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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. XLII

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</i> Madigan Dep excerpts	5353
Ex B - July 16, 2024 <i>Perry</i> Longo Dep excerpts.....	5369
Ex C - Madigan May 1, 2024, Report, <i>Talc, Asbestos, and Mesothelioma</i>	5377
Ex D – <i>Zimmerman</i> Madigan Dep. excerpts.....	5395
Ex E – <i>Lanzo</i> Madigan Dep. excerpts	5399
Ex F – <i>Citizen</i> Madigan Dep. excerpts.....	5411
Ex G - Compton 05/07/20 <i>Lopez</i> Dep. excerpts	5416
Ex H - Moline 06/11/20 <i>Lopez</i> Dep. 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</i> Tr. Excerpt	5501
Ex M - <i>Davis</i> Madigan Dep. excerpts.....	5505
Ex N - Longo Expert Report	5513
Ex O - 10/30/23 <i>Lanzo</i> Longo Dep. excerpts	5526
Ex P - 4/25/2024 <i>Clark</i> Madigan Dep. 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</i> Madigan Dep. Excerpts.....	5647
Ex Y - <i>Ingham</i> Madigan Tr. Excerpts	5653
Ex Z - Garcia, Madigan <i>Asbestos and Mesothelioma</i> Report	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.

1 whole series of different journals that publish and
2 have published my work.

3 And that paper then is reviewed
4 anonymously by a series of scientists. I don't know
5 who's looking at my work. They each send a report
6 back to the editor. And then I have the option to
7 revise the paper based on what the reviewers think.
8 Sometimes they agree with me; many times they don't.
9 And so when the reviewers are satisfied and I'm
10 satisfied, then it can appear as a paper in the open
11 medical literature called a peer-reviewed paper.

12 Q You mentioned you had published in the
13 peer-reviewed literature. It looks like it was
14 about asbestos and cancer. Do I have that right?

15 A That's what it says.

16 Q In 2018?

17 A Yes.

18 Q When did you first start publishing in the
19 peer-reviewed scientific literature?

20 A My first paper in -- my first published
21 paper was in 1969, but my first paper in asbestos
22 disease was in 1981.

23 Q And so for the past 50 years, have you
24 fairly routinely published in the peer-reviewed
25 scientific literature?

1 A Well, that's the only way really to remain
2 current and to be able to do your job, so to speak.
3 I mean, that's the requirement of a successful
4 professor in a medical school.

5 MR. ADAMS: Can I have the ELMO?

6 BY MR. ADAMS:

7 Q How many peer-reviewed scientific
8 publications do you have?

9 A I have 154 peer-reviewed papers, and I
10 have 56 book chapters and proceedings.

11 Q How many of your peer-reviewed published
12 papers are on asbestos, or asbestos disease?

13 A About 80 percent of them. I don't know
14 exactly the number, but it's about 80 percent. The
15 others deal with viruses and asthma disease that I
16 published on, as well.

17 Q I have a copy here of your CV or resume.
18 All right. I think I pressed a button and it froze.
19 What did I do? Well, I've got a copy here. If we
20 thumb through it, I just highlighted a couple here.
21 All right.

22 Page after page after page of publications
23 on asbestos and asbestos disease, fair?

24 A True.

25 See if it works. Maybe it'll work now.

1 MR. ADAMS: I think it's working, but it's
2 not focused. Well, everything highlighted but
3 no one can read this. It says asbestos, so...

4 THE WITNESS: Yes, it does.

5 MR. ADAMS: There it is. Okay.

6 BY MR. ADAMS:

7 Q Very quickly, has any of your work
8 publishing about asbestos or mesothelioma or
9 asbestos-related diseases been funded by industry or
10 asbestos companies?

11 A No. My funding has all been through the
12 National Institutes of Health through competitive
13 grants.

14 Again, I mean, you say what's the greatest
15 reward I've had in my career? It's to be funded by
16 the National Institutes of Health. It's a very
17 competitive process where I'm competing with these
18 great schools across the nation, whether it's MIT or
19 UCLA or Harvard. And the National Institutes of
20 Health receives tens of thousands of applications
21 every year, and only about 10 to 15 percent of them
22 get funded. And I was funded without interruption
23 through my career by the National Institutes of
24 Health.

25 Q Has part of your work publishing in the

1 peer-reviewed literature for the last 50 or so years
2 been an effort to try to find a cure to some of
3 these asbestos-related diseases?

4 A So the focus on these diseases are mainly
5 because there are no effective treatments for any of
6 these diseases. All of the asbestos-related
7 diseases shorten one's life or take the life. And
8 so the National Institutes of Health funds work that
9 helps us understand the disease process so these
10 treatments can be developed.

11 Q Have you served as a peer reviewer,
12 someone who reviews other scientists' work in this
13 arena?

14 A I do that regularly, sure.

15 Q Have you published book chapters on
16 scientific work?

17 A A number of them, yes.

18 MR. ADAMS: Your Honor, in the interest of
19 time, we would tender Dr. Brody at this time as
20 an expert in cell biology and experimental
21 pathology.

22 MS. BUENO: No objection, Your Honor.

23 THE COURT: All right. By reason of
24 Dr. Brody's training, education, and
25 experience, he is qualified as an expert in

1 cell biology and experimental pathology and may
2 express opinions on these matters to the jury.

3 You may continue.

4 MR. ADAMS: Thank you, Your Honor.

5 - - -

6 DIRECT EXAMINATION

7 - - -

8 BY MR. ADAMS:

9 Q Dr. Brody, quickly, just let's start with
10 the basics. You're our first witness. Can you tell
11 the jury what asbestos is?

12 A Well, asbestos is a naturally occurring
13 mineral. It's been mined in many countries around
14 the world, U.S., Australia, South Africa, Canada,
15 many different places; Italy, for example.

16 And this is the rock form. So there are
17 six different kinds of asbestos -- one, two, three,
18 four, five, six. Chrysotile is the main use --
19 mainly used type. It's used more than any other
20 type. About 95 percent of the world's use is
21 chrysotile.

22 The other five varieties make up the other
23 5 percent of the world's use. All of these asbestos
24 varieties cause all of the asbestos diseases:
25 scar tissue disease called asbestosis, lung

1 cancer, and this cancer we're talking about today,
2 mesothelioma.

3 Q In any of your peer-reviewed work, when
4 you've worked with asbestos, you've worked with raw
5 asbestos in your work, correct?

6 A Yes.

7 Q Do you ever have to consult with any kind
8 of geologist before determining that the asbestos
9 you were working with was actually asbestos?

10 A No. I told you where it comes from.
11 That's basically what you need to know. No, a
12 geologist wouldn't play a role in the kind of work
13 that I did. What happens then is you can see
14 there's a fiber form in the rock. And when that's
15 crushed and broken out, then you have the fiber form
16 that can be used in various -- and it has been used
17 in thousands of different products.

18 Q The jury in opening statement earlier
19 today saw slide after slide about something called
20 fibrous tremolite in Johnson's Baby Powder. What is
21 that?

22 A So tremolite is one of the asbestos
23 varieties. You can see it right here. If it's
24 fibrous tremolite, that makes it asbestos. I mean,
25 asbestos is a fiber. If you say something is

1 asbestiform, that means it's a mineral, one of these
2 minerals, in a fiber form. And a fiber means it's a
3 structure three times longer than it is wide. So
4 there you go. It's a fiber. Okay. Three-to-one
5 ratio as it's called.

6 Q So something that's three times longer
7 than it is wide or longer?

8 A Right.

9 Q That's a fiber?

10 A Sure.

11 Q And so if you have one of these six
12 asbestos minerals and it's in that shape, what is
13 it?

14 A It's asbestos, sure.

15 Q One of the things we prepared is some
16 slides that demonstrate how asbestos is inhaled in
17 the body and travels and causes disease. We're
18 looking at the first one. I'm going to give you the
19 pointer and have you sort of take the lead there,
20 and I'll have questions as you go along.

21 MR. ADAMS: Your Honor, is it okay if
22 Dr. Brody stands?

23 THE COURT: Why certainly.

24 MR. ADAMS: Okay.

25 THE WITNESS: Okay, Your Honor. I'm not

1 as agile as I used to be.

2 THE COURT: Me neither, Dr. Brody. No
3 apologies necessary.

4 THE WITNESS: I do want to explain my scar
5 face, though. I had a little procedure done.
6 I apologize for my appearance. That's the way
7 it goes.

8 BY MR. ADAMS:

9 Q How does this slide help us understand
10 mesothelioma and how asbestos causes disease?

11 A Right. So this obviously is a diagram I
12 took from a textbook. And I would just want to
13 remind you that when you take a breath, the air
14 comes into your nose, through down into your mouth,
15 and down this tube that's called a trachea or
16 windpipe. You can feel the top of that in your
17 Adam's apple right here. That's the trachea. And
18 the air goes rushing down into this series of tubes
19 that we call conducting airways because they conduct
20 air down into the lungs.

21 Now, this black line that runs around the
22 outside of the lung, that black line represents the
23 pleura, P-L-E-U-R-A, a Saran Wrap-thin membrane. It
24 wraps around the outside of the lungs and makes the
25 lungs airtight like balloons.

1 There's a single layer of cells that wrap
2 around the outside of the pleura, and those are
3 called mesothelial cells. If somebody has a cancer
4 of the mesothelial cells, that's this cancer,
5 mesothelioma.

6 Okay. So I'm going to kind of take this
7 apart and show you where the asbestos goes and how
8 it influences the cells that develop into cancer.

9 Okay. So this is -- you've already seen
10 it under the microscope. All right. So here's a
11 piece of lung tissue that I've taken with a
12 microscope. You get sort of a three-dimensional
13 view. And I'm going to focus -- well, if you take a
14 breath and the air comes running into these tubes,
15 the air then will move out into these small air
16 spaces that you see here.

17 And we have some excellent defenses that
18 get -- protect us, prevent us from getting sick.
19 Most people, no matter how much asbestos they're
20 exposed to, do not get any of the asbestos diseases
21 because of our excellent defense mechanisms.

22 Our defense mechanisms start with our nose
23 and our mouth where we have moisture that trap the
24 cells and trap the fibers. And then as we get down
25 into the airways, I'm going to show you, we have a

1 very effective defense mechanism that removes fibers
2 that land in the lung.

3 So I'm going to focus the microscope here
4 and I'm going to fill the screen with what's in that
5 green spot. It could be anywhere along the airway.
6 It could be in you, me, a rat, a cat, a dog. We all
7 have these same things. And here is what it looks
8 like.

9 Now, this says human bronchiole --
10 bronchiole is a small airway. And you can see that
11 our airways are lined by these little hairlike
12 structures called cilia, C-I-L-I-A. And these cilia
13 are beating a synchronous, wavelike action. So if
14 there's something like a pollen grain or an asbestos
15 fiber lands on that, it gets swept up to your mouth
16 where you swallow it or spit it out. That's going
17 on all the time, going on right now as we speak.

18 So now I just want to also point out
19 this -- see this bar here. This means 10 microns.
20 This is how we measure asbestos, in microns. So let
21 me explain how big a micron is.

22 Q How big is a micron?

23 A So if you take your thumb and your
24 forefinger and you just make a space you can barely
25 see with your naked eye, naked eye -- if you don't

1 have a magnifying glass or you don't have a
2 microscope, you can just barely see that splice.
3 That's about a millimeter. Now take that millimeter
4 and divide it a thousand times. What you've done
5 then is you've made a thousand microns.

6 Okay. Now, here in this picture it's easy
7 to see 10 microns because I magnified it so many
8 tens of thousands of times. And we'll be -- most of
9 the pictures will have these magnification bars so
10 you can see just how big and small these things
11 actually are.

12 Okay. So we're going to then move ahead.
13 And because I want to take us into -- sorry. I'm
14 going to take us into one of these air spaces, these
15 little air spaces. I'm going to go right inside of
16 these because I want to show you the last line of
17 defense, sitting in our air spaces.

18 Think of this room, this courtroom, as an
19 air space. And if you look down on the floor, you
20 see a carpet. And we have cells called epithelial
21 cells. Epithelial cells line surfaces, like the
22 epithelium and the epidermis. And this, the
23 epithelium we have in our lungs, is very thin like a
24 carpet, runs up over the walls into the next air
25 space, covers all these surfaces.

1 And on this air space surface we have our
2 last line of defense. I showed you the first line
3 of defense, the mucus and nose hairs, and then the
4 cilia in our airways. And now things go right past
5 those defenses and land -- I'm going to show you.
6 Asbestos lands right on the carpet of the lung.

7 Let's take a look at -- into one of these
8 air spaces in a person. Okay. That's what we have
9 right here. So here's the air space. Here's the
10 carpet down here.

11 And this lung once belonged to somebody
12 who was killed in a motorcycle accident. And I was
13 on the medical examiner's autopsy call. I prepared
14 this lung. And as I was going from air space to air
15 space, looking for interesting things to show the
16 medical students, I saw these two characters, this
17 one and this one, sitting on the carpet.

18 Now, these cells are well-known, but to
19 see one of these cells, as you see here, this one
20 has a tail end and a couple of false feet. I caught
21 it when it was just about ready to pick up this
22 pollen grain here. As this guy was zipping along in
23 his motorcycle, he was inhaling a lot of different
24 things. One thing we know he inhaled was this
25 pollen grain. It went right past this cilia and

1 landed on the carpet.

2 We have a very effective defense
3 mechanism, these cells. There's one that's just
4 sitting there, idle and fluffy, not doing anything.
5 But this one received a signal that something
6 doesn't belong there and was moving toward the
7 pollen grain when I stopped the action.

8 Q What are these called? You might have
9 said.

10 A Okay. These are macrophages. "Macro"
11 means big. "Phage" means big. Big eaters of the
12 lung. We'll see what they do in relation to
13 asbestos. See, they find the asbestos, too. We
14 discovered the chemical signal in our laboratory
15 that directs the macrophages to the asbestos. Turns
16 out that asbestos -- not all grains, but asbestos is
17 toxic to these macrophages, injures and kills the
18 macrophages, and they become part of the disease
19 process. We'll get to that in a minute.

20 Okay. So let's now take a look at the
21 lung for a minute. This is a normal pleura. I want
22 you to see a normal pleura, thin. I showed you a
23 diagram earlier. This was that black line. You can
24 see how very thin it is. And if you compare that to
25 the pleura of somebody with a mesothelioma, you can

1 see how dramatically thickened that is. Some of the
2 mesothelial tumor cells are invading the lung.

3 And so what I'm going to do is I'm going
4 to spend the rest of the time explaining how these
5 asbestos fibers cause cancer.

6 Q Can I just ask you one question about the
7 lung cancer, mesothelioma?

8 A Of course.

9 Q What are the diseases that asbestos
10 causes? What are the asbestos-related diseases?

11 A Yeah. So asbestosis develops in this part
12 of the lung. It's scar tissue from inhaling
13 asbestos. So the asbestos injures the lung. The
14 lung responds by making a scar. If you stuck
15 asbestos under your skin, you'd get scarring
16 wherever you stuck the asbestos because it causes
17 cell injury.

18 Okay. And then the next disease is lung
19 cancer. This actually is a lung cancer. It's not
20 an asbestos-induced lung cancer, but it is a lung
21 cancer. And that's developed from certain cells in
22 the airways.

23 And then there's a pleural thickening or
24 scarring out here on the surface, and that's another
25 scar tissue disease.

1 And then there's mesothelioma that we're
2 going to talk about.

3 Q Does -- sometimes people just wonder, does
4 smoking cigarettes give you mesothelioma? Does, you
5 know, pollution give you mesothelioma, or is it a
6 signal tumor for something?

7 A Yeah, so all good questions. It's a
8 signal tumor. Meaning if somebody walks into the
9 doctor with and has this diagnosis of mesothelioma,
10 it signals that that person has been exposed to
11 asbestos. It's very rare to find a mesothelioma
12 without an asbestos exposure. You find them,
13 they're there, but there is a number of diseases,
14 pleural diseases, that are idiopathic, meaning you
15 don't know the cause. If you have an asbestos
16 exposure, it's not worth talking about an idiopathic
17 disease. We know the cause.

18 Okay. Now, the issue of cigarette
19 smoking. Cigarette smoking causes lung cancer. It
20 has nothing to do with mesothelioma. There's no
21 association in cigarette smoking with lung cancer.
22 Air pollution -- I'm sorry. No association between
23 cigarette smoking and mesothelioma. Okay. Thank
24 you.

25 When you said -- you added pollution in

1 there. Just general pollution, I mean, gases, they
2 don't cause mesothelioma. They can cause a variety
3 of other lung diseases. We'll save that for another
4 time.

5 Q Thank you.

6 A All right. So we've been there.

7 All right. So this is what asbestos looks
8 like when it's -- when you see a little pinch of it
9 with the electron microscope, that microscope I was
10 sitting at.

11 So if this whole bundle -- see, it's a
12 fiber bundle, and it's easy to see one micron
13 because I magnified this 4,300 times. So now you
14 can see the individual fibers. And if this whole
15 bundle were to be floating by and the light was just
16 right, it would look like a speck of dust. You
17 cannot see the individual fibers.

18 So a human, as you saw, can see just about
19 a millimeter. To see a micron, as you see here, you
20 need an electron microscope to see that.

21 But this bundle then, even this bundle, if
22 you can see with the naked eye, is too big to
23 inhale. It's the fibers that fracture off these
24 bundles, those are the ones that get down onto the
25 carpet surfaces that we're going to see in a couple

1 minutes.

2 Q Do all of the varieties of asbestos cause
3 mesothelioma?

4 A All of the asbestos varieties cause all of
5 the asbestos diseases.

6 Q How does this slide help us understand how
7 asbestos causes diseases?

8 A Right. So in order to -- you don't get to
9 stand there and watch as a person is inhaling
10 asbestos, you know, right? You can't be there. And
11 even if you were, you wouldn't be looking inside
12 their lungs. You can't do that.

13 So scientists use animal models of
14 disease. Whether it's tuberculosis or genetic
15 diseases or a whole variety of different -- excuse
16 me -- infectious diseases, we use animal models,
17 typically rats and mice. If we can prove that the
18 rats and mice get the same diseases as people, we
19 can use them as models of diseases.

20 I typically use rats and mice. This is
21 the lung -- this is a piece of lung from a rat. And
22 you can see some of the things we were looking at in
23 a human, where there's an airway that comes down and
24 opens up into the small air spaces. Where I showed
25 you those macrophages sitting on the carpet, they

1 were sitting in one of these air spaces in a person.
2 And I can find exactly the same thing, as I'll show
3 you in a minute, in a rat.

4 So this is from an experiment we did where
5 we set up some animals and exposed them in chambers
6 about 6 feet high, 4 feet wide to a high
7 concentration of asbestos for a single hour. And
8 then after the hour, you give the animals an
9 overdose of anesthetic. Overdose means they don't
10 wake up from that. We go in and prepare the lungs
11 so we can look at the individual air spaces, and
12 where did the asbestos go?

13 When I started my work, there was no
14 answer to the question. We know the asbestos goes
15 in the lungs, but where does it go? We couldn't do
16 that.

17 So I'm going to show you, we're going to
18 look at this in this animal immediately after a
19 single hour of exposure, we're going to focus on
20 this spot right here. And you'll see this black
21 hole right here. Because when the animal or you or
22 I take a breath, the air comes down the tube and go
23 in this way, or the air can split and go in this
24 direction, or it can split again and go in this
25 direction.

1 So these are called bifurcations. Like a
2 road bifurcates and splits, the air is doing the
3 same thing. And the asbestos fibers that are being
4 inhaled are traveling along with the airflow. It
5 turns out they flow in the middle of the air. We
6 found out the asbestos is flowing through the center
7 of the air space or through the airway. And
8 therefore they get -- there's interference by these
9 splits.

10 So I'm going to show you this spot right
11 here in the next slide. I'm going to focus on this
12 area. Okay. And so this black hole right here is
13 this black hole right here. Okay. So now we're
14 looking at the -- this is that carpet that covers --
15 that you're standing on is the carpet. Okay.

16 And here's the carpet. Now, this is a
17 10-micron bar. That means this fiber is about
18 10 microns long. There's some short fibers.
19 There's some long, curly fibers. There's some
20 short, straight ones. There's a whole variety of
21 different shapes and sizes just like we saw when we
22 looked at the asbestos by itself in the microscope.
23 Now all of these fibers are sitting on the carpet.

24 Now, this is one of thousands of spots,
25 millions of spots like this around the lung. And

1 every time there's an exposure to a human or a
2 person, some proportion of those fibers are cleared,
3 protected by the -- by our defenses, and some
4 proportion of them get right past those and land on
5 the carpet.

6 Okay. So we're concerned with the fibers
7 that land on the carpet. Yes, we have excellent
8 defenses, they do a great job, but they don't trap
9 everything. So here we're going to see what happens
10 to these fibers.

11 Now, I use this as an example because as I
12 was sitting in a laboratory late at night, I noticed
13 that one of these -- I noticed in some of these
14 sections that some of the fibers were disappearing
15 under the carpet. In fact, you can see the fibers
16 here, but you can't see them here. You can see them
17 here, but you can't see them here.

18 So no one had ever seen this before.
19 There was nothing about it in the literature. So I
20 started doing the studies required to find what's
21 going on. And what we learned was when the fibers
22 land, these carpet cells come up over the top of the
23 fibers and shove them under the carpet. Now, they
24 do that because we have a storage space under the
25 carpet. You, me, rats, cats, dogs.

1 Q Giraffes?

2 A Whales, giraffes. We all have a space
3 under the carpet. And we store lots of things in
4 there. If you look at a lung of a cigarette smoker,
5 if you look at the lung of a cigarette smoker, that
6 space is black and it outlines all the air spaces
7 because the person inhaling cigarette smoke is
8 inhaling carbon, which is black. And it outlines --
9 by sticking in these spaces, it outlines the lung.
10 But asbestos gets into that space, as well.

11 Question?

12 Q Well, I'm hoping to get you out of here
13 before 5:30.

14 A Well, you can't ask me questions.

15 Q I know.

16 So we've inhaled the asbestos. It's
17 landed on the carpet. It's going under the carpet.
18 What happens next?

19 A Yeah, so in this carpet and underneath the
20 carpet in that space is a fluid. It's called lymph,
21 L-Y-M-P-H. And lymph is a clear fluid that runs
22 head to toe in our bodies. It has two very
23 important functions. It carries cells in the immune
24 system and it also plays a role in -- in preventing
25 too much pressure in our blood vessels.

1 It turns out that the lymph fluid in the
2 lung flows to the pleura. So to make a long story
3 short, the fibers that are getting into that space
4 now have access to the pleura, and they do that
5 through the lymph.

6 So let's go -- in fact, this is a picture
7 by Dr. Netter, N-E-T-T-E-R. Dr. Netter has given us
8 atlases of the human body in health and disease.
9 And here he's showing us the pattern of lymph flow
10 in the lung. He's showing these very small vessels,
11 many of which end at the pleura. You can see the
12 network of small vessels out in the pleura.

13 Now, there's another way to look at this
14 and other scientists have shown this. The
15 scientists cut a piece of the lung out and made a
16 diagram out of it. So you can see the pleura on the
17 right and you see some fibers coming in. And the
18 fibers then move into the -- so here's the -- here
19 are the air spaces. Here's the space underneath
20 that I was talking about, and the artist says
21 lymphatic fiber transport to the pleura.

22 So that's the illustration of it going to
23 the pleura. And a number of scientists -- not my
24 work, but -- have studied the collection of asbestos
25 fibers of all kinds in the pleura.

1 Q Is the pleura another word for this lining
2 of the lung where the mesothelioma develops?

3 A Exactly.

4 Q Thank you.

5 How does this slide help us understand our
6 defense mechanisms?

7 A Right. So here, this is the rat now.
8 This is the rat lung. One, two, three, four, five,
9 six, seven macrophages have arrived, having detected
10 the signal that we discovered that they -- that they
11 followed to find odd things that don't belong in the
12 lung.

13 And you can see that -- so this fiber is
14 about 10 microns long, and you can see they're
15 sharing fibers, but these macrophages are dead and
16 dying. They have holes in them and they're not
17 doing very well. And dead and dying macrophages
18 make what are called growth factors. Growth factors
19 cause other cells to divide and multiply. And a
20 dividing cell is more likely to become a cancer
21 cell. So we don't want our cells dividing out of
22 turn.

