detectability of 1% chrysotile in talc vs. 5% chrysotile in talc by scanning X-ray diffraction.

EXHIBIT 32

JOHNSON & JOHNSON
LIMITED

SOUTHAMPTON ROAD COSHAM PORTSMOUTH HANTS. PO6 4RL. TEL: COSHAM 75298

for 60 years
the most trusted name in Britain for
Baby Products and Surgical Dressings

Our ref: IWS/VW

18th February 1975.

Dr. R. Rolle.,
Johnson & Johnson Research Centre.,
U.S. Highway No. 1.,
North Brunswick,
New Jersey 08903.,
U. S. A.

Dear Bob,

I am writing to put you in the picture regarding the U.K. work on analytical methods and to ask you to keep me informed on your front so that we can present a united front on this topic. I understand that you are the Chairman of the C.T.F.A. Committee on analytical methods. I serve on the T.P.F. Talc working party and the T.P.F. analytical sub committee.

I am therefore enclosing data on an Infra Red technique being worked on by Yardley and Avon. This is intended to be specific for tremolite and to be used only as a routine quality control check. Perhaps you could let me have your comments on the I.R. technique together with any results you have obtained in your own researches on Infra Red techniques.

I have also enclosed our test method for the proposed Xray technique which was drawn up by Boots Ltd in conjunction with Dr. Pooley. We deliberately have not included a concentration technique as we felt it would not be in worldwide company interests to do this. However, Fred tells me that you are now considering such a test in the U.S.A. If you are, it is important that the U.K. uses the same technique.

We have started a reference library of standard talc/minerals and I will send you a photocopy of the data so far. We would be pleased to include any input you might feel necessary.

Avon, U.K., have been receiving copies of the CTFA task force meeting minutes. Could I ask you to provide me with copies also?

Many thanks for your help.

Kind regards,

Yours sincerely,

Ian

I. W. S. J. J. J.

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JNJNL61_000062953

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RoA_16463

EXHIBIT 33

200346

Central File

cc: Dr. R. A. Fuller
 Dr. T. H. Shelley
 Dr. G. H. Lord
 Dr. S. Sawchuk
 Mr. D. D. Johnston
 Mr. J. Hadley
 Dr. J. E. Willson

Dr. R. E. Faust
 Dr. R. L. Sundberg
 Dr. E. R. L. Gaughran
 Mr. W. Ashton
 Mr. R. G. Schoel
 Mr. J. T. Dettre

June 17, 1966

TO: Dr. G. Hildick-Smith

SUBJECT: JOHNSON's Baby Powder
Talc Aspiration

RECEIVED

JUN 21 1966

JOHNSON & JOHNSON
 PHARMACEUTICAL RESEARCH
 R. L. SUNDBERG

Reference is made to the attached note from Mr. J. Dettre forwarding an article by Drs. Hughes and Kalmer which appeared in June, 1966 American Journal of Diseases of Children.

Baby Powder represents the cornerstone of our baby products franchise. In addition, we have a large investment in a talc mine. I am concerned over the conclusions drawn in the article, quote:

"In conclusion, it is strongly urged that talcum powder be removed from the environment of children and the traditional association of talcum powder and babies be abandoned. It has no medicinal value; wherever placed it serves as a foreign body; and at least three deaths and an unknown morbidity have resulted from this silicate powder."

Would it be possible for us to initiate basic work to explore this phenomenon either to obtain data to refute this problem or to develop mechanisms to reduce the hazard.

W. H. Steinberg

mk

JNJ 000235850

RoA_16465

EXHIBIT 34

STATE OF SOUTH CAROLINA : IN THE COURT OF COMMON PLEAS
:
COUNTY OF RICHLAND : FOR THE FIFTH JUDICIAL CIRCUIT

SARAH J. PLANT and :
PARKER PLANT, :
Plaintiffs, :
v. : C/A NO. 2022-CP-40-1265
AVON PRODUCTS, INC., :
et al. :
Defendants. :

- - - - -

CERTIFIED
ORIGINAL

KELLY PAYNE CLARK and :
SHANNON PAYNE LANCASTER, :
as Co-Executors of the :
Estate of SHELBY :
LINVILLE PAYNE, deceased: :
Plaintiffs, :
v. : C/A NO. 2022-CP-40-01281
3M COMPANY, et al., :
Defendants. :

- - - - -

Deposition of GREGORY B. DIETTE, MD, MHS

Reported by:

Adam D. Miller, Registered Professional Reporter

Gregory B. Diette, MD, MHS
February 03, 2023

Page 2 1 2 3 Deposition of GREGORY B. DIETTE, MD, MHS 4 5 Via Zoom Videoconferencing 6 7 Friday, February 3, 2023 8 11:00 a.m. 9 10 - - - - - 11 12 APPEARANCES: 13 On Behalf of Plaintiffs: 14 BENJAMIN H. ADAMS, ESQUIRE 15 badams@dobslegal.com 16 DAVID C. HUMEN, ESQUIRE 17 dhumen@dobslegal.com 18 RACHEL A. GROSS, ESQUIRE 19 rgross@dobslegal.com 20 DEAN OMAR BRANHAM SHIRLEY, LLP 21 302 North Market Street, Suite 300 22 Dallas, Texas 75202 23 214.722.5990 24 25	Page 4 1 On Behalf of Rite Aid of South Carolina, Inc.: 2 R. SCOTT WALLINGER, JR., ESQUIRE 3 swallinger@barnwell-whaley.com 4 BARNWELL WHALEY PATTERSON & HELMS, LLC 5 211 King Street, Suite 300 6 Charleston, South Carolina 29401 7 843.577.7700 8 On Behalf of Mary Kay Inc.: 9 WILLIAM M. WILSON, III, ESQUIRE 10 bwilson@wyche.com 11 WYCHE, P.A. 12 200 East Broad Street, Suite 400 13 Greenville, South Carolina 29601 14 864.242.8200 15 On Behalf of Coty, Inc., Noxell Corporation, The Procter 16 & Gamble Company, and Wyeth Holdings LLC: 17 BRIANNA BAILEY, ESQUIRE 18 brianna.bailey@cs-law.com 19 COSMICH SIMMONS & BROWN, PLLC 20 One Eastover Center 21 100 Vision Drive, Suite 200 22 Jackson, Mississippi 39211 23 601.863.2100 24 25
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Gregory B. Diette, MD, MHS
February 03, 2023

Page 6					Page 8				
1	On Behalf of Brenntag North America Inc.:				1	On Behalf of International Paper Company and			
2	KELLY L. NEAR, ESQUIRE				2	Weyerhaeuser Co. (Payne case):			
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5	259 Seven Farms Drive, Suite 300				5	FORMAN WATKINS & KRUTZ LLP			
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7	843.727.0001				7	Jackson, Mississippi 39201-2375			
8	On Behalf of Color Techniques, Inc. and Bahnson, Inc.:				8	601.960.8600			
9	JULIE FEKETE, ESQUIRE				9	- - - - -			
10	jfekete@grsm.com				10	INDEX			
11	GORDON REES SCULLY MANSUKHANI, LLP				11	DEPONENT: GREGORY B. DIETTE, MD, MHS			
12	40 Calhoun Street, Suite 350				12	EXAMINATION BY: PAGE			
13	Charleston, South Carolina 29401				13	ATTORNEY ADAMS 11			
14	843.278.5900				14	- - - - -			
15	On Behalf of Avon Products, Inc. (Payne case):				15	EXHIBITS			
16	MADELYN IULO, ESQUIRE				16	NAME	DESCRIPTION	PAGE	
17	miulo@foleymansfield.com				17	Exhibit 1	2/1/23 Diette Report re Plant	16	
18	FOLEY & MANSFIELD				18	Exhibit 2	2/1/23 Diette Report re Payne	16	
19	86 Chambers Street, Suite 202				19	Exhibit 3	Plant Medical Record Excerpt	31	
20	New York, New York 10007				20	Exhibit 4	Rough Draft Transcript of the	36	
21	212.421.0436				21		Deposition of Taylor Ripley, MD		
22					22	Exhibit 5	7/12/19 Poye Report	56	
23					23	Exhibit 6	Diette Notes re Eric Johnson in	60	
24					24		the Plant Case		
25					25				

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1	On Behalf of Vi-Jon, LLC (Plant case):				1	Exhibit 7	Diette Notes re Dr. Maddox in	60	
2	ANGELA G. STRICKLAND, ESQUIRE				2		the Plant Case		
3	angela.strickland@bowmanandbrooke.com				3	Exhibit 8	Diette Notes re Patrice Johnson	61	
4	BOWMAN AND BROOKE LLP				4		in the Plant Case		
5	1441 Main Street, Suite 1200				5	Exhibit 9	Diette Notes re the Deposition	61	
6	Columbia, South Carolina 29201				6		of Sarah Plant		
7	803.726.7420				7	Exhibit 10	Diette Legal and Employment	61	
8	On Behalf of Chattem, Inc.:				8		Notes in the Plant Case		
9	STEVEN J. PUGH, ESQUIRE				9	Exhibit 11	Diette Medical Notes in the	62	
10	SPugh@RichardsonPlowden.com				10		Plant Case		
11	RICHARDSON PLOWDEN ROBINSON, P.A.				11	Exhibit 12	Diette Pulmonary Function Test	62	
12	1900 Barnwell Street				12		Summary Chart in the Plant Case		
13	Columbia, South Carolina 29201				13	Exhibit 13	Diette CV	62	
14	803.771.4400				14	Exhibit 14	Diette Testimony List	62	
15	On Behalf of CVS Pharmacy, Inc., Walgreen Co.,				15	Exhibit 15	Diette Fee Schedule	63	
16	Winn-Dixie Stores, Inc. (Payne case); and Walgreen Co.,				16	Exhibit 16	Diette Invoices in the Plant	63	
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18	case):				18	Exhibit 17	Diette Medical Notes in the	65	
19	AMY HARMON GEDDES, ESQUIRE				19		Payne Case		
20	AGeddes@nexsenpruet.com				20	Exhibit 18	Diette Legal Notes in the Payne	65	
21	NEXSEN PRUET, LLC				21		Case		
22	1230 Main Street, Suite 700				22	Exhibit 19	Diette Notes re the Deposition	65	
23	Columbia, South Carolina 29201				23		of Shannon Payne Lancaster		
24	Post Office Box 2426 (29202)				24	Exhibit 20	Diette Notes re the Deposition	66	
25	803.771.8900				25		of Kelly Payne Clarke		

Gregory B. Diette, MD, MHS
February 03, 2023

Page 10 1 Exhibit 21 Diette Pulmonary Function Test 66 2 Results, Summary Chart in the 3 Payne Case 4 Exhibit 22 Diette Invoices in the Payne 66 5 Case 6 Exhibit 23 Diette Notice of Deposition in 67 7 the Plant Case 8 Exhibit 24 Diette Notice of Deposition in 67 9 the Payne Case 10 Exhibit 25 11/16/21 Diette Report re Moore 83 11 Exhibit 26 8/9/22 Gordon Report re Moore 92 12 Exhibit 27 5/31/22 Dodson Report re Moore 95 13 Exhibit 28 Colgate-Palmolive's Objections 129 14 to the Notices 15 16 17 18 19 20 21 22 23 24 25	Page 12 1 expert opinions that you've reached in the Payne 2 case? 3 A. I am. 4 Q. Are you prepared to tell us about 5 each and every one of the expert opinions you've 6 reached within a reasonable degree of medical 7 certainty? 8 A. Yeah, I hope so. 9 Q. Okay. Is there any reason you can't 10 give us your opinions today? 11 A. No. 12 Q. Are there any documents you wanted 13 that you didn't receive? 14 A. None that I know that exist. I mean, 15 just in general, I have, you know, an interest 16 in documents that could exist, you know, if they 17 come up later, I guess. 18 Q. Are there any questions you had that 19 weren't answered? 20 A. By lawyers or...? 21 Q. Yeah. 22 A. No, there weren't any. 23 Q. If I ask a question that's vague or 24 ambiguous, will you let me know? 25 A. A hundred percent.
Page 11 1 GREGORY B. DIETTE, MD, MHS, having 2 first been duly sworn according to law, was 3 examined and testified as follows: 4 BY ATTORNEY ADAMS: 5 Q. Dr. Diette, can you tell us your full 6 name for the record. 7 A. Sure. Gregory Bruce Diette. 8 Q. You've been retained as an expert 9 witness in the Sarah Plant case? 10 A. That's correct. 11 Q. And the Shelby Payne case? 12 A. That is correct. 13 Q. By who? 14 A. Well, let's see. For Miss Payne, 15 it's Colgate-Palmolive and Mennen and Avon. 16 Let me just be sure -- and for 17 Miss Plant, Colgate-Palmolive and Whittaker, 18 Clark & Daniels. 19 Q. Anyone else in either case? 20 A. No. 21 Q. Are you prepared to give all your 22 expert opinions that you've reached in the Plant 23 case? 24 A. I am. 25 Q. Are you prepared to give all your	Page 13 1 Q. If ask a question you don't 2 understand, will you let me know? 3 A. I will. 4 Q. If I ask a question that assumes a 5 fact that's untrue, will you let me know? 6 A. I'm not sure. Like, I don't know if 7 I'll know that that's the case. 8 Q. But if I say something like "When did 9 you stop beating your wife," would you let me 10 know that I've assumed a fact that isn't true, 11 that kind of thing? 12 A. If it's clear like that, I will. 13 Q. Thanks. Is it your opinion, within a 14 reasonable degree of medical certainty, that 15 Sarah Plant was exposed to asbestos? 16 A. NO. I think it's possible. But I 17 don't have enough information to show that she 18 was. 19 Q. Is it one of your opinions in this 20 case, to a reasonable degree of medical 21 certainty, that Shelby Payne was exposed to 22 asbestos? 23 A. I think it's similar. Like I know 24 that there's allegations that she was. But I 25 don't have enough information for me to say that

Gregory B. Diette, MD, MHS
February 03, 2023

Page 14 1 that's a fact. 2 Q. Is it your opinion in this case, 3 within a reasonable degree of medical certainty, 4 that Sarah Plant's mesothelioma was caused by 5 asbestos? 6 A. Based on the information I have right 7 now, I cannot say that it was. 8 Q. Is it one of your opinions in this 9 case, within a reasonable degree of medical 10 certainty, that Shelby Payne's mesothelioma was 11 caused by asbestos? 12 A. Again, you know, based on the 13 information I have, I can't make that statement 14 that it was caused by asbestos. 15 Q. Is it one of your opinions, within a 16 reasonable degree of medical certainty, that 17 Sarah Plant's mesothelioma was caused by 18 exposure to asbestos from her father? 19 A. No, I don't have enough information 20 to say that that's the case. 21 Q. Is it one of your opinions, within a 22 reasonable degree of medical certainty, that 23 Sarah Plant's mesothelioma was caused by 24 exposure to asbestos from pottery? 25 A. Again, I know that there's that	Page 16 1 husband. 2 Q. Is it one of your opinions, within a 3 reasonable degree of medical certainty, that 4 Miss Payne's mesothelioma formed spontaneously? 5 A. It is. 6 Q. Is it one of your opinions, within a 7 reasonable degree of medical certainty, that 8 Miss Payne's mesothelioma was naturally 9 occurring? 10 A. It is. 11 ATTORNEY ADAMS: I'm going to attach 12 as Exhibit 1 your report in the Sarah 13 Plant case dated February 1st, 2023. 14 (Exhibit 1 was marked for 15 identification.) 16 ATTORNEY ADAMS: And I'll attach as 17 Exhibit Number 2 Dr. Diette's report in 18 the Shelby Payne case dated February 2nd, 19 2023. 20 (Exhibit 2 was marked for 21 identification.) 22 BY ATTORNEY ADAMS: 23 Q. Do you have those reports, Doctor? 24 A. I do. 25 Q. Are all of your opinions that you
Page 15 1 allegation, but I don't have enough information 2 for me to say that she was exposed to asbestos 3 from her pottery work. 4 Q. Is it one of your opinions, within a 5 reasonable degree of medical certainty, that 6 Sarah Plant's mesothelioma was spontaneous? 7 A. Yeah, I think I use the term 8 "naturally occurring" for her because I think 9 that -- I think -- you know, I'm referring to 10 spontaneous mutations but also a contribution 11 from her germline genetic defect. 12 Q. Is it one of your opinions, within a 13 reasonable degree of medical certainty, that 14 Sarah Plant's mesothelioma was naturally 15 occurring? 16 A. Yes. 17 Q. Is it one of your opinions, within a 18 reasonable degree of medical certainty, that 19 Miss Payne was exposed to asbestos from her 20 husband? 21 A. You know, it's similar to, I guess, 22 what we talked about with these other exposures. 23 I know that it's been mentioned in the 24 materials. But I don't have enough information 25 to say that she was exposed to asbestos from her	Page 17 1 have reached as of today, February 3rd, 2023, 2 contained within those two reports? 3 A. Yeah, I think all the main or basic 4 opinions. You know, there sometimes can be 5 minor opinions that are supporting that I didn't 6 list. But my major, my major opinions that I 7 expect to have in both of these reports are in 8 there. 9 Q. Are there any opinions in the Payne 10 or Plant case you can tell me about now that are 11 not contained in the two reports? 12 ATTORNEY LAWLER: Objection to form. 13 THE WITNESS: No, I'm not aware of 14 any right now. I'm just imagining that 15 there could be a question, you know, that 16 elicits an opinion. And I may not have 17 written it in the report. 18 BY ATTORNEY ADAMS: 19 Q. One of your conclusions in the 20 report -- let's start with the Sarah Plant 21 case -- is [as read]: Based on the available 22 medical and scientific literature, it is not 23 plausible that asbestos as a potential 24 contaminant of talc in Cashmere Bouquet cosmetic 25 talcum powder or cosmetic talc allegedly

Page 18 1 distributed by Whittaker, Clark & Daniels to 2 Avon could have caused Miss Plant to develop 3 mesothelioma; correct? 4 A. That's correct. 5 Q. Where did the talc Whittaker, Clark & 6 Daniels supplied to Avon come from? 7 ATTORNEY LAWLER: Object to form. 8 THE WITNESS: It's whatever's in 9 Mr. Seagrave's report. It's detailed 10 there. I mean, I didn't memorize it. But 11 I could pull out his report and see what 12 he said. 13 BY ATTORNEY ADAMS: 14 Q. Sure. 15 A. Would you like me to do that? 16 Q. Please. 17 A. Okay. 18 So I have his report. So it looks 19 like he, he detailed talc deposits from Val 20 Chisano in Italy; Murphy, North Carolina; 21 Southwestern Montana; Alpine Alabama; Southern 22 Vermont; and Guangxi, China. And I think he 23 also mentioned France as the general sources 24 that he considered. 25 And then for Avon in particular, I	Page 20 1 considered in his report for all of the sources 2 together, including those that went to Avon. 3 But I haven't -- I don't think I 4 remember exactly whether it's every single one 5 of those or just some subset of those that he 6 links with Avon. 7 Q. Okay. But Italy -- okay. So what is 8 your understanding of where the talc that 9 Whittaker, Clark & Daniels supplied to Avon came 10 from? Is it just based on Mr. Seagrave's 11 report? 12 A. It is. 13 Q. Okay. And based on Mr. Seagrave's 14 report, the talc Whittaker, Clark & Daniels 15 supplied to Avon came from Italy, 16 North Carolina, Southwestern Montana, Southern 17 Vermont, China, and France or some subset of 18 those regions; correct? 19 A. Yes. 20 ATTORNEY LAWLER: Object to form. 21 THE WITNESS: Correct. Especially 22 with "or some subset," right. I think 23 that's the full universe potentially. I'd 24 have to go back and look carefully at his 25 report to see which of those he
Page 19 1 think he's got -- let's see if I can figure this 2 out. 3 I think it's some subset of that. 4 But that's the universe of potential, potential 5 sources. 6 Q. Italy, North Carolina, Southern 7 Montana, Vermont, China, and France? 8 A. Do we leave one out? Did you say 9 North Carolina? 10 Q. I did. 11 A. Okay. And Southern Vermont? 12 Q. I just have Vermont. I had Southern 13 Montana. 14 A. I got -- I have Southwest Montana and 15 then Southern Vermont, from his report. 16 Q. Got it. Let me just make sure I have 17 it. 18 So it's your understanding, 19 Dr. Diette, that the talc Whittaker, Clark & 20 Daniels supplied to Avon at issue in the Sarah 21 Plant case came from Italy, North Carolina, 22 Southwestern Montana, Southern Vermont, China, 23 and France? 24 A. No. It's not my opinion. My opinion 25 is that those are the sources that Mr. Seagrave	Page 21 1 specifically linked to Avon and not 2 necessarily to some other company or 3 product. 4 BY ATTORNEY ADAMS: 5 Q. But no other regions that you're 6 aware of -- strike that. 7 Other than what I just listed, there 8 are no other regions you're aware of where talc 9 came from that Whittaker, Clark & Daniels 10 supplied to Avon at issue in the Sarah Plant 11 case; am I correct? 12 A. I think so. I didn't listen 13 carefully as you read off the locations. But 14 again, it's the ones that he's listed literally 15 in his report. So assuming you said all of 16 those that I said, then that's exactly right. 17 Q. Okay. Dr. Diette, I need you to try 18 to listen very carefully. This is important to 19 me. 20 The regions were you understand the 21 talc Whittaker, Clark & Daniels supplied to Avon 22 are -- I don't even -- I don't like that 23 question. Let me try again. 24 Your understanding of where the talc 25 Whittaker, Clark & Daniels supplied to Avon came

Page 22 1 from -- I don't like that either. Let me try a 2 third time. 3 It's your understanding that the talc 4 Whittaker, Clark & Daniels supplied to Avon came 5 from Italy, North Carolina, Southwestern 6 Montana, Southern Vermont, China, and France, or 7 some subset of those regions; correct? 8 ATTORNEY LAWLER: Object to form. 9 THE WITNESS: Yeah, you left out 10 Alabama. 11 BY ATTORNEY ADAMS: 12 Q. Ah, that's good. 13 A. But I can say my answer would be yes 14 if you also include Alabama in your question. 15 Q. Got it. You're not aware of 16 Whittaker, Clark & Daniels supplying talc to 17 Avon from any other region other than those that 18 I just listed; correct? 19 ATTORNEY LAWLER: Object to form. 20 THE WITNESS: That's correct. 21 BY ATTORNEY ADAMS: 22 Q. And the basis of your understanding 23 of where Whittaker, Clark & Daniels got the talc 24 it supplied to Avon is Mr. Seagrave's report; 25 correct?	Page 24 1 A. I think I've seen, I've seen one 2 study that I think's an exposure study. But not 3 a traditional epidemiology study. 4 Q. So you're not aware of any 5 traditional epidemiology studies performed on 6 any miners and millers of talc in Southwestern 7 Montana? 8 A. Correct. 9 Q. I know you're aware of epidemiology 10 studies performed on miners and millers of talc 11 in Italy and Vermont; correct? 12 A. You are. 13 Q. Are there epidemiology studies of 14 miners and millers of talc in France? 15 A. There are. 16 Q. That's what I thought. 17 Another one of your opinions in your 18 report is that [as read]: Miss Plant had a 19 genetic predisposition to cancer, BRCA2, which 20 increased her risk of developing malignancies, 21 including mesothelioma. 22 Correct? 23 A. That is correct. 24 Q. Did BRCA2 cause Miss Plant's 25 mesothelioma?
Page 23 1 THE WITNESS: That is correct. 2 BY ATTORNEY ADAMS: 3 Q. Anything else? 4 A. No. 5 Q. Are you aware of any epidemiology 6 studies performed on the miners and millers of 7 talc in Alabama? 8 A. I am not. 9 Q. Are you aware of any epidemiology 10 studies performed on the miners and millers of 11 talc in China? 12 A. Sure. I mean -- but there's 13 different epidemiology studies done in different 14 regions at different times. 15 Q. Are you aware of any specifically 16 done on miners and millers in China? 17 A. I can't recall -- I can't recall any 18 right now. 19 Q. Are you aware of any epidemiology 20 studies performed on the miners and millers of 21 talc in North Carolina? 22 A. I have not seen any. 23 Q. Are you aware of any epidemiology 24 studies performed on the miners and millers of 25 talc in Southwestern Montana?	Page 25 1 A. I think it may have contributed to 2 her development of mesothelioma. 3 Q. Is it one of your opinions, to a 4 reasonable degree of scientific certainty, that 5 Miss Plant's BRCA2 genetic mutation was the sole 6 cause of her mesothelioma? 7 ATTORNEY LAWLER: Object to form. 8 THE WITNESS: I don't think so. 9 I'm just trying to make sure I 10 understand your question. I guess, I 11 guess my answer would be no because I 12 think what she has is a DNA repair gene 13 abnormality. 14 And so I think more likely it would 15 be that she had a spontaneous mutation 16 that couldn't be repaired. So the BRCA2 17 defect contributed. 18 But I wouldn't be able to say that 19 all by itself, you know, that it 20 literally, you know, caused the cancer. 21 BY ATTORNEY ADAMS: 22 Q. Are you aware of a study that 23 concludes BRCA2 causes mesothelioma in the 24 absence of asbestos exposure? 25 ATTORNEY LAWLER: Object to form.

