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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.

RECORD ON APPEAL - VOL. XLI

RECORD ON APPEAL INDEX

VOLUME I

Orders:

Order Granting Default Against AII, October 3, 2023	1
Order Denying AII's Motion to Lift Default, November 2, 2023	4
Form 4 Order denying Janssen, Johnson & Johnson Holdco, Inc, and Kenvue's Motion to Dismiss, July 2, 2024.....	9
Form 4 Order granting Motion to Compel, July 2, 2024.....	11
Order Granting Joint Motion Requesting the Division of Plaintiff Michael L. Perry's Tissue, July 10, 2024	13
Order Regarding AII's Financial Discovery, August 8, 2024	17
Order on Plaintiffs' Motion to Compel and Motion for Sanctions against Defendants Kenvue, Inc and Johnson & Johnson Holdco (NA) Inc., August 9, 2024.....	20
Order on AII's Post-trial Motions, December 11, 2024	24
Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc.'s Post Trial Motions, December 11, 2024.....	68
Amended Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc.; and Kenvue, Inc's Post Trial Motions, March 2, 2025	154
Order on Remand from the South Carolina Court of Appeals regarding Defendants Johnson & Johnson's Motion to Reconsider or to Alter and Amend this Court's December 11, 2024 Order, March 2, 2025	240

Verdict Form:

Verdict Form, August 19, 2024	259

Pleadings:

Plaintiff's Summons and Complaint, August 4, 2023	263
Johnson & Johnson's Answer to Complaint, September 7, 2023.....	414
LTL Management's Answer to Complaint, September 7, 2023.....	448

VOLUME II

Plaintiff's First Amended Complaint, November 30, 2023	480
Johnson & Johnson's Answer to Amended Complaint, December 6, 2023	617
LTL Management's Answer to Amended Complaint, December 6, 2023	651
Plaintiff's Second Amended Complaint with Exhibits, February 1, 2024	683
Johnson & Johnson's Answer to Second Amended Complaint, February 16, 2024	815
LLT Management, LLC Answer to Second Amended Complaint, February 16, 2024.....	850
Johnson & Johnson's Holdco (NA) Answer to Second Amended Complaint, July 17, 2024.....	883
Kenvue Inc's Answer to 2 nd Amended Complaint, July 17, 2024.....	917

VOLUME III

Motions, Supporting Memoranda:

PreTrial Motions, Supporting Memorandums:

Kenvue, Janssen, and J&J Holdco's Motion to Dismiss & Exhibits, February 16, 2024	951
Ex A – 4/23/23 Kenvue S-1	1127
Ex B - <i>Ochoa v 3 M</i> – Order	1120
Ex C – <i>Henderson v Taylor-Seidenback</i> Order.....	960
Ex E – <i>LaSalle v. Am Int'l</i> – Order	1284
Ex F – <i>Yandell v J&J</i> – Order	961
Ex G – <i>Egli v J&J</i> – Order	1277
Johnson & Johnson Defendants Motion for Partial Summary Judgment, June 11, 2024.....	1292
Ex A – Michael Perry Vol 1 Deposition Excerpts.....	1302
Plaintiffs' Response in Opposition to Defendants Johnson & Johnson Holdco (NA) Inc. and Kenvue, Inc.'s Motion to Dismiss (and exhibits attached thereto), June 28, 2024.....	1306
Ex 1 – Special Verdict Form from <i>Lee v. Johnson & Johnson</i>	1323
Ex 2 – Verdict Form and Special Interrogatory, <i>Garcia v. Avon Products, Inc.</i> , ...	1327
Ex 3 – Order in <i>Garcia/Salcedo</i> in Cook County, Illinois, 2/26/2024	1333
Ex 4 – New Jersey (Middlesex Cty.) Hearing Transcript 5/24/2023	1335
Ex 5 – New Jersey Order 6/1/2023	1377
Ex 6 – Louisiana Hearing Transcript/Order 9/29/2023	1381
Ex 7 – Pennsylvania Order 10/20/2023	1388
Ex 8 – New Jersey (Atlantic Cty.) Order 9/27/2023	1390
Ex 9 – Order Denying J&J Defendants' Motion to Dismiss, 4/10/24.	1409
Ex 10 - Plaintiffs' Responses to Defendants' Standard Interrogatories, 9/13/23.....	1415

Ex 11 - List of Providers and Facilities.....	1426
Ex 12 - Kenvue (Mongon) depo. 8/14/2023	1428

VOLUME IV

Ex 13 - Kenvue (Ruh) depo. 8/16/2023.....	1473
Ex 14 – Transcript of JJCI (Goodridge) 2/14/2022	1511
Ex 15 – JJCI (Goodridge) depo. 12/20/2021	1557
Ex 16 - Donald McGraw Declaration 9/18/2023.....	1604
Ex 17 - Kenvue SEC S-4 8/3/2023	1629
Ex 18 - Kenvue, Inc. SEC Form S-1 1/4/2023	1637
Ex 19 – Old JJCI Annual Report (filed in NC) 4/5/2021	1660
Ex 20 – Johnson & Johnson Form 10k 2018	1662
Ex 21 – (a)-(e) , Certificates 10/12/2021	1673
Ex 22 - J&J/LTL (Kuffner) depo. 11/9/2023.....	1707
Ex 23 – New JJCI/Holdco Report (filed in NC) 4/5/2023.....	1729
Ex 24 – Janssen Pharmaceuticals Annual Report (filed in NC) 3/28/2023	1731
Ex 25 – LTL Management LLC Articles of Formation (NC) 10/12/2021	1734
Ex 26 – J&J Project Plato approval memo 10/11/2021	1738
Ex 27 - Draft of J&J’s Product List for the FDA, 12/5/11.....	1750
Ex 28 - Product List, undated (listing all baby powders under the same category: “baby powder”).....	1757

Plaintiffs’ Response in Opposition to Defendants Johnson & Johnson, Inc. and LLT Management, LLC’s Motion for Partial Summary Judgment (and exhibits attached thereto), July 8, 2024 — Pursuant to Plaintiff Counsel agreement only the below exhibits are to be included in the Record on Appeal	1784
Ex 01 – M. Perry Video Deposition, 10/10/2023	1801
Ex 21 - Dana, “A Text-book of Mineralogy”	1848
Ex 128 - Peretti, “Geology and Genesis of the Talc Deposits in the Pinerolese” 1966	1858
Ex 134 - Report of Dr. James Webber, 7/11/2022.....	1868
Ex 257- J&J Resp. to Requests for Admission, 7/26/2021	1889
Ex 258 - Old JJCI Responses to Requests for Admission, 7/26/2021	1906
Ex 259 - J&J Audit Testing of Windsor 66 for Asbestos 6/28/1977; J&J letter to R. Miller 2/23/1978; J&J Raw Material Spec. RM08006 1/7/1992; J&J Raw Material Spec. RM08006, 9/23/1997.....	1917
Ex 260 - Tran. of J&J (Dr. Hopkins), 7/22/2019	1938

VOLUME V

Ex 261 - International Agency for Research on Cancer (IARC) Monograph, “Asbestos,” 2012.....	1967
Ex 262- J&J Resp. to Interrog. (<i>Chapman</i>), 5/30/2018	1981
Ex 263 - J&J (Dr. Hopkins) depo., 4/11/2018	1992
Ex 264 - Gillson, “Origin of the Vermont Talc Deposits,” Econ. Geo., 1927	2080
Ex 265- J&J letter “Talc/Asbestos”, 9/5/1972	2103
Ex 266 - Affidavit of R. Mark Bailey, 10/30/2023	2113

Ex 267 - Report of Dr. Mark Rigler, 11/6/2023	2145
Ex 268 - J&J memo 1/3/1974 (TEM is “the only absolute proof”)	2197
Ex 269 - J&J internal memo, 5/16/1973	2199
Ex 270 - Decl. of Dr. Hopkins, 7/7/2016	2201
Ex 271 - Demonstrative Chart Summarizing Battelle Italian Results; Battelle Reports	2208
Ex 272 - J&J memo “Preliminary Evaluation”, 11/1/1967	2229
Ex 273 - J&J internal memo, 4/15/1969	2244
Ex 274 - Demonstrative of J&J’s Internal Documents 1957-2004; Transcript showing its admission	2247
Ex 275- Decades of Evidence” (1948-2020) Demonstrative Chart, 3/31/2021	2258
Ex 276 - Letter from Dr. Blount on her 1991 paper, 2/10/1992	2279
Ex 277 - J&J internal memorandum, 10/16/1997	2282
Ex 278 - NIOSH “Summary of Plant Observation Reports and Evaluation”, 3/1979	2288
Ex 279 - Depo. of Steven Mann (J&J), 2/15/2021	2306
Ex 280 - Dr. Reynolds report to J&J, 3/1974 (Dartmouth).	2377
Ex 281 - J&J “Proposed Specs For Analyzing Talc For Asbestos”, 5/22/1973	2412
Ex 282 - J&J letter, 2/18/1975	2422
Ex 283 - J&J memo, 11/24/1976	2424
Ex 284 - J&J memo “Talc Program”, 6/7/1971	2426
Ex 285 - J&J memo “Windsor Minerals and Talc”, 4/26/1973	2428
Ex 286 - J&J PowerPoint, 4/28/1997	2432
Ex 287 - J&J PowerPoint, 8/18/1997	2436
Ex 288 -, J&J memo on NIOSH study	2439
Ex 289 - J&J memo “Management Authorization for Additional Talc Safety Studies”, 3/3/1975	2449
Ex 290 - J&J memo “Talc/Powder Program and Strategy”, 3/17/1975	2452
Ex 291 - J&J “Antagonistic Personalities” memo, 11/29/1972	2455
Ex 292 - CTFA meeting minutes, 2/4/1975	2459
Ex 293 - J&J letter to FDA 9/6/1974; J&J letter to the CTFA 12/17/1974	2464

VOLUME VI

Ex 294 - Dr. Langer to J&J, 11/10/1971	2468
Ex 295 - Dr. Hutchinson report to McCrone/J&J	2473
Ex 296 - J&J letter to the CTFA (to be forwarded to the FDA), 3/15/1976	2517
Ex 297 - Depo. of J&J (Musco), 3/8/2019	2520
Ex 298 - J&J advertisement 1965	2533
Ex 299 - J&J guidebook for physicians and nurses, 6/10/1976	2535
Ex 300 - J&J purity claim support, 2/10/1974	2585
Ex 301- McCrone letter to Zeitz, 11/05/1975	2588

Motions in Limine, Memos, Replies and Trial Submissions:

Plaintiffs’ Motion in Limine No. 17 to Exclude the Testimony of Dr. Gregory Diette (and exhibits attached thereto), July 11, 2024	2593
Ex 01 – Diette Report, 6/27/24	2606

Ex 02 – Diette Supplemental Report, 7/2/24	2705
Ex 03 – Diette Deposition, 2/3/23.....	2744
Ex 04 – McDonald & McDonald, Mesothelioma: <i>Is there A Background?</i>	2779
Ex 05 – McDonald & McDonald, Mesothelioma: <i>The epidemiology of mesothelioma in historical context</i>	2791
Ex 06 – Hillerdal, <i>Mesothelioma: cases associated non-occupational and low does exposure</i>	2803
Ex 07 – Wiggins, <i>BTS Statement on malignant mesothelioma in UK.</i>	2813
Ex 08 – Moore, <i>Malignant mesothelioma</i>	2833
Ex 09 – Dail and Hammar’s Pulmonary Pathology.....	2845
Ex 10 – Teta, <i>US mesothelioma patterns.</i>	2849
Ex 11 – Tan, <i>Projection of mesothelioma mortality in Britain.</i>	2860
Ex 12 – Delgermaa, <i>global mesothelioma deaths reported to World Health.</i>	2868
Ex 13 – Report of Dr. David Madigan, 2/1/21	2882
Ex 14 – Moolgavkar, <i>Pleural and peritoneal mesotheliomas in SEER.</i>	2907
Ex 15 – Moolgavkar Reporting, <i>Hirshberg</i>	2918
Ex 16 – MUSC Medical Record	2921
Ex 17 – Dr. Diette Depo Transcript, 7/3/24.....	2923
Ex 18 – No exhibit reference	

VOLUME VII

Ex 19 – Playne/Plant MIL Hearing Transcript, 2/14/23	2951
Plaintiffs’ Motion in Limine No. 20 Regarding Admissibility of Documents Without Sponsoring Witness (and exhibits attached thereto), July 10, 2024	
Ex 01 – Stipulation regarding J&J Documents Produced.....	3036
Plaintiffs’ Motion in Limine No. 22 Motion for Evidentiary Sanctions Against Johnson & Johnson, LLT Management LLC, Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc. Based on Spoliation of Evidence (and exhibits thereto), July 10, 2024	
Ex 01 – Deposition of M. Perry, Vol 1	3081
Ex 02 – McBrayer Order, 11/5/21	3128
Ex 03 - Battelle Report 2/29/1956	3141
Ex 04 – Report of Dr. Webber, 6/10/21.....	3186
Ex 05 – Demonstrative summarizing reports of asbestos from 1957 to 2004.....	3225
Ex 06 – Demonstrative on findings of asbestos minerals 696 samples years 1967 to 1988	3233
Ex 07 – Memo from J&J ‘s Dr. Nash, 7/29/1971	3254
Ex 08 - Memorandum from J&J’s D.R. Petterson 4/26/1973	3257
Ex 09 - Memorandum from Dr. Nashed 10/23/1973	3261
Ex 10 - Ernest F. Fullam Inc. report to (codefendant) Whittaker, Clark & Daniels, Inc.	3264
Ex 11 - Luzenac report on Argonaut 5/23/2002	3270
Ex 12 - Blount, A.M., <i>Amphibole Content of Cosmetic and Pharmaceutical Talcs</i>	3273
Ex 13 - Steffen et. al. Serious ovarian cancer caused by exposure to asbestos.....	3282
Ex 14 - Report of Dr. Rigler 6/11/2021.....	3296
Ex 15 - Excerpt of Mark Bailey’s Report on Vermont talc 11/16/2020.....	3306

Ex 16 - Moline, J., et. al., <i>Mesothelioma associated with the use of cosmetic talc</i>	3328
Ex 17 - Emory, TS. <i>Malignant mesothelioma following repeated exposures to cosmetic talc</i>	3336
Ex 18 – Talc and Asbestos – J&J (Madigan)	3343
Ex 19 - J&J notebook 8/10/1972 (reporting tremolite “fibers”	3364

VOLUME VIII

Ex 20 - J&J memo 4/19/1973 (noting tremolite fibers in four JBP samples).....	3367
Ex 21 – J&J responses to Interrogatories, <i>Breakell v. 3M</i>	3369
Ex 22 - CSMRI report 4/14/1971.....	3505
Ex 23 - CSMRI report 7/7/1971.....	3501
Ex 24 - CSMRI report 2/26/1973.....	3515
Ex 25 - J&J memo 7/9/1971 at pg. 4	3522
Ex 26 - Dr. Langer to J&J 11/10/1971	3530
Ex 27 - J&J memo 9/9/1975	3535
Ex 28 - J&J memo 10/3/1975	3539
Ex 29 - Excerpt of report of Dr. Hutchins 1972	3543
Ex 30 - McCrone report 10/27/1972.....	3568
Ex 31 - McCrone report 2/11/1974	3572
Ex 32 - McCrone report 3/11/1974.....	3574
Ex 33 - McCrone report 7/8/1974.....	3578
Ex 34 - McCrone report 7/1/1975.....	3582
Ex 35 - McCrone report 11/5/1975	3588
Ex 36 - Windsor Mineral, 5/24/1976	3591
Ex 37 - Dr. Reynolds report 3/1974 at pg. 6	3593
Ex 38 - EMV Associates report 4/4/1977	3628
Ex 39 - RJ Lee report 3/14/1988.....	3631
Ex 40 - Dr. Blount to J&J attorney 4/23/1998	3635
Ex 41 - Excerpt of the J&J designee Dr. Hopkins 7/22/2019	3637
Ex 42 - J&J’s responses to discovery (excerpt) in Eggers.....	3644
Ex 43 - Expert report of Dr. Sanchez report 7/30/2021	3672
Ex 44 - Excerpts of) Mineralogy and Morphology of Amphiboles	3703
Ex 45 - <i>Misidentification of Asbestos in Talc</i> by J&J’s Mr. Ashton 1977.....	3718
Ex 46 - J&J’s TM7024 8/21/1995.....	3735
Ex 47 - McCrone to J&J (Windsor Mineral) 8/22/1985	3746
Ex 48 - J&J (Windsor Mineral) to McCrone 9/10/1985	3749
Ex 49 - McCrone to J&J (Windsor Mineral) 10/8/1985	3751
Ex 50 - McCrone to J&J 12/17/1990.....	3753
Ex 51 - McCrone to Cyprus Windsor Minerals 11/26/1990	3759
Ex 52 - ASTM D6620-19, Standard Practice for Asbestos Detection Limit Based on Counts (2019).....	3770
Ex 53 - EPA, Region III Fact Sheet, Quality Control Tools: Blanks (2009)	3782
Ex 54 - McCrone Standard Operating Procedure 3/24/1987	3785
Ex 55 - Email from Ruark Lanham, FDA Divisional Recall Coordinator, 10/17/2019	3791
Ex 56 - Decl. of Dr. Sanchez 3/29/2021	3793

Ex 57 - Letter from RJ Lee 10/28/2019	3797
Ex 58 - Excerpt of Dr. Van Orden 3/12/2020.....	3802
Ex 60 - McCrone to J&J 1/28/1987	3805
Ex 61 - McCrone 6/25/1995	3809
Ex 62 - Executive Summary of Preliminary Recommendations by the Interagency Working Group on asbestos in Consumer Products, 1/6/2020	3812
Ex 63 - CSMRI to J&J 5/18/1971.....	3819
Ex 64 - J&J “Assay of Talc in Baby Powder, 5/14/1971	3823
Ex 65 - J&J report 10/1980	3825
Ex 66 - RJ Lee to Mr. Ashton of J&J 3/9/2004.....	3831
Ex 67 - McCrone on JBP 8/19/1971	3833
Ex 68 - McCrone 1/7/1972	3842
Ex 69 - Dr. Pooley 2/3/1972	3845
Ex 70 - J&J internal document 12/20/1972	3852
Ex 71 - EMV Associates for J&J 6/3/1983.....	3854
Ex 72 - RJ Lee 5/23/1989	3859
Ex 73 - McCrone to Luzenac 1/24/1994.....	3861
Ex 74 - McCrone to Luzenac 6/25/1995.....	3863
Ex 75 - Mr. Ashton to Dr. Hildick-Smith 4/9/1969.....	3866

VOLUME IX

Ex 76 - Dr. Hildick-Smith regarding Dr. Cooper, 7/30/1971.....	3869
Ex 77 – J&J Alternate Domestic Talc Sources 04/15/1969	3872
Ex 78 - J&J’s privilege log (excerpt) from the deposition of Nancy Musco 2/15/2019	3875
Ex 79 - Deposition of Nancy Musco (excerpt) 2/15/2019.....	3902
Ex 80- J&J memorandum on the <i>Westfall</i> case 7/15/1981.....	3977
Ex 81 - J&J on <i>Jolly</i> case 12-3-1982	3980
Ex 82 - J&J list of inhalation complaints 6/17/1985.....	3982
Ex 83 - Schedule I to J&J-Cyprus contract 12/30/1988	3987
Ex 84 - Luzenac to J&J 10/17/1994.....	3990
Ex 85 - Ex. 21 to the deposition of James Mittenthal 10/18/2018.....	3993
Ex 86 - McCrone to Dr. Hutchinson, 10/5/1972	3995
Ex 87 - Report of Dr. Sanchez in Hirshberg (excerpt) 4/2/2021.....	3997
Ex 88 - CSMRI to J&J 8/13/1971	4026
Ex 89 - J&J’s Interrogatory Responses, <i>Eggers v. Colgate-Palmolive Co.</i> , ...	4029
Ex 90 - CSMRI to J&J 6/8/1973.....	4087
Ex 91 - McCrone report to J&J without percentages 10/27/1972	4094
Ex 92 - Dr. Hopkins deposition (excerpt) 8/16/2017	4098
Ex 93 - Deposition of James Mittenthal 10/18/2018	4102
Ex 94 - Deposition of J&J designee James Mittenthal (Vol. 3 of 3) dated 10/19/2018	4114
Ex 95 - <i>Coker</i> legal hold 10/6/1997	4132
Ex 96 - <i>Krushinski</i> legal hold 11/11/1999.....	4137
Ex 97 - J&J trip report 11/23/1993	4140
Ex 98 - George Lee files 7/1988	4145

Ex 99 - Talc Closet Cleanout 1/20/2000 and (d) J&J's file on all phone calls and correspondence it had with the FDA that no longer exists.	4150
Ex 100 - John O'Shaughnessy deposition (excerpt) 6/22/2021.....	4152
Ex 101 - J&J designee Dr. Hopkins deposition (excerpt) 8/15/2017.....	4220
Ex 102 - J&J marketing Power Point 4/28/1997	4230
Ex 103 - J&J marketing Power Point 8/18/1997	4234
Ex 104 - J&J on antagonistic personalities 11/29/1972	4237
Ex 105 - J&J's Vernon Zeitz 5/5/1975.....	4240
Ex 106 - J&J to FDA 9/6/1974	4255
Ex 107 - J&J to Dr. Estrin 12/17/1974	4258
Ex 108 - Testimony of Dr. Sanchez (excerpt) 5/22/2018.....	4260
Ex 109 - J&J re: Dutch Organization 9/20/1973	4263
Ex 110 - J&J's summary of submissions to the FDA 1971-1979.....	4271
Ex 111 - J&J letter to the CTFA (to be sent to the FDA) 3/15/1976	4285
Ex 112 - Dr. Hopkins deposition (excerpt) 8/17/2017	4287
Ex 113 - Dr. Hopkins deposition (excerpt) 4/11/2018	4297
Ex 114 - Dr. Langer to Mt. Sinai 3/17/1976.....	4305
Ex 115 - Pfizer memorandum on media coverage 3/25/1976.....	4310
Ex 116 - J&J regarding meeting with Don Ferry 10/2/1974.....	4312
Ex 117 - J&J on booklet 10/8/1974	4314
Ex 118 - J&J on trip to Italy 10/31/1974	4317
Ex 119 - J&J to UK confirming decision not to publish 11/26/1974.....	4320

VOLUME X

Ex 120 - Deposition of Nancy Musco	4322
Ex 121 - Roger Miller Affidavit (<i>Edley</i>) 7/3/1987.....	4378
Ex 122 - J&J interrogatory responses 5/23/2000 at #17	4384
Ex 123 - O'Shaughnessy Deposition, 6/30/21	4396
Ex 124 - J&J employee William Ashton's Affidavit 5/8/1989	4522
Ex 125 - J&J's Interrogatory Responses, <i>Eggers v. Colgate-Palmolive Co.</i> , ...	4531
Ex 126 - J & J revealed approximately 500 additional TEM evaluations were performed at #16	4536
Ex 127 - J&J Press Release, Oct. 29, 2019.....	4542
Ex 128 - Deposition of Walgreen's designee Rudy Kucera (excerpt) 2/26/21	4546
Ex 129 - Hopkins Testimony, <i>Herford</i> , 11/3/17	4554
Ex 130 - Hearing, <i>Hirshberg v. Johnson & Johnson</i>	4564
Ex 131 - J&J's Second Supplemental Responses to Certain of Plaintiff's First Set of Interrogatories, <i>Eggers v. Colgate Palmolive Co</i>	4573
Ex 132 - Webber Deposition, 5/31/2017.....	4580
Ex 133 - Deposition of J&J designee James Mittenthal (Vol. 1 of 3) dated 9/24/2018	4591
Ex 134 - Pl's McBrayer Motion.....	4648
Ex 135 - 10/28/2021 Transcript of Record.....	4688

VOLUME XI

Plaintiffs’ Motion in Limine No. 23 to Exclude Expert Hearsay Opinions (and exhibits attached thereto), July 10, 2024	4793
Ex 01 - Deposition Testimony of Dr. Matthew Sanchez, <i>Hirshberg v. Johnson & Johnson</i>	4800
Ex 02 - Expert Report of Matthew Sanchez PhD for Johnson & Johnson	4809
Ex 03 - Van Gosen, et al., <i>Using the geologic setting of talc deposits as an indicator of amphibole asbestos content</i> (2004)	4849
Ex 04 – Deposition Testimony of Dr. Matthew Sanchez (“Dr. Sanchez Depo.”), <i>Hirshberg v. Johnson & Johnson, et al.</i> , King County, Washington, dated April 5, 2021	4870
Ex 05 – Email from J&J’s Counsel stating Dr. Sanchez could not locate the e-mail he testified about, dated 4/15/10.....	4875
 J&J Defendants’ Motion in Limine to Partially Exclude Opinions of Dr. Steven Haber with exhibits, July 10, 2024	4877
Ex A - Plaintiffs’ Fact & Expert Witness Designation at 2-5, <i>Perry</i> , June 10, 2024	4886
Ex B – Haber Depo., <i>Garcia</i> , July 27, 2021.....	4901
Ex C – Haber Depo., <i>Chapman</i> , Sept. 6, 2022.....	4910
Ex D – Haber Depo., <i>Roy</i> , Jan. 13, 2022.....	4915
Ex E – Haber Depo., <i>Moore</i> , Nov. 24, 2021.....	4926
Ex F- Haber Depo., <i>Hirshberg</i> , Feb. 23, 2021	4930
Ex G - Haber Depo., <i>Perry</i> , June 24, 2024	4934
Ex H - Order in <i>Lynne Roy v. Colgate-Palmolive Co., et al.</i> , No. 2020-02718 (La. Dist. Ct. May. 4, 2023).....	4944
 J&J Defendants’ Motion in Limine No. 2 to Exclude Each and Every Exposure/Cumulative Dose Causation Opinions, July 10, 2024 – no exhibits	4969
 J&J Defendants’ Motion in Limine No. 5 to Exclude Plaintiffs’ Summary Evidence Charts, with exhibits, July 10, 2024.....	4989
Ex A - “Decades of Evidence” chart	4997
Ex B – <i>Perry</i> , June 24, 2024, Haber Dep.	5014
Ex C – Dr. Haber’s Reference List	5019
Ex D – five-page summary compilation entitled “J&J’s Internal Documentation	5096
 J&J Defendants’ Motion in Limine No. 8 to Exclude evidence, argument, regarding Certain Advertising Campaigns that Focused on Babies and the Mother-Infant Bond, with exhibits, July 10, 2024	5102
Ex A - Baby Camp PowerPoint	5107
Ex B – Vol. I, Michael L. Perry Dep., October 10, 2023	5110
Ex C – Vol. II, Michael L. Perry Dep., October 11, 2023, ...	5116
Ex D – Supplemental Answers to Master Interrogatories, June 10, 2024	5120
Ex E - Feb. 26, 2019 Trial Tr., <i>Rimondi, et al. v. BASF Catalysts LL, et al.</i> , Superior Court of New Jersey, Middlesex County, Law Division, Docket No. MID-2912-17AS.....	5139

Plaintiffs’ Motion in Limine No. 22 – Ex. 60 – McCrone Letter, July 11, 2024	5174

VOLUME XII

Plaintiffs’ Motion in Limine No. 19 to Exclude the 1986 Letter From H.W. Swanson to Phillippe Douillet (and exhibits attached thereto), July 15, 2024.....	5178
Ex 01 - Swanson Letter” and attachments parts IV to VII	5186

J&J Defendants’ Motion in Limine to Partially Exclude the Opinions of Dr. David Madigan with exhibits A to BB, July 23, 2024 –.....	5339
Ex A - July 15, 2024 <i>Perry Madigan Dep</i> excerpts	5353
Ex B - July 16, 2024 <i>Perry Longo Dep</i> excerpts.....	5369
Ex C - Madigan May 1, 2024, Report, <i>Talc, Asbestos, and Mesothelioma</i>	5377
Ex D – <i>Zimmerman Madigan Dep.</i> excerpts.....	5395
Ex E – <i>Lanzo Madigan Dep.</i> excerpts.....	5399
Ex F – <i>Citizen Madigan Dep.</i> excerpts.....	5411
Ex G - Compton 05/07/20 <i>Lopez Dep.</i> excerpts	5416
Ex H - Moline 06/11/20 <i>Lopez Dep.</i> excerpts.....	5427
Ex I - Gordon, et al., <i>Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women</i> , J. Occup. & Envir. Health (2014) (“Gordon 2014”)	5432
Ex J - Steffen et al., <i>Serous Ovarian Cancer Caused by Exposure to Asbestos and Fibrous Talc in Cosmetic Talc Powders—A Case Series</i> , J. Enviro. Occupational Medicine (2020)	5450
Ex K - MAS Chart of J&J Testing at 1 (M65205-001).....	5464
Ex L - Longo 9/21/19 <i>Weirick Tr.</i> Excerpt	5501
Ex M - <i>Davis Madigan Dep.</i> excerpts.....	5505
Ex N - Longo Expert Report	5513
Ex O - 10/30/23 <i>Lanzo Longo Dep.</i> excerpts	5526
Ex P - 4/25/2024 <i>Clark Madigan Dep.</i> excerpts.....	5530
Ex Q - Madigan General Report	5534
Ex R - <i>Alfaro v. Imerys Talc Am. Inc.</i> , 2017 WL 3668610, at *9 (Cal. Ct. App. Aug. 25, 2017).....	5560
Ex S - <i>Barlow v. ACandS, Inc.</i> , Consolidated No. 24X11000783, at 16–17 (Bal. Cir. Ct. Nov. 13, 2015)	
Ex T - <i>Greene v. ACandS, Inc.</i> , Consolidated No. 24X16000314, (Bal. Cir. Ct. May 16, 2017).....	5574
Ex U - <i>Nosse v. ArvinMeritor, Inc.</i> , LASC No. BC603354, Motion Hearing Tr. 41:16–24 (Cal. Super. Ct. Jun. 29, 2016).....	5578
Ex V - <i>Schoeniger v. Colgate-Palmolive Co.</i> , Dkt. No. MID-L-5869-16AS, Mot. Hr’g Tr. (N.J. Super. Ct. Oct. 19, 2017)	5598
Ex W - <i>Fishbain v. Colgate-Palmolive Co.</i> , Dkt. No. MID-L-5633-13 AS, Ruling at 7 (N.J. Super. Ct. Aug. 6, 2015)	5630
Ex X - <i>Ingham Madigan Dep.</i> Excerpts.....	5647
Ex Y - <i>Ingham Madigan Tr.</i> Excerpts	5653
Ex Z - Garcia, Madigan <i>Asbestos and Mesothelioma Report</i>	5658

VOLUME XIII

Ex AA - 2/7/2020 <i>Birch</i> Madigan Dep. excerpts	5678
Ex BB - <i>Hamilton</i> Madigan Dep. excerpts	5684
J&J Defendants’ Motion in Limine to Exclude Evidence of or Reference to Tissue Testing with exhibits, July 23, 2024	
Ex A - Email Correspondences	5689
Ex B - Email Correspondences	5694
Ex C - Order Granting Joint Motion. On July 14, 2024.....	5710
Ex D – Longo Dep., <i>Perry</i> , July 16, 2024 excerpts	5715
Ex D – Longo Dep., <i>Perry</i> , July 16, 2024 excerpts	5720
Plaintiffs’ Consolidated Response in Opposition to Defendants’ Motions in Limine to Exclude or Limit Causation Testimony of Plaintiffs’ Experts Witnesses (and exhibits attached thereto), July 24, 2024 –	
Ex 01 - Jolly v. General Electric Co., No. 2016-CP-42-1592 (S.C. Com. Pl. Dec. 15, 2017).....	5725
Ex 02 – Garvin v Agco Order 11/14/14.....	5758
Ex 03 - Brody Depo., Voelker v. Alfa Laval, Inc., 5/8/15.....	5798
Ex 04 - Brody Dep., Bodine v. 3M Company, 11/13/14.....	5839
Ex 05 - Larson v. Bondex Int’l, No. 09-69123	5868
Ex 06 - Dr. Haber curriculum vitae.....	5889
Ex 07- Dr. Haber report 6/11/2021	5895
Ex 08 - Dr. Haber (Exhibit D) Johnson & Johnson General Report 10/27/2023.....	5906
Ex 09 - Dr. Haber report 11/8/2023 – Exhibit C	5909
Ex 09 - Dr. Haber report 11/8/2023 – Exhibit C	5933

VOLUME XIV

Ex 10 - Haber Report, 3/30/23.....	6030
Ex 11 – Declaration of Dr. Longo, Prudencio v. Johnson & Johnson (5/13/21).....	6191
Ex 12 - Transcript of Proceedings, In Re Johnson & Johnson Powder Products Marketing, Sales Practices (“J&J Daubert Hearing”)-	6209
Ex 13 - Declaration of William Longo, Ph.D., Anderson v. Avon Products, Inc.....	6219
Ex 14 – Letter, Krishnamoorthi to Hahn (3/3/20).....	6259
Ex 15 - Steffen, Serous Ovarian Cancer Caused by Exposure to Asbestos and Fibrous Talc in Cosmetic Talc Powders – A Case Series (2020).	6264
Ex 16 - Order, Ingham v. Johnson & Johnson (6/4/18)	6278
Ex 17- Excerpt Transcript of Proceedings, Henry v. Brenntag (9/14/18).....	6286
Ex 18 - Notice of Ruling on Defendants’ Motions in Limine, Blinkinsop v. Albertsons Companies, Inc. (2/26/19)	6298
Ex 19 - Transcript of Trial Proceedings, Zimmerman v. Whittaker Clark & Daniels (4/22/21)	6305
Ex 20 - Excerpt of Transcript of Proceedings, Chapman v. Avon Products, Inc. (12/12/22).....	6323
Ex 21 - Johnson & Johnson Baby Products Company correspondence from W. Ashton to J.P. Grange, Subject: Talc Asbestos, L. Paoletti (9/26/84)	6328
Ex 22 - Decades of Evidence summary chart	6346
Ex 23 - Bird, A Review of the Talc Industry’s Influence on Federal Regulation and Scientific Standards for Asbestos in Talc.....	6363