23 Okay. So a few slides on cancer.

24 Q All right. What is cancer and how do
25 these slides help us understand it?

1 A Okay. So the best definition of cancer is
2 the loss of control of cell growth. That's what I
3 have on my sheet. It's the next thing. Okay. The
4 loss of control of cell growth. The cells will keep
5 growing, and they have to be removed or killed in
6 other ways.

7 Okay. And so this is the cover of the
8 proceedings of a meeting I was at a few years ago.
9 And the topic was, How do fibers cause cancer,
10 carcino -- cancer -- genesis formation? How do
11 fibers cause cancer to form?

12 We've been talking about cells today.
13 I've shown you a lot of different kinds of cells,
14 but you can't talk about carcinogenesis until you
15 talk about the molecular aspect.

16 Cancer is a genetic disease. Molecular
17 biology is the study of genes and genetics. You
18 can't talk about carcinogenesis unless you talk
19 about the molecular aspects, which genes are
20 involved. That's the key to cancer.

21 Now, what I'm going to show in the next
22 couple slides is that asbestos causes damage to DNA
23 genetic material, and that's how it acts as a
24 carcinogen, as a cancer-causing agent.

25 Okay. So one of the ways we do that is by

1 taking cells. There's two cells here; one and
2 another one. We take cells out of animals and
3 people and put the cells in a dish. If you give
4 them the right nutrients, those cells will grow.
5 You can feed them the materials you want to study.

6 For example, some fibers have been added
7 here. You see there's kind of a long fiber and some
8 short fibers. And notice how those fibers have
9 collected around the center circle in the cell. The
10 center cell is called the nucleus. The nucleus of
11 our cells contains all of our genes, all of our DNA.

12 But notice how the fibers are excluding
13 because we have a protective membrane around the
14 DNA. When a cell is dividing, it loses that
15 protective membrane. That's where we're going to
16 go. These are dividing cells.

17 Okay. I'm showing you now what is
18 supposed to happen, normal cell division; three
19 cells, one, two, three. I put an "N" on here for
20 nucleus. Did I tell you that was the nucleus, that
21 circle? No. Okay. So this circle here that the
22 fibers are attached to, that's the nucleus, the
23 center circle is called the nucleus of the cell.

24 So here now we have nucleus in this cell,
25 nucleus here. But this cell is dividing, is

1 replicating. We need -- it's going to have two of
2 the same. It might be if you cut your skin and you
3 scrape your skin, you need to make new skin cells.
4 That's a reason for the cells to divide.

5 Our cells divide at a specific rate, and
6 that rate is controlled by specific genes. When you
7 get errors in a set of those genes that control cell
8 growth, you get cancer. That makes it more likely
9 that you get a cancer.

10 Okay. So I put some notes in here about
11 how often cells divide or are supposed to divide.
12 So here this cell, I put "CH" here for chromosomes,
13 because all the DNA now is stained blue. And the
14 DNA is going to condense into what are called
15 chromosomes.

16 Chromosomes are condensed strands of DNA,
17 all of our genes. I'm going to take these
18 chromosomes out, spread them out so you can see
19 human chromosomes.

20 So humans have 23 pairs of chromosomes.
21 And all of our 20,000 or so genes are distributed
22 across our chromosomes. And every chromosome has to
23 be in the right place on the right chromosome or
24 it's not going to function.

25 So those genes, we have a set of genes

1 that are called growth control genes. I think I
2 said that. Okay. Now, these growth control genes
3 are what protect us from getting cancers. And if
4 their growth control gene isn't where it's supposed
5 to be on a chromosome, then it's not going to work.

6 We have about 150 of them. I'll tell you
7 about one in a second. It's found in the tip of
8 human chromosome 17. It's called P53. P53 was in
9 the year 1994, and it has some great nicknames.
10 It's a tumor-suppressant gene. It is the guardian
11 of the genome. And it's found to be damaged in
12 about half of all human cancers. This is a very
13 important gene that protects us from getting cancer.
14 And it sits -- we know exactly where it sits at the
15 tip of human chromosome 17.

16 So let's see what happens then as cells
17 divide.

18 MS. BUENO: Your Honor, I have no
19 objection to the testimony, but the
20 narrative --

21 MR. ADAMS: I'll ask the question, Your
22 Honor.

23 MS. BUENO: Okay. All right.

24 MR. ADAMS: That's fine. I'll ask another
25 question. I'm sorry.

1 THE COURT: I'm going to be very liberal
2 with him because I'm trying to get him out on
3 time. And I don't see how in the world it
4 helps you for him to narrate; so overruled.
5 Go ahead.

6 MR. ADAMS: All right. We've been given a
7 five-minute warning, Dr. Brody, just so you
8 know.

9 BY MR. ADAMS:

10 Q How does this slide help us understand how
11 a dividing cell is a vulnerable cell?

12 A Yeah, so here's a normally dividing cell.
13 The chromosome is this time a purple. You can make
14 them any color you like. But the key here is that
15 yellow background. In this previous picture the
16 background was red. And that background is called a
17 cytoskeleton.

18 Cells have skeletons just like we do. Not
19 made of bone, but made of connect -- contractual
20 filaments that actually bind to the chromosomes and
21 pull them into the new cell. So we know that we
22 have to have contractual filaments to move the new
23 chromosomes into the two new cells that we call
24 daughter cells.

25 And let's see what actually happens when

1 you put the asbestos into the cells that we've been
2 talking about. Over here is a normal cell. Half
3 the chromosomes go to one side, half -- half to the
4 other. Okay. Half go to one side, half to the
5 other.

6 Do we have another pointer somewhere?

7 Q Did the battery die?

8 A It seems to have.

9 Q Come on, guys.

10 A I'll keep talking while you find another.

11 Yeah, right.

12 MR. ADAMS: Sorry, Your Honor. Can I go
13 over here?

14 THE WITNESS: What are you doing? You
15 don't have another pointer anywhere? Okay.

16 BY MR. ADAMS:

17 Q We'll keep going.

18 A All right. So I will narrate what's
19 happening there.

20 So the one on the left has no asbestos on
21 it. The cell on the right, the asbestos fibers have
22 an arrow. You see I put arrows there? Those show
23 the asbestos fibers.

24 The arrowheads show where the asbestos is
25 bound and the DNA, the black DNA that's bound to the

1 asbestos. So in this case instead of the DNA being
2 able to move to the newly forming cells, it's bound
3 to the asbestos. And I told you that every gene has
4 to be in the right place in the right chromosome.
5 That means any genes that are in that DNA are not
6 going to be able to function.

7 Now, this is the same kind of thing
8 published by another author. I'd love to go into it
9 and tell you what she found, the same kind of thing.
10 The -- the term is called aneuploiding.
11 Aneuploiding is abnormal chromosome separation.
12 Aneuploid cells are not cancer cells, but the door
13 is opening. And the more aneuploid cells you have,
14 the more likely it is you'll get a cancer.

15 Last slide. I need a pointer. I'm, like,
16 helpless without a pointer. I'm trying. We've got
17 some pretty good colors here.

18 Anybody? Anybody?

19 THE COURT: Anybody on the defense side
20 have a pointer?

21 TECHNICIAN: I have one right here.

22 THE COURT: Cute. Thank you so much.

23 THE WITNESS: Here we go, last slide. So
24 this kind of summarizes everything I've been
25 trying to say about cancer. Here's a layer of

1 cells, mesothelial cells sitting on the outside
2 lining of the wall, millions of them, hundreds
3 of millions of them.

4 This says "DNA damage." Now, it shows
5 lightning bolts, but in this case we're talking
6 about a mesothelioma. So from the environment
7 we're talking about asbestos coming in there
8 and damaging DNA, as I just showed you.

9 Now, what happens then as the cell
10 divides, one of the daughter cells goes off and
11 if there's DNA damage like I've showed you in
12 those aneuploid cells, those cells typically
13 die because P53 and other genes drive them down
14 a death path and you never hear about them
15 again.

16 It's going on all the time in our bodies.
17 It's programmed cell death. But in order to
18 have a cancer, one of these daughter cells must
19 survive. And here it is. Here's the surviving
20 daughter cell.

21 Now, between the surviving daughter cell
22 and this tumor here, you've got to give me
23 whatever the latency is. Latency is the time
24 from the first exposure till the time the
25 person came to the clinic. It could be

1 anywhere between 30 and 70 years. Typically
2 it's around 50, 60 years, but it can be in any
3 of that time frame.

4 So here's what's going on with this cell
5 during those -- during that interim period. I
6 mean that latency period. So picture that cell
7 now. It sits there looking and acting like a
8 normal mesothelial cell for months. But
9 eventually it has to divide. Two cells, four,
10 eight, 16, 32, 64, making what's called a field
11 of similar cells. And one or more of those
12 cells now picks up another error, another
13 asbestos fiber, another error forms. So now
14 you have two errors.

15 One is not enough to cause a cancer. Two
16 is not enough. Three is not enough. Four is
17 probably not enough. When you start getting
18 into five, six, seven different errors in these
19 genes like P53 that protect us, you increase
20 the likelihood that cancer will develop.

21 So now we have two errors and you have a
22 field of all the cells in there have two
23 errors, and those cells sit there for months.
24 Eventually they have to divide again. You get
25 now they pick up a third error or fourth error.

1 And then you find fields, multiple fields,
2 scattered across the mesothelial surface until
3 one cell, a single cell, with sufficient number
4 of errors for that person and with the right
5 combination of errors for that person grows out
6 into this tumor.

7 That's why the artist made this all the
8 same color, because they were cloned from a
9 single cell with sufficient errors in the right
10 combination for that person. And that's what,
11 when that keeps growing, causes the cancer and
12 brings the person to the clinic.

13 BY MR. ADAMS:

14 Q Dr. Brody, thank you so much for answering
15 my questions. Were all of the opinions you gave
16 today within a reasonable degree of scientific
17 certainty?

18 A Yes.

19 MR. ADAMS: Thank you. Pass the witness.

20 MS. BUENO: Your Honor?

21 THE COURT: Cross-examination.

22 MS. BUENO: Yes, thank you.

23 - - -

24 CROSS-EXAMINATION

25 - - -

1 BY MS. BUENO:

2 Q Dr. Brody, hello. My name is Kim Bueno.

3 I've never asked you questions before. It's nice to
4 see you.

5 A Thank you.

6 Q All of the slides that you just showed the
7 jury were about asbestos, right?

8 A Yeah, I would say so.

9 Q There wasn't anything that you showed the
10 jury about Johnson's Baby Powder, true?

11 A Well, if there's asbestos in Johnson's
12 Baby Powder, then it would be like the asbestos I
13 just showed.

14 Q The slides you showed were asbestos from
15 experiments not involving Johnson's Baby Powder,
16 true?

17 A Agreed.

18 Q You have never done anything to determine
19 whether Johnson's Baby Powder has asbestos in it,
20 right?

21 A That's not what I do. That's correct.

22 Q You've never tested talcum powder?

23 A I have not. I've never tested any
24 product, actually.

25 Q You've never done studies to see if

1 exposure to cosmetic talc causes mesothelioma?

2 A I've never tested any kind of product.

3 That's not what I've ever done.

4 Q You've never exposed rats or mice to
5 cosmetic talc, right?

6 A True.

7 Q And you talked about all the articles
8 you've published, but you've never written any
9 articles on cosmetic talc, correct?

10 A No, just in asbestos because talc doesn't
11 cause mesothelioma. Asbestos does.

12 Q I told the jury earlier today that dose
13 matters. And you agree with that?

14 A Of course.

15 Q You agree with me that asbestos-related
16 mesothelioma is what we call a dose-response
17 disease?

18 A Correct.

19 Q That means the greater the dose of
20 asbestos, the greater the risk of developing
21 mesothelioma?

22 A Certainly.

23 Q And conversely, the smaller the dose means
24 less risk?

25 A Certainly.

1 Q And the lower the dose, the better the
2 body's defense mechanisms are in getting rid of it,
3 true?

4 A Sure.

5 Q And most of the dusts that we breathe in
6 are very efficiently handled by our body's defense
7 systems, true?

8 A Right.

9 Q And our defense mechanisms remove the
10 great majority, well over 90 percent, of all the
11 dust we inhale, right?

12 A That's right.

13 Q We're all exposed to low, low doses of
14 asbestos, true?

15 A Yeah, sure, and some people are exposed to
16 more than that. That's right.

17 Q Sure. And we're all breathing asbestos
18 fibers every day. And that's what we call the
19 background level, right?

20 A Correct.

21 Q And there are billions of asbestos fibers
22 in the background air that we breathe, correct?

23 A Not all at once. I mean, in your
24 lifespan, you might pick up a billion fibers.
25 But -- and you can get a billion fibers into a

1 thimble, don't forget, so...

2 Q Sure. So over our lifetime, you agree we
3 accumulate billions of asbestos fibers in our lungs?

4 A It's possible. Not everybody does that,
5 but it's possible.

6 Q You can pull up slide 1, please.

7 These billions of asbestos fibers in our
8 lungs that we all breathe, they're just one of the
9 many things we live with and our bodies know how to
10 handle, correct?

11 A I agree.

12 Q As a general principle, there actually is
13 a safe level of asbestos exposure, that being
14 background. True?

15 A It appears that way for most people, yes.

16 Q There's no measurement of disease from the
17 background level, correct?

18 A If that's all one is exposed to, correct.

19 Q And in layman's terms, that means anybody
20 walking around, it's safe to breathe the background
21 level. True?

22 A As far as we can tell, yes.

23 Q Let's talk about what the background level
24 is. When we talk about the background levels of
25 dust or particles in the air, sometimes researchers

1 use fibers per cc, correct?

2 A Right.

3 Q And a cc is a cubic centimeter, kind of
4 like a sugar cube size, right?

5 A That's right.

6 Q And you agree that .006 fibers per cc is a
7 background number from the National Institute of
8 Occupational Safety and Health that you have
9 testified about before, correct?

10 A Yes.

11 Q I'm going to try to use this ELMO. And if
12 I can't do it, we'll make do, Dr. Brody.

13 TECHNICIAN: Hit the little button in the
14 middle that says -- add, article, then circle.

15 THE COURT: That's the focus button.

16 MS. BUENO: Thank you, Judge.

17 BY MS. BUENO:

18 Q There. How about that? All right.

19 A I'm getting tired of seeing me.

20 Q .006 fibers of -- fibers per cc is what
21 you've testified about as a background level,
22 correct?

23 A It's a high background, correct.

24 Q And you've even testified before that
25 there are background levels of exposure as high as

1 .01, true?

2 A Well, it depends on where you are. I
3 mean, if you're outside a shipyard or a place where
4 asbestos is being used, sure, you can get higher
5 than that even.

6 Q And even at that level, the NIOSH, the
7 National Institute of Occupational Safety and
8 Health, .006 fibers per cc, there is no increased
9 risk of mesothelioma, correct?

10 A Correct.

11 Q And just so the jury understands, that's
12 breathing that .006 fibers per cc day in, day out,
13 every day of your entire life. And there's no
14 evidence that causes cancer, true?

15 A Well, I don't know if they know what a
16 person is breathing every day, every minute of their
17 life, but as a general principle, that's what that
18 means, yes.

19 Q And, again, that's breathing that .006
20 fibers per cc of asbestos day in and day out over
21 one's entire life, correct?

22 A I'm saying I don't know that you get to
23 know everything that's going in every minute, but as
24 a general principle, that's the way they measure it,
25 yes.

1 Q As a general principle at that level, that
2 doesn't cause cancer, correct, Dr. Brody?

3 A As far as we know.

4 MS. BUENO: Thank you. I have no further
5 questions.

6 THE COURT: Thank you. Redirect?

7 MR. ADAMS: Very brief, Your Honor.

8 THE COURT: Good.

9 - - -

10 REDIRECT EXAMINATION

11 - - -

12 BY MR. ADAMS:

13 Q Dr. Brody, very quickly, I just want to
14 follow up on the background level, 0.006, that the
15 lawyer for Johnson & Johnson just asked you about.
16 Do you remember that?

17 A Sure.

18 Q And you indicated that's a very high
19 background. Do you remember that?

20 A I don't know if I said "very," but it is a
21 high background.

22 Q What's a more typical background?

23 A Well, instead of -- instead of two zeros
24 in front of, you see five or six zeros. So .006
25 means that you'd need a thousand sugar cube volume,

1 you'd need 6,000 volumes of air to find a single
2 fiber. That's what that means.

3 Q Okay. That's a more typical background
4 level?

5 A Well, no. I'm saying that's what that
6 .006 means. But if you go .0000, then you need
7 10,000 of those spaces, or if you start getting more
8 zeros, you get 100,000 before you can find a fiber.
9 So it's a very low background.

10 Q If a paid expert for Johnson & Johnson
11 came and said it was okay for us to expose children
12 and babies and teenagers going through puberty, with
13 their cells dividing, to asbestos in a powder
14 product in the home -- because if you add up our
15 asbestos, it's less than a cumulative dose of 0.1 or
16 0.4 fibers per cc years.

17 Are you with me?

18 MS. BUENO: Objection, Your Honor.

19 THE COURT: Overruled.

20 BY MR. ADAMS:

21 Q Are you with me?

22 A Only sort of. I mean, you know, there are
23 a whole variety of different backgrounds there. Go
24 ahead.

25 Q Right. But if the cumulative dose from

1 Johnson's Baby Powder was more like 0.1 or 0.4
2 fibers per cc, that was the argument?

3 A That's high, yeah.

4 Q How many epidemiology studies are there
5 showing a double and 28-fold increased risk of
6 mesothelioma at those levels?

7 MS. BUENO: Objection, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: At .1, it's -- it's clear.
10 I mean, .1 is actually the permitted exposure
11 level in the workplace nowadays by OSHA,
12 Occupational Safety and Health. And they say
13 at that level there will be increased numbers
14 of mesothelioma.

15 BY MR. ADAMS:

16 Q You were asked if you tested talc. Do you
17 remember?

18 A Yes.

19 Q Have you tested talc products? And you
20 said no, right?

21 A I never tested any products.

22 Q Are you familiar with the International
23 Agency for Research on Cancer?

24 A Of course.

25 Q What do they say about talc-containing

1 asbestos?

2 A They say it's a carcinogen.

3 Q And what disease does it cause?

4 A I'm sorry?

5 Q What disease does it cause?

6 A Mesothelioma.

7 MR. ADAMS: Thank you. That's all I have.

8 THE WITNESS: You're welcome.

9 THE COURT: Dr. Brody, thank you very
10 much. You may step down, and we appreciate
11 your testimony very much.

12 THE WITNESS: Thank you, Your Honor.

13 - - -

14 (Witness excused.)

15 - - -

16 THE COURT: Ladies and gentlemen of the
17 jury, this completes your service today. A
18 couple of things.

19 First of all, the alternates are just like
20 jurors. We don't know what happens over the
21 course of this time, but alternates and jurors
22 have no distinction. So don't you alternates
23 feel like, "Well, hey, maybe I'm kind of off
24 here in a corner someplace." Alternates are
25 jurors just like regular jurors are jurors, and

1 they may become a juror at any point during
2 this trial. So that's the first thing.

3 Second thing is, before you come back into
4 the courtroom tomorrow, elect a foreperson of
5 the jury.

6 Third thing is, leave your personal notes
7 in the jury room. Personal notes, as I told
8 you, are perfectly okay for you to take. Kind
9 of leave them in a spot in the jury room.
10 Don't take them home with you.

11 And the last thing is don't talk about the
12 case. It's awfully tempting when you get home
13 to family or friends to talk about this
14 experience, but please resist that temptation.

15 And I thank you for it, as does everyone
16 else involved in the trial. Have a pleasant
17 evening. See you tomorrow morning. We will
18 begin the case at 9:30, so arrive a little
19 early so you can refresh and get set so that we
20 can try to promptly get moving on the trial.

21 Thank you so much. Great attention paid
22 by everyone. I can't tell you how much I am
23 impressed with the way you all have listened to
24 this evidence.

25 All right. Stand for the departure of the

1 jury.

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

4 THE COURT: All right, ladies and
5 gentlemen, what have we to do? I'm tired and I
6 know y'all are tired.

7 MS. MCVEY: So let's do this. We do need
8 to discuss some of the exhibits. If we can
9 come in maybe early tomorrow morning.

10 THE COURT: Yes, I'll be happy to.

11 MS. MCVEY: Okay. So whatever time the
12 Court wants to be here, we'll be here to
13 discuss it.

14 THE COURT: Madam Court Reporter, it's
15 really up to you. Would you be able to be in
16 place and set up at 9:00?

17 THE COURT REPORTER: Yes.

18 THE COURT: Would 9:00 give enough time to
19 look at what we need to look at?

20 MS. MCVEY: I think it should, Your Honor.

21 THE COURT: Okay. If you all have any
22 communications about anything this evening, I
23 know you won't resist the temptation to send
24 them to me. And I will --

25 MS. MCVEY: I will send an e-mail just

1 confirming who's coming tomorrow, but certainly
2 Dr. Haber.

3 Just one tiny preview is that on
4 Wednesday, two of the witnesses -- Dr. Gibney,
5 who is the MUSC physician that Ms. Bueno just
6 referenced, he has patients. He's going to
7 appear remotely. So we'll have all that set
8 up. Just so you know that.

9 THE COURT: Good. And I will promise you
10 I will bring my computer tomorrow, technical
11 folks, so we can get set up if my computer is
12 needed in that regard.

13 MS. MCVEY: Okay. Great. So we'll have
14 it situated.

15 THE COURT: Okay. And just so you know my
16 habits and schedule. I am a very early riser.
17 So things that come in, I will view very early
18 in the morning. But as my grandchildren are
19 fond of saying, Big Mama doesn't go into four
20 figures very often. I'm an early go to bedder.
21 So if you don't hear from me, it's because I'm
22 already up in the upper deck, as we say in my
23 house.

24 MS. MCVEY: And, Your Honor, the last
25 thing, and I know they're going to, but it

1 would be great if they would tell us if they're
2 calling Weill or Diette.

3 THE COURT: Yeah, that would be nice. I
4 would like to know that as well tomorrow. I
5 think Ms. Bueno will be able to accommodate us
6 on that.

7 MS. BUENO: We need to do a little bit of
8 shuffling now that we can't call Dr. Barlow.

9 THE COURT: Understood.

10 MS. BUENO: So we'll find out and we'll
11 let the Court know.

12 THE COURT: Understood. Thank you so
13 much. And thank you for the very professional
14 way you're presenting this case. I am most
15 impressed with you, and I think the jury is
16 attentive to what you're bringing to them. So
17 thank you so much.

18 MS. BUENO: Thank you, Your Honor.

19 MS. MCVEY: Thank you.

20 THE COURT: Have a good evening.

21 MS. BUENO: You, too.

22 - - -

23 (Proceedings were adjourned at 5:39 p.m.)

24 - - -

25

CERTIFICATE OF REPORTER

I, Cynthia First, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify: That the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that it is a correct transcript of the same.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 5th day of August 2024, at Chapin, Lexington County, South Carolina.

Cynthia First,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
October 16, 2028

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND

IN THE COURT OF
 COMMON PLEAS
 FOR THE FIFTH
 JUDICIAL CIRCUIT

- - -

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

Plaintiffs,)

vs.)

AMERICAN INTERNATIONAL)
 INDUSTRIES, ET AL.,)

Defendants.)

Case No.
 2023-CP-40-04072

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
 DAY 2 - Morning Session

DATE TAKEN: Tuesday, August 6, 2024
 TIME BEGAN: 9:00 a.m.
 TIME ENDED: 5:02 p.m.
 LOCATION: Richland County Judicial Center
 1701 Main Street
 Courtroom 3B
 Columbia, South Carolina
 REPORTED BY: Cindy A. Hayden, RMR, CRR
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I N D E X

PAGE

STEVEN E. HABER, M.D.	
DIRECT EXAMINATION BY MR. ADAMS	343
CROSS-EXAMINATION BY MS. BUENO	454
REDIRECT EXAMINATION BY MR. ADAMS	518
JOHN HOPKINS, Ph.D. (Via videotaped)	
DIRECT EXAMINATION BY MR. PANATIER	548

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
COURT EXHIBIT 3	Proffer provided by Attorney Buono regarding Motion in Limine Numbers 10 and 19	646
EXHIBIT DX19	Affidavit of Katherine Uhl	495
EXHIBIT DX7315	Document titled Talc: Consumer Uses and Health Perspectives	494
EXHIBIT DX8240	Johnson & Johnson document dated 11/21/1975, Subject: Talcs Analyzed by Langer	490
EXHIBIT DX9341	Notes of Dr. Harber	458
EXHIBIT DX12007	Work History Affidavit of Michael Lawrence Perry	480

P R O C E E D I N G S

* * *

THE COURT: All right. Ladies and gentlemen, the first thing we're going to do is consider this objective exhibits situation, and I'll talk to you in a minute about that. And then the next thing we're going to do is talk about this trial and how it's going to run in the light of what we're facing.