Page 26 1 THE WITNESS: Well, I think we have 2 to think about what "cause" means. You 3 know, there are studies that have found 4 association of BRCA2 with mesothelioma 5 cases, including in people with no 6 asbestos exposure. 7 And, you know, for that type of 8 germline mutation it's been shown that 9 those are more likely in people with 10 minimal or no asbestos exposure. So it 11 fits with the concept I think you're 12 asking about. 13 BY ATTORNEY ADAMS: 14 Q. Can you name any of those studies? 15 A. Sure. No, I have them listed in my 16 report. 17 Q. Right. Can you point me to them? 18 A. Uh-huh. So I think we'll find most 19 of what we're looking for on page 31 and maybe 20 into 32 of the report. And then the articles 21 that I've listed there -- let me just see -- 22 that in sum sort of cover this topic are the 23 number 261 through number 266, as the, the 24 referenced citations at the bottom. 25 Q. And this is for Sarah Plant --	Page 28 1 A. I don't, I don't have any others to 2 point to. 3 Q. Okay. Do you know whether or not any 4 of the authors in any of the studies 261 to 266 5 have been paid by talc companies, asbestos 6 companies, or lawyers for the same? 7 A. I don't know one way or the other. I 8 haven't looked at the full list of each and 9 every author. 10 Q. Okay. Have you reviewed Miss Plant's 11 medical records in this case? 12 A. I have. 13 Q. Do you know who Dr. Taylor Ripley is? 14 A. I don't remember doctor by doctor. I 15 mean, I read all the notes, but I didn't 16 memorize, you know, who the doctors were. 17 Q. Okay. Have you reviewed the 18 deposition of Dr. Taylor Ripley that was taken 19 in this case? 20 A. I don't think I have it. 21 Q. Who provided you the case-specific 22 materials in this case? 23 A. The law firms involved in this case. 24 Q. For Colgate, Mennen, Whittaker, 25 Clark & Daniels, and Avon?
Page 27 1 A. I hope so. 2 Q. -- the report? 3 A. Yeah, that's the one I'm looking at. 4 Q. Okay. And it's your testimony that 5 the articles referenced in the footnotes 261 to 6 266 of your report in the Sarah Plant case state 7 that BRCA2 genetic mutation contributes to the 8 development of mesothelioma in individuals not 9 exposed to asbestos? 10 A. Well, what you said isn't a quote 11 from one of the studies. But what the studies 12 show in aggregate -- I can pull out the specific 13 ones -- show that BRCA2 and other similar 14 germline mutations are associated with people 15 who lack an asbestos exposure history. 16 So they don't say it the way you did, 17 but that's the meaning of that. 18 Q. And that's what the studies 19 identified in footnotes 261 to 266 of your 20 report indicate; correct? 21 A. That is correct. 22 Q. Okay. Are you aware of any other 23 studies that indicate BRCA2 genetic mutation is 24 associated with the development of mesothelioma 25 in the absence of asbestos exposure?	Page 29 1 A. No, not all those, right. Remember, 2 I said this was Colgate-Palmolive and Whittaker, 3 Clark & Daniels. 4 Q. Okay. All the materials you received 5 in the Sarah Plant and Shelby Payne cases came 6 from lawyers for Whittaker, Clark & Daniels, 7 Colgate, and Mennen? 8 A. If we're talking about materials, if 9 we're talking about the medical records and so 10 forth, then that's the, that's the way. 11 If we're talking about, like, 12 reliance materials, like articles and things, 13 then that's not the mechanism. 14 But if we're talking about, you know, 15 deposition transcripts, other legal materials, 16 and medical materials, then that's the way I got 17 them. 18 Q. From the lawyer? 19 A. From the lawyers. 20 Q. Did the lawyers for Whittaker, 21 Clark & Daniels, Mennen, or Colgate send you the 22 deposition transcript of Dr. Taylor Ripley? 23 A. I don't -- well, let me -- I don't 24 recall it, but let me just look at -- I have a 25 list here of what I received. I'll just

Page 30 1 double-check. 2 So I don't -- I don't see it on my 3 list, and I don't recall receiving it. 4 Q. When you received the medical records 5 for Sarah Plant from the lawyers, did you review 6 them? 7 A. I did. 8 Q. Did you see what Miss Plant's 9 treating doctor said about whether or not her 10 BRCA2 genetic mutation caused her mesothelioma? 11 A. I saw two different things from 12 treating doctors, and I think they were 13 different treating doctors. So I don't -- I'd 14 have to go back and look to see, you know, which 15 doctor we're talking about. 16 I saw one that -- I'm just 17 paraphrasing -- who said that the BRCA2 probably 18 did not cause the mesothelioma. And then I saw 19 a different one -- and I don't know who's who -- 20 who actually was taking the BRCA2 defect into 21 account for the treatment plan because patients 22 with a BRCA2 defect with mesothelioma apparently 23 are more responsive to platinum-based therapies. 24 So I think one doctor acknowledged 25 its importance in the treatment plan and the	Page 32 1 you; correct? 2 A. It looks familiar. I mean, it's 3 literally what you have in front of you. I 4 could see if I could find a copy of this, if 5 this is that important. I think it looks, it 6 looks like what I've seen. 7 Q. You think the lawyers sent you a 8 forgery? 9 A. Oh, I don't. I don't. I'm just -- 10 the way you're asking the questions, though, 11 like you're asking me to just affirm something 12 about this document. And, you know, you're the 13 one that's showing it to me. So I think it's up 14 to you to affirm how you got it. 15 Q. See how it has Sarah J. Plant's name 16 on it and her date of birth? 17 A. I do. 18 Q. And then it says [as read]: She also 19 carries a BRCA2 genetic mutation. The 20 mesothelioma is probably not a consequence of 21 the genetic mutation. 22 Do you see that? 23 A. I do. 24 Q. And if you go to the next page of 25 Exhibit 3, it's signed by Laura Witherspoon, MD.
Page 31 1 other one said something like "probably didn't 2 cause it." 3 Q. Miss Plant had several treating 4 doctors? 5 A. Yes. 6 Q. Did any of them say BRCA2 caused her 7 mesothelioma? 8 A. I didn't see a statement like that. 9 ATTORNEY ADAMS: I'm going to attach 10 as Exhibit Number 3 an excerpt of a couple 11 medical records from Miss Plant's file. 12 (Exhibit 3 was marked for 13 identification.) 14 BY ATTORNEY ADAMS: 15 Q. Are you able to see what I've marked 16 as Exhibit 3, Doctor? 17 A. I do. 18 Q. This is a true and correct copy of 19 one of Sarah Plant's medical records; correct? 20 A. I mean, it's up to you decide. I 21 don't know. I mean, it looks like a good copy 22 of a record. But I have no idea how to know 23 that this is a true and correct copy. 24 Q. Okay. This is one that was sent to 25 you by the lawyers for the companies that hired	Page 33 1 Do you see that? 2 A. I do. 3 Q. That's one of Miss Plant's treating 4 physicians; correct? 5 A. It is. Is this the person that's 6 giving her counseling about like future 7 surgeries for -- you know, because of her BRCA2? 8 Maybe if I can see the top. I'm just 9 wondering -- when you say treating, I'm not sure 10 she was one of the ones who is treating her 11 cancer. 12 Yeah, no, okay. I was just trying to 13 figure out, you know, where this person is. So 14 this is the person who I think was advising her 15 about, you know, future risk of other cancers. 16 Q. Okay. But Dr. Witherspoon is a 17 doctor that Miss Plant went to and saw in person 18 for some kind of medical care; correct? 19 ATTORNEY LAWLER: Object to form. 20 THE WITNESS: That is correct. 21 BY ATTORNEY ADAMS: 22 Q. You have never been one of Sarah 23 Plant's treating physicians; correct? 24 A. That is correct. 25 Q. Miss Plant never came to you for

Page 34 1 medical care; correct? 2 A. She has not. 3 Q. You've never met Miss Plant; correct? 4 A. I have not. 5 Q. You've never spoken to her; correct? 6 A. Correct. 7 Q. You wouldn't know what she looked 8 like if she bumped into you on the street; 9 correct? 10 A. I have not seen a picture of her. 11 Q. Do you agree or disagree with this 12 statement that Sarah Plant's mesothelioma is 13 probably not a consequence of her BRCA2 genetic 14 mutation? 15 ATTORNEY LAWLER: Object to form. 16 THE WITNESS: Yeah, I don't agree 17 with that statement. 18 BY ATTORNEY ADAMS: 19 Q. I'm just going to pages 4 and 5 of 20 Exhibit 3, which is the same statement. 21 [As read]: Also carries BRCA2 genetic mutation. 22 The mesothelioma is probably not a consequence 23 of the genetic mutation. 24 And this note is signed by another 25 one of Miss Plant's treating physicians. Do you	Page 36 1 ATTORNEY ADAMS: I'll mark as Exhibit 2 Number 4 the rough draft of the deposition 3 of Dr. Taylor Ripley. 4 (Exhibit 4 was marked for 5 identification.) 6 BY ATTORNEY ADAMS: 7 Q. Dr. Diette, are you able to see this 8 document where it says [as read]: Rough draft 9 only, deposition, Dr. Robert Ripley, January 27, 10 2023? 11 Do you see that? 12 A. I do. 13 Q. This is not a document you've seen 14 before; correct? 15 A. It does not look familiar. I don't 16 believe I've seen it. 17 Q. On page 219 of the document I asked 18 Dr. Ripley a few questions about the record that 19 I just showed you; okay? Can you assume that to 20 be true? 21 A. I'm sorry. I missed the first part 22 of what you said. 23 Q. I asked Dr. Ripley the same 24 questions -- strike that. 25 I asked Dr. Ripley about the same
Page 35 1 see that? 2 A. Yeah, I think this is the same thing, 3 though. 4 ATTORNEY LAWLER: Object to form. 5 THE WITNESS: And it looks like a 6 copy-forward, you know, type of note. 7 It's signed by somebody else, but it looks 8 like it's from the same clinic. 9 BY ATTORNEY ADAMS: 10 Q. This note is signed by Sarah E. 11 Snell, MD. Do you see that? 12 A. I do. 13 Q. Okay. I presume you disagree with 14 this statement -- never mind, I'll just withdraw 15 it. 16 We have two of Miss Plant's treating 17 physicians signing separate documents indicating 18 her mesothelioma was probably not a consequence 19 of her BRCA2 genetic mutation; correct? 20 ATTORNEY LAWLER: Object to form. 21 THE WITNESS: That is correct. 22 BY ATTORNEY ADAMS: 23 Q. I'm sorry. I didn't hear your 24 answer. 25 A. Oh, I said "That is correct."	Page 37 1 document I just showed you here at page 219; 2 okay? You with me? 3 A. I am. Thank you. 4 Q. And my question is [as read]: 5 It says, quote, the mesothelioma is 6 probably not a consequence of the genetic 7 mutation? Do you see that? 8 Answer: Yeah. I agree with him on 9 that. 10 Question: How come? 11 Because BRCA2 doesn't cause 12 mesothelioma. It makes her at risk of not 13 repairing injuries as well as a patient 14 should because it's, it's a mutation in a 15 DNA repair gene, and so -- but it's not a 16 causative event. It's, it's a lack of 17 recovery event, if you will. 18 Do you see that testimony from 19 Dr. Ripley? 20 A. I do. 21 Q. Okay. Do you agree or disagree with 22 Dr. Ripley's testimony? 23 ATTORNEY LAWLER: Object to form. 24 THE WITNESS: I agree. This is 25 exactly what I was telling you earlier,

Page 38 1 right. This is why I said it was 2 naturally occurring, because I don't, I 3 don't know that there's enough information 4 to say this gene literally causes cancer, 5 but it contributes to the development of 6 it or the perpetuation of it because it 7 can't fix an error. 8 So this fits with exactly what I was 9 saying earlier. 10 BY ATTORNEY ADAMS: 11 Q. Okay. What about the part where he 12 says [as read]: I agree with the treating 13 doctors that the mesothelioma is probably not a 14 consequence of the genetic mutation? 15 Do you agree with that or not? 16 A. I think his answer's inconsistent 17 with that statement above it because, because he 18 goes to say it's not a consequence -- 19 "consequence" is a different word than 20 "cause" -- but he also says that it's a repair 21 gene. So it's not a causative event; it's a 22 lack of recovery event, right. 23 But that's still an event, right. 24 It's still something that matters. So I think 25 his answer is inconsistent with the statement	Page 40 1 Do you see the portion that I've 2 read? 3 A. I do. 4 Q. Do you agree with Dr. Ripley's 5 agreement or do you disagree? 6 ATTORNEY LAWLER: Object to form. 7 THE WITNESS: It's impossible for me 8 to agree with his agreement. I mean, he's 9 himself; I'm not him. I could agree with 10 you that that's what he stated. 11 I just think that his fuller answer 12 down below after the "how come" actually 13 is a better explanation of what he's 14 talking about. And he's saying that the 15 BRCA gene doesn't cause it, but he talks 16 about how it contributes to the cancer. 17 BY ATTORNEY ADAMS: 18 Q. Three separate treating doctors for 19 Sarah Plant have indicated that her BRCA2 20 genetic defect -- genetic mutation, excuse me -- 21 is probably not -- strike that. Let me start 22 over. 23 Three separate treating doctors for 24 Sarah Plant have indicated that her mesothelioma 25 is probably not a consequence of her BRCA2
Page 39 1 that he was read that he, you know, didn't make 2 to begin with. 3 Q. So you disagree with Dr. Ripley's 4 agreement that the mesothelioma is probably not 5 a consequence of the genetic mutation? 6 ATTORNEY LAWLER: Object to form. 7 THE WITNESS: It looks to me as if he 8 clarified it by saying it doesn't cause it 9 but then he explained what the role was. 10 So I think he answered the question. But 11 I don't think it's -- I think he qualified 12 it in a way that makes a lot of sense. 13 BY ATTORNEY ADAMS: 14 Q. Let's just isolate the part where 15 Dr. Ripley says [as read]: Yeah, I agree with 16 them on that. 17 Right? You know what I'm talking 18 about? 19 A. I do. 20 Q. Lines 3 to 5 [as read]: 21 Question: It says, quote, 22 mesothelioma is probably not a consequence 23 of a genetic mutation. 24 Do you see that? 25 Yeah. I agree with him on that.	Page 41 1 genetic mutation; correct? 2 ATTORNEY LAWLER: Objection; 3 mischaracterizes, assumes facts. 4 THE WITNESS: So I think literally -- 5 you know, we saw those two articles or, I 6 mean, those two abstractions from the 7 medical records where they signed the same 8 statement. And I see that he says that he 9 agrees here in this third case. But I 10 think his full answer is not fully 11 consistent with that because he actually 12 describes why it is a consequence. 13 ATTORNEY ADAMS: Move to strike the 14 nonresponsive. 15 BY ATTORNEY ADAMS: 16 Q. Do you agree that three separate 17 treating physicians for Sarah Plant have 18 indicated her mesothelioma is probably not a 19 consequence of her BRCA2 genetic mutation or do 20 you disagree? 21 A. I'm not going to -- 22 ATTORNEY LAWLER: Objection; 23 mischaracterizes, assumes facts. 24 THE WITNESS: I'm not going to answer 25 differently than I did because I think my

Page 42 1 answer is the correct answer. 2 BY ATTORNEY ADAMS: 3 Q. I'm asking you a new question, now. 4 A. No, it sounds like the same question 5 to me. And if there's a difference, I can't 6 detect what it is. 7 Q. Do you agree that three separate 8 treating physicians for Sarah Plant -- 9 Dr. Witherspoon, Dr. Snell, and Dr. Ripley -- 10 have all stated that her mesothelioma is 11 probably not a consequence of her BRCA2 genetic 12 mutation? Do you agree or disagree? 13 ATTORNEY LAWLER: Objection; 14 cumulative, mischaracterizes, and assumes 15 facts. 16 THE WITNESS: And I disagree for the 17 reasons I said, right. If you were going 18 to just try to trick me and just show me 19 that first little snippet of the answer, 20 then it would be hard to disagree with. 21 But when you see what his actual full 22 answer is, then that's not consistent with 23 him agreeing that it's not a consequence. 24 BY ATTORNEY ADAMS: 25 Q. So when Dr. Ripley said -- was	Page 44 1 event. So that part I agree with. 2 BY ATTORNEY ADAMS: 3 Q. Do you agree with Dr. Ripley's 4 testimony that BRCA2 doesn't cause mesothelioma? 5 ATTORNEY LAWLER: Object to form. 6 THE WITNESS: So I think the answer 7 is I don't know; because I haven't seen 8 studies that tell whether or not these 9 germline mutations that are linked to 10 mesothelioma, whether they can, all by 11 themselves, cause a cancer or whether they 12 are just simply in the role of not 13 repairing a defect that come from some 14 other mechanism. 15 So I think there's enough information 16 to say that BRCA2 can't cause a tumor. 17 But I haven't seen affirmative evidence 18 that shows that it does. 19 BY ATTORNEY ADAMS: 20 Q. Does BRCA2 -- okay. You haven't seen 21 evidence that -- strike that. 22 Have you seen evidence that BRCA2 23 causes genetic mutation? 24 A. The BRCA2 is a genetic mutation. And 25 the thing we're talking about, right, I
Page 43 1 asked -- [as read]: It says, quote, the 2 mesothelioma was probably not a consequence of 3 the genetic mutation. Do you see that? And he 4 answered, Yeah, I agree with him on that -- he 5 didn't say the mesothelioma is probably not a 6 consequence of the genetic mutation? 7 Is that your testimony? 8 ATTORNEY LAWLER: Object to form; 9 argumentative. 10 THE WITNESS: I see it exactly. But 11 I think -- I don't know if you're not 12 listen carefully. But I think since he 13 gave a fuller answer after he said "how 14 come," that that is inconsistent with it 15 not being a consequence of the genetic 16 mutation. 17 BY ATTORNEY ADAMS: 18 Q. Okay. So you agree with Dr. Ripley? 19 ATTORNEY LAWLER: Object to form. 20 THE WITNESS: I agree with this 21 statement that we see where he explains 22 that the BRCA2 didn't cause the 23 mesothelioma, per se, but that because 24 it's the mutational -- it's a repair gene 25 for mutation, it's a lack-of-recovery	Page 45 1 assume -- we're talking about a mutation in the 2 BRCA2 gene. 3 ATTORNEY ADAMS: Move to strike as 4 nonresponsive. 5 BY ATTORNEY ADAMS: 6 Q. Have you seen an indication that 7 BRCA2 causes genetic mutation? 8 ATTORNEY LAWLER: Object to form. 9 THE WITNESS: So it itself is -- 10 we're referring to a genetic mutation. 11 It's a shorthand for a genetic mutation in 12 a particular gene. 13 I have not seen that that particular 14 abnormal gene can itself induce a genetic 15 defect in another cell. But I don't know 16 that it can't. I just haven't seen that 17 it can. 18 BY ATTORNEY ADAMS: 19 Q. Have you seen evidence that BRCA2 can 20 cause a genetic defect in mesothelial cells? 21 ATTORNEY LAWLER: Object to form. 22 THE WITNESS: I haven't seen anything 23 on that one way or the other. 24 BY ATTORNEY ADAMS: 25 Q. In your report you say [as read]: In