Ex 24- Chart of Johnson & Johnson Positive Testing.....	6417
Ex 25 - Dr. Madigan report “Asbestos and Mesothelioma” 4/1/2023	6423
Ex 26- Dr. Madigan report “Talc, Asbestos and Mesothelioma” 9/1/2023	6444
Ex 27 - Dr. Madigan report “Talc and Asbestos – J&J” 9/21/2021	6459
Ex 28 - Kanarek, Asbestos in Talc and Mesothelioma: Review of the Causality Using Epidemiology, Med. Res. Archives, Vol. 8 (5): 2020	6485
Ex 29- IARC Monograph “Asbestos” 2012 at pgs. 219, 234, 280, 293, 294	6499
Ex 30- Magnani, “Italian Consensus Conference on Malignant Mesothelioma of the Pleura. Epidemiology, Public Health and Occupational Medicine Related Issues,” Med Lav 2015	6508
Ex 31 - Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution	6517
Ex 32- Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution 2014, Scand J Work Environ Health.....	6524

VOLUME XV

Ex 33 - Guide for Ship Scrappers: Tips for Regulatory Compliance, p. 2-6 (Summer 2000)	6536
Ex 34 - OSHA Website, Safety and Health Topics: Asbestos, https://www.osha.gov/SLTC/asbestos , ...	6547
Ex 35 - IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Vol. 14, Asbestos, § 5.2	6553
Ex 36 - National Cancer Institute Mesothelioma Fact Sheet.....	6556
Ex 37 - NIOSH Revised Recommended Asbestos Standard 1976	6568
Ex 38 - WHO Air Quality Guidelines, Chapter 6.2 Asbestos	6581
Ex 39 - CPSC Ban of Consumer Patching Compounds Containing Respirable Free- Form Asbestos, ...	6596
Ex 40 - Landrigan et al., The Hazards of Chrysotile Asbestos: A Critical Review, IND HEALTH 37:271-280, 275 (1999)	6610
Ex 41- Hillerdal, Mesothelioma: Cases Associated with Non-Occupational and Low Dose Exposures, OccUP ENVIRON MED 56:505-513, 510 (1999).	6621
Ex 42 - Welch, Asbestos Exposure Causes Mesothelioma, But Not This Asbestos Exposure: An Amicus Brief to the Michigan Supreme Court, INT J OccUP ENVIRON HEALTH 13:318-327 (2007).....	6631
Ex 43 - Joyce Rost v. Ford Motor Company, No. 56 EAP 2014 (Pa. April 7, 2015).....	6642
Ex 44 - Iwatsubo, et al, Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study, AM J EPID 148(2):122-142 (1998)	6685
Ex 45 - Rodelsperger et al., Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results From a German Hospital-Based Case-Control Study, AM J INDUS MED 39: 262-275, 262 (2001)	6696
Ex 46 - Rolland, Risk of pleural mesothelioma: A French population-based case- control study (1998-2002) (Oct. 20, 2006).	6711
Ex 47 - A. Lacourt et al., Occupational and non-occupational attributable risk of asbestos exposure for malignant pleural mesothelioma, Thorax, published online, at Table 4 (Feb. 7, 2014).....	6714

Ex 48 - Dr. Markowitz, Asbestos-Related Lung Cancer and Malignant Mesothelioma of the Pleura: Selected Current Issues, Semin Respir Crit Care Med 36:334-346, 336, Table 1 (2015)	6725
Ex 49 - Smith and Wright, Chrysotile Asbestos Is the Main Cause of Pleural Mesothelioma, AM J IND MED 30:252-266, 255 (1996).....	6739
Ex 50 - Kanarek, Mesothelioma from Chrysotile Asbestos: Update, ANN EPIDEMIOL 21:688-697, 695 (2011)	6756
Ex 51 - R.P. Everatt et al., Occupational Asbestos Exposure Among Respiratory Cancer Patients in Lithuania, Am. J. Indus. Med., Supplement 50:455-463 (2007).....	6767
Ex 52 - M.T. Madkour, Environmental exposure to asbestos and the exposure-response relationship with mesothelioma, E. Mediterranean Health J. 15(1):25-38 (2009)	6777
Ex 53 - Bianchi, Latency periods in asbestos-related mesothelioma of the pleura, EUR J CANCER PREV 6:162-166 (1997).	6792

VOLUME XVI

Plaintiffs' Response to Johnson & Johnson Defendants' Motion in Limine to Partially Exclude the Opinions of Dr. Steven Haber (and exhibits attached thereto), July 24, 2024	6798
Ex 01 - Trial Tr., 2/27/23, Plant v. Avon Prods, Inc., S.C. Court of Common Pleas, Richland Cty, at 682-769	6781

VOLUME XVII

Ex 02 – Haber Aff., 4/4/24, Newton, at 1-2	7178
Ex 03 - Haber, supra, Malignant Mesothelioma: A Clinical Study of 238 Cases	7366
Ex 04 - Trial Transcript, Chapman v. Avon Products, Inc., No. 22STCV05968 (Oct. 26, 2022), at 180:23-187:4.....	7374
Ex 05 - Trial Transcript, Chapman v. Avon Products, Inc. (October 27, 2022), at 45:3-11	7427
Ex 06 - Excerpts of Trial Transcript, Hirshberg v. Johnson & Johnson, No. 20-2-05603-1 SEA (May 10, 2021).....	7478
Ex 07 - Excerpts of Trial Transcript, Chatfield v. Avon Products, Inc., No. 21CV40522 (Feb. 26, 2023).	7529
Ex 08 - Judgment, Roy v. Colgate-Palmolive Co., No. 2020 – 02718 (May 4, 2023....	7545
Ex 09 - Reasons for Judgment, Roy v. Colgate-Palmolive Co., No. 2020 - 02718 (May 4, 2023).....	7551
Ex 10 - Excerpts of Trial Transcript, Salcedo v. Johnson & Johnson (March 25, 2024)	7572
Ex 11 – Haber Dep., 11/15/21, Moore, at 248:2-21.....	7596
Ex 12 - Ghio and Roggli, Letter to the Editor: Talc Should Not Be Used in Pleurodesis in Patients with Nonmalignant Pleural Effusions.....	7661

VOLUME XVIII

Ex 13 - Haber Dep., Vol. II, 11/24/21, Moore, at 463:25-464:5	7664
Ex 14 - Hinch to Luckewicz, 12/18/87 (acknowledging that TEM limit of detection is 0.003% compared to XRD at 0.5%).....	7729

Ex 15 - Report of CTFA Talc Subcommittee on Method to Detect Chrysotile and Tremolite in Talc, 12/10/73	7733
Ex 16 - Practical Aspects of Talc and Asbestos, at 409 (Nov. 1978)	7741
Ex 17 - Lemen, Asbestos in Brakes: Exposure and Risk of Disease, Am J Indus Med 45:229-237, 234 (2004)	7751
Ex 18 - Rohl, Consumer Talcums and Powders: Mineral and Chemical Characterization 261 (1976).	7761
Ex 19 - Rohl, Consumer Talcums and Powders: Mineral and Chemical Characterization 261 (1976).	7792
Ex 20 - Rohl Asbestos in Talc, Env Health Persp J, 9:129-132, 129 (Dec 1974)	7798
Ex 21 - Dana, A Textbook of Mineralogy, at 678	7803
Ex 22 - Pfizer Technical Report for Ceramic Materials, Jan. 1967	7813
Ex 23 - Moline, J., et. al., Mesothelioma associated with the use of cosmetic talc (2020);	7819
Ex 24 - Emory, TS, et al., Malignant mesothelioma following repeated exposures to cosmetic talc: A case series of 75 patients (June 2020)	7827
Ex 25 - Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution, Scand J Work Environ Health, 23:311-316, 311 (1997)	7834
Ex 26 - Hearing Transcript, Henderson, at 2:7-12 (denying the defendants' motion).	7842
Ex 27 - Hearing Transcript, Hirshberg v. Johnson & Johnson (April 29, 2021), at 132:16-23	7846
Ex 28 - Relevant excerpts of the Position Statement of the Societies of Epidemiology 6/4/2012	7851
Ex 29 - Relevant excerpts of the IARC Monograph on Asbestos 2012, at 219, 234, 238,280, 293, 294	7879
Ex 30 - Kanarek, Asbestos in Talc and Mesothelioma: Review of the Causality Using Epidemiology, Med. Res. Archives, Vol. 8 (5) (2020).	7891
Ex 31 - Magnani, "Italian Consensus Conference on Malignant Mesothelioma of the Pleura. Epidemiology, Public Health and Occupational Medicine Related Issues," Med Lav 5:106, 325-332, at 328 (2015).	7905
J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 15 to Exclude Any Speculative Testimony that Blames Laboratory Contamination for the Presence of Asbestos in a Talc Sample with exhibits, July 24, 2024.....	7914
Ex A – Dep. of R. Mark Bailey, P.G., <i>Garcia v. Colgate-Palmolive Co.</i> , May 23, 2018 ("Garcia Bailey Dep.") excerpts	7922
Ex B - Dep. of Matthew Sanchez, Ph.D., <i>Hirshberg v. Johnson & Johnson</i> , March 1, 2021 (" <i>Hirshberg</i> Bailey Dep.") excerpts	7926
Ex C - Curriculum Vitae for Matthew S. Sanchez, Ph.D.....	7932
J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 17 to Preclude the Testimony of Dr. Gregory Diette with exhibits, July 24, 2024	7939
Ex A - Diette <i>Perry</i> Rep. excerpts	7949
Ex B - February 28, 2023, <i>Payne/Plant</i> MIL Order	8048

Ex C - Diette's <i>Perry</i> Supp. Ex. Rep	8054
Ex D - Garcia, March 20, 2024, Brody Trial Tr. excerpts	8093
Ex E - February 22, 2021, Brody <i>Eggers</i> Dep. excerpts	8098
Ex F - Diette Dep., July 3, 2024 excerpts	8102

VOLUME XIX

J&J Defendants' Opposition to Plaintiffs' Motion in Limine No.19 to Exclude the 1986 Letter from H.W. Swanson to Phillippe Douillet with exhibits, July 24, 2024	8016
Ex A - FDA's certificate of authenticity and 1986 FDA Response.....	8114
Ex B - 2018.11.09 <i>Boyd-Bostic</i> Trial excerpts	8305
Ex C - 11/15/72 letter to Dr. Goudie (DX7052).....	8309
Ex D - 2024.05.23 <i>Lee</i> Trial excerpts	8311
Ex E - 2024.03.22 <i>Garcia</i> trial excerpts	8316

VOLUME XX

J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 22 Seeking Evidentiary Sanctions Based on Spoliation of Evidence with exhibits, July 24, 2024	8320
Ex 1 to 11- (Hood) Johnson & Johnson Defendants memorandum in opposition and supporting exhibits, October 25, 2021	8325
McBrayer Order	8917

VOLUME XXI

J&J Defendants' Reply in Support of Omnibus Motion in Limine No. 5 to Exclude Plaintiffs' Summary Evidence Charts with exhibits, July 29, 2024	8929
Ex A - January 6, 2024, Kuffner <i>Eggers</i> Dep. excerpts	8934
Ex B - Eggers- Def J&J March 21 Supplemental Response to Plainiff's First Set of Interrogatories and Request for Production.....	8941
Ex C - August 11, 2022, <i>Payne</i> Pfizer Dep. excerpts	9403

VOLUME XXII

J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 21 to Exclude Testimony of Dr. David Weill with exhibits, July 29, 2024.....	9412
Ex A - February 28, 2023, <i>Payne/Plant</i> MIL Order	9424
Ex B - July 11, 2024, Weill <i>Perry</i> Rep.	9434
Ex C - Weill Curriculum Vitae	9565
Ex D - July 18, 2024, David Weill Dep. excerpts	9581
Ex E - <i>Garcia</i> , March 20, 2024, Brody Trial Tr. excerpts.....	9587
Ex F - February 22, 2021, Brody <i>Hirshberg</i> Dep. excerpts	9591
Ex G - July 12, 2024, Weill <i>Perry</i> Supp. Report	9594
Ex H - June 24, 2024 <i>Perry</i> Longo Dep. excerpts.....	9597
J&J Defendants' Motion in Limine to Exclude Evidence of or Reference to Tissue Testing with exhibits, August 1, 2024	9601
Ex A -J&J Defs.' MTE	9605
Ex B - Geyer Affidavit.....	9611
Ex C - Longo Dep., <i>Perry</i> , July 16, 2024	9615

Ex D - 7/31/24 K. Bueno Email Correspondence.....	9620
J&J Defendants’ Mode of Trial Motion Regarding Successor Liability and Amalgamation, August 3, 2024	9622
J&J Defendants Objection to Plaintiffs’ Proposed Instructions on Parties in Default and Conditional Motion to Sever with exhibits, August 3, 2024	9626
Ex 1 – 8/2/24 email to Atty McVey.....	9630
J&J Defendants Objection to Plaintiffs’ Proposed Order regarding Plaintiffs’ Motion in Limine No. 22 Based on Spoliation of Evidence with exhibit, August 3, 2024.....	9637
Ex A – 8/3/24 email with attachment	9640
Ex B – Redline comparison of proposed order to Hood (McBrayer) order.....	9658
J&J Defendants’ Objection to Plaintiff Efforts to Submit to the Jury Evidence of Successor Liability or Amalgamation Issued for the Court but Unrelated to Plaintiffs’ Products Liability Claims with exhibit, August 6, 2024.....	9670
J&J Defendants’ Proffer of Evidence re: Mr. Perry’s Exposure to Asbestos in the Library while working at Embassy Suites with exhibits, August 6, 2024.....	9674
Ex A - Dep. of Michael Perry excerpts	9678
Ex B - July 11, 2023 Office Visit, DX12000.398.....	9692
Ex C - Dr. Haber Report.....	9697
Ex D - January 18, 2024 Testimony of William Longo.....	9707
J&J Defendants’ Memorandum related to Procedure and Evidence for Successor Liability with exhibits, August 6, 2024	9713
Ex A – Deposition Designations of Mongon.....	9722
Ex B - Deposition Designations of Ruh.....	9767
Ex C – Proposed Joint Stipulation	9789
Ex D - Dep. of M. Perry excerpts	9792
Ex E - Notice of Commencement of Chapter 11 Case and Meeting of Creditors	9798
Ex F - 8/5/2024 Trial Tr. Excerpts	9804
J&J Defendants’ Objection to Sanctions Order, August 8, 2024	9810
VOLUME XXIII	
J&J Defendants’ Motion for Mistrial with exhibits, August 10, 2024	9813
Ex A – <i>Hood-McBrayer</i> 11/02/2021 Spoliation Order	9828
Ex B - <i>Perry</i> 7/30/2024 Tr excerpts	9841
Ex C – 08/05/2024 Trial Tr excerpts	9868
Ex D - 08/10/2024 Trial Tr. excerpts	9875
Ex E - 2019 Health Hazard Evaluation of Johnson’s Baby Powder (“HHE”).....	9894
VOLUME XXIV	
Ex F - Sanchez Report on Longo Samples.....	9907

VOLUME XXV

Ex G - Longo Affidavit	10407
Ex G - Longo Affidavit (CONTINUED).....	10584
Ex H - PowerPoint Slides (Kuffner-1940s Talc).	10655
Ex I - 8/7/2024 Tr. Transcript (Longo)	10658

VOLUME XXVI

J&J Defendants’ Proposed Jury Charges and Verdict Form, Exhibit A, August 11, 2024	10663
Ex A – Perry v. American Int’l 8/7/2024 Transcript (Day 3).	10667

VOLUME XXVII

Ex A – Perry v. American Int’l 8/7/2024 Transcript (Day 3). (Continued)	10907
Plaintiffs’ Response to J&J’s Motion for Mistrial (and exhibits attached thereto), August 12, 2024.....	11019
Ex 1 – Email exchange 8/1/2024 -8/4/2024.....	11031
J&J Defendants’ Submission of Law Regarding Proper Causation Standard, August 12, 2024.....	11038
J&J Defendants’ Proffer of Evidence re: The 1986 FDA Citizen Petition Response with exhibits, August 12, 2024	11041
Ex A – 1986 FDA Response	11046
Ex B - 85 Fed. Reg. 51035, 51035 (August 19, 2020).....	11237
Ex C - 11/9/2018 <i>Boyd-Bostic</i> Trial Tr. excerpts	11239
Ex D - 5/23/2024 <i>Lee</i> Trial Tr excerpts	11243
Ex E - 3/22/2024 <i>Garcia</i> Trial Tr excerpts	11248
Ex F - 12/17/2019 <i>Forrest</i> Trial Tr. excerpts.....	11252
J&J Defendants’ Proffer of Evidence re: The “Health Hazard Evaluation of Johnson Baby Powder” with exhibits, August 12, 2024	11259
Ex A – 2019 Health Hazard Evaluation of Johnson’s Baby Powder (HHE).....	11262
Ex B - 3/14/2024 Dep. of Dr. Kuffner, Newton excerpts	11275
J&J Defendants’ Memorandum regarding Successor Liability with exhibits, August 12, 2024.....	11294
Ex A – Deposition Designations Thibaut Mongon, 8/14/2023	11307
Ex B – Deposition Designations of Paul Ruh, 8/16/2023.....	11333
J&J Defendants’ Objections to Plaintiffs’ Requested Jury Charges with Exhibits, August 12, 2024.....	11354
Ex A – Plaintiffs’ Requested Jury Charges.....	11359

J&J Defendants’ Objections to Plaintiffs’ Proposed Verdict Form with exhibits, August 12, 2024.....	11390
Ex A – Plaintiffs’ Proposed Verdict Form.....	11394

VOLUME XXVIII

J&J Defendants’ Proffer of Evidence regarding Dr. Kuffner’s Excluded Testimony on Winchite with exhibits, August 13, 2024.....	11399
Ex A - 8/9/2024 Tr. Transcript (Kuffner) excerpts	11403
Ex B - Sanchez Report on Longo Samples	11409

VOLUME XXIX

Ex B – Sanchez Report on Longo Samples (continued).....	11900
Ex C - Longo Affidavit	12086
Ex D - PowerPoint Slides (Kuffner-1940s Talc).....	12157
Ex E - 8/7/2024 Tr. Transcript (Longo)	12160
 J&J Defendants’ Motion and Memorandum in Support of Motion for Directed Verdict with exhibits, August 13, 2024	12164
 J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form, August 14, 2024	12199

J&J Defendants’ Motion for Mistrial with exhibits, August 15, 2024 -14 pgs	12203
Ex A - Perry Trial Transcript, 8/14/2024 excerpt	12207
Ex B - Perry Trial Transcript, 8/14/2024 excerpt	12213

Plaintiffs’ Trial Brief on Successor Liability of The Johnson & Johnson Defendants (and exhibits attached thereto), August 22, 2024.....	12217
Ex 01 - J&J & Old JJCI Resp. to Interrog. (<i>Leavitt</i>) 3/21/2018	12242
Ex 02 -J&J & Old JJCI Resp. to Interrog. (<i>Rimondi</i>) 7/5/2018	12259
Ex 03 - Old JJCI Resp. to RFAs (<i>Garcia</i>) 7/26/2021	12264
Ex 04 - Trans. of J&J (Hopkins) 7/22/2019 at 20:11-17	12275
Ex 05 - Trans. of Mr. Kim 10/22/2021 at 45, 85, 87-89, 90-91	12283
Ex 06 - J&J (Kuffner) depo. 11/9/2023 excerpts.....	12295
Ex 07-. J&J Project Plato approval memo 10/11/2021	12317
Ex 08 - J&J e-mail 10/5/2021	12329
Ex 09 - JJCI (Goodridge) depo. 12/20/2021 at 312:8-9	12331
Ex 10 - Kenvue (Mongon) depo. 8/14/2023 at 22:6-11	12357

VOLUME XXX

Ex 11 - Kenvue (Ruh) depo. 8/16/2023 excerpts.....	12402
Ex 12 -Transcript of New JJCI (Goodridge) 2/14/2022 excerpts	12425
Ex 13 - Mr. Kim Declaration 4/4/2023 at ¶ 24	12471
Ex 14 - Donald McGraw Declaration (with PowerPoint) 9/18/2023.	12482
Ex 15 – Bankruptcy Court Dismissal Order dated 8/11/2023	12507
Ex 16 - <u>16(a)-(e)</u> , Agreements and Certificates 10/12/2021.	12519

Ex 17- J&J “Project Plato Master Q&A” 10/10/2021 at 9 (instructing employees to state that the Texas Two Step “has no impact on our operations.”	12553
Ex 18 - Old JJCI Annual Report (NC) 4/5/2021 (listing Michelle Goodridge as president and director with Kevin Neat as Treasurer	12569
Ex 19 - New JJCI Annual Report (NC) 4/14/2022	12571
Ex 20 - Dr. Kuffner depo. 10/30/2021 at 32:5-7, 32:12-15	12573
Ex 21 - Continued Video-Recorded Deposition of Kenvue Inc. and Johnson & Johnson Holdco (NA) Inc. (through John Kim, Esq.), 8/10/24, at 60:22-25...	12597
Ex 22 - New Jersey Certificate of Amendment 12/16/2022	12705
Ex 23 - Donald McGraw depo. 9/28/2023. New JJCI 3.0 was initially incorporated in Nevada in June 2022 before converting to a Delaware corporation in January 2023	12707
Ex 24 - New JJCI 3 Certificate (NV);.....	12791
Ex 25 - New JJCI 3 Certificate of Conversion (DE).	12793
Ex 26 - Kenvue, Inc. SEC Form S-1 1/4/2023	12795
Ex 27 - Kenvue SEC Prospectus 9/18/2023	12818
Ex 28 - Kenvue LinkedIn profile compilation.....	12824
Ex 29 - Kenvue SEC S-4 8/3/2023..	12858
Ex 30- Kenvue SEC S-4 9/6/2023.....	12866
Ex 31 - Johnson & Johnson Form 10k for the year 2018	12872
Ex 32 - Order on Plaintiffs’ Motion to Compel and Motion for Sanctions Against Defendants Kenvue, Inc. and Johnson & Johnson Holdco (NA) Inc., 8/9/24	12883
Ex 33 - Oral and Videotaped Deposition of James Mittenthal as Defendant Kenvue Inc. 30(b)(6) Representative, Vol. I, 7/26/24, at 38:19-39:7	12888
Ex 34 - Video-Recorded Deposition of Kenvue Inc. (through James P. Mittenthal), Vol. II, 7/30/24, at 313:8-314:7.....	12897

VOLUME XXXI

Ex 35 - Mass. SOS filing 3/14/2022	12911
Ex 36 – Business Corp Annual Report for J&J Holdco, 12/31/2022.....	12914
Ex 37- Mittenthal Outline for Perry/ Kenvue Deposition—updated 7/25/2024, at pgs. 37-38.....	12916
Ex 38 - Draft of J&J’s Product List for the FDA, 12/5/11.....	12955
Ex 39 - Product List, undated (listing all baby powders under the same category: “baby powder”).	12962

Post Trial Motions & Memos:

Plaintiffs’ Trial Brief, Ex. 10 – Dep. of Thibaut Mongon, August 22, 2024.....	12989
Plaintiffs’ Trial Brief, Ex. 13 – Decl. of John Kim, August 22, 2024.....	13034
Plaintiffs’ Trial Brief, Ex. 15 – Decl. of Donald McGraw, August 22, 2024.....	13045
Plaintiffs’ Trial Brief, Ex. 21 – Dep. of John Kim, August 22, 2024.....	13057

Plaintiffs’ Trial Brief, Ex. 34 – Kenvue Depo. (Mittenthal), Vol. II, 7/30/24	13165

J&J Defendants’ Motions for JNOV, New Trial Absolute Based on Errors of Law, New Trial Absolute based on the Thirteenth Juror Doctrine, and New Trial nisi Remittitur with exhibits, August 26, 2024	13179
Ex A - Trial Transcripts excerpts	13274
Ex B – Weill Kuffner (Valadez) Tr. excerpts	13390
Ex C – <i>Salcedo</i> Tr. excerpts	13398
Ex D – Arnoldy Brody (Hirshberg) 2/22/2021 excerpt.....	13402
Ex E – Longo Dep. (Yerkes/Hofmaister), 01/18/2024 excerpts	13407

VOLUME XXXII

Ex F – Perry Pre-Trial Transcript excerpts	13412
Motion to Substitute Pecos River Talc, LLC as a Party Defendant for LLT Management LLC f/k/a LTL Management, LLC, August 26, 2024	13438
J&J Defendants’ Motion for Setoff and Motion for Production of Settlement, August 26, 2024.....	13441
J&J Defendants’ Motion to Stay Execution on Judgment, August 26, 2024	13448
J&J Defendants’ Reply to Substitute Pecos River Talc, LLC as a Party Defendant for LLT Management, LLC f/k/a LTL Management, LLC, September 9, 2024.....	13453
Ex 1 – Declaration of John Kim	13456
Ex A – Amended and Restated Funding Agreement.....	13461
Plaintiffs’ Consolidated Response to Defendants’ Motion for Setoff and Production of Plaintiffs’ Settlement Agreements, September 13, 2024	13478
Plaintiffs’ Consolidated Response to Defendants’ Motions to Stay Execution of Judgment (and exhibits attached thereto), September 13, 2024.....	13483
Ex 01 – Perry v. American Int’l Trial Transcript (Day 6), 8/13/24.....	13488

VOLUME XXXIII

Plaintiffs’ Response in Opposition to Defendants Johnson & Johnson, LLT Management, LLC, Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc.’s Motions for JNOV, New Trial Absolute Based on Errors of Law, New Trial Absolute Based on the Thirteenth Juror Doctrine, and New Trial Nisi Remittitur (and exhibits attached thereto), September 13, 2024	13636
Ex 01 – TT 8/5/24 excerpts.....	13742

VOLUME XXXIV

Ex 02 – TT 8/6/24, excerpts	14046
Ex 03 - TT 8/7/24, excerpts	14391

VOLUME XXXV (beginning 14546)

Ex 04 – TT 8/9/24, excerpts	14743

VOLUME XXXVI (beginning 15046)

Ex 05 – TT 8/12/24, excerpts	15117
Ex 06 – TT 8/13/24, excerpts	15448

VOLUME XXXVII

Ex 07 – TT 8/14/24 excerpts	15596
Ex 08 - TT 8/15/24 excerpts	15867

VOLUME XXXVIII

Ex 09 - Pre-Trial Hearing, 7/30/24 excerpts	16048
Ex 10 - Trial Ex. 611	16294
Ex 11 - Punitive Damages Verdict Form, 8/19/24.....	16301
Ex 12 - Plaintiffs’ Trial Exhibit No. 72-Chart-Decades of Evidence of Asbestos in Johnson & Johnson Products).....	16306
Ex 13 - Plaintiffs’ Trial Exhibit No. 3.....	16323
Ex 14 – Plaintiff Trial Exhibit No 62	16327
Ex 15 - Plaintiffs’ Trial Exhibit No. 106.....	16329
Ex 16 - Plaintiffs’ Trial Exhibit No. 49	16332
Ex 17 - Plaintiffs’ Trial Exhibit No. 7	16338
Ex 18 –Plaintiffs’ Trial Exhibit No. 136.....	16341
Ex 19 - Plaintiffs’ Trial Exhibit No. 193.....	16344
Ex 20 - Plaintiffs’ Trial Exhibit No. 194	16347
Ex 21 –Plaintiffs’ Trial Exhibit No. 196.....	16385
Ex 22 - Plaintiffs’ Trial Exhibit No. 111.....	16389
Ex 23 - Plaintiffs’ Trial Exhibit No. 113	16408
Ex 24 - Plaintiffs’ Trial Exhibit No. 191	16411
Ex 25 - Plaintiffs’ Trial Exhibits Nos. 92-94	16421
Ex 26 - Plaintiffs’ Trial Exhibits Nos. 117-118.....	16427
Ex 27 - Plaintiffs’ Trial Exhibit No. 181	16435
Ex 28 - Plaintiffs’ Trial Exhibit No. 203.....	16441
Ex 29 - Plaintiffs’ Trial Exhibit No. 10	16443
Ex 30 - Plaintiffs’ Trial Exhibit No. 90	16451
Ex 31 - Plaintiffs’ Trial Exhibit No. 55	16453
Ex 32 - Plaintiffs’ Trial Exhibit No. 61	16462
Ex 33 - Plaintiffs’ Trial Exhibit No. 5.....	16464
Ex 34 - Deposition of Gregory Diette, 2/3/23, at 80:13-2	16466
Ex 35 - <i>Jolly v. General Electric Co.</i> , Order denying Defs’ Post Trial Motions	16501

VOLUME XXXIX

Ex 36 - <i>Garvin v. Agco Corp.</i> , Order denying in part and granting in part Def Crane Co’s Motion for Post Trial Relief, 11/10/14.....	16541

Ex 37 - <i>Tort Law—Expert Testimony in Asbestos Litigation—District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound</i> , 131 Har. L. Rev. 658 (Dec. 2017).....	16582
Ex 38 – Order granting Joint Motion requesting the Division of PL Perry Tissue, 7/10/24	16591
Ex 39 – Video Deposition of William E Longo 8/6/24.....	16596
Ex 40 - Johnson & Johnson Defendants’ Witness List	16630
Ex 41 - Letter from Donald Kennedy, Commissioner of Food and Drugs, dated 1/11/1979	16636
Ex 42 - Goudie, Examination of Johnson & Johnson’s Baby Powder (10/27/72)	16645
Ex 43 - Chart of Decades of Evidence of Asbestos Content in Johnson & Johnson Products at pp. 1 – 10.....	16649
Ex 44 - “Swanson Letter” and attachments (parts 44-2 to 44-7)	16666
Ex 45 - J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form, 8/14/24.....	16861
Ex 46 - Johnson & Johnson Defendants Proposed Verdict Form, ...	16866
Ex 47 - Notice of Joint Stipulation, 7/31/24	16876
Ex 48 - <i>Lee v. Johnson & Johnson, et al.</i> , No. 23CV40369, Circuit Court of Multnomah County, Oregon, Special Verdict Form, 6/3/24	16879
Ex 49 - <i>Salcedo v. Avon</i> , 4/19/24, Cook County, Illinois Circuit Court)	16883
Ex 50 - <i>Vanklive</i> , 12/9/21, Alameda County Superior Court.).....	16890
Ex 51 - <i>Chapman v. Avon Products</i> , 12/14/22, Los Angeles Superior Court).....	16898
Ex 52 - <i>Plant v. Whitake Clark & Daniels</i> , 3/3/23, South Carolina Court of Common Pleas	16922
Ex 53 – Hood-McBrayer Spoliation Order, 11/5/21	16926
Ex 54 - Email Exchange from Kim Bueno, Re: Perry Trial Schedule, 8/3/24	16939

VOLUME XL

J&J Defendants’ Renewed Motion for Directed Verdict and Nonsuite as a Matter of Law and J&J Defendants’ Memorandum in Support Thereof regarding Successor Liability and in Opposition to Plaintiffs’ Requests with exhibits, September 19, 2024 –	16957
Ex A – <i>LaSalle</i> - Order granting Defendants J&J Holdco and Kenvue Motion to Dismiss, 9/12/2023	16973
Ex B – <i>Egli</i> – 10/26/23 Order on Motion to Quash	16982
Ex C – Yandell – 8/15/2023 Order on Motion to Quash	16990
Ex D – Johnson & Johnson SEC Form 8-K, 05/17/2024	17000
Ex E - 08/23/2023 J&J Announces Final Result of Exchange Offer and Finalize Separation from Kenvue, Inc.	17004
Ex F – Johnson & Johnson SEC Schedule to Amendment No.4 – Tender Offer Statement.....	17008
Plaintiffs’ Response to J&J Defendants’ Renewed Motion for Directed Verdict and Nonsuit as a Matter of Law Regarding Successor Liability (and exhibits attached thereto), September 20, 2024 – (Exhibits referenced refer to Plaintiff’s Trial brief on Successor Liability	17013

J&J Defendants’ Objections to Plaintiffs’ Proposed Order, and Supplemental Memorandum Supporting Johnson & Johnson Defendants’ Post Trial Filings with exhibits, October 7, 2024	17027
Ex 1 – C. Brown letter to Honorable Jean Toal, 10/7/2024.....	17030
Ex 2 – Proposed Order 1 – does not rule on Successor Liability	17033
Ex 3 – Proposed Order 2 – rules on Successor Liability	17046
 J&J Defendants Objection to Proposed Order on Successor Liability and Further Memorandum in Support of J&J Defendants’ JNOV and Other Legal Positions with exhibits, November 8, 2024.....	17059
Ex A – Plaintiffs’ Proposed Order on Successor Liability	17077
 J&J Defendants’ Motion to Reconsider, December 23, 2024	17096
 Plaintiffs’ Response to J&J Defendants’ Motion to Reconsider (and exhibits attached thereto), February 21, 2025	17105
Ex 01 – JJ Defendants Mode of Trial Motion re. Successor Liability and Amalgamation, 8/3/24.....	17118
Ex 02 - TT 8/5/24, excerpts.....	17123
Ex 03 - Hearing on Post-Trial Motions, Vol. II, 9/25/24 excerpts.....	17132
Ex 04 – Verdict Form, 8/19/24	17138
Ex 05 – TT 8/13/24 excerpts	17143
Ex 06 - J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form	17153
Ex 07 - J&J Defendants’ Objections to Plaintiffs’ Proposed Verdict Form, 8/12/24.....	17158
Ex 08 - Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc.; and Kenvue, Inc.’s Post-Trial Motions, 12/11/24.....	17168
Ex 09 – TT 8/6/24 excerpts.....	17255
Ex 10 – TT 8/7/204 excerpts.....	17264
Ex 11 - Mongon Depo., 8/14/23, 55:3-12	17274

VOLUME XLI

Transcripts:

Pre-Trial Hearing Transcript, July 30, 2024	17280
 Trial Transcripts Vols I – VIII, August 5, 2024 to August 14, 2024.....	17525
Vol 1, August 5, 2024	17525

VOLUME XLII (beginning 17780)

Vol 2, August 6, 2024.....	17828
Vol 3, August 7, 2024.....	18172

VOLUME XLIII (beginning 18280)	
Vol 4, August 9, 2024.....	18523
VOLUME XLIV (beginning 18780)	
Vol 5, August 12, 2024.....	18896
Vol 6, August 13, 2024	19226
VOLUME XLV (beginning 19280)	
Vol 7, August 14, 2024.....	19281
Vol 8, August 15, 2024.....	19643
VOLUME XLVI	
Post Trial Hearing Transcripts Vols I & II	19823
Vol I, September 24, 2024	19823
Vol II, September 25, 2024.....	19981
Other:	
Johnson & Johnson Defendants’ Witness List, 7/20/2024	20022
J&J Defendants’ Proposed Jury Charges and Verdict Form, August 11, 2024.....	20027
J&J Defendants’ Notice of Appeal with exhibits, January 10, 2025	20190
VOLUME XLVII	
J&J Defendants’ Supplemental Notice of Appeal, March 3, 2025.....	20295
Supersedeas Bond, March 19, 2025.....	20405
Email Correspondence:	
Re: Perry Trial Schedule, July 29-August 2, 2024	20410
Re: Perry-Outstanding Issues, August 4, 2024	20422
Re: Perry Trial Schedule, August 6-10, 2024	20424
Depositions:	20429
Deposition of Dr. William Longo, 8/6/24.....	20429
Deposition of Michael Perry, Vol. I, 10/10/23	20438
Deposition of Michael Perry, Vol. IV, 10/13/23	20616
Deposition of Gregory B. Diette, M.D., 7/3/24	20738
VOLUME XLVIII	
Deposition of David Weill, M.D., 7/18/24	20765
Trial Exhibits:	
Plaintiffs’ Exhibit 10	20816
Plaintiffs’ Exhibit 40	20823
Plaintiffs’ Exhibit 49	20825
Plaintiffs’ Exhibit 72	20830

Plaintiffs’ Exhibit 117	20846
Plaintiffs’ Exhibit 289	20849
Plaintiffs’ Trial Ex. 4274	20855

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

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

-----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

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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 liminé 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 Douillet 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 someway 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
Certified Real-Time Reporter
Certified Court Reporter
Registered Professional Reporter
Certified LiveNote Reporter

25

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

- - -

MICHAEL L. PERRY AND LONNIE	)	
L. LONG,	)	
	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	2023-CP-40-04072
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
DAY 1

DATE TAKEN: Monday, August 5, 2024

TIME BEGAN: 9:00 a.m.