I've had long conversations with Dan Shearouse, who is the interim court administrator, was my right hand in situations just like this for many, many years.

I also, just so you know, developed the National Center For State Courts and Conference of Chiefs pandemic policy way before we had COVID and we were still in Ebola and SARS.

So I think I'm first in what you do in this kind of situation. What we're not going to do is lose this trial if I can possibly avoid it and try this case, and the question is how we do that.

1 So -- all right. Let's go to these
2 exhibits first. I have read the
3 information about each and every one of
4 them. Almost each of -- one of these
5 exhibits is something I am very familiar
6 with from both trials.

7 The authenticity and relevance claims
8 satisfy me on every one of them. And I
9 don't plan to go through every one of them
10 by any means. If there are some very
11 serious issues with regard to a few of
12 them, I'll hear those, but otherwise, I am
13 prepared to rule on these papers.

14 So I go first to you, Ms. McVey, and I
15 will ask you to go through all of them.
16 And if you've got something that takes
17 about two minutes to say about it before I
18 turn to Ms. Bueno, please do so.

19 MS. McVEY: Your Honor, just very
20 briefly, you'll note that we withdrew four
21 of the exhibits that they objected to. And
22 that would be 95, 96, 271 and 272.

23 THE COURT: Right. Those are
24 withdrawn.

25 MS. McVEY: And just briefly, I gave

1 you the categories of documents, 23 or so,
2 where Johnson & Johnson documents have been
3 stipulated to be authentic business records
4 and meet the hearsay exceptions.

5 Two are Cyprus documents, who, of
6 course, was a Johnson & Johnson supplier.
7 Eleven are Imerys documents, another
8 Johnson & Johnson supplier. One is
9 actually a Johnson & Johnson advertisement
10 that they object to.

11 There are FDA documents, which come in
12 for a myriad of reasons. A Kenvue document
13 and a BASF document, that Johnson & Johnson
14 has repeatedly admitted an authentic
15 affidavit of Roger Miller, who was the
16 manager of the Windsor Mines in Vermont.

17 THE COURT: Right.

18 MS. McVEY: That's their own talc
19 mine. So, Your Honor, I think there are
20 three RJ Lee documents, who, of course, was
21 their main testing lab -- I'm sorry -- it's
22 RJ Lee testing in 2019 in which we've
23 talked about. And then the last one is --
24 is a rather large exhibit that contains all
25 of the adverse events dealing with

1 Johnson & Johnson Baby Powder.

2 THE COURT: All right.

3 MS. McVEY: And, of course, we've
4 given you a chart and the other side a
5 chart just outlining why we believe they're
6 admissible and how they're authentic.

7 THE COURT: I was interested,
8 Ms. McVey, in one exhibit, and that is
9 Exhibit Number 41. Which category is
10 Exhibit 41 in? Is it in the 23 that are
11 all J&J documents and been stipulated, or
12 which one is it?

13 MS. McVEY: So it is a Johnson &
14 Johnson document, and it contains the names
15 of known Johnson & Johnson employees. And
16 its content is consistent with the other
17 correspondence during that time. It is not
18 part of the stipulation. But we, as we
19 outline in our chart, give you a list of
20 reasons why it's admissible.

21 MR. COWAN: Your Honor, we're not
22 objecting to the authenticity of that
23 document. What we're objecting to is the
24 content of the document. It concerns
25 ingesting talc, which plaintiff actually

1 moved to exclude that type of evidence.
2 This shouldn't come in either. It's the
3 same thing.

4 THE COURT: You're going to have to
5 speak up a little bit, Mr. Cowan.

6 MR. COWAN: I apologize.

7 Your Honor, we do not object to the
8 authenticity of 41. It's got a Bates on
9 it. It's not part of the stip, but I'm not
10 going to object to the authenticity. The
11 issue is the -- the content. The issue is
12 that plaintiffs move to exclude stuff about
13 GRAS and --

14 THE COURT: G-R-A-S?

15 MR. COWAN: Yes. Yes, ma'am.

16 THE COURT: And which of these
17 documents do you think violates that
18 stipulation?

19 MR. COWAN: We've got Number 41, one
20 of the ones you just said.

21 THE COURT: Well, Number 41, I know
22 George Frazza very well. When I chaired
23 the Conference of Chiefs and the National
24 Senate of the State Courts, I created a
25 business council to try to get state courts

1 more interfacing with the business
2 community and get their help for funding
3 with state courts, and George Frazza was
4 one of the members of that. He was the
5 longtime general counsel for Johnson &
6 Johnson.

7 I do not understand how GRAS, which is
8 generally regarded as acceptable, has
9 anything to do with what's in the Frazza
10 letter.

11 MR. COWAN: It's about the ingestion
12 of talc, not the --

13 THE COURT: Well, the ingestion of
14 talc is going to be talked about in a
15 variety of different circumstances, and the
16 fact that it is talked about, it doesn't
17 mean that generally regarded as -- GRAS
18 comes into the picture.

19 But that's not a reason to exclude
20 this. If it comes down to that and you
21 think she's opened the door, if she
22 presents the Frazza letter to the jury
23 because of GRAS exclusions, then we'll
24 climb that mountain when we come to it.

25 MR. COWAN: I wasn't going to battle

1 this one out, but I just brought it up
2 because it was brought up. But I have the
3 papers. We filed our papers, our
4 objections, our --

5 THE COURT: I've not seen them and
6 looked at them. And quite frankly, you
7 know, I see -- I can't maybe think of maybe
8 but one of these things I haven't seen
9 before. All right. I've tried a lot of
10 J&J cases.

11 And the information that's contained
12 about or what it's offered for as well as
13 the information about its authenticity
14 convinces me these documents will come in.

15 MR. COWAN: Your Honor, the only --
16 the only documents that I have any interest
17 in actually arguing, if you're willing to
18 hear it, are the decade of evidence chart.

19 THE COURT: Mr. Cowan, you're going to
20 have to either turn that microphone on --

21 MR. COWAN: I'm going to -- I'm going
22 to stand up. I'm going to project.

23 The only documents that I think are
24 even worth arguing about -- you have
25 everything else in the papers. You even

1 have this in the papers. But if you are
2 willing to hear argument about the decades
3 of evidence chart, I'm glad to provide that
4 argument.

5 THE COURT: I've already ruled on the
6 decades of evidence chart and said it comes
7 in.

8 MR. COWAN: I think what happened was,
9 Your Honor, is I wasn't sure which chart
10 they were going to use, and you said, well,
11 we're going to wait until I know which
12 chart they're going to use. That's -- I
13 believe that's what went on --

14 THE COURT: Well, if I haven't ruled
15 on it, I will give you a short period of
16 time to talk about the decades of evidence
17 chart. So go ahead.

18 MR. COWAN: Okay. So this chart fails
19 on multiple fronts as a Rule 1006 chart.
20 Those charts are not supposed to be
21 argumentative. They are supposed to be
22 neutral statements of voluminous writings
23 that are inconvenient to be individually
24 put before the Court.

25 Putting aside the fact that these are

1 not so voluminous that they need a chart,
2 regardless of that, the chart itself begins
3 with arguments. It says: Decades of
4 evidence of asbestos in Johnson & Johnson
5 products at the very tippy top of the
6 chart. That is, by definition, argument
7 and improper under Rule 1006, which is
8 supposed to be a neutral statement of
9 the --

10 THE COURT: I don't understand that
11 argument. "Decades" means ten years plus
12 ten years plus ten years of evidence. What
13 is argumentative about that and uncertain
14 by definition?

15 MR. COWAN: By definition of asbestos,
16 it is not. There are numerous, dozens of
17 documents on that list that have nothing to
18 do with --

19 THE COURT: Okay. I may have strayed,
20 then. You started by saying, the first
21 thing I want to show you about how
22 argumentative it is, is its title, "Decades
23 of Evidence." I disagree with that
24 completely and would not rule it out for
25 the title.

1 MR. COWAN: Okay. The second thing
2 is, is that it repeatedly misrepresents
3 what is in the documents themselves by the
4 definition on top, "Decades of Evidence of
5 Asbestos," and then listing out -- I don't
6 know -- about 40 documents that don't say
7 anything about asbestos and talc.

8 There are also numerous documents in
9 there about products that are not at issue
10 in this case, not even Johnson & Johnson
11 products. Therefore, the title is also
12 inaccurate because of that.

13 Also, in this case there are numerous
14 documents that are inapplicable to this
15 case because they concern mine sources that
16 are not at issue in this case.

17 Lastly, everything has to be
18 admissible evidence, meaning it's got to be
19 stuff that could go back to the jury.

20 There are at least two pages of expert
21 retained litigation reports from
22 Plaintiffs' experts that fill out the end
23 of that chart. Those expert reports are
24 not admissible evidence. They are hearsay.
25 They are not going back to the -- to the

1 jury.

2 Not only that, there is a -- there is
3 a -- there's an expert report,
4 second-to-the-last entry on this -- on this
5 Decades of Evidence chart, that their
6 expert wrote that he said he's not even
7 relying on in this case because it's about
8 Australian talc. Mr. Perry did not get
9 exposed to Australian talc.

10 It's -- there are just so many
11 different entries that are problematic.

12 It is unnecessary. They can -- to the
13 extent they want testing documents in, they
14 are more than capable of putting them in.

15 And -- and they'll get them in. But
16 not to get expert reports going back to the
17 jury to summarize it for them. That's just
18 not the law, Your Honor.

19 THE COURT: All right. Ms. McVey.

20 MS. McVEY: So --

21 THE COURT: Don't talk about
22 everything. I'll tell you right now, the
23 expert reports is, I think, the one thing I
24 want you to concentrate on.

25 MS. McVEY: So I don't even know

1 exactly what he's talking about on that,
2 and I'll go back and look at that
3 specifically.

4 But each document listed in that chart
5 relates to a Johnson & Johnson product or a
6 source mine that Johnson & Johnson has
7 used. Whether or not it was Italian or
8 Vermont or Chinese --

9 THE COURT: I get that from almost
10 everything.

11 I'm now down to a very specific thing,
12 which is the two pages that indicate expert
13 reports and apparently summarize the expert
14 reports is what I'm getting at in his
15 argument.

16 MR. COWAN: Beginning on 193 entry on
17 the second-to-last page, Scientific
18 Analytical Institute litigation report.

19 194, the MVA litigation report.

20 195, MAS, the litigation report.

21 THE COURT: All right. I got -- I got
22 the picture.

23 MR. COWAN: Okay.

24 MS. McVEY: So these -- this has come
25 in at every trial that we've had against

1 Johnson & Johnson. They are -- if we want
2 to withdraw the expert report, we can do
3 that. But the images are from the expert
4 reports. Those would certainly be
5 admissible as to what was found in the
6 testing.

7 MR. COWAN: Nobody is saying that the
8 photos of particles aren't coming in.
9 These are -- these are summaries of -- of
10 conclusions in a expert litigation report.

11 THE COURT: Yeah. And apparently
12 those are reports that were relied upon by
13 experts in this case, correct?

14 MR. COWAN: That's fine, Your Honor.
15 But the summary --

16 THE COURT: I mean, I have seen so
17 many trials where they take a reliance
18 document -- defense does it all the time to
19 cross-examine the plaintiff -- and sticks
20 it up on the screen and then cross-examines
21 the plaintiffs' expert about it.

22 MR. COWAN: Absolutely, Your Honor.
23 But that's not the same thing as putting an
24 exhibit tab on it and going back with the
25 jury.

1 If they want to use it as a
2 demonstrative, we can maybe talk about it.

3 THE COURT: Right. I thought they
4 were using it as a demonstrative.

5 MR. COWAN: They're offering it into
6 evidence.

7 MS. McVEY: It is. It's totally
8 admissible. That's the exact purpose of
9 1006 is to summarize a bunch of documents.

10 THE COURT: Well, here's what I'm
11 going to do. I am going to allow you to
12 show it to the jury like you would show a
13 witness your summary, but I am not going to
14 allow it to go back to the jury from 193
15 forward.

16 So strike that off of the chart. As
17 it goes back to the jury, strike that off.

18 MS. McVEY: Okay.

19 THE COURT: And I will not allow it to
20 go back to the jury with anything that gets
21 marked with an evidence tag. So that's my
22 ruling.

23 MS. McVEY: Other than 193 forward,
24 the rest of it can go back to the jury?

25 THE COURT: That's correct.

1 MS. McVEY: Okay. Thank you,
2 Your Honor.

3 THE COURT: And what you choose to do
4 about 193 to the end in terms of examining
5 a witness or something like that, I don't
6 know. I'm not going to get into that right
7 now.

8 MS. McVEY: That works.

9 THE COURT: Okay. What else have we
10 got with respect to these documents?

11 The -- I think we've got the -- I
12 mean, with respect to all these mines -- I
13 mean, Imerys, Cyprus, Windsor, Argonaut,
14 Hamm Mine, I mean, I am real familiar with
15 all these mines that are involved in trying
16 to J&J cases. And many of them are mines
17 that were owned by J&J. So I'm not
18 inclined to exclude anything about the
19 mines.

20 MS. McVEY: And I'm not sure they're
21 even arguing that anymore.

22 THE COURT: I do not understand the
23 documents I was looking at that any of it
24 includes the Australian mines or any mines
25 that are not suppliers to J&J.

1 MR. COWAN: That was just the chart.

2 THE COURT: Okay. Very good. Well,
3 then, I'm going to let all that in.

4 MS. McVEY: So, Your Honor, I think
5 that my understanding is that, then, the
6 exhibits on our motion for preadmission,
7 other than the ones that we've withdrawn
8 and you've ruled on, are now admitted into
9 evidence.

10 THE COURT: That's correct. And over
11 Defendants' -- they are admitted over
12 Defendants' objections.

13 Those objections have been well
14 briefed. They're in the record. And
15 those -- the -- their objections are
16 preserved for appellate review.

17 MR. COWAN: Thank you, Your Honor.

18 MS. McVEY: And, Madam Court Reporter,
19 we'll give you each of the exhibits to
20 take.

21 THE COURT: All right. Now, what else
22 have we got before I talk about how we're
23 going to do the trial?

24 MS. McVEY: I think that's it, at
25 least as far as -- oh. I do have one other

1 thing. This is not a big deal. We can do
2 it later.

3 I have neglected to get you to sign an
4 order admitting Jonathan George pro hac in
5 this case. He's not said anything, but
6 I've got -- we filed a motion and order
7 last week. I just wanted to hand it up to
8 you.

9 THE COURT: Yes. Send it up here
10 right now and let me sign it before I
11 forget that.

12 MR. GEORGE: Thank you, Your Honor.

13 THE COURT: All right. Now, the only
14 other thing I know we had before we talked
15 about how to do about this trial is Diette
16 and Weill. What are we doing next?

17 MS. BUENO: Your Honor, I think
18 perhaps the discussion about the scheduling
19 that Your Honor is about to discuss with
20 the trial will dictate that.

21 As of right now, if nothing changes,
22 our plan is to bring Dr. Weill first thing
23 Monday morning, when we start our case. We
24 have scheduled him for then.

25 But I will -- I will wait to hear what

1 Your Honor has to say about how the storm
2 is going to impact us.

3 THE COURT: Okay.

4 MS. BUENO: And reserve our right if
5 the scheduling changes to change that.

6 THE COURT: I understand.

7 All right. It's always a little bit
8 of a roll of the dice to figure out how
9 these storms are going to work.

10 But the worst-case scenario for
11 Columbia would be tornadic winds and a lot
12 of rain beginning this evening and for
13 continuing at least through Thursday and
14 maybe some of Friday. That's the
15 worst-case scenario.

16 I think we can go forward with today
17 with the caveat to the jury -- and I'm
18 going to reassure them to begin with that
19 we're going to re-evaluate this at the
20 lunch break and see what's happening.

21 Right now, from what I understand, is
22 that we are not expecting the big bands of
23 rain here until late in the afternoon or
24 early evening, but that could change.

25 And so -- and I will be monitoring

1 that with the chief court administrator,
2 Dan Shearouse, on an hourly basis to see
3 what they are learning.

4 Of course, Charleston is all shut
5 down. And we just don't know how far up
6 from the Pee Dee and the Lowcountry it's
7 going to come before the Midlands starts to
8 be affected. But it looks like it's going
9 to be affected kind of from the bottom up.

10 So Columbia kind of sits on the cusp,
11 and the other things around Columbia will
12 be affected before Columbia itself is
13 affected.

14 Now, it's certainly going to affect
15 flights and things of that nature. So
16 that's also something to keep in mind.

17 If the worse comes to the worst, I
18 would let them go today and not hold court
19 Wednesday and Thursday.

20 I think Kittredge's investiture as
21 chief is likely to be postponed, which is
22 going to take place Thursday. And then
23 depending on what -- what is said, crank
24 back up Friday. If not, those two days
25 would be gone and we would crank up -- back

1 up Monday.

2 I would intend to move this thing
3 around in such a way that we finish by
4 Friday. All right? There's been too much
5 time and effort and finance expenditure
6 made on a big trial like this to just scrap
7 it, and I'm going to do everything in the
8 world to keep from doing that.

9 But that will mean further compression
10 of witnesses and presentations and this
11 kind of thing, and that's just going to be
12 how I rule. And if people take exception
13 to that, I understand that completely, and
14 those exceptions will be preserved.

15 And, frankly, the appellate court
16 hasn't ruled, in my memory, about what
17 happens if a judge insists on moving
18 forward when a two-week trial has been
19 planned without carrying it over past the
20 originally allotted two weeks.

21 But that is how I intend to do that.
22 I promised the jury that I might give you a
23 pass on Friday of next week, and I intend
24 to live by that, if possible.

25 So that's all I know to tell you right

1 now. So I'm not going to tell them they're
2 dismissed tomorrow yet. I'm going to tell
3 them we are considering all of that.

4 And I certainly invite your input now
5 as to what you feel about the worst-case
6 scenario. Start with you, Ms. McVey.

7 MS. McVEY: Your Honor, we want to get
8 this case tried, so however we need to do
9 that I think we're willing to do.

10 Dr. Longo is driving today here. And
11 so depending on what we know when and if
12 you think we're going to end up canceling
13 tomorrow, we'll call him off from -- from
14 driving; otherwise, he'll head this way.

15 THE COURT: Where is he driving from?

16 MS. McVEY: Atlanta.

17 THE COURT: Uh-huh.

18 MS. McVEY: So it's doable. It's just
19 going to be --

20 THE COURT: Yeah. And Atlanta seems
21 to be, at this point, not affected. But,
22 again, we know that those things can
23 change.

24 MS. McVEY: You know, ideally,
25 tomorrow is our heavy, heavy full day.

1 THE COURT: Exactly. And that's why
2 I'm very reluctant to change it, unless I
3 have to.

4 MS. McVEY: So I think we'll pledge to
5 go forward as fast as we can and then see
6 what shakes loose.

7 THE COURT: All right. Ms. Bueno.

8 MS. BUENO: Yes. You know, I think
9 Your Honor's suggestion makes sense. We
10 have to see what Mother Nature brings us.

11 I'll state for the record and for your
12 understanding that we have Dr. Kuffner, our
13 corporate representative, scheduled to be
14 here on Thursday to testify in plaintiffs'
15 case. Our plan is to bring him back in our
16 case for the direct and to not do it in
17 their case. So we've got some flexibility
18 on timing with him.

19 We do have Dr. Weill scheduled for
20 Monday morning, which might need to be
21 adjusted, depending on what happens.

22 And we're still working on the rest of
23 our scheduling. And I'm going to wait to
24 hear from Your Honor and your decision
25 before we finalize that, but I think we'll

1 be in a position to hopefully make it work,
2 and we'll just see how it goes.

3 THE COURT: Well, thank you very
4 kindly for that. And it's good information
5 and valuable information to have. And I
6 will absolutely work with you as best I can
7 to create something that seems equitable
8 for both sides.

9 MS. BUENO: Thank you, Your Honor.

10 THE COURT: All right. Okay. We've
11 got five more minutes before our jury comes
12 in. So be at ease --

13 MS. McVEY: Thank you, Your Honor.

14 THE COURT: -- unless you've got
15 anything else I need to deal with. Yes?
16 Yes?

17 MS. PEPKE: Your Honor, I did want to
18 call the Court's attention to the filings
19 last night. I don't know if you saw them.
20 We did file a supplemental brief on
21 successor liability evidence, of course,
22 just restating and explaining in more
23 detail our position as to the -- that
24 evidence should not be admitted. And
25 plaintiffs had a filing, too, if they want

1 to --

2 THE COURT: Okay. What do I need to
3 do about successor liability? Do I need to
4 go on and deal with it now?

5 MS. McVEY: No, I don't think so. I
6 think we can kick it down the road. What
7 they're really trying to do is prevent us
8 from putting in evidence that we believe is
9 relevant to all the other causes of action.

10 THE COURT: Well, and I understand
11 that, and I don't blame you for wanting to
12 nail down their position before you put up
13 that evidence, et cetera, et cetera,
14 because once it gets in front of the jury,
15 it's hard to erase it from their minds.

16 When does the evidence they are
17 concerned about begin to come in?

18 MS. BUENO: Well, I mean, you're going
19 to hear from Dr. Hopkins this afternoon.

20 THE COURT: So have I got until this
21 afternoon to deal with --

22 MS. PEPKE: We've agreed on Hopkins.

23 MS. McVEY: We've agreed on Hopkins.

24 THE COURT: Okay. But then I'm trying
25 to think about what I ought to do about

1 successor --

2 MS. McVEY: I -- I think you can -- I
3 don't think we need to deal with it today.
4 Let me go and figure out when it -- when it
5 might be coming.

6 THE COURT: Okay. Fine.

7 MS. McVEY: And we did file last night
8 a motion to compel. You'll recall that you
9 denied Kenvue and Holdco's motion to
10 dismiss the case because they were -- and
11 then they ordered them to sit for a
12 deposition.

13 THE COURT: Yeah.

14 MS. McVEY: And they have never sat
15 for a full 30(b)(6) deposition before.
16 This was their first time. And we thought
17 a motion, which I'll hand up -- we filed it
18 late last night, because they were totally
19 unprepared for some of the topics that will
20 be relevant to this case.

21 And so I'll hand that up to you. They
22 haven't had a chance to respond yet. So I
23 want to let them read it and process it.

24 THE COURT: Okay.

25 MS. McVEY: But I do want to get it to

1 you because it's important. And I think
2 it's -- you know, our position is, while
3 you decide the successor liability stuff,
4 the jury decides the fraud stuff, and a lot
5 of this goes directly to our fraud claim.

6 THE COURT: Well, I know. And the
7 sooner I make a decision about the
8 successor liability, the better.

9 So what I need to do, I guess, is get
10 all the -- everything that's so far been
11 submitted, let's get it printed out for me.

12 MS. McVEY: Yeah, I've got a copy of
13 the motion. I'll -- I'll hand it up to
14 you.

15 THE COURT: Okay. Ms. Bueno, can you
16 be sure I get a copy -- a printed copy of
17 your stuff?

18 MS. BUENO: Ms. Pepke is handing it up
19 to you right now.

20 THE COURT: Thank you. Thank you very
21 much.

22 MS. BUENO: And as Ms. McVey said, we
23 do want to file a response to what
24 plaintiffs filed last night.

25 THE COURT: I understand.

1 MS. BUENO: But I will just mention
2 for the Court, as we're starting to dig in
3 on this a little bit more, that yesterday
4 during opening statements, on Page 194 of
5 the transcript, plaintiffs' counsel said to
6 the jury, quote: And what happens in 2021,
7 there's a myriad of Johnson & Johnson
8 companies, but for purposes of this trial,
9 the only ones you-all need to worry about
10 are Johnson & Johnson and Kenvue.