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Page 46 1 women in the US, most cases of mesothelioma, 2 77 percent, are not caused by asbestos exposure. 3 Do I have that right? 4 A. You do. 5 Q. What's the source of that statement? 6 Is there a way for you to point me to it in your 7 report or some other way? 8 A. So the general statement comes from 9 multiple sources. But the specific 77 percent 10 comes from, as you know, from Spirtas from 1994. 11 Q. Can you identify any study, 12 publication, or literature written by someone 13 who was not paid by talc defendants, asbestos 14 defendants, or their lawyers that says over 15 70 percent of women's mesotheliomas are not 16 caused by asbestos? 17 ATTORNEY LAWLER: Object to form. 18 THE WITNESS: So we're talking about 19 attributable risk. And that's the only 20 paper I can find -- or most recent paper 21 in the United States -- that has that 22 attributable risk estimate. And as far as 23 I know, the authors of that paper were not 24 paid by any of the types of, you know, 25 entities that you just listed.	Page 48 1 Q. First of all, do you know how to 2 spell -- is it H-E-N-L-A-Y or E-Y? 3 A. E-Y. It's listed on page 61 of my 4 report. 5 Q. Thank you. So I've got Spirtas 1994, 6 Henley, Moolgavkar, Price and Ware. 7 Are there any other studies or 8 authors you can identify in support of your 9 opinion that most mesotheliomas in women are 10 because -- are not caused by asbestos exposure? 11 A. I'd have to look back. I've seen it 12 written off in -- I think there's one of the 13 papers where, like from a mesothelioma group 14 that Carbone is part of. I think there was like 15 a 2020 or 2019 paper. I haven't memorized it. 16 I think they have a statement in there about 17 that. But the foundation for it comes from the 18 epidemiology studies. 19 And the Moolgavkar, there's more than 20 one. There's a book chapter as well as a paper. 21 And Price and Ware, there's more than one, you 22 know, more than one publication. 23 Q. Moolgavkar you know has been 24 routinely hired and paid by asbestos companies 25 and talc companies; correct?
Page 47 1 BY ATTORNEY ADAMS: 2 Q. You're talking about Spirtas 1994? 3 A. I am. 4 Q. What are the other sources for your 5 77 percent spontaneous opinion? 6 A. So what I tried to clarify is that 7 the general statement that most women's 8 mesotheliomas in the US are not caused by 9 asbestos comes from a different body of evidence 10 as well. 11 So the 77 percent specifically only 12 links to Spirtas, right. That specific number 13 only links to Spirtas. 14 The other comes from other 15 epidemiologic studies. So, for example, you 16 know, from Henley, from Moolgavkar, from Price 17 and Ware, that have looked at the historic 18 trends through the SEER data and looking at the, 19 essentially, you know, flat or unfluctuating 20 rate of mesothelioma among women and then the 21 lack of an association with historic asbestos 22 usage in the United States. 23 Q. Can you give me a more precise cite 24 on the Henley paper? 25 A. Let's see.	Page 49 1 ATTORNEY LAWLER: Object to form. 2 THE WITNESS: I know nothing about 3 routinely. I'm aware of at least one 4 case, I think, that he was involved in 5 that I was involved in. But otherwise, I 6 don't know what is -- you know, how he 7 spends his time. 8 BY ATTORNEY ADAMS: 9 Q. You didn't know that the asbestos 10 brake companies hire them all the time to defend 11 them in asbestos cases? 12 ATTORNEY LAWLER: Object to form. 13 THE WITNESS: Yeah, I have no idea if 14 that's true or not. 15 BY ATTORNEY ADAMS: 16 Q. And you know that Bertram Price has 17 been paid by the law firms that represent the 18 talc companies in asbestos litigation; correct? 19 A. I have -- 20 ATTORNEY LAWLER: Object to form. 21 THE WITNESS: Yeah, I have no 22 information about that. 23 BY ATTORNEY ADAMS: 24 Q. You know that Carbone has been 25 retained and paid by talc companies in asbestos

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Page 50 1 litigation; correct? 2 ATTORNEY LAWLER: Object to form. 3 THE WITNESS: I think -- I don't have 4 knowledge of that other than I think I saw 5 a disclosure where he's been retained by 6 plaintiffs and defendants, I think, in 7 either talc- or asbestos-related cases, if 8 I remember right. But otherwise, I don't 9 have knowledge about that. 10 BY ATTORNEY ADAMS: 11 Q. He's been retained by plaintiffs, you 12 think? 13 A. I think -- if I remember right, I 14 think I saw a disclosure statement in one of his 15 papers. 16 And actually -- so if we're talking 17 about retained by, that seems like a technical 18 term. Like maybe he did some work for a 19 plaintiff that isn't the same as being retained 20 by; or maybe he read a study or a slide or 21 something. I don't know. But I did see 22 something that it wasn't just defense work. 23 Q. Do you know whether or not Henley has 24 been retained or paid by asbestos companies, 25 talc companies, or their lawyers?	Page 52 1 Q. Okay. So you don't know whether or 2 not the authors who you have relied on to 3 support your opinion that most mesotheliomas in 4 women are not related to asbestos have been paid 5 by talc companies, asbestos companies, or their 6 lawyers? 7 ATTORNEY LAWLER: Object to form. 8 THE WITNESS: Yeah, I can't, I can't 9 answer that. 10 BY ATTORNEY ADAMS: 11 Q. In your report in the Payne case, 12 which I marked as Exhibit 2, you indicate that 13 [as read]: There is no clinical evidence that 14 Miss Payne had any exposure to asbestos from 15 Avon, Mennen, or Cashmere Bouquet cosmetic 16 talcum powders. 17 Correct? 18 A. That sounds right. I'm just opening 19 to the -- you looking in the assessment? 20 Q. I think it was the conclusions at the 21 end. I can pull it up if you need it. 22 A. No, okay, I see it. It's probably in 23 both. It's for sure in the conclusions. I see 24 it. 25 Q. Did you look at any materials from
Page 51 1 ATTORNEY LAWLER: Object to form. 2 THE WITNESS: I have no idea. I 3 think it wouldn't have been possible at 4 the time that the paper came out because 5 that was a, like a CDC paper. I would 6 imagine they, you know, wouldn't be 7 involved in litigation. 8 BY ATTORNEY ADAMS: 9 Q. Can you identify any author of any 10 paper or study who you know has not been paid by 11 talc, asbestos -- talc companies, asbestos 12 companies, or their lawyers who says that most 13 mesotheliomas in women are not related to 14 asbestos? 15 ATTORNEY LAWLER: Object to form. 16 THE WITNESS: I need some time to 17 pull out the paper that Carbone's on. But 18 that was quite a long panel of -- quite a 19 long, long list of authors. 20 But I also -- I don't have like a 21 registry of who's done work for whom under 22 what circumstances. So it's kind of an 23 impossible question for me to ask -- 24 answer, I mean. 25 BY ATTORNEY ADAMS:	Page 53 1 Avon before reaching that conclusion? 2 A. I guess I don't know what you mean by 3 "from Avon." You mean specifically from the 4 company? 5 Q. Yeah; like company documents, 6 testing, anything like that. 7 A. I have not. 8 Q. Did you look at any Mennen corporate 9 documents before reaching your opinion that 10 Miss Payne was not exposed to asbestos from any 11 Mennen talcum product? 12 ATTORNEY LAWLER: Object to form. 13 THE WITNESS: I have not. 14 BY ATTORNEY ADAMS: 15 Q. Did you look at any Colgate internal 16 corporate documents before reaching your 17 conclusion that Miss Payne was not exposed to 18 asbestos from any Colgate talcum powders? 19 ATTORNEY LAWLER: Object to form. 20 THE WITNESS: I have not. 21 BY ATTORNEY ADAMS: 22 Q. Are you aware that there's a -- 23 strike that. 24 What is the Avon product that 25 Miss Payne used? You know how they have names

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Page 54 1 like Skin So Soft, Wild Rose, Unforgettable, 2 stuff like that? 3 A. Yeah. I think Cotillion, I think 4 Cotillion was the, like, body powder, was the 5 one that was identified. 6 Q. Did the lawyers for Avon give you any 7 of the testing they have for asbestos in their 8 Cotillion powder? 9 ATTORNEY IUOLO: Objection. 10 ATTORNEY LAWLER: Object to form. 11 THE WITNESS: They had not. 12 BY ATTORNEY ADAMS: 13 Q. Okay. Did you assume that there was 14 no asbestos in Avon's Cotillion powder at any 15 time? 16 ATTORNEY IUOLO: Objection; form. 17 THE WITNESS: I did not. 18 BY ATTORNEY ADAMS: 19 Q. How did you reach the opinion that 20 Miss Payne was never exposed to any asbestos 21 from any Avon Cotillion talcum powder? 22 A. I didn't. So the statement you read 23 is that there's no clinical evidence that she 24 had exposure, which is not the same as saying 25 she never had any exposure.	Page 56 1 A. I have no idea what you're talking 2 about. 3 (Exhibit 5 was marked for 4 identification.) 5 BY ATTORNEY ADAMS: 6 Q. I've marked as Exhibit 5 the report 7 of Lee Poye dated July 12, 2029. 8 A. 2029? Is this a future report from 9 six years from now? 10 Q. 2019; sorry. Are you able to see 11 that? 12 A. I can see that. 13 Q. See how it says July 12, 2019? 14 A. I do. 15 Q. And then it says [as read]: Analysis 16 of Cashmere Bouquet and Avon Cotillion cosmetic 17 talc products for the presence of asbestos. 18 Do you see that up at the top, 19 bolded? 20 A. I do. 21 Q. And then on the second page it says 22 Summary of Analytical Results. And it's signed 23 by Lee W. Poye, vice president, J3 Resources, 24 Inc. 25 Do you see that?
Page 55 1 Q. What does "clinical evidence" mean? 2 A. Looking for things through the 3 medical records that would establish that. 4 Q. Okay. So in Miss Payne's medical 5 records there's no evidence of exposure to 6 asbestos from Avon Cotillion powder; that's your 7 opinion? 8 A. It is my opinion. 9 Q. Okay. Are you aware that Avon's own 10 expert found 1 percent anthophyllite asbestos in 11 Cotillion talcum powder? 12 ATTORNEY IUOLO: Objection. 13 THE WITNESS: I'm not aware of that. 14 I don't know if that's right or not. I 15 don't have any way to corroborate that. 16 BY ATTORNEY ADAMS: 17 Q. Well, you could read the study; 18 right? 19 A. What's the study? 20 Q. The study that Avon's expert 21 performed on Avon Cotillion cosmetic talc 22 products for asbestos. 23 ATTORNEY IUOLO: Objection to form. 24 BY ATTORNEY ADAMS: 25 Q. Do you know what I'm talking about?	Page 57 1 A. I do. 2 Q. It says [as read]: Polarized light 3 microscopy, ISO 22262-1, found the samples 4 contained approximately 94 percent to a hundred 5 percent talc. Platy talc, fibrous talc, and/or 6 talc ribbons was observed and documented in all 7 five samples. 1 percent anthophyllite asbestos 8 was detected in sample AV-4. 9 Do you see that? 10 A. I do. 11 Q. Do you have any information to 12 dispute Mr. Poye's findings? 13 ATTORNEY LAWLER: Object to form. 14 ATTORNEY IUOLO: Objection. 15 THE WITNESS: This isn't my 16 expertise. I mean, I'm not an expert in 17 the same field he is. So I can't critique 18 his findings one way or the other. 19 BY ATTORNEY ADAMS: 20 Q. [As read]: Analytical transmission 21 electron microscopy, ISO 22262-2, following 22 heavy liquid separation identified 23 0.00256 percent tremolite asbestos in AV-2 and 24 0.330 percent anthophyllite asbestos in sample 25 AV-4.

Page 58 1 Do you see that? 2 A. I do. 3 Q. And then if you go to the next page, 4 it's got pictures of the four Avon Cotillion 5 samples that Mr. Poye tested. Do you see that? 6 A. I see five pictures. I don't know. 7 Q. One's Cashmere Bouquet. See the 8 other four are Avon Cotillion? 9 A. I see that now; yeah. 10 Q. And so if this report is true, then 11 Mr. Poye found up to 1 percent asbestos in the 12 very Avon powder that Miss Payne used for years; 13 correct? 14 ATTORNEY IUOLO: Objection. 15 ATTORNEY LAWLER: Object to form. 16 THE WITNESS: I don't, I don't know 17 what the sources of these are. 18 BY ATTORNEY ADAMS: 19 Q. The Avon lawyers never showed you 20 this report? 21 ATTORNEY IUOLO: Objection. 22 THE WITNESS: We've already discussed 23 that. No, I've not seen this. 24 BY ATTORNEY ADAMS: 25 Q. Is there still no clinical evidence	Page 60 1 ATTORNEY ADAMS: And I'm going to 2 start with Plant. I'll attach as 3 Exhibit 6 notes regarding Eric Johnson in 4 the Plant case. 5 (Exhibit 6 was marked for 6 identification.) 7 ATTORNEY ADAMS: I'll attach as 8 Exhibit 7 notes regarding Dr. Maddox in 9 the Plant case. 10 (Exhibit 7 was marked for 11 identification.) 12 THE WITNESS: Pardon me just for 13 interrupting. Are you asking me to 14 confirm that these are what I have, or are 15 you just reading them? 16 BY ATTORNEY ADAMS: 17 Q. I'm hoping that once I get through 18 reading them, you can answer a question like: 19 Do I have all of the materials you've generated 20 in the Sarah Plant case? 21 A. Sure. So I might just need a moment 22 to pull up my list, then, so I can, you know, 23 mentally go through it and see if you're reading 24 everything that I know of too. 25 Q. Right. Let me know when you've done
Page 59 1 that Miss Payne had any exposure to asbestos 2 from Avon cosmetic talcum powders? 3 A. That's still correct. 4 Q. But clinical evidence doesn't mean 5 all evidence; right? It just means medical 6 records? 7 ATTORNEY LAWLER: Objection. 8 ATTORNEY IUOLO: Objection. 9 THE WITNESS: That's what I, that's 10 what I intend it to mean. 11 BY ATTORNEY ADAMS: 12 Q. Another opinion you put in your 13 report about Miss Payne is that [as read]: Her 14 personal and family history of neoplasms, it is 15 possible that Miss Payne had a hereditary risk 16 for developing cancer. 17 Correct? 18 A. That's correct. 19 Q. Can you go further than "possible"? 20 A. I cannot. 21 ATTORNEY ADAMS: I want to attach the 22 documents quickly that we received in the 23 Payne and Plant cases and make sure I have 24 everything; okay? 25 THE WITNESS: Sure thing.	Page 61 1 that. 2 A. Okay. I'm all set. 3 ATTORNEY ADAMS: Okay. So I attached 4 as Exhibit 6 your notes regarding Eric 5 Johnson's deposition in the Plant case. 6 Exhibit 7 will be Dr. Diette's notes 7 regarding Dr. Maddox in the Plant case. 8 Exhibit 8 will be Dr. Diette's notes 9 regarding Patrice Johnson in the Plant 10 case. 11 (Exhibit 8 was marked for 12 identification.) 13 ATTORNEY ADAMS: Exhibit 9 will be 14 Dr. Diette's notes regarding Sarah Plant's 15 deposition in the Plant case. 16 (Exhibit 9 was marked for 17 identification.) 18 ATTORNEY ADAMS: Exhibit 10 will be 19 Dr. Diette's document regarding Sarah 20 Plant, legal and employment notes. 21 (Exhibit 10 was marked for 22 identification.) 23 ATTORNEY ADAMS: Exhibit 11 will be 24 Dr. Diette's medical notes in the Plant 25 case.

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Page 62 1 (Exhibit 11 was marked for 2 identification.) 3 ATTORNEY ADAMS: Exhibit 12 be 4 Dr. Diette's pulmonary function test 5 summary chart in the Plant case. 6 (Exhibit 12 was marked for 7 identification.) 8 ATTORNEY ADAMS: Exhibit 13 will be 9 Dr. Diette's CV in the Plant case. 10 (Exhibit 13 was marked for 11 identification.) 12 BY ATTORNEY ADAMS: 13 Q. How do I tell if it's your most 14 current CV, Dr. Diette? Is there an easy way? 15 A. No. It just is. I mean it's -- 16 that's the one that I, you know, I sent along to 17 my assistant. 18 ATTORNEY ADAMS: Okay. Exhibit 14 19 will be Dr. Diette's testimony list that 20 was produced in the Plant case. 21 (Exhibit 14 was marked for 22 identification.) 23 ATTORNEY ADAMS: Exhibit 15 will be 24 Dr. Diette's fee schedule that was 25 produced in the Plant case.	Page 64 1 Q. Right. 2 A. You didn't say the transcripts, but I 3 have the transcript. But I didn't probably 4 produce it, if that's right word, because I 5 assumed you have that, like you have the same 6 thing I do. 7 Q. Right, okay. Have I attached all of 8 the documents you generated, you created in the 9 Sarah Plant case? 10 A. Yes. And it includes my report as 11 well. 12 Q. Okay. Were there other materials you 13 received but did not summarize? 14 Understand? In other words, I know 15 you receive the deposition of Eric Johnson 16 because you summarized it. My question is: 17 Were there some depositions or materials that 18 you received that you didn't identify in the 19 summary? 20 A. Well, I get, like, the reports, like 21 the expert reports. I didn't, I didn't create a 22 summary of those, although I included a little 23 bit of, you know, text in my report to 24 acknowledge, you know, what they had put in the 25 report.
Page 63 1 (Exhibit 15 was marked for 2 identification.) 3 ATTORNEY ADAMS: Exhibit 16 will be 4 Dr. Diette's invoices from the Plant case. 5 (Exhibit 16 was marked for 6 identification.) 7 BY ATTORNEY ADAMS: 8 Q. Exhibit 17 will be -- now we're going 9 to start on the Payne documents. I don't know 10 if you need -- why don't we pause here. 11 A. Yeah. 12 Q. Have I now attached all of the 13 documents you have produced in the Sarah Plant 14 case? 15 A. Just -- I'm just stumbling on 16 "produced" because my case materials also 17 include the actual documents themselves, right. 18 So like the medical records and so forth as an 19 example. So you're trying to not exclude, like, 20 the primary source documents or...? 21 Q. Well, we didn't get those. But I 22 assumed you had them because of the summaries. 23 A. Well, I'll give you another example. 24 Like where there's a deposition, I have the 25 deposition transcript.	Page 65 1 Q. Okay. Anything else? 2 A. No. So that would be like -- you'd 3 find that in my report, like whatever my 4 abstraction is from those. 5 Q. Yeah, I saw that. Okay. Is there 6 any other materials received in this case that 7 you haven't identified in your report or 8 summarized in some other document? 9 A. No, nothing else. 10 ATTORNEY ADAMS: All right. I'll 11 attach as Exhibit 17 Dr. Diette's medical 12 notes in the Payne case. 13 (Exhibit 17 was marked for 14 identification.) 15 THE WITNESS: Okay. 16 ATTORNEY ADAMS: Exhibit 18 will be 17 Dr. Diette's notes in the Payne case. 18 (Exhibit 18 was marked for 19 identification.) 20 ATTORNEY ADAMS: Exhibit 19 will be 21 Dr. Diette's notes regarding the 22 deposition of Shannon Payne Lancaster in 23 the Payne case. 24 (Exhibit 19 was marked for 25 identification.)