TIME ENDED: 5:39 p.m.

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

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I N D E X

	PAGE
Jury Voir Dire	75
Plaintiffs' Opening Statement	169
Defendants' Opening Statement	209
PLAINTIFFS' WITNESS	
ARNOLD R. BRODY, Ph.D.	
Direct Examination On Voir Dire by Mr. Adams	251
Direct Examination by Mr. Adams	260
Cross-examination by Ms. Bueno	289
Redirect Examination by Mr. Adams	295
Certificate of Reporter	303

E X H I B I T S

EXHIBIT	DESCRIPTION	MARKED
1	Plaintiffs' Motion to Pre-Admit	42
2	Chief Justice Toal's Ruling Regarding Motions in Limine	139

1
2
3
4
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P R O C E E D I N G S

- - -

THE COURT: I'll respond. My apologies to all of you. We have got a disaster with our roof and it's going to get worse because the big storm is coming. So I've got people --

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

THE COURT: More complicated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Okay. That's my two hangups.

6 With that, Ms. McVey.

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

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

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

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

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

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

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

1 outline. All right.

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

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

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

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

23 THE COURT: Yes.

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

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

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

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

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

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

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

1 THE COURT: All right.

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

3 THE COURT: Okay. Hold right there.

4 All right. Mr. Bogan --

5 MS. PEPKE: Pepke.

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

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

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

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

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

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

1 thought.

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

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

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

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

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

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

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

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

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

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

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

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

24 MS. MCVEY: Yes, ma'am.

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

1 want to do.

2 MS. MCVEY: Right.

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

7 MS. MCVEY: That's right.

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

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

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

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

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

1 allegations.

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

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

13 MS. PEPKE: Or submitted on papers.

14 THE COURT: Or submitted on papers. Okay.

15 MS. PEPKE: That is our position.

16 THE COURT: I understand.

17 Ms. McVey.

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

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

8 THE COURT: Okay. Ms. Pepke.

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

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

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

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

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

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

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

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

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

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

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

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

1 not so?

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

4 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

22 THE COURT: That's correct.

23 MR. BOGAN: Okay.

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

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

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

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

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

15 THE COURT: That's correct.

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

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

25 I am not going to allow plaintiff to argue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MS. MCVEY: Yes, ma'am.

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

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

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

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

5 MS. MCVEY: Yes, ma'am.

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

9 MS. MCVEY: Fair enough.

10 THE COURT: And for his husband.

11 MS. MCVEY: Thank you.

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

23 MS. PEPKE: I understand your ruling.
24 Thank you, Your Honor.

25 THE COURT: So we understand where we're

1 going. Okay.

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

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

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

12 THE COURT: All right.

13 MS. MCVEY: And...

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

18 MS. FLYNN: Yes, Your Honor.

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

24 You're familiar with that charge?

25 MS. FLYNN: Correct, Your Honor.

1 THE COURT: Very good.

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

4 THE COURT: Certainly. Thank you so much.

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

7 THE COURT: Gotcha.

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

10 THE COURT: On the spoliation thing?

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

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

16 Okay. All right. Ms. McVey.

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

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

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

1 as a matter of law that their product --

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

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

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

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

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

1 will be for you to determine.

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

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

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

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

3 All right. Now, talk to me.

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

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

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

1 because they were already --

2 THE COURT: They attempted to answer.

3 MS. MCVEY: That's right.

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

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

11 MS. MCVEY: And we added new defendants.

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

14 MS. MCVEY: That's right.

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

18 MS. MCVEY: That's right.

19 THE COURT: Does that clarify it?

20 MS. FLYNN: I understand.

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

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

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

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

6 MS. FLYNN: Yes, Your Honor.

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

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

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

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

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

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

8 THE COURT: Good.

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

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

14 MS. FLYNN: Understood, Your Honor.

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

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

1 MS. MCVEY: Okay.

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

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

6 THE COURT: Yes, ma'am.

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

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

18 All right. J&J?

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

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

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

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

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

20 MS. PEPKE: Thank you, Your Honor.

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

25 MS. MCVEY: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

1 this case that we believe prejudices us.

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

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

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

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

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

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

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

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

20 MS. BUENO: Thank you, Your Honor.

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

1 boxes.

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

4 THE COURT: Okay. Mr. Cowan.

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

6 THE COURT: Good. I know you did.

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

11 THE COURT: Okay. I love that one.

12 MR. COWAN: Can I approach?

13 THE COURT: Of course.

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

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

21 - - -

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

25 - - -

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

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

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

6 MR. COWAN: I'm sorry.

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

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

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

12 Thank you, ma'am.

13 MR. COWAN: Just roughly --

14 THE COURT: Let her mark it.

15 Thank you, Cindy.

16 All right. Yes, sir.

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

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

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

1 preserves anything.

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

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

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

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

1 limine that you have denied against the
2 defendants.

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

7 MR. COWAN: Yes, ma'am.

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

12 MR. COWAN: Thank you, Your Honor.

13 THE COURT: All right.

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

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

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

3 MR. COWAN: Thank you, Your Honor.

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

7 Yes, sir.

8 MR. COWAN: The next --

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

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

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

15 MR. ADAMS: Yes, Your Honor.

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

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

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

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

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

5 MR. ADAMS: No, Your Honor.

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

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

10 THE COURT: This is the decades chart.

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

14 THE COURT: Two other ones, right.

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

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

22 MR. COWAN: Thank you, Your Honor.

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

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

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

3 Okay. Branham.

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

8 THE COURT: Branham versus Ford Motor
9 Company?

10 MR. COWAN: Yes, ma'am.

11 THE COURT: All right.

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

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

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

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

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

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

11 THE COURT: I got you.

12 All right. Ms. McVey.

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

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

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

4 THE COURT: I'm looking at it.

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

7 THE COURT: All right. Ben.

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

11 THE COURT: Yes.

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

19 THE COURT: Right.

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

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

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

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

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

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

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

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

6 MS. MCVEY: Thank you, Your Honor.

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

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

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

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

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

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

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

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

18 MS. PEPKE: Thank you, Your Honor.

19 THE COURT: Okay. Miscellaneous.

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

1 the objections as --

2 THE COURT: How many of these are there?

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

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

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

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

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

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

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

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

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

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

18 MR. COWAN: I understand.

19 THE COURT: Understood?

20 MR. COWAN: Yes, Your Honor.

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

25 MR. COWAN: Yes, Your Honor.

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

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

6 MS. MCVEY: I think so.

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

9 MS. MCVEY: Yes.

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

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

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

15 All right. Time limits for each witness.

16 MS. MCVEY: Hold on one second.

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

18 THE COURT: Yeah, yeah.

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

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

25 MS. BUENO: And we have not received any

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

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

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

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

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

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

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

22 MS. MCVEY: Yes.

23 THE COURT: Okay. Very good.

24 All right. Time limit on each witness.

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

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

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

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

11 MS. MCVEY: Thank you.

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

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

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

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

22 MS. BUENO: Dr. Barlow.

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

24 MS. BUENO: No.

25 MS. MCVEY: Yes, you did.

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

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

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

8 THE COURT: Is he a doctor now?

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

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

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

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

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

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

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

25 So we've been giving this some thought.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MS. BUENO: Understood.

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

24 MS. BUENO: Thank you.

25 THE COURT: I understand you need to know

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

3 MS. BUENO: Thank you.

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

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

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

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

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

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

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

1 MS. MCVEY: I didn't know they agreed. I
2 thought it was conditioned on them bringing --

3 THE COURT: Okay. Good. If they've
4 agreed, done.

5 MS. MCVEY: Wonderful.

6 Last thing, Dr. Haber is coming tomorrow
7 morning. Would it be possible to start court
8 at 9:00?

9 THE COURT: That's hard on the jury.

10 MS. MCVEY: I know. It's okay if we
11 can't. I'm just trying to, like, jam as much
12 in as we can.

13 THE COURT: Let me see what happens today
14 and how long they go today. I might give them
15 a trade-off.

16 MS. MCVEY: And the last thing is they
17 have two pulmonologists listed, Diette and
18 Weill. I think they're only bringing one. We
19 would love to know who they're bringing.

20 THE COURT: Yes, I'm going to make them do
21 that before we get farther down the road here.

22 MS. MCVEY: Thank you, Your Honor. That's
23 all the issues that I have.

24 THE COURT: All right. Then what I need
25 to do is find out what's going on with our

1 jury.

2 THE BAILIFF: Your Honor, Ms. Jackie was
3 just here. She said do you want her to go
4 ahead and do the roll call?

5 THE COURT: So we're still cool with her?

6 THE BAILIFF: No.

7 THE COURT: Is she doing the roll call
8 now?

9 THE BAILIFF: No. She wants to know. She
10 didn't want to --

11 THE COURT: Go on and do the roll call.
12 I'm prepared to qualify. And where are you
13 going to qualify, downstairs?

14 THE BAILIFF: In Courtroom 2A.

15 THE COURT: 2A. Okay. All right. Y'all,
16 be advised that you need to go down to 2A and
17 we'll have jury qualifications just as soon as
18 we can.

19 Go on and do the roll call and I'll be
20 down.

21 MS. BUENO: Your Honor, just to be clear,
22 when would be the appropriate opportunity to
23 raise any questions about the proposed voir
24 dire that has been submitted by both sides?

25 MS. MCVEY: And I can hand them up, too,

1 if that's helpful.

2 THE COURT: I thought I decided all that.

3 MS. BUENO: No, Your Honor. Both sides
4 have submitted proposed voir dire.

5 THE COURT: Okay. Well, wait a minute.
6 Let me have yours.

7 MS. FLYNN: Your Honor, I obviously
8 thought with voir dire, I understood the
9 Court's rulings on that.

10 THE COURT: You know, I just don't do all
11 this stuff that y'all want me to do about voir
12 dire. I believe voir dire is pretty simple.

13 MS. MCVEY: A hundred percent. You'll see
14 we asked more than we normally do. One concern
15 that we have, because it kind of came up in
16 pretrial, is that Mr. Perry is married to his
17 husband, Lonnie.

18 THE COURT: Right.

19 MS. MCVEY: And so I just want to make
20 sure that we don't have anybody who totally
21 objects to --

22 THE COURT: Let me look at this for a
23 minute.

24 MS. MCVEY: Okay.

25 THE COURT: All right. So send yours up

1 to me, Ms. Pepke.

2 Okay. With respect to the plaintiffs'
3 voir dire, I will charge 1, 2, 3, 4, 5, 6 -- I
4 will not charge 7 -- I mean, I will not ask 7.
5 I will not ask 8. I will ask 9. I will not
6 ask 10. I will not ask 11. I will not ask 12.
7 I will not ask 13. I will ask 14. I will not
8 ask 15. I will ask 16 kind of in the way I've
9 modified.

10 What I ask for all of these things about
11 the plaintiffs' claim is, "One of the questions
12 you may be asked," is what I'll say, "is
13 whether plaintiffs are entitled to recover
14 punitive damages from defendants."

15 I am not going to say "intended to punish
16 the company."

17 "Does anyone believe they're unable to
18 award money damages of punishment against a
19 company regardless of what the evidence might
20 demonstrate?" I will ask that.

21 Then 17, I will say, "Has any member of
22 your immediate family -- husband, wife,
23 children, mother, father -- ever worked around
24 asbestos-containing material?"

25 18, I am not going to ask that. 19, I

1 will ask something about the use of baby -- of
2 cosmetic talc, but it's not going to be exactly
3 what 19 is. And same for 20, I'll ask
4 something like that and, again, defining
5 members of your family as I have suggested.
6 All right.

7 On 21, I'll say "of immediate family."

8 MS. MCVEY: Thank you, Your Honor.

9 THE COURT: All right. Now, with respect
10 to defendants, I will ask, number 1, whether
11 they've read anything. I don't know how much
12 I'm going to get into what they've read. My
13 bet is they'll say no to that and solve my
14 problem.

15 2 -- I've asked this many times and never
16 had anybody say they've read anything about the
17 cases I tried. And then I'll ask about the
18 attorneys. So, 2, yes, I'll ask.

19 I hope that B is the same thing as their
20 witness list. I think it is.

21 MS. MCVEY: I think it is, Your Honor.

22 THE COURT: Yeah, so I'll ask about
23 witnesses. I will not ask about 3. I will ask
24 about immediate family working around asbestos
25 or been exposed to asbestos. I will not ask B

1 and C. Well, I may ask "whether you filed
2 anything related to asbestos," but I'm not
3 going to get concerned for your loved ones and
4 all that.

5 Number 5, I'm not going to ask. Number 6,
6 I will ask. 7 does not make sense, but I'm
7 going to say, "Do you use some talc" -- that
8 "or" doesn't make any sense. I think that's a
9 typo.

10 8, I will not ask. 9, I will not ask.
11 10, I will ask. 11, I will not ask. I will
12 ask some form of 12. I think it's in my normal
13 questions. I'm not going to ask 13. I've got
14 a question mark about 14. I'll give them to
15 you on that.

16 So that's what I'm going to ask and not
17 ask. And let me just say this to you. I don't
18 allow the -- as you know, we do not have
19 lawyer-directed voir dire in South Carolina. I
20 do not try to stake out the jury's position and
21 stake them out on positions when they try the
22 case. I try to ask them some basic questions
23 about their situation and the facts in the
24 case, but I don't get into their opinions about
25 things and so forth and so on. So that's just

1 the way I do it, and you can accept through the
2 course.

3 Ms. Flynn?

4 MS. FLYNN: Yes, Your Honor. I just
5 wanted to make sure that the Court is not going
6 to entertain any of the proffered voir dire
7 that AII submitted.

8 THE COURT: I don't even know what it is,
9 but I don't think you get to voir dire the --
10 well, I don't know. Let me see what you've
11 got, Ms. Flynn. Is it so different from all of
12 the rest of this?

13 MS. FLYNN: It's probably not, Your Honor.

14 THE COURT: Okay. Let me just look at it.

15 All right. On AII, I won't ask these
16 things just like they're written, but I'll ask
17 whether they know the plaintiff, obviously, and
18 his husband. And I'm going to do all the list
19 of names as to -- 3 is fine. Vi-Jon is out. 4
20 is no longer needed. 5, yes, I'll ask about
21 the attorneys. 6, yes, I'll ask about AII's
22 attorneys. 7, I will not ask that. 8, I will
23 ask that, just whether they're familiar, yes or
24 no.

25 I will not ask whether they are familiar

1 with the Clubman brand or Clubman talc. I will
2 not ask 11 or 12. I will not ask 13, 14, 15,
3 16, 17, 18, 19, 20, 21. I will ask something
4 about 22 without asking about the details of
5 the lawsuit. I will not ask 23, 24, 25, 26,
6 27, 28, 29. And I always have something about
7 being fair and impartial, which is 30.

8 So that's what I'm going to do with that.
9 All right. Are we clear?

10 MS. BUENO: We are, Your Honor. This does
11 not involve jury selection, but there's one
12 outstanding motion. We have renewed our motion
13 to exclude tissue testing. You recall that we
14 had a motion in limine on this that Your Honor
15 denied, but you said we will revisit it if the
16 experts are not capable of performing the
17 tissue testing in advance of trial.

18 THE COURT: Yeah.

19 MS. BUENO: We filed a motion, attaching
20 an affidavit from our expert saying he cannot
21 and does not have time. He talked through the
22 whole process that it takes --

23 THE COURT: All right. Just send that up
24 to me and let me look at it. I'm not inclined
25 to give you any ruling on that, as I said

1 before, but send it up to me and we'll revisit
2 it sometime later today.

3 MS. MCVEY: And, Your Honor, Dr. Longo has
4 concluded the tissue digestion and is in the
5 process, I think, today. And we'll be able to
6 put him up for a, you know, short deposition.

7 THE COURT: Well, Longo is not going
8 today, is he?

9 MS. MCVEY: No.

10 THE COURT: Well, then we can figure this
11 out before that.

12 MS. BUENO: Yes, but, Your Honor, we
13 cannot have an opening statement before we know
14 what Dr. Longo says he found in this tissue.
15 This is unbelievable that we now have tissue
16 testing coming in after we're going to start
17 trial, where Dr. Longo is going to say he found
18 something that we haven't even been able to
19 discover yet. This has to be excluded, Your
20 Honor.

21 THE COURT: I hear.

22 MS. MCVEY: Your Honor, we discussed this
23 at length, of course, and I'll let Mr. Adams
24 speak to the digestion.

25 THE COURT: I'm not going to talk about

1 digestion in any detail.

2 MS. MCVEY: Perfect. That works.

3 THE COURT: You know, we will visit this
4 at a later time. I don't see what it has to do
5 with what's being said in opening statement.

6 MS. MCVEY: Thank you, Your Honor.

7 THE COURT: All right.

8 MS. MCVEY: Last things, these are just
9 orders that we sent around this weekend. I can
10 just hand them up. They don't need to be
11 addressed right now, but it's the motions in
12 limine, that kind of stuff that -- the AII
13 financials that we e-mailed to you and copied
14 to everyone else. We don't have to deal with
15 them right now. I just want to hand them up.

16 THE COURT: Yeah.

17 MS. MCVEY: Okay (handing).

18 THE COURT: All right. Thank you.

19 MS. MCVEY: Thank you, Your Honor.

20 MS. BUENO: May I pass up the binder on
21 the tissue testing motion?

22 THE COURT: What's that?

23 MS. BUENO: The tissue testing (handing).

24 THE COURT: Tissue sample. Okay. All
25 right.

1 MS. FLYNN: Stephanie Flynn on behalf of
2 AII. We just want to be sure we've got an
3 opportunity to be heard on financial motions
4 before any order is signed. I understand you
5 don't want to do that now.

6 THE COURT: Ms. Flynn, we just said we're
7 going to do that a little bit later on.

8 MS. FLYNN: I understand. I just wanted
9 to make sure.

10 THE COURT: Okay. All right. Anything
11 else? All right. I'm going to reassemble down
12 there where the jury is and see what's going
13 on.

14 THE CLERK: Excuse me, Your Honor.
15 They're not doing anything until the attorneys
16 get down there for the roll call.

17 (Whereupon there was a recess in the
18 proceedings from 10:14 a.m. to 10:27 a.m.)

19 THE COURT: Is that the roll call?

20 THE CLERK: Yes, Your Honor.

21 THE COURT: All right. Have you
22 administered the oath?

23 THE CLERK: No, Your Honor.

24 THE COURT: Very good. Administer the
25 oath, please.

1 THE CLERK: Yes, Your Honor.

2 - - -

3 (The prospective jurors were
4 administered the oath.)

5 - - -

6 JURY VOIR DIRE

7 - - -

8 THE COURT: Ladies and gentlemen, I will
9 try to speak so that all may hear, but if you
10 have any problems hearing what I'm saying,
11 please raise your hand.

12 Good morning, ladies and gentlemen. My
13 name is Jean Toal. I am the retired Chief
14 Justice of South Carolina, and in retirement I
15 have served as a senior active judge. This
16 week I am serving, and next week I am serving
17 as a circuit court judge for Richland County.

18 This term of court is for two weeks.
19 Therefore, your service as jurors would be this
20 week and would end next Friday, not this
21 Friday. If there is a potential for any
22 service beyond, I would advise you upfront, but
23 quite frankly, I'm pushing these lawyers very
24 hard and I'm pushing them to have this case
25 ready to submit to you by midway next week. So

1 that is the current plan, and I generally get
2 it accomplished within that kind of time frame.

3 We understand the inconvenience of jury
4 service and what it causes with your personal
5 life. And we all thank you, and particularly
6 me, as your judge, for being here. We will do
7 our best to minimize the inconvenience, and
8 hopefully this will be an enjoyable and
9 educational two weeks for you.

10 Our purpose this morning is to determine
11 your qualifications and eligibility to serve as
12 jurors. Jury qualification is done in several
13 stages. The first stage you just completed,
14 the roll call. As a part of the -- I now have
15 certain questions in the next stage to ask you
16 to determine your qualifications as jurors in
17 court. These questions determine your general
18 eligibility to serve.

19 State law requires that I ask these
20 questions. And quite frankly, some of these
21 questions are very personal and you may not
22 want to stand and disclose this information
23 openly in the presence of your fellow jurors.
24 After each question, if any juror feels the
25 need to respond, I'll ask you to stand. And if

1 you don't want to stand, that's fine. At the
2 end of this process, I will give you a chance
3 to come forward and speak privately with me and
4 with the court reporter and the clerk. We
5 don't want any of you to suffer any
6 embarrassment. So if you do not want to stand
7 as a question is asked, you need to make a
8 mental note and remember to come forward at the
9 end when I ask you to.

10 It's absolutely essential that we have
11 accurate information so that we can pick a
12 qualified jury. These are the questions that I
13 am asking that bear on your qualification to
14 serve as jurors.

15 Is any member of the jury panel not a
16 citizen of the United States? If so, please
17 stand.

18 Is any member of the jury panel not a
19 resident and citizen of Richland County, South
20 Carolina? If so, please stand.

21 Is any member of the jury panel unable to
22 read, write, speak, or understand the English
23 language? If so, please stand.

24 Does any member of the jury panel have
25 less than a sixth grade education or its

1 equivalent? If so, please stand.

2 Is any member of the jury panel unable
3 because of mental or physical infirmities to
4 render efficient jury service? For example,
5 does any member of the jury panel have any
6 medical condition that would prevent you from
7 serving on a jury for this week and next week?

8 Let me explain how I conduct court. And
9 this may give you the opportunity to fully
10 evaluate your ability to participate. I begin
11 court at 9:30 unless there is some particular
12 need to begin earlier. But in no case have I
13 ever begun court more than at 9:00. So that is
14 generally the beginning.

15 I try to close proceedings at 5:00 or
16 close to it as possible. In no case do I run
17 past 5:30 unless we are in the active
18 deliberation of a verdict on the case.

19 I take a break about midmorning for folks
20 to refresh themselves, stretch, and relax. I
21 try to have lunch for an hour and 15 minutes,
22 an hour and a half, depending on how the trial
23 is progressing. And that generally takes place
24 sometime between 12:00, 12:15, and 1:00, and
25 then goes for an hour, an hour and a half. And

1 I take a similar break midafternoon for folks
2 to refresh themselves.

3 But we will have a foreperson of the jury,
4 and I allow members of the jury to communicate
5 if there's some need for a break that's outside
6 the normal parameters of time. That is
7 basically the schedule that I follow.

8 So, all right, with that in mind, is any
9 member of the jury panel unable because of
10 mental or physical infirmities to render
11 efficient jury service? If so, please stand.

12 Yes, ma'am. Would you care to tell me or
13 come forward?

14 PROSPECTIVE JUROR: I just have bad
15 anxiety.

16 THE COURT: You have anxiety?

17 PROSPECTIVE JUROR: Uh-huh.

18 THE COURT: Are you concerned that your
19 anxiety condition will prevent you from serving
20 for two weeks?

21 PROSPECTIVE JUROR: It's bothering me now.

22 THE COURT: Ma'am?

23 PROSPECTIVE JUROR: It's bothering me
24 right now.

25 THE COURT: I understand. All right. I

1 will excuse you.

2 THE CLERK: What's your juror number?

3 PROSPECTIVE JUROR: 24.

4 THE COURT: 24. You are excused to come
5 to the clerk and make arrangements to see what
6 else needs to be done.

7 Yes, ma'am. Juror number?

8 PROSPECTIVE JUROR: 149.

9 THE COURT: Yes, ma'am.

10 PROSPECTIVE JUROR: I have arthritis and
11 it is very difficult for me to walk from the
12 parking today. I am under a doctor's care for
13 my arthritis.

14 THE COURT: And how old are you?

15 PROSPECTIVE JUROR: I'll be 74.

16 THE COURT: Let me tell you. If you're
17 above 65, you're going to have an exemption if
18 you want to claim it anyway. So you ought to
19 claim your age 65 exemption from service.

20 PROSPECTIVE JUROR: Yes.

21 THE COURT: And I'll tell you, those of
22 you who are 65 and above, you can serve if you
23 care to, but you also can claim your exemption.
24 You are exempt from juror service, number?

25 PROSPECTIVE JUROR: 149.

1 THE COURT: 149. Very good.

2 Yes, ma'am. Number?

3 PROSPECTIVE JUROR: 163. Being here is
4 causing me some trauma and emotional feelings.
5 Last July, right next door --

6 THE COURT: Yes, ma'am.

7 PROSPECTIVE JUROR: -- I was involved in a
8 murder trial of my brother.

9 THE COURT: You need to say no more. If
10 you are still concerned about your feelings
11 about that, you will be excused. You may come
12 to the clerk and make arrangements. Number
13 again?

14 PROSPECTIVE JUROR: 163. Eisha James.

15 THE COURT: Very good.

16 PROSPECTIVE JUROR: Thank you.

17 THE COURT: All right. Yes, ma'am?

18 PROSPECTIVE JUROR: Juror Number 47. I
19 think I can do it. I have -- I'm a diabetic.
20 I do need to have my -- I need to have a bottle
21 of water and a snack with me. Other than that,
22 I think I can do it.

23 THE COURT: We will accommodate every
24 need. If you serve on this jury, please know
25 that we will accommodate you completely with

1 everything related to both water and any other
2 needs that you have related to your diabetic
3 condition, absolutely.

4 PROSPECTIVE JUROR: Thank you.

5 THE COURT: Yes, sir.

6 PROSPECTIVE JUROR: I suffer from
7 depression from -- my mother died a year ago
8 and I have a hard time being in places like
9 this. I wake up in the morning, and the doctor
10 do have me on --

11 THE COURT: Actually, you need to say no
12 more. Your number is?

13 PROSPECTIVE JUROR: 364.

14 THE COURT: All right. You'll be excused.
15 Yes, sir.

16 PROSPECTIVE JUROR: I moved in October and
17 I believe I currently live in Lexington County.

18 THE COURT: Say your number again.

19 PROSPECTIVE JUROR: 362.

20 THE COURT: Say again.

21 PROSPECTIVE JUROR: I moved in October. I
22 got served at my old house, but I currently
23 believe I live in Lexington County right now,
24 I'm just finding out.

25 THE COURT: If you live in Lexington

1 County, come down here. You are exempt. I
2 will excuse you. You've got to come down here
3 and tell the clerk, this lady that's standing
4 back here.

5 Whoa, silence.

6 THE BAILIFF: Quiet, please.

7 THE COURT: Quiet, please.

8 Ma'am, come forward a little bit so I can
9 hear you and the clerk can hear you. A little
10 bit closer. Thank you, ma'am.

11 PROSPECTIVE JUROR: I'm Juror 152. My
12 name is Tiffany Hudgens. I have MS, which I
13 can't sit down long, can't stand up too long.
14 Frequent, you know, going back and forth to the
15 restroom.

16 THE COURT: Yes, ma'am. You don't need to
17 discuss it further. You're excused.

18 PROSPECTIVE JUROR: Thank you, sir.

19 THE COURT: It's ma'am. Old, cancer hair,
20 but grandmother, mother, wife of 56 years.

21 Yes, ma'am. Come down where we can hear
22 you just a little bit better.

23 PROSPECTIVE JUROR: I've got COVID.

24 THE COURT: Oh, you have COVID. You're
25 excused. Get her number. She's excused. What

1 number?

2 THE CLERK: 324.

3 THE COURT: 324. Excused.

4 Yes, sir.

5 PROSPECTIVE JUROR: Jeffrey Coles, Juror

6 61. I'm a retired veteran, suffer from PTSD.

7 I'm currently taking meds. Right now I have
8 bad anxiety.

9 THE COURT: I understand. All right.
10 You're excused.

11 THE CLERK: What's his number?

12 PROSPECTIVE JUROR: 61.

13 THE COURT: All right. Has any member of
14 the jury panel been convicted by a guilty plea
15 or a trial in state or federal court of record
16 of a crime punishable by imprisonment for more
17 than one year and your civil rights have not
18 been restored by pardon or amnesty?

19 Punishable by more than one year means you
20 could have received a sentence of more than one
21 year regardless of what sentence you may have
22 actually received. If this applies to you,
23 please stand.

24 Is any member of the jury panel --

25 PROSPECTIVE JUROR: I don't know if it a

1 hundred percent applies, but when I was 21, I
2 had a misdemeanor DUI in New Jersey.

3 THE COURT: First offense?

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: All right. And what was
6 your -- what was your sentence?

7 PROSPECTIVE JUROR: Suspended license for
8 seven months.

9 THE COURT: Yeah, I don't know that we
10 have mandatory one year for DUI there or here,
11 so you're qualified. You're able to serve, and
12 thank you for drawing that to my attention.

13 All right. Is any member of the jury
14 panel a clerk or deputy clerk of court, a
15 constable, sheriff, or other commissioned law
16 enforcement officer, probate judge, county
17 commissioner, magistrate, or other county
18 officer, or employed within the walls of any
19 courthouse? If so, please stand.

20 Yes, sir.

21 PROSPECTIVE JUROR: I'm a retired
22 constable.

23 THE COURT: Retired constable.

24 PROSPECTIVE JUROR: Retired law
25 enforcement officer. I'm a current Class 2

1 constable.

2 THE COURT: And you have a current
3 classification as Class 2 constable?

4 PROSPECTIVE JUROR: Yes, ma'am.

5 THE COURT: You're excused.

6 THE CLERK: What's your number, sir?

7 PROSPECTIVE JUROR: 99.

8 THE CLERK: Thank you.

9 THE COURT: Is there any member of the
10 jury panel who has not -- excuse me. Let me
11 restate that. Is there any member of the jury
12 panel who has previously served on jury duty in
13 circuit court, not city court, magistrate's
14 court or federal court, during this calendar
15 year? If so, please stand.