11 And I'll remind the Court that there
12 was a slide that had a bunch of different
13 entities. And as counsel said this
14 statement on Page 194, everything was
15 pulled off except Johnson & Johnson and
16 Kenvue. Holdco was one of the companies
17 that was pulled off that counsel said the
18 jury didn't need to worry about.

19 And so I think that the plaintiffs'
20 position in opening has been clear. So
21 although we disagree very strongly with the
22 allegations that our corporate rep was not
23 prepared, I think the Holdco issue doesn't
24 need to be addressed by this Court because
25 I don't hear that that's what plaintiffs

1 are intending to offer.

2 THE COURT: Well, I understood their
3 reference in the opening argument to be the
4 Johnson & Johnson companies because that is
5 the way I have designated them when I made
6 the initial charge to the jury, that there
7 were several different entities, and then I
8 said the Johnson & Johnson companies are --
9 so that's what I understood them to be
10 saying.

11 MS. McVEY: More -- more than that,
12 you limited what we could say in opening
13 because of their motion. We have not given
14 up on any of that. We want to talk about
15 the bankruptcy, we want to talk about the
16 different companies and how they looked
17 through this maze of stuff because it's
18 directly relevant to the fraud claim.

19 THE COURT: I understand, and I don't
20 think that's precluded by anything that's
21 happened so far.

22 MS. BUENO: It is all related in one
23 issue. Your Honor now has the information.
24 You know we filed our brief. You know they
25 have --

1 THE COURT: The substance of it -- I'm
2 not going to rule on the basis of what
3 happened in open argument, but --

4 MS. BUENO: Understood.

5 THE COURT: -- but I certainly am
6 going to look carefully at the materials
7 that you submitted before I make any ruling
8 about successor liability.

9 MS. BUENO: Terrific. And,
10 Your Honor, this is our motion to compel.
11 If you want paper exhibits, I'll print them
12 all out. I just didn't think that you
13 would --

14 THE COURT: I think I can deal with
15 the motion to compel.

16 MS. McVEY: But they're -- the
17 deposition, if you want the full
18 deposition, we can get that to you.

19 THE COURT: Let's just do it this way.
20 And so what is -- the only thing that's
21 missing then -- I got the objection. I got
22 motion to compel and the sanctions.

23 Now, what is your motion on? Yours is
24 the -- yours is the objection. This is
25 their reply as well --

1 MS. McVEY: We just filed a motion to
2 compel because we're missing the evidence.

3 THE COURT: How about your -- I want
4 to put your document and their document on
5 successor liability.

6 MS. McVEY: Okay. So that was mostly
7 in the motion to dismiss. Do you want to
8 stick -- we could brief something else and
9 get that filed today.

10 THE COURT: No, you don't need to
11 file it at this point. If it's in the
12 motion to dismiss, that's fine.

13 MS. McVEY: Okay.

14 MS. PEPKE: We'll get you a response
15 to their motion to compel by this evening.

16 THE COURT: Okay. Well, I -- I'm
17 going to try to rule on this today.

18 MS. McVEY: Okay.

19 MS. PEPKE: I'll do something.

20 THE COURT: Okay.

21 MS. McVEY: And I'm going to get
22 somebody who maybe can do something while
23 we're here and then -- but if you want any
24 of the exhibits, we'll get those to you,
25 whatever you need.

1 THE COURT: No. I -- I just want some
2 compact position paper --

3 MS. McVEY: Okay.

4 THE COURT: -- brief or whatever, on
5 who cites first the successor liability.
6 And then with respect to this 30(b)(6),
7 I'll look at that also.

8 MS. McVEY: I -- we will get -- we
9 will get that list to you today.

10 THE COURT: Okay. All right.

11 All right. Be at ease. I'm just
12 about to bring in the jury.

13 How are we on jurors?

14 * * *

15 (Whereupon, there was a recess in the
16 proceedings from 9:30 a.m. to 9:36 a.m.)

17 * * *

18 THE BAILIFF: The court will come to
19 order. All rise.

20 THE COURT: Please be seated.

21 All right. The jury is ready. Bring
22 me the jury.

23 THE BAILIFF: Yes, ma'am.

24 (The jury enters the courtroom at
25 9:38 a.m.)

1 THE BAILIFF: The jury is seated,
2 Your Honor.

3 THE COURT: Thank you, sir.

4 Good morning, ladies and gentlemen of
5 the jury. I understand you have elected a
6 foreperson and that that foreperson is
7 Juror 31, Caroline F. Bond. Thank you very
8 much.

9 I know that one thing that's on your
10 mind, and it's on my mind, too, is what is
11 this storm going to do to this trial. And
12 I am monitoring that very closely as we
13 speak.

14 As you know, I operated the whole
15 court system 15 of the 27 years I served on
16 the Supreme Court and am quite familiar
17 with how plans, many of which I've
18 developed, of dealing with everything from
19 pandemics to weather-related issues. And
20 I'm in touch with the person within court
21 administration now, the chief, who is
22 handling this issue.

23 So what I can tell you is this. Of
24 course, we know that the coast is the most
25 affected area. Columbia will certainly

1 receive some very heavy rains and winds,
2 and the question is: When will they start
3 and how long will they last?

4 The best information, as I stand here
5 right now, is that we will begin to see
6 those more severe rain events -- it's
7 raining now, but we will see the heavier
8 rain later in the day along with the
9 heavier winds.

10 Worst-case scenario is that Wednesday
11 and Thursday would be very difficult days.
12 Friday, maybe not so much so.

13 I am not going to put you in peril and
14 danger. Please be assured of that. And we
15 will develop a situation and I will report
16 to you as the day goes on about what
17 the court administration says.

18 But I have control of this trial and
19 this courtroom. And if I feel there's the
20 slightest chance that there's a need for us
21 to go on and stop this trial, I can do that
22 whether or not they have officially closed
23 the courthouse or anything. And I will do
24 that and all that you may safely return to
25 your homes and then keep up with things as

1 best you can through the jury information
2 system that the bailiffs will -- if you
3 haven't already been instructed, they will
4 tell you about.

5 It is my fervent desire to complete
6 this trial in the two weeks allotted to it.
7 These parties have spent enormous amounts
8 of time and enormous amounts of money
9 getting this case ready for trial, both
10 sides, and it would be a shame to have that
11 all go for naught and have to start this
12 issue from scratch again.

13 At the same time, I promised you when
14 jury selection was made that I would not
15 keep you past two weeks, and I intend to
16 live by that promise.

17 So that's the kind of the parameters.
18 If things have to be compressed even more,
19 I've already been pretty fierce with both
20 sides about compressing things and focusing
21 and limiting witnesses who are duplicated
22 and that kind of thing.

23 And I may have to further compress and
24 compress. I'll try as best I can. But
25 please be assured that your safety is

1 paramount in my considerations, and I will
2 keep you advised as the matter progresses.

3 If you have any questions about that,
4 if you'd put them through your foreperson,
5 and I will receive them and answer them
6 immediately.

7 All right. Are there any questions
8 at the moment?

9 Very good. Thank you so much for your
10 patience and your consideration.

11 All right. Please be seated.

12 The plaintiffs' case continues.

13 Ms. McVey. Or Adams.

14 MR. ADAMS: Thank you, Your Honor.

15 Plaintiffs call Dr. Steven Haber as
16 our next witness.

17 THE COURT: Come down, Dr. Haber, and
18 be sworn.

19 THE CLERK: Do you swear or affirm
20 that the testimony you are about to give in
21 this case will be the truth, the whole
22 truth, and nothing but the truth so help
23 you God?

24 DR. HABER: I do.

25 * * *

1 STEVEN E. HABER, M.D.,
2 having been first duly sworn, was examined and
3 testified as follows:

4 * * *

5 THE CLERK: Thank you, sir. Please
6 have a seat in the witness stand and state
7 your full name for the record.

8 State your full name for the record.

9 DR. HABER: Dr. Steven, S-T-E-V-E-N,
10 Earl, E-A-R-L, Haber, H-A-B-E-R.

11 THE COURT: All right. Dr. Haber is
12 going to be presented as an expert witness.
13 And at the appropriate time, I will address
14 qualifications and indicate on what matters
15 he is to be considered as an expert and
16 allowed to offer opinions.

17 You may proceed.

18 MR. ADAMS: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MR. ADAMS:

21 Q. Good morning, Dr. Haber.

22 A. Good morning, Mr. Adams.

23 Q. Can you introduce yourself to the jury
24 and tell them what kind of doctor you are?

25 A. Yes. I'm Dr. Steven Haber. I'm a

1 medical doctor. And I specialize in internal
2 medicine, occupational lung disease and pulmonary
3 diseases, which are diseases of the chest and
4 lungs.

5 THE COURT: Dr. Haber, keep your voice
6 up. I think the jury can hear you fine,
7 but you need for everybody in the room to
8 be able to hear you.

9 THE WITNESS: Yes, ma'am.

10 BY MR. ADAMS:

11 Q. You're a little faint.

12 We've got this slide with these
13 acronyms after your name. Can you explain to the
14 jury what those mean?

15 A. Yes. So "M.D." is "medical doctor."

16 The FACP, that's the Fellow of the
17 American College of Physicians. The American
18 College of Physicians are physicians that have
19 dedicated their careers to diseases of adults:
20 diabetes, high blood pressure, heart disease,
21 asthma, you name it. And I'm a fellow of that
22 organization. That's indicating my expertise and
23 dedication to that field.

24 I'm also a fellow of the American
25 College of Chest Physicians. The American College

1 of Chest Physicians are doctors that have focused
2 their careers on diseases of the chest, the heart,
3 the lungs. They're cardiologists, pulmonologists
4 like myself; cardiothoracic surgeons, doctors who
5 are doing operations on the heart or on the lungs;
6 maybe radiologists as well that focus on the
7 chest. And I'm a fellow of that organization as
8 well, indicating my experience and expertise in
9 that area.

10 Q. What have you spent most of your
11 career doing?

12 A. I have been a clinician. So I've been
13 in private practice as a clinician since 1991.
14 I've seen hospital patients in multiple hospitals
15 over my -- over my career and office-based
16 practice as well.

17 Q. Have you seen folks with
18 asbestos-related diseases, including mesothelioma?

19 A. Yes.

20 Q. You mentioned your expertise in
21 pulmonary disease and internal medicine. Can you
22 just tell the jury a little bit more about what it
23 means to be a pulmonologist?

24 A. Yes. So after going through medical
25 school, you need to then take an internship and

1 you become -- an internship, you're accepted into
2 a program, and that is a one-year program.

3 After that, I did two more years of
4 training as a resident. These were in internal
5 medicine. So three years' additional training
6 after medical school at hospitals and clinics on
7 internal medicine, and then an additional two more
8 years after that training as a pulmonologist.

9 And then after you do your successful
10 training, you're -- you can be asked to sit for an
11 examination, and that's called a "board
12 certification."

13 You don't have to be board-certified
14 to be a doctor, but I've been board-certified in
15 both internal medicine and pulmonary diseases.

16 Q. And what does it mean to be
17 board-certified?

18 A. Well, you have to successfully
19 complete the program. Then you have to be able to
20 be accepted to take the examination and
21 successfully pass the examination.

22 And for pulmonary medicine, they have
23 changed the rules after -- after I became a
24 pulmonologist, so we have to continually retake
25 the pulmonary board. So I've been recertified now

1 three times.

2 Q. How long have you been board-certified
3 in these two specialties?

4 A. Internal medicine since 1989 and
5 pulmonary medicine since 1991.

6 Q. What is pulmonary medicine?

7 A. So pulmonary medicine is diseases
8 related to the -- to the lungs. So asthma,
9 emphysema, pneumonia; and then dust diseases of
10 the lungs like asbestosis, silicosis.

11 Q. Does mesothelioma fall within your
12 area of expertise?

13 A. It does. Not only do most cases of
14 mesothelioma affect the chest and are presented
15 because patients will have chest pain or shortness
16 of breath is one of the most common symptoms, but
17 also you can also have it in other parts of the
18 body. But as an internist, I will also take care
19 of those patients as well.

20 Q. We've marked as Exhibit 622 a portion
21 of your résumé. Can you give the jury just sort
22 of the Cliff Notes of your education --
23 educational background?

24 A. Sure. So after medical school, which
25 was in Houston, I did an internship at the Baylor

1 College of Medicine followed by a residency, then
2 followed by fellowship training. All together,
3 five additional years after medical school.

4 Q. Are you, in addition to the
5 specialties that we just referenced, something
6 called a "B Reader"?

7 A. I am.

8 Q. What is that?

9 A. So, NIOSH, the National Institute of
10 Occupational Safety and Health, along with the
11 World Health Organization, WHO, which is an
12 organization called International Labour
13 Organization, they got together and have a program
14 called the "B Reader."

15 And these are doctors, usually either
16 pulmonologists or radiologists, who have expertise
17 in reading chest X-rays for dust diseases of the
18 lungs; so asbestos-related disease, silica-related
19 disease, aluminum, beryllium, any of the
20 dust-related diseases.

21 And we -- there's only about 200 of
22 us in the United States. You have to go to
23 NIOSH headquarters, which is in Morgantown,
24 West Virginia. You go there. It used to be every
25 four years you have to do the examination. Now

1 it's every five years. Very difficult
2 examination. Only about 45 percent of the doctors
3 who take the examination are able to pass it. And
4 I've been a B Reader since 2003. I'm now
5 certified through 2029.

6 Q. Are you going to show the jury some of
7 the scans and X-rays that Mr. Perry underwent as
8 part of your testimony today?

9 A. I will be.

10 Q. Okay. You mentioned being in practice
11 as a clinician seeing patients. How long did you
12 do that?

13 A. So I've been in practice since 1991.
14 That has included, over the years, multiple
15 hospitals and as well as clinic practice. I just
16 recently, earlier this year, closed my office
17 practice because of some health issues in my
18 family, and I was trying to devote a little bit
19 more time to them.

20 But up until earlier this year, I have
21 been continuing to do both office- and
22 hospital-based practice. But for well over 30
23 years, a good majority of my practice was seeing
24 patients.

25 Q. Did you see patients with the disease

1 mesothelioma in the course of your practice?

2 A. Of course.

3 Q. Even though you closed your practice
4 earlier this year, are you still examining
5 patients at times when you're asked?

6 A. Yes, I am.

7 Q. Are you a member of certain
8 professional organizations?

9 A. I am. And I mentioned a few of those,
10 the American College of Physicians, the American
11 College of Chest Physicians. There's also the
12 American College of Occupational and Environmental
13 Medicine, which are doctors that focus their
14 career on occupational and environmental issues
15 related to talc.

16 I'm also -- belong to the American
17 Thoracic Society. They, like the American College
18 of Chest Physicians, are doctors that focus on
19 diseases of the chest. And the ATS, that they're
20 called, promulgate guidelines for doctors on
21 diagnosing and treatment and management of
22 diseases, including asbestos-related disease.

23 And then I'm also -- from the
24 American Board of Medical Specialties, that's the
25 board that governs the board certifications.

1 Q. Is it often important to know the
2 cause of a disease in order to properly diagnose
3 it?

4 A. Certainly for -- yes, it is, and
5 especially for some of the occupationally related
6 diseases.

7 Q. Have you published in the
8 peer-reviewed scientific literature?

9 A. I have. I -- I'm not a active
10 admission. I'm not one of these doctors that is,
11 you know, publishing day after day. But I -- I've
12 got about four publications, and two of those are
13 dealing with mesothelioma.

14 Q. The jury is not super familiar with
15 this, probably, yet. But are you routinely hired
16 by both -- in litigation by both the side that
17 represents the person with the disease and also by
18 the defense side? Are you routinely hired by both
19 or just one side?

20 A. No. It's been -- and it's been like
21 this for many, many years here. Both sides. I
22 currently now review cases still for both
23 defendants as well as the plaintiff cases. I'll
24 review a case and let them know what my -- my
25 opinions are.

1 Q. Do your opinions change in any way
2 depending on which side hires you?

3 A. No.

4 Q. Can you give all of the opinions that
5 you're going to give today within a reasonable
6 degree of medical certainty?

7 A. I will.

8 MR. ADAMS: Your Honor, we would offer
9 Dr. Haber as an expert in internal medicine
10 and pulmonology.

11 MS. BUENO: Your Honor, we have no
12 objection to that tender. We do object to
13 anything outside of internal medicine and
14 pulmonology; for example, any opinions
15 about asbestos detection in talc; any
16 marketing opinions; any opinions on mineral
17 science, geology or microscopy, which fall
18 out of Dr. Haber's expertise.

19 MR. ADAMS: He has read and relied
20 on -- on all of those areas. He's
21 relied -- read and relied on the testing
22 from Johnson & Johnson, from their
23 consultants, from other organizations as
24 the foundation for his specific causation
25 opinion about what caused Mr. Perry's

1 disease, just like Johnson & Johnson's
2 pulmonologist has as well.

3 THE COURT: Very good. I'll overrule
4 the objection to the extent that it seeks
5 to limit Dr. Haber's reliance on certain
6 matters.

7 But this is a qualification of him as
8 an expert, and I find that by reason of
9 Dr. Haber's training, education and
10 experience, he may express opinions as well
11 as give factual testimony in the areas of
12 internal medicine and pulmonology.

13 And he may rely, in expressing those
14 opinions, on such information as he recites
15 he is relying on when he expresses his
16 opinions to you.

17 So that may be a partial sustaining
18 and partial overruling of Ms. Bueno's
19 objection, but that's how I rule on the
20 matter.

21 And, therefore, ladies and gentlemen
22 of the jury, I -- he's been qualified as an
23 expert in two areas. And under the
24 circumstances I just described, you may
25 listen to his opinions and evaluate them

1 for their credibility and reliability as
2 you do other expert opinion testimony.

3 You may proceed, Dr. Haber.

4 THE WITNESS: Thank you, Your Honor.

5 BY MR. ADAMS:

6 Q. Dr. Haber, can you tell us what you
7 did to evaluate Mr. Perry?

8 A. Well, I got his medical record --

9 THE COURT: Can I just interrupt you
10 for one minute. Thank you so much.

11 Ladies and gentlemen of the jury, they
12 will often do things that are displayed on
13 the screen. And you, of course, can look
14 at the screen and look right at that paper
15 given your angle. And you may think, why
16 isn't that judge looking at any of this
17 stuff that's on the screen? I have a
18 little screen here that allows me to see
19 and the witness and the lawyers, and that's
20 where I'm -- that's where my attention is.
21 But I'm looking at the same thing you're
22 looking at.

23 All right. Dr. Haber and Mr. Adams,
24 you may proceed.

25 MR. ADAMS: Thank you, Your Honor.

1 BY MR. ADAMS:

2 Q. Let's start with: What disease does
3 Mr. Perry have?

4 A. He has mesothelioma.

5 Q. What caused Mr. Perry's mesothelioma?

6 A. Asbestos.

7 Q. Did the Johnson's Baby Powder that
8 Mr. Perry used for nearly five decades play a role
9 in his mesothelioma?

10 A. Yes.

11 Q. Can you tell us about your evaluation
12 of Mr. Perry?

13 A. Yes. So I reviewed all the medical
14 records from Medical University of South Carolina,
15 from his pulmonologist, from all of his treating
16 doctors. I reviewed every page of those records.

17 I reviewed a number -- if you go to
18 the next slide here. So, chest X-rays, 15 chest
19 X-rays, 4 CT scans, PET scans, MRIs of the chest.

20 In addition, I called him up, and I
21 talked with him on the phone and got my own
22 history and -- and evaluation of him personally.

23 I've looked at other expert reports.
24 I've read through the deposition testimony in this
25 case and other materials in order to come up with

1 my opinions.

2 Q. Did you evaluate Mr. Perry's overall
3 health before he was diagnosed with mesothelioma?

4 A. I did.

5 Q. Can you tell us about that?

6 A. Sure. So the first one, dyslipidemia,
7 that's a fancy medical term for high cholesterol.
8 So he had high cholesterol. He had GERD or acid
9 reflux disease, very common.

10 AR is allergic rhinitis. That
11 basically is -- you know, when it's seasonal, when
12 you go out and -- pollens and you get watery eyes
13 and runny nose. Very, very common.

14 And he had diverticulosis.
15 Diverticulosis is where in the -- in the colon
16 there are little outpouchings that can become
17 inflamed sometimes. It can cause swelling in
18 the -- in the abdomen and pain, and he did have
19 diverticulosis. Again, a very, very common
20 condition. But it was not of any limitation.

21 He had really no significant lung
22 issues, except he did have a little bit of
23 seasonal asthma, which means that -- you know,
24 during certain seasons, when the allergies -- he
25 would get a little congested, a little short of

1 breath and wheezy. But he was on no chronic
2 medications for any lung condition and, really, a
3 quite healthy man.

4 Q. Did you evaluate other --

5 A. Yeah. So I looked at social history.
6 So he -- he never smoked. This is in the records
7 as well as I talked with him. He had never had
8 any cancer before. And he really had no family
9 history to suggest any sort of a concern.

10 Q. It says: No family history c/w
11 germline mutation.

12 What does that mean?

13 A. Consistent with. So there are --
14 there are certain types of genetic abnormalities.
15 There's a very small number of people in families
16 that they've -- they've been able to find from the
17 past ten years or so across the world.

18 It's just a handful of -- of these
19 cases. But they can have this genetic defect that
20 causes them to have a number of certain types of
21 rare cancers: cancers of the eye, cancer of the
22 kidney, mesothelioma, certain types of skin
23 cancers. And a lot of people in the family all
24 have -- they'll have multiple cancers, multiple,
25 five, six, seven cancers. And there was nothing

1 in his family history that suggested anything like
2 that.

3 Q. Even in the folks that have that
4 germline mutation who develop mesothelioma, does
5 it still require exposure to asbestos to develop
6 the disease or do they just develop it
7 spontaneously?

8 A. No. No. The -- the people who have
9 this, it still requires -- they're very, very
10 sensitive. So even -- even a less amount of
11 asbestos will -- but it still requires the
12 asbestos.

13 Q. And just -- Mr. Perry had no history
14 consistent with having that type of mutation?

15 A. Correct. And nor did he -- in fact,
16 he -- he absolutely did not, because in the
17 medical record we -- they actually did tests, and
18 he didn't.

19 Q. Was there anything in your review of
20 Mr. Perry's health condition overall before his
21 diagnosis with mesothelioma that would have
22 shortened his normal life expectancy?

23 A. No. I mean, he was just a very
24 typical individual. If anything, here, you know,
25 maybe even on the healthier side, but certainly

1 nothing that would -- that would make you
2 concerned that he wouldn't just be an average man
3 of his age.

4 Q. Once Mr. Perry was diagnosed with
5 mesothelioma, have you evaluated his clinical
6 course of care and treatment once he was
7 diagnosed?

8 A. I have.

9 Q. Can you tell us about that?

10 A. Sure. So in June of last year, so
11 one -- a little over one year ago, 53 years old,
12 he started having cough. He was feeling short of
13 breath -- that's what "SOB" stands for -- and he
14 was having weight loss.

15 And so he went to the doctor, and the
16 doctor took a chest X-ray, and they saw what's
17 called a pleural effusion. I'll show you in a
18 minute what that looked like. And he had pleural
19 thickening.

20 I think the jury heard yesterday about
21 the pleura. But in his case, where it's normally
22 it's supposed to be as thin as tissue paper, it
23 had become thicker.

24 So they did a CAT scan, a CT scan,
25 which is a more focused and more detailed X-ray,

1 and they confirmed that they had a pleural
2 effusion. He had nodules and lumps on the pleura,
3 and he had some lymphadenopathy, which means that
4 the lymph glands were swollen, which is a concern.
5 And at that point, the doctor said, "We need to do
6 a biopsy." So he underwent a surgical biopsy.

7 Q. We touched on this yesterday, but can
8 you just tell the jury a little bit more about
9 what the pleura is, the lining of the lung?

10 A. Sure. So if you picture a pillowcase
11 around a pillow, you've got this lining -- it's
12 actually two linings. There's what's called the
13 "visceral pleura," which is lining around the
14 lung, and then you have the parietal pleura, which
15 is adjacent to it.

16 And it's a very normal, thin, slight
17 amount of -- of fluid between those two layers so
18 that as you breathe, we don't -- we don't hurt.
19 We don't feel anything.