Page 66 1 ATTORNEY ADAMS: Exhibit 20 will be 2 Dr. Diette's notes regarding the 3 deposition of Kelly Payne Clark in the 4 Payne case. 5 (Exhibit 20 was marked for 6 identification.) 7 ATTORNEY ADAMS: Exhibit 21 will be 8 Dr. Diette's pulmonary function test 9 results, summary chart, in the Payne case. 10 (Exhibit 21 was marked for 11 identification.) 12 ATTORNEY ADAMS: Exhibit 22 will be 13 Dr. Diette's invoices in the Payne case. 14 (Exhibit 22 was marked for 15 identification.) 16 BY ATTORNEY ADAMS: 17 Q. Okay. Have I attached all of the 18 documents you have created in the Payne case, 19 Dr. Diette? 20 A. Plus my report. 21 Q. Which I attached earlier but... 22 A. Yes. 23 Q. Okay. Are there any documents you 24 received in the Payne case that you did not 25 identify in your report or summarize in some	Page 68 1 mean, I think I've just seen papers from, 2 you know, plaintiff's experts who have 3 published some of the results. 4 BY ATTORNEY ADAMS: 5 Q. Okay. Is crocidolite a type of 6 asbestos that you have seen found in talc? 7 A. I've not seen that. 8 Q. How about amosite? 9 ATTORNEY LAWLER: Object to form. 10 THE WITNESS: Yeah, no, I've not seen 11 that. 12 BY ATTORNEY ADAMS: 13 Q. Okay. Is tremolite a type of 14 asbestos that you have seen found in talc? 15 ATTORNEY LAWLER: Object to form. 16 THE WITNESS: Yeah, I've seen it 17 reported in different ways, you know, 18 through the plaintiff's experts, 19 essentially. 20 BY ATTORNEY ADAMS: 21 Q. Have you seen anthophyllite reported 22 as a type of asbestos found in talc? 23 ATTORNEY LAWLER: Object to form. 24 THE WITNESS: Yes; in the same way, 25 same way I've seen that.
Page 67 1 other document? 2 A. No. 3 ATTORNEY ADAMS: I'm going to attach 4 just for the record as Exhibit 23 the 5 notice of deposition in the Plant case. 6 And Exhibit 24 will be the notice of 7 deposition in the Payne case. 8 (Exhibit 23 was marked for 9 identification.) 10 (Exhibit 24 was marked for 11 identification.) 12 BY ATTORNEY ADAMS: 13 Q. Dr. Diette, do you have an 14 understanding of what types of asbestos can be 15 found in certain -- in talc, just in general? 16 A. I have an understanding of what's 17 been alleged in some of these cases. 18 Q. What about what you've seen as far as 19 the literature about the types of asbestos found 20 in talc? Do you have any understanding of what 21 types of asbestos are found in certain types of 22 talc? 23 ATTORNEY LAWLER: Object to form. 24 THE WITNESS: I think what I've seen 25 overlaps entirely with the litigation. I	Page 69 1 BY ATTORNEY ADAMS: 2 Q. How about actinolite? 3 ATTORNEY LAWLER: Object to form. 4 THE WITNESS: I don't recall seeing 5 actinolite. 6 BY ATTORNEY ADAMS: 7 Q. How about chrysotile? 8 ATTORNEY LAWLER: Object to form. 9 THE WITNESS: I do recall seeing 10 chrysotile. 11 BY ATTORNEY ADAMS: 12 Q. Okay. So the types of asbestos 13 you've seen reported through plaintiffs or their 14 experts as being found in certain types of talc 15 are tremolite, anthophyllite, and chrysotile? 16 ATTORNEY LAWLER: Object to form. 17 THE WITNESS: That's right. 18 BY ATTORNEY ADAMS: 19 Q. Have you seen anyone other than 20 plaintiffs or their experts report finding 21 tremolite, anthophyllite, or chrysotile in talc? 22 ATTORNEY LAWLER: Objection. 23 THE WITNESS: And we're talking about 24 asbestos in each of those cases, right, as 25 opposed to, like, anthophyllite that's not

Page 70 1 asbestos, or tremolite? 2 BY ATTORNEY ADAMS: 3 Q. Let's start with -- I'll ask a more 4 precise question. 5 Have you seen anyone other than 6 plaintiffs or their experts report finding 7 tremolite asbestos, anthophyllite asbestos, or 8 chrysotile in talc? 9 ATTORNEY LAWLER: Objection. 10 THE WITNESS: So I think I saw -- in 11 Mr. Seagrave's report I saw identification 12 of -- I don't remember -- I think I saw 13 anthophyllite asbestos identified in one 14 example, or maybe more than one sample. 15 I don't know if he identified any of 16 those other ones we just talked about. 17 And I may have seen others, but I don't 18 recall them right now, about, you know, 19 other people finding them. 20 BY ATTORNEY ADAMS: 21 Q. Your understanding is Mr. Seagrave is 22 a defense expert in the Payne and Plant case -- 23 cases? 24 ATTORNEY LAWLER: Objection. 25 THE WITNESS: It -- that's my	Page 72 1 Mr. Poye. I don't know if that's the type 2 of document you're talking about, if 3 that's an internal document. 4 BY ATTORNEY ADAMS: 5 Q. No. I'm talking about something 6 different, like internal corporate records from 7 the 1970s, for example, in Avon finding 8 tremolite in talc. 9 ATTORNEY IULO: Objection to form. 10 BY ATTORNEY ADAMS: 11 Q. Have you seen anything like that? 12 A. So it's possible in deposition or 13 trial somebody might have shown me something 14 that that. But otherwise the answer's no. 15 Q. What are the asbestos-related 16 diseases? 17 A. There are several. There is, you 18 know, mesothelioma, lung cancer, laryngeal 19 cancer, asbestosis. There are -- it's not 20 really disease, but pleural plaques are a 21 finding. Diffuse pleural thickening is a 22 finding not necessarily a disease. There's 23 rounded atelectasis, which is a finding from 24 asbestos exposure, which I wouldn't call a 25 disease. And then there's also a benign pleural
Page 71 1 understanding. 2 BY ATTORNEY ADAMS: 3 Q. Have you seen anyone other -- strike 4 that -- anyone else other than Mr. Seagrave who 5 is not a plaintiff or plaintiff's expert? 6 A. It's possible I have, but I don't 7 recall any at this point. 8 Q. Okay. Have you seen anyone finding 9 tremolite, anthophyllite, or chrysotile in talc 10 who is not a plaintiff or plaintiff's expert? 11 ATTORNEY LAWLER: Object to form. 12 THE WITNESS: I don't know how that's 13 different than what you asked me already. 14 BY ATTORNEY ADAMS: 15 Q. I took out the word "asbestos." 16 A. Oh, I see. So -- no. No, I'm not -- 17 like the non-asbestos forms, I haven't. 18 Q. Have you seen any of Avon's internal 19 corporate records finding tremolite and 20 anthophyllite in talc? 21 ATTORNEY IULO: Objection. 22 THE WITNESS: I haven't received any. 23 I can't recall if I've ever been shown, 24 you know, a document like -- for example, 25 you showed me a document before from	Page 73 1 effusion, which I guess might count as a 2 disease. 3 Q. Does being diagnosed with an 4 asbestos-related disease indicate someone was 5 likely exposed to asbestos? 6 ATTORNEY LAWLER: Object to form. 7 THE WITNESS: It depends on what 8 you're talking about. If somebody's 9 diagnosed with asbestosis, you know, and 10 it's literally asbestosis and that's, you 11 know, not contested, right, everyone 12 agrees it's asbestosis, the exposure is 13 baked into the name of that, that 14 particular disorder. 15 But otherwise, the other ones don't 16 imply that with such absolute, you know, 17 certainty, the way that asbestosis would. 18 BY ATTORNEY ADAMS: 19 Q. Do you agree that there are four 20 different regions where mesothelioma can 21 develop? 22 A. And we're talking about in the human 23 body? 24 Q. Correct. 25 A. So pleural, peritoneal, pericardial

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Page 74 1 and tunica vaginalis; yeah. 2 Q. Okay. Which one of those four types 3 of mesothelioma is most strongly associated with 4 asbestos exposure? 5 A. The pleural form. 6 Q. That's the form that both Sarah 7 Payne -- excuse me. That's the form that both 8 Sarah Plant and Shelby Payne have; correct? 9 A. That is correct. 10 Q. Does Shelby Payne have any genetic 11 mutations that you can identify with a 12 reasonable degree of medical certainty that 13 contributed to her development of mesothelioma? 14 A. So what I've seen, she's not had, you 15 know, genetic germline testing. So there's no 16 way for me to say that she does have such a 17 defect. 18 Q. Have either Sarah Plant or Shelby 19 Payne had a tissue digestion performed? 20 A. If they have, I haven't seen it. 21 Q. Have you ever performed a tissue 22 digestion? 23 A. I have not. 24 Q. Have you ever performed a fiber 25 burden analysis?	Page 76 1 career? 2 A. I wouldn't agree to that because it's 3 a really rough estimate. But it's -- I would 4 say it's somewhere in the tens. It's certainly 5 not zero, and I don't think would be a hundred. 6 Yes, it's somewhere in the tens. 7 Q. It's certainly not anywhere near 8 to 300; correct? 9 A. I -- 10 Q. Let me ask a better question. You 11 have not seen anywhere near 300 patients with 12 mesothelioma in your career; correct. 13 ATTORNEY LAWLER: Object to form. 14 THE WITNESS: Yeah, it can't be 300. 15 BY ATTORNEY ADAMS: 16 Q. Okay. Are you the director of any 17 mesothelioma groups? 18 A. I am not. 19 Q. Are you the director of any 20 mesothelioma treatment centers? 21 A. I am not. 22 Q. Has any hospital ever put you in 23 charge of mesothelioma treatment? 24 A. They have not. 25 (Discussion held off the record.)
Page 75 1 A. No. These are things that are 2 outside of my skill set. 3 Q. Okay. Do you know how to do either 4 one of those procedures? 5 A. No, of course not. I'm not a 6 pathologist. 7 Q. How many patients have you seen with 8 mesothelioma in your career? 9 A. I, I don't keep a count. 10 Q. Do you have any kind of estimate? 11 A. No. I think the -- the only way I 12 can come close is that I think in a typical 13 year, you know, since medical school, I've seen 14 approximately one, you know, maybe two at the 15 most, and some years zero. 16 So I think if it was an average of 17 one a year, that might be about right. But I'm 18 not sure that's exactly accurate. 19 Q. And how many years has it been since 20 you graduated medical school? Can you remind 21 me? 22 A. I graduated in 1990. So thirty- -- 23 32. 24 Q. Okay. So you've seen approximately 25 30 or less patients with mesothelioma in your	Page 77 1 (Recess.) 2 BY ATTORNEY ADAMS: 3 Q. Dr. Diette, who do you report to at 4 Johns Hopkins? Is there like a department head 5 or chief or someone who you report to? 6 A. Well, there's a hierarchy. I mean, 7 there's division chief and then a department 8 chair and then the dean; yeah. 9 Q. Who's the division chief of your 10 division? 11 A. Currently, it's John Orens as an 12 interim chief. 13 Q. Who's the department chair? 14 A. Nadia Hansel. 15 Q. And then I forget the other one you 16 said? 17 A. Yeah, there's a new dean. I'll have 18 to see. He just started. But there's a new 19 dean as well. 20 Q. You can't remember his name off the 21 top of your head? 22 A. No. No. 23 Q. Are you aware of anyone who has not 24 been paid by the talc or asbestos industry who 25 says a person can breathe asbestos, develop

Page 78 1 pleural mesothelioma, with proper latency, and 2 it's appropriate to call that spontaneous? 3 ATTORNEY LAWLER: Object to form. 4 THE WITNESS: I don't know where that 5 statement comes from. But I don't -- I 6 would imagine that there's plenty of 7 people that understand the concept of 8 dose. And so -- but I don't know what 9 that statement comes from. 10 BY ATTORNEY ADAMS: 11 Q. Do you think there's plenty of people 12 who understand the concept of individual 13 susceptibility as well? 14 ATTORNEY LAWLER: Object to form. 15 THE WITNESS: So I do think there 16 are -- individual susceptibility to all 17 sorts of things is well understood in 18 medicine and in a continuously emerging, 19 you know, field -- for precision medicine, 20 for example. 21 BY ATTORNEY ADAMS: 22 Q. Are you aware of anyone not paid by 23 the talc or asbestos industry who says a person 24 can have an exposure to asbestos above 25 background, have a proper latency time period	Page 80 1 use that statement other than in litigation, a 2 statement similar to that. But I don't know 3 what an occupational exposure refers to because 4 I think there's a broad range of occupational 5 exposures. 6 You know, like, for example, in these 7 cases there's potential occupational exposures 8 to others other than the plaintiffs themselves. 9 And so whether you call that an occupational 10 exposure, I think people would consider whether 11 or not it's a sufficient or significant exposure 12 as well. 13 Q. Are you aware of anyone not paid by 14 the talc or asbestos industry who says a person 15 can be exposed to asbestos, develop 16 mesothelioma, and that mesothelioma can be 17 appropriately called spontaneous? 18 ATTORNEY LAWLER: Object to form. 19 THE WITNESS: So I don't know of 20 anybody making a statement that's 21 literally exactly that. 22 BY ATTORNEY ADAMS: 23 Q. How many times have you called a 24 woman with pleural -- strike that. 25 How many times have you given the
Page 79 1 pass, develop pleural mesothelioma, and it's 2 appropriate to call that mesothelioma 3 spontaneous? 4 ATTORNEY LAWLER: Object to form. 5 THE WITNESS: So I'd say other than 6 in litigation circumstances, I don't know 7 people that talk about the concept of 8 above background. So I just don't know 9 people one way or the other that referred 10 to above background being like some 11 threshold importance. 12 BY ATTORNEY ADAMS: 13 Q. Are you aware of anyone outside 14 of -- strike that. 15 Are you aware of anyone not paid by 16 the talc or asbestos industry who says a person 17 can have an occupational level of exposure to 18 asbestos -- 19 ATTORNEY LAWLER: Object to form. 20 BY ATTORNEY ADAMS: 21 Q. -- let the proper latency period 22 pass, develop pleural mesothelioma, and it's 23 appropriate to call that mesothelioma 24 spontaneous? 25 A. So I never heard anybody whatsoever	Page 81 1 opinion that a woman with pleural mesothelioma 2 had a spontaneous or naturally occurring 3 mesothelioma? 4 A. Yeah, I don't know the number. 5 Q. Do you have any estimate whatsoever? 6 A. No. You've asked me this before. 7 And I don't keep track of it that way. And even 8 still -- like sometimes if it's a case where 9 we're talking about where the most likely thing 10 is spontaneous, I may also in another case say 11 it's possible, right; because, you know, you can 12 be a heavy smoker and get lung cancer and you 13 can still have something other than smoking, you 14 know, cause it, but I think smoking is the most 15 likely cause. 16 So in some cases, if there's evidence 17 of significant exposures that matter, I'll say 18 that. And if there's not, then spontaneous is 19 what's left. 20 Q. You remember some of the questions 21 that I've asked you before? 22 A. Of course. 23 Q. Do you remember some of the cases 24 that we've worked on together before? 25 A. Hirshberg's the only one I can think

Page 82 1 of off the top my head. But, you know, I know 2 there's a few others. 3 Q. In every single case we've ever 4 worked on before, you've called my client's 5 mesothelioma spontaneous; correct? 6 ATTORNEY LAWLER: Objection; 7 mischaracterization. 8 THE WITNESS: I don't agree with 9 that. And you remember when we talked 10 about this before, I said we want to look 11 specifically at the report to see what it 12 said; because I may have used the term 13 spontaneous in there, but in some cases it 14 may not have been the most likely 15 scenario. 16 BY ATTORNEY ADAMS: 17 Q. You remember Rita Chapman? 18 A. I do. 19 Q. That was my client right? 20 A. I think that's correct. 21 Q. You called her mesothelioma 22 spontaneous; correct? 23 A. I believe it was. 24 Q. Do you remember Mae Moore? 25 A. I don't remember specifics there.	Page 84 1 A. I do. 2 Q. Go to the very end. Your opinion in 3 the Mae Moore case was [as read]: It is most 4 likely that Mrs. Moore's mesothelioma formed 5 spontaneously or was naturally occurring. 6 Correct? 7 A. It was. But can you do me a favor 8 and just scroll up to the assessment as well. 9 Q. Sure. 10 A. So, yeah. So this is an example, 11 too, where, you know, I allowed for the 12 possibility, because it was what the, the facts 13 were in the case, that she may have had 14 take-home exposures from her grandfather's 15 industrial work. And if there were more 16 information that came in that showed that that 17 was a significant exposure, then I would have 18 up -- my opinion would have been it was an 19 asbestos-induced exposure cancer. 20 But because there wasn't enough 21 evidence about that, the only thing left was 22 spontaneous. And that was my opinion. 23 Q. Ah, I see what at you're saying. 24 In your conclusion, though, you say 25 [as read]: It is more likely that Mrs. Moore's
Page 83 1 Q. Okay. Do you remember giving the 2 opinion that Mae Moore's mesothelioma, pleural 3 mesothelioma was spontaneous? 4 ATTORNEY LAWLER: Objection; 5 foundation. 6 THE WITNESS: Yeah, I don't remember 7 the details of the case. But I would, you 8 know, let the report, if you have it, 9 speak for itself. 10 (Exhibit 25 was marked for 11 identification.) 12 BY ATTORNEY ADAMS: 13 Q. I do. I've marked as Exhibit 25, and 14 I'll show it to you right now. It's dated 15 November 16th, 2021. 16 Are you able to see that document? 17 It says Foley & Mansfield on the front. 18 A. I do. 19 Q. See it's got my name on it, Benjamin 20 Adams? 21 A. I do. 22 Q. Mae Moore versus Johnson & Johnson? 23 A. Correct. I see that. 24 Q. Here's your report in that case dated 25 November 15th, 2021. Do see that?	Page 85 1 mesothelioma formed spontaneously or was 2 naturally occurring. 3 Correct? 4 A. Yeah, that was the statement. And if 5 I were to, you know, expand what I mean by that, 6 absent more information about her grandfather's 7 exposure, assuming there's nothing more 8 forthcoming. 9 Q. Okay. You don't mention anything 10 about her grandfather's exposures in the 11 conclusion section; correct? 12 A. No. But the assessment and the 13 conclusion together is where my opinions are. 14 So I don't -- it doesn't need to be in the 15 conclusion for it to be part of my opinion. I 16 just try to make it, you know, simpler to read 17 the conclusion section. There's some redundancy 18 and there's some other things. But to get my 19 opinions, you actually have to look at the 20 assessment and the conclusions. 21 Q. Do you have any estimate at all about 22 how many times you have said something to the 23 effect of it is most likely that a woman's 24 mesothelioma formed spontaneously or was 25 naturally occurring?

Page 86 1 ATTORNEY LAWLER: Object to form. 2 THE WITNESS: No, I don't have an 3 estimate. I would say it would be in 4 every case where there's no identified 5 significant asbestos exposure and no other 6 exposure or some other sort that was a 7 likely cause -- like, for example, 8 radiation. 9 BY ATTORNEY ADAMS: 10 Q. Okay. And so in Miss Moore's case, 11 you had concluded that there was no evidence of 12 a likely substantial asbestos exposure, and so 13 you concluded that it was likely spontaneous or 14 naturally occurring? 15 A. Exactly right. 16 Q. You made the same conclusion in Wendi 17 Hirshberg's case; correct? 18 ATTORNEY LAWLER: Object to form. 19 THE WITNESS: Yeah. Although if 20 we're talking about these, these details, 21 there may be the same statement. I mean, 22 I'm not disagreeing with you. 23 But I think there were -- you know, I 24 don't remember all the details of each 25 case. But I think there were some	Page 88 1 A. Okay. 2 Q. She then passed and a tissue 3 digestion was done by both the plaintiffs -- 4 their expert -- and the defense expert. Were 5 you aware of that? 6 ATTORNEY LAWLER: Object to form. 7 THE WITNESS: Yeah, I'm not aware of 8 that. 9 BY ATTORNEY ADAMS: 10 Q. Okay. When you give an opinion in 11 the mesothelioma case that a woman's 12 mesothelioma is spontaneous, are you held 13 financially responsible in any way for that 14 opinion? 15 ATTORNEY LAWLER: Object to form. 16 THE WITNESS: I don't know what that 17 means. 18 BY ATTORNEY ADAMS: 19 Q. Are you -- if you get it wrong, do 20 you have to give the money back that you've been 21 paid? 22 ATTORNEY LAWLER: Object to form. 23 THE WITNESS: I don't know what the 24 mechanism would be for that. 25 BY ATTORNEY ADAMS:
Page 87 1 potential alternative exposures that 2 didn't have enough information for me to 3 conclude that she had an asbestos-induced 4 cancer. 5 But I think it was possible in her, 6 you know, based on what the -- based on 7 what the information was. 8 BY ATTORNEY ADAMS: 9 Q. Are you aware that when Miss Moore 10 died, a tissue digestion was performed? 11 ATTORNEY LAWLER: Objection; assumes 12 facts. 13 THE WITNESS: I'm not aware of that. 14 BY ATTORNEY ADAMS: 15 Q. By both plaintiffs and defendants; 16 were you aware of that? 17 ATTORNEY LAWLER: Same objection. 18 THE WITNESS: As I'm sitting here 19 now, I'm not aware of it. I don't 20 remember what I knew at the time I wrote 21 this report. 22 BY ATTORNEY ADAMS: 23 Q. She was still alive. So at the time 24 you wrote this report, she was still alive; 25 there was no tissue digestion.	Page 89 1 Q. If you get it wrong when you call a 2 woman's mesothelioma spontaneous, have you ever 3 been sued for malpractice for anything like 4 that? 5 ATTORNEY LAWLER: Objection; form, 6 badgering. 7 THE WITNESS: So, yeah, I don't think 8 that is malpractice. I think my opinion 9 is solid. And I only give the opinion 10 that I believe in. So to me, there is no 11 malpractice in giving an appropriate 12 opinion based on the facts of the case. 13 But what you're asking specifically, 14 no, that's never happened. 15 BY ATTORNEY ADAMS: 16 Q. Have you ever had any consequence 17 come to you financially for giving an opinion 18 that a woman's mesothelioma was spontaneous when 19 that opinion turned out to be wrong? 20 ATTORNEY LAWLER: Objection. 21 THE WITNESS: I'm not aware of a 22 circumstance where it's turned out to be 23 wrong. 24 BY ATTORNEY ADAMS: 25 Q. Do you even --

Page 90 1 (Crosstalk.) 2 A. Well, I'm not done. Sorry. 3 But based on what I've had in front 4 of me, available, I'm not aware of a single time 5 that I've been wrong. 6 Q. Do you follow the cases where you 7 give -- 8 ATTORNEY LAWLER: Wait. 9 Does that complete your response, 10 Dr. Diette? 11 BY ATTORNEY ADAMS: 12 Q. Sorry. 13 A. It's enough of an answer. I'll wait 14 for the next question. 15 Q. Do you follow the women you go around 16 the country giving the opinion that their 17 mesotheliomas are spontaneous? Do you follow 18 them after the case is over? 19 ATTORNEY LAWLER: Objection; 20 argumentative, beyond the scope. Well 21 beyond the scope. 22 THE WITNESS: I don't. I don't know 23 how to either. 24 BY ATTORNEY ADAMS: 25 Q. Do you follow any of the women whose	Page 92 1 put in your question, the answer's going 2 to be no. 3 BY ATTORNEY ADAMS: 4 Q. Have you followed up with Mae Moore 5 or her family after calling her mesothelioma 6 spontaneous? 7 ATTORNEY LAWLER: Object to form. 8 THE WITNESS: So again, I don't 9 follow-up after a case. So my answer for 10 Miss Moore in particular is no. And I 11 don't know how to do that either. 12 ATTORNEY LAWLER: I'm going to lodge 13 a continuing objection to this line of 14 questioning. It implies an obligation 15 that has been established -- 16 (Crosstalk.) 17 ATTORNEY ADAMS: I'm going to mark as 18 Exhibit 26 a report from Dr. Gordon in the 19 Mae Moore matter on his tissue digestion. 20 And I will show that to the witness now. 21 (Exhibit 26 was marked for 22 identification.) 23 BY ATTORNEY ADAMS: 24 Q. Do you see what I've marked as 25 Exhibit 26, Doctor, at least part of the cover
Page 91 1 mesotheliomas you've called spontaneous after 2 the clients that hired you resolve the case? 3 ATTORNEY LAWLER: Objection. 4 THE WITNESS: I don't do that. But I 5 don't do any follow-up. You know, once, 6 once the case is over, then that's the end 7 of the case for me. 8 BY ATTORNEY ADAMS: 9 Q. Have you followed up with Wendi 10 Hirshberg at all about her disease? 11 A. I've never spoken to Miss Hirshberg. 12 Q. Do you know whether or not she's 13 alive or dead? 14 A. I do not. 15 Q. Have you followed up with Mae Moore 16 about her mesothelioma that you called 17 spontaneous? 18 ATTORNEY LAWLER: Objection. 19 THE WITNESS: Well, you're asking a 20 question that's a subset of a broader 21 question, which you said have I ever 22 followed up. So you can keep asking me 23 about specific people. But I already said 24 I don't do follow-up, you know, after the 25 case is over. So no matter whose name you	Page 93 1 page? 2 A. I do. 3 Q. August 9th, 2022. And it says Mae 4 Moore on it; correct? 5 A. It does. 6 Q. And then down at the bottom it's 7 signed by Ronald E. Gordon, PhD, professor of 8 pathology. Do see that? 9 A. I do. 10 Q. It's also got the Mount Sinai School 11 of Medicine logo on the top left-hand corner. 12 Do you see that? 13 A. I do. 14 Q. And I've underlined a couple portions 15 here where Dr. Gordon reports finding tremolite 16 and anthophyllite asbestos in Miss Moore's lung 17 tissue. Do you see that? 18 ATTORNEY LAWLER: Object to form. 19 THE WITNESS: I do. 20 BY ATTORNEY ADAMS: 21 Q. Did you say "I do"? 22 A. I did say that. 23 Q. And then Dr. Gordon reports finding 24 talc in Ms. Moore's lymph node tissue. Do you 25 see that?