16 Has any member of the jury panel served as
17 a member of the Richland County grand jury
18 during the past several years? If so, please
19 stand.

20 PROSPECTIVE JUROR: Your Honor?

21 THE COURT: Yes.

22 PROSPECTIVE JUROR: I was at the one on
23 Decker a few years ago. I'm not sure if that
24 counts or not.

25 THE COURT: That's a magistrate court and

1 it wouldn't count.

2 PROSPECTIVE JUROR: All right.

3 THE COURT: All right. We now move to
4 jury exemptions. State law provides for
5 several exemptions to jury service. An
6 exemption does not mean you're not qualified to
7 serve. It simply means that if you want, you
8 have the right to say "I choose not to serve."

9 First exemption. Those of you who are 65
10 years of age or older may be exempted from jury
11 service. Those of you who are 65 years of age
12 or older represent a pool of tremendous talent
13 for jury service, and we urge you to serve this
14 week if you are inclined to do so. But if you
15 wish to be exempted, you may certainly do so.

16 Is there any member of the jury panel who
17 is 65 years of age or older and who wishes to
18 be exempted from jury service this week and
19 next week? If so, please stand.

20 Another exemption concerns prior jury
21 service. No person is required to serve as a
22 juror more than once every three calendar
23 years. Therefore, if any member of the jury
24 panel has served on jury duty during the last
25 two calendar years, you may be exempt from

1 service this week and next week if you choose
2 to be exempted.

3 Please note this exemption does not apply
4 if your jury service was in a magistrate's
5 court, a city court, or a federal court. If
6 this exemption, which is the last three years
7 circuit court jury service, and you wish to
8 claim the exemption, please stand.

9 All right. Next exemption. Persons who
10 have served as grand jurors in the last five
11 calendar years may also be exempt. So if
12 anyone has served on a grand jury in the last
13 five years, you may be exempted for claim. If
14 so, please stand.

15 Next exemption deals with those of you who
16 have small children. Please listen very
17 carefully to this exemption. It has several
18 parts, all of which must apply for you to be
19 exempted on this basis.

20 You may be exempted from jury service if
21 you have a small child or small children under
22 the age of seven years; you have legal custody
23 of your child or children; you have the
24 principal care, custody, and control of your
25 child or children; and you are unable to make

1 arrangements for the adequate care of your
2 child or children while performing jury duty.

3 If all of these requirements apply to you,
4 then you may be exempted on this basis. If
5 this exemption applies to you, and you wish to
6 be exempted, please stand at this time.

7 All right. I'll ask each of you juror
8 number and tell me that juror number.

9 PROSPECTIVE JUROR: 280.

10 THE COURT: Yes, ma'am.

11 PROSPECTIVE JUROR: I have two small
12 children in elementary school. They're not in
13 after-school care. I work from home.

14 THE COURT: Very good. All right. You
15 can claim your exemption. Come to the clerk
16 and you'll be excused.

17 Yes, ma'am, in the back there.

18 PROSPECTIVE JUROR: 297. I have two small
19 children at home with me.

20 THE COURT: And you don't have any ability
21 to have alternate care for them?

22 PROSPECTIVE JUROR: No, ma'am.

23 THE COURT: Very good. You may claim your
24 exemption. Come down to the clerk.

25 Yes, ma'am, in the back there.

1 Would you all mind coming down? I'm going
2 to come to the front. You two in the back,
3 would you mind coming a little closer.

4 Yes, ma'am, you at the rail there. Ma'am,
5 you.

6 PROSPECTIVE JUROR: I'm 346. And I have
7 two small kids, and their day care closes at
8 6:00. And there's two nights during the week
9 when my husband works till 7:00, so I don't
10 have anyone else to pick them up.

11 THE COURT: All right. You can claim your
12 exemption. Please come to the clerk.

13 Yes, ma'am.

14 PROSPECTIVE JUROR: I'm 153. I have a
15 three-month old, and I don't really have the
16 care situation set up right now; so I won't be
17 able to.

18 THE COURT: Yes, ma'am. You may claim
19 your exemption.

20 Yes, sir.

21 PROSPECTIVE JUROR: How you doing? 287.
22 I have two small children. And, unfortunately,
23 my fiancée is recovering from a delivery.

24 THE COURT: Understood. You may claim
25 your exemption.

1 All right. The next exemption involves --
2 you got the -- oh, yes, ma'am?

3 PROSPECTIVE JUROR: I have two at home --

4 THE COURT: You've got to come down a
5 little closer here.

6 PROSPECTIVE JUROR: My --

7 THE COURT: Come down to the rail here so
8 I can hear you and so we can get your number.
9 Your number first.

10 PROSPECTIVE JUROR: 227.

11 THE COURT: All right.

12 PROSPECTIVE JUROR: I have a daughter at
13 home by myself.

14 THE COURT: Okay. You may claim your
15 exemption. Come down to the clerk now.

16 The next exemption involves those of you
17 who may be attending school at this -- who may
18 be attending school at this time or working in
19 some capacity with a school.

20 If this exemption applies to you and you
21 wish to be exempted, we will transfer your
22 service to another term of court at a time
23 which will not conflict with your school
24 responsibility.

25 Is there any member of the jury panel who

1 is a full-time student, school teacher, school
2 crossing guard, school bus driver, or who
3 serves in any other school-related function who
4 is unable to serve on jury duty this week and
5 next as a result of that school involvement?
6 If so, please stand.

7 On the rail there, yes, ma'am.

8 PROSPECTIVE JUROR: I'm Juror 337. I move
9 back to college on Saturday, so I wouldn't be
10 able to do it next week.

11 THE COURT: Understood. You may claim
12 your exemption. Come down to the front, and
13 you'll be transferred to another term of court.

14 Yes, ma'am.

15 PROSPECTIVE JUROR: 179. I'm a school
16 psychologist.

17 THE COURT: All right. And you're on
18 active duty at this time as a school
19 psychologist? You may claim your exemption and
20 will be transferred to another term. Come down
21 to the front.

22 Yes, ma'am.

23 PROSPECTIVE JUROR: 223. I work with
24 special needs kids, and I start work tomorrow.

25 THE COURT: You what now?

1 PROSPECTIVE JUROR: I work with special
2 needs kids.

3 THE COURT: Oh, okay. Got you. You may
4 claim your exemption.

5 Yes, sir.

6 PROSPECTIVE JUROR: Juror 256. I am chief
7 of operations for a school district that starts
8 school on Wednesday.

9 THE COURT: Yes, sir. You may claim your
10 exemption. Come down to the front.

11 Yes, ma'am.

12 PROSPECTIVE JUROR: 199. I am a school
13 teacher.

14 THE COURT: Good. We need more school
15 teachers. My daughter is a teacher. Come down
16 and claim your exemption.

17 Is there any member -- do we have anybody
18 else? Yes, ma'am. I didn't see you. Sorry.

19 PROSPECTIVE JUROR: I'm Juror 236. I
20 attend school early next week, so I won't be
21 able to.

22 THE COURT: I understand. You may claim
23 your exemption and be transferred to another
24 term.

25 All right. Is there any member of the

1 jury panel who is employed with the Department
2 of Corrections at a penitentiary? If so, and
3 you would like to be exempted, please stand.

4 Is there any juror who performs services
5 for a business, commercial, or agricultural
6 enterprise which are so essential -- meaning
7 your services are so essential to the operation
8 of the enterprise that if you were required to
9 perform jury duty, the enterprise would have to
10 close or stop functioning? If so, and you wish
11 to be exempted, please stand.

12 Yes, ma'am.

13 PROSPECTIVE JUROR: Juror Number 53. I
14 work for my family's business, and I'm the only
15 one in the office. I do payroll.

16 THE COURT: All right. You may claim your
17 exemption.

18 Yes, sir.

19 PROSPECTIVE JUROR: Your Honor, Juror
20 Number 286. I'm a managing partner of a real
21 estate busy law firm. I have nine offices and
22 I'm running three of them, one in the Village
23 at Sandhill. If I miss this week and next
24 week, it's going to cost the law firm over
25 \$50,000. It's going to be a pretty substantial

1 hardship. We have to move everything. We also
2 have depositions on Thursday we'd have to move.

3 THE COURT: Well, I don't understand why
4 one person is so essential to that operation,
5 to be honest with you. I practiced law for
6 many years.

7 PROSPECTIVE JUROR: Yes, Your Honor. We
8 lost two attorneys in the last few months, and
9 we've got two attorneys right now running nine
10 offices.

11 THE COURT: I understand. Okay. I will
12 allow you to claim your exemption.

13 Yes, sir.

14 PROSPECTIVE JUROR: I'm 244. I'm on
15 patient trauma call at Richland Hospital and
16 oral surgery call at Midlands Oral Surgery, and
17 I have a full schedule of patients this week.

18 THE COURT: I understand. I tell you what
19 I'm going to do. I'm going to allow you to
20 claim your exemption. I was going to transfer
21 you to another term. I'm not going to do that.
22 I'll allow you to claim your exemption.

23 Yes, sir, in the back there.

24 PROSPECTIVE JUROR: Juror 124. I own a
25 floor-cleaning business. It's me and my son.

1 Our largest account was scheduled for this week
2 and I rescheduled it for next week.

3 THE COURT: I understand. I will allow
4 you to claim your exemption.

5 Yes, ma'am.

6 PROSPECTIVE JUROR: Juror 130. I run a
7 department --

8 THE COURT: Wait a minute. I can't hear
9 you.

10 PROSPECTIVE JUROR: I run a department and
11 am scheduled to be out of office -- I'm
12 sorry -- on-site with my whole office in
13 Virginia next week, Wednesday through Friday,
14 to run departmental operations for an off-site
15 meeting. I'm the one leading.

16 THE COURT: Okay. I understand. I will
17 allow you to claim your exemption.

18 Yes, ma'am.

19 PROSPECTIVE JUROR: Thank you, Judge. I'm
20 361, and I'm the broker in charge for a small
21 real estate company. It's just me and my
22 girls.

23 THE COURT: On the edge, but I'll allow
24 you to claim your exemption.

25 Yes, ma'am.

1 PROSPECTIVE JUROR: So my juror number is
2 209, and I have my own store and I have no one
3 to work there.

4 THE COURT: I understand. You may claim
5 your exemption. All right.

6 Yes, sir.

7 PROSPECTIVE JUROR: Juror Number 13. I'm
8 a first responder for a restoration company and
9 we're expecting Debby to be real bad down in
10 Charleston. So we're all supposed to go to
11 Charleston.

12 THE COURT: I'm going to tell you, that
13 really gives me some heartburn, but I will
14 excuse you.

15 All right. That concludes the statutory
16 list of qualifications and exemptions for jury
17 service. It may be you're qualified and no
18 exemption applies to you, but jury service this
19 week would constitute an extreme hardship on
20 you for a particular reason.

21 I cannot permanently excuse or qualify a
22 juror from jury service, but under extreme and
23 compelling circumstances I may excuse a juror
24 from this term of court and transfer the juror
25 to another term of court, particularly if you

1 have not been previously transferred.

2 Please understand that general
3 inconvenience is not a sufficient reason to
4 transfer you to another term of court. To
5 justify transfer to another term of court, it
6 must be an extreme hardship, like an hourly
7 worker who will not be paid and is the family's
8 only source of income.

9 Okay. That's the -- oh, I see people
10 lining up. Ladies and gentlemen, this is now a
11 chance for those of you who did not respond
12 earlier to any questions that I asked, those of
13 you who have a compelling reason to request a
14 transfer, to come forward. If you believe you
15 are disqualified or exempt from jury service or
16 you have any questions about whether you are
17 disqualified or exempt and want to be
18 transferred to another term, then come forward
19 now.

20 All right. Now, the way this works, I've
21 got to --

22 THE BAILIFF: Do it quietly, please.
23 Quiet.

24 THE COURT: Yeah, I'm going to tell you,
25 the more people start lining up here, the more

1 I'm going to be inclined to say I'm not going
2 to be very liberal about these transfers. It's
3 an extreme hardship for me to take two weeks as
4 a retired judge.

5 All right. Quiet, please. Thank you so
6 much.

7 Now, let's don't send everybody on your
8 team up here.

9 THE BAILIFF: For the last time, quiet,
10 please. The judge has got to hear.

11 THE COURT: Appreciate your patience with
12 this process and the fact that this is a
13 soundproof nightmare in this courtroom, so it's
14 hard for us to hear. And we don't mean to be
15 hollering at you all the time; so please accept
16 my apologies for that, but we've got a process
17 we have to follow.

18 All right. First juror.

19 THE BAILIFF: Juror Number 164.
20 Juror 164.

21 THE COURT: Come right up here, please.

22 THE CLERK: Ms. Jamison.

23 THE COURT: Yes, ma'am.

24 PROSPECTIVE JUROR: I suffer from anxiety
25 and I thought I was going -- I'm having an

1 attack now.

2 THE COURT: All right. I'm excusing you.

3 PROSPECTIVE JUROR: Thank you.

4 THE COURT: Go around here to the clerk.

5 Yes, sir.

6 THE BAILIFF: Juror Number 232. 232.

7 Juror Number 232.

8 PROSPECTIVE JUROR: I don't know if it
9 disqualifies me. My primary address is still
10 Richland County. I live in Georgetown. I
11 don't mind being here. I have the time off
12 from work.

13 THE COURT: Where do you vote?

14 PROSPECTIVE JUROR: Richland County.

15 THE COURT: Then you're qualified.

16 PROSPECTIVE JUROR: I just wanted to make
17 sure.

18 THE BAILIFF: Juror Number 293. 293.

19 Juror Number 293.

20 THE COURT: Please come forward. Yes,
21 ma'am.

22 PROSPECTIVE JUROR: I'm the only caretaker
23 of my elderly mother. I'm the only caretaker
24 of my elderly mother.

25 THE COURT: I gotcha. By the way, how old

1 is she?

2 PROSPECTIVE JUROR: 86.

3 THE COURT: Well, tell her I'm trying to
4 join her. 81 times around the sun next Sunday.

5 PROSPECTIVE JUROR: Bless your heart.

6 THE COURT: Thank you. You're excused.

7 PROSPECTIVE JUROR: 293.

8 THE COURT: 293, excused.

9 THE BAILIFF: Juror Number 251, 251.

10 THE COURT: Yes, sir. Come forward.

11 Only reason I'm standing back here -- by
12 the way, y'all, the court reporter has to get
13 this down, so this is a compromise in this very
14 unhospitable courtroom environment here to try
15 to get it on the record.

16 Yes, sir.

17 PROSPECTIVE JUROR: Judge, I didn't
18 realize it was going to be two weeks.

19 THE COURT: I told you two weeks upfront.

20 PROSPECTIVE JUROR: No, no. I have a
21 business trip next week I have to go to.

22 THE COURT: Where?

23 PROSPECTIVE JUROR: Pittsburgh. I'm a
24 contract manager. I do meetings.

25 THE COURT: Okay. We'll transfer you to

1 another term.

2 PROSPECTIVE JUROR: Sounds good.

3 THE BAILIFF: Juror Number 299, 299.

4 THE COURT: Yes, ma'am.

5 THE BAILIFF: Juror 299.

6 PROSPECTIVE JUROR: Hi, Your Honor. I
7 don't know if it's an exemption. I have MS.
8 It's difficult for me to sit for long periods.
9 I need frequent bathroom breaks.

10 THE COURT: I will excuse you. Excused.

11 PROSPECTIVE JUROR: Thank you.

12 THE CLERK: 299.

13 THE BAILIFF: Juror Number 208, 208.

14 Juror Number 208.

15 PROSPECTIVE JUROR: Hey, how are you
16 doing? I work overnight and I don't get off
17 until 7:30 in the morning time. And I'm a
18 single parent.

19 THE COURT: Oh, my, my. That's all you've
20 got to say. Single parent, and it's an
21 overnight work situation.

22 PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: You're excused.

24 PROSPECTIVE JUROR: Thank you.

25 THE BAILIFF: Juror Number 217, 217. 217.

1 PROSPECTIVE JUROR: I have kids. My
2 three-year-old nephew has autism, and I work my
3 schedule and my sister's schedule. She had to
4 call out this week. I'm his caregiver while
5 she's at work and --

6 THE COURT: I'll excuse you.

7 PROSPECTIVE JUROR: Thank you.

8 THE BAILIFF: Juror Number 340, 340. 340.

9 PROSPECTIVE JUROR: This would put me in a
10 financial hardship. I currently work at Sam's
11 Club Battery and I'm part-time (inaudible).

12 THE COURT: Okay. That's all you need to
13 say. You're excused.

14 THE BAILIFF: Juror Number 203, 203.
15 Juror Number 203.

16 PROSPECTIVE JUROR: I'm a CDL truck
17 driver, owner-operator, so I'm basically my own
18 business. And I have a family reunion coming
19 up this weekend.

20 THE COURT: Sure. Okay. You're excused.

21 PROSPECTIVE JUROR: Thank you.

22 THE BAILIFF: Juror Number 147, 147.
23 Juror Number 147.

24 PROSPECTIVE JUROR: I'm a business owner
25 and I'm the only employee. I work for myself.

1 THE COURT: Okay.

2 PROSPECTIVE JUROR: I wouldn't have
3 income.

4 THE COURT: You're excused.

5 PROSPECTIVE JUROR: I appreciate it.
6 Thank you.

7 THE BAILIFF: Juror Number 27, 27. Juror
8 Number 27.

9 PROSPECTIVE JUROR: Sir.

10 THE COURT: Ma'am.

11 PROSPECTIVE JUROR: Ma'am, sorry. My
12 apologies. I'm a contract consultant right
13 now. I bring about 90 percent of my household
14 income. If I don't work, I don't get paid.

15 THE COURT: Okay. You're excused.

16 PROSPECTIVE JUROR: Thank you so much.

17 THE BAILIFF: Juror Number 354, 354.
18 Juror Number 354.

19 PROSPECTIVE JUROR: I don't get paid to be
20 here for jury duty with my job, and we're also
21 limited staffing right now in my department.

22 THE COURT: Well, they're not supposed to
23 do that. What's the company?

24 PROSPECTIVE JUROR: It's DDI Technology.
25 I'm a title specialist.

1 THE COURT: Well, they're not supposed to
2 do that. They can't do that by law and it puts
3 you in a bind. I get that.

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: Well, I'll excuse you, but
6 tell them that's not legal.

7 PROSPECTIVE JUROR: Okay. Thank you.

8 THE BAILIFF: Juror Number 142. 142.
9 Juror Number 142.

10 THE COURT: Yes, ma'am.

11 PROSPECTIVE JUROR: Judge, I was the
12 caregiver for my dad. He passed suddenly. I'm
13 emotionally and --

14 THE COURT: I understand.

15 PROSPECTIVE JUROR: And my mother-in-law
16 broke her hip. She's in rehab now, and now
17 she's coming to stay with us next week.

18 THE COURT: I understand.

19 PROSPECTIVE JUROR: It's a lot.

20 THE COURT: It's a lot. You're excused.

21 PROSPECTIVE JUROR: Thank you.

22 THE BAILIFF: Juror Number 69, 69. Juror
23 Number 69.

24 THE COURT: Yes, ma'am.

25 PROSPECTIVE JUROR: I actually have a

1 therapy -- I have -- I have therapy twice a
2 week, so I have various mental illnesses going
3 on. So I have a hard time focusing, as well,
4 and I don't --

5 THE COURT: You don't need to say more.
6 You're excused.

7 PROSPECTIVE JUROR: Thank you.

8 THE BAILIFF: Juror Number 318, 318.
9 Juror Number 318.

10 PROSPECTIVE JUROR: I have a small
11 one-year-old and I'm a full-time mom. It's
12 just me. I don't have any babysitter.

13 THE COURT: You just didn't feel like
14 standing up when I asked that before?

15 PROSPECTIVE JUROR: Because I really
16 wanted to try to do it.

17 THE COURT: You're excused.

18 PROSPECTIVE JUROR: Thank you, sir.

19 THE COURT: Ma'am. This old short cancer
20 hair is getting me in more trouble, after being
21 a mom and a beloved wife, I hope.

22 THE BAILIFF: Juror Number 338. 338.
23 Juror Number 338.

24 PROSPECTIVE JUROR: Ma'am, I don't have a
25 lot of employees now.

1 THE COURT: What is your business?

2 PROSPECTIVE JUROR: Heating and
3 air-conditioning and supplies.

4 THE COURT: So it's a private business?

5 PROSPECTIVE JUROR: Yes, ma'am.

6 THE COURT: You're excused.

7 PROSPECTIVE JUROR: Thank you.

8 THE BAILIFF: Juror Number 331. 331.
9 Juror Number 331.

10 THE COURT: Yes, ma'am. Now, you be calm.
11 You be calm. You be relaxed. Tell me what's
12 going on.

13 PROSPECTIVE JUROR: I'm in a domestic
14 situation with my husband, and I'm not sure if
15 we're going to leave, me and my daughter.

16 THE COURT: You're excused. Don't you
17 worry about it.

18 PROSPECTIVE JUROR: Thank you.

19 THE BAILIFF: Juror Number 109. 109.
20 Juror Number 109.

21 THE COURT: Good morning.

22 PROSPECTIVE JUROR: Good morning.

23 THE COURT: Come up here where we can hear
24 you. Yes, sir.

25 PROSPECTIVE JUROR: Can I transfer to

1 another court date?

2 THE COURT: What's the reason?

3 PROSPECTIVE JUROR: I'm very sick right
4 now.

5 THE COURT: Okay. Yeah, that's all you
6 need to say. You're excused.

7 Transfer this gentleman. He's ill right
8 now.

9 THE BAILIFF: Juror Number 235. 235.
10 Juror Number 235.

11 THE COURT: Yes, sir.

12 PROSPECTIVE JUROR: I don't need to be
13 excused, but I was wondering who I would have
14 to go to to get a written form sent in to be
15 two weeks instead of one week. Because I've
16 got an auto waive for one week out of school.

17 THE COURT: If you're cool with that,
18 we'll get you all the necessary paperwork. You
19 just be sure to deal with this -- he's got a
20 one-week excuse, thinking that was going to be
21 it. He needs a two-week excuse. Y'all work
22 with him on that. No problem.

23 THE BAILIFF: Juror Number 58. 58.

24 THE COURT: Yes, sir.

25 PROSPECTIVE JUROR: Good morning, Judge.

1 I'm not sure if this counts, but my wife is 34
2 weeks pregnant and it's considered a high-risk
3 pregnancy. I'm not sure --

4 THE COURT: I'm going to let you go.

5 PROSPECTIVE JUROR: Thank you, Judge.

6 THE COURT: All right. That's it.

7 All right. Ladies and gentlemen of the
8 jury, the jury panel is now qualified. All
9 right. How much time are you all going to need
10 to produce the list?

11 THE CLERK: Maybe about 15 minutes.

12 THE COURT: All right. Ladies and
13 gentlemen of the jury, here is what happens
14 now. It used to be that they had a child that
15 would come and draw the names out of a big jury
16 box and that's how you picked the venire from
17 which the jury was struck. But now we have
18 automation, thank goodness, so the process
19 won't take that long.

20 But there will be a random process using
21 an algorithm and it will produce a list of
22 potential members of the jury. Then the
23 lawyers will have a time to check out the jury
24 and see that -- see who they want to strike and
25 so forth. And so we're close to end of the

1 process.

2 Now, one thing I want to ask before I let
3 you go is whether any of you know the lawyers
4 involved. Was that asked?

5 MS. MCVEY: Your Honor, I don't think we
6 asked the individual voir dire questions that
7 we discussed.

8 THE COURT: We got the individual voir
9 dire, but I generally don't voir dire them
10 until I qualify them.

11 MS. MCVEY: However you want to do it. I
12 just want to know in case some of that may
13 produce people leaving. Up to you.

14 THE COURT: All right. We can do the voir
15 dire now if that's what you all prefer. Hang
16 on. I've got a notebook for that.

17 You know, I'm not going to do that now.
18 Voir dire questions, let me tell you -- that's
19 a fancy Latin word that means questions will be
20 asked you about whether you know anything about
21 the particular case and things of that nature.
22 But that won't be asked until we get a
23 qualified set, because you don't get knocked
24 out of jury service because of that. They just
25 have to know that to decide whether they want

1 to strike you from the potential jury or not.
2 But that comes after you're qualified.

3 So the jury is now qualified. And so,
4 clerks, get us a jury venire from which we can
5 strike.

6 THE CLERK: Yes, Your Honor.

7 THE COURT: We'll take about 15 minutes.
8 So in this 15 minutes, if you want to move
9 around and be at your ease. Be back here -- it
10 is now 10 minutes after 11:00. Be back here at
11 25 after 11:00.

12 (The following proceedings were held
13 outside the presence of the jury:)

14 THE COURT: What I'm going to do after I
15 get voir dire selection made, I'm going to let
16 them go to lunch and let you all begin the
17 opening arguments after lunch.

18 MS. MCVEY: So we'll strike before lunch?

19 THE COURT: Get them settled, strike, the
20 jury will be selected and we let them go to
21 lunch and have mercy on the court reporter.

22 MS. MCVEY: And you'll give us a little
23 bit of time to figure out who we're striking?

24 THE COURT: Oh, yeah. As usual, I give
25 you about 15 minutes or so to decide who you're

1 striking. We're going to be after midday
2 before we even get the jury selected. So I
3 think y'all need to and she needs to have a
4 little break before we go forward.

5 MS. MCVEY: Thank you, Your Honor.

6 MS. BUENO: Thank you, Your Honor.

7 MR. ADAMS: Thank you, Your Honor.

8 (Whereupon there was a recess in the
9 proceedings from 11:26 a.m. to 11:34 a.m.)

10 THE COURT: My bailiffs, are all the
11 jurors present? Are we good?

12 All right. Ladies and gentlemen, let me
13 explain what happens now. There's a fancy
14 Latin word, "voir dire," but it simply means
15 these are questions that the parties on each
16 side have asked that I ask the jury.

17 These aren't things that disqualify you or
18 anything else that I know about. We'll see
19 what happens. But they are questions I ask
20 you. Just like before, I ask you to please
21 stand or acknowledge in some way, depending on
22 whether this question applies to you or not.
23 So that's what I'm going to do now. I will ask
24 those questions.

25 Yes, sir?

1 THE BAILIFF: There's one missing.

2 THE COURT: There's one missing?

3 THE BAILIFF: Yes, ma'am.

4 THE COURT: Didn't see anybody down there?

5 THE BAILIFF: Yes. I'm going to get her.

6 She's eating.

7 THE COURT: Okay. Sorry. Be patient for
8 a minute.

9 Ms. McVey, Mr. Bogan, come up here for a
10 second.

11 The descriptors we had about the case and
12 so forth, I propose to read those before you
13 make your opening arguments. The summary I
14 have here is just who is the parties in the
15 case.

16 MS. MCVEY: I didn't know if you wanted
17 to --

18 THE COURT: I think it's better when we
19 have the panel here to make those things. So
20 I'll do those before you open.

21 MS. MCVEY: We don't have Jamie's name on
22 the sheet. We can introduce ourselves or you
23 can do it.

24 THE COURT: I'm going to turn to each
25 side.

1 All right. All present. Ladies and
2 gentlemen of the jury, we will proceed to
3 these, as I explained, voir dire questions that
4 will be asked.

5 Before we do that, we have the plaintiff
6 and defendants' attorneys assembled at these
7 two tables. And I'm going to begin with the
8 plaintiffs' counsel and ask Ms. Theile McVey,
9 who heads the plaintiffs' team, to introduce
10 herself and have each of her members of her
11 team introduce themselves to you.

12 MS. MCVEY: Good morning. Theile McVey
13 from the law firm of Kassel McVey here in
14 Columbia.

15 MR. ADAMS: Good morning. Ben Adams. I
16 represent Michael Perry and Lonnie Long. Thank
17 you for being here.

18 MS. GROSS: Good morning. I also
19 represent Michael Perry and Lonnie Long. My
20 name is Rachel Gross.

21 MS. RUTKOSKI: Jamie Rutkoski, also from
22 Kassel McVey.

23 MR. GEORGE: Jonathan George, also with
24 Dean Omar.

25 THE COURT: All right. And on behalf of

1 the defendants, please introduce yourselves to
2 the jury.

3 MS. BUENO: Good morning. Kim Bueno is my
4 name. I work for a law firm called Butler
5 Snow, and I'm here on behalf of the defendants
6 with my partners.

7 MS. PEPKE: Good morning. Amy Pepke, and
8 I'm also with Butler Snow.

9 MR. COWAN: Good morning. Chris Cowan.
10 I'm also with Butler Snow.

11 MR. BOGAN: Good morning. My name is Matt
12 Bogan. I work for Nelson Mullins here in
13 Columbia, South Carolina.

14 MS. FLYNN: This is Stephanie Flynn. I'm
15 with Fox Rothschild. I represent American
16 International Industries.

17 MR. CHERRY: Nick Cherry, also with Fox
18 Rothschild for American International
19 Industries.

20 THE COURT: All right. Ladies and
21 gentlemen, this is the case of Michael L. Perry
22 and Lonnie L. Long versus Johnson & Johnson;
23 LTL Management, LLC; Johnson & Johnson Holdco,
24 Inc., and Kenvue, Inc., the Johnson & Johnson
25 defendants; and American International

1 Industries.

2 This case arises out of Mr. Perry's
3 alleged exposure to asbestos-containing talcum
4 powders. The plaintiffs are Michael Perry and
5 his husband, Lonnie Long.

6 The plaintiffs claim that Mr. Perry's
7 cancer, mesothelioma, was caused by his
8 exposure to asbestos found in defendants' talc
9 products. The defendants in this case are
10 Johnson & Johnson entities and AII.

11 Here are the questions for you as the
12 panel. Do you know or are you related either
13 by blood or marriage to Michael Perry or Lonnie
14 Long? If so, please stand.

15 Is there any juror who knows, currently
16 works for, or in the past has worked for or has
17 a business interest in Johnson & Johnson; LTL
18 Management, LLC; Johnson & Johnson Holdco,
19 Inc., and Kenvue, Inc., the Johnson & Johnson
20 defendants; and American International
21 Industries? If so, please stand.

22 Is there any juror who has been
23 represented by the law firm of Kassel McVey or
24 by Theile McVey of Kassel McVey, Jamie Rutkoski
25 of Kassel McVey, or the law firm of Dean Omar

1 Branham and Rachel Gross or Ben Adams or --

2 MR. GEORGE: Jonathan George.

3 THE COURT: If any juror has been
4 represented by any of those members of the
5 plaintiffs' team, please stand.

6 Is there any juror who has been
7 represented by the firm of Nelson Mullins or
8 Blake Williams, Mitch Brown, Yasmeen Ebbini, or
9 Matt Bogan? If so, please stand.

10 Has any juror been represented by the law
11 firm of Butler Snow or Kimberly Bueno,
12 Christopher Cowan, or Amy Pepke? If so, please
13 stand.

14 Has any juror been represented by the law
15 firm of Fox Rothschild or Stephanie Flynn or
16 Nick Cherry? If so, please stand.

17 Is there any juror who knows any of the
18 following potential witnesses: Michael Perry,
19 Lonnie Long, Dr. Barry Gibney, Dr. David Zhang,
20 Dr. Arnold Brody, Mark Bailey, Dr. Steven
21 Haber, Dr. William Longo, Dr. David Madigan,
22 Robert Johnson, Dr. Steven Mann, Paul Root,
23 Thibo Mongon, Dr. Edwin Kuffner, Dr. Dominik
24 Alexander, Dr. Christy Barlow, Dr. Gregory
25 Diette, Dr. Stanley Geyer, Dr. Victor Roggli,

1 Dr. Matthew Sanchez, Dr. David Weill, Dr. John
2 Hopkins, Dr. Alice Blount, Timothy McCarthy?
3 If so, please stand.

4 Has anyone --

5 PROSPECTIVE JUROR: Your Honor, I need to
6 go back just a second. I was represented by, I
7 believe, an attorney at Nelson Mullins. Her
8 name's Erin Black.

9 THE COURT: How long ago was it?

10 PROSPECTIVE JUROR: Two years ago.

11 THE COURT: All right.

12 MR. BOGAN: I think she works at Nexsen
13 Pruet.

14 PROSPECTIVE JUROR: Thank you. I wasn't
15 sure, and didn't --

16 THE COURT: So not connected with this
17 case at all. Thank you for being sure about
18 that.

19 Has anyone personally or has any member of
20 your immediate family -- which is your husband,
21 your wife, your children, your father, your
22 mother -- ever been a plaintiff or a defendant
23 in a lawsuit? If so, please stand.

24 Yes, sir.

25 PROSPECTIVE JUROR: Seven years ago I was

1 a plaintiff. My son died in a tree accident.

2 THE COURT: In a what?

3 PROSPECTIVE JUROR: **Tree accident.**

4 THE COURT: All right. Very good.

5 MS. PEPKE: Juror number?

6 PROSPECTIVE JUROR: **182.**

7 THE COURT: 182. Thank you, sir. You may
8 be seated.

9 Is there anyone here who would not award
10 money to a husband for a loss of consortium of
11 his male spouse? If so, please stand.

12 Does anyone here believe that they are
13 unable under any circumstances to award money
14 damages for someone's pain and suffering or
15 emotional distress? If so, please stand.