20 So those two layers, it's kind of like
21 a little bit of -- if you have oil or, you know, a
22 little bit of lubricating oil in your car, it's
23 just allowing the piston to move without getting
24 stuck.

25 So we have these two layers. So this

1 would be the lung. Then we have the visceral
2 pleura which is around it and then the parietal
3 pleura surrounds that. And that's all within the
4 chest cavity.

5 Q. And you mentioned that Mr. Perry had a
6 pleural effusion. Can you tell us about that?

7 A. Yes. So if you can picture if you had
8 a balloon in a box, the balloon being the lung and
9 the box being the pleura, if you poured water into
10 the box, it's not in the lung. It's outside of
11 the lung. But it's inside of that cavity.

12 So the lung would be kind of
13 compressed and you get this fluid collection that
14 is between the layers.

15 Normally you have a tiny amount, just
16 a little bit to lubricate. But, instead, he
17 developed a large amount, where you could actually
18 see it on X-ray and detect it if you listened to
19 the lungs with a stethoscope. And that's where it
20 shows up.

21 Q. What are the symptoms when you have
22 that collection of fluid in your pleura?

23 A. So it will cause shortness of breath
24 because it doesn't allow the lungs to expand. It
25 will cause cough because the person -- the lungs

1 think that there's something in the lungs, but
2 there's not. It's outside of the lungs but it's
3 pressing on it, so you're constantly coughing.

4 And it can cause what's called
5 "pleurisy" or "pleuritic chest pain." So there's
6 nerves along here, and those nerves can become
7 inflamed and then it causes a sharp pain.

8 Most people have had pleurisy at one
9 point in their life. Suddenly you can't breathe
10 anymore and it's -- really get that sharp pain.

11 Q. What are we looking at here?

12 A. So this is his chest X-ray from June
13 of 2023. This is the right lung. This is the
14 left lung. So a chest X-ray is like you're
15 looking at somebody. So the left side is on your
16 right side, as if you were looking at him here.

17 And normally this is the diaphragm
18 here, and you normally see the same diaphragm on
19 this side. But instead, we see this coming up
20 here, and that's that -- this is this collection
21 of fluid right there.

22 And then the pleura, normally it's
23 very, very thin. So you've got the ribs and
24 you've got the lung and you don't see anything
25 between it.

1 But on him you can see these bumps
2 coming up, and that is pleural thickening. He's
3 getting what we call that "lumpy-bumpy." And a
4 technical term there. But it's bumps. Very, very
5 thickened. That's about an inch thick right
6 there. So it's quite thickened. It's supposed to
7 be tissue paper-thin; instead, it's like this.

8 Q. What are we looking at here?

9 A. So this is the CAT scan. So they did
10 the next CAT scan, and it gives you much more
11 detail.

12 So again, you can see the diaphragm
13 here, the chest wall. You've got this collection
14 of fluid here. And then you can see these bumps
15 here, here, here. That's the -- you don't see it
16 on the right side, just on this left side here,
17 and this is the pleural thickening.

18 And this is a very characteristic
19 finding. Pleural effusion with this lumpy-bumpy
20 pleural thickening is very, very characteristic of
21 malignant mesothelioma.

22 Q. You mentioned the diaphragm on the
23 bottom?

24 A. Yes.

25 Q. What happens when you have cancer

1 impacting your diaphragm?

2 A. So the diaphragm is the major muscle
3 of breathing. And so if you have an effect on the
4 diaphragm either because of the cancer or because
5 of the treatment -- sometimes we have to remove
6 the diaphragm or do surgery on it -- then if it
7 doesn't function well, it will adversely affect
8 breathing and make you continuously, 24 hour/7,
9 feeling like you're suffocating or short of
10 breath.

11 Q. What are we looking at here?

12 A. So this is the same CAT scan, but we
13 looked at it from a -- this is called an "axial
14 plane." This looking at it like if you took a
15 loaf of bread and you sliced it and then just look
16 at a single slice.

17 So this is the top of the chest of
18 Mr. Perry. This would be his back. His feet
19 would be sticking up towards you. The head would
20 be in the next room.

21 And this is the left chest, again,
22 with -- you have this large fluid collection here,
23 and there's actually -- this is the -- the darker
24 here is the fluid. There's actually a scenario
25 here of solidness. This is cancer. This is tumor

1 here as well. And then you've got, again, some
2 areas here where you can see the tumor sticking
3 right up against the chest wall and quite thick.

4 Q. And this looks like another view of
5 the same --

6 A. This is the same -- just a little bit
7 different location. Again, you've got the pleural
8 effusion and then you've got the lumpy-bumpy
9 pleural thickening. Some is quite thick.

10 In fact it's actually starting to
11 erode into -- there's like a little bit of a
12 hollow spot right there. This is the bone, the
13 ribs. And you can see right there that tumor is
14 actually eating into the ribs.

15 Q. June 21st, 2023, these were taken?

16 A. Yes.

17 Q. Did Mr. Perry undergo some surgeries
18 following that?

19 A. He did.

20 Q. What surgery did Mr. Perry have about
21 a week later?

22 A. So they did what's called a "VATS," or
23 video assisted thoracoscopic surgery. And what
24 that is the -- it's under general anesthesia, so
25 they put you to sleep.

1 But the surgeon will -- you're laid on
2 your side, and the surgeon will make usually three
3 or sometimes four holes underneath the armpit.
4 And one is for instrumentation, one is for light
5 and one is for camera, and then usually one for a
6 drainage tube afterwards.

7 And they're able to actually look --
8 and this camera, they're making these incisions,
9 and it's going through the chest into between that
10 parietal pleural layer and the visceral pleural
11 layer, where that effusion was. And so that
12 they're going into that space where that liquid
13 was.

14 They'll drain out the liquid, and they
15 put a light and a camera. And in a moment you'll
16 see what the surgeon saw.

17 Q. Did they take actual pictures of the
18 cancer inside Mr. Perry's body?

19 A. Yes.

20 Q. What are we looking at here?

21 A. So this is -- this is -- normally, the
22 tissue on the inside, that pleural layer should be
23 kind of about this color right here, this nice
24 pink. All of these white spots, that's all
25 cancer.

1 And this is very typical of
2 mesothelioma, where it will -- it will just start
3 hopping from one spot and kind of creeping along
4 the surface.

5 And then on the -- this is -- what's
6 on the outside of these is going towards the chest
7 wall. So if you were to go -- if I were to pierce
8 that pink, I would be going towards the ribs.

9 And so these are in this -- in that
10 space between the -- those two pleural layers and
11 heading towards the ribs and the chest wall. And
12 these are -- this is all cancer.

13 Q. What happens when the mesothelioma
14 spreads into the ribs and the chest wall?

15 A. Well, it can cause -- it can go into
16 the nerves and it can cause tremendous pain, so
17 much so that people need to be on opioids and
18 narcotics for pain relief.

19 Q. You mentioned the pleural effusion and
20 the fluid buildup.

21 A. Yes.

22 Q. Did Mr. Perry have a procedure where
23 that -- where something was installed to
24 repeatedly drain that?

25 A. Yes. So what happens is, is as --

1 when you have a malignant effusion, which was
2 their concern right from the get-go, that effusion
3 will keep coming back. So -- and it's not safe to
4 keep doing a surgery on somebody to drain the
5 fluid.

6 So instead, when they had him under --
7 under anesthesia, they inserted what's called a
8 "pleural catheter." So there was like a drainage
9 tube, like a little garden hose, but it's about
10 the size of my pinky.

11 And it actually goes into that pleural
12 cavity and comes out of the chest wall, and then
13 the patient goes home with -- it usually just
14 hooks on like a little baggie. And it will drain
15 the fluid so that it won't come -- keep coming
16 back.

17 Because otherwise, the person -- you
18 know, if you -- if you get large amounts --
19 sometimes even gallons in the chest, it can
20 completely collapse the lung. So the lung is not
21 going to work. So this way, it allows the lung to
22 stay expanded.

23 Q. When Mr. Perry's treating doctors
24 diagnosed him with mesothelioma, did they
25 reference asbestos exposure?

1 A. Yes.

2 Q. Can you tell us about that?

3 A. Sure. So they -- they did the
4 biopsies. The biopsies came back as being
5 mesothelioma. And one of the first things that
6 we're taught in medical school, it's called a
7 "signal tumor." So when you see someone with
8 meso, you think about asbestos exposure. And when
9 you have someone who has asbestos exposure, you're
10 always on the lookout for -- for mesothelioma.
11 The -- the one signals the other.

12 And so immediately they were concerned
13 about -- you know, he was 53 years old; look for
14 exposures to asbestos, particularly in childhood.

15 The other thing here is that when they
16 tested -- the B-A-P-1, BAP1, is that -- is a
17 genetic marker. We also use it to help, in many
18 cases, determine -- it makes the pathology easier
19 for them to see whether it's mesothelioma. But in
20 his case, he did not have a BAP1 mutation.

21 So that shows that he did not have
22 that genetic abnormality, because in -- the cancer
23 itself did not have it. And if you had a genetic
24 abnormality, all of your cells would have it, not
25 just, you know -- so if you don't have the genetic

1 abnormality in the tumor, you don't have it in the
2 rest of your body.

3 Q. And that would be one of the genetic
4 abnormalities that would -- would make Mr. Perry
5 more susceptible to the disease mesothelioma?

6 A. Correct, as well as a number of other
7 types of cancers that -- those individuals were
8 interested in.

9 Q. Is Mr. Perry's mesothelioma curable?

10 A. It is not.

11 Q. What does -- did his treating doctors
12 say about that?

13 A. That it is incurable, and
14 unfortunately, it is. The average life expectancy
15 for mesothelioma in the type that he has, the
16 epithelioid, which is -- the better prognosis, if
17 you will, is 18 months.

18 Q. And when was Mr. Perry diagnosed?

19 A. 13 months ago.

20 Q. When Mr. Perry's treating doctors
21 diagnosed him with mesothelioma, did they
22 specifically reference in his medical records the
23 use of talc?

24 A. Yes.

25 Q. Can you tell us about that?

1 A. Yes. There were -- both the surgeon
2 as well as the oncologist had referenced in the
3 record his use of talc.

4 Q. Did Mr. Perry undergo PET scans?

5 A. Yes. So the PET scan, or positron
6 emission tomography, is a specialized CAT scan
7 where we inject into the bloodstream a sugar
8 molecule, glucose, and that sugar molecule goes to
9 where there are dividing cells. And cancer cells
10 are dividing much more rapidly than noncancerous
11 cells. And so we inject this molecule, and then
12 we scan, and it will light up where there's cancer
13 cells.

14 Q. What are we looking at here?

15 A. So this is now July, and they -- they
16 do the PET scan. This is the same view that we
17 saw. So this is the right lung. This is the left
18 lung. These are just multiple views going higher
19 and lower into the chest.

20 But throughout, around the chest, it's
21 along the chest wall; it's around the heart; it's
22 in the mediastinum, which is in the central area;
23 the lymph nodes; it's into the ribs; it's going in
24 through the chest wall.

25 So these are -- all these areas where

1 you see this bright light, that's all areas of
2 cancer. And there were multiple more. These were
3 just 4 images, but there's probably 200 images
4 of -- throughout that chest. And every one of
5 them showed -- showed evidence of tumor.

6 Q. Did Mr. Perry undergo a procedure
7 called a bronchoscopy?

8 A. He did.

9 Q. What is that?

10 A. So a bronchoscopy with -- and this is
11 a endobronchial ultrasound -- is a procedure
12 doctors like myself do, pulmonologists, where we
13 do a flexible scope down into the lungs, looking
14 on the inside of the lungs and then also looking
15 to see if there's cancer within the lung that we
16 can visualize, as well as the lymph glands within
17 the central area of the chest.

18 And so he underwent that procedure as
19 part of their -- they're doing what's called a
20 "staging," trying to see how extensive this cancer
21 is, to decide what treatment to use.

22 Q. What treatments did Mr. Perry's doctor
23 decide to do next?

24 A. Well, they -- because of his age and
25 the fact that the PET scan showed disease

1 localized to the chest, and because it was an
2 epithelioid, the -- the better prognosis, if you
3 will, they opted to do what's called a thoracotomy
4 with pleurectomy and decortication.

5 Q. Let's start with the first word. What
6 is a thoracotomy?

7 A. So a thoracotomy is where, under
8 general anesthesia, the surgeon will take an
9 incision [sic] and make a long incision -- usually
10 it's about 14 inches or so -- from just inside the
11 sternum, all the way wrapping around the chest,
12 large enough to get the surgeon's hands,
13 instruments, et cetera.

14 But it's a -- and that goes through
15 the skin, through the muscle. And then usually
16 they'll even resect a little bit of the bone
17 there. They may take out a chunk of the -- of the
18 ribs to be able to get in between there, cut
19 through the nerves and then get down into the
20 lungs where the tumor is.

21 Q. Was the thoracotomy done at the same
22 time as the pleurectomy and decortication? Was
23 that all one surgery?

24 A. That's correct.

25 Q. Okay. So they opened Mr. Perry up,

1 and then what did they do next?

2 A. So the pleurectomy and decortication
3 is where they are removing the visceral and the
4 parietal pleura any -- as much as the surgeon can.
5 So he's using instruments to try to kind of make
6 free -- because a lot of this tumor will -- it
7 will be interstitial, going down into the -- into
8 the skin and into the soft tissues.

9 And they'll try to release it or cut
10 it, try to remove as much cancer as you can,
11 remove the pleura, remove the visceral and the
12 parietal pleura. He's also taking samples just so
13 they'll be able to see where exactly the -- the
14 cancer is -- is affecting.

15 In -- in this particular case, it --
16 it had also affected the diaphragm. And so he had
17 to have the diaphragm resected, and then they --
18 or a good portion of it.

19 And then they put on what's called
20 a -- a "mesh," which is a -- it's Gore-Tex. It's
21 actually thin -- you know, like waterproof
22 jackets. You usually use that, the surgical, and
23 it -- it -- we basically make a -- a -- recreate
24 the diaphragm so that there's some function.
25 Although it does not really function like the

1 normal, at least it has some function to it. And
2 so he had -- he had to have that procedure as
3 well.

4 So it wasn't just removing the tumor,
5 but he actually had to have some repairs done of
6 the diaphragm.

7 Q. Can you give the jury a sense of how
8 serious, long and major this type of surgery is?

9 A. Oh, I mean, this is -- some of these
10 surgeries can be 6, 8, 10, 12, 14 hours long. It
11 is a very tedious for the surgeon to try to, you
12 know, peel apart and try to remove the -- the
13 cancer as much as they can.

14 Q. What did [sic] the surgeon's report
15 finding as far as the severity and spread of
16 Michael's disease?

17 A. Yes, it was -- it was extensive. So
18 it was invasive. It involved both the parietal
19 pleura and the visceral pleura. It went into the
20 soft tissues of the chest wall, so it had already
21 passed through that visceral pleura into the --
22 into the chest wall.

23 It went into the lymph nodes. It went
24 into the diaphragm, involved the diaphragm. It
25 went into the lung. So it actually started

1 affecting part of the lung itself. It went into
2 the skin. And it went into the fibro and adipose,
3 which is the -- the -- these are tissues. The --
4 the adipose is fat tissue. And fibro are --
5 are -- these are connective tissues.

6 So it was basically all the way
7 through the chest. And, again, you know, on -- on
8 a PET scan, you can see that it was involving the
9 ribs. And because of the involvement -- extensive
10 involvement as well as the fact that we had lymph
11 node involvement, which is very concerning -- I
12 think you've heard about lymph channels. Once it
13 gets into the lymphs, then it can -- it can start
14 spreading into other places.

15 So he had what's called Stage IIIA,
16 which is -- there's four stages. Stage I is the
17 -- well, Stage zero is actually very early. It's
18 just cellular. But typically, we think about
19 Stage I, Stage II, Stage III, and then Stage IV
20 is -- is widespread.

21 Q. You mentioned this lengthy surgery.
22 Is that designed to cure mesothelioma or something
23 else?

24 A. Something else. No, surgery does not
25 cure. These are palliative. So it is the intent

1 of trying to prolong survival. But even in the
2 best-case scenarios where you see the -- the
3 people getting the surgery who are the youngest,
4 usually, and the -- the -- and with the -- with
5 the more localized disease, even those forms it's
6 not curative. It's just prolonging.

7 Q. Did Michael undergo chemotherapy and
8 radiation?

9 A. He did.

10 Q. Can you tell us about that?

11 A. Sure. So after they had the
12 diagnosis, he then went on chemotherapy, and he
13 took chemotherapy from September 2023 to January
14 of this year. That's going to be giving two
15 agents intravenously. He'd repeatedly come back
16 for infusions and side effects and problems
17 with -- with chemotherapy.

18 Then once he completed the
19 chemotherapy, because he had some of this erosion
20 into the chest wall -- the problem is, it can
21 start going into the nerves, causing pain. So we
22 did radiation treatments to the chest, and this
23 was between February and March of this year. They
24 tried to palliate that portion of the cancer that
25 was -- it's not the whole chest, but just the

1 areas where it was eroding into the chest wall.

2 And then they were giving him
3 medications for pain, opioids, narcotics,
4 antiemetics. That -- those are medicines for
5 nausea and vomiting. And then medicines for
6 anxiety and depression, because, I mean, this
7 is -- this is -- I mean, this is a
8 life-changing diagnosis.

9 Q. Has Michael had a recurrence recently?

10 A. Yes and no. So he was then followed
11 with CAT scans. In December, things looked
12 stable. But he just had one in April, a CAT scan,
13 and the pleura has doubled in size compared to
14 December.

15 So they're not calling it a recurrence
16 at this moment. And they're going to be repeating
17 another scan. I mean, basically, what we -- we
18 talked about is people with mesothelioma live in
19 three-month segments.

20 And so, basically, you go to the
21 doctor. You get your CAT scan, and then you know
22 you're going to be okay for the next three months.
23 And then you go back to the doctor.

24 So he's in this three-month segment.
25 So at the end of this month or into -- into next

1 month, he will be getting another CAT scan, and
2 they'll be making a determination whether to try
3 immunotherapy or more radiation therapy. But
4 there's certainly evidence radiologically since
5 the pleura had -- had doubled in thickness.

6 Q. What is Michael's current prognosis?

7 A. It's poor.

8 Q. Can you tell us a little bit about
9 what you mean by "poor"?

10 A. Yeah. So average would be another six
11 months. In his case, he has some -- he's younger.
12 He had the -- he has the epithelioid and he had
13 the surgery. He's had the chemotherapy. So, you
14 know, maybe another year, another two years. But,
15 most likely, not beyond that.

16 Q. Have you reviewed life expectancy
17 tables for an average 53-year-old man?

18 A. I have.

19 Q. Can you tell us about that and what it
20 says?

21 A. Yeah. So these are tables that look
22 at all-comers. This is for males, for females,
23 different ethnicities. And they have tables of
24 all-comers of what we expect.

25 So at birth, we expect a certain age.

1 But then as you age, it's not like if you turn 83
2 you don't have any life expectancy anymore.

3 But as a 53-year-old, almost 26 years
4 is the life expectancy of someone like -- like
5 Mr. Perry had he not gotten mesothelioma.

6 Q. And there are specific South Carolina
7 life expectancy tables for folks in South
8 Carolina. If that life expectancy, which I think
9 the jury will be instructed on, is 25.65 years, is
10 that in line with what you've reviewed?

11 A. Right. It's exactly in line.

12 Q. We touched on what asbestos is
13 yesterday with Dr. Brody. We went very quickly,
14 and I don't want to duplicate anything. But, as a
15 medical doctor, can you tell us what asbestos is?

16 A. Sure. And, you know, in -- whenever
17 as a doctor when we're dealing with
18 asbestos-related diseases, almost invariably the
19 first sentence is, "Asbestos is one of these six
20 minerals" -- they can do a chemical analysis and
21 see what the mineral is -- "and it's in fibrous
22 form."

23 And if you have one of those six
24 minerals in fibrous form, that is what is asbestos
25 and that's what causes a whole host of

1 asbestos-related diseases.

2 Q. And just so folks understand why we're
3 asking some of these questions, do you understand
4 that one of the things the jury will be asked to
5 do on that last section is evaluate Mr. Perry's
6 pain and suffering and put a dollar value on that
7 if we prove our case?

8 A. I understand.

9 Q. Okay. And then for -- well, why are
10 we talking about this definition of asbestos, just
11 so people understand?

12 Are you familiar with how Johnson &
13 Johnson hires a geologist to come in and give a
14 different definition of asbestos? Are you
15 generally familiar with that?

16 MS. BUENO: Objection, Your Honor.
17 This is outside his role as a pulmonologist
18 and internal medicine doctor.

19 THE COURT: Overruled.

20 THE WITNESS: Yes. I am aware that
21 they have hired experts that have used a
22 different definition than even Johnson &
23 Johnson have used and science have used.

24 BY MR. ADAMS:

25 Q. So that's why we're spending the time

1 going over this.

2 So one of the six minerals and in
3 fibrous form?

4 A. Yes.

5 Q. Okay. What are we looking at here?

6 A. So these are the fancy names. There's
7 chrysotile, amosite, crocidolite. And then those
8 are the ones that they use in commercial industry.

9 So they were used in products that as
10 I, as a doctor, then, would -- maybe someone who
11 was occupationally exposed because they were doing
12 some occupation, then I have to have an
13 understanding of those because those were -- those
14 are used.

15 Then you have the noncommercial ones:
16 tremolite, anthophyllite, actinolite. And those
17 are ones that can be found in -- in nature, but
18 they're not -- they weren't used as commercial
19 properties because they weren't as useful than the
20 commercially used ones. They're still all
21 dangerous, and they still all cause mesothelioma
22 and a lot of other cancers.

23 Q. And so if you have one of those six
24 minerals and it's in fibrous form, what do you
25 have?

1 A. Asbestos.

2 Q. And then what does it mean to be
3 "fibrous"? Is there a definition in the medical
4 community?

5 A. Yes. It's -- it's within what's
6 called an "aspect ratio," length to width, of
7 greater than 3 to 1.

8 Q. What are we looking at here?

9 A. So these are examples that -- of --
10 this is tremolite, and showing that there's all
11 kinds of different ranges of lengths and widths.
12 Some of the tremolite -- and this is tremolite
13 asbestos. Some of it is thicker, and some of it
14 is thinner and longer. There's just all different
15 ranges of thicknesses and aspect ratios.

16 Q. Have you evaluated and reviewed
17 Johnson & Johnson's own internal records about
18 what definition Johnson & Johnson used for decades
19 for asbestos?

20 A. I did.

21 Q. What are we looking at here?

22 A. This is an example. So this is from
23 1994, and it's the same definition I used, where
24 asbestos is the fibrous serpentine, chrysotile.

25 So chrysotile, or the curvy one. The

1 only one in that category is serpentine or
2 serpent-like is the chrysotile.

3 And the fibrous forms are the
4 amphiboles. The amphiboles make up the other
5 five, represented by amosite, anthophyllite,
6 tremolite, and then also crocidolite and
7 actinolite.

8 Q. Have you reviewed Johnson & Johnson's
9 own internal records?

10 A. I have.

11 Q. Give us a sense of how much.

12 A. I've reviewed thousands and thousands
13 of them.

14 Q. We were talking about this fibrous
15 tremolite. Are you familiar with Johnson &
16 Johnson finding fibrous tremolite in its talc in
17 1950?

18 A. Yes. They hired a laboratory to test,
19 and it found fibrous tremolite.

20 Q. Have you also reviewed peer-reviewed
21 published medical and scientific literature on the
22 definition of "asbestos"?

23 A. Yes. And this is just one example,
24 but there are literally hundreds of them. Almost
25 every article ends up starting with the first

1 sentence: "Asbestos is a fibrous form of these
2 minerals."

3 Q. Have you reviewed public health
4 agencies' definition of "asbestos"?

5 A. I have.

6 Q. What are we looking at here?

7 A. This is from OSHA, Occupational Safety
8 and Health Administration: "Asbestos is the
9 mineral fibers of chrysotile, amosite,
10 crocidolite, tremolite, anthophyllite, and
11 actinolite."

12 Q. Have you reviewed Johnson & Johnson's
13 own internal documents about what they said about
14 this fibrous tremolite and the disease
15 mesothelioma?