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Page 94 1 A. I do. 2 Q. And he reports finding no other 3 asbestos; correct? 4 A. I haven't read the whole thing. I 5 don't know what else he said he did or didn't 6 do. 7 Q. Do you see anything on the page I'm 8 displaying right now indicating Dr. Gordon found 9 any other types of asbestos other than tremolite 10 and anthophyllite? 11 ATTORNEY LAWLER: Objection. 12 THE WITNESS: I only see tremolite 13 and anthophyllite on this page. 14 BY ATTORNEY ADAMS: 15 Q. Now, Dr. Gordon is an expert you're 16 familiar with? 17 A. I've seen him involved in some legal 18 cases. 19 Q. Which side typically hires him; do 20 you know? 21 A. I can't say. I think he's been a 22 plaintiff's expert in cases that I've seen. But 23 I have no idea who typically retains him. 24 Q. But he reports finding talc, 25 anthophyllite asbestos, and tremolite asbestos	Page 96 1 A. I do. 2 Q. And then he reports finding in the 3 lymph samples for Mae Moore a Libby amphibole 4 fiber, a tremolite fiber -- that's tremolite 5 asbestos fiber -- an anthophyllite asbestos 6 fiber, and an actinolite asbestos fiber. Do you 7 see that? 8 A. I do. 9 Q. Is finding tremolite asbestos, 10 anthophyllite asbestos, actinolite asbestos, and 11 talc in a person's body consistent with that 12 person having a spontaneous mesothelioma? 13 ATTORNEY LAWLER: Object to form. 14 THE WITNESS: Well, it could be. I 15 mean, Dr. Dodson himself has published 16 that you can find -- in Texas you can find 17 those same fibers in those people with no, 18 you know, occupational asbestos exposure. 19 And those numbers by themselves don't 20 tell me whether that's a meaningful 21 difference compared to background for this 22 particular laboratory or anyone's 23 particular laboratory. 24 So no, that doesn't, that doesn't 25 tell me enough information.
Page 95 1 in Mae Moore's tissue; correct? 2 ATTORNEY LAWLER: Object to form. 3 THE WITNESS: It appears so. 4 ATTORNEY ADAMS: I'm going to mark as 5 Exhibit 27 a report from Dr. Dodson in the 6 same case, the Mae Moore case. 7 (Exhibit 27 was marked for 8 identification.) 9 BY ATTORNEY ADAMS: 10 Q. Are you able to see the cover page of 11 that Exhibit 27, Doctor? 12 A. I am. 13 Q. Okay. See how it says May 31, 2022; 14 case name, Mae Moore? 15 A. I do. 16 Q. And then it says authorization from 17 Mr. Lindsay Weiss at the MGM Law Firm. 18 Do you know her? 19 A. I don't know her. And I don't know 20 that -- unless it's -- I don't know what "MGM 21 Law Firm" refers to. 22 Q. Okay. Then on the second page 23 Dr. Dodson reports finding in the left lung 24 sample tremolite, one tremolite asbestos fiber. 25 Do you see that?	Page 97 1 BY ATTORNEY ADAMS: 2 Q. Who else says that besides you and 3 Dr. Dodson? 4 ATTORNEY LAWLER: Object to form. 5 THE WITNESS: Says what? 6 BY ATTORNEY ADAMS: 7 Q. A person can be diagnosed with 8 pleural mesothelioma; have a tissue digestion 9 performed; find talc, anthophyllite asbestos, 10 tremolite asbestos, and actinolite asbestos and 11 confirm -- and conclude that that pleural 12 mesothelioma was spontaneous? 13 Who says that other than you and, 14 allegedly, Dr. Dodson? 15 ATTORNEY LAWLER: Object to form. 16 THE WITNESS: So I'm not alleging 17 that Dr. Dodson said that, by the way. 18 I'm talking about a paper that he said. 19 And I don't know who else has similar 20 opinions to mine in general. 21 But what I am saying is that when you 22 find mineral fibers in somebody's lung, 23 they have to be in a meaningful amount. 24 Our lungs are open to the outside world, 25 and we accumulate all sorts of dust.

Page 98 1 So it's not a treasure hunt where you 2 just say, Oh, I found a single fiber of 3 something and that that caused that 4 person's illness. 5 BY ATTORNEY ADAMS: 6 Q. Can you identify any peer-reviewed 7 published study that indicates it's appropriate 8 to call a person's pleural mesothelioma 9 spontaneous when a tissue digestion is performed 10 and talc and three forms of asbestos are found 11 in their tissue? 12 ATTORNEY LAWLER: Objection to the 13 characterization of "appropriate." 14 THE WITNESS: Yeah, it's an absurdly 15 specific question. And what I'm going to 16 say is there is no paper that says that. 17 You actually have to use all the science 18 available to you to make a conclusion like 19 that. 20 So I think, for example, in 21 Dr. Dodson's paper from Texas, he shows 22 that those fibers can be found in people 23 who have no known asbestos exposure from 24 work, for example. And so just finding 25 them all by itself is not an implication	Page 100 1 for there to be a sufficient dose of asbestos -- 2 if we're talking about asbestos -- or some other 3 exposure that's meaningful if it's not asbestos; 4 so, for example, like external beam radiation, 5 you know, as an example. 6 And if there is a sufficient exposure 7 to cause the disease or increase the risk of the 8 disease, than that to me would be an 9 asbestos-induced tumor or radiation-induced 10 tumor or whatever. 11 If there's no meaningful exposure -- 12 you know, there's only three ways you can get 13 mutations, right. You can be born with them or 14 they can spontaneously develop or they can be 15 induced by something exogenous. 16 So if you can't find something 17 exogenous in a sufficient dose to cause the 18 tumor, there's not much left. 19 Q. And so in determining whether or not 20 an individual's mesothelioma is spontaneous, the 21 method that you use is, number one, look at the 22 facts of the case; correct? 23 A. Correct. 24 Q. Look at the -- look at what's known 25 from the medical and scientific literature;
Page 99 1 that they've had a meaningful asbestos 2 exposure. 3 There's by -- you know, the article 4 that summarized the so-called Helsinki 5 criteria, that talks about there being an 6 issue about above laboratory background 7 levels of asbestos findings for them to be 8 meaningful. 9 So I think you have to integrate many 10 things. You're not looking for a simple 11 statement like you just made to pretend 12 that the concept isn't, isn't valid, 13 right. The concept is valid if you can 14 find asbestos fibers in people's lungs in 15 general and not in a meaningful amount. 16 That doesn't mean that's got any causal 17 connection to whatever their cancer is. 18 BY ATTORNEY ADAMS: 19 Q. What is the method or procedure that 20 you use to determine whether or not a person's 21 pleural mesothelioma is spontaneous? 22 A. So I look at all the facts of the 23 case and integrate with what that's -- what's 24 known from the medical and scientific 25 literature. And generally speaking, I'm looking	Page 101 1 correct? 2 A. That's correct. 3 Q. Determine whether or not there is a 4 sufficient dose of asbestos or some other 5 exposure that's meaningful; correct? 6 A. That is correct. 7 Q. And if there is no meaningful 8 exposure to asbestos or another 9 mesothelioma-inducing substance or procedure, 10 then you conclude the mesothelioma was 11 spontaneous; correct? 12 ATTORNEY LAWLER: Object to form. 13 THE WITNESS: Yes. 14 BY ATTORNEY ADAMS: 15 Q. How do you determine whether the 16 mesothelioma was idiopathic? 17 A. So I don't know what you mean by 18 "idiopathic," because people use that term 19 different ways. 20 Q. What's the potential error rate in 21 your process for determining whether or not a 22 person's mesothelioma is spontaneous; do you 23 know? 24 A. I don't know of a measurable error 25 rate. I think that would include having to know

Page 102 1 some truths about things that sometimes aren't 2 available in the case, right. So, for example 3 if in the cases we have in front of us, if their 4 claimed exposures to other sources of asbestos 5 turn out to be meaningful, then it would be -- 6 if those were meaningful or significant, they 7 might -- well, I don't think -- it would be an 8 error, per se. It would be a correct, a correct 9 opinion based on the available materials. 10 But if it turns out later that, you 11 know, somebody finds out, for example, that the 12 plumber, you know, was actually working with, 13 you know, an awful lot of, like, old 14 asbestos-wrapped piping and brought a lot home, 15 then that would be something where I would 16 adjust my opinion. 17 But as far as it goes with what's 18 available, I'm not aware there is any error. 19 Q. Is part of your method and procedure 20 in determining whether a mesothelioma is 21 spontaneous to ignore positive test results 22 finding asbestos in powder products that the 23 individual used? 24 A. Absolutely not. 25 ATTORNEY IULO: Objection.	Page 104 1 a worst-case scenario would entail, then 2 that's very helpful for me to understand 3 what dose we're talking about. 4 And so it doesn't ignore it. It 5 doesn't assume that there's no, there's no 6 asbestos. I take into account all the 7 information that's available in the case. 8 So that's not the same as ignoring it. 9 And when you're talking about -- you 10 know, putting in front of me a document 11 that I haven't had a chance to scrutinize 12 or look into, you know, about findings and 13 talc fibers, I still have to understand 14 what that means. It's not a treasure-hunt 15 approach, right. I'm not trying to 16 sensationalize the finding in order to try 17 to convince somebody that one fiber of 18 tremolite means something, right. 19 So it's not ignoring it. It's taking 20 it into account, based on what the context 21 is providing. 22 BY ATTORNEY ADAMS: 23 Q. Has your method to determine whether 24 or not a person's mesothelioma is spontaneous 25 been subjected to peer review?
Page 103 1 ATTORNEY LAWLER: Object to form. 2 THE WITNESS: Absolutely not. 3 BY ATTORNEY ADAMS: 4 Q. Would ignoring findings of asbestos 5 in powder products that the victim used for 6 years increase or decrease the error rate in the 7 method by which you determine whether a person's 8 mesothelioma spontaneous? 9 ATTORNEY IULO: Objection. 10 ATTORNEY LAWLER: Objection. 11 THE WITNESS: So it wouldn't, it 12 wouldn't change it based on what I know 13 about the cases that are real cases that 14 we're talking about, right. 15 First of all, I don't ignore it, 16 right. So I acknowledge when there are 17 opinions that say that there was asbestos 18 found in talc. When those are available 19 in the case, I'll consider those. 20 Sometimes there are opinions that say 21 that there isn't asbestos in the talc, and 22 there might be experts that have different 23 opinions. And I can't resolve that. 24 But when I look at, for example, like 25 an industrial hygienist's estimate of what	Page 105 1 A. It's not a method that I've created 2 or would be subjected to peer review. 3 Literally, the information that I use 4 is what comes from the peer-reviewed literature, 5 right. As I said, there's only three ways to 6 get a mutation. And those three ways are 7 something exogenous causing one or to have a 8 genetic defect that you're born with or to form 9 spontaneously. 10 So it's not a method that I've 11 created. It's just an application of the 12 medical and scientific information. 13 BY ATTORNEY ADAMS: 14 Q. The peer-reviewed literature you're 15 referring to is what you cited to me: Spirtas 16 1994, the Henley paper, Moolgavkar's paper, 17 Price and Ware's paper, and Carbone 2019 or 18 2020; correct? 19 A. It includes those. 20 Q. What else does it include? 21 A. Well, it includes everything that 22 I've read, much of which that I've cited in my 23 report. So it doesn't just come from a 24 particular location, right. 25 So I might not have thought of

Page 106 1 Dodson, for example. But since you showed me 2 something with Dr. Dodson's name on it, it 3 reminds me that there's a paper that he has that 4 shows that it's possible to have asbestos fibers 5 in people that don't have occupational exposure 6 to asbestos -- and all six types, by the way. 7 So that's part of the information. 8 If we're going to talk about, you 9 know, what constitutes a rate of spontaneous 10 mutations, you know, that Tomasetti and 11 Vogelstein stuff is very instructive on that. 12 And that's listed in my report. 13 So there isn't just one source of 14 information. It's an accumulated community, you 15 know, knowledge from practicing medicine and 16 understanding, you know, what scientists and 17 doctors talk about how cancer forms. And that's 18 all the information that I use. 19 Q. Is it your opinion that Tomasetti and 20 Vogelstein say that most pleural mesotheliomas 21 in women are spontaneous? 22 ATTORNEY LAWLER: Objection. 23 THE WITNESS: So they don't. They 24 actually don't say that anywhere 25 literally. What they do is they have a	Page 108 1 what's in my report. 2 But I think my specific answer 3 includes that their estimate is about 4 48 percent of the driver mutations are 5 spontaneous mutations for women with 6 regard to mesothelioma. 7 BY ATTORNEY ADAMS: 8 Q. Did Tomasetti and Vogelstein ever say 9 anywhere at any time most mesotheliomas in women 10 are spontaneous? 11 ATTORNEY LAWLER: Object to form. 12 THE WITNESS: There's no statement 13 like that. And they don't mention it for 14 many of the tumor types that they've 15 included in their paper. 16 BY ATTORNEY ADAMS: 17 Q. Does Dr. Dodson ever say anywhere 18 that you've ever read at any time that most 19 mesotheliomas in women are spontaneous? 20 ATTORNEY LAWLER: Objection. 21 THE WITNESS: I can't recall if he 22 has or not. 23 BY ATTORNEY ADAMS: 24 Q. Can you recall any other 25 peer-reviewed published study or author who says
Page 107 1 proportion of driver mutations that's 2 estimated to be from exposure versus 3 spontaneous. And we'd have to look at my 4 report to get the exact number. But I 5 think the proportion of driver mutations 6 for women is about 48 percent. 7 And that's international, right. 8 That's based on international data and 9 particularly heavy on the UK. 10 So it's about -- you know, it's close 11 to 50/50, but I think it's about 48 12 percent. 13 ATTORNEY ADAMS: I'm going to move to 14 strike everything after "they don't." 15 BY ATTORNEY ADAMS: 16 Q. Is it your opinion that Dr. Dodson 17 says that most mesotheliomas in women are 18 spontaneous? 19 ATTORNEY LAWLER: Objection. 20 THE WITNESS: So I want to correct my 21 last answer, because I might have a 22 familiar way of speaking that's not as 23 crisp as you might like. 24 But I think when I said "they don't," 25 I was then thinking about the table and	Page 109 1 that who you have not already referenced? 2 A. I think we've talked about several. 3 I can't think of others off to top of my head. 4 But I will say -- actually, I take 5 that back. You know, there is -- a couple years 6 ago I did a citation search for who has cited 7 the Spirtas article. And so I think -- I can't 8 tell you today sitting here. But there's a way 9 to link back the many, many articles that have 10 cited the Spirtas and supported a statement 11 along those lines. 12 So I can't recall what they all are, 13 but the Spirtas article's been cited by many 14 other authors. 15 Q. Do you believe your method of 16 determining whether or not a pleural 17 mesothelioma is spontaneous has been accepted in 18 the relevant scientific community? 19 ATTORNEY LAWLER: Object to form. 20 THE WITNESS: I think my method is 21 not unique to mesothelioma. You asked me 22 about mesothelioma. But I think it's in 23 general the same approach that my peers 24 use for thinking about cancer causation, 25 right. It's not unique to mesothelioma.

Page 110 1 People consider the exposures that 2 they know are relevant. And in many cases 3 there aren't known relevant exposures; and 4 then you're left with nature, you know, 5 being the explanation for it. 6 And in some tumor types, where 7 there's very little known about 8 environmental exposure, that there -- you 9 know, it's just basically assumed that 10 it's most likely to be a naturally 11 occurring one. And I'll give you an 12 example of like, you know, spinal cord 13 cancer, which is a rare cancer that 14 doesn't have much known about exposures 15 that could increase the risk of it. 16 BY ATTORNEY ADAMS: 17 Q. Do you believe your method of 18 determining that there has been no meaningful 19 exposure for the inducement of mesothelioma and 20 therefore it must be a spontaneous mesothelioma 21 has been accepted in the relevant scientific 22 community? 23 A. So I think in general the principles 24 that I'm applying -- it's not my method, right. 25 I'm applying the methodology that's available to	Page 112 1 spontaneous versus idiopathic? 2 ATTORNEY LAWLER: Object to form. 3 THE WITNESS: I don't know what you 4 mean by "idiopathic." 5 BY ATTORNEY ADAMS: 6 Q. Unknown cause. 7 A. Yeah, I don't know. See, 8 idiopathic's a word -- so if that's -- that's 9 your definition. I think idiopathic has meant a 10 lot of things, and it changes over time. I know 11 some people -- I hear colleagues talking about 12 idiopathic versus spontaneous interchangeably. 13 And to me, idiopathic means that 14 there is a, there is a cause, right, that just 15 has been discovered yet; there's some exogenous 16 cause. 17 And so I don't, I don't know how that 18 kind of fits into the conversation we're having. 19 I don't recognize that there's something called 20 idiopathic that means something different here 21 than spontaneous. 22 Q. Here's the National Cancer 23 Institute's definition. Have you ever looked 24 that up? 25 A. I don't know if I have or not.
Page 111 1 all of us, which is looking, for example, for 2 environmental exposures that are known to induce 3 a cancer. And it's baked into what my peers and 4 I do on a regular basis. 5 If somebody has lung cancer and 6 they've smoked, you know, 40 pack-years of 7 tobacco, then there's going to be an assumption 8 made that we can't prove, right. There's no 9 biomarker in the lung tissue to say that is from 10 tobacco. But there's going to be an assumption 11 that it's a tobacco-induced cancer. 12 We're faced all the time, and 13 increasingly so, with people who come into the 14 clinic that have lung cancer diagnosed, for 15 example, and they never smoked and they don't 16 have any industrial exposure and they don't have 17 anything else to explain it. 18 So in those cases we're left with it 19 being naturally occurring. And whether you use 20 the term "spontaneous" or "naturally occurring," 21 you're talking about something that didn't 22 require, you know, something from outside the 23 body in order to come and induce that cancer. 24 Q. What's the standard in your 25 methodology for determining a mesothelioma is	Page 113 1 Q. I just did. [As read]: Idiopathic 2 describes a disease of unknown cause. 3 Do you agree or disagree with the 4 National Cancer Institute's definition of 5 idiopathic? 6 ATTORNEY LAWLER: Objection. 7 THE WITNESS: I don't know. I don't 8 embrace that. I think it's a -- I think 9 it's one way that people use that term. 10 But it implies that there's a cause that 11 just hasn't been discovered. And it 12 doesn't mean that there will be one that's 13 discovered. But it just -- it's a 14 placeholder sometimes in people's 15 thinking. 16 BY ATTORNEY ADAMS: 17 Q. Do you have a standard in the 18 methodology that you use to determine whether a 19 mesothelioma is idiopathic or spontaneous, or 20 no? 21 A. So I don't think I can answer your 22 question because you keep asking me about 23 idiopathic and I told you that I don't think 24 it's relevant for the conversation that we're 25 having. Like I don't recognize that there is