16 PROSPECTIVE JUROR: **Excuse me. I think**
17 **there's --**

18 THE BAILIFF: Stand up, please.

19 THE COURT: You've got to stand.

20 PROSPECTIVE JUROR: **I think there's some**
21 **concern about the previous question. I think**
22 **some folks, the jurors --**

23 THE COURT: Hang on. The previous
24 question is, is there anyone here who would not
25 award money to a husband for loss of consortium

1 of his male spouse? All right.

2 And the question I just asked that we kind
3 of -- I didn't see any stand, but does anyone
4 believe they are unable under any circumstance
5 to award money or damages for someone's pain
6 and suffering or emotional distress? If so,
7 please stand.

8 One question you may be asked during the
9 course of the trial is whether plaintiffs are
10 entitled to recover punitive damages from the
11 defendants. Does anyone believe they are
12 unable to award money damages, punitive
13 damages? If so, please stand.

14 Has anyone or any member of your immediate
15 family -- husband, wife, children, mother,
16 father -- ever worked with or around
17 asbestos-containing material that you know
18 about? If so, please stand.

19 Yes, ma'am.

20 PROSPECTIVE JUROR: Juror 94. My husband
21 is a painting contractor, so he does have to
22 sometimes, you know, get testing for asbestos.

23 THE COURT: All right. Would the fact
24 that your husband is a painting contractor
25 interfere with your ability to render a fair

1 and impartial verdict in this matter?

2 PROSPECTIVE JUROR: No, ma'am.

3 THE COURT: Let me go back to the
4 gentleman on the front row. Forgot to ask you
5 that question. You were involved in a tree
6 matter as a plaintiff.

7 PROSPECTIVE JUROR: Yes, ma'am.

8 THE COURT: Would the fact that you were
9 involved in that matter seven years ago
10 interfere with your ability to render a fair
11 and impartial verdict in this matter? If so,
12 tell me now.

13 PROSPECTIVE JUROR: No, Your Honor.

14 THE COURT: All right. Has anyone or any
15 member of your family, immediate family --
16 husband, wife, children, mother, father -- ever
17 worked or are currently working for a company
18 that made products using talcum powder? If so,
19 please stand.

20 Has any member of the jury panel had an
21 immediate family member -- husband, wife,
22 children, mother, father -- who had
23 mesothelioma or any asbestos-related disease?
24 If so, please stand.

25 Has anyone read or heard anything about

1 this case before today? If so, please stand.

2 All right. That completes the voir dire
3 questions. Now, here's what's going to happen.
4 The lawyers have something that is called a
5 strike sheet. It has names on it. And from
6 that they will make their strikes. And then we
7 will read out the names of the jurors who have
8 been selected.

9 It will be a different number that's used
10 for the strike, so you won't be able to tell
11 who's being struck from the number because it
12 won't be the same number as your juror number.
13 But when we assemble the whole jury, we'll call
14 that out so that you'll understand who has been
15 selected for service on this jury and who has
16 not.

17 These lawyers need about 15 minutes to
18 complete this. And they will then come back
19 and we'll strike the jury. And then here's
20 what's going to happen. I will dismiss you for
21 lunch. Those who are not, you have completed
22 your jury service. Those who are picked, I
23 will dismiss you for lunch. I will settle on a
24 time when you have to be back, and then we will
25 come back and begin the case.

1 And the case will begin by opening
2 arguments by each side of the case. And then
3 we'll move forward to the first witness.

4 I'll have a little something to say about
5 the nature of the case before we get started
6 and kind of how you function as jurors.

7 I think I've told you everything I need
8 to. So be at ease for about 15 minutes. Don't
9 stray too far. And these jurors -- I mean
10 these lawyers will sit here and work on their
11 strikes. And then it's 10 minutes of. Come
12 back at 5 after 12:00. All right. Court will
13 be at ease.

14 (Whereupon there was a recess in the
15 proceedings at 11:52 a.m.)

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

18 THE COURT: Yes?

19 PROSPECTIVE JUROR: I know Matt Bogan. We
20 go to church together.

21 THE COURT: Would the fact that you know
22 him have any effect on your ability to be a
23 fair juror?

24 PROSPECTIVE JUROR: I don't believe it
25 will.

1 THE COURT: Here is what's going to
2 happen. When we assemble again, I'm going to
3 ask that question in open court so we can put
4 that on the record. Thank you so much for that
5 disclosure.

6 PROSPECTIVE JUROR: **Absolutely. Do I need**
7 **to say I know Matt Bogan?**

8 THE COURT: Yes. I'm going to have you
9 stand up and tell me just what you told me and
10 we'll put it on the record. Thank you so much
11 for that.

12 PROSPECTIVE JUROR: **Okay.**

13 - - -

14 (Whereupon proceedings resumed at
15 12:07 p.m.)

16 - - -

17 (The following proceedings were held
18 in the presence of the prospective
19 jurors:)

20 THE COURT: Are we prepared to strike the
21 jury?

22 MS. MCVEY: Yes, ma'am.

23 MS. BUENO: Yes, Your Honor.

24 THE COURT: Very good. One thing that I'd
25 like to draw to your attention before we begin.

1 Juror 263?

2 PROSPECTIVE JUROR: 363.

3 THE COURT: Please stand. Say the number
4 again.

5 PROSPECTIVE JUROR: 363.

6 THE COURT: 363. Right. Juror 363 goes
7 to the same church as Mr. Bogan does. All
8 right. And so she knows him.

9 Would the fact that you know Mr. Bogan
10 through being in the same church with him have
11 any effect on your ability to render a fair and
12 impartial verdict in this matter?

13 PROSPECTIVE JUROR: No, Your Honor.

14 THE COURT: Very good. You may be seated.

15 PROSPECTIVE JUROR: Thank you.

16 PROSPECTIVE JUROR: Your Honor?

17 THE COURT: Yes.

18 PROSPECTIVE JUROR: Juror 50. I called my
19 company to find out and Johnson & Johnson is a
20 customer of ours and we supply them raw
21 materials.

22 THE COURT: Say again. Come down here
23 where I can...

24 PROSPECTIVE JUROR: Juror Number 50.
25 Johnson & Johnson is a customer of the company

1 that I work for and we supply them with two raw
2 material. I just wanted to be honest with
3 that.

4 THE COURT: What kind of raw materials?

5 PROSPECTIVE JUROR: Two powders.

6 THE COURT: Okay. Very good. Thank you,
7 ma'am. I appreciate that. Would the fact that
8 your company supplies Johnson & Johnson with
9 these two powder products have any effect on
10 your ability to render a fair and impartial
11 verdict in this matter?

12 PROSPECTIVE JUROR: No, sir.

13 THE COURT: All right. Ma'am. I swear I
14 shouldn't have gone to the beauty parlor and
15 gotten this haircut. Grandmother, mother,
16 daughter, beloved wife, I hope.

17 PROSPECTIVE JUROR: I'm sorry.

18 THE COURT: That's all right. Okay.

19 Let's begin the striking of the jury. And
20 I may say that in striking the jury, we will
21 pick four alternates.

22 Very good. All right. Ms. McVey, are you
23 speaking for the plaintiff?

24 MS. MCVEY: Yes, Your Honor. Just one
25 second. I apologize.

1 We're ready, Your Honor. I understand
2 we're striking the first four from 1 through 20
3 on the left-hand side?

4 THE COURT: That's correct.

5 MS. MCVEY: Your Honor, the plaintiffs
6 excuse Juror Number 3.

7 THE CLERK: Plaintiffs excuse Juror
8 Number 3.

9 MS. BUENO: And to be clear, are you
10 talking about the juror number or the one on
11 the left?

12 MS. MCVEY: Left.

13 THE COURT: The one on the left. Just
14 like I told y'all that's the one we'd be using.
15 Okay?

16 MS. BUENO: I just wanted to make sure.

17 THE COURT: All right. Defense?

18 MS. BUENO: Yes, Your Honor. We strike
19 Juror Number 7.

20 THE CLERK: Defense strikes 7.

21 MS. MCVEY: Your Honor, the plaintiffs
22 excuse Juror Number 1.

23 THE CLERK: Plaintiff strikes 1.

24 MS. BUENO: Defendants would strike Juror
25 Number 12, please.

1 THE CLERK: Defense strikes 12.

2 MS. MCVEY: Your Honor, the plaintiffs
3 strike Juror Number 9.

4 THE CLERK: Plaintiff strikes Number 9.

5 MS. BUENO: Defendants strike Juror
6 Number 16.

7 THE CLERK: Defense strikes Number 16.

8 MS. MCVEY: And the plaintiffs would
9 strike Juror Number 13.

10 THE CLERK: Plaintiff strikes Juror
11 Number 13.

12 MS. BUENO: And defendants strike Juror
13 Number 20.

14 THE CLERK: Defendant strikes Juror
15 Number 20.

16 THE COURT: All right. Alternates?

17 MS. MCVEY: Your Honor, the next three in
18 order, for the first alternate, the plaintiffs
19 strike Juror Number 23.

20 THE CLERK: Plaintiff strikes Juror Number
21 23.

22 THE COURT: 23 or 22, Ms. McVey?

23 MS. MCVEY: 23.

24 THE COURT: 23. All right.

25 MS. BUENO: Defendants strike Number 21.

1 THE CLERK: Defense strikes Number 21.

2 THE COURT: All right. That's the first
3 alternate.

4 MS. MCVEY: For the second alternate, the
5 plaintiffs would strike Juror Number 26.

6 THE CLERK: Plaintiff strikes Juror 26.

7 MS. BUENO: Defendants strike Juror
8 Number 24.

9 THE COURT: All right.

10 THE CLERK: Defendants strike Number 24.

11 THE COURT: Third alternate?

12 MS. MCVEY: Plaintiffs strike Juror
13 Number 27.

14 THE CLERK: Plaintiff strikes 27.

15 MS. BUENO: Defendants strike Juror
16 Number 28.

17 THE CLERK: Defense strikes Number 28.

18 THE COURT: Fourth alternate?

19 MS. MCVEY: I'm sorry, Your Honor. Your
20 Honor, the plaintiffs would strike Juror
21 Number 30.

22 THE CLERK: Plaintiff strikes 30.

23 THE COURT: Defendant?

24 MS. BUENO: Defendant would strike Juror
25 Number 32, please.

1 THE CLERK: Defendant strikes Number 32.

2 THE COURT: All right. Mr. Clerk, please
3 repeat the strikes.

4 THE CLERK: Yes, Your Honor.

5 Plaintiff strikes numbers 3, 1, 9, and 13
6 and alternates 23, 26, 27 and 30. Is this
7 correct?

8 MS. MCVEY: Yes.

9 THE CLERK: Defense strikes numbers 7, 12,
10 16, 20, and alternates 21, 24, 28, and 32. Is
11 this correct?

12 MS. BUENO: Yes, it is.

13 THE COURT: Very good. All right.
14 Mr. Clerk, call the names and seat the jury.

15 THE CLERK: Yes, Your Honor.

16 Ladies and gentlemen of the jury panel, as
17 I call your name, please come to the jury box
18 bringing your personal belongings.

19 Juror Number 37, Brandy Brown.

20 Juror Number 40, Fatima Bucheli.

21 Juror 31, Caroline Bond.

22 Juror 253, Donna Quirk.

23 Juror 51, Matthew Carswell.

24 Juror 78, Veronica Deas.

25 Juror 235, Austin Parrish.

1 Juror 75, Stephanie Davis.

2 Juror 360, Kayla Queener.

3 Juror 191, Aleksey Lyashevich.

4 Juror 296, Frantzetter Stone.

5 Juror 50, Ms. Carson.

6 Juror 166, Lakeisha Jenkins.

7 Juror 138, Kenneth Haynesworth.

8 Juror 355, Mary Gillespie.

9 And Juror 124, Gloria Green.

10 The jury's been seated, Your Honor.

11 THE COURT: Thank you. All right.

12 Clerk's office, check me on this, 3B.

13 THE CLERK: Yes, Your Honor.

14 THE COURT: Very good. Ladies and
15 gentlemen of the jury, the first thing we will
16 do is swear you. So let's go on and swear the
17 jury now.

18 THE CLERK: Yes, Your Honor.

19 THE COURT: Very good. All right.

20 THE CLERK: Ladies and gentlemen of the
21 jury, please stand and raise your right hand to
22 be sworn. After I give this oath, please
23 affirm with an "I do."

24 - - -

25 (Jury was administered the oath.)

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THE COURT: Ladies and gentlemen of the jury, the first thing to tell you is where you will be when you come back. Instead of being here in the second floor, you'll go up to the third floor and you will be in Courtroom 3B. So as you approach those doors, B is on your right, but you'll be in Courtroom 3B. That's where we're going to try the case.

We'll also make sure as time goes by that we pronounce such names as have been incorrectly pronounced, pronounce correctly. So we'll take care of that.

My maiden name was H-O-E-F-E-R, and I got Hoofer, Heifer, Hoffer, Hoefer, and everything else, but it was pronounced "Hoefer." So we'll take care of that.

I want you to refresh yourself and have lunch. And what's going to happen after you come and are seated is that I will give you the opening charge of the judge. That will describe to you what the case is in just a slight bit more detail than what you've so far heard and will describe your duties and mine.

And then the lawyers will give you their

1 opening statement. Each statement will take
2 about an hour, and they'll fully outline what
3 they intend to show on behalf of the client.

4 And then we will proceed to at least one
5 witness today. I'm going to try to keep it as
6 close to 5:00 as I am able to do. You will, of
7 course, have a midafternoon break, but if
8 there's any concern other than at that
9 particular time, you let me know.

10 What I will do is this. Some judges pick
11 the foreperson of the jury. I generally let
12 the jury do that themselves. But you need to
13 have just a little bit of a chance to know who
14 you are. So what I will do is have you
15 assemble. You'll hear the opening statements,
16 you'll take a break, go to the jury room. And
17 after that, if you feel you are ready, I'll ask
18 you while you're on your break to pick your
19 foreperson, and you'll do that and let me know
20 who that person is.

21 That foreperson doesn't have any more of a
22 voice than anybody else does. It is just the
23 person that is kind of our point of contact
24 with you, the members of the jury, about needs,
25 concerns, and ultimately the verdict itself.

1 But everybody's on the very same footing and
2 has the same influence as anybody else.

3 Of course, you can't talk about the case
4 ever until it's submitted to you for an actual
5 verdict. And that means while you're on your
6 break for lunch today.

7 I think that's probably all I need to
8 preliminarily charge you. I'll talk to you a
9 little bit in my charge about not looking
10 elsewhere for information other than what comes
11 out of this jury box or what comes, as far as
12 the law is concerned, from me. In other words,
13 don't -- resist that temptation to take those
14 wonderful electronic devices that we now live
15 by and do research about the case. You're not
16 supposed to do that. You can only hear what is
17 produced to you in this courtroom, and that
18 includes taking time for lunch right now. So
19 "Hmm, let me look up something." Don't do
20 that.

21 Your cell phones, I don't know exactly how
22 to do it here, about I imagine they secure the
23 cell phones and give them to you as you leave
24 to go about your business. And that's fine.

25 So it's 12:30, for all intents and

1 purposes. Come back to the 3B and be able
2 to -- ready to go at 2:00. Very well.

3 All rise as the jury retires. And the way
4 I'm going to let them retire -- have you got
5 all your belongings, members of the jury? Then
6 you follow the bailiff and he will show you how
7 you get out of this rabbit warren and where you
8 go to come back.

9 THE BAILIFF: Follow me.

10 THE COURT: Please be seated for just a
11 moment longer for members of the jury venire.

12 This may be a source of great relief to
13 you that you don't have to be with me and these
14 lawyers the next two weeks and try this case.
15 But this definitely counts as jury service, as
16 far as I'm concerned.

17 I thank you very much for your attention
18 to this matter, for all the pushes and pulls
19 that go with what seems to be endless delay and
20 everything else before trials proceed. Thank
21 you for your patience more than I can say.

22 And you are dismissed and not subject to
23 recall at any time during this two weeks. So
24 you may retire from the courtroom at this time.

25 Please stand for the jury venire.

1 UNIDENTIFIED PROSPECTIVE JUROR: Your
2 Honor, thank you for your years of service.
3 They're so appreciated.

4 THE COURT: Oh, aren't you kind. Thank
5 you so much. It's still fun or I wouldn't be
6 doing it. My husband says he has embraced
7 retirement and Jean has flunked retirement.

8 - - -

9 (The prospective jurors exited the
10 courtroom at this time.)

11 - - -

12 THE COURT: The courtroom door is closed.
13 Okay. Now, let's talk about what we need to
14 talk about. All right. Do we want a break,
15 have lunch, and come back here in an hour?
16 Would that be -- or thereabouts? Would that be
17 sufficient to take up whatever else we need to
18 take up?

19 MS. BUENO: That would be perfect.

20 THE COURT: Very good. And at that time I
21 will put on the record -- now that we have an
22 impaneled and sworn jury, I will put on the
23 record something that Matt Bogan was kind
24 enough to supply me with, which is putting on
25 the record the rulings made on the in limine

1 portion of this case.

2 Before I let y'all go, court personnel, we
3 can't print anything on our printer. Can you
4 figure out some way to get it so we can do
5 that? On my printer upstairs in my office, I
6 typed up Matt Bogan's little statement and some
7 other things that I wanted to print.

8 THE CLERK: I'll give you my e-mail
9 address and I'll print it up from mine.

10 THE COURT: Well, I don't like that.

11 THE CLERK: You don't?

12 THE COURT: No. I mean you're very kind,
13 and give me the e-mail address, but also tell
14 those folks to get something done about our
15 printer. This is a recurring problem. Tell IT
16 please help me out on this.

17 THE CLERK: Yes, ma'am.

18 THE COURT: Thank you.

19 MS. BUENO: Will we be in 3B?

20 THE COURT: 3B, exactly. If you want to
21 take things there now and secure things in any
22 way, you will be fine to do that.

23 Members of the bailiff staff, will they be
24 able to get in the courtroom?

25 THE BAILIFF: Yes.

1 THE COURT: You will be able to get in the
2 courtroom. If you want to put things in there,
3 that's fine.

4 MS. BUENO: Thank you.

5 (Whereupon there was a recess in the
6 proceedings from 12:33 p.m. to 1:51 p.m.)

7 - - -

8 THE COURT: My thinking is to put the
9 motion in limine statement, preserving it for
10 the record, on the record right now. And then
11 what else do I need to do?

12 MS. MCVEY: I think we can wait for
13 exhibits until at the end of the day.

14 THE COURT: Yes, I agree.

15 MS. MCVEY: There is one slide in the
16 opening that I think Johnson & Johnson --

17 THE COURT: All right. And then you've
18 got this tissue digestion matter. Well, why
19 don't I put the motion in limine on the record
20 right now, and then we'll go to these two
21 things we've got.

22 MS. BUENO: And we have two other things,
23 too. I have a total of four just quick things
24 before --

25 THE COURT: We'll get to them right now.

1 That's why I didn't even put my robe on. This
2 is Court's Exhibit Number 2.

3 - - -

4 (Chief Justice Toal's Ruling
5 Regarding Motions in Limine marked Court
6 Exhibit Number 2 received into evidence.)

7 - - -

8 THE COURT: This is a copy for each side
9 (handing).

10 All right. I'd like to place on the
11 record my ruling with respect to motions in
12 limine rulings that affect trial, but also
13 specifically affect possible evidentiary
14 matters and other matters. I have conducted
15 extensive pretrials and we have talked about
16 these motions in limine that deal with
17 witnesses, that deal with elements and other
18 things.

19 I have made rulings on these matters, but
20 there is concern that since those rulings were
21 made pretrial, there's a concern that
22 objections to these rulings are not adequately
23 preserved. And I intend to do everything
24 within my power to be absolutely sure that the
25 rulings are a matter of this record. As it now

1 stands, the jury hasn't even been impaneled, so
2 as to protect the objections of the objecting
3 parties with respect to my rulings.

4 I have reread all the rulings on the
5 motions in limine. I am familiar with the
6 requirements of State versus Forester. But I
7 hereby rule under Rule 43(i) of South Carolina
8 Rules of Civil Procedure, now that the jury is
9 impaneled, there will be no further arguments
10 regarding the elements that was the subject of
11 the motions in limine. Proffers in summary
12 form by any party can be made as needed at the
13 next break after any contested evidence is
14 introduced.

15 And in continece with the discussion in
16 State v. Forester, which I authored, I have in
17 effect refused to receive further arguments
18 about it, shut down further arguments. And on
19 that basis, the position of the objecting
20 parties, both sides, has been preserved.

21 All right. Now, these little things.

22 MS. BUENO: Your Honor, the first item is
23 just one slide in plaintiffs' deck. May I
24 approach and pass it out?

25 THE COURT: Certainly. I know you all

1 will provide me with the decks when you get
2 ready.

3 MS. BUENO: This is slide number 142,
4 which is the bottom left of the page I just
5 gave you.

6 THE COURT: Yes, I see it.

7 MS. BUENO: This relates to our discussion
8 earlier about successor liability.

9 THE COURT: Yes.

10 MS. BUENO: Plaintiffs wish to put up this
11 slide, which I understand will be animated to
12 start with all of these entities, and then take
13 certain entities away until it's left with
14 Kenvue and Johnson & Johnson Holdco. And I
15 object to this slide because there are entities
16 on here who are not defendants.

17 And the suggestion will be that
18 Johnson & Johnson created all of these
19 entities, but the only ones you need to worry
20 about are Kenvue and Johnson & Johnson Holdco.
21 That goes beyond Your Honor's ruling about what
22 they can do on successor liability in opening,
23 and I ask for this slide to be -- I object to
24 the slide and ask for it to be struck.

25 THE COURT: Very good. Ms. McVey.

1 MS. MCVEY: Thank you, Your Honor. This
2 is not to talk about successor liability. It's
3 simply to show, because you're going to see it
4 in documents and hear from witness, that these
5 are various entities. It's going to flash up
6 there. All these will go away and the only
7 thing -- the only point being made is that it's
8 just Johnson & Johnson and Kenvue. That's who
9 you're left with. That's who is important.

10 It's not talking about all the different
11 iterations and when they happened and all that
12 kind of stuff. It's going to be a quick move
13 through. But it's important to at least
14 introduce it because they're going to see it.
15 It's coming in in other stuff.

16 THE COURT: What you're saying, as I
17 understand it, by this slide is there are
18 myriad past and present Johnson & Johnson
19 entities.

20 MS. MCVEY: Right.

21 THE COURT: Amongst that myriad group of
22 entities, there are entities about which we are
23 concerned.

24 MS. MCVEY: That's right.

25 THE COURT: Yes, ma'am.

1 MS. BUENO: Your Honor, I object to
2 Chenango 1, Chenango 2. Some of the entities
3 on here are directly related to bankruptcy
4 issues. They have no bearings. They are not
5 defendants in this case and they have nothing
6 to do with Kenvue.

7 THE COURT: I understand. I overrule your
8 objection.

9 MS. MCVEY: Thank you, Your Honor.

10 MS. BUENO: Your Honor, another question
11 about opening. May I say in opening about
12 default against the AII defendant is procedural
13 and does not affect the proof regarding J&J?

14 MS. MCVEY: No.

15 THE COURT: I don't think you get to
16 interpret my ruling about another defendant. I
17 would -- I would deny your ability to do that.

18 MS. BUENO: Your Honor, the next item
19 let's talk about is Dr. Longo and the tissue
20 testing.

21 THE COURT: Yes.

22 MS. BUENO: As Your Honor knows, you told
23 us on Tuesday that you denied our motion in
24 limine. We understand that's a final ruling,
25 but you invited us to revisit it with you if

1 the experts were unable to do the tissue
2 testing before trial.

3 THE COURT: And what we have here is one
4 not able, yours; one able, theirs.

5 MS. BUENO: That's not true. We have two
6 that were unable to get the tissue testing done
7 before trial.

8 THE COURT: Two of yours unable, one of
9 theirs able.

10 MS. BUENO: No. Plaintiffs' experts did
11 not get the testing done in order for us to do
12 a discovery deposition before trial. We do not
13 know --

14 THE COURT: Okay. There are two questions
15 here. One is: Was the tissue digestion able
16 to be done? That's the first and really the
17 most important thing that I'm concerned about.
18 Tissue digestion was able to be done by
19 plaintiffs' expert. Was it able to be done by
20 your expert?

21 MS. BUENO: It was not, and we have no
22 idea what those results were.

23 THE COURT: That's the second question.
24 First of all, why -- if their experts could do
25 the tissue digestion, why were your experts not

1 able? You got it both at the same time.

2 MS. BUENO: Your Honor, if you read
3 Exhibit A to our motion, the most recent one
4 that we filed, we have an affidavit from
5 Dr. Geyer, our expert, who explained in
6 detail --

7 THE COURT: Oh, I've read his affidavit.
8 That's what you're relying on.

9 MS. BUENO: Dr. Longo testified --

10 THE COURT: Let's not get into Longo just
11 yet. I'm trying to find out -- we have a
12 discrete test to be run of tissue digestion.
13 It's always a big issue in these cases. These
14 tissues, you have to have a neutral that is
15 trustworthy to both sides to divide the tissue.
16 Then you have to get it to the parties'
17 experts, and then they have to do the digestion
18 which takes a little while to do. One side --
19 you both got it at the same time. Your experts
20 did.

21 MS. BUENO: Yes, ma'am.

22 THE COURT: That's part of the protocol.
23 They were able to complete theirs. Your
24 experts go into all kind of different things
25 about how they disagree with how theirs is done

1 and this, that, and the other and so forth, and
2 suggest that it was too short a period of time
3 to do it.

4 I've already had all that before me. That
5 has not changed. That does not persuade me to
6 exclude their tissue digestion. I don't
7 understand why it took so long. Part of it was
8 MUSC's fault, as I understand it. But in the
9 end you all both got it at the same time. You
10 all don't have one tissue digestion expert,
11 you've got two. I do not understand why at
12 least one of them was not able to do it.

13 Now, the second thing is you were not able
14 to have this big discovery thing and so forth.
15 Sometimes you don't get that. Discovery is not
16 a precursor to every piece of evidence that
17 comes in. I know about discovery disputes.
18 I've monitored them in this case. That makes
19 no difference to me in terms if a late piece of
20 evidence before it is to be presented to the
21 jury before the jury is to hear the first
22 opening argument.

23 There is now produced information about
24 the digestion. The fact that you can't perform
25 the kind of discovery you'd like is not the

1 issue to me. The issue is whether it's
2 admissible. I find it is admissible.

3 MS. BUENO: Your Honor, we cannot start
4 this trial and provide an opening statement
5 without understanding what testimony Dr. Longo
6 is going to come into this courtroom and talk
7 to the jury about.

8 THE COURT: Well, I disagree with that.
9 You can certainly say what you want to say
10 about tissue digestion, but I'm not going to
11 stop the trial and say they can't mention it
12 simply because they were able to perform it and
13 you were not.

14 In terms of knowing what Dr. Longo says,
15 my bet is, just a bet, that as experienced as
16 you lawyers are in this little particular slice
17 of evidence, that what Dr. Longo says is going
18 to come as no surprise to you.

19 MS. BUENO: It will come as a surprise to
20 me, Your Honor, because he said less than three
21 weeks ago that he was not able to get this
22 done.

23 THE COURT: That has no bearing on the
24 admissibility of it. Able to get done is not
25 something. What he found is the something.

1 And you're going to, I think, pretty well be
2 able to guess what he found.

3 MS. BUENO: I am not able to guess.

4 THE COURT: Well, then, I'm sorry for
5 that, but I am not going to do anything about
6 not admitting this evidence and I'm not doing
7 anything about excluding the mention of this
8 evidence in opening statement.

9 MS. BUENO: When can we get this evidence,
10 Your Honor?

11 THE COURT: I don't know, but I'm not
12 debating that with you right now. I'm going to
13 rule on these things and bring this jury in.
14 And it's past time to bring them in as it
15 stands. I've made my ruling.

16 MS. MCVEY: Your Honor, just to be
17 clear --

18 THE COURT: I have made my ruling.

19 MS. MCVEY: I was going to agree with you.

20 THE COURT: There's a rule that says when
21 the judge makes a ruling, you move on. I have
22 ruled.

23 MS. BUENO: Final issue, Your Honor.

24 THE COURT: Yes, ma'am.

25 MS. BUENO: Dr. Barlow, we mentioned her

1 earlier today. I understand from my
2 colleagues, perhaps I wasn't clear. Dr. Barlow
3 is our inhalation toxicologist. I would like a
4 ruling on this before opening because I intend
5 to open on it.

6 THE COURT: I'm not going to let you
7 interrupt their trial to have Dr. Barlow. They
8 proposed a proposal that would allow them to
9 keep on track and have Dr. Barlow come whenever
10 you put her in. But I am not going to grant
11 the motion to have her come early or anything.
12 They're going to finish their case and you're
13 going to do your case.

14 MS. BUENO: And we will adjust our
15 witnesses in their case accordingly so
16 Dr. Barlow can be here on Friday. We need to
17 do that.

18 THE COURT: You're not going to be able to
19 present Dr. Barlow on Friday. They have
20 already indicated that they have a full day on
21 Friday before they can close their case. So
22 you're not going to be able to present
23 Dr. Barlow on Friday.

24 MS. BUENO: Here is the concern and I
25 don't think I was clear. Dr. Barlow, due to

1 family commitments, is unable to be here Monday
2 and Tuesday. Your Honor has had a seven-day
3 trial. We're closing on Wednesday, the 14th,
4 which gives defendants two days, the 12th and
5 13th. Our expert cannot come. We're just
6 asking for grace from the court that we can
7 bring our expert on Friday. And we will -- we
8 will take --

9 THE COURT: Enough. You have asked now
10 about five times, just in this argument, for me
11 to do something I've already told you I'm not
12 going to do. I know why you want Dr. Barlow to
13 come on Friday.

14 Ms. McVey.

15 MS. MCVEY: Your Honor, the only thing I
16 want to say is that Dr. Brody has got to get
17 off the stand by 5:30 today.

18 THE COURT: Correct. I'm not going to
19 spend all this time with this. If y'all can
20 work out something, that's fine, but I'm not
21 going to grant your motion to interrupt their
22 trial with Dr. Barlow. That's it. Have I made
23 all the rulings I need to make?

24 MS. MCVEY: Yes, Your Honor. And I didn't
25 get the slide that you have.

1 MS. FLYNN: Your Honor, Stephanie Flynn on
2 behalf of AII. I have one --

3 THE COURT: Wait a minute, Ms. Flynn. Let
4 me recognize you first. I am not going to do
5 anything else about this matter. I'm going to
6 bring this jury in. I'm going to get these
7 opening arguments made, and then I'm going to
8 hear from Dr. Brody.

9 MS. FLYNN: I understand, Your Honor. I
10 just wanted to clarify whether AII would be
11 permitted to make an opening statement.

12 THE COURT: No.

13 MS. MCVEY: Your Honor, the only thing we
14 need to do when the jury comes in, as I recall,
15 is the Clubman charge. The AII charge on --
16 the liability's been determined before
17 openings.

18 THE COURT: Yeah, I just don't have it
19 right here.

20 MS. MCVEY: I'll get it for you.

21 THE COURT: I mean, I've got a whole list
22 of charges I'm going to have to give this jury
23 before we get started, as I think you well
24 know.

25 No, it's not up here. Do you know what

1 I'm talking about? Okay. Let me go get my
2 robe and this charge.

3 Okay. What I've got for things other than
4 my opening, I'm going to make my opening charge
5 to the jury, and then I'm going to tell them
6 about this case.

7 And I've got a -- that's what I haven't
8 got, is the general charge of the case.
9 Theile, do you got --

10 MS. MCVEY: Can we put on the --

11 THE COURT: Yes, yes. What I've got is
12 the AII default claim, and the spoliation
13 thing.

14 MS. BUENO: And you're not going to read
15 the spoliation thing, right, Your Honor?

16 THE COURT: Just let me get through what
17 I'm up here doing first and don't jump up
18 immediately, Ms. Bueno, and start trying to
19 make an argument before I figure out what I've
20 got up here. I've got the spoliation charge.
21 And then I've got --

22 MS. MCVEY: That's the case, the chunk
23 about the case.

24 THE COURT: I've already read them this
25 much. So all I've got to do is this, but I'm

1 going to kind of remind them on this first.

2 MS. MCVEY: That's fine.

3 THE COURT: What I'm going to do is just
4 remind them this is the case, as we said, Perry
5 and Long against the Johnson defendants, and
6 what it is. We've already read that to the
7 jury before.

8 And then I'm going to read the AII
9 material, which is, as I think I have
10 indicated, is the one that -- not the one that
11 AII did. I'm going to read the one that says,
12 "It's been determined as a matter of law,"
13 et cetera, et cetera. That's the one I'm going
14 to read as to AII.

15 And then I'm going to read the part
16 that -- of hers, of AII's, that says, "You find
17 if the non-default defendant is liable, your
18 only task as to American International is to
19 determine the amount" -- wrong. I'm going to
20 read the rest of the Theile thing, which is if
21 they're liable -- after I read about what
22 Johnson & Johnson is, I'm going to say you're
23 instructed if they are liable -- that they are
24 liable, and your only task is to determine the
25 total amount of damages.

1 MS. MCVEY: Yes, ma'am.

2 THE COURT: So that's what I'm reading.

3 All right. Ms. Flynn, is that -- does
4 that clarify for you what's going to be done?
5 I'm not going to have any more argument about
6 this. So listen carefully to what I have to
7 say. You've already objected to it. It's on
8 the record.