16 A. Yes.

17 Q. What did they say?

18 A. That the fibrous tremolite is a very
19 potent cause of mesothelioma.

20 Q. Have you reviewed peer-reviewed
21 published literature on evaluations of folks with
22 cancer who have used talcum powders and what they
23 find in those people's lungs?

24 A. Yes, I have.

25 Q. What are we looking at here?

1 A. So this is just one example, but there
2 have been others, where they have taken patients
3 who have had asbestos-related cancers and they've
4 looked inside of the lungs.

5 And what they found is a combination
6 of talc and tremolite and/or, plus or minus,
7 anthophyllite, which are these non -- those two
8 noncommercial types of asbestos, along with talc.
9 And that's been considered as a -- as unique or a
10 fingerprint for exposure to asbestos-containing
11 talc.

12 Q. And so if you're trying to figure out
13 whether someone was exposed to asbestos from a
14 asbestos-containing product like a joint compound
15 or drywall or insulation, or whether they were
16 exposed to asbestos from talc, what does finding
17 tremolite and/or anthophyllite and talc in their
18 lung tell you about that?

19 A. That it's not from some sort of
20 industrial exposure where it was used, because
21 those are not used commercially. It tells that
22 you it comes from talc.

23 Q. Dr. Brody testified yesterday about
24 the asbestos-related diseases, and I don't want to
25 go over it again. But can you just tell us from a

1 medical doctor perspective what are the
2 asbestos-related diseases?

3 A. Sure. So there are nine diseases, one
4 called "asbestosis," which is scarring of the
5 lung, and that's where the lung gets squeezed
6 down.

7 You can have what are called "pleural
8 plaques," or asbestos-related pleural disease,
9 which is lumps of hardened areas around the
10 pleura.

11 But then you can also have
12 malignancies. So I think you've heard about
13 mesothelioma, which can occur around the chest, or
14 often it can also occur around the abdomen and
15 other areas around the heart.

16 You can have lung cancer caused by
17 asbestos.

18 You can also have ovarian cancer. You
19 can have laryngeal cancer. You can have stomach
20 cancer. You can have cancer of the
21 gastrointestinal tract, so colon cancer.

22 And so I think -- I mean, one of the
23 defense mechanisms we talked about is, you know,
24 it can be brought up through the ciliary tract,
25 the "elevator," we call it, and then you swallow

1 it.

2 But when you swallow asbestos, you're
3 not getting rid of it. It actually goes into the
4 GI tract, which is why you end up with -- you get
5 it in the larynx, in the stomach, in the colon.
6 So it can -- it can cause a whole host of other
7 cancers.

8 Q. I want to ask you about a new topic
9 about when asbestos can be most dangerous.

10 Are there -- are there -- are there
11 steps folks can take to minimize the risks of
12 asbestos or circumstances where the risk can be
13 minimized, and other circumstances where the risks
14 are severe?

15 A. Sure. Sure.

16 Q. I want to go through a few topics on
17 that, okay?

18 A. Sure.

19 Q. What do these words have to do with
20 that topic?

21 A. Okay. So you can take asbestos and
22 you can bind it with something so it's hard, or
23 you can seal it off so it's enclosed. And in
24 those cases, we don't worry about it because it
25 has to be respirable. You have to be able to --

1 to breathe it in.

2 It could be, however, friable. So it
3 could be something that was solid, but -- you
4 know, maybe, like, if you -- you've probably seen,
5 like, an old -- if you have a piece of rubber, if
6 it gets really old, it starts to, like -- just
7 almost, like, fall apart in your hands. So the
8 same thing with asbestos. It could be in -- it
9 could be in a material that was hardened, but then
10 with age or heat or other processes, it becomes
11 friable, so that if you bump it or if you hit it,
12 things will flake off.

13 The worst is in a powder form, because
14 it's already in a respirable form. You don't --
15 you don't need to do anything to it. So if you
16 have asbestos in a powder form, that's the worst.

17 Q. Have you reviewed Johnson & Johnson
18 documents and historical TV commercials where we
19 can kind of see how powdery and dusty Johnson's
20 Baby Powder was?

21 MS. BUENO: Objection, Your Honor.
22 Marketing materials and advertisements are
23 outside this witness's qualifications. The
24 jury can see for themselves what these --
25 these documents are.

1 THE COURT: Overruled.

2 THE WITNESS: I have.

3 BY MR. ADAMS:

4 Q. Is this one of them?

5 A. It is.

6 (Playing video.)

7 BY MR. ADAMS:

8 Q. You mentioned that talc is in a powder
9 form?

10 A. Correct.

11 Q. Okay. And so if there's asbestos in
12 talc and it's used in a powder form inside the
13 home, what does that mean as far as the levels of
14 exposure?

15 A. Well, there were -- so, again, when
16 you look at exposure locations, you can be
17 outdoors, which would be the best. It will be
18 blown away, or the wind can -- can do it.

19 You can have occupational exposures,
20 but then a lot of times, we'll have abilities
21 to -- industrial hygiene measures to mitigate
22 exposures. We'll have someone wearing a
23 respirator. We'll have watering techniques.
24 We'll have, you know, enclosures or ventilation;
25 isolation; getting it, you know, so the people

1 next to you aren't getting exposed.

2 In a home situation, you -- you aren't
3 having any of those things. It's an enclosed
4 space, oftentimes in a -- in a bedroom or in even
5 a small bathroom. And then whenever you get it
6 into the home -- and it's been studied that
7 asbestos in the home never leaves, ever. They've
8 come back 20 years later and still been able to
9 detect asbestos in a home where asbestos was
10 brought into the home.

11 In addition, you can have what's
12 called "reentrainment." So asbestos is
13 extraordinarily small and extraordinarily light,
14 and so it can stay floating in the air for hours
15 and hours, even days.

16 But when it does actually finally
17 settle to the ground or to a surface, anyone
18 walking by, or if you brush it, or if you -- you
19 know, if it's on your clothes and you shake your
20 clothes, whatever you do, it's called
21 "reentrainment." So you can actually put it back
22 up in the air.

23 If you vacuum, the asbestos actually
24 goes -- unless you have a special type of vacuum,
25 it actually goes right through the -- the

1 container and goes right back up. You're actually
2 just, like, blowing it in, or if you sweep. These
3 are -- all put it back into the air. Once it's in
4 the air, it can be breathed in, and these are
5 dangerous.

6 Q. Is there scientific and medical
7 literature that discusses this concept of asbestos
8 reentrainment?

9 A. Yes. And this is just one example
10 here from Dr. Hillerdal, where once it gets in
11 there, it will spread from room to room, and it's
12 almost impossible. It -- you know, it's pretty
13 darn impossible to get rid of it. And even --
14 like I said, if you vacuum it, you can actually --
15 or disturb it, you can actually make it worse.

16 Q. Are there certain age groups that are
17 more vulnerable to asbestos exposure?

18 A. Yes. So in -- in babies or children
19 or adolescents, because they are growing, and so
20 they've got more cellular division going on than
21 in an 80-year-old. And so that -- they have more
22 problems.

23 In addition, they're smaller,
24 generally. And sometimes, I guess, once the
25 teenagers get big -- they're -- they're

1 adult-sized. But babies or children, they're
2 smaller. So they will -- for the same amount of
3 asbestos getting in, can be more percentagewise
4 by -- by their -- by their body weight.

5 And then when you look at, you know,
6 infants and -- and children, they may not know
7 better -- first off, they may be crawling on the
8 ground. So they're even breathing up some of
9 the -- the asbestos that's in a carpet. But then,
10 you know, they may use products, if it's in the
11 home, without knowing that they're -- they're
12 getting a high exposure.

13 Q. Which groups did Johnson & Johnson
14 market its talc powder to?

15 MS. BUENO: Same objection,
16 Your Honor.

17 THE COURT: Overruled.

18 THE WITNESS: I've seen a lot of
19 marketing to -- to moms and -- and for use
20 on their babies.

21 BY MR. ADAMS:

22 Q. You mentioned this earlier about --
23 let's just introduce this document quickly.

24 Are you familiar with the White Paper?

25 A. I am.

1 Q. What is this?

2 A. So the White Paper -- this -- there
3 were -- 38 subject-matter experts from 7 or 8
4 governmental agencies got together in 2019 and
5 then published their findings in December of 2021.

6 Q. You mentioned earlier about how when
7 people know they're being exposed to asbestos --
8 for example, at work -- they can set up
9 containment, wear respirators, protect themselves.
10 Is that specifically mentioned in the White Paper?

11 A. Correct. So workers can have -- they
12 have industrial hygienists, and they -- they know
13 what materials that they're working with. And
14 they can give the -- the workers warnings, and
15 they can set up protocols to mitigate this.

16 Q. Do they have to know the hazard before
17 they -- they know to take the -- the protective
18 measures?

19 A. Yes. I mean, any sort of warning, you
20 have to -- you know, you can be told, okay -- back
21 100 years ago, I mean, Merewether said, you know,
22 that the worker has to have a sane appreciation of
23 the risk.

24 And so, you know, if your risk -- if
25 you're told, "Okay." You know, "If you breathe

1 this, you could be getting a deadly cancer," or,
2 you know, "If you breathe this, then you can have
3 some health risks," or worse is you're just
4 totally sick.

5 Q. What did Johnson & Johnson tell its
6 customers about its baby powder?

7 A. It's safe.

8 Q. What did Johnson & Johnson tell the
9 FDA about asbestos in its baby powder?

10 A. That substantial asbestos could be in
11 their talcum powder and used safely on a baby.

12 MR. ADAMS: And just so people
13 understand, we've got an exhibit number on
14 some of the documents. These have been
15 admitted into evidence earlier, and so
16 those will go back with the jury. That's
17 what that Exhibit 19 is.

18 BY MR. ADAMS:

19 Q. Quickly, on this issue of knowing that
20 asbestos is harming somebody, does asbestos hurt
21 right away when it's breathed?

22 A. Right. So I call this the "onion
23 properties." So when you slice an onion, it makes
24 you tear, you can smell it, you can see it, you
25 can taste it. Asbestos does not have any onion

1 properties. You cannot see it. It is -- you need
2 a special microscope to be able to see it.

3 So you won't be able to see it, and
4 you're breathing it in. You don't feel anything.
5 It's not like if you smell ammonia,
6 instantaneously you know -- or sulfur -- you know.
7 You smell it. Asbestos, there's no recognition in
8 your body that you are breathing this -- this
9 deadly, deadly, deadly substance.

10 MR. ADAMS: Your Honor, I don't know
11 if you want to take a morning break.

12 THE COURT: How much longer have you
13 got?

14 MR. ADAMS: An hour.

15 THE COURT: How long did you schedule
16 for?

17 MR. ADAMS: Two.

18 THE COURT: All right. Then I do
19 think that this would be a good time to
20 take a morning break. Please come back and
21 be prepared to go at 11:00. It's quarter
22 of 11:00 now.

23 So, Jury, you may go to the jury room.
24 And weather so far, some rain but not
25 heavy. All right. The court will be in

1 recess.

2 (The jury exited the courtroom at
3 10:44 a.m.)

4 MS. BUENO: Your Honor, I do have one
5 issue to raise with you before the
6 cross-exam. We can either do that now or
7 later.

8 THE COURT: All right. You can do it
9 now.

10 MS. BUENO: Okay, Your Honor.

11 Dr. Haber put a medical record on the
12 screen from Dr. Gibney --

13 THE COURT: Yes.

14 MS. BUENO: -- who is the treating
15 surgeon, and he read one sentence that
16 says: Mr. Perry denies any direct asbestos
17 exposure; however, he did use a lot of talc
18 throughout his life as a swimmer.

19 The record on the screen was cut off
20 to end there.

21 The very next sentence that was cut
22 off on the slide says: He also used to
23 work at Embassy Suites adjacent to the old
24 county library, which apparently have a lot
25 of asbestos in the walls.

1 I would like -- we've discussed this
2 in the motions in limine. We talked about
3 alternative exposures, specifically to
4 the hotels --

5 THE COURT: I will allow you to ask
6 about that on cross-examination.

7 MS. BUENO: Thank you.

8 MS. GROSS: Your Honor, there was an
9 MIL that you granted -- there was an MIL on
10 alternative exposure specifically related
11 to the hotels that you granted because
12 their experts --

13 THE COURT: Oh, that's right. And the
14 brake job is what --

15 MS. GROSS: That's correct.

16 THE COURT: -- you can talk about.
17 But I've already ruled that --

18 MS. GROSS: Yes.

19 THE COURT: -- Embassy Suites thing is
20 remote, that there's no indication that he
21 got into anything that was in the walls and
22 so forth. I've already ruled about that.

23 MS. BUENO: You have, Your Honor, but
24 they put in a medical record -- they didn't
25 have to do this. They put in a medical

1 record and left out a sentence.

2 THE COURT: I understand -- I don't
3 think that opens the door. I think they
4 were going by what the previous rulings
5 have been.

6 MS. McVEY: Yes.

7 THE COURT: And the previous rulings
8 would allow them to shield from the jury
9 that particular information. So that's not
10 a backdoor way of getting back into it.

11 MS. BUENO: Well, certainly, we
12 object. And I also note that I will have
13 the same objection tomorrow with Dr. Gibney
14 because this is --

15 THE COURT: Well, that's fine.

16 MS. GROSS: -- a record that he wrote.

17 THE COURT: We'll cross that bridge
18 when we come to it. But --

19 MS. BUENO: I will reraise it with
20 Your Honor when we talk with Dr. Gibney.

21 THE COURT: Very good. But for the
22 present time, that objection is overruled.

23 MS. McVEY: Thank you, Your Honor.

24 THE COURT: Now, that doesn't have
25 anything to do with the brake job. You can

1 get into that all you want to.

2 MS. BUENO: Yes. Thanks, Your Honor.

3 THE COURT: All right.

4 The court will be in recess.

5 * * *

6 (Whereupon, there was a recess in the
7 proceedings from 10:47 a.m. to 11:03 a.m.)

8 * * *

9 THE BAILIFF: The court will come to
10 order.

11 All rise.

12 THE COURT: Please be seated. I'm
13 just checking some things on the screen.

14 I'm not ready yet, y'all. Be at ease.

15 (Off-the-record conference.)

16 THE COURT: Bring in the jury.

17 (The jury enters the courtroom at
18 11:10 a.m.)

19 THE BAILIFF: The jury is seated,
20 Your Honor.

21 THE COURT: Thank you.

22 All right. Dr. Haber, of course,
23 you're still under oath. You may be
24 seated.

25 THE WITNESS: Thank you.

1 THE COURT: Mr. Adams.

2 MR. ADAMS: Thank you, Your Honor.

3 BY MR. ADAMS:

4 Q. Dr. Haber, yesterday in opening
5 statement we heard a suggestion from Johnson &
6 Johnson that occupational levels of exposure to
7 asbestos might be safe. Were you here for that?

8 A. I was.

9 Q. Is that true?

10 A. It is not.

11 Q. What does OSHA say -- well, let's take
12 a step back.

13 Did OSHA regulate asbestos exposure in
14 the workplace?

15 A. Yes. Starting in the early 1970s,
16 yes. It was the first thing that they started to
17 regulate.

18 Q. And what did the permissible exposure
19 limit eventually get down to?

20 A. It -- it eventually went down to .1
21 fiber per cc TWA, or time-weighted average.

22 Q. And did OSHA say that was safe for the
23 disease mesothelioma?

24 A. No. It was the opposite. They said
25 even at .1, it was not.

1 Q. Did OSHA, in fact, do a calculation of
2 what would happen if folks were exposed at this
3 0.1-fibers-per-cc level for only one year?

4 A. Yes.

5 Q. And what did OSHA conclude would
6 happen for the disease mesothelioma at that low
7 level of exposure for just one year?

8 A. That you would have 6.9 cases, almost
9 7 cases, of mesothelioma if you exposed that
10 population to .1.

11 Q. And 7 cases in 100,000 might sound --
12 not sound like that much. How rare is the disease
13 mesothelioma, though?

14 A. Right. I mean, we consider -- we call
15 it a "one in a million" disease. It's extremely
16 rare outside of exposures to asbestos.

17 And so -- but if you were to -- to
18 expose the population of the United States to that
19 level, you -- you'd have tens of thousands of
20 cases of mesothelioma.

21 Q. Just that 0.1 level for one year?

22 A. For one year.

23 Q. Because of that, what did OSHA
24 conclude about whether or not there is any safe
25 level of exposure to asbestos for the disease

1 mesothelioma?

2 A. They concluded that there was no safe
3 level.

4 Q. What did OSHA say about exposures to
5 asbestos as short as a few days?

6 A. Again, so you can have -- the
7 exposures may be prolonged, but you can have --
8 there are many, many reports in the literature,
9 and -- and I agree with OSHA that there have been
10 cases with just very, very brief -- days, even
11 one -- there's a report in the literature of one
12 day's worth of exposure. And I've seen cases
13 very, very brief exposures.

14 Q. Does that key in to this concept of
15 individual susceptibility, how each of us are --
16 have different susceptibilities to these toxins?

17 A. Absolutely.

18 Q. I'm not sure if this is understood,
19 but you listed the asbestos diseases. Do you
20 remember that?

21 A. I do.

22 Q. Which asbestos disease takes the least
23 amount of asbestos exposure to be toxic?

24 A. Mesothelioma.

25 So the other ones, some of the other

1 cancers or asbestosis generally in a population --
2 I mean, there's going to be some that are more
3 susceptible or less susceptible.

4 Overall, the exposures necessary to
5 cause mesothelioma are far, far less than
6 asbestosis.

7 Q. We've got some citations to here --
8 here to the World Health Organization, some
9 peer-reviewed medical literature that you pulled
10 out. What do they say about how much exposure it
11 takes to cause mesothelioma?

12 A. Again, so -- and, by the way, this
13 microphone, it's not working. I'm not sure it's
14 supposed to.

15 Q. Can you see that okay?

16 A. So there's the concept, first off, of
17 threshold. And study after study and organization
18 after organization said that there's no threshold
19 level below which there's no risk.

20 So you can't sit there and say, "Okay.
21 Well, as long as I haven't been" -- you know, "If
22 my exposure is below this level, I don't have to
23 worry." It's not the way it works.

24 So study after study, lower and lower
25 and lower doses, there's still a continued

1 documented risk; and that papers talk about that
2 it can be a brief exposure, a minimal exposure, a
3 seemingly inconsequential exposure, is still
4 capable of causing mesothelioma.

5 Q. Moving on through this topic of when
6 asbestos is most dangerous, are there different
7 potency levels based on the type -- different
8 potency levels and the ability to cause
9 mesothelioma between the asbestos fiber types?

10 A. Yes. In general, all things being
11 equal, the amphiboles are somewhat more capable of
12 causing mesothelioma than the serpentine or
13 chrysotile.

14 Q. And I don't think we've introduced
15 these two concepts yet.

16 So there's six types of asbestos
17 fibers, right?

18 A. Correct.

19 Q. Which ones fall into the serpentine
20 group?

21 A. So the serpentine is only chrysotile.
22 That's white asbestos.

23 Q. And which ones fall under the
24 amphibole group?

25 A. The amphibole group are the other

1 five: tremolite; actinolite; crocidolite, or the
2 blue; amosite; and anthophyllite.

3 Q. And so the jury has seen in the -- in
4 Johnson & Johnson's records chrysotile being found
5 over and over. Are you familiar with that?

6 A. I am.

7 Q. Were -- were forms of amphibole
8 asbestos also found in the baby powder?

9 A. Yes. In particular, the tremolite,
10 which is -- as far as the amphiboles go, is
11 actually a very potent form of amphibole for
12 causing mesothelioma.

13 Q. Does the length of a person's exposure
14 to asbestos matter when you're considering how
15 dangerous those exposures are?

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

23 Q. What did Johnson & Johnson tell its
24 customers to use as far as the duration of use of
25 Johnson's Baby Powder?

1 A. For life.

2 Q. This is a slide that you prepared on
3 this notion that very -- this concept that low
4 levels of exposure cause the disease mesothelioma.
5 Can you help us explain this?

6 A. Sure. So -- well, there's a couple of
7 things. So, first off, mesothelioma is
8 exceptionally rare outside of asbestos exposure.
9 And so when you have it, it -- with OSHA and --
10 NIOSH and -- which is the -- NIOSH is the
11 scientific arm of OSHA.

12 But what they're saying is, is that
13 when you see -- it's almost diagnostic of having
14 had asbestos exposure because it's so
15 extraordinarily rare without asbestos exposure.

16 And that FDA says that when you are
17 using talc, you can actually get occupational
18 levels. And -- and when they said this, this
19 is -- the occupational level was much higher than
20 the -- the .1. This was -- it was like 50 times
21 higher back in the early '70s.

22 And that, again, mesothelioma can
23 appear after just days, weeks, months of exposure.
24 You don't have -- it doesn't have to be for your
25 working lifetime. Absolutely reported cases over

1 and over again in the literature of what we would
2 consider to be very, very brief. Days.

3 Q. Has asbestos been banned in countries
4 around the world, including the United States?

5 A. 70-plus countries have -- have banned
6 asbestos.

7 Q. I want to ask you about this topic,
8 epidemiology, which is a word the jury has heard a
9 few times. Can you explain to the jury what
10 epidemiology is?

11 A. Sure. In basic, epidemiology is the
12 study of disease in a population. So we -- you
13 know, it's not just an individual person, but
14 they'll look at a group maybe of -- as an
15 occupation. And they'll say, okay, insulators,
16 and what diseases are they at risk for; or it
17 might be a population who lives in a certain
18 place; or it might be a population who every day
19 you see, you know -- if you drink coffee, if you
20 don't drink coffee, if you drink alcohol, if you
21 don't drink alcohol.

22 So then you look at a population of a
23 certain behavior -- if you are a smoker, not a
24 smoker -- and determine disease risks. And that
25 allows us to take that information and try to

1 prevent disease, and it's all part of disease
2 prevention.

3 Q. Did Johnson & Johnson, when it was
4 selling talc -- actually, I want to just -- I just
5 remembered, I wanted to ask you one thing. What
6 is baby powder? What is it made out of?

7 A. It's made out of -- well, it can --
8 some people have also used it, but Johnson &
9 Johnson's Baby Powder was made out of talc.

10 Q. Okay. I think everyone understands
11 that, but I just want to make sure. It was
12 literally a bottle of talc?

13 A. Correct.

14 Q. Did Johnson & Johnson, when it was
15 selling talc baby powder for over 100 years, ever
16 conduct an epidemiology study on cosmetic talc
17 users?

18 A. No.

19 Q. Did they ever fund a study to study
20 the folks using their cosmetic talc to see if they
21 got mesothelioma?

22 A. Not that I'm aware of. I've never
23 seen one.

24 Q. Is that necessary to determine whether
25 or not the asbestos in the talc -- are there

1 epidemiology studies studying the levels of
2 asbestos exposure that we see from talc and
3 finding massive rates of death and disease?

4 A. Yes.

5 Q. Okay. Is it necessary to study each
6 individual occupation or group or product to know
7 whether epidemiologically it causes mesothelioma?

8 A. No. And in fact, from the scientific
9 and medical perspective, asbestos-causing
10 mesothelioma is established as a fact. And so
11 there is no need to get a study who was exposed to
12 this particular product or this particular product
13 or this particular product.

14 If it's capable of releasing asbestos
15 into someone's breathing zone or getting into
16 their body and -- it is dangerous, and you don't
17 need a whole nother study. It's been studied for
18 60 years. We've done plenty of studies in all
19 kinds of scenarios. In every scenario, at lower
20 and lower and lower and lower doses, we still have
21 substantial risk of mesothelioma.

22 Q. This textbook by Dr. Dodson and
23 Dr. Hammar says it's exposure to asbestos, not the
24 occupation or the specific job, that is
25 responsible for asbestos-related diseases. Do you

1 agree?

2 A. Yes, I do. That's -- that's the exact
3 concept.

4 Q. Are there epidemiology studies that
5 study the level of exposure of asbestos in the air
6 and then determine whether those levels of
7 exposure to asbestos cause death and disease?

8 A. Yes. So these are just some examples
9 in -- in the peer-reviewed literature, and these
10 are from around the world. So there's -- there's
11 studies from -- from France -- it's hard for me to
12 see -- which I don't have my version up here. But
13 there's some from Germany. There's some from
14 other countries. Italy.