Page 114 1 such a thing as idiopathic mesothelioma. I 2 think it may be a term that people use; and I 3 wouldn't criticize them for it, necessarily. 4 But it doesn't mean anything to me. 5 I think that there are established 6 causes of mesothelioma that are exogenous. And 7 I think spontaneous is -- spontaneity is a way 8 for a -- for any tumor to potentially form, 9 including mesothelioma. 10 Q. Since you don't believe the word 11 idiopathic applies to mesothelioma, you don't 12 have a standard to control your methodology for 13 determining between a spontaneous and idiopathic 14 mesothelioma; correct? 15 A. No, that's nonsense. 16 ATTORNEY LAWLER: Objection. 17 THE WITNESS: What I'm saying is 18 idiopathic refers in this context to 19 something or somebody believes there's an 20 exposure that hasn't been found or 21 identified yet. And I don't know what 22 we're talking about there. That's why I 23 said I don't recognize that for this. 24 I think there are known exposures, 25 right, and there's also the opportunities	Page 116 1 asbestos exposures and then talc. 2 I would say in the last year I 3 probably made somewhere between 100- and 200,000 4 from talc-related cases and probably on that 5 order of magnitude for asbestos that's not talc. 6 There's been, you know, years where I 7 make nothing from those. And probably two years 8 ago I probably made a bit more than that. 9 Q. Do you have any estimate of the total 10 amount of money you've made working in asbestos 11 and talc litigation? 12 A. I don't. 13 ATTORNEY LAWLER: Object to form. 14 THE WITNESS: Yeah, I don't. 15 BY ATTORNEY ADAMS: 16 Q. No estimate at all? 17 A. I don't. 18 Q. Is it more or less than \$10 million? 19 A. Well, it can't be \$10 million. But I 20 don't have an estimate. 21 Q. Is it more or less than \$5 million? 22 ATTORNEY LAWLER: Objection; 23 cumulative. 24 THE WITNESS: Yeah, I don't think it 25 can be anywhere near that.
Page 115 1 for cells to get a mutation spontaneously. 2 And that's kind of the universe that 3 exists for cancers at this point. 4 BY ATTORNEY ADAMS: 5 Q. Since it's nonsense, you don't have a 6 methodology that determines whether or not a 7 mesothelioma is spontaneous or idiopathic; 8 correct? 9 ATTORNEY LAWLER: Objection. 10 THE WITNESS: I can't answer the 11 question and I keep telling you why I 12 cannot, and so I'm not going to try 13 anymore. 14 BY ATTORNEY ADAMS: 15 Q. How much money have you made working 16 in asbestos litigation? 17 ATTORNEY LAWLER: Object to form. 18 THE WITNESS: I don't have a 19 cumulative amount. 20 BY ATTORNEY ADAMS: 21 Q. Do you have any estimate whatsoever 22 of the money you've made in asbestos litigation? 23 A. So I can tell you, I've sorted 24 separately with asbestos and talc. So there are 25 some cases that involve, you know, traditional	Page 117 1 BY ATTORNEY ADAMS: 2 Q. Is it more or less than \$2 million? 3 ATTORNEY LAWLER: Objection. 4 THE WITNESS: I doubt it, but I don't 5 have an estimate. 6 BY ATTORNEY ADAMS: 7 Q. Who assists you in your talc and 8 asbestos litigation? 9 A. Well, there's folks that work at a 10 company called Medical Science Affiliates that 11 provide administrative support. 12 Q. How did you get in contact with 13 Medical Science Affiliates? 14 A. Many, many years ago a colleague of 15 mine knew somebody who worked there. And they 16 were looking for somebody who was an 17 epidemiologist to conduct an epidemiologic 18 review. And so I got connected with them that 19 way. 20 Q. Do you know what year that was? 21 A. I don't -- 22 (Crosstalk.) 23 Q. Sorry. 24 A. No, that's all right. 25 I was going to say it's got to be at

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Page 118 1 least 15 years ago. But I don't know how long 2 ago. 3 Q. How much money did you make last year 4 working in asbestos and talc litigation? You 5 may have just told me, but can you just repeat 6 it. 7 A. Yeah, I did. I think my estimate was 8 somewhere between 100- and 200,000 for each of 9 those two categories, but I think maybe a little 10 less in terms of asbestos, per se, as opposed to 11 talc. 12 Q. So roughly between -- strike that. 13 In 2022 you made roughly 200- 14 to \$400,000 working in asbestos and talc 15 litigation? 16 A. I think that's a reasonable estimate. 17 Q. Who are the individuals at Medical 18 Science Affiliates that provide administrative 19 support for you in talc litigation? 20 A. Well, Madalyn Pettenati has been the 21 primary one. And then there's other, other 22 folks that I don't interact with directly but -- 23 you know, people who, you know, prepare 24 materials or photocopy papers and other things. 25 Q. Can you spell Madalyn's last name?	Page 120 1 to you? 2 A. \$600. 3 Q. You also have a four-hour minimum for 4 travel if you travel more than 60 miles from 5 your home or office; correct? 6 A. That's right. 7 Q. And so if you travel 90 miles from 8 your office for a case, you bill a minimum of 9 \$2900; correct? 10 A. Um... 11 Q. It's 4 times 725. 12 A. Oh, okay. That sounds right, then, 13 yeah. Although I personally would charge 2400 14 for that, not the amount you said. 15 Q. 500 goes to Med Science Affiliates 16 and 2400 goes to you? 17 A. That's correct. 18 Q. Your hourly rate goes up by \$200 an 19 hour for deposition testimony; correct? 20 A. That's right. 21 Q. Why is that? 22 A. Well, two things. One, so my 23 personal rate is 700. So it goes up by a 24 hundred for me. 25 And it's, it's generally more work.
Page 119 1 A. Maybe. It's -- I think it's 2 P-E-T-T-A-N-I-T-I [sic]. 3 Q. Is there anyone outside of Medical 4 Science Affiliates that assists you with your 5 work in asbestos and talc litigation? 6 A. No. 7 Q. Your fee schedule indicates that your 8 billable rate is 725 an hour, correct, your 9 baseline billable rate? 10 A. Yeah. Although, for me it's \$650 an 11 hour -- or, I'm sorry, \$600 an hour. 12 Q. The portion that you receive is 600 13 an hour? 14 A. Well, I get a hundred percent of what 15 I asked for, right. So I ask for \$600 an hour. 16 And then Medical Science Affiliates has a 17 business model where they add something to that 18 for some of their work. 19 Q. Okay. How much goes to you? 20 A. Well, the 600 that I ask for. 21 Q. Got it. You also have a travel 22 policy where you bill \$725 per hour for travel; 23 correct? 24 A. That's correct. 25 Q. How much of that 725 for travel goes	Page 121 1 You know, it's -- like, qualitatively, I think 2 it's a different type of work than, you know, 3 sitting and reading materials and or, you know, 4 drafting a report and that type of thing. 5 Q. Who typically pays for your 6 deposition testimony, the defendants or the 7 plaintiff? 8 A. I would assume whoever's taking the 9 deposition, you know, would pay for. But I 10 don't know that that's uniformly true. 11 Q. Who's usually taking the deposition, 12 lawyers for the plaintiff or lawyers for the 13 defendants? 14 A. Oh, it depends upon the case. We're 15 talking just about the talc cases? 16 Q. Yes. 17 A. Yeah, so in talc cases, it's always 18 the plaintiffs. 19 Q. And so in talc cases, the plaintiffs 20 always pay your bill for the depositions; 21 correct? 22 A. It's my intent. I don't know if I've 23 kept track well enough to know that they always 24 do. 25 Q. You have a 4-hour minimum for



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Page 122 1 depositions? 2 A. That's correct. 3 Q. Does that mean that you get paid for 4 4 hours of time even if the deposition lasts 5 only an hour? 6 A. It does. 7 Q. So if the depo lasts 1 hour, you 8 request to be paid \$3700? 9 A. I do; unless we had some agreement in 10 advance, you know, that somebody knew it was 11 only going to be an hour, for example. But if 12 there's no agreement, then I have to block out a 13 chunk of time, and I bill for it. 14 Q. You have a cancellation policy -- 15 wait. Sorry. 16 How do you bill your time when you 17 travel? And what I'm asking is: Do you bill 18 from the time you leave your door until you get 19 home? Do you bill an 8-hour minimum every day? 20 Do you bill some other increment? 21 How do you bill when you travel? 22 A. So not, not from door to door. Like, 23 I don't mean from the minute I leave the door. 24 I think if it's a full day of travel, it would 25 be, you know, 8 hours, you know, if it's	Page 124 1 Q. Okay. We're going to have to figure 2 that out, then. 3 A. I think, just to help you, I don't 4 think there's any of my time on there. So I 5 don't think there's -- whether it's 28,000 or 6 not, I don't think that there's any billable 7 time for me on there. 8 Q. What does that mean? 9 A. I think this was all, all time billed 10 to MSA staff. 11 Q. Have you billed any money in the 12 Sarah Plant case? 13 A. I have not. 14 Q. Have you made any money in the Sarah 15 Plant case? 16 A. I can't think how that would work. 17 But no. No, I just haven't submitted a bill 18 yet. 19 Q. Have you spent any time working on 20 the Sarah Plant case? 21 A. Oh, yeah, of course. 22 Q. How much? 23 A. Probably in the -- somewhere in the 24 20-to-30-hour range, 20 to 30. 25 Q. And has that been at 725 an hour --
Page 123 1 approximately that. 2 I don't think it's happened. But, 3 like, if it took 36 hours of, you know, train 4 time or something, I guess I would bill 36 5 hours. 6 But that hasn't happened. So it's 7 basically, like, a day's kind of a day. 8 Q. You have a cancellation policy for 9 travel; correct? 10 A. I do. 11 Q. If a deposition or trial testimony 12 that requires travel is canceled less than a 13 week before the event, you charge \$5800; 14 correct? 15 A. Well, that's what the paper says. 16 I've actually never done that. And things get 17 canceled all the time at the last second. So I 18 have never invoked it, but I just -- I aspire to 19 it. 20 Q. Got it. You produced a number of 21 invoices in the Plant matter. I added them up. 22 It added up to \$28,402.47. Does that sound 23 right? 24 A. Oh, I have no idea. I didn't look 25 at -- I mean, I didn't look at the totals.	Page 125 1 or 600 an hour? 2 A. So I think -- so I literally just 3 changed the fee schedule like a couple weeks 4 ago. So I don't think any of the time would 5 actually be billed at these rates that you see 6 here. I think it was 650 before and 550 that I 7 billed. So I think most of what we're talking 8 about would be, to me personally, would be 550 9 an hour for that time. 10 Q. So you've billed approximately 15-, 11 16,000 -- strike that. 12 Dr. Diette, you have -- strike that. 13 Dr. Diette, the time you've spent 14 working on this case, you expect to be paid 15 approximately 15-, \$16,000 so far before today; 16 fair? 17 A. That sounds right. 18 Q. And I'm referring to the Sarah Plant 19 case; you understand? 20 A. I do. 21 Q. In the Shelby Payne case, how much 22 time have you spent working on that case? 23 A. I'd estimate a similar amount to the 24 Plant case. 25 Q. So for the -- as of February -- I'll

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Page 126 1 go with yesterday -- 2nd, 2023, you expect to be 2 paid for your work in the Payne and Plant cases 3 somewhere around \$30,000? 4 A. For the two together, did you say? 5 Q. Yeah. 6 A. Yeah, that sounds about right. 7 Q. And that doesn't include the 8 deposition today; correct? 9 A. That is correct. 10 Q. For which you expect to be paid 11 another -- 12 A. I can tell you. 2800. 13 Q. 2800. So as of February 3rd, 2023, 14 you expect to be paid approximately \$3,280, 15 roughly, for these two cases, the Sarah Plant 16 and Shelby Payne cases; correct? 17 A. Did you say 3,000 or -- it sounded 18 like 3. There's 30,000. 19 Q. I'll try again. As of today, 20 February 3rd, 2023, you expect to be paid for 21 your work in the Shelby Payne and Sarah Plant 22 cases approximately \$32,800? 23 A. That, that sounds like a good 24 estimate. 25 Q. Okay. You listed a number of other,	Page 128 1 analysis, you know, of the case. 2 Q. Did Sarah Plant have any diseases, 3 conditions, or co-morbidities that you found, 4 within a reasonable degree of medical certainty, 5 would have shortened her life expectancy? 6 A. Well, I think it's possible that her 7 BRCA2 gene mutation has the potential. But I 8 haven't, I haven't analyzed that. But she is at 9 risk for other cancers. And so I think, you 10 know, one would want to take that into account, 11 you know, in sort of thinking about that 12 question. 13 Q. Can you go farther than "possible"? 14 A. Possible shortening or possible risk 15 of cancer? 16 Q. Shortening of life. 17 A. Oh, yeah, no, I can't. I mean, I 18 don't -- I haven't, I haven't been tasked with 19 putting the work in to try to determine whether 20 there would be shortening or how much that would 21 be. 22 ATTORNEY ADAMS: All right. Those 23 are all the questions I have for you 24 today, Dr. Diette. I appreciate your 25 time.
Page 127 1 sort of, medical conditions that Miss Payne had 2 in your report. Do you know what I'm referring 3 to? 4 A. Well, I'll just say maybe, because 5 there is a -- there's many medical conditions 6 that are sort of captured within the, like the 7 notes themselves. But there's also a section -- 8 let me see if I've got the right report -- also 9 called Past Medical History. Is that what 10 you're referring to? 11 Q. I can't remember. But I remember 12 seeing you list, you know, things like skin 13 cancer, I think. Let me see if I can find it. 14 A. I can tell you -- so -- 15 Q. Yeah. Past medical history you've 16 got. Arthritis, anxiety, rib fractures. You 17 know, goes on and on. Do you know what I'm 18 talking about? 19 A. I do. 20 Q. Spider bite. 21 Did Miss Payne have any diseases or 22 co-morbidities that you believe, within a 23 reasonable degree of medical certainty, would 24 have shortened her life expectancy? 25 A. So I haven't done that sort of	Page 129 1 THE WITNESS: Thank you, Mr. Adams. 2 ATTORNEY ADAMS: Does anyone else 3 have any questions? 4 ATTORNEY LAWLER: This is Katherine 5 Lawler for Colgate-Palmolive Company, as a 6 successor-in-interest to the Mennen 7 Company. I do not have any questions for 8 this witness. But I would like to attach 9 as, I believe it's Exhibit 28, 10 Colgate-Palmolive Company's objections to 11 the deposition notices that were 12 previously attached as exhibits. 13 (Exhibit 28 was marked for 14 identification.) 15 ATTORNEY ADAMS: Anyone else have 16 anything? 17 All right. I think can go off the 18 record, then. 19 (Deposition concluded at 1:17 p.m.) 20 21 22 23 24 25

C E R T I F I C A T I O N

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I, ADAM D. MILLER, Registered
Professional Reporter, certify that the
foregoing is a true and accurate transcript
of the foregoing deposition, that the
witness was first sworn by me at the time,
place and on the date herein before set
forth.

I further certify that I am neither
attorney nor counsel for, not related to nor
employed by any of the parties to the action
in which this deposition was taken; further,
that I am not a relative or employee of any
attorney or counsel employed in this case,
nor am I financially interested in this
action.



/s/ Adam D. Miller
Registered Professional Reporter
and Notary Public

EXHIBIT 35

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-42-1592

Beverly Dale Jolly and

General Electric Company, et al.

Brenda Rice Jolly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Theile B. McVey

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge
SCRPC Form 4C (02/2017)

2758
Judge Code

12-15-17
Date

Page 1 of 4

RoA_16502

FILED FOR RECORDING IN E-DOCKET (Case 1:16-cv-00000-UNA) AS A STATE BAR 2016-00000-UNA

and/or asbestos packing on valves, particularly during outages at the plant, and he recalled that the use of grinders and brushes created dust. (TT 7/25 at 74-76, 84-94). He recalled that there were a lot of Fisher and Crosby valves present at those plants. (TT 7/25 at 72-73, 90-91). At times, engineers from Fisher or Crosby were present to assist with the maintenance of the valves. (TT 7/25 at 107).

Exposure testimony was also provided by Mr. Jolly's co-worker, David Taylor, who worked at the same Duke nuclear plants where Mr. Jolly was stationed, particularly Oconee. (TT 7/25 at 198-201). As a pipefitter, it was Mr. Taylor's job to connect and disconnect valves and pumps to and from pipe systems. ((TT 7/25 at 201). He explained that he bolted valves to pipe flanges, and that there was a gasket between the pipe and the valve to seal the connection. (TT 7/25 at 201). He had to remove valve gaskets about once a week. (TT 7/25 at 204). He removed asbestos gaskets from valve flanges with a scraper or wire brush, which created a lot of dust. (TT 7/25 at 202, 204-05). Mr. Jolly was nearby when Mr. Taylor and other workers removed asbestos flange gaskets. (TT 7/25 at 207-09, 220).

Fisher and Crosby sold valves to Duke that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 7/25 at 74; TT 7/27 at 187-89; 7/31 at 122-23, 125, 164-65). Those flanged connections utilized asbestos gaskets. (TT 7/25 at 210). Fisher and Crosby valves also had internal asbestos gaskets and packing. (TT 7/25 at 210-13).

The original and replacement asbestos valve gaskets came from Fisher and Crosby. (TT 7/25 at 214-15; TT 7/26 at 214-15; TT 7/27 at 104-05). Most of the valve flange gaskets sold by Fisher and Crosby were asbestos gaskets. (TT 7/26 at 202, 210-13; Pl's Ex. 1012.6). Asbestos gaskets contain up to 90% asbestos. (TT 7/26 at 51-52).

The evidence at trial also established that at least some of the gaskets and packing sold by Defendants contained crocidolite, or Blue African asbestos. (Pl's Ex. 1008.10670; Pl's Ex. 1008.10665). Fisher also had a specification for crocidolite packing. (TT 7/27 at 201-02, 206; Pl's Ex. 2006.037). Defense expert Dr. Oury testified that gaskets and packing were known to contain crocidolite. (TT 8/2 at 188-89; Crosby Ex. 533). Crocidolite is known to be by far the most potent type of commercial asbestos fiber. (TT 8/1 at 114; TT 8/2 at 179).

There was testimony that Mr. Jolly's exposures to asbestos from Fisher and Crosby valves were many orders of magnitude above background levels. (TT 7/26 at 76-77). Dr. Frank testified that Mr. Jolly's exposures were extensive and repetitive. (TT 7/26 at 71).

Both of Plaintiffs' medical experts, Dr. Arthur Frank and Dr. John Maddox, testified that Mr. Jolly's exposure to asbestos from Fisher and Crosby valves was a substantial factor in the development of his mesothelioma. (TT 7/26 at 72-73; TT 7/31 at 180-82). They testified that mesothelioma can be caused by brief or low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). Even Defense expert Dr. Crapo admitted that a "very low" level of exposure to crocidolite can cause mesothelioma. (TT 8/1 at 114).

Experts on both sides agreed that Mr. Jolly's mesothelioma would most likely be fatal. (TT 7/26 at 99; TT 8/2 at 190). Dr. Frank testified that Mr. Jolly would likely die in a year or less. (TT 7/26, at 99-100). Mesothelioma was described as an unusually painful disease. (TT 7/26 at 98; TT 8/1 at 150-53). Dr. Frank and defense expert Dr. Crapo indicated that Mr. Jolly will continue to require medical care until his death. (TT 7/26 at 101-02; TT 8/1 at 153).

A jury trial was held against Fisher and Crosby in July and August 2017. The jury considered Plaintiffs' claims of negligence, strict products liability, and breach of implied warranty. They returned a verdict for Plaintiffs on the negligence and breach of implied warranty

claims, and awarded \$200,000 in compensatory damages to Mr. Jolly and \$100,000 in compensatory damages to Mrs. Jolly.

II. Ruling on Motion for New Trial *Nisi Additur*.

A. Standard of Review

A new trial *nisi additur* may be granted when the trial court finds the amount of the verdict to be “merely inadequate” in light of the evidence presented at trial. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (2003); *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996). When granting a motion for *additur*, the court must offer compelling reasons. *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). “Great deference is given to the trial judge . . . [because] the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate courts].” *Waring v. Johnson*, 31 S.C. 248, 257, 533 S.E.2d 906, 911 (2000).

“A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court.” *Waring*, 31 S.C. at 257, 533 S.E.2d at 911. The trial court has the authority grant a new trial to the plaintiff unless the defendant agrees to the payment of an additional amount. *Id.* at 258, 533 S.E.2d at 911.

B. Additur

A new trial *nisi additur* is warranted when a jury has awarded medical damages for injuries caused by the defendant but has failed to consider the plaintiff’s pain and suffering associated with those injuries. *See Waring v. Johnson*, 31 S.C. 248, 260, 533 S.E.2d 906, 912 (2000). In *Waring*, the jury only awarded the exact amount of the plaintiff’s medical expenses, \$23,237.28, associated with her injuries from a car wreck. The Supreme Court found that it was proper to grant a *nisi*

additur of \$40,000 given the evidence that the plaintiff's pain was caused by her injury and that she was unable to continue her previously active lifestyle. *Id.* at 260, 533 S.E.2d at 912; *see also id.* at 258-59, 533 S.E.2d at 911-12 (collecting South Carolina cases upholding trial court orders granting new trial *nisi additur* under the abuse of discretion standard).

In *Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015), the Supreme Court held that the trial court had not abused its discretion in granting a *nisi additur* in the amount of \$600,000. This was a product liability case against Ford brought by the estate of a man who was killed when his door latch failed in a car accident. *Id.* at 189, 777 S.E.2d at 826-27. The uncontradicted evidence was that the family had \$228,000 in economic damages, plus a number of witnesses testified about the significant noneconomic damages suffered by his family. *Id.* at 193, 777 S.E.2d at 829. The trial court found the jury's verdict of \$300,000 to be inadequate, granted a *nisi additur* of \$600,000, and entered judgement for \$900,000. *Id.* at 189, 777 S.E.2d at

827.

In upholding the grant of a new trial *nisi additur*, the Supreme Court clarified that a *nisi additur* may be appropriate even when the jury has awarded some amount for noneconomic damages. *Id.* at 194, 777 S.E.2d at 829-30. The trial court had articulated compelling reasons for granting the *nisi additur*, including "a thorough recitation of the 'uncontested, and emotionally compelling' evidence, including testimony and supporting exhibits that demonstrated both the pecuniary losses suffered by the Riley family and also the noneconomic compensable elements of loss that are recoverable in a wrongful death action." *Id.*; *see also Graham v. Whitaker*, 282 S.C. 393, 405, 321 S.E.2d 40, 45 (1984) (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from \$10,000 to \$67,500).

damages); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 17, 27-28 (Mo. Ct. App. 2004) (upholding award of \$2 million for pre-death pain, suffering and emotional distress where 43-year-old had survived one year with mesothelioma).

The South Carolina Supreme Court has held that the goal of compensatory damages is “to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.” *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000).

Under this case law, it is clear that the Jollys’ verdict is inadequate and should be increased to more accurately reflect the extent of their losses. The jury only awarded Mr. Jolly medical expenses in the amount of \$142,000, plus \$58,000 for pain and suffering.