9 MS. FLYNN: I understand, Your Honor. We
10 maintain our objection. I just wanted to make
11 sure there was nothing going to be read about
12 willful, wanton conduct.

13 THE COURT: No. I charge that if punitive
14 damages become necessary to be charged. The
15 only thing I said so far about punitive damages
16 is whether they would be willing in the proper
17 case to award them. I'm not going to say
18 anything else about that until the second half
19 of the case when it comes, if it does come.

20 All right. Bring me the jury.

21 Is this something they're trying to set up
22 so other people can listen to this thing? Is
23 that what this Webex thing is? We don't have
24 to worry about it now because the next witness
25 is going to be live, Brody.

1

- - -

2

(The jury entered the courtroom at this

3

time.)

4

- - -

5

THE BAILIFF: The jury is seated, Your

6

Honor.

7

THE COURT: Thank you very much.

8

Ladies and gentlemen of the jury, it's now

9

going to be my task to orient you as to the

10

case, which I'm going to do, explain to you

11

what your responsibilities are and what my

12

responsibilities are. And then we'll have the

13

opening arguments for the jury.

14

Lawyers, you be seated.

15

Ladies and gentlemen of the jury, as I

16

think I explained to you -- you may all be

17

seated. You're kind of in the corner there.

18

Ma'am, over on my extreme left, can you see and

19

hear me? Very good.

20

This is the case of Michael Perry and

21

Lonnie Long versus Johnson & Johnson, LTL

22

Management, LLC, Johnson & Johnson Holdco,

23

Inc., and Kenvue, Inc., for Johnson & Johnson

24

defendants and American International

25

Industries. This case arises out of

1 Mr. Perry's alleged exposure to
2 asbestos-containing talcum powders.

3 The plaintiffs are Michael Perry and his
4 husband, Lonnie Long. The plaintiffs claim
5 that Mr. Perry's cancer, mesothelioma, was
6 caused by his exposure to asbestos found in
7 defendants' talc products. The defendants in
8 this case are Johnson & Johnson entities and
9 AII.

10 It has been determined as a matter of law
11 that American International Industries, AII,
12 which is a company responsible for Clubman talc
13 products, is liable to Mr. Michael Perry on
14 each of the causes of action pled against them
15 in this case, specifically negligence, strict
16 liability, fraud, conspiracy and implied
17 warranty of merchantability. It has been
18 determined as a matter of law that Clubman's
19 asbestos-containing talc product was defective
20 and unreasonably dangerous and was a
21 substantial factor in the development of
22 Michael Perry's mesothelioma. It has been
23 determined as a matter of law that American
24 International Industries' conduct was willful,
25 wanton, and reckless, meaning American

1 International Industries acted with conscious
2 indifference to the rights and safety of
3 others.

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

10 MS. FLYNN: Your Honor, may I approach?
11 Your Honor?

12 THE COURT: All right. Just one moment.

13 MS. FLYNN: May I approach?

14 THE COURT: No, ma'am, Ms. Flynn. You may
15 not approach. I have fully discussed what I
16 continue to do with regard to AII, and I've
17 done that. And I do not intend to revisit
18 that.

19 MS. FLYNN: There was a piece included
20 that was not intended to be included in the
21 instruction.

22 THE COURT: Well, all right. I can't do
23 anything about that right now, Ms. Flynn. I've
24 done the best I could.

25 MS. FLYNN: Yes, Your Honor. Please just

1 note our objection for the record.

2 THE COURT: All right.

3 Now, I've been passed a note about note
4 taking. And be assured that I will cover that
5 in the instruction I'm giving about how you
6 operate as a jury. But the short answer is
7 this: Many judges do not allow note taking. I
8 do allow note taking. And at your next break,
9 you will be supplied with tablets and writing
10 equipment so that you may take notes. And I
11 will explain to you in the process of this
12 charge how that operates and how you use those
13 notes.

14 Before we begin this trial, I want to tell
15 you this trial probably will be different from
16 what you might expect. Many people do not have
17 a chance to attend actual court sessions as you
18 are doing now, and may think from watching
19 television or reading books that trials are
20 always full of high drama, intense action and
21 rivetting circumstances.

22 While all of these things may be true at
23 times, this trial is not entertainment. It is
24 a fundamental part of our democracy, a search
25 for the truth and effort to make sure that

1 justice is done between the parties before the
2 court. Searching for the truth and making sure
3 that justice is done is often slow, deliberate,
4 repetitive, the opposite of what you may have
5 seen on television or in movies or may have
6 read in books. This courtroom is a place of
7 honor, dedicated to the protection and
8 preservation of citizens' rights through what
9 many have called the greatest justice system
10 ever.

11 The attorneys appearing before you are
12 advocates for the parties they represent, but
13 first and foremost, they are officers of the
14 court, sworn to uphold the integrity and
15 fairness of our judicial system and to help you
16 search for the truth. You should expect them
17 to be professional, competent, and ethical in
18 the representation of their clients' interest.
19 And remember that you have taken an oath to try
20 this case and reach a fair and just verdict.
21 So you will also be expected to be
22 professional, reasonable, and ethical.

23 I know something about your background
24 from the jury questionnaires, and I am
25 confident this jury is able to do that. Thank

1 you for accepting this important responsibility
2 of jury service and for your contribution today
3 to our justice system.

4 The first thing that will occur is that
5 one of the attorneys for the plaintiff -- and
6 the plaintiffs are the two people who brought
7 this action -- will make an opening statement
8 which will be followed by similar opening
9 statement on the part of the defendants. These
10 opening statements are not arguments. Those
11 arguments will come at the conclusion of the
12 entire case. Opening statements are not
13 evidence. The purpose of an opening statement
14 is for each party to outline to you his or her
15 claims and the elements which he or she intends
16 to present in support of these claims.

17 Following the opening statements, each
18 side will present its evidence with plaintiffs,
19 once again, going first. Evidence may take
20 many forms. It may be testimony, documents,
21 models, photographs or the like. You should
22 pay close attention to all evidence which is
23 presented by each party. You, the jury, are
24 the sole finders of the facts and no one else
25 will be permitted to weigh the evidence or

1 render a verdict except you.

2 After all the evidence has been presented,
3 the attorneys will make their closing
4 arguments. Unlike the opening statements, the
5 final remarks will be true arguments. That is,
6 each side will emphasize certain portions of
7 the evidence and try to persuade you to agree
8 with their version.

9 Keep in mind the opening statements, as
10 well as the closing arguments of the attorneys,
11 do not represent evidence in the case. Give
12 the attorneys your undivided attention, but
13 keep in mind that what they say is not
14 evidence.

15 After the arguments are finished, I will
16 explain to you what the law is applicable to
17 this case. That is called the charge to the
18 jury. I follow the practice of giving you the
19 charge as I must by reading it to you. But I
20 give each juror a copy of the charge. Maybe
21 you don't need to look at it or want to look at
22 it, but you'll have that in the jury room with
23 you, along with all the exhibits, and your best
24 understanding of the evidence as you decide the
25 case.

1 And once you have considered the facts in
2 the law, you will return a verdict in favor of
3 one side or the other. During the course of
4 the trial, the plaintiff has the burden of
5 proving his claims and the plaintiff must meet
6 this burden by proving his claims, their
7 claims, by the greater weight of the
8 preponderance of the evidence. And what we
9 mean by the greater weight of the evidence can
10 be illustrated by imagining a traditional set
11 of scales. When the case begins, those scales
12 are exactly even. After all the evidence has
13 been presented, if the scales remain perfectly,
14 evenly balanced or if they should tip slightly
15 so in favor of the defendant, then the
16 plaintiff will have failed to meet their burden
17 of proof and your verdict will be for the
18 defendant. But if, on the other hand, the
19 scales shall tip even slightly in favor of the
20 plaintiff, then they will have met the burden
21 of proof and your verdict would be for the
22 plaintiff.

23 I'd like to make a few additional comments
24 before the case begins. First, as I mentioned
25 earlier, although I am the only person who can

1 tell you the law, you are the only ones that
2 can determine the facts. I do not have the
3 right to indicate in any way how I might feel
4 about the evidence that is presented. And
5 throughout this trial, my intention will be to
6 act impartially towards each party.

7 Second, from time to time, an attorney
8 will object to some bit of evidence or -- which
9 the other side has presented. And as in sports
10 or business or any other structured activity,
11 there are certain rules that both sides must
12 follow in presenting the evidence. And these
13 rules have a definite purpose. They ensure
14 that the information you receive is the most
15 trustworthy and reliable evidence available.
16 An objection is a procedure that is used for an
17 attorney to call to the attention of the judge
18 a possible violation of the rules.

19 For this reason, don't hold it against the
20 attorneys if they make objections. Nor should
21 you conclude from my ruling that I favor one
22 side against the other. And sometimes I make a
23 ruling that I may change in the light of
24 something that goes on. Ms. Flynn just made an
25 objection. We don't hold that against AII.

1 She's going to look one more time at how I
2 explain their posture as a defendant in the
3 case. If I think there's something I said
4 incorrectly, and I may need to correct it, I'll
5 do so to you. But don't think that I -- I
6 deliberately try to stay as far away from
7 favoring one side as I possibly can, because I
8 don't have any interest in anything other than
9 in the fair trial of this case.

10 And, finally, I'd like to talk for a
11 minute about cell phones and just tell you, as
12 I said briefly this morning before you went to
13 lunch, you're not permitted to use those
14 devices either here in the jury room or when
15 you go back home at night to look up anything.
16 Nor are you allowed to do anything that
17 involves research on your own about the case.

18 Now, I know each of you has curious minds.
19 I certainly do. So that's very tempting to
20 look and see, "hey, let me check this out and
21 see what I think of that." But that goes
22 totally contrary to the way this trial
23 operates. You must only consider evidence
24 which comes from the witness box or from the
25 exhibits and so forth that are presented to

1 you. And you must only consider the law as I
2 give it to you and I charge it to you. And
3 that is the fundamental framework of this
4 endeavor. So we must all work very hard, you
5 and I, as these lawyers will, to be sure we
6 follow that framework as this case unfolds
7 before you.

8 Now, I would ask you to pay close
9 attention to all the evidence presented to you
10 because you will determine the facts and the
11 result you will have to evaluate the
12 credibility, which means the believability of
13 each witness who testifies in this matter.
14 There's going to be a lot of technical evidence
15 in this case. And frankly, when I first
16 started trying these asbestos cases and saw
17 these terms, like mesothelioma, and
18 epidemiology, and some of these other technical
19 matters that are brought to your attention, I
20 thought, oh, my, will I ever figure this out
21 enough to be able to render the service I need
22 to as a judge in this case.

23 My friends, you use your common sense as
24 you evaluate this material. It will be
25 presented to you in a way that you can

1 understand it. And before this trial is over,
2 mesothelioma and epidemiology and all the rest
3 of the terms will be rolling off your mouth
4 like you went to medical school. So your one
5 piece of concern, "I don't know if I can
6 understand this," you'll understand it. It's
7 the job of the lawyers and the evidence they
8 present to help you understand the technical
9 matters in this case. And you will understand.

10 You're participating in a time-tested
11 system and it's extremely important that you
12 listen carefully to all the evidence. Now, you
13 may take notes during the trial of this case.
14 I permit that. And just remember that these
15 notes are for your own individual purposes.
16 They shouldn't be discussed with anybody. Of
17 course, you can't discuss the case even with
18 each other until you've had a finding given for
19 your consideration at the end of the whole
20 case. And I should also warn you that you must
21 not allow this taking of notes to keep you from
22 listening and observing the witnesses. I'm
23 sure that each of you will perform your duties
24 accordingly. And we will now begin this trial.

25 Now, one more time, I am going to look at

1 what Ms. Flynn was concerned about, about the
2 way I introduced AII. So give me just a moment
3 to do that.

4 I think I charged what I need to about
5 AII, but let me just simply again emphasize to
6 you the liability has been determined. The
7 facts, with respect to Clubman talc, have been
8 determined. But the amount of damages has not
9 been determined. Much less has it been
10 determined that any actual or punitive damages
11 should be awarded. That is for the evidence to
12 proceed and determine. And although AII cannot
13 contest the fact of liability, they can
14 certainly participate in the discussion of
15 damages and will, and will make the appropriate
16 presentations on actual damages, and if the
17 case went to another level on any other kind of
18 damages that might be sought properly from the
19 jury. All right.

20 Ms. Flynn, I know that's not exactly what
21 you wanted, but I hope that cures any possible
22 inadvertence on my part. You don't need to
23 agree with me or disagree with me, but I've
24 done that in the hopes that I have clarified
25 the situation for all defendants in the matter.

1 MS. FLYNN: I understand, Your Honor. And
2 we appreciate it. And our prior objections I
3 made stand.

4 THE COURT: As I looked over it again I
5 realized that you were correct about that, so
6 that's why I tried to modify it in the way I
7 have done. Thank you very much for calling
8 that to my attention.

9 All right. We now come to opening
10 arguments. The plaintiff may proceed.

11 MS. GROSS: Hi, everyone.

12 THE COURT: Ms. Gross, on behalf of the
13 plaintiffs.

14 MS. GROSS: Yes.

15 Hi, everybody. I'm sure this is not what
16 you all pictured your day to be like when you
17 woke up this morning, but we just want to thank
18 you guys for being here today.

19 THE COURT: Ms. Gross?

20 MS. GROSS: Yes.

21 THE COURT: Get that microphone and get it
22 up where you can be heard.

23 MS. GROSS: In my face. All right.

24 THE COURT: Now speak one more time before
25 you begin your opening argument.

1 MS. GROSS: Is this better?

2 THE COURT: I don't think it's quite as
3 broadcast as it could be.

4 MS. GROSS: It's really going to be in my
5 face. Is this better?

6 THE COURT: Yes. The closer it gets to
7 you, the better. Keep your voice up. You may
8 proceed.

9 - - -

10 PLAINTIFFS' OPENING STATEMENT

11 - - -

12 MS. GROSS: So I get to tell you all why
13 you're here today, and that story begins in
14 1886 -- there we go. It begins in 1886 when
15 Johnson & Johnson first came into existence.
16 And shortly thereafter, Johnson & Johnson
17 started selling its very first product, which
18 was baby powder.

19 Johnson & Johnson has a credo. They call
20 it their moral code. And it's what they
21 project out into the world about what they
22 think is important. And what Johnson & Johnson
23 tells the world in their credo is that their
24 first responsibility is to the patients, and
25 then it's to mothers and fathers.

1 A few short years after Johnson & Johnson
2 started selling its baby powder, you could go
3 down to the library and see what was being
4 written down in mineralogy textbooks that talc
5 frequently contains asbestos. So now I think
6 is probably a good time for us to stop in our
7 story and talk about what on earth asbestos is
8 and what it's got to do with talc.

9 So this photo right here is an asbestos
10 mine. Asbestos at its core and its simplest is
11 a rock. If you leave it in the ground, you
12 don't mess with it, it's fine. But what
13 happens is -- what happened a long time ago is
14 companies decided that it was really useful.
15 They actually used to call it magic mineral.
16 It was acid-resistant; it was heat-resistant.
17 It was resistant -- indestructible. So what
18 would happen would be they would mine it out
19 and intentionally add it into products. And it
20 was also really cheap. They actually used to
21 call it the magic mineral because of how useful
22 it was and how inexpensive it was.

23 But the real problem with asbestos is that
24 it kills you. When you breathe asbestos, it
25 gives you a super-rare form of cancer called

1 mesothelioma. And mesothelioma is not one of
2 those cancers that we all may have heard of
3 that you can slow down with chemotherapy, you
4 can really treat it. It is a cancer that
5 essentially crushes your lung from the outside
6 in. It is incurable and it is always fatal.

7 There's six types of asbestos. Three
8 commercial types of asbestos, which means you
9 can buy it and intentionally add it into a
10 product. Three noncommercial, which means they
11 grow naturally. The four you have to worry
12 about for the length of this trial are the
13 three types of noncommercial, which are
14 tremolite, anthophyllite, actinolite, and
15 chrysotile as well. I can barely spell
16 anthophyllite; so I see some faces. I promise
17 you guys will feel better about this as we get
18 going.

19 You guys are going to learn as well a
20 whole bunch of things that makes asbestos
21 really dangerous and very scary. The first
22 thing is that you get this mesothelioma when
23 you inhale it, when you inhale these asbestos
24 fibers that have become respirable. These
25 photos up here are actually photos of asbestos

1 fibers that have been taken from talc, from a
2 talc product.

3 And the second thing you all are going to
4 learn is asbestos is really small. It's
5 microscopic. You can't see it. It's
6 completely aerodynamic. I show you this
7 semi-cheesy photo just to show you that point.
8 On the left side where we have the bigger
9 circle, you see two to three grains of rice.
10 In the bottom you see five or six human hairs
11 draped across a penny. But in that tiny little
12 circle, there's actually more than 20,000
13 asbestos fibers, and it's because it is so
14 microscopic that you can't see the fibers.

15 The next thing you guys are going to learn
16 about what makes asbestos so dangerous is it
17 has -- does not have what we call onion
18 properties. And what that means is, when y'all
19 are cutting or cooking and cut onions and it
20 makes your eyes water, or you're in a building
21 or a house and there's a gas leak and you can
22 smell it, asbestos has no natural warning signs
23 to let your body know that you're breathing it.
24 There's some people that actually call it
25 throughout history the silent stalker, because

1 you have no way that you're breathing these
2 tiny, microscopic, aerodynamic particles.

3 The other thing, next thing you're going
4 to learn about asbestos is this concept called
5 the latency period. And the way that I sort of
6 started wrapping my head around it when I
7 started doing this is when you're in a crowded
8 elevator or out in public and someone sneezes
9 or coughs around you and they don't cover their
10 mouth, and you think, "I'm going to get sick in
11 a couple of days," the couple of days in
12 between is the latency period. You don't get
13 sick right away. With mesothelioma, from the
14 time you start breathing asbestos until your
15 lung looks like that, the difference is it's
16 decades. It's anywhere from 10 to 80 years
17 from the first time you start breathing
18 asbestos is when your lung is going to look
19 like that.

20 The next concept you guys are going to
21 learn about is something called individual
22 susceptibility. And why it's important is
23 because it actually doesn't take that much
24 asbestos to give people cancer, to give people
25 mesothelioma. And what this means is I could

1 breathe the same amount of asbestos as
2 Mr. Adams or Ms. McVey, and I could get sick
3 and they could be fine. You just have no way
4 of knowing that I may be more individually
5 susceptible to getting the mesothelioma after
6 breathing asbestos.

7 And the other thing about it is once you
8 get asbestos into your home, like in a powder
9 product, it's virtually impossible to get it
10 out. It gets in your carpet. It gets in your
11 furniture. You try to vacuum it up, and
12 because the fibers are so small, it kind of
13 floats in the air and settles and it's the
14 cycle over and over again.

15 On the left is a healthy human lung. That
16 sort of shiny layer that you all see is called
17 the pleura. That is where the mesothelioma
18 cancer is. It's not in the lung, it's the
19 lining around the lung. The purpose of the
20 pleura is when we breathe, our lungs expand,
21 they expand out into your ribcage, and that
22 moist pleura lining is what protects your lung
23 from rubbing up against your ribcage.

24 And what happens when you get mesothelioma
25 is that shiny pleura, the layer, that's where

1 the tumor starts and it forms -- if you all see
2 on the left side, it looks like an orange rind.
3 It's hard. You can't really expand your lungs
4 fully to catch your breath because it's that
5 orange rind that's pushing in, crushing your
6 lung from the outside in. And if you can catch
7 your breath, it's just this hard rind rubbing
8 up against all the nerves in your chest cavity
9 and your ribcage. Some people who have
10 mesothelioma actually have a procedure to dull
11 the nerves because of how painful it is.

12 Now is probably the time where some of you
13 all are wondering what's this got to do with
14 talc. Talc, just like asbestos, is a rock. So
15 this is a talc mine. And what happens is talc
16 occurs naturally in the ground just like a
17 rock. There's all kinds of other minerals that
18 can be in it, but it's like a rock. It grows
19 along asbestos. What happens is they blast it
20 out of the ground. And then these big rocks
21 get soft and it gets pulverized down into a
22 powder that then ends up in cosmetic products
23 that we use in our house.

24 And because they are rocks -- I'm just
25 showing all this so you can see they look the

1 same unless you look in the middle. If you see
2 the fiber-looking things on the right side,
3 that's the asbestos.

4 And the way -- the best way to think about
5 this is when you have a steak and you have a
6 vein of fat that run through the steak, and you
7 can never really get the vein of fat out of the
8 steak. It's the same concept with asbestos and
9 talc, except the asbestos is the veins of fat
10 that you can't get it out. So you get the
11 talc; it's blasted out of the ground; it's
12 ground down and pulverized into this very fine
13 powder to go into cosmetic products.

14 Because asbestos and talc grow next to one
15 another hand in hand, the asbestos just gets
16 ground down into the talc and you can never
17 really get it out.

18 And so the next natural question is
19 probably, well, what did they know? Right?
20 Did Johnson & Johnson know this? Did they know
21 that there can be asbestos in talc? Did they
22 know asbestos makes people sick? Did they know
23 that there was asbestos in their talc? And the
24 answer is unequivocally, by 1958, you all will
25 learn, they did. The answer to all those

1 questions is yes. And we know this because
2 they started writing it down. And I'll just
3 tell you guys, when you see quotes like this,
4 that means it comes from a document that was
5 given to us by Johnson & Johnson. They gave us
6 these documents.

7 So in 1958, Johnson & Johnson in their own
8 internal documents starts writing down the
9 medical department has knowledge that asbestos
10 was associated with cancer. And in that same
11 year, Johnson & Johnson goes and hires this
12 lab, Battelle Memorial. And what Battelle
13 Memorial does is they test Johnson & Johnson's
14 Italian talc. So the talc that went into
15 Johnson & Johnson's baby powder and other
16 products in 1957 came from Italy.

17 So Battelle goes and tests the Italian
18 talc and tells Johnson & Johnson there's
19 fibrous amphibole established in tremolite.
20 Tremolite is one of those type asbestos that we
21 just talked about. And then here is the
22 definition of what asbestos is to make it
23 simple for you all. "Asbestos is defined to be
24 the fibrous serpentine, chrysotile and the
25 fibrous forms of the amphibole group as

1 represented by amosite, anthophyllite,
2 crocidolite, tremolite and actinolite."

3 For anybody that is wondering where I got
4 this, did I just Google it, some whacky
5 definition off the Internet, this is actually
6 Johnson & Johnson's definition. They wrote it
7 down. You'll see it. This is how
8 Johnson & Johnson defines what asbestos is.

9 After Battelle finds fibrous tremolite in
10 their Italian talc in 1958, Johnson & Johnson
11 keeps selling their baby powder year after year
12 until we get to 1966. And what happens in 1966
13 is there is an employee of Johnson & Johnson, a
14 doctor who started asking some questions. Why
15 are we selling this baby powder with talc in
16 it? It has no medicinal value. It's a foreign
17 body. There's been at least three deaths of
18 infants who have asphyxiated. They actually
19 choked on it from inhaling the baby powder.
20 What Johnson & Johnson writes down in response
21 is "Baby powder represents the cornerstone of
22 our baby products franchise." Our entire
23 reputation is built on baby powder and also "we
24 have a large investment in a talc mine."

25 And so in 1967, as they're continuing to

1 sell their baby powder, Johnson switches their
2 talc from Italian to Vermont, which is where
3 they bought a talc mine, in Vermont, and they
4 immediately test the Vermont talc. And they
5 find tremolite twice. They just keep selling
6 it.

7 In 1969, they write down "medical
8 literature has made reference to potential
9 hazards of talcs containing tremolite. Severe
10 objections to that mineral in talcum powders."
11 And then just a month or so later, they write
12 down again, "we've received inquiries
13 expressing concern over the possibility of
14 adverse effects on the lungs of babies or
15 mothers who inhale our talc." Mothers reaching
16 out to Johnson & Johnson worried about their
17 babies breathing this talc in the baby powder.
18 They continue that there would be "a furor -- a
19 furor is a public outrage or outcry -- there
20 would be a furor if it became known that our
21 talc contained any significant amount of
22 tremolite. The law department should be
23 consulted." Not health and safety. The law
24 department should be consulted. And then they
25 keep selling it.

1 In 1971, you all will see the director of
2 science information for Johnson & Johnson is
3 doing a lot of research internally, a lot of
4 it. And he's looking into things like
5 "asbestos and lungs, talc, mesothelioma and
6 asbestos exposure, relation between exposure to
7 asbestos and mesothelioma, mortality among talc
8 miners and millers, malignant pleural
9 mesothelioma and asbestos exposure." This is
10 all what their director of science information
11 is researching and circulating within the
12 company in 1971.

13 And in the same year their ads to the
14 public look like this. Johnson & Johnson is
15 advertising to the public that very same year
16 that its baby powder is so pure, it feels like
17 love. Later that year they hire another --
18 another lab, Colorado School of Mines, to test
19 their baby powder. Colorado School of Mines
20 writes down and tells Johnson & Johnson you've
21 got needles of tremolite in your baby powder.

22 That same year Dr. Langer, a doctor from
23 Mount Sinai, goes and buys a bottle of baby
24 powder off the shelf to test it. He writes
25 down, there's chrysotile fibers in Johnson's

1 Baby Powder.

2 Again, in 1971, Johnson & Johnson itself
3 writes down in their own documents "the talc in
4 Johnson's Baby Powder is from Vermont where the
5 ore consists of platy talc with fibrous
6 tremolite and actinolite." Just to sum it up,
7 because that's been a lot already, by 1971 you
8 have Battelle who found the fibrous tremolite
9 in 1958. You have Dr. Langer who bought the
10 bottle off the shelf and tested it and found
11 chrysotile asbestos. Colorado School of Mines
12 wrote down there's "needles of tremolite" in
13 your baby powder. And then Johnson & Johnson
14 wrote down there's "fibrous tremolite and
15 actinolite" in your talc.

16 And so what Johnson & Johnson does that
17 same year in 1971, they go to the FDA. They
18 tell the FDA, Johnson's Baby Powder contains no
19 asbestos minerals.

20 You guys will hear a lot about Dr. Pooley,
21 I'm sure, through this trial. But even
22 Dr. Pooley tests its talc, tests Johnson &
23 Johnson's talc in 1971. Dr. Pooley found one
24 small chrysotile fiber. And I'm showing you
25 guys this ad to tell you that at the same time

1 Johnson & Johnson sold baby powder, it sold
2 another talc product called Shower to Shower.
3 What you all need to know about it is it
4 contained the same talc that was inside the
5 baby powder, the Vermont talc. That's really
6 what you guys need to know about that.

7 Johnson & Johnson that same year, still in
8 1971, the testing continues, goes and hires
9 McCrone, another lab, to test its Shower to
10 Shower with its same Vermont talc. And McCrone
11 in a report to Johnson and Johnson says, in
12 your Shower to Shower there's chrysotile.

13 In 1972, the next year, the FDA goes and
14 hires Dr. Lewin from NYU to test Shower to
15 Shower. Dr. Lewin finds chrysotile. After
16 that Johnson & Johnson hires another lab,
17 Sperry Rand. And Sperry Rand double-checked
18 the sample that Dr. Lewin had just tested and
19 found chrysotile. Sperry Rand said there are
20 asbestos fibers. They're chrysotile.

21 So again, just to sum it up, there's a lot
22 of testing we are talking about. In 1972,
23 Dr. Langer, the year prior, found chrysotile
24 asbestos in the baby powder. Dr. Pooley found
25 small chrysotile fiber; McCrone, chrysotile

1 asbestos; Dr. Lewin, chrysotile asbestos; and
2 Sperry Rand, when they double-checked
3 Dr. Lewin, chrysotile asbestos.

4 And what happens is Johnson & Johnson goes
5 to the FDA and talks about Sperry Rand, just
6 Sperry Rand that same year, and tells the
7 FDA -- they convince the FDA that Sperry Rand's
8 testing results are completely at variance from
9 the information we have despite all that.

10 All the while Johnson & Johnson reaches
11 out to a doctor in Minnesota called
12 Dr. Hutchinson. They send him two samples of
13 Shower to Shower. They send him more of the
14 Dr. Lewin sample. They sent them to
15 Dr. Hutchinson. He tests them. He says the
16 original Lewin material had tested, he found
17 chrysotile asbestos eight times. It's
18 unmistakable. And then he takes photos of the
19 asbestos that he found in the talc powder. And
20 then continues and writes down "chrysotile
21 asbestos does exist in the specimens of Shower
22 to Shower and Lewin supplied to this
23 laboratory."

24 So then again Johnson & Johnson goes back
25 to the FDA and they tell the FDA -- they don't

1 just bury Dr. Hutchinson's results, they go
2 back to the FDA and tell the FDA, the Lewin
3 sample Dr. Hutchinson tested, there's no
4 chrysotile there, no chrysotile was detected,
5 even though he took those photos.

6 So another summary slide. All of these
7 doctors, all of these labs at this point in
8 time, by 1972, have found chrysotile asbestos
9 in Johnson & Johnson's talc over and over
10 again. But what Johnson & Johnson does is they
11 take Dr. Lewin's testing, the guy that kind of
12 started all this in 1972, and then they
13 convince the FDA it's not reliable; what
14 Dr. Lewin found should not be trusted; it's not
15 reliable. I don't expect that he will allow
16 the release of Dr. Lewin's report.

17 And then they beg the FDA, please don't
18 release it. Don't tell anybody. Hold
19 Dr. Lewin's findings in strict confidence.

20 All the while Johnson & Johnson is
21 advertising not just to even mothers with
22 babies, they're advertising actually to men, as
23 well. I had to Google who this was, but it
24 turns out he was a pretty famous baseball
25 player that hit a lot of home runs. And

1 they're using him to advertise their baby
2 powder. "Mama taught me it takes more than a
3 towel to really get dry."

4 Later that same year, Johnson & Johnson
5 hires Dr. Ian Stewart to do some testing on its
6 baby powder and the Lewin samples again.
7 Dr. Stewart writes down, "both samples contain
8 tremolite, tremolite content approximately
9 0.5 percent and 0.2 to 0.3 percent," which I
10 know looks like a small number, but because of
11 how microscopically small the asbestos fibers
12 are, what you guys are going to learn is that
13 represents millions upon millions of asbestos
14 fibers.

15 And then Dr. Stewart continues. He writes
16 down "a few tremolite rods as well at a level
17 less than 0.5 percent, definitely significant
18 quantities of tremolite." And then what
19 Johnson & Johnson does -- you all will see the
20 document -- they delete this last sentence.
21 And then they write across the front in big
22 letters, "Do not use this report." And then
23 they bury it.

24 Again, later that same year, 1972 -- it's
25 a busy year -- Johnson & Johnson writes this

1 document that they call "Antagonistic
2 Personalities in the Talc Story in the USA."
3 What it is is a list of people who are talking
4 about asbestos being in talc. They write down
5 Dr. Selikoff, who we will learn, as well, was
6 sort of the forefather of asbestos disease
7 research. They write down Dr. Selikoff is an
8 antagonistic personality because he showed
9 people suffering from cancer related to
10 asbestos.

11 They also write down Dr. Langer, who
12 identified chrysotile in 1971. They write down
13 Dr. Lewin because he insists on claiming
14 there's asbestos in the talc. They also just
15 write the FDA. FDA is an antagonistic
16 personality in 1972.

17 The next year, 1973, Johnson & Johnson
18 writes down itself in its own documents, "Our
19 baby powder contains tremolite or actinolite,
20 and these might be classified as asbestos." So
21 the next year, in 1974, the FDA decides we're
22 going to test this. So the FDA tests again the
23 Dr. Lewin sample. They say, hey,
24 Johnson & Johnson, we found 107 fibers of
25 tremolite and actinolite per milligram. And so

1 Johnson & Johnson's response is something I
2 truly hope that long after this trial you all
3 remember, if there's anything. They convince
4 the FDA substantial asbestos can be allowed
5 safely in a baby powder.

6 Later that same year they hire McCrone
7 once again to test their Vermont talc. McCrone
8 finds chrysotile asbestos 15 times, fibrous
9 tremolite four times. Again that same year
10 they hire Dartmouth to test their Vermont talc.
11 Dartmouth says there's "fibrous anthophyllite,
12 extremely low chrysotile levels present."

13 And you guys might be wondering, why
14 didn't they just use something else? If talc
15 was so bad, was there something else they could
16 have used in their powder? And there was.
17 You'll see in Johnson & Johnson's own
18 documents, they knew "people were selling
19 cornstarch for baby powder throughout the
20 entire 1900s." Why wouldn't they just use
21 that? They tell us why. "We should avoid
22 changes to the product that would increase our
23 vulnerability to criticism or suspicion." They
24 were afraid they'd get caught.

25 So the next year, in 1975, the testing

1 continues. Johnson & Johnson once again hires
2 McCrone to test its Vermont talc. And McCrone
3 tells them "29 talc samples from your ore body
4 confirmed asbestos 14 times."

5 Six months later, in November of that same
6 year, Johnson & Johnson again hires McCrone to
7 test its Vermont talc. The samples we have,
8 there's fibers of asbestos rather high. So a
9 few months later, in early 1976,
10 Johnson & Johnson hires a consulting company to
11 write a 50-page or so monograph to give to
12 hospitals due to the concern in the public eye
13 about asbestos being in talc. And this
14 document is called "Talc, Professional
15 Information for Physicians and Nurses." And
16 what Johnson & Johnson tells hospitals, doctors
17 and nurses in 1976, just a few months after
18 McCrone found fibrous tremolite in their talc
19 again, "Johnson's Baby Powder contains no
20 detectable asbestos."