15 And what they did, is they had
16 people -- large, large, large populations, and
17 they had experts figuring out how much exposure to
18 asbestos people had and the risk they had of
19 getting mesothelioma based on that exposure.

20 And what they found is that -- this is
21 the result here. OR is basically -- is that what
22 you're saying -- another way is the risk. And so
23 this is a 4 -- I think -- is that -- I can't read
24 it here. Is this 4?

25 So that is 4 times the risk if you

1 were less than .1 -- so under .1 fiber per cc
2 year. So a fiber per cc year is that exposure
3 for -- for one year. So if you were exposed
4 to .1 fibers per cc -- if you had .1 fiber per cc
5 for one year, that's .1 fiber cc year. But they
6 would even be getting a risk even below that.

7 The -- the German study here, almost
8 8-fold risk at less than .1. And these can go
9 down, all the way down to much lower than that.

10 2 1/2 fold risk at .2. 4 1/2, almost
11 a 4-fold risk between .1 and .99 fiber per cc
12 year. And there's others as well. So multiple
13 examples of substantial increased risk at well
14 below a fiber year and even well below .1 fiber
15 year.

16 Q. This slide, I think, is sometimes
17 confusing for me, but -- so I just want to make
18 sure everyone understands. The middle column is a
19 measurement of the amount of asbestos in the air?

20 A. Well, this is -- this is a combination
21 of what -- this is what the people were breathing
22 in. So this is a dose. So it was how much
23 asbestos -- so this -- less than .1 fiber per cc
24 year, you could get that by having .1
25 fiber -- .1 fiber per cc year could be .1 fibers

1 per cc for one year or .05 fibers per cc for two
2 years or .01 fibers per cc for ten years. They
3 all would give you the same at that upper range of
4 that and then going down to -- to even less below
5 that.

6 Q. And then the column on the right that
7 says "OR" and the number or "HR" and number --

8 A. Yeah. So these are half -- these are
9 risk ratios. So these are -- this is the -- how
10 many times -- so "4" means 4-fold, 4 times
11 increased risk. A 7.9 times increased risk. A
12 2.69 times increased risk. A 4.4 times increased
13 risk, which means there was 4 1/2 or 8 times more
14 cancers in that group, in that population, than --
15 than there should have been.

16 Q. And the specific cancer studied in
17 these studies?

18 A. This is mesothelioma. This is
19 looking -- this is looking at the risk for
20 mesothelioma.

21 Q. Have you reviewed the peer-reviewed
22 published literature about the levels of exposure,
23 that middle column, that occur when someone uses
24 Johnson & Johnson's talc?

25 A. I have.

1 Q. And what do those show?

2 A. Well, this is from a published paper
3 showing that -- and this was looking at people
4 that used it for 40 years, .38 to 5.18 fiber --
5 it's fiber years or fiber per cc years, same
6 thing.

7 So, again, those -- those exposures, I
8 mean, even at the low end, .38 fiber years, is
9 well with -- it's even above some of those
10 examples that we just saw, substantially
11 increasing your risk of mesothelioma.

12 Q. Have you formed an opinion to a
13 reasonable degree of medical certainty about the
14 fiber per cc levels of exposure or a range of
15 exposures from Johnson's Baby Powder?

16 A. I have.

17 Q. And what is that?

18 A. So it's between .1 to 4 fibers per cc.
19 So a cc, I think you have heard, is about the size
20 of -- of a sugar cube. We breathe in 500 ccs,
21 roughly, with every breath, 20 breaths. So if you
22 have 1 fiber per cc, you're going to breathe in
23 10,000 fibers every minute, millions or billions
24 in a year.

25 Q. In addition to these population-based

1 studies, as a part of epidemiology, do they also
2 look at case reports?

3 A. Sure.

4 Q. What is that, and why is it important
5 for the disease mesothelioma?

6 A. So case reports, instead of looking at
7 studying a population and seeing what happens to
8 them, case reports are an individual person had
9 the disease, and then you look in detail at that
10 person or at multiple people.

11 And certain diseases are so closely
12 linked, they're what we call "sentinel diseases"
13 or "signal diseases," like mesothelioma, like
14 poisoning. Another one is silicosis. Those sorts
15 of diseases, you can use -- the case reports can
16 be very, very helpful because there's not these
17 other causes of things in general. They're so
18 closely associated.

19 Q. This is an epidemiology textbook that
20 says: Malignant mesothelioma, which is nearly
21 always attributable to asbestos exposure, fit this
22 description.

23 What -- what are they saying there?

24 A. Yeah. So that it's a -- it's a
25 sentinel health event, so that even cases or case

1 reports serve as an indicator of a hazard.

2 Q. Are there case reports based on
3 certain occupations that work with talc,
4 indicating concerns about mesothelioma?

5 A. Yes. And there -- there have been
6 case reports not only of that, but of people when
7 the -- when people can die, sometimes the
8 pathologists can look at the lungs. And they have
9 seen cases, just like the publications of
10 mesotheliomas that we see, that -- that have
11 mesothelioma cases where there is talc and the
12 noncommercial amphiboles, tremolite and/or the
13 anthophyllite, which was an indicator or
14 suggestion of a source from being cosmetic talc
15 in -- in those individuals.

16 Q. Are there also peer-reviewed published
17 studies looking at hundreds of case reports of
18 individuals exposed to cosmetic talc who develop
19 mesothelioma?

20 A. Yeah. There are -- there is hundreds
21 of cases of -- mesothelioma cases where the
22 majority of them were just exposed to asbestos
23 from -- from the talc use.

24 And when they've taken those
25 individuals and looked at them at autopsy, they

1 found repeatedly the presence of talc,
2 anthophyllite, tremolite.

3 Q. What happened in 2017 and why is that
4 significant in this case?

5 A. Well, starting in 2017, there was a
6 lot more information that became available to the
7 public about asbestos in talc. And since that
8 time, there have been more and more and more
9 studies that have been published in the scientific
10 literature.

11 Q. What happened with respect to Johnson
12 & Johnson's internal confidential corporate
13 documents in 2017?

14 A. They became public.

15 Q. Has there been an explosion of
16 information and study on this specific issue since
17 those documents were released in 2017?

18 A. Yes.

19 Q. Are there other workers and
20 occupations who work with talc who have been
21 studied for the disease mesothelioma?

22 A. Yeah. So they -- there have -- there
23 are other uses for talc. And some of these have
24 also had either case reports or other studies that
25 have shown that they are also at risk.

1 Q. Have the miners and millers who worked
2 in Johnson & Johnson's talc mines been studied for
3 the disease mesothelioma?

4 A. Yes.

5 Q. And what did they find for the miners
6 who worked in the Vermont talc mine?

7 A. In the Vermont talc mine, there were
8 two mesotheliomas in 427 miners and millers. And
9 that is a significant increase.

10 And in the Italian, although there was
11 also one pleural that wasn't included, there were
12 four peritoneal cancers that were reported in
13 that -- in that population. And peritoneal
14 cancer -- and these are all men. Primary
15 peritoneal cancer is -- is going to be
16 mesothelioma, but it's -- the other diseases are
17 usually the diseases of women.

18 Q. This also mentions a New York talc
19 mine. What did they find in that talc mine?

20 A. They -- they had 13 or more
21 mesothelioma cases in 782, where those were a
22 significant increased risk of mesothelioma in the
23 New York talc miners and millers.

24 Q. Are you familiar with Johnson &
25 Johnson's involvement in a paper written about the

1 Italian miners?

2 A. I am.

3 Q. Can you just tell us very quickly --
4 we've got to move along. But can you just tell us
5 very quickly what you've reviewed about Johnson &
6 Johnson's role in that study?

7 MS. BUENO: Objection, Your Honor.
8 Qualifications.

9 THE COURT: All right. Overruled.

10 THE WITNESS: Well, I have reviewed
11 internal documents from Johnson & Johnson.
12 This is -- this was a study by a gentleman
13 by the name of Rubino.

14 And Johnson & Johnson was involved in
15 the planning stages of it. They -- there
16 was some ghostwriting involved. There was
17 a lot of involvement that was not
18 disclosed.

19 When you actually look at the paper,
20 you normally have disclosures on the paper.
21 But there was nothing about, you know, any
22 involvement of Johnson & Johnson in the
23 actual publication.

24 BY MR. ADAMS:

25 Q. There's going to be a video played

1 this afternoon from Johnson & Johnson's corporate
2 spokesperson that's going to talk about this.

3 But are you familiar with the
4 documents that show Johnson & Johnson excluded
5 people who were acutely ill from this study on the
6 Italian talc miners?

7 A. Yes. I mean, the -- the -- there were
8 people that had cancers were excluded, people who
9 were older, people who were sick.

10 And so, yes, there are -- that is some
11 of the issues that were problematic with -- with
12 this study.

13 Q. Have you evaluated Mr. -- Mr. Perry's
14 specific asbestos exposure?

15 A. Yes.

16 Q. Can you tell us about his background
17 with respect to exposures to asbestos other than
18 from talc?

19 A. Right. I mean, there -- there
20 really -- what -- what -- I mean, first of all, he
21 was born in 1969, and we were already -- by '71,
22 when OSHA was coming out as having a lot of
23 restrictions. So much later years are -- are less
24 of a problem.

25 I mean, nothing in his work. He

1 didn't do any remodeling of -- of his home or
2 construction work and none of his schools. Didn't
3 live with anyone that was working around or with
4 asbestos.

5 Q. Did Mr. Perry have some exposures in
6 the mid-'80s to asbestos from some brake work he
7 did with his father?

8 A. Potentially, yes. So from about '85
9 to '88 time frame, he was helping with his dad
10 doing about a dozen, or a little more than a
11 dozen, brake jobs over that three-year period.

12 At some point they started changing
13 what was in brakes, but the brakes -- some brakes
14 did contain chrysotile asbestos in -- in the
15 brakes. So there was potential to have exposure
16 to asbestos if you were doing a brake job.

17 Q. And you mentioned a dozen. I think
18 Mr. Perry testified to several dozen. Was that an
19 exposure that counted and contributed to his
20 cumulative dose of asbestos?

21 A. I think so.

22 Q. What was Mr. Perry's first exposure to
23 asbestos from?

24 A. Johnson & Johnson's Baby Powder.

25 Q. Have you considered the frequency and

1 quantity of Mr. Perry's use of Johnson's Baby
2 Powder?

3 A. I have.

4 Q. Can you tell us about that?

5 A. Sure. So he was an above-average
6 user. And I talked with him. He was not only
7 using it two to four times a day, but he was
8 putting it on his whole body, and in one of his
9 places of work where he -- at times he was
10 actually putting it on his -- on his face.

11 He was in the Boy Scouts, and he was
12 putting it in his sleeping bag. So he was
13 actually sleeping with his face in it.

14 He would put it in his pillow and on
15 his sheets. So he's sleeping it [sic] in his own
16 bedroom with it.

17 And he was very much involved in
18 sports. So he was in hockey. And so he was
19 putting it in the pads, putting it in the --
20 putting it every time he was playing hockey.

21 He was also very much involved in
22 swimming. And so he was putting it in a swim cap
23 and then putting the swim cap, so he basically --
24 and I've heard other people say this here that,
25 you know, it kind of dumps it -- some of it back

1 right into your breathing zone.

2 And then he would use it after
3 swimming because he wanted to get rid of the
4 chlorine smell.

5 So this was a repeated use, and he's a
6 big guy. And so the amount of talc that he uses
7 to put it on his body is going to be more than,
8 you know, if it was just a small -- a
9 smaller-framed individual.

10 Q. Was Michael also allergic to
11 deodorant?

12 A. Yes.

13 Q. Okay. So did he use Johnson's Baby
14 Powder in relation to that?

15 A. He did. He put it in the axillary
16 armpits area as -- as a deodorant, too.

17 But this was something that I think he
18 used multiple times a day in multiple different
19 scenarios, literally head-to-toe, and in -- in
20 sleeping sheets and in -- and in sleeping bags.

21 Q. This says "thousands of uses, hundreds
22 of bottles." Is that with respect to Johnson's
23 Baby Powder?

24 A. Yes.

25 Q. I think we've talked about this, that

1 last bullet point, "compared to background," what
2 does that mean?

3 A. So there is, or was, a certain amount
4 of asbestos. These are -- it's almost all
5 chrysotile. And it's almost all very, very tiny,
6 less than 1 micron. I mean, I think you heard
7 yesterday about a micron. And it's really,
8 really, really tiny fragments of chrysotile,
9 mostly. No anthophyllite. No tremolite in the
10 background, really.

11 But when you look at these levels,
12 these -- there were -- there were measurements
13 made in general in the urban center of .00003
14 fibers per cc. Urban environments could be even
15 less than that. And over time, as we have
16 viewed -- it's been banned for -- since the 1980s
17 in a lot of products.

18 Over time, that background has -- or
19 ambient has become even less and less. In fact,
20 in Houston it was just studied about three years
21 ago, and there was no detectible asbestos in the
22 air in Houston, which is where I practice.

23 The other thing is, is that, again,
24 it's almost all chrysotile.

25 If you're looking at amphiboles, it

1 only makes up about 2 percent of that background.
2 So the amphibole -- if you're comparing amphiboles
3 to amphiboles -- and even, again, all those are
4 short-fiber.

5 If you're comparing long-fiber
6 amphibole to long-fiber amphibole, the amount of
7 asbestos at .1 to 4 fibers per cc is a millionfold
8 more.

9 Q. Were Michael Perry's exposures to
10 asbestos from Johnson & Johnson's Baby Powder a
11 substantial contributing factor to his development
12 of mesothelioma?

13 A. In my opinion, yes.

14 Q. I'm going to ask you about if Michael
15 Perry's exposures had only gone from 1979 to
16 2019 and we assume that -- I know it's not what
17 actually happened. But if his only exposures to
18 Johnson's Baby Powder were in that shortened time
19 period.

20 Are you with me?

21 A. Yes.

22 MS. BUENO: Your Honor, I object to
23 the slide that's being shown to the jury
24 right now, as it relates to Kenvue, Inc.,
25 which is not something that this witness is

1 here or prepared to discuss.

2 Do you see that on the slide,

3 Your Honor?

4 THE COURT: Overruled. Overruled.

5 THE WITNESS: I didn't hear the

6 question. I'm sorry.

7 BY MR. ADAMS:

8 Q. If Mr. Perry's exposures were only
9 from 1979 to 2019 to Johnson's Baby Powder, is it
10 your opinion that they -- those exposures were a
11 substantial contributing factor to his development
12 of mesothelioma?

13 A. Yes. We've still got 40 years and his
14 type of usage, yes.

15 Q. You have a list of other things that
16 you've relied on for your opinion that -- that
17 Mr. Perry's exposures to asbestos and Johnson's
18 Baby Powder were significant. I'm running out of
19 time, but can you just summarize them real quick?

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

1 those are more vulnerable years.

2 Q. Did Mr. Perry use other talc products?

3 A. He did, but not as -- to that degree.

4 Q. Were there some of those that you
5 determined were significant exposures and others
6 that you determined were not?

7 A. Yes.

8 Q. Which ones did you determine were
9 significant?

10 A. I think the Gold Bond and the Equate.
11 The -- the Old Spice he didn't use as much, but
12 I -- I think that he did use that some, limited.

13 Q. And does this go back to the
14 dose-response nature of mesothelioma?

15 A. Correct.

16 Q. Okay. Is there any way to go back
17 medically through someone's exposure and say,
18 "These exposures to asbestos counted. These other
19 exposures didn't," or is it the cumulative dose of
20 asbestos exposure that causes mesothelioma?

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

1 Q. We talked about knowing the source of
2 the talc in Johnson's Baby Powder. What was the
3 talc that Johnson & Johnson was using in the baby
4 powder before the year 1966?

5 A. That was from Italy.

6 Q. And from 1966 to 2003, what was the
7 source of talc in Johnson's Baby Powder?

8 A. Mostly Vermont.

9 Q. And was there a time period of about
10 seven months in 1979 when Johnson & Johnson was
11 using a different talc source in its baby powder?

12 A. Yes. Back to Italy.

13 Q. And then from 2003 until 20 -- excuse
14 me. From 2003 until 2020, what was the source of
15 talc in Johnson's Baby Powder?

16 A. China.

17 Q. So we've got Italy, Vermont and then
18 China?

19 A. Correct.

20 Q. Was Mr. Perry exposed to talc from
21 each of those sources in Johnson's Baby Powder?

22 A. Yes.

23 Q. Okay. Why is it important to know the
24 talc source? The CliffsNotes version, if you can.

25 A. Well, just, basically, I mean, because

1 there have been tests not only of individual
2 products, whether it be ore, and from other
3 companies that -- or other -- other sources that
4 used these same -- same types of locations, and
5 it's consistent.

6 Q. Okay. This says 1,000-plus samples
7 containing asbestos in talc over the course of
8 70-plus years. What does that mean?

9 A. So I'm looking back at tests of --
10 either related specifically to Johnson & Johnson
11 or other companies that were using Italian or
12 Vermont or Chinese talc or the talc itself or the
13 ore itself evidencing -- evidence of asbestos
14 going back to 1948.

15 Q. Have you reviewed Johnson & Johnson's
16 efforts to remove asbestos from its talc and baby
17 powder?

18 A. Yes.

19 Q. What -- what -- what did Johnson &
20 Johnson do, CliffsNotes version, to try to take
21 out asbestos from its talc?

22 MS. BUENO: Your Honor, objection.

23 Again, this is a pulmonologist, internal
24 medicine doctor, who was been qualified in
25 those areas. Now we're talking about

1 removal of asbestos from talc. It's
2 outside his qualifications.

3 THE COURT: Lay a foundation for the
4 questions --

5 MR. ADAMS: Sure.

6 THE COURT: -- Mr. Adams.

7 BY MR. ADAMS:

8 Q. Dr. Haber, as part of your work as a
9 pulmonologist, do you -- do you routinely review
10 MSDS sheets, other types of documents in
11 determining what your patients were exposed to?

12 A. Of course.

13 Q. Have you reviewed similar documents in
14 this case from Johnson & Johnson to determine
15 whether or not there was asbestos in the talc that
16 Mr. Perry was exposed to for five decades?

17 A. Yes.

18 Q. Okay. Is this one of those documents
19 from Johnson & Johnson about where they're talking
20 about trying to remove asbestos from the talc?

21 MS. BUENO: Same objection,
22 Your Honor.

23 THE COURT: All right. I overruled
24 the previous objection. Now that the
25 foundation has been laid, I overrule this

1 objection.

2 THE WITNESS: Yes, this is one of the
3 documents.

4 BY MR. ADAMS:

5 Q. And what did Johnson & Johnson do to
6 try to remove asbestos from the talc? What were
7 the different procedures that they tried?

8 A. They tried flotation. They tried
9 different acids to burn it out, to float it out,
10 to -- to get rid of it. There -- one of their own
11 talc people, Dr. Pooley, said, "Once it's there,
12 you're not going to be able to get rid of it."

13 Q. This is a document that says
14 asbestiform particles cannot be removed from talc
15 we've marked as Exhibit 42. Is that one of the
16 documents where Johnson & Johnson concluded there
17 was no way to get it out?

18 A. Correct.

19 Q. What is this -- this is Exhibit 39.
20 Is this a Johnson & Johnson document?

21 A. Yes.

22 Q. What -- what are they doing -- what
23 are they trying to do here?

24 A. Trying to get rid of tremolite or
25 chrysotile.

1 Q. This is another Johnson & Johnson
2 document, Exhibit 38. It's in evidence. What are
3 they trying to do here with the talc?

4 A. Trying to get rid of asbestos.

5 Q. It says "floated." Do you see that?

6 A. Yes.

7 Q. Did they try to float the asbestos out
8 of the talc?

9 A. Correct. And they didn't.

10 Q. Okay. This is a document -- at the
11 top right, it says "Froth Flotation." Is this --
12 this is in Exhibit 38 as well. Is this part of
13 those efforts?

14 A. Yes.

15 Q. What are we looking at here -- this is
16 Exhibit 38 -- with respect to chrysotile?

17 A. That they're finding it in the ore and
18 in the product.

19 Q. We heard yesterday that the levels of
20 asbestos, from Johnson & Johnson's opening, in
21 their baby powder were safe. Do you remember
22 hearing that?

23 A. I do.

24 Q. What did Johnson & Johnson say in its
25 own internal documents about that topic?

1 A. That it actually is a severe health
2 hazard.

3 Q. Are they talking about talc with
4 asbestos in it in this document?

5 A. Yes.

6 Q. What did Johnson & Johnson conclude
7 about trying to clean the asbestos out of the talc
8 in its talc mines?

9 A. Yeah. Saying that the -- the clean
10 mine approach -- saying that, well, we'll just,
11 you know, know where we're going to be sourcing
12 this. It -- it -- it's over. It just doesn't
13 work.

14 Q. Have you reviewed and verified the
15 accuracy of a chart evidencing asbestos in
16 Johnson & Johnson's talc products that summarizes
17 document after document after document over a 60-,
18 70-year period finding asbestos in the talc?

19 A. I did.

20 Q. Okay. Is that what we are looking at
21 here?

22 A. That's one part of one page of it,
23 yes.

24 Q. So this is the first page of
25 Exhibit 72 that's in evidence. And I was hoping

1 that we could just very quickly go through a
2 couple of examples. The jury will have it back
3 during their deliberations so they can understand
4 what this document shows. Are you prepared to do
5 that?

6 A. I am.

7 Q. Have you verified the accuracy of this
8 chart?

9 A. Yes, I have.

10 Q. Have you seen the documents that
11 underlie the chart that are -- that are summarized
12 in it?

13 A. I have. And I've -- I've also seen,
14 you know, if someone said there was -- Johnson &
15 Johnson said that there was changes they didn't
16 agree with, then I looked at those as well.

17 Q. When we first summarized it, did
18 Johnson & Johnson say, "You've got a couple of
19 things wrong"?

20 A. Yes.

21 Q. And were they right on a handful?

22 A. Yes.

23 Q. Okay.

24 A. And they were removed.

25 Q. This is Number 3, the third entry on

1 the chart.

2 A. Yes.

3 Q. And is this the document that
4 underlines that entry?

5 A. Correct.

6 Q. This is one the jury has seen before,
7 Exhibit 314 in evidence. Have you -- I just want
8 to help people orient them to the chart. Can you
9 explain the entries in the chart and how they
10 relate to the document?

11 A. Right. So it gives you the date that
12 it was -- this is Battelle Lab, hired by Johnson &
13 Johnson. This is an Italian source, and they
14 found fibrous tremolite in 24 samples.

15 Q. What are we looking at here?

16 A. These are the -- the tremolite that
17 was reported in that testing.

18 Q. Yesterday, during opening statement,
19 this slide was shown by our side. Dr. Langer
20 observed chrysotile fibers in Johnson's Baby
21 Powder in 1971.

22 Have you verified that that's true?

23 A. I have.

24 Q. I don't know if you were here for this
25 portion, but the lawyer for Johnson & Johnson got

1 that up and said -- and showed a document from
2 Mount Sinai on the -- on the ELMO and said, well,
3 Dr. Langer took that all back and we left it out
4 in the dot, dot, dots.

5 Were you here for that?

6 A. I was.

7 Q. Is that true?

8 A. It is not.

9 Q. Okay. Is this the entry about
10 Dr. Langer?

11 A. It is.

12 Q. Is this document we've marked as
13 Exhibit 126 the specific document where Dr. Langer
14 finds in Johnson's Baby Powder chrysotile
15 asbestos?

16 A. Yes.

17 Q. Have you reviewed Dr. Langer's sworn
18 deposition testimony, with Johnson & Johnson
19 lawyers present, where he was asked:
20 "Dr. Langer" -- under oath -- "did you ever take
21 back your findings of chrysotile asbestos in
22 Johnson's Baby Powder?"

23 A. Yes. I have.

24 Q. Have you read, relied and considered
25 that deposition in forming your opinions about the

1 asbestos content of Johnson's Baby Powder?

2 A. Yes, I did.

3 Q. I want to take a look at one of those.

4 Let's -- from Dr. Langer now.

5 (Playing video.)

6 DR. LANGER: "There were many samples
7 that we discussed. And in terms of the original
8 reports concerning the chrysotile fibers
9 identified in the talcs, including J&J, that
10 remained. You should have that. I stood by
11 that."

12 (End of video.)