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 The jury was instructed that, “[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the accident or incident occurred. Actual damages would be the actual losses and expenses the Plaintiffs have incurred.” (TT 8/3 at 139). The jury was instructed on four categories of actual damages – medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. (TT 8/3 at 139-40). The jury was also instructed that future damages should be awarded for the duration of Mr. Jolly’s life expectancy, which is a little more than eleven (11) years given his age of 73. (TT 8/3 at 141-42).

The evidence supported damages in all of these categories, and for future damages. The jury’s award of only \$200,000 was not sufficient to make Mr. Jolly whole for the magnitude of his losses resulting from his mesothelioma diagnosis, treatment, and expected death.

Testimony bearing on damages was offered by Plaintiffs Dale and Brenda Jolly, their daughter, Tracy Pavlish, Plaintiffs’ expert Dr. Arthur Frank, and defense expert Dr. James Crapo.

As noted, Dr. Frank testified that all of the medical treatment received by Mr. Jolly was medically necessary. (TT 7/26 at 100). Dr. Frank testified, *without dispute*, that the total cost of Mr. Jolly's past and future medical care, from the time of his diagnosis to the time of his death, would reasonably be \$1,000,000. (TT 7/26 at 101, 179). This undisputed testimony took into account some of Mr. Jolly's past medical bills of \$142,000, plus the cost of his surgery that was hundreds of thousands of dollars. (TT 7/26 at 101, 193).

The jury heard evidence that Mr. Jolly is currently undergoing an experimental therapy that requires him to go for treatments and doctor visits several times a week. (TT 7/25 at 145, 162-63, 172; TT 7/26 at 100). Experts on both sides agreed that Mr. Jolly's would likely die from mesothelioma and that his medical needs would increase as he got sicker and closer to death. (TT 7/26 at 101-02; TT 8/1 at 153).

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Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, the Court will increase the medical expenses award to \$1,000,000.

The Court also finds that the jury's award of \$58,000 for Mr. Jolly's pain and suffering in inadequate. There was evidence that after his diagnosis Mr. Jolly suffered greatly through three rounds of chemotherapy, and endured surgery that involved removing his rib and scraping out the tumor. (TT 7/25 at 145, 159-60, 175; TT 7/26 at 96-97, 102). He lost 45 pounds. (TT 7/25 at 60). His recovery from the surgery required months of rehabilitation to help him regain his ability to walk and to breathe without oxygen. (TT 7/25 at 161-62). At the time of trial, he was on an experimental treatment that he said "brings you to your knees." (TT 7/25 at 145). Dr. Frank and defense expert Dr. Crapo both confirmed that the pain associated with mesothelioma is quite bad. (TT 7/26 at 98; TT 8/1 at 150-53).

This is not to mention Mr. Jolly's expected death, which Dr. Crapo described at length as "in no way . . . a comfortable death [because it is] a very bad tumor," "not a very good death," and "a bad death." (TT 8/1 at 151, 152, 153). Mr. Jolly will continue to waste away and by the end of his life will likely require feeding by a feeding tube or intravenously, and will be on hospice care. (TT 7/26 at 102).

There was also substantial evidence of Mr. Jolly's loss of enjoyment of life. The evidence is that he was a very healthy, active person prior to his diagnosis and that because of his mesothelioma he can no longer do any of the things that bring him joy. (TT 7/25 at 157). The testimony was that his life "came to a halt" after his diagnosis. (TT 7/25 at 156-57). He was still working at Duke at the time of his diagnosis, at the age of 71, because he "loved" his work. (TT 7/25 at 64). He had to stop because of his illness. (TT 7/25 at 59). He used to keep a vegetable garden and spend a lot of time gardening and mowing the grass, which he can no longer do. (TT 7/25 at 165). He cannot go to church or have friends over for dinner. (TT 7/25 at 173). They used to go to the beach for a vacation every year and they can no longer do that. (TT 7/25 at 173).

Mr. Jolly has also suffered mental anguish. His daughter testified that he was "heartbroken" by the diagnosis, (TT 7/25 at 157), and became "depressed" after going through chemotherapy. (TT 7/25 at 159, 175). She explained that he was "devastated" by the recent news that his cancer had come back. (TT 7/25 at 162). Mr. Jolly's mental anguish was evident for the jury to witness, as he became overwhelmed with emotion. (TT 7/25 at 107-08).

The Court will increase Mr. Jolly's noneconomic damages award by a factor of ten, and award \$580,000.

The Court will also increase Mrs. Jolly's loss of consortium damages. The evidence established that Mr. and Mrs. Jolly have been married for 51 years. (TT 7/25 at 170). Mrs. Jolly

has turned into Mr. Jolly's caregiver and has witnessed him in a lot of pain. (TT 7/25 at 167, 173). Her own health has been neglected to the point that she had a heart attack a few weeks before trial. (TT 7/25 at 163-64). Her daughter described her as "really scared" by the return of the cancer. (TT 7/25 at 162).

Given everything that the Jollys have endured, and that her time with Mr. Jolly will be cut short by at least ten years, the jury's award of \$100,000 in loss of consortium damages is inadequate to compensate Mrs. Jolly for her losses. The evidence supports a loss of consortium award of \$290,000.

The Court therefore grants a new trial *nisi additur* and orders an added verdict of \$1,580,000 to Mr. Jolly and \$290,000 to Mrs. Jolly.

III. Ruling on Defendants' Joint Motion for Judgment Notwithstanding the Verdict

Fisher and Crosby have raised nine separate points of error in support of their motion for judgment notwithstanding the verdict. The Court denies Defendants' motion on all grounds.

A. Standard of Review

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

its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

B. Open and Obvious Danger.

Fisher and Crosby first contend that they had no duty to warn Jolly because the danger was open and obvious. This is contradicted by the fact that Fisher and Crosby took the position at trial that asbestos gaskets and packing are not dangerous. (TT 7/27 at 145-46). The jury could have concluded that neither Duke, nor Mr. Jolly, knew that the asbestos gaskets and packing used in Fisher and Crosby valves were dangerous because Fisher and Crosby completely denied that.

“A seller is not required to warn of dangers or potential dangers that are generally known and recognized.” *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41-42, 674 S.E.2d 500, 504 (Ct. App. 2009) (quoting *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (Ct. App. 1996). The jury was instructed to this effect in this case. It was told that there is no duty to warn of a danger that is “obvious” or that is “generally known and recognized.” (TT 8/3 at 124).

In arguing that Mr. Jolly was aware of the danger, Defendants rely entirely on his testimony regarding warnings that Duke provided about asbestos insulation. (TT 7/25 at 119-20, 124-25, 130, 135). There was evidence that Duke did not know that asbestos gaskets were hazardous, and thus was not warning its employees. (Pl's Ex. 136). A Duke document from September 1984 instructing employees how to protect themselves from asbestos insulation, states that asbestos used in gasket material is “bonded, which means it produces virtually no dust.” (Pl's Ex. 136 at Script, p. 3). Mr. Jolly explained that he was only warned by Duke about asbestos hazards that Duke knew about. (TT 7/25 at 142). Mr. Jolly's co-worker, David Taylor, testified that when Duke gave its employees information about asbestos hazards, Duke made a distinction between insulation and gaskets. (TT 7/27 at 126). Employees did not know there was a danger from asbestos gaskets until several years

gaskets and packing were asbestos-containing. The question of whether Mr. Jolly knew about the danger of working around asbestos gaskets and packing was for the jury, which it decided in Plaintiffs' favor.

C. Sophisticated Intermediary Defense

The South Carolina Supreme Court has observed that the sophisticated intermediary defense has not been adopted in South Carolina. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015), *reh'g denied* (Feb. 12, 2016). The Court nevertheless determined that the jury should be instructed on this defense under the facts of this case. This is an affirmative defense for which Defendants had the burden of proof. *See Webb v. Special Elec. Co.*, 63 Cal. 4th 167, 187, 370 P.3d 1022, 1034 (2016).

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The jury decided this issue in Plaintiffs' favor. The Court finds that their verdict is supported by the evidence and that Fisher and Crosby are not entitled to judgment as a matter of law on this defense. Fisher and Crosby did not show that they warned Duke; the evidence was that Fisher and Crosby provided no warnings to Duke. (TT 7/27 at 144; TT 7/31 at 64-65). Fisher and Crosby also failed to show that they knew Duke was aware or should have been aware of the danger from asbestos gaskets. The evidence was that Duke distinguished asbestos gaskets as non-hazardous because it was thought they did not release asbestos fibers when disturbed. (Pl's Ex. 136 at Script, p. 3; TT 7/27 at 126). There was no evidence that Fisher and Crosby were relying on Duke to inform its employees of those hazards. The record thus supports the jury's rejection of this defense.

D. Product in Same Condition.

Fisher and Crosby contend that they are not liable for Mr. Jolly's exposure to asbestos flange gaskets because the flange gaskets "were placed between piping and the Defendants' valves

after they were sold and sent to Duke.” JNOV Motion at 10. Because the flange gaskets were applied to the flange during the installation of the valve at the power plant, Fisher and Crosby argue that the valve was not in the same condition as when they sold it.

The Court does not agree that connecting flanged valves to a pipeline in the field is an alteration of the valve. Fisher and Crosby sold valves that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 7/27 at 187-89; 7/31 at 18-19, 122-23, 125). The evidence was that Fisher and Crosby intended that flange gaskets would be used to connect their valves to the pipe line. (TT 7/27 at 188-89). Mr. Martin agreed that “the design was a flange that would have to have a gasket.” (TT 7/31 at 123).

Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). Defendants' engineers determined what materials the flange gaskets were made of to create the right seal under different conditions. (TT 7/27 at 189). Mr. Taylor recalled that the Fisher and Crosby valves present at Duke had flange connections that utilized asbestos flange gaskets. (TT 7/26 at 210-13).

Fisher and Crosby did not simply sell valves, they both also sold replacement asbestos flange gaskets to Duke. Mr. Taylor testified that all of the valve flange gaskets were supplied by the valve manufacturers. (TT 7/26 at 214-15; TT 7/27 at 104-05). Most of those valve flange gaskets were asbestos gaskets. (TT 7/26 at 202, 210-13). Duke purchase orders corroborate his recollection, as they show asbestos flange gaskets being sold by Fisher. (Pl's Ex. 1012.6). The evidence supports a jury finding that Mr. Jolly was exposed to asbestos flange gaskets sold directly by Defendants.

To the extent that the use of a flange gasket on a flanged valve could be considered an “alteration” of the valve, it was an entirely foreseeable and expected modification. “Liability may

be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller.” *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997). Only “if it can be shown that the product was (1) materially altered before it reached the injured user and (2) such alteration could not have been expected by the manufacturer or seller, then the manufacturer or seller is not liable.” *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592–93 (1994).

Fisher and Crosby did not show that the “alteration” of their valves by placing a flange gasket in the valve flange was unexpected. The valves could not be placed in service without use of a flange gasket, and, as noted, Fisher and Crosby sold asbestos flange gaskets to Duke. The jury declined to find an unexpected alteration to the valves simply from application of a flange gasket in the field that was called for by Defendants’ flanged valve design. Their determination is supported by the record.

E. Proximate Causation

Fisher and Crosby next contend that Plaintiffs did not show that Defendants’ failure to warn about the dangers of asbestos exposure from their valves was a proximate cause of Jolly’s mesothelioma. They contend that there is no evidence that Jolly would have heeded such a warning if it had been given. The Court disagrees.

Defendants rely on *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998), which does state the basic rule that the failure to warn must be the proximate cause of the plaintiff’s injuries. *Allen* makes clear, however, that the issues of proximate cause, and the adequacy of the defendant’s warning, are for the jury to decide. *Id.* at 432–33, 505 S.E.2d at 360. In *Allen*, the product manufacturer did warn and the plaintiff did not follow the warning. But

because there was evidence that the warning was inadequate, that created a fact issue as to whether a different warning would have caused the plaintiff to behave differently. *Id.*

Here, there was a fact issue for the jury. There was evidence that Mr. Jolly followed every asbestos warning he was given. He testified that when he saw asbestos warnings at Duke, he heeded them and avoided touching asbestos insulation. (TT 7/25 at 120). He did not go into areas that were cordoned off for asbestos abatement. (TT 7/25 at 125). When he was in a zone that required a respirator, he wore a respirator. (TT 7/25 at 121, 127). There was also evidence that Jolly checked for any applicable warnings on Fisher and Crosby products. (TT 7/25 at 142).

There was evidence that Fisher and Crosby did not warn about the hazards of asbestos on the asbestos-containing products they sold to Duke. (TT 7/25 at 209-10, 218-19; TT 7/27 at 143-44, 232; TT 7/31 at 64-65). Plaintiffs' expert, Dr. Frank, testified that product warning labels were required by OSHA as of 1972 and that Fisher and Crosby's products should have contained asbestos warnings. (TT 7/26 at 110-11, 189).

The record therefore supports the jury's conclusion that Mr. Jolly would have followed an adequate warning if one had been present on Fisher and Crosby products. Under *Allen*, the mere fact that an adequate warning was missing from the products was sufficient to create a jury question regarding whether an adequate warning would have changed Jolly's behavior. 332 S.C. at 432-33, 505 S.E.2d at 360. The evidence supports the jury's determination that Fisher and Crosby's failure to warn was a proximate cause of Jolly's mesothelioma.

F. Design Defect

Fisher and Crosby contend that Plaintiffs failed to prove their design defect claims because, they argue, there was no evidence of a reasonable alternative design. While a reasonable alternative design must be shown, this is part of the risk-utility test for design defect that is a matter for the

jury to decide. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 219, 701 S.E.2d 5, 13 (2010). The jury weighs the availability of a feasible alternative design, as well as the associated costs, safety, and functionality. *Id.* at 225, 701 S.E.2d at 16.

Evidence at trial showed that Fisher and Crosby had alternative feasible designs available to them at the time they were selling asbestos gaskets and packing with their valves and as replacement parts. Mr. Duimstra agreed that non-asbestos gasket and packing materials were always available. (TT 7/28 at 141). Mr. Martin also agreed that “one of the standards at that time would be asbestos but there are other materials they could have used.” (TT 7/31 at 122-23).

Mr. Duimstra and Mr. Martin both testified that there were a variety of non-asbestos gasket materials available, including graphite, metal, and Teflon. (TT 7/28 at 100; TT 7/31 at 125). Defendants both sold some valves to Duke that did not contain asbestos materials. (TT 7/31 at 139, 163).

With regard to packing, Mr. Duimstra testified that Teflon had been available since the 1950s, and could have been sold instead of asbestos packing. (TT 7/28 at 100-01, 140-41). He acknowledged that there was no reason for Mr. Jolly to be exposed to asbestos gaskets and packing because of the availability of alternative materials. (TT 7/28 at 145-46).

The record showed that there were multiple non-asbestos materials that were available to Fisher and Crosby and that they have could have sold gaskets and packing to Duke that were made exclusively out of graphite, metal, or Teflon. Defendants did, in fact, sell gaskets and packing to Duke that were made out of these alternative materials. The evidence created a fact issue for the jury on reasonable alternative design, and supports their finding in Plaintiffs' favor on this issue.

G. Standard of Care

The Court does not agree with Fisher and Crosby's contention that there was a lack of evidence as to the standard of care and their deviation from that standard. A product manufacturer is held to the skill of an expert in its business and to an expert's knowledge of the materials and processes in its industry. *Carolina Home Builders, Inc.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972); *see also Humphries v. Mack Trucks, Inc.*, 198 F.3d 236 (4th Cir. 1999); § 32-20 Products Liability - Standard of Care - Manufacturer, Anderson, S.C. Requests to Charge - Civil, 32-20. The manufacturer is therefore required to keep abreast and aware of current standards and scientific knowledge in his industry. *Id.* Because the manufacturer is held to the knowledge and skill of an expert, "[t]his is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product." *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089-90 (5th Cir. 1973). Industry knowledge may be established through expert testimony. *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir. 1982).

Manufacturers have a duty to test and inspect their products. *Nelson v. Coleman Co.*, 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967). "A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009). In addition, "[s]afety standards promulgated by government or industry organizations [] are relevant to the standard of care for negligence." *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477-78, 534 S.E.2d 289, 290-91 (Ct. App. 2000), *aff'd*, 352 S.C. 179, 573 S.E.2d 789 (2002) (collecting cases).

The evidence supports the jury's finding that Fisher and Crosby failed to meet the standard of care. There was evidence that they did not keep aware of the health hazards caused by the asbestos products they were selling, they failed to test their products to determine whether they were exempt from OSHA labeling regulations, they failed to comply with OSHA labeling requirements, and did not warn about asbestos hazards.

Plaintiff's expert Dr. Frank established that the dangers of asbestos exposure became known in industry around the turn of the century. (TT 7/26 at 86-89). In the early twentieth century, there were a number of publicly available publications about the dangers of asbestos exposure. (TT 7/26 at 88-89). In 1930, researchers Meriwether and Price published a paper that not only described the risk of lung diseases from asbestos exposure, but set forth the precautions that could be taken to reduce exposures and reduce the risk. (TT 7/26 at 86). Crosby received such information in the 1930s through its membership in the National Safety Council. (TT 7/31 at 91-92; Pl's Ex. 102).

By 1955, it was established that occupational asbestos exposure could cause lung cancer. (TT 7/26 at 89-90). By 1960, it was known that asbestos exposure could cause mesothelioma. (TT 7/26 at 91-93).

In the 1950s, the U.S. Department of Labor established workplace safety regulations for government contractors, called the Walsh-Healey Act, that required employers to take steps to control asbestos exposure levels below a certain threshold. (TT 7/26 at 83-85; Pl's Ex. 149.) As government contractors, Fisher and Crosby were required to comply with the Walsh-Healey Act. (TT 7/26 at 83-84; 7/31 at 85-86).

Although Fisher maintained a library at its manufacturing facility and corporate offices, it contained no publications regarding the hazards of asbestos. (TT 7/27 at 149). Crosby did not even

maintain a library of health and safety materials. (TT 7/31 at 71, 99). Nor did it have an industrial hygiene or a medical department. (TT 7/31 at 71). Mr. Martin admitted that he did not know of anything that Crosby had done to keep up with the dangers of the asbestos products it was selling. (TT 7/31 at 99).

Plaintiffs presented evidence that by 1980, when Mr. Jolly began working around asbestos gaskets and packing associated with Fisher and Crosby valves, Defendants should have known that the only safe level of asbestos exposure is zero. (TT 7/26 at 109). In Dr. Frank's opinion, Fisher and Crosby should have been warning users about the dangers of asbestos exposure from their valves. (TT 7/26 at 108-09, objections omitted).

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In 1972, OSHA promulgated asbestos regulations, some of which applied to product manufacturers. (TT 7/26 at 81, 110-11; Pl's Ex. 155). As of that time, product manufacturers were required to place warning labels on any asbestos-containing products. (TT 7/26 at 81-82, 110-11). The OSHA asbestos regulations applied to Fisher and Crosby as sellers of asbestos-containing products. (TT 7/26 at 83).

The only exemption from OSHA's warning label requirement was if the manufacturer could demonstrate that the asbestos in the product was encapsulated and would not be released during the normal use of the product. (TT 7/26 at 111). In order to determine if a product releases asbestos dust during normal use, the manufacturer was required to conduct tests under normal working conditions to measure any fiber release from the product. (TT 7/26 at 112).

Fisher and Crosby claim that asbestos gaskets and packing were not friable. Dr. Frank testified, however, that asbestos fibers did not remain encapsulated during the ordinary wear and tear on the gaskets. (TT 7/26 at 109-10). There was also evidence that Fisher and Crosby did not measure the fiber release levels from the removal of asbestos gaskets and packing. (TT 7/27 at

146-47; TT 7/31 at 13, 33-34, 40-41, 90). In the absence of fiber release testing, the jury could have reasonably concluded that Defendants did not have a rational basis to say that their products did not release asbestos fibers. (TT 7/26 at 112).

There was evidence that replacement asbestos gaskets sold by Fisher and Crosby should have included an OSHA-approved asbestos warning label. (TT 7/26 at 189). In addition to a warning label, Fisher and Crosby could have provided material safety data sheets (“MSD sheet”) with information about the product composition, hazards, and recommended precautions. (TT 7/26 at 188-89). Dr. Frank testified that this was not an OSHA requirement until 1986, but would have been a good prudent business practice. (TT 7/26 at 194). If Fisher and Crosby had provided MSD sheets to Duke, that would have corrected Duke’s misconception, as stated in its asbestos policy, that gaskets do not release asbestos fibers. (TT 7/26 at 191-92).

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Even though Fisher was supposed to behave with the knowledge of an expert, Fisher did not discontinue its sales of asbestos-containing gaskets and packing until its customers demanded it. (Pl.’s Ex. 1008.01).

Defendants also argue that Mr. Jolly’s exposure to asbestos from their valves did not exceed OSHA permissible exposure limits (PEL). Plaintiffs’ evidence contradicted this, as Dr. Frank testified that “if you see dust from an asbestos product you’re dealing with levels that are generally quite high.” (TT 7/26 at 113). He further testified that Mr. Jolly’s exposures to asbestos from gaskets were many orders of magnitude above background levels. (TT 7/26 at 76-77).

Plaintiffs’ evidence therefore establishes the standard of care, and it was reasonable for the jury to conclude that Fisher and Crosby failed to meet this standard. Even though they were charged with the knowledge of experts, and were supposed to keep up with scientific developments with regard to the products they were selling, there was evidence that they made no effort to do

so. Even though they were required under OSHA to determine whether their products released asbestos fibers, there was evidence that they made no effort to do so. Even though they were required by OSHA to include a warning label on their asbestos products, the evidence showed that they failed to do so. Plaintiffs presented evidence that if Fisher and Crosby had tested their products, they would have learned that the gaskets and packing they were selling were friable, released high levels of asbestos, and should have included a caution label. The evidence was thus sufficient for the jury to conclude that Fisher and Crosby violated the standard of care.