21 The following year, Johnson & Johnson
22 hires a new lab in 1977. This time it's EMV
23 Associates. EMV tests their talc, tells
24 Johnson & Johnson in nine talc samples,
25 "fibrous tremolite found, anthophyllite,

1 possible fibrous shown."

2 And so what does Johnson & Johnson do?
3 Nothing except they keep selling it year after
4 year after year, all the way through the rest
5 of the '70s, all of the 1980s, until we get to
6 1991.

7 They're still selling it, but what happens
8 in 1991 is they go to one of their consultants,
9 Dr. Blount, who worked for Johnson & Johnson at
10 the time, and she does a study on a bunch of
11 talc samples. And you'll see through documents
12 she tests sample I and finds tremolite
13 asbestos. And when you piece it together,
14 sample I is Johnson & Johnson's Vermont talc.
15 And they keep selling it year after year.

16 And in 1997, something interesting
17 happens. Johnson & Johnson writes down they're
18 starting to look at the bodies of women who
19 have mesothelioma, this super-rare cancer. And
20 they say in several mesothelioma patients, both
21 talc fibers and tremolite were detected. The
22 majority of asbestos bodies from women have
23 tremolite or anthophyllite, the kind of
24 asbestos you can't buy. These are known
25 contaminants of talc.

1 They go on to say "This data suggests that
2 rare cases of mesothelioma among women with no
3 other identifiable exposure might be related to
4 cosmetic talc." So these women with
5 mesothelioma that have these noncommercially
6 available asbestos in their bodies have no
7 other asbestos exposure except to cosmetic
8 talc, and they wrote it down in 1997.

9 All that while that same year they are
10 training their people about the image
11 Johnson & Johnson has and they're explaining to
12 them how important this mother-infant bond is.
13 The key competitive advantage is the
14 mother-baby company. That's what we portray to
15 the world. Their ads are consistent with that.
16 This is the one we looked at earlier, "So pure
17 it's love." The one on the left is actually
18 from 1958, the year that Battelle found
19 tremolite and wrote it down. And you'll see
20 when you get your hands on the ad, it's talking
21 about how fragile babies are.

22 They also advertise to fathers and sons,
23 the whole family, like son like father. 1998,
24 Johnson & Johnson goes back to Dr. Blount who
25 is no longer working for them at the time.

1 Tries to get her to do some work for them, and
2 she says, "I guess, but your Vermont talc has
3 asbestos in it." And they keep selling it well
4 into the 2000s.

5 In 2003, Johnson & Johnson switches from
6 using the talc from its Vermont mine to one
7 from China. In 2004, this news station in
8 Sacramento, California, went and bought a
9 bottle of Johnson's Baby Powder off the shelf
10 and had a lab test it. The lab finds asbestos.
11 You guys will see, they tell Johnson & Johnson,
12 "Hey, we bought a bottle of your baby powder
13 off the shelf and found asbestos in it." And
14 Johnson & Johnson buries it and tells no one.
15 They keep selling it.

16 Again, 2004, again, more internal
17 documents educating their employees. Baby
18 powder, Johnson & Johnson's baby powder is the
19 primary link to the positive Johnson & Johnson
20 name and whole line. They use words to
21 describe how important baby powder is to their
22 image as a company. They use words like
23 sacred, sacred cow, golden egg, our equity, our
24 flagship, our foundation, the cornerstone of
25 our company is this baby powder, and they keep

1 selling it.

2 In 2013, Johnson & Johnson is writing a
3 draft press release article for their website,
4 and you guys will see "Our talc-based consumer
5 products have always been asbestos-free."
6 Someone goes in, they cross out "have always
7 been" and Johnson & Johnson writes, "We cannot
8 say 'always.' We cannot say that our
9 talc-based consumer products have always been
10 asbestos-free." And they keep selling it year
11 after year.

12 In 2016, Johnson & Johnson again hires a
13 new lab. This time it's R.J. Lee, who you guys
14 will learn sort of becomes their go-to lab.
15 They have R.J. Lee test their talc. R.J. Lee
16 finds multiple chrysotile particles observed.
17 Johnson & Johnson says, "Test it again."

18 They test it again. A re-prepared sample
19 is analyzed. This time R.J. Lee finds no
20 chrysotile, no asbestos. And Johnson & Johnson
21 doesn't tell anybody about the first time they
22 found all the chrysotile, and they keep selling
23 it.

24 2017 is a big year. You guys will hear a
25 lot about this. There is a massive explosion

1 of information in the public because 2017 is
2 the first year that Johnson & Johnson was
3 forced to turn over all these documents that I
4 just talked to you all about that you will see
5 throughout this trial. No one had seen them
6 before, before 2017. They keep selling it.

7 And after this explosion of information,
8 the FDA decides we're going to test this baby
9 powder again. They go and buy a bottle of
10 Johnson's Baby Powder. They test it. They
11 find chrysotile over and over again. They take
12 photos of the asbestos, and then they call it
13 poisonous.

14 And so what Johnson & Johnson does next is
15 they take this bottle of baby powder that the
16 FDA has said is poison and they fly it on a
17 private plane to R.J. Lee, their go-to lab.
18 And R.J. Lee tests it, the same bottle. They
19 find chrysotile asbestos. They take photos of
20 it. They find it 27 times.

21 And then that same year Johnson & Johnson
22 turns around and tells the American public
23 asbestos was not present in the bottle the
24 FDA's contracted lab tested. And they keep
25 selling baby powder for another year, through

1 2020, in the United States and Canada.

2 And what happens in 2021, there's a myriad
3 of Johnson & Johnson companies, but for
4 purposes of this trial, the only ones you all
5 need to worry about are Johnson & Johnson and
6 Kenvue. They keep selling the baby powder,
7 their talc, worldwide for another few years
8 until we get to 2023. And then they decide "we
9 should stop." And so we brought this case to
10 you guys for three reasons because of that.

11 The first is Johnson & Johnson knew,
12 right? They knew there was asbestos in their
13 talc, and they sold it anyway; that the talc
14 that had asbestos in it was an unreasonably
15 dangerous product to sell, and that it hurt
16 somebody. And that somebody is named Michael
17 Perry.

18 In 1969, when Johnson & Johnson is writing
19 down there would be a furor, a public outcry if
20 it became known that our talc formulations
21 contained any significant amount of tremolite.
22 Michael is born on December 20th, 1969.

23 In 1974, when Johnson & Johnson tells the
24 FDA that a substantial amount of asbestos can
25 be allowed safely in a baby powder, Michael is

1 having his first memory. He is about five.
2 He's having his first memory of life ever. And
3 one of those memories is using Johnson's Baby
4 Powder all over his body because he's allergic
5 to deodorant.

6 In 1980, when Johnson & Johnson is
7 advertising to the public, targeting men, like
8 son like father, you'll learn that Michael was
9 playing hockey and he would take bottles of
10 Johnson's Baby Powder and dump it in his hockey
11 gear to keep it from smelling really bad.

12 And so like Judge Toal instructed you,
13 after me, the lawyers for Johnson & Johnson are
14 going to come talk to you all. I think they
15 are going to talk to you about a few things
16 most probably what -- I will spend a few
17 moments addressing them now.

18 The first thing is they're going to tell
19 you it was not there; there was no asbestos in
20 our baby powder. But for that to be correct,
21 all these doctors and labs have to have gotten
22 it wrong. All except R.J. Lee. And what you
23 all will learn about R.J. Lee,
24 Johnson & Johnson's go-to lab, is that R.J. Lee
25 is not a stranger to talc litigation. They

1 were first hired by a company named
2 R.T. Vanderbilt who owned a talc mine in
3 upstate New York. And what they did with this
4 Vanderbilt talc mine is R.J. Lee would go in
5 and they would say, this tremolite isn't really
6 asbestos. The anthophyllite isn't really
7 asbestos.

8 All those documents that the plaintiffs'
9 lawyers showed you, they're not saying what
10 they really say. They're about something else.
11 And it's exactly what they're going to do here
12 today.

13 The problem for R.J. Lee is that multiple
14 people, over a dozen, died of mesothelioma in
15 that R.T. Vanderbilt talc mine, and a couple
16 people actually died in Johnson & Johnson's
17 talc mine, too.

18 The next thing you're going to hear from
19 them is, "Well, we tested. We tested our
20 product. We tested our talc." Well, this is
21 the best photo I could think of to illustrate
22 this point. We obviously know there's billions
23 of people who live on earth. We can't see
24 them. We can't see them looking at this photo,
25 but we know they're there. The tool that

1 Johnson & Johnson would use for a period of
2 time is called XRD, x-ray diffraction. And it
3 was not -- you couldn't see it. You couldn't
4 see the asbestos that was there.

5 And then you might hear from them, we used
6 a strong tool. We used this big, giant
7 microscope. You guys will see it at some
8 point. To use that microscope, it's called
9 TEM, and it can zoom in close enough to
10 literally look for a needle in a haystack,
11 which is finding the asbestos in the talc.
12 When you use the TEM and zoom in that close,
13 the talc kind of looks like this. It's platy.
14 It's thin and literally they look like plates.
15 And to look for the asbestos needles, it takes
16 time. It's a time-consuming process. It's
17 work looking for it. But that's the only way
18 to truly find the needle in the haystack as it
19 were.

20 And then Johnson & Johnson is going to
21 tell you, not only did we use the TEM, but we
22 designed our own testing method for it. Their
23 testing method is called TM7024. And I want to
24 talk to y'all about what this testing method
25 actually means. So what TM74 says is the

1 detection of five or more asbestiform minerals
2 of one variety constitutes a quantifiable level
3 of detection.

4 In English that means this: I can find
5 four fibers of chrysotile asbestos in a bottle
6 of baby powder and say it's not there. It
7 means I can find four fibers of chrysotile
8 asbestos and four fibers of tremolite in one
9 bottle of baby powder and say it's not there,
10 because it's not five or more of one kind.

11 What it means is I could find all of this,
12 I could find four fibers of chrysotile, four
13 fibers of tremolite, four fibers of
14 anthophyllite and four fibers of actinolite, 16
15 fibers of asbestos in one bottle of baby powder
16 and I could say it's not there. That's what
17 TM7024 allows for.

18 And the thing with using TEM is you take
19 photos. These are photos that you take when
20 you look under that microscope of the talc for
21 the asbestos needles. And it's pretty hard to
22 rig a test if you take photos because it's
23 proof. And what you all will learn is in over
24 90 -- 99 percent of the photos with the TEM
25 that Johnson took over time with all the

1 testing they did, the photos are gone with no
2 explanation, no trace. They're just gone.

3 But it actually gets worse because there's
4 this testing method called the concentration
5 method that's been around for decades. You'll
6 see Johnson & Johnson has known about it since
7 1971. And the way the concentration method
8 works is asbestos and talc weigh different
9 amounts. And so you take the talc sample you
10 want to look at and you put it in one of these
11 test tube things, and you put it in the
12 centrifuge like you have at the doctor's office
13 when you get your blood checked, and they spin
14 it around really fast. Once it spins around,
15 the heavier asbestos needles sink and
16 everything else floats. Then you take the TEM
17 and you look at what is at the bottom.

18 So why wouldn't Johnson & Johnson just use
19 that method? They've known about it since
20 1971. Why wouldn't they use that method to
21 find a needle in the haystack? They tell us
22 why. "We deliberately have not included a
23 concentration technique as we felt it would not
24 be in worldwide company interests to do this."

25 And then I think the next thing you're

1 going to hear from the Johnson & Johnson
2 lawyers is the justification or defense of it
3 wasn't fair. There was no asbestos in our
4 powder is going to sort of morph into something
5 else, more of a defense, more of an excuse.
6 And what it's going to become is "it was there,
7 but."

8 And what that means is a couple of things.
9 The first is this: You guys will see document
10 after document talking about the millions of
11 dollars Johnson & Johnson spent trying to get
12 the asbestos out of their talc. They tried to
13 wash the asbestos out of the talc. That didn't
14 work. They tried to burn the asbestos out of
15 the talc. That didn't work. They tried to
16 float it out of the talc. That didn't work
17 either. And so they knew that they couldn't
18 get asbestos out of their talc. They wrote it
19 down: Asbestiform particles cannot be
20 processed out of the talc.

21 And then the next thing they're going to
22 tell you about, okay, "There's lab
23 contamination. It's the lab that did it." But
24 what they won't tell you is that professional
25 labs, professional scientific labs actually

1 have failsafe procedures to keep this from
2 happening. And the way they work is this: So
3 you take the talc sample you want to look at.
4 You put it in the samples petri dish, like we
5 did in high school, and you put it under this
6 hood. This one looks like a cooking hood, but
7 in real life it's completely enclosed. And the
8 hood sucks all of the air out, negative air, so
9 there's no air in there. And then these labs,
10 they take a blank and they put it on either
11 side, an empty dish on either side of the talc
12 sample that you all are looking at. The reason
13 is if there's asbestos floating around in the
14 lab and it somehow makes its way past this
15 negative air pressure hood into the petri
16 dishes, if you find it in the sample and the
17 two blanks, then it might have been lab
18 contamination. But if you find it in just the
19 sample, you find asbestos in just the sample,
20 you know the lab is not contaminated because
21 there's no way the asbestos would know to just
22 float into the sample dish.

23 So why would Johnson & Johnson tell you
24 all that there's lab contamination in some of
25 their tests? You guys are going to learn that

1 they actually kept it, a few, some samples,
2 some results of the test they did, and the
3 blanks are blank. There's nothing there. But
4 y'all will also learn that a lot of the tests
5 that they did, the blanks data is gone just
6 like the photos, without a trace or
7 explanation.

8 Then you guys are going to hear Michael
9 had a lot of other exposures to asbestos. He
10 did. We know he used Clubman talc sitting here
11 today. He did about 70 or so brake changes
12 with his father in the early 1980s. But
13 something else you all will learn throughout
14 this trial is mesothelioma is actually a
15 cumulative disease. The expert that we're
16 going to bring and you will meet as soon as we
17 are both done talking to you all is a doctor
18 named Dr. Brody. He's published at least over
19 100 papers on this, on asbestos and disease.
20 And what he's going to explain to you guys is
21 that mesothelioma is a dose-responsive disease.
22 And what that means is every exposure to
23 asbestos counts. You can't parse out one
24 exposure to asbestos and say that's what did
25 it, that's what gave them cancer, any more than

1 y'all could parse out the cigarette that gave
2 someone lung cancer. It's the same concept.

3 But what you guys are going to hear is by
4 far and away Michael's biggest exposure to
5 asbestos was to Johnson & Johnson's baby
6 powder. He used it every day, multiple times a
7 day for about five decades because he was
8 allergic to deodorant.

9 And then the final thing you guys are
10 going to hear from the defendants, I think, is
11 this idea of, well, where is the epidemic? If
12 this baby powder had asbestos in it, where is
13 all the sick people? Where is all the people
14 with mesothelioma? There already has been one.
15 So for six to seven -- for about 50 or so
16 years, 6- to 700 women have died of
17 mesothelioma. And even though it's a really
18 rare cancer, you're going to hear that
19 Johnson & Johnson's doctors could not find any
20 relationship to asbestos exposure.

21 But there's actually two different kinds
22 of mesothelioma you can get. You can get it in
23 your pleura, pleural mesothelioma, when you
24 inhale it, but you can also get it in your
25 stomach lining. It's called peritoneal

1 mesothelioma. And the thing about it when you
2 get it in your stomach is you typically have to
3 have a heavier exposure to asbestos.

4 And so a lot of these women happen to be
5 getting peritoneal, the kind in your stomach.
6 And Johnson & Johnson doctors will come in,
7 they will look and they will try to figure out,
8 was she exposed to asbestos from her husband,
9 from her son, from a brother; did she somehow
10 indirectly or directly work with asbestos that
11 exposed her to it that would explain the
12 stomach cancer?

13 And there just wasn't an explanation. So
14 what happens is the doctors come in and they
15 say, "Things happen. Bodies just failed them.
16 Oh, well."

17 And so we started asking questions like,
18 well, okay. What's the difference between men
19 and women? Right? Are our bodies somehow
20 immune to asbestos in a different way than men?
21 Do our bodies truly just fail us? What's going
22 on? What's the biological difference between
23 men and women that would explain this? The
24 answer really is there, isn't it?

25 But here is what we do know: Remember the

1 slide, the 2017 slide, the massive explosion of
2 information in public where for the first time
3 Johnson & Johnson was forced to turn over all
4 these documents. And then for the first time
5 everybody saw that this exposure to asbestos
6 that women typically have more because we use
7 the cosmetic products more that have talc in
8 them. And we realized there is a biological
9 difference, because women don't just breathe
10 it. They don't just breathe the asbestos.
11 They don't just breathe the talc. They use it
12 in their underwear. And so there is a direct
13 pathway from vaginal dusting into your stomach
14 lining, particularly if you don't have your
15 tubes tied.

16 And so then we had an explanation for the
17 first time of why all of these women with no
18 identifiable asbestos exposure were getting
19 this incredibly rare cancer that required this
20 higher exposure to asbestos for decades. And
21 it's all directly linked with the documents
22 that nobody knew existed, nobody knew to ask,
23 were you a talc user?

24 And the thing is it doesn't discriminate.
25 If you use the talc in that exact same way, if

1 you use it all over your body for decades,
2 multiple times a day, you're going to get the
3 same disease just like Michael.

4 A few things about Michael before I sit
5 down. You guys will hear from him and the
6 person who loves him most in the world, his
7 husband Lonnie. And I really do want you guys
8 to hear their story directly from them. But
9 here is what I will tell you about him in the
10 meantime. Michael is the kind of person who --
11 I always feel kind of cheesy saying it, but
12 he's that kind of person that lives life to the
13 fullest. He makes it happen. His dream in
14 high school was to chase sunsets for a living
15 in the Keys. He graduated from high school.
16 He made it happen. He moved to the Florida
17 Keys and he worked there on his boat for a
18 couple years chasing sunsets. Michael is the
19 kind of guy who loves to laugh and is happiest
20 when he's making those around him happy.
21 Michael is the kind of guy who met the love of
22 his life and, instead of getting scared, ran
23 straight towards it.

24 And then you guys are going to also learn
25 that in January of 2023, Michael got COVID. He

1 had a little bit of cough. The COVID went
2 away, but the cough remained, except the cough
3 got a little bit worse week after week. And
4 then after a few weeks, he started having
5 pretty bad night sweats. And so his husband at
6 a certain point in time said, "Enough. We're
7 going to the doctor."

8 So Michael went to the doctor, had some
9 labs done. The doctor tells him "You've got to
10 get some more testing done right away."

11 And so what you all will hear and learn is
12 that after a battery of tests, Michael, at the
13 age of 53, was told that he had mesothelioma,
14 the kind of cancer that crushes your lung from
15 the outside in.

16 And so when we're all done here, we don't
17 have to hear from any lawyers anymore. And you
18 all have heard all the evidence, got your hands
19 on the documents. The judge has instructed you
20 on what the law is. We're going to ask you to
21 hold this company to their word, their word,
22 their public credo, "Our first responsibility
23 is to the patients, mothers and fathers,"
24 because the thing about asbestos is we talked a
25 lot today about how it's horrible and it's

1 always fatal and it's dangerous and how toxic
2 it is and all these things, but the truly most
3 important thing about it is this cancer, this
4 mesothelioma, is entirely preventible. You
5 just don't expose people to asbestos.

6 Thank you all for listening to me so far.
7 I appreciate it.

8 THE COURT: Thank you, Ms. Gross.

9 Ms. Bueno for the defendant.

10 MS. BUENO: Thank you, Your Honor. Just
11 give me a quick second to set up, if I can.

12 THE COURT: Ladies and gentlemen, let's
13 stand up and stretch for a minute.

14 Sorry, Ms. Bueno. It's not your fault.
15 This is the jankiest sound system known to man.
16 You tell me when you're ready, Ms. Bueno.

17 MS. BUENO: I'm ready if you are, Your
18 Honor. Is that too loud? Can we turn it down?

19 THE COURT: There you go. Perfect.

20 MS. BUENO: I feel like that might be a
21 little bit too loud. Is that okay?

22 THE COURT: Ms. Bueno, you need to go down
23 a little bit. Rachel talked softly, but too
24 fast.

25 MS. BUENO: So I need to talk softly and a

1 little -- if I'm too loud, you all please let
2 me know. I don't want to blow out the speaker
3 here. Are you all able to see the screen and
4 this board here?

5 Your Honor, is this okay with you here?

6 THE COURT: Certainly. Absolutely.

7 MS. BUENO: May I begin, Your Honor?

8 THE COURT: Yes, you may. Ms. Bueno for
9 the defendant.

10 - - -

11 DEFENDANTS' OPENING STATEMENT

12 - - -

13 MS. BUENO: You just heard some very
14 serious allegations, some disturbing
15 allegations. And I could spend my entire time
16 with you today doing nothing but going over
17 that presentation and going through each slide
18 and telling you why it's flat wrong and it's
19 untrue. But the evidence that you need to
20 answer the questions at the end of this trial
21 is not contained in that presentation, because
22 at the end of this trial, you are not going to
23 be asked the question about whether or not
24 there was ever a fiber of asbestos in a bottle
25 of Johnson's Baby Powder somewhere in the

1 world. That is not a question you will be
2 asked.

3 What you are here to decide in your job as
4 jurors is to determine if Johnson's Baby Powder
5 caused Mr. Perry's cancer. And the answer to
6 that is no. There is no science to support
7 these allegations. There are no facts to
8 support these claims. This is not true, and
9 Johnson's Baby Powder did not cause Mr. Perry's
10 cancer, and that's why we're here defending
11 ourselves as Johnson & Johnson and our family
12 of companies.

13 So what I'm going to do today is give you
14 a roadmap of the evidence that will actually
15 help you answer the question at the end of
16 trial and to determine whether or not
17 Johnson & Johnson was responsible with our
18 talcum powder for Mr. Perry's cancer.

19 And so as I was thinking about trying to
20 figure out a way to distill all of this and
21 give you the information, and I was watching
22 the Olympics at the time and watching the
23 swimmers in the swimming pool, and I thought to
24 myself, these amazing athletes have been in
25 that pool days in, days out, years and years.

1 Think of how much time they spent swimming in
2 those pools.

3 And, you know, those pools have very small
4 amounts of chlorine in them, don't they?
5 That's safe for them. That's not a health
6 hazard. But yet we know that chlorine is a
7 dangerous chemical, don't we? And if those
8 same swimmers got into a pool that had really
9 high levels of chlorine, what would happen to
10 them? They would burn their skin. They would
11 probably get sick.

12 And last week when it was so darn hot and
13 I was drinking a lot of bottles of water, that
14 was fine. I can drink water all day and my
15 body is able to flush that out. But if I sat
16 in one place and drank 10 gallons of water in
17 one sitting, what would happen? It would be
18 dangerous and maybe deadly.

19 So both of these examples demonstrate a
20 key concept in this trial that I ask you to
21 keep in mind and that we will continue to
22 discuss, and that is this: Dose matters. The
23 dose, the amount, the level matters. And why
24 do I start my valuable time with you with this?
25 Why do I start with dose? Well, it's important

1 because plaintiffs want you to believe that
2 when you hear asbestos and cancer, there is
3 immediately and always a relationship between
4 the two. And nobody is going to dispute that
5 if you have a high level of asbestos, cancer
6 can happen. Nobody who comes into the
7 courtroom and sits on that witness stand, and
8 it's right there, nobody's going to tell you
9 otherwise. But dose matters even for asbestos.

10 And let me give you a type of perspective
11 here. Counsel mentioned Dr. Brody. Thank you.
12 This is Dr. Brody. He's going to be here this
13 afternoon, if he's not here already. And
14 Dr. Brody is going to explain to you that there
15 are billions of asbestos fibers in our lungs.
16 We all have them. And why do we have them?
17 He's going to explain that it's something
18 called a background level. That means day in
19 and day out, just in our general, natural
20 lives, we are breathing in small levels of
21 asbestos in a background level.

22 Now, you may be surprised by that and
23 wonder, well, how in the world did that happen?
24 Why is there asbestos? And the answer to that
25 is pretty simple. You see back in the '50s and

1 '60s and '70s, even into the '80s and '90s,
2 there was a lot of products that had asbestos
3 in them. You heard a little bit about what
4 asbestos is. And these products, everything
5 from construction material to brakes to
6 insulation, they used asbestos because it had
7 great properties, like being a fire retardant.
8 And so of course we wanted to have things in
9 our schools, on the ceilings, in the boiler
10 rooms, in our Navy ships. We wanted to have
11 asbestos to stop fires and keep things safe.

12 And we were using it a lot at that period
13 of time. And as a result of that the fibers
14 from all of that asbestos, it got in our air,
15 it got in our soil, and it got in our water.
16 And that is why we have what is called a
17 background level.

18 Now, as you might imagine, back in the
19 '60s and '70s, that background level was
20 higher, wasn't it? Because there was more
21 asbestos around. But even today there's a
22 background level. And the evidence will show,
23 and Dr. Brody will tell you that the background
24 level of asbestos is safe. What does that
25 mean? That means that there is a level of

1 asbestos that we are all breathing in and
2 breathing out and not getting sick. And that's
3 true today and it was true in the '60s and '70s
4 when the level was even higher.

5 And the evidence is going to show that the
6 level of asbestos in Johnson's Baby Powder that
7 the plaintiffs are claiming in this trial is
8 lower than the background level, lower than the
9 background level. It is not a health hazard,
10 and it is safe.

11 Now, let me stop there and explain to you
12 that Johnson & Johnson's talc is not at issue
13 here. Plaintiffs are not claiming that the
14 talc itself was dangerous. They're claiming
15 that these trace amounts of asbestos in the
16 talc caused the problem. And I think that's an
17 important distinction. And I want to say right
18 now so there's no confusion, that
19 Johnson & Johnson is not conceding that there
20 is asbestos in our talc. So if anybody comes
21 up here and says that I said or anyone on my
22 team said that there's asbestos in Johnson's
23 Baby Powder, they're flat wrong.

24 But what I'm telling you and what the
25 evidence is going to show in this case is

1 that -- the question is whether or not
2 Johnson's Baby Powder caused Mr. Perry's
3 mesothelioma. And we know the answer is no.
4 And we know that because even if you believe
5 what they are saying, even if you believe what
6 plaintiffs' witnesses tell you, the level of
7 asbestos we're talking about is so low that it
8 does not and cannot cause mesothelioma. That's
9 the point. That's why dose matters.

10 And the reason I have this board up here,
11 and I think it's going to be instructive and
12 helpful for us in this trial, is we need to
13 keep straight when the witnesses are here about
14 what are they talking about. Because in order
15 to prove their case, the plaintiffs have to
16 prove that the amount of asbestos that they say
17 is in the bottle got into the air when
18 Mr. Perry used it, when he put the talc on
19 himself. And then what is in the air, he
20 breathed in and it became a dose in his body
21 that his body did not flush out; and that it
22 ultimately was enough asbestos to cause his
23 mesothelioma. And they cannot prove that. The
24 evidence will not prove that.

25 So that's what I'm going to do right now.

1 I'm going to go through what plaintiffs say is
2 in the bottle, what they say is in the air, and
3 what they say got into Mr. Perry's body. And
4 I'm going to explain what the evidence in this
5 case will not prove, that Johnson's Baby Powder
6 caused Mr. Perry's cancer.

7 Then, when we're done with this, I want to
8 talk about Johnson & Johnson and some of the
9 attacks you heard. And I'm going to give you
10 more evidence that you'll hear at this trial
11 that plaintiffs' lawyer didn't tell you about.
12 When she did that chronology starting in 1898
13 and going all the way up until today, there was
14 a whole lot that was left out of there and
15 misrepresented. And I'm going to set the
16 record straight, and we're going to do that
17 throughout this trial. Okay.

18 So let's start with, what is in the
19 bottle? This is Dr. William Longo. He will be
20 here this week to testify to you. He is the
21 testing expert for the plaintiffs. Now,
22 Dr. Longo has been around a long time. He's
23 been testifying in courtrooms like this for
24 decades. And he started testifying against
25 those companies that I showed you that made all

1 those different asbestos materials. He's
2 testified against companies that made brakes
3 and companies that made insulation and
4 construction material. And he's made, like,
5 \$33 million testifying in asbestos litigation.

6 And now he's turned his sights on talc
7 manufacturers like Johnson & Johnson. So
8 that's his business now. And back when he was
9 testifying for those other asbestos -- or
10 plaintiffs suing other asbestos defendants, do
11 you know what he said about cosmetic talc? He
12 said this idea that cosmetic talc has asbestos
13 in it is just an urban legend, just an urban
14 legend. That's what he said.

15 Then he started getting paid by plaintiffs
16 to testify against Johnson & Johnson, and now
17 all of a sudden he's finding asbestos in
18 bottles. That's Dr. Longo.

19 And so Dr. Longo has done testing of our
20 product. So the very first time, what he calls
21 round 1 testing, he went and got a lot of
22 bottles and tested them. And, my goodness, he
23 found a lot of asbestos in Johnson's Baby
24 Powder. People started to say, "Where did you
25 get those bottles, Dr. Longo?"

1 "Well, I got them on eBay. I got them
2 from a plaintiff lawyer. I got them opened
3 from somewhere. I don't know who gave them to
4 me, but I found asbestos in it." Well, that's
5 a sketchy question.

6 Then he did round 2 testing, another round
7 of Johnson's Baby Powder testing. And this
8 time we gave him the bottles. The bottles came
9 from the Johnson & Johnson archives. So we
10 know where they were and we knew that they were
11 actually bottles that we sold. And you're
12 going to hear about that round 2 testing, we
13 call it, the second time he did it. And what
14 did it show? I see it up here.

15 First of all, a lot of those bottles he
16 tested had no asbestos in it. He'll tell you
17 that. Then he had the highest and lowest
18 amounts. The lowest amount of asbestos he
19 found in the bottle of Johnson's Baby Powder
20 was .0000033, five zeros, percent. That's the
21 weight of percent. Now, the bottle that he
22 tested where he says he found asbestos that had
23 the most in it was from Shower to Shower, which
24 was a different product. And that one he said
25 was .0092 percent asbestos. We're talking

1 about very, very small levels.

2 And Dr. Longo testified that he'll call
3 something trace if it's less than 1 percent,
4 and ultra trace if it's less than .1 percent.
5 So what are these? I guess we'll ask him.
6 Ultra, ultra, ultra trace? Very, very low
7 percentages. So keep that in mind as we go
8 through this trial. Even their own testing
9 expert is saying that the amount of asbestos
10 they're claiming in the bottle is really,
11 really low.

12 So now let's talk about what plaintiffs
13 claim is in the air when you use Johnson's Baby
14 Powder. So what we're talking about here, so
15 we're all clear, is if we believe plaintiffs
16 that there's these ultra, ultra trace levels of
17 asbestos, if we believe that, and there's a
18 bottle of Johnson's Baby Powder, how much is
19 going to get in the air when you shake that on
20 yourself? That's the question. When we talk
21 about air, we talk about exposure. So if you
22 hear the word "exposure," that's what we're
23 talking about in this trial, what's in the air.

24 And you're going to hear that there are
25 government organizations and agencies who set

1 standards. And one of them you'll learn about
2 is OSHA. And if you haven't heard about that
3 already in your life, it's the Occupational
4 Safety and Health Administration. So it's for
5 job sites and employers. And they set what are
6 called PELs, permissible exposure limit, which
7 basically means they figure out how much of a
8 contaminant or asbestos, or anything else in
9 the air, a worker can breathe in over an
10 eight-hour workday, day in and day out, for
11 their whole life of working, 40-plus years.
12 And OSHA sets a limit, a permissible exposure
13 limit for workplaces. And you're going to hear
14 what that is.

15 And you're going to hear from Dr. Longo,
16 who tests what's in the bottle, that he did
17 calculations to figure out what would be in the
18 air. And Dr. Longo will explain to you that if
19 you took a bottle of Johnson's Baby Powder with
20 the average amount of asbestos that he found in
21 those round two bottles, and you took that
22 bottle and you shook it on yourself and you
23 patted it on yourself, and you did that every
24 day all day for 40 years, you will never reach
25 the level of the OSHA-permissible exposure

1 level. You'll never reach it. That's the
2 minute amount that we're talking about that is
3 in the air, even if you believe what plaintiffs
4 say.

5 And their own expert, Dr. Brody, who will
6 be here, he will give us a background level.
7 He's testified about it before, and I will ask
8 him about it hopefully today. And he will give
9 me that number. And we will compare it to the
10 number that Dr. Longo says is in the air. And
11 you will learn, not from our own witnesses, but
12 by plaintiffs' own witnesses will have to admit
13 that the amount of asbestos that gets in the
14 air, even assuming their data is right, it is
15 less than the background level which we know is
16 safe.

17 So now we go to what is in the body.
18 Okay. So stick with me. Assuming what
19 plaintiffs said is in the bottle, you shake it
20 on your body, it gets in the air, you breathe
21 it in. Now, how much gets into the body? Now,
22 we talked about air is exposure, body is dose.
23 When we talk about the dose, we -- that means
24 how much actually is retained in the body. And
25 you're going to learn that our body has these

1 amazing defense mechanisms. We've got hairs in
2 our nose so when we breathe in, it catches
3 things, doesn't it? We've got mucus in our
4 throats so if we breathe something in and
5 swallow it, our body rids it of it. If
6 something actually gets in our lungs, we have
7 cells and macrophages to clean it all out. And
8 most of everything we inhale in our body is
9 cleaned out. And that is the concept of a
10 background level.