H. Bare Metal Defense

1. Direct Sales to Duke

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Fisher and Crosby contend that they are entitled to summary judgment because they did not manufacture or provide the asbestos materials to which Mr. Jolly was exposed. This assertion is contradicted by the evidence that they were selling asbestos gaskets and packing to Duke with some of their valves, and that they also supplied replacement internal gaskets, flange gaskets, and packing. Under South Carolina law, “[a] manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part.” *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). In fact, “[a] manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.” *Duncan*, 385 S.C. at 133, 682 S.E.2d at 884. “The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product.” *Baughman*, 780 F.2d at 1132.

There was evidence that Crosby valves have incorporated asbestos components since the 1930s. (TT 7/31 at 26). Internal asbestos gaskets were installed by Crosby at the factory. (TT 7/31 at 22). Some Crosby valves contained asbestos components until 1991, but thereafter asbestos replacement parts may still have been available. (TT 7/31 at 39). Crosby provided asbestos replacement gaskets. (TT 7/31 at 41).

Plaintiff presented evidence that Crosby sold a lot of valves to the Duke plants where Jolly worked—66 to Oconee, 72 to McGuire, and 18 to Catawba. (TT 7/31 at 143-150; Pl's Ex. 6395). Some Crosby valves sold to Duke contained asbestos gaskets. (TT 7/31 at 157). Crosby sold asbestos-containing replacement gaskets and packing to Duke. (TT 7/31 at 151, 155; Pl's Ex. 6364.04). The material specification for the gasket part card relevant to Duke sales showed that an asbestos gasket made by Garlock was supplied by Crosby. (TT 7/31 at 74-77; Pl's Ex. 6395, p. 39). This asbestos gasket was used in valve number 67261 at Duke. (TT 7/31 at 78). This gasket specification was for an asbestos-containing gasket until 1989. (TT 7/31 at 79). Other records show that asbestos gaskets were specified by Crosby until 1989. (TT 7/31 at 167).

Depending on Fisher's design, its valves came with a number of internal gaskets, including bonnet gaskets, cage gaskets, and seat ring gaskets, as well as packing. (TT 7/27 189-91). The gasket and packing material was selected according to Fisher specifications and installed at its manufacturing facility in Iowa. (TT 7/27 at 190, 208). Fisher sold valves to Duke that contained asbestos gaskets and packing. (TT 7/27 at 158). Fisher material specification 17A2 was for asbestos gasket material composed of 80 to 85% asbestos fiber. (TT 7/27 at 166-67). Fisher used a material specification number for its asbestos gaskets so that its customers could order replacement gaskets that were the exact same asbestos gaskets that had been supplied with the valve. (TT 7/27 at 167, 169). Every time the 17A2 specification was used in invoices and purchase

orders through 1988, the gaskets would have contained 85% asbestos. (TT 7/27 at 168). Fisher also had a specification number its customers could use to order asbestos packing from Fisher. (TT 7/27 at 177, 179, 192; Pl's Ex. 1008.1964; Pl's Ex. 948 at 27-28).

David Taylor testified that the replacement asbestos flange gaskets came from the valve manufacturers. (TT 7/26 at 214-15; TT 7/27 at 104-05). Purchase orders confirm the presence of Fisher valves at Duke and the sale of replacement asbestos gaskets, including asbestos flange gaskets, to Duke. (Pl's Ex. 1012; Pl's Ex. 1012.6; TT 7/26 at 215-16). Duke purchase orders indicate that Fisher was selling replacement asbestos gaskets, specification 17A2, to Duke facilities. (TT 7/27 at 168-69; Pl's Ex. 1008.1964). In 1982, Fisher sold replacement asbestos gaskets, specification 17A2, to the Oconee nuclear station. (TT 7/27 at 169; Pl's Ex. 1012.5). In 1982, Fisher sold several different asbestos gaskets to Oconee, including bonnet gaskets, gage gaskets, adaptor gaskets, and seat ring gaskets for Fisher valves. (Pl's Ex. 1012.5). Fisher sold more asbestos gaskets to Oconee in 1985. (Pl's Ex. 1012.7).

Given the evidence of sales of asbestos gaskets and packing from both Crosby and Fisher to Duke, the jury could have reasonably inferred that Mr. Jolly was exposed to asbestos materials supplied directly by Defendants. The record supports the conclusion that Mr. Jolly was exposed to asbestos gaskets supplied by Fisher and Crosby with their valves and as replacement parts.

2. Liability for Foreseeable Harm

Fisher and Crosby raise the so-called "bare metal" defense, contending that they do not bear liability for replacement asbestos gaskets and packing. The Court has already rejected this argument.

A manufacturer's duty to warn extends to foreseeable dangers resulting from the anticipated and intended use of its products. *See* Ralph King Anderson, Jr., South Carolina

Requests to Charge - Civil § 32-27 (2d ed. 2009); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 84 (4th Cir. 1962); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 359-60, 191 S.E.2d 774, 870 (S.C. 1972); *Mickle v. Blackmon*, 252 S.C. 202, 233, 166 S.E.2d 173, 187 (S.C. 1969). A manufacturer is “expected to anticipate the environment which is normal for the use of his product and . . . must anticipate the reasonably foreseeable risks of the use of his product in such environment.” *Mickle*, 252 S.C. at 233 (quoting *Spruill*, 308 F.2d at 83-84). “Liability may be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller.” *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997).

In *Garvin*, Judge D. Garrison Hill ruled that when a “manufacturer recommends specifies, or requires that asbestos gaskets and packing be replaced with like materials,” liability may be imposed for replacement gaskets and packing because the product remains in essentially the same condition as when it was sold. *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, at 18 (S.C. Ct. Comm. Pleas Nov. 14, 2014). Judge Hill reasoned that, “Crane’s liability arises because its own valves caused injury as manufactured, supplied, and designed by Crane with asbestos gaskets and packing. When the asbestos gaskets and packing were replaced with the same materials that came with the valve, it was not a ‘substantial change’ in the condition of the product.” *Id.* at 16-17.

The Court rejected the “bare metal defense” on the basis that Crane Co. valves were not sold as mere bare metal, but with asbestos materials that needed to be replaced. When asbestos replacement parts are recommended, specified, or required, the manufacturer cannot reasonably claim that its product somehow ceases to be harmful when such replacements are used. The Court reasoned that, “[t]o say Crane was no longer part of the ‘chain of distribution’ when the original

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gaskets and packing wore out on its still-functioning product would be artificial, if not silly.” *Id.* at 13-14. The evidence showed that the asbestos gaskets and packing used as replacements were no different than that originally supplied by Crane Co., that Crane Co. knew those parts would have to be replaced, and knew that exposure to asbestos was hazardous. *Id.* at 13. The Court determined that Crane Co. “occupied the best position in the chain of distribution to warn consumers of those risks.” *Id.* This conclusion is supported by the comments to the Restatement of Torts (Second) § 402A, incorporated by reference by S.C. Code Ann. § 15-73-30, which espouses the policy that “the consumer of such products is entitled to the maximum of protection . . . and the proper persons to afford it are those who market the products.” *See id.* at 14 (quoting Comment c to the Restatement of Torts (Second) § 402A).

Other courts have taken a similar approach and recognized an equipment manufacturer’s liability when the manufacturer could foresee and anticipate that asbestos replacement parts would be used and could cause injury. *See, e.g., Osterhout v. Crane Co.*, No. 514CV208MADDEP, 2016 WL 6310765, at *3 (N.D.N.Y. Oct. 27, 2016); *Stevens v. Foster Wheeler, LLC*, No. CV 14-157S, 2016 WL 8577465, at *3 (D.R.I. Oct. 14, 2016), *report and recommendation adopted sub nom. Stevens v. Air & Liquid Sys. Corp.*, No. CV 14-157 S, 2017 WL 1025797 (D.R.I. Mar. 16, 2017); *Spychalla v. Boeing Aero. Operations Inc.*, 2015 U.S. Dist. LEXIS 71682, at *8-11, 2015 WL 3504927 (E.D. Wis. June 3, 2015); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 762, 769-70 (N.D. Ill. 2014); *Chicano v. Gen. Elec. Co.*, 03-5126, 2004 WL 2250990 at *6 (E.D. Pa. Oct. 5, 2004); *In re New York City Asbestos Litig. (Dummit and Suttner)*, 27 N.Y.3d 765, 794, 59 N.E.3d 458 (N.Y. App. 2016); *McKenzie v. A. W. Chesterson Co.*, 373 P.3d 150, 159-60 (Or. App. 2016); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 1000 (Md. 2015).

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Most recently, the U.S. Third Circuit Court of Appeal reversed summary judgment for asbestos equipment manufacturers and held that under federal maritime law “a manufacturer of a bare-metal product may be held liable for a plaintiff’s injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff’s injuries were a reasonably foreseeable result of the manufacturer’s failure to provide a reasonable and adequate warning” *In re Asbestos Prods. Liab. Litig. (Devries)*, 2017 WL 4366866, at *6 (3d Cir. Oct. 3, 2017). Such foreseeability is shown with evidence that the manufacturer knew asbestos was hazardous and knew asbestos-containing parts would be used with its equipment because the product was originally equipped with asbestos-containing parts, the manufacturer specified asbestos-containing parts, or the product required asbestos-containing parts to function properly. *Id.* at *6-7.

Here, Plaintiffs presented evidence that Fisher and Crosby sold their valves with asbestos components, knew that the gaskets and packing would have to be changed according to the valve design, and intended that asbestos replacements be used. There was evidence that Fisher engineers selected the components and built the valves for the particular application requested. (TT 7/27 at 197). Similarly, the internal components of Crosby valves were installed by Crosby pursuant to the valve design of Crosby engineers. (TT 7/31 at 22).

Both Fisher and Crosby had material specifications that called for asbestos gaskets and/or packing to be used. (TT 7/27 at 166-69; Pl's Ex. 1008.1964; TT 7/28 at 84-86; TT 7/31 at 74-79, 167; Pl's Ex. 6395, p. 39). Mr. Jolly recalled that the manuals for Fisher and Crosby valves specified the type of gaskets that must be used. (TT 7/25 at 78). Crosby, in fact, recommended that asbestos gaskets be used as replacement parts. (TT 7/31 at 30-31).

There was evidence that Fisher decided whether or not to utilize asbestos-containing materials for the parts it supplied with its valves and as replacement parts. (TT 7/27 at 225). In

1986, for example, it changed the material composition of its packing to substitute non-asbestos materials. (TT 7/27 at 226-27). After that substitution, Duke would order the same Fisher part number and receive a part with a different material. (TT 7/27 at 227-28).

In addition to specifying asbestos gaskets, Plaintiffs' evidence showed that Fisher recommended that the gasket should be replaced whenever the valve was opened. (TT 7/28 at 38-39). Crosby was similarly aware that the internal gaskets in its valves would have to be removed and replaced during routine maintenance of its valves. (TT 7/31 at 41).

Defendants also designed their valves with flanged connections, as set forth above. (TT 7/27 at 187-89; 7/31 at 18, 122-23, 125). A lot of the valves Fisher and Crosby sold to Duke had flanged connections. (TT 7/31 at 164-65). Because of that design, flange gaskets had to be used to connect their flanged valves to the pipeline. (TT 7/27 at 187-89; *see also* TT 7/31 at 18-19, 123). Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). The Fisher and Crosby valves at Duke did, in fact, require asbestos flange gaskets. (TT 7/26 at 210-13).

The evidence that Fisher and Crosby could anticipate that asbestos components would be used in their valves, and that asbestos flange gaskets would be used with their flanged valves, raised questions of fact for the jury regarding Defendants' breach of their duty to warn of the foreseeable dangers resulting from the design of Defendants' valves. When Mr. Jolly or his co-workers used replacement asbestos gaskets and packing in Fisher and Crosby valves, the valves remained unchanged from Defendants' original design. The evidence was therefore sufficient for the jury to conclude that Fisher and Crosby were negligent in failing to warn Mr. Jolly of the asbestos hazards associated with their valves.

I. Expert Causation Testimony

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1. Standard of Review.

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

Courts evaluating the admissibility of scientific expert evidence “must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

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

2. Testimony of Dr. Frank and Dr. Maddox

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Dr. Frank and Dr. Maddox testified that mesothelioma can be caused by brief or low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). These experts were entitled to rely on this basic medical fact in reaching their opinion in this case. That does not mean that they concluded that “each and every exposure” that Mr. Jolly had was a substantial factor in causing his disease. This distinction was recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank’s causation opinions. *See Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The court found his testimony to be entirely compatible with the substantial factor causation standard. *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016).

The Eleventh Circuit has recently held the same. In *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that “there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma,” and that “all ‘significant’ exposures to asbestos ‘contribute to cause mesothelioma,’” is not the same thing as saying that each and every exposure is causative. *Id.* The expert’s causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Judge Robreno of the federal asbestos MDL has similarly found that a “cumulative exposure” opinion is not the same as the “each and every exposure” opinion. The court agreed with the plaintiff that the “cumulative exposure” opinion is different “in substance and by definition” from the “any exposure” opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The court therefore rejected the defendant’s argument that the experts’ opinions were inadmissible on grounds that they are the same as the “any exposure” opinion. *Id.*

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As recognized by these other distinguished courts, which have all admitted the causation testimony of Dr. Frank and/or Dr. Maddox, it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. In reaching their opinions, Dr. Frank and Dr. Maddox both relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by Jolly and Taylor, and the facts surrounding Jolly's exposure to visible dust from Defendants' valves. (TT 7/26 at 19-95; 7/31 at 169-77, 179-80, 184-85).

The specific causation opinions of Drs. Frank and Maddox were firmly grounded in the exposure evidence presented at trial. Dr. Frank testified that he had reviewed Jolly's medical records, the deposition transcripts of Jolly and his co-workers and other case-specific materials. (TT 7/26 at 58-60). He also described that, based on Jolly's testimony, the exposures he had from working with Fisher and Crosby valves were quite high. (TT 7/26 at 51). Mr. Jolly's exposures were many orders of magnitude above background levels. (TT 7/26 at 76-77). In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury. (TT 7/26 at 72-73).

Dr. Maddox similarly based his specific causation opinions on a summary of the exposure facts in this case. (TT 7/31 at 180-82). Dr. Maddox also addressed the issue of very low exposures and explained that low exposures carry only a low risk of disease. (TT 7/31 at 194-95).

The trial testimony of Dr. Frank and Dr. Maddox demonstrates that their causation opinions are based on the record of Mr. Jolly's repeated exposures to asbestos from Fisher and Crosby

valves during four years at Duke, as well as the scientific literature. The methodology and approach of Dr. Frank and Dr. Maddox is exactly the same as that approved by Judge Hill in *Garvin v. Agco Corp.*. There, Judge Hill rejected a challenge to the admissibility of Dr. Maddox's causation testimony, and found it reliable and helpful to the trier of fact. No. 2012-CP-40-6675 (S.C. Ct. Comm. Pleas Nov. 14, 2014).

The Court finds that the causation testimony of Dr. Frank and Dr. Maddox is admissible. It is supported by the scientific literature as well as the facts of this case, and was relevant and helpful to the jury.

J. *Henderson* Causation Standard

A plaintiff in an asbestos case may defeat summary judgment with evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

The Court finds that the *Henderson* causation standard is satisfied by the evidence presented at trial. The evidence showed that when Mr. Jolly was a mechanical inspector at Duke from 1980 to 1984, he was repeatedly exposed to asbestos gaskets and packing from Fisher and Crosby valves. (TT 7/25 at 61-63, 72-76, 84-94). Asbestos gaskets and packing were removed in a manner that released dust, and Mr. Jolly was close enough to breathe that dust many times over the course of his time at Duke. (TT 7/25 at 198-201, 204-05, 220).

The jury could thus have concluded not only that Mr. Jolly had frequent, regular, and proximate exposure to asbestos gaskets and packing from Fisher and Crosby valves, but that these exposures were to the most potent form of asbestos fiber. This evidence was sufficient to support the jury's determination that Mr. Jolly's mesothelioma was caused by his exposure to asbestos products sold by Defendants and for which they are responsible.

IV. Ruling on Defendants' Motion for Election of Remedies

Defendants argue that Plaintiffs should be required to “elect a remedy” between their negligence and breach of implied warranty claims. Defendants have confused election of remedies with election of causes of action. “Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action.” *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996). “[I]n cases where the complaint stated different causes of action, but only one recovery was sought, and the causes of action were so stated because of an uncertainty as to which the evidence might establish or on which it might appear that plaintiff was entitled to recover, no election was required.” *Harper v. Ethridge*, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (Ct. App. 1986).

At trial, three causes of action were submitted to the jury. Each, however, was for recovery of a single injury. Plaintiffs, individually, were awarded a single recovery on their claims. “[W]hile the complaint stated . . . different causes of action, only one recovery was sought and only one recovery was awarded.” *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct.

App. 1998). Consequently, there are no inconsistent remedies for Plaintiffs to choose between, no danger of double recovery as the jury only made one award per plaintiff. Plaintiffs do not have to elect their remedies in this matter.

V. Ruling on Defendants' Motion for Production of Settlements

Defendants argue that they are entitled to disclosure of Plaintiffs' confidential settlement documents because they are "relevant" to set-off. The Court does not find a compelling reason to require disclosure of the confidential releases. The only matter of relevance is the amount of the settlements, and that information has been disclosed. The Court has reviewed the releases *in camera* and has verified that Plaintiffs' pre-trial settlements are in the amount of \$2,270,000. Defendants' motion for production of settlement releases is denied.

VI. Ruling on Defendants' Motion for Setoff

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Defendants are entitled to a set-off in the amount of Plaintiffs' settlements with other defendants in this case. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater" S.C. Code Ann. § 15-38-50.

Defendants correctly assert that Plaintiffs have received settlement money from other defendants in this case. The Court has verified that Plaintiffs have received \$2,270,000 in pre-trial settlements. This is not the end of the matter, however. In determining set-off, the Court must take into account the allocation of these pre-trial settlements to the various claims that the Jollys have or may have had at the time the settlement releases were executed.

In *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999), the Court of Appeals held that “when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law.” *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no setoff as a matter of law. *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). When the settlement “is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between” the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

The claims tried to verdict in this matter were personal injury claims on Mr. Jolly’s behalf and loss of consortium on Mrs. Jolly’s behalf. The settlements received by Plaintiffs also include compensation for the release of the potential future wrongful death claim that the Jollys had at the time of their pre-trial settlements. As such, Defendants’ entitlement to a setoff does not arise as a matter of law.

Defendants are only entitled to “credit for the amount paid by another defendant who settles for the same cause of action.” *Rutland v. S.C. Dep’t of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). Plaintiffs’ personal injury and loss of consortium claims are separate and distinct from their potential wrongful death claim. Because the potential wrongful death claim is different, factually and legally, from the claims tried to verdict, the amount that Plaintiffs received as compensation for the release of future claims, such as wrongful death, should not be considered by this Court when determining the setoff amount. Instead, in accordance with *Rutland* and *Smith*,

only the amounts received by Plaintiffs in settlement for the personal injury and loss of consortium claims should be considered when determining the setoff amount.

In determining the allocation of Plaintiffs' settlements, the Court accepts Plaintiffs' representation that at the time the settlements were received by Plaintiffs, they were internally allocated as one-third to Mr. Jolly's personal injury claims, one-third to Mrs. Jolly's loss of consortium claims, and one-third to the release of future wrongful death claims. Additionally, the Court reviewed the releases of the settling defendants and confirmed that all future claims related to Mr. Jolly's mesothelioma, including wrongful death, were released by the Plaintiffs. Because the total pre-trial settlements were in the amount of \$2,270,000, one-third of the settlements is valued at \$756,666.67.

The Court finds that the internal allocation of the settlement funds received by Plaintiffs is reasonable as required by South Carolina precedent. The Supreme Court has noted that "[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify . . . reapportionment for the sole purpose of benefitting [non-settling defendants]." *Riley v. Ford Motor Co.*, 414 S.C. 185, 196-97, 777 S.E.2d 824, 830-31 (2015).

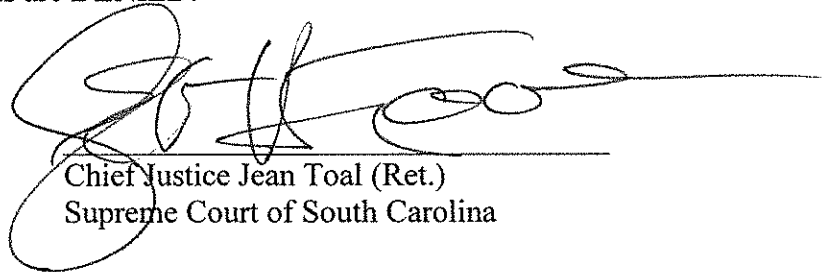
As set forth above, the total amount of the added verdict for Mr. Jolly's personal injury claims is \$1,580,000. Defendants are entitled to a setoff in the amount of Plaintiffs' pre-trial settlements allocated to the personal injury claim, which is \$756,666.67. Defendants owe the balance of \$823,333.33 for Mr. Jolly's personal injury claim.

As set forth above, the total amount of the added verdict for Mrs. Jolly's loss of consortium claim is \$290,000. This does not exceed the \$756,666.67 in settlement proceeds allocated to her loss of consortium claim.

VII. Conclusion

The Court GRANTS Plaintiffs' motion for new trial *nisi additur*, and raises the verdict to \$1,580,00 for Mr. Jolly's personal injury damages and \$290,000 for Mrs. Jolly's loss of consortium damages. The Court GRANTS in part Defendants' motion for set-off, and reduces Mr. Jolly's damages by one-third of Plaintiffs' pre-trial settlements, in the amount of \$756,666.67. Mrs. Jolly's damages are likewise reduced in the amount of \$756,666.67, which exceeds her added damages award. Judgment will therefore be entered against Defendants in the amount of \$823,333.33. Defendants may, of course, reject the additur, and a new trial will be scheduled. Defendants' remaining post-trial motions are DENIED.

IT IS SO ORDERED.



Chief Justice Jean Toal (Ret.)
Supreme Court of South Carolina

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December 15, 2017

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