11 Now, I bet you're thinking, like I did
12 when I first got involved in this case, if you
13 have a background level and then you have
14 additional asbestos exposure, doesn't it just
15 add on to each other? And I think you heard
16 counsel say that asbestos is cumulative. But
17 respectfully, that is not what the evidence is
18 going to show in this case. The best way for
19 me to think about it is like this, so bear with
20 me.

21 Plaintiffs want you to believe our body is
22 a bowl. Okay? And if we're talking about a
23 bowl of water, and we take a background level
24 and we pour the water in the bowl, right, it's
25 just sitting there, the background. And every

1 day, all day, we're breathing in more, and the
2 bowl fills. And plaintiffs want you to believe
3 that if you are exposed to any kind of other
4 type of asbestos, then you have additional
5 drops of water into the bowl. And eventually
6 what happens to the bowl? It runs over and can
7 cause disease. That is plaintiffs' story in
8 theory. And this is what they want you to
9 believe.

10 But what the evidence will show, and the
11 experts will explain to you, is that our bodies
12 are more like this, like a colander. Do you
13 all call this a colander? I do. I told my
14 husband I was bringing the colander to court.
15 He said, "What are you talking about?" He said
16 it was a strainer. Colander, strainer.

17 But this is what the experts will explain.
18 It's almost like you put the colander in your
19 sink and you turn on the background level.
20 There's a little drip. The background level
21 drips in. It doesn't pool like plaintiffs want
22 you to think. Your body is able to release
23 that and clear that out. And that is why, if
24 you have another exposure that is below the
25 background level, it doesn't get in your body

1 and stay there and cause disease.

2 So when you hear about background level
3 and you hear about things being below
4 background level, it's that slow drip that is
5 slow enough for your body to expel. And I hope
6 that makes sense. We'll talk about that more
7 during trial.

8 But that's why we know that the dose, even
9 if you believe what plaintiffs are claiming,
10 even if you believe there's the ultra, ultra
11 trace amounts in the bottle and the low amount
12 in the air, we know that the dose, that even
13 using their own numbers, is not enough to cause
14 mesothelioma. So what is the dose? What is
15 the dose?

16 Chief Justice Toal mentioned it earlier,
17 and you'll hear at the end of the trial that
18 it's plaintiffs' burden to prove this case,
19 which means they need to bring evidence to you
20 on each of these different parts to prove that
21 Mr. Perry's cancer was caused by Johnson's Baby
22 Powder. But this fundamental question of what
23 is the dose, they will not answer for you.
24 There is not one witness that they are going to
25 bring to that stand, and to do the math, to

1 tell you how much asbestos Mr. Perry allegedly
2 got in his lungs, not one, not one.

3 What are they going to say? They're going
4 to say it was substantial, it was significant,
5 but they're not going to do the math. And the
6 math matters. They're not going to even bring
7 you a statistician to give you this
8 information, but they are bringing a
9 statistician. His name is Dr. Madigan. He's
10 the guy that does numbers all day long. He'll
11 give you a bunch of numbers, but he will not
12 give you the number that matters in this case:
13 How much asbestos from Johnson's Baby Powder
14 did Mr. Perry get?

15 And what plaintiffs are relying on is that
16 you will hear about the phenomenal amount of
17 talcum powder use that Mr. Perry had, and just
18 agree with, oh, significant, oh, substantial,
19 that dose doesn't matter. And I'll tell you
20 right now, Mr. Perry used a lot of talcum
21 powder. On the left-hand side you see the
22 products that Mr. Perry will testify he used
23 over and over again in his lifetime. Johnson's
24 Baby Powder is just one of them. There are
25 nine other talcum powder products that

1 Mr. Perry will tell you he used: Equate,
2 Ammens, Gold Bond, Clubman, Drakkar, Ralph
3 Lauren Polo, Obsession, Stetson. He will tell
4 you that he used some of them, like Johnson's
5 Baby Powder, as a base layer, and then put
6 scented talc on top of it. He will tell you
7 that he used four or five tablespoons at a
8 time, three or four times a day for 40 years.
9 His experts will allege that there's asbestos
10 in every single one of those, not just
11 Johnson & Johnson mind you, all of them.

12 And he alleges exposure not just from his
13 personal use talc. He also alleges that he was
14 in the bathroom with his mother and was exposed
15 to asbestos when she used the talc on the right
16 side, 10 additional types of talc. Or I guess
17 I should say nine, Johnson & Johnson, Johnson's
18 Baby Powder, and nine others that she used in
19 her lifetime that Mr. Perry is claiming also
20 exposed him to asbestos.

21 Significant, substantial -- see, that's
22 what their experts will say because of this
23 use. But they're not going to answer the most
24 important question, which is dose. They're not
25 going to answer that question.

1 Now, before I move on, I need to tell you
2 one more thing about Dr. Longo. He's the guy I
3 told you about that tested what's in the
4 bottle. He's going to be here. We learned
5 today that Dr. Longo has done an examination,
6 an analysis of Mr. Perry's tissue. And that
7 was surprising because when we talked to him a
8 few weeks ago under oath, we asked him if he
9 was going to do this before trial, and he
10 indicated that it would take him too long. It
11 would take him two or three weeks to do this
12 analysis, and it would be very hard, if not
13 impossible, to get it done. He testified that
14 the analysis is so complicated and requires so
15 much thought that he couldn't do a rush job.

16 But lo and behold, he's going to come up
17 to the stand and tell you something about the
18 tissue he analyzed. And I'm standing here as
19 the counsel for Johnson & Johnson defendants,
20 and I have no idea what this man is going to
21 tell you. We'll have an opportunity to
22 cross-examine him. And who knows what he'll
23 say about this tissue in Mr. Perry's body.
24 We'll have to find out. But too little, too
25 late.

1 When we had a chance to depose him a
2 couple weeks ago, he hadn't done that analysis.
3 So now he's going to come to trial and try to
4 tell you something that was in Mr. Perry's
5 body. We'll see what he says. We'll see what
6 he says.

7 Now, you heard about experts who are paid
8 by plaintiffs. You're going to hear from
9 experts who are paid by defendants. It's going
10 to be experts on both sides. But there's going
11 to be one doctor who comes into this room that
12 you're going to want to pay attention to. And
13 this is his name: Dr. Barry Gibney. He's at
14 MUSC. He is Mr. Perry's treating physician.
15 He is a very well-known and respected
16 cardiothoracic surgeon. What that means is he
17 actually opens people up and operates with
18 terrible disease like mesothelioma, and he did
19 the surgery for Mr. Perry. And he'll be here
20 to talk to you.

21 And the thing about Dr. Gibney is he
22 specializes in this disease, mesothelioma.
23 This is what he does. He goes to conferences;
24 he talks to doctors; he reads medical
25 literature. And Dr. Gibney will not come into

1 this room and blame Mr. Perry's mesothelioma on
2 talc. He won't do it. In fact, when we asked
3 him recently under oath about these claims, he
4 had no idea what we were talking about, that
5 talcum powder caused mesothelioma. He had
6 never talked to his colleagues about these kind
7 of allegations. How strong is the science that
8 you're going to hear in this courtroom if a
9 well-known surgeon in this community who
10 specializes in this disease does not believe
11 these claims and will not come in here and tell
12 you that talcum powder is to blame? How strong
13 is the science? I submit to you there is no
14 science. The science tells otherwise. I'm
15 going to talk to you about the science in a
16 minute, but let me first deal with this.

17 I can guarantee you that one of the things
18 you're going to hear, because you already did,
19 is that 2017 was this watershed year where all
20 of a sudden the skies parted and all of the
21 information came down because
22 Johnson & Johnson, in a lawsuit, had to produce
23 a bunch of documents. You just heard that a
24 couple times. Nothing could be further from
25 the truth. The evidence is going to show that

1 this information about talcum powder and
2 concerns about asbestos have been around for a
3 long time. It's been in medical literature.
4 It's been discussed. The FDA's looked into it.
5 I'm about to tell you all about that. There is
6 absolutely nothing to suggest that just because
7 Johnson & Johnson produced millions of
8 documents in 2017, that somehow that changed
9 the game. Not at all. And Her Honor told us
10 to use common sense. That is your job.

11 When was 2017, folks? That was seven
12 years ago. Seven years ago. And if what
13 plaintiffs claim is true that all of a sudden
14 now everybody knows everything since 2017,
15 Dr. Gibney, the treating surgeon, he doesn't
16 know. There is not a warning on cosmetic talc
17 for asbestos even today. And do you know what
18 Johnson & Johnson's done? Now, the Court told
19 you not to go do any research, so I'm not
20 asking you to do it, but I will give you this
21 information which will be evidence. We took
22 all of the documents that you're going to see
23 in this trial and we put them on a website for
24 the whole world to see, the whole world. The
25 FDA can look at them. Doctors can look at

1 them. The public can look at them.
2 FactsAboutTalc.com. There's nothing to hide.
3 Nothing to hide. There's not one document
4 you'll see that's not publicly available.
5 Nothing's changed. There's still not a warning
6 label on cosmetic talc for asbestos, and
7 there's a good reason for that.

8 Let me tell you a little bit about what
9 you didn't hear about the story about
10 Johnson & Johnson. You heard that we sold
11 cosmetic talc starting in 1894. Absolutely
12 right. Sometimes it was used for diapering.
13 In this case, as you heard, Mr. Perry claims he
14 used it for personal use starting at age five.
15 And he said he stopped using it in 2019.
16 That's the time frame we're looking at. And
17 you're going to hear that Johnson & Johnson
18 always has tested our product for asbestos, as
19 well as other contaminants. And that is
20 because asbestos and talc both grow in the
21 ground, as you heard. That is why we do
22 testing. That is why we have done testing.

23 And the evidence will show that over the
24 years Johnson & Johnson tested talc in a
25 variety of different ways. First, we selected

1 high-quality mines. We didn't just go to any
2 talc mine. You'll hear that we did searches
3 not just in the U.S., but around the world, to
4 find the best, purest, and most pure talc
5 mines. And when we did that, we found some in
6 Italy initially. Then we found some in
7 Vermont, and more recently in China.

8 You'll hear about other mines that we went
9 and looked at and thought, that talc is not
10 good enough. We don't want to use it. We want
11 to look and find one that's better. And once
12 we found the mines, we did what's called
13 selective mining, which means we didn't just
14 take the talc from any old place in the mine.
15 We took core samples of specific places in the
16 mine and tested it and tried to figure out
17 whether the talc in that area of the mine was
18 pure enough.

19 And then we tested it again when it got to
20 the mill, processing at the mill, to make sure
21 that the talc that we had taken selectively
22 from the mine was indeed pure and free of
23 contaminants. And then we tested the final
24 product.

25 And you'll hear that for some period of

1 time, Johnson & Johnson, we owned our own mine
2 so we had third-party testers. But then when
3 we sold the mine, we had other suppliers that
4 would sell the talc to us and they tested. So
5 there was testing along the way. And there was
6 a suggestion to you that our testing somehow
7 wasn't good enough.

8 Well, the evidence is going to show
9 otherwise. What I have in the middle of the
10 slide are three different types of microscope
11 going from the top being the least sensitive --
12 that was what was criticized by counsel, XRD,
13 to the bottom being the most sensitive. And on
14 the left-hand side, those blue checkmarks are
15 the J4-1 industry standard. So all of the
16 industry got together and figured out how do we
17 best test talc? And they said we need to use
18 the top microscope and the middle microscope,
19 the XRD and the PLM. And Johnson & Johnson did
20 that. But we took it a step further. The
21 evidence will show that we used the TEM, the
22 highest type of microscope, to test, as well.

23 Now, why was all this testing being done
24 and how was this being developed? You're going
25 to learn that in the early '70s, there was a

1 concern, there was kind of a scare, actually,
2 because some scientists said they found
3 asbestos in cosmetic talc. I saw some of you
4 get a little disturbed when you saw those
5 slides that were put up. I saw that, but I'll
6 tell you that what happened in the early '70s
7 with that cosmetic talc scare, and the
8 headlines, and the problems was a lot because
9 of the technology not being developed at that
10 time.

11 And you know what? I'm going to show you
12 just one example of why you can't believe what
13 you just heard and why throughout trial you
14 have to ask yourself some questions.

15 I'm going to -- can I turn to the ELMO,
16 please? If I can figure out how to work it.

17 TECHNICIAN: Would you like some
18 assistance?

19 MS. BUENO: I would. Yes, please. I
20 should have done this before, shouldn't I have,
21 Mr. Loebbaka? This is a great time for me to
22 introduce Mr. Loebbaka who is our tech
23 extraordinaire and who is going to help us
24 figure all of this out. Thank you. I
25 appreciate that very much.

1 This is one of the slides that you saw.
2 And this was something that counsel showed to
3 you and said, Dr. Langer from Mount Sinai, in
4 1971, observed, dot, dot, dot, dot, dot, dot,
5 chrysotile fibers, dot, dot, dot, dot, dot,
6 dot, in Johnson's Baby Powder. I don't know if
7 you've noticed throughout the presentation from
8 counsel how many dot, dot, dot, ellipses there
9 were. And we know that when you see dot, dot,
10 dot, that means some words are removed.

11 And I'll tell you that I think that this
12 is what's going to happen throughout this
13 trial. Plaintiffs' lawyers are going to throw
14 up these documents where these little snippets
15 and words are taken out of context, trying to
16 paint a story that's just not true, all in an
17 attempt to make Johnson & Johnson look like we
18 had some kind of cover-up or conspiracy or that
19 somehow we thought there was a problem. And
20 boy, I saw your faces. I know that it is a
21 powerful message, but it is not true. Because
22 what the story is going to show is that this
23 Dr. Langer at Mount Sinai, he retracted his
24 findings. It determined that it wasn't true.
25 Dr. Lewin, who they told you about, also

1 retracted his findings and said, upon further
2 review, what I found wasn't asbestos at all.

3 And in fact, there's a statement that you
4 weren't shown that wasn't part of the
5 chronology that was from Mount Sinai Hospital,
6 the president of Mount Sinai Hospital. And
7 this was a memo and a statement. And I'm going
8 to show you all of this during trial. I'm not
9 going to spend all the time on it now, but I
10 think it's important to point it out. This was
11 a statement that you'll see in its entirety
12 from the president of Mount Sinai that says,
13 "Recently data from research carried out in the
14 Mount Sinai Medical Center for the last four
15 years on the asbestos content of some talcum
16 powders was cited in the press before it had
17 been published in the scientific journal."

18 And he goes on to say, importantly,
19 "Although the news media specifically
20 emphasized the dangers of talcum powders
21 advertised for babies, the only baby powder
22 tested that was reported to show asbestos
23 represents less than 1 percent of the market."

24 Now, I'll tell you right now,
25 Johnson & Johnson's powder was never less than

1 1 percent of the talcum powder market. And it
2 goes on to say, "The most commonly used baby
3 talc has been consistently free of asbestos."

4 Folks, Johnson's Baby Powder there. So
5 the letter from Mount Sinai's president sets
6 the record straight on Dr. Langer. This is
7 just one example. I can't do this all day. I
8 cannot go through and demonstrate why all of
9 the dot, dot, dots are leaving out the full
10 story, but there is more to the story. There
11 is more to the story.

12 And what you also didn't hear is the FDA's
13 role monitoring cosmetic talc. You'll hear
14 that in 1976, right after all of that hubbub
15 that you saw from plaintiffs' counsel about
16 alleged asbestos findings, the FDA said, "We
17 better test this out ourselves." And they
18 tested Johnson's Baby Powder and they found no
19 asbestos. ND, not detected. And they didn't
20 stop there.

21 In 1994, you'll hear that the FDA gathered
22 folks together for a talc symposium. They
23 co-sponsored this big meeting, 100 people, with
24 the FDA and toxicology groups to just have a
25 candid conversation about cosmetic talc. And

1 they concluded that cosmetic talc was among the
2 safest of consumer products. And they
3 concluded the probability of human risk is
4 likely nonexistent.

5 Ask yourself why you didn't hear this.
6 Ask yourself why you didn't hear that in 2009
7 and 2010, the FDA went and took some Johnson's
8 Baby Powder off a shelf in Washington D.C.,
9 just walked into the store, bought the bottles,
10 had people test it. No asbestos detected in
11 Johnson's Baby Powder.

12 In 2019, in April, no asbestos detected.
13 Again, the FDA doing its routine monitoring.
14 Same thing in early September of 2019. Now,
15 here's the part you heard. Lo and behold, that
16 same lot that in 2019, in September, the FDA
17 found sub ultra trace amounts of asbestos, of
18 chrysotile. And you better believe this was a
19 surprise to Johnson & Johnson.

20 This was the first time in all of the FDA
21 testing that they had ever found asbestos in
22 our talc. And we're going to bring you the
23 chief medical officer from Johnson & Johnson
24 who will come in and tell you where he was and
25 what happened when he heard this news. He was

1 overseas at a meeting. He got in a plane as
2 soon as he could, flew back to deal with this.
3 And you're going to hear that although
4 Johnson & Johnson determined that the amount of
5 chrysotile allegedly found in this lot was not
6 a health hazard, within two days that lot, that
7 certain group, was immediately recalled, a
8 voluntary recall, and that we worked with the
9 FDA to do what's called a Class II recall where
10 the FDA identifies Class II as the probability
11 of serious adverse events is remote.

12 So even though the amount found in that
13 one bottle in that one lot was so low and
14 insignificant, Johnson & Johnson immediately
15 recalled that. That's what the evidence is
16 going to show, and that's what you would want a
17 company to do.

18 And then you're going to hear a year later
19 there was a decision to stop selling talcum
20 powder in the United States, in 2020. So as of
21 today, Johnson & Johnson doesn't sell
22 talc-based cosmetic talcum powder. We continue
23 to sell Johnson's Baby Powder, the cornstarch
24 variety, but we stopped in 2020.

25 And Dr. Kuffner, the chief medical

1 officer, is going to come in here and explain
2 to you that that was a surprise to him when he
3 learned the news. That was a business decision
4 that had nothing to do with his medical
5 department, and he wasn't even consulted before
6 the business folks decided to make this
7 decision.

8 Now, you might wonder how a company like
9 Johnson & Johnson can come in here and tell you
10 that a trace amount of asbestos in a bottle is
11 not a health hazard. And the answer is
12 science. I told you I would get back to
13 science. This is it, science. Chief Justice
14 Toal told you you're going to learn the word
15 "epidemiology," and I'm glad you did that.
16 That was a good intro for this. Epidemiology,
17 it's a type of science. It's a specialty. It
18 deals with epidemics. Epidemiology, that's
19 what it means. And what it is is a study of
20 cause and effect, of what is it that causes
21 human disease. It's specifically for humans,
22 not talking about animals, but humans,
23 epidemiology. It's when you take large human
24 groups and you figure out what causes different
25 disease.

1 And I will tell you right now there is no
2 epidemiological study concluding that cosmetic
3 talc causes mesothelioma. None, zero.
4 Plaintiffs will not bring any expert that can
5 point to one study, epidemiological human
6 causation study that says this product causes
7 this disease, not one. But there have been
8 studies showing the opposite.

9 So common sense, again, the Court told us
10 to use it. If you wanted to do a study and
11 figure out, okay, does this talc thing cause
12 mesothelioma, what would be the way to do it?
13 You would go to the group of people who have
14 the most talc exposure, wouldn't you? And who
15 would those people be? It would be the people
16 in the mines, in the mills, right? It would be
17 the people that are blowing up the mills and --
18 blowing up the mines to get out the talc, in
19 the dust and the sweat covering themselves for
20 eight hours a day, breathing in all of the
21 talc. And it would be the people in the mills
22 that were churning up the talc into powder and
23 breathing it in all day.

24 And those studies have been done. We will
25 bring you doctors to talk through the studies

1 showing that talc miners and millers had no
2 increased risk of mesothelioma, individuals
3 that by far had more talc exposure than anybody
4 would with a baby powder, no matter how much
5 they use. Common sense. Common sense.
6 There's no epidemiological study and the talc
7 miners and millers have no increased risk.

8 But common sense doesn't stop there.
9 Hundreds of millions of people have used
10 Johnson's Baby Powder. I want you to think
11 about that for a minute. A lot of people have
12 used this product. And counsel knew I was
13 going to say it. There is not an epidemic of
14 mesothelioma. This is an extremely rare
15 disease, thank goodness. But it just doesn't
16 add up for all of the people who have used this
17 who do not have any sickness. That tells us
18 something. That tells us something.

19 Now, mesothelioma is a rare disease, but
20 we know some things about it. We know that
21 there are some people who get mesothelioma who
22 have never been exposed to asbestos. Just like
23 some people get lung cancer and they've never
24 had a smoke in their life, right? It happens.
25 It's rare, but it happens. But you're going to

1 hear that the vast majority of people who get
2 this disease do have asbestos exposure. And
3 you're going to hear that Mr. Perry was exposed
4 to asbestos. And that's not me saying it.
5 That's not my witnesses saying it. It's
6 plaintiffs' own witnesses will explain to you,
7 and Mr. Perry himself, that when he was a
8 teenager, in his home garage with his father,
9 he did a lot of brake jobs, brakes using
10 asbestos. And the thing you have to understand
11 about asbestos brakes, there's like 30 to
12 40 percent asbestos in these brakes. I mean,
13 we're not talking about .00000. We're talking
14 30 to 40 percent asbestos in brakes. And he
15 did six dozen brake jobs in about a three-year
16 period.

17 Plaintiffs' own medical expert will tell
18 you that that exposure to asbestos was enough
19 to cause his cancer. Their own expert will
20 tell you that if he had never used cosmetic
21 talc in his whole life, he would blame this
22 mesothelioma just on the brakes. He'd blame it
23 just on the brakes. But they're not just
24 blaming the brakes, right? They're blaming all
25 of the different asbestos cosmetic talc

1 products.

2 But who are they really blaming?

3 Johnson & Johnson, right? We're the ones.

4 We're the ones that have the spotlight. We're

5 the ones they singled out here for this trial.

6 I think we know why. I think we know why.

7 At the end of the day this is just a great
8 justice system. I hope you -- I hope you get
9 something out of this that is very valuable to
10 you because I'm always just amazed about how
11 awesome and phenomenal the system is. In our
12 society, any individual can sue somebody,
13 whether it be a neighbor or a boss or a big
14 company like Johnson & Johnson. And that's an
15 awesome, awesome power that we have.

16 But along with that privilege, along with
17 that privilege is a requirement, a task to
18 prove the case, to prove the case. And in this
19 case, in order to prove it, in order to
20 prevail, Mr. Perry is going to have to prove
21 not that there was just some fiber of asbestos
22 in some bottle of Johnson's Baby Powder
23 somewhere, but that it was in the bottles he
24 used. And he's going to have to prove that
25 that amount in that bottle, that sub-ultra

1 trace amount, was enough that when he used it
2 on his body, it got into the air and his body
3 didn't fight it off and that it caused his
4 mesothelioma. And I submit to you that
5 Mr. Perry will not be able to prove that case.
6 The science doesn't support it. The facts do
7 not support it.

8 And I know that there's documents you'll
9 see. I know that there's this tail of
10 corporate woe. I know that they probably spent
11 50 minutes of a 60-minute discussion with you
12 doing nothing but talking about
13 Johnson & Johnson and trying to paint us and
14 our family of companies in a bad light. I
15 guarantee that's going to happen throughout
16 this trial.

17 But the question you're going to be asked
18 is: Was Mr. Perry's cancer caused by Johnson's
19 Baby Powder? The answer to that is going to be
20 no. And that's what the evidence is going to
21 show.

22 So I'm going to stand in the same spot
23 probably next Wednesday, or whenever we can get
24 this case wrapped up and get you out of here.
25 But when I do, the last thing I'm going to do

1 is ask you for a verdict in favor of
2 Johnson & Johnson.

3 And we don't fault Mr. Perry for wanting
4 answers. We don't fault him, because when
5 somebody gets cancer, it makes sense and it's
6 natural to want to hold somebody accountable to
7 find a reason to point the finger. And
8 Johnson & Johnson is maybe a good place to
9 point the finger, but in this case, Johnson's
10 Baby Powder did not cause Mr. Perry's
11 mesothelioma.

12 Thank you for your time.

13 THE COURT: All right. That concludes the
14 opening argument for the defense. And you
15 previously heard the opening argument for the
16 plaintiff. Let's take a 15-minute break. Be
17 back here a little bit after -- well, as close
18 to 4:30 you can make it. Let's be in our seats
19 by that time and be ready to proceed.

20 Please rise while the jury departs for its
21 break.

22 - - -

23 (The jury exited the courtroom at
24 this time.)

25 - - -

1 THE COURT: Court will be in recess.

2 - - -

3 (Whereupon there was a recess in the
4 proceedings from 4:13 p.m. to 4:30 p.m.)

5 - - -

6 THE COURT: Everybody present. Dr. Brody,
7 good to see you again, sir.

8 DR. BRODY: Pleasure, Your Honor.

9 THE COURT: Madam Bailiff, check and see
10 if they're all refreshed. If they are, bring
11 me the jury. Be seated until they bring them
12 in.

13 - - -

14 (The jury entered the courtroom at
15 this time.)

16 - - -

17 THE BAILIFF: The jurors are seated, Your
18 Honor.

19 THE COURT: Very good. Please be seated.

20 Ladies and gentlemen of the jury, I would
21 be remiss before we start this if I don't
22 introduce my law clerk. This is Tasha
23 Bridenback. Judges have law clerks and we're
24 very blessed by that. That wasn't always true
25 in my time in practice as long as I've been a

1 lawyer. But we now have employed by the
2 judicial department young lawyers. Most of
3 them have just finished law school or maybe out
4 a couple years who clerk for judges. They
5 clerk for trial court judges. That's what I'm
6 operating as now. And of course they clerk for
7 appellate court judges, and I had a series of
8 law clerks when I served for my very lengthy
9 service on the South Carolina Supreme Court.
10 They're all like my children to me. They're
11 wonderful young people. They go on to have
12 great and successful careers, as I'm sure Tasha
13 will. As a matter of fact, in this trial we're
14 in right now, each side of this endeavor has in
15 its trial counsel group one of my beloved law
16 clerks. On the plaintiffs' side, Jamie
17 Rutkoski. Where are you, Jamie? Did you send
18 her out on errands?

19 MS. MCVEY: She had to do real work and
20 had to go.

21 THE COURT: Jamie is one of the law clerks
22 I have had since I have been a trial judge, and
23 she is on the plaintiffs' team.

24 On the defense team is my very beloved
25 long-time clerk, Matt Bogan. Matt was one of

1 my law clerks when I was on the Supreme Court.
2 So you can see he's got a few more miles on him
3 than Jamie does, but these lawyers have
4 uniformly turned in great service to the firms
5 or outfits with whom they've become associated,
6 and they're a very important part of this
7 endeavor, particularly for their research and
8 writing skills. And I could not do without
9 Tasha, that's for sure.

10 All right. Plaintiffs' case will begin.

11 MR. ADAMS: Thank you, Your Honor.

12 Plaintiffs call as their first witness

13 Dr. Arnold Brody.

14 THE COURT: Dr. Brody, please come around
15 and please be sworn.

16 THE BAILIFF: Stand here and face the
17 clerk.

18 - - -

19 ARNOLD R. BRODY, Ph.D., being first
20 duly sworn, was examined and testified as
21 follows:

22 THE CLERK: Thank you, sir. Please have a
23 seat on the witness stand and state your full
24 name for the record.

25 THE WITNESS: My name is Arnold R. Brody,

1 B-R-O-D-Y.

2 THE COURT: Ladies and gentlemen of the
3 jury, Dr. Brody is going to be offered as an
4 expert witness in this case. And expert
5 witnesses, if I so qualify them, are qualified
6 by means of their education, training, and
7 experience to actually offer an opinion about
8 the evidence. They are the only type of
9 witness you'll hear from that, in addition to
10 talking about the factual matters they know
11 about, can actually offer an opinion.

12 The plaintiffs' counsel will examine
13 Dr. Brody about his qualifications and then
14 offer him as an expert witness. And if I
15 agree, which I certainly would be surprised if
16 I did not -- I've heard Dr. Brody testify many
17 times -- then I qualify him on certain
18 technical fields.

19 That means that you are permitted to
20 receive his opinion. But please remember this
21 about an expert witness, just like any other
22 witness you hear from, you are the sole judges
23 of the credibility of anyone who sits in the
24 witness box, is sworn, and gives you testimony.
25 You may believe all of the witness' testimony;

1 you may believe part of the witness' testimony.
2 It's up to you to measure credibility. I can't
3 do that. That's up to you. I can simply
4 decide whether the witness is permitted to give
5 expert testimony. And that's what we are about
6 to do right now.

7 MR. ADAMS: Thank you, Your Honor.

8 - - -

9 DIRECT EXAMINATION ON VOIR DIRE

10 - - -

11 BY MR. ADAMS:

12 Q Good afternoon, Dr. Brody.

13 A Good afternoon.

14 Q Thank you for being here.

15 Have I asked you to come and explain to
16 the jury how asbestos causes disease?

17 A Exactly.

18 Q Is that the general --

19 THE COURT: Well, Mr. Adams, you're not
20 going to qualify him or are they agreeing to
21 his qualifications? And if they are, I would
22 like to know on what he's being offered for.

23 MR. ADAMS: I'm absolutely going to
24 qualify him, Your Honor. I just want the jury
25 to know why he's here.

1 THE COURT: Oh, okay. You just got to
2 have a little throat-clearing exercise. That's
3 all right. Go right ahead.

4 BY MR. ADAMS:

5 Q You're going to help the jury understand
6 how asbestos causes disease?

7 A Yes.

8 Q Okay. Can you tell the jury what kind of
9 doctor you are?

10 A Yeah. As you can see, I'm a Ph.D. I have
11 a doctorate in what's called cell biology. Every
12 living thing is made of cells. We need to
13 understand how cells develop, how they're involved
14 in disease. And that's what I've been doing for --
15 focusing on lung cells, most recently. The last few
16 decades, I should say.

17 Q It also says "experimental pathologist."
18 What does that mean?

19 A So pathology is the study of disease. And
20 as an experimental pathologist, I study by use of
21 experiments and animal models and human cells to
22 understand how that disease develops.

23 Q Is one of the things you've done in your
24 career spent a lot of time looking at cells and
25 asbestos with microscopes?

1 A Yeah, definitely have from a long time
2 ago, but yes, that's right.

3 Q Can you give the jury a sense of your
4 educational background and how you became a cell
5 biologist?

6 A Right. So after high school in New
7 Hampshire, I went out to Colorado to do a Bachelor
8 of Science degree in zoology, which is the study of
9 animals. I then went to the University of Illinois
10 where I received a Master of Science degree in
11 anatomy. That was human anatomy, animal anatomy.
12 That's when we learned all of our parts put together
13 and function.

14 Then I went back to Colorado to do a
15 doctorate. That's a Ph.D. And then I did three
16 years of postdoctoral study at Ohio State
17 University, and then started my first academic
18 position.

19 Q What was your first academic position?

20 A That was at the University of Vermont.
21 And that's where this picture actually was taken, in
22 the laboratory of the University of Vermont, the
23 medical school, in the pathology department. That's
24 where I started my interest in asbestos disease.

25 Q And did your interest in asbestos disease

1 include studying animal models?

2 A Yeah, animal models to help us understand
3 human disease, sure. And they're not just models
4 because I say so. These are models that we have to
5 prove to our peers, other scientists, that actually
6 teach us about human disease.

7 Q The things that you're going to be
8 teaching the jury about today -- and we're going to
9 move pretty quickly -- have you taught those exact
10 same subjects at universities?

11 A Yeah, to medical students every year, to
12 graduate students, and biology students, sure.

13 Q You mentioned your work at University of
14 Vermont. And you said you were there for six years?

15 A That's right.

16 Q What was your job title there?

17 A I was an assistant professor.

18 Q And then what did you do after the
19 University of Vermont?

20 A I went to the National Institutes of
21 Health, the National Institute of Environmental
22 Health Sciences, where I was the head of the lung
23 pathology research laboratory there. I was there
24 for 15 years, started my basic science research on
25 asbestos and how it causes disease, and started

1 publishing in that field.

2 As I say, I was there for 15 years. And
3 then I went to Tulane University. I was offered a
4 position as a full tenured professor in the medical
5 school at Tulane, and I actually became the vice
6 chairman of the pathology department in the medical
7 school. And I retired in 2011. Carrying on, I
8 wrote this paper in my retirement, so I tried not to
9 disappear.

10 Q You mentioned publishing. Can you just
11 give the jury very quickly an understanding of what
12 it means to be published in a peer-reviewed
13 scientific literature?

14 A Right, so that's what scientists try to do
15 as often as possible, and that's publish their work.
16 It's been reviewed by other scientists, by their
17 peers.

18 So I do a series of experiments, send --
19 write up the paper that describes the methods, the
20 materials, the results that I found, discussion
21 about what we're trying to do in the work, send that
22 paper to a journal, to a journal like this one,
23 Current Respiratory Medicine Reviews, that we did in
24 2018, or the American Journal of Pathology, Journal
25 of Respiratory Cell Molecular Biology. There are a