13 BY MR. ADAMS:

14 Q. Did Dr. Langer take back his findings
15 of asbestos in Johnson & Johnson's talc?

16 A. No.

17 Q. Did he testify to that over and over?

18 (Playing video.)

19 QUESTION: "Did you ever write an
20 article and publish an article saying you were
21 wrong about Johnson & Johnson having chrysotile
22 asbestos?"

23 DR. LANGER: (Inaudible.)

24 BY MR. ADAMS:

25 Q. Was it accurate when Johnson & Johnson

1 told the jury yesterday that Dr. Langer took back
2 his findings of chrysotile asbestos in Johnson's
3 Baby Powder?

4 A. No.

5 Q. Did Johnson & Johnson -- the next
6 topic I want to ask you about is did Johnson & --
7 when Johnson & Johnson knew there was asbestos in
8 the baby powder. I think we've covered it, but I
9 just want to go through a couple quick points very
10 quickly.

11 When was it known that there was an
12 association between talc and asbestos?

13 A. Late 1800s, 1898.

14 Q. When was it known that asbestos causes
15 deadly diseases?

16 A. By the 19 -- early 1930s.

17 Q. Have you reviewed Johnson & Johnson's
18 own sworn testimony about when Johnson &
19 Johnson -- the medical doctors at Johnson &
20 Johnson knew that asbestos causes cancer?

21 A. Yes.

22 Q. When was that?

23 A. 1930s.

24 Q. What was known in the 1940s about how
25 commonly asbestos was found in talc?

1 A. Right. By the 1940s, the association
2 between asbestos and talc was -- in cosmetic talc
3 was known as a common impurity.

4 Q. What did Johnson & Johnson write down
5 about whether or not there was asbestos in their
6 talc in 1958?

7 A. That they had fibrous tremolite, which
8 is asbestos.

9 Q. Whose definition of asbestos is this?

10 A. Johnson & Johnson's.

11 Q. What was known by the 1960s about
12 asbestos and mesothelioma?

13 A. By the 1960s, it was established that
14 mesothelioma was caused by asbestos.

15 Q. There was discussion yesterday in
16 opening statement about the findings of asbestos
17 by the FDA, Dr. Lewin, Dr. Langer, and a host of
18 individuals in the early '70s.

19 Are you familiar with that sequence of
20 events?

21 A. I am.

22 Q. And the documents that show what
23 happened?

24 A. Yes.

25 Q. I want to just ask you a quick couple

1 of questions about that.

2 Who was Dr. Lewin and what did he find
3 in the early 1970s in Johnson & Johnson's talc?

4 A. He was a -- he had actually been an
5 industry expert. But he tested baby powder at the
6 request of the FDA and found chrysotile asbestos.

7 Q. This says "84." Was that Johnson &
8 Johnson's Shower to Shower product?

9 A. Correct.

10 Q. Did the Shower to Shower talc product
11 contain the same asbestos as the baby powder or
12 something different?

13 A. The same.

14 Q. Okay. And it says 5 percent
15 chrysotile?

16 A. Correct.

17 Q. Okay. We heard in opening statement
18 that Dr. Lewin got it wrong, that he got it wrong
19 that there was actually chrysotile in Johnson's
20 Baby Powder. Is that partially true and partially
21 not true?

22 A. Yes.

23 Q. Tell us.

24 A. Yeah. So what he got wrong was the
25 percentage; but the presence of asbestos, he did

1 not. And it was repeatedly found by many other --
2 many others.

3 Q. So he says 5 percent here, and he used
4 a microscope called XRD?

5 A. Correct.

6 Q. And you're saying it wasn't 5 percent,
7 it was a lower percentage, but it was still there.
8 Is that fair?

9 A. That's my understanding.

10 Q. Okay. And is one of the ways we know
11 it was still there because Dr. Hutchinson reviewed
12 the Lewin samples and made findings?

13 A. Yeah. So Hutchinson, at University of
14 Minnesota, used TEM and -- which is the most
15 powerful magnifier. And he found chrysotile.

16 Q. In which sample?

17 A. The Lewin sample. The same -- same
18 sample.

19 Q. Okay. And did Dr. Hutchinson take
20 photographs of that chrysotile asbestos?

21 A. He did.

22 Q. Okay. What are we looking at here?

23 A. These were some of the photographs of
24 the asbestos that he photomicrographed in his
25 report.

1 MR. ADAMS: And this is in evidence as
2 Exhibit 115.

3 BY MR. ADAMS:

4 Q. Are these photographs that
5 Dr. Hutchinson took of chrysotile asbestos in
6 Johnson & Johnson's talc that was the same sample
7 Lewin examined?

8 A. Yes.

9 Q. And so is there any doubt whether or
10 not there was chrysotile asbestos in the Lewin
11 sample of Johnson & Johnson's talc?

12 A. No.

13 Q. I don't think we have time to go
14 through all the documents, so I just want to ask
15 you a question. We'll do it with another witness
16 or we'll do it in closing.

17 What did J&J tell the FDA about
18 Dr. Hutchinson's findings?

19 MS. BUENO: Objection, Your Honor.

20 What the FDA was told by Johnson & Johnson
21 is outside this witness's qualifications as
22 a pulmonologist.

23 THE COURT: Lay a foundation.

24 MS. BUENO: And it's hearsay.

25 THE COURT: Lay a foundation.

1 BY MR. ADAMS:

2 Q. In evaluating Mr. Perry's exposure to
3 asbestos, have you considered internal Johnson &
4 Johnson corporate documents about what they
5 reported internally about asbestos in baby powder
6 and what they reported externally?

7 A. Yes.

8 MS. BUENO: Same objection,
9 Your Honor.

10 THE COURT: Overruled.

11 BY MR. ADAMS:

12 Q. What did Johnson & Johnson report to
13 the FDA about Dr. Hutchinson's findings of
14 asbestos in baby powder?

15 A. They -- they did not report the TEM
16 findings. They just reported the -- the SEM
17 findings, where he didn't find it. But they
18 didn't report that -- that he did find it.

19 Q. And SEM and TEM, those are -- are
20 those microscopes?

21 A. Yes.

22 Q. Which one is more powerful at finding
23 asbestos?

24 A. TEM.

25 Q. Okay. And so just so everyone

1 understands, and we'll have some pictures so
2 everyone knows what these microscopes are.

3 In SEM, when Dr. Hutchinson looked, he
4 didn't find asbestos?

5 A. Correct.

6 Q. And then with TEM, when he looked at
7 the Lewin sample, what did he find?

8 A. Chrysotile asbestos.

9 Q. And which one did Johnson & Johnson
10 report to the FDA?

11 A. The -- the SEM that -- that Hutchinson
12 had not found it.

13 Q. Did Johnson & Johnson share
14 Dr. Hutchinson's TEM findings of asbestos it
15 contains in Johnson & Johnson's talc with the
16 public until 2017?

17 A. No.

18 Q. Did Johnson & Johnson use industrial
19 talc in baby powder?

20 A. Yes.

21 Q. What is the definition of "cosmetic
22 talc," "pharmaceutical talc" and "industrial
23 talc"?

24 A. Cosmetic talc is supposed to be
25 greater than 98 percent talc. Pharmaceutical,

1 greater than 99 percent talc.

2 Q. Is this some FDA testing of Johnson &
3 Johnson's talc?

4 A. Yes.

5 Q. And did they report the percentage of
6 it that was talc versus something else?

7 A. Yes.

8 Q. What does this show us about whether
9 it was industrial or cosmetic talc?

10 A. Well, even -- some people have said
11 that if -- if -- cosmetics couldn't go over
12 90 percent, but usually some people say even
13 higher. None of these -- there are several here.
14 88 percent, 87 percent, 89, 83, those are
15 definitely levels that would be considered
16 industrial grade.

17 Q. Are there other studies done by the
18 FDA -- for example, Johnson & Johnson's Shower to
19 Shower product -- that show it was industrial
20 talc?

21 A. Yes, 87 percent.

22 Q. Does this match other testing of
23 Italian talc by other companies?

24 A. Yes.

25 Q. Is this a document from Avon who used

1 Italian talc in their powders for a time?

2 A. Correct.

3 Q. Do all asbestos fibers, when released
4 into the air and breathed, increase someone's risk
5 of developing the disease mesothelioma?

6 A. Yes, except that if it's just the --
7 if it's just the background, we don't know how
8 much it would increase it because there's no
9 population that isn't exposed. You would compare
10 it to the ambient to ambient. But if you've got
11 additional exposures beyond ambient, yes, those
12 would all be --

13 Q. Can malignant mesothelioma, the
14 disease that Michael Perry has, be prevented?

15 A. Yes.

16 Q. How do you prevent it?

17 A. You don't allow people to be exposed
18 to asbestos and you prevent mesothelioma.

19 Q. Have all of the opinions you've given
20 today been within a reasonable degree of medical
21 certainty?

22 A. They have.

23 MR. ADAMS: Thank you, everyone, for
24 bearing with me. I know we're five minutes
25 after lunch. Thanks for answering my

1 questions.

2 Pass the witness, Your Honor.

3 THE COURT: All right. Ms. Bueno.

4 MS. BUENO: I'm ready to go, but I
5 think the jury probably wants lunch. I'm
6 fine to start, or we can take lunch and
7 come back after.

8 JURORS: Lunch.

9 MS. BUENO: I thought so. I thought
10 so.

11 THE COURT: Very good. All right.
12 We'll send the jury to lunch now. Please
13 be back, if you can, at 1:15-ish, the best
14 you can do. Understood.

15 All right. The weather report hasn't
16 changed, raining but not heavy. So, okay.
17 So far, so good. I think we can do the
18 afternoon. But I'll tell you again with a
19 more detailed report because I'm going to
20 call the folks over at the court
21 administration and see what they're saying.

22 Thank you so much. Please rise for
23 the jury's departure.

24 (The jury exits the courtroom at
25 12:05 p.m.)

1 THE COURT: All right. The court will
2 be in recess.

3 * * *

4 (Whereupon, there was a lunch recess
5 in the proceedings from 12:05 p.m. to
6 1:24 p.m.)

7 * * *

8 THE BAILIFF: The court will come to
9 order. All rise.

10 THE COURT: All right. Please be
11 seated.

12 (Off-the-record conference.)

13 MS. BUENO: Just a quick note,
14 Your Honor --

15 THE COURT: Yes.

16 MS. BUENO: -- before we start up with
17 Dr. Haber again. Defendants object to
18 plaintiffs playing those clips of
19 Dr. Langer during the direct exam. There
20 had been an agreement to exchange direct
21 materials and exhibits and demonstratives
22 the night before. That did not happen.

23 We received Dr. Haber's slides as he
24 was taking the stand this morning and had
25 no heads-up that they were going to play

1 those clips for Dr. Langer.

2 Dr. Langer was not designated. His
3 deposition was not designated in this case.
4 Certainly, if they had wished to put that
5 evidence into the record in front of the
6 jury, we would have wanted an opportunity
7 to do counter-designations.

8 THE COURT: Well, I understand all
9 that, but I'm going to tell you, the level
10 of sophistication you people get into about
11 wanting discovery on every single thing
12 before you put something in is way beyond
13 what the normal rules of the road require.

14 So I note your objection. I overrule
15 it. And we're going to move on.

16 MS. McVEY: Your Honor, just so the
17 record -- the record is clear --

18 THE COURT: You don't need to argue.
19 When you win, you don't argue.

20 MS. McVEY: I'm not trying to argue
21 with you. I just wanted to say a couple of
22 things about what they just handed you --

23 THE COURT: About what?

24 MS. McVEY: This huge response they
25 just handed you about the motion to compel.

1 THE COURT: Well, I can speed read.

2 MS. McVEY: I know, Judge, but they
3 have -- I'm sorry, but they have an army of
4 people who can file stuff. We haven't had
5 a chance to respond to it, so I'm just
6 asking for a time --

7 THE COURT: I get it. We're not going
8 to do a thing until you have a chance to
9 respond.

10 MS. McVEY: Thank you, Your Honor.

11 THE COURT: No -- no worries about
12 that. No worries.

13 All right. Bring me the jury.

14 MS. FLYNN: Your Honor, before --
15 before we do start, I did -- I did have --
16 Stephanie Flynn, Your Honor, on behalf of
17 American International Industries.

18 THE COURT: Stephanie, when you do --
19 you -- come up here where the court
20 reporter can hear you and I can hear you.

21 MS. FLYNN: My apologies.

22 THE COURT: Excuse me. Ms. Flynn.

23 MS. FLYNN: My apologies. I wanted
24 to --

25 THE COURT: That's all right. That's

1 all right.

2 MS. FLYNN: I wanted to inquire if
3 the Court will allow me to cross-examine
4 Dr. Haber to the extent I need to on any
5 damages issues that may not be covered by
6 Ms. Bueno.

7 THE COURT: I am not real fond of
8 having you repeat what Johnson & Johnson is
9 going to already say. There's not a thing
10 that AII will say about damages that
11 they're not going to say because damages
12 are not specific to you on any kind of
13 percentage basis. Damages are what damages
14 Mr. Perry suffered. And he's going to get
15 a very thorough -- and those Haber things
16 are going to be very thoroughly
17 cross-examined.

18 So I want to ask -- I will withhold my
19 ruling on this until Ms. Bueno has
20 completed her cross-examination. I cannot
21 imagine what would be needed beyond what
22 she is going to do.

23 MS. FLYNN: Thank you.

24 THE COURT: But I will hold it in
25 abeyance until we see.

1 MS. FLYNN: Thank you, Your Honor.

2 I believe that she will be very, very
3 thorough. I just wanted to make sure that,
4 you know, if there are areas that are not
5 covered, that we would have the
6 opportunity --

7 THE COURT: Yes, ma'am. I can't
8 imagine, but I've been completely wrong
9 before.

10 MS. FLYNN: I appreciate it,
11 Your Honor.

12 THE COURT: All right. Bring me the
13 jury.

14 THE BAILIFF: Yes, ma'am.

15 (The jury enters the courtroom at
16 1:30 p.m.)

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

19 THE COURT: Thank you, sir.

20 Ladies and gentlemen of the jury, my
21 advice weatherwise is this: The latest and
22 greatest on modeling is that the storm, if
23 it hits Columbia, will hit Columbia at
24 8 a.m. on Thursday.

25 Now, it's got a lot of wiggling around

1 to do, because, apparently, it's going to
2 weave out to the ocean and then weave back
3 in. And the question is, how does it weave
4 in and so forth.

5 So lots of unknowns, as I'm sure all
6 of you know. I'm sure you're all looking
7 at your Internet and seeing some of this
8 stuff. But that's what I'm told.

9 The Supreme Court has issued an
10 advisory for the courts that there will be
11 a honeymoon for filing deadlines for these
12 lawyers. Because a lot of them are down on
13 the coast, and they have buttoned up their
14 offices and evacuated. But it applies to
15 everybody.

16 But the trial judges are left with the
17 discretion. So I do have the discretion
18 that you can go or no-go. And right now,
19 Wednesday looks probable to me, but
20 Thursday, very iffy.

21 So that's where we are. Thank you.
22 And I'll keep you advised as I hear more
23 things this afternoon.

24 Ms. Bueno on cross-examination of
25 Dr. Haber.

1 MS. BUENO: Thank you, Your Honor.

2 Good afternoon.

3 CROSS-EXAMINATION

4 BY MS. BUENO:

5 Q. Good afternoon, Dr. Haber.

6 A. Good morning.

7 Q. You understand, Dr. Haber, that you
8 are the only medical doctor who is going to come
9 into this courtroom and tell the jury that
10 Mr. Perry's mesothelioma was caused by Johnson's
11 Baby Powder, correct?

12 A. I'm not sure who is on the witness
13 list, so I -- I don't know that.

14 Q. You are familiar with Dr. Gibney, the
15 cardiothoracic surgeon that did Mr. Perry's
16 surgery, correct?

17 A. Yes, I'm familiar with him and I did
18 read his deposition testimony.

19 Q. And are you aware that he will be here
20 with us tomorrow, I believe?

21 A. I'm not sure when he is going to be
22 here, but it's my understanding that he was going
23 to be here.

24 Q. And having read Mr. -- or Dr. Gibney's
25 deposition, you understand that he's at MUSC, and

1 he sees the majority of surgical cases at that
2 hospital, correct?

3 A. No.

4 Q. That's not your understanding?

5 A. No. No. I mean, he doesn't --

6 Q. I'm sorry. The surgical mesothelioma
7 cases.

8 A. Oh, yes.

9 Q. I apologize.

10 A. Yeah.

11 Q. Yeah. That's -- what I meant to say
12 was that Dr. Gibney sees the majority of the
13 mesothelioma surgeries, and you agree with that?

14 A. Right. I think he said it was like
15 five or ten a year or something like that.

16 Q. Exactly.

17 And you are aware that Dr. Gibney's
18 testimony was that he does not have an opinion
19 that Mr. Perry's talc use caused his mesothelioma,
20 right? You saw that?

21 A. What I recall was that he said that it
22 was asbestos-related, but he didn't really give --
23 get into any issues as to where Mr. Perry got the
24 asbestos.

25 Q. Exactly. Exactly.

1 And you are also aware, out of all of
2 the medical records for Mr. Perry that you
3 reviewed, there's not a single medical record
4 where one of his treating physicians has given a
5 causation opinion blaming his mesothelioma on
6 cosmetic talc, true?

7 A. As far as I know, there was -- from
8 what I saw, none of them -- they all focused on
9 treatment and diagnosis. None had any causation
10 opinion at all.

11 Q. Exactly. So let's talk a little bit
12 about what the claims are in this lawsuit.

13 MS. BUENO: Could I have the ELMO,
14 please.

15 BY MS. BUENO:

16 Q. Now, I saw -- I showed the jury this
17 slide in opening statement.

18 And you are familiar, based on
19 Mr. Perry's testimony, about the types of cosmetic
20 talc that he used in his lifetime, correct?

21 A. Yes, ma'am.

22 Q. And, in fact, we're going to get
23 there, but you actually wrote some notes to keep
24 track of the facts and the background and when he
25 used which powder when; is that correct?

1 A. The notes I did were the notes from my
2 interview and discussion with him. It wasn't
3 from -- he also had his deposition testimony. I
4 didn't make notes on those.

5 Q. Okay. Perfect. So you -- you made
6 notes based on your discussion with Mr. Perry and
7 your review of the materials?

8 A. The -- the notes also were -- were
9 some of the issues related to his medical care and
10 treatment, yes.

11 Q. And you received that from the medical
12 records?

13 A. Yeah. As well as from my interview
14 with him.

15 Q. Perfect. Do you have those notes with
16 you?

17 A. I do, ma'am.

18 Q. Okay. Perfect.

19 MS. BUENO: I'm going to mark for the
20 record and ask to offer into evidence
21 Dr. Haber's notes, and I've marked those as
22 DX9341.

23 BY MS. BUENO:

24 Q. And you have a copy there, or do I
25 need to bring -- you've got a copy?

1 A. I do.

2 Q. Okay.

3 MR. ADAMS: No objection, Your Honor.

4 THE COURT: All right.

5 (EXHIBIT DX9341, Notes of Dr. Harber,
6 was admitted into evidence.)

7 BY MS. BUENO:

8 Q. All right. So based on those notes --
9 and you've got them for reference, if you need
10 them -- you would agree that the slide I'm showing
11 the jury right now has pictures of the bottles
12 that Mr. Perry used both for his personal use and
13 the bottles that his mother used that -- when he
14 was around her, correct?

15 A. Well, I mean, on some of them, I
16 know -- I recall, like, Avon. I'm not sure I --
17 what particular smell or scent of these. But
18 those do look correct.

19 Q. Okay. And we can talk, obviously,
20 with Mr. Perry and make sure this is right. But
21 this is our best reflection.

22 And you believe, it is your opinion,
23 that six of these talc products that Mr. Perry
24 personally used were significant contributing
25 factors to his mesothelioma.

1 And those are: Johnson's Baby Powder,
2 Clubman Talc, Gold Bond, Ammens or Ammens, Equate,
3 and Old Spice, which I think we have -- did I miss
4 the Old Spice? I'll add it. My fault there. I
5 thought I caught them all.

6 So those are the six that you believe
7 were significant contributing factors to his
8 development of mesothelioma, true?

9 A. Of -- of the talcs that he used,
10 particularly some that he used a lot more than the
11 others. The Old Spice is limited use. But some
12 of the other ones were -- like the Johnson &
13 Johnson's was over a lot more.

14 Q. And we'll talk about that.

15 THE COURT: Ms. Bueno and Mr. Adams,
16 approach.

17 (Bench conference off the record.)

18 BY MS. BUENO:

19 Q. Dr. Haber, Judge Toal, as she always
20 does, knows all of the specifics and sees all the
21 details in something I missed. So I want to make
22 sure the jury understands that I missed something
23 here.

24 I asked our graphics team to help me
25 put together this photo, and I'm sure they went

1 online and got some pictures and clipped them in
2 there.

3 And Justice Toal noted what I didn't,
4 which is that this Equate bottle here -- and I'm
5 going to blow it up so the jury sees what we're
6 talking about.

7 This Equate bottle --

8 A. It says "cornstarch."

9 Q. -- it says "cornstarch."

10 MS. BUENO: And I don't know how your
11 eyes are better than mine, Justice Toal,
12 but good for you.

13 BY MS. BUENO:

14 Q. So the cornstarch there -- and we
15 know, don't we, that the Equate that Mr. Perry
16 used was not the cornstarch variety, but it was
17 the talcum powder variety, correct?

18 A. That's true.

19 Q. All right. So I'm going to mark this
20 off and I'm going to apologize. And during the
21 course of this trial, I'm going to get a new
22 graphic made and I'm going to put the right one on
23 there. Because that was -- I did not mean to do
24 that. Okay?

25 So with that correction --

1 MS. BUENO: And thank you, Your Honor.

2 BY MS. BUENO:

3 Q. With that correction, you would agree
4 with me that the arrows I have placed here are the
5 six talcum powder personal-use varieties that you
6 believe were a significant contributing factor in
7 the development of Mr. Perry's mesothelioma?

8 A. Yes. They -- they added significantly
9 to his -- his dose.

10 THE COURT: All right. Excuse me, all
11 right, Ms. Bueno.

12 MS. BUENO: Did I make another
13 mistake, Your Honor? Oh, goodness
14 gracious.

15 (Bench conference off the record.)

16 THE WITNESS: Oh. I just saw that
17 one, too.

18 BY MS. BUENO:

19 Q. I did, too.

20 MS. BUENO: Do you know what I'm going
21 to do? I'm going to quit while I'm ahead.
22 See? You can't run anything past Judge
23 Toal.

24 Again, this was another mistake. So
25 this one, if you go really close here, as

1 the Justice pointed out, it says
2 "talc-free," which we know it wasn't
3 either. So that is incorrect.

4 So we really need to get this -- this
5 slide taken care of, which we will.

6 BY MS. BUENO:

7 Q. Let me move on. And I think the jury
8 understands that we're talking about the talc
9 bottles. So we need to get those pictures taken
10 and put in the correct bottles, but the testimony
11 is the same.

12 So looking now at the secondhand
13 exposure on the right, it is your opinion that six
14 talc products that Mr. Perry's mother used also
15 contributed to his mesothelioma. And they are:
16 Avon, Cashmere Bouquet, Chanel, Johnson &
17 Johnson's Baby Powder, Estee, and Shower to
18 Shower; is that correct?

19 A. I don't remember about the Estee. But
20 the other ones, it is my recollection.

21 Q. And if your prior testimony included
22 the Estee, you have no reason to doubt that? Do
23 we need to look?

24 A. I do not. I just didn't --

25 Q. Sure.

1 A. -- recall it from --

2 Q. Okay. So what I'm going to print here
3 is that there were six talc brands of -- that
4 Mr. Perry personally used and six that his mother
5 used. And all of those, in your opinion, were
6 significant contributing factors to his
7 mesothelioma, correct?

8 A. Yes. But not equally.

9 Q. Great. And even though you're blaming
10 the 12 different brands for his mesothelioma, you
11 have not calculated a total amount of talc, either
12 by brands or containers, that Mr. Perry used in
13 his lifetime, true?

14 A. I didn't. I mean, he gave some
15 estimates about how much he was using on his body,
16 and it was a lot. But, no. I've not tried to
17 figure out how many grams total.

18 Q. Okay. And you're relying on
19 Mr. Perry's testimony that he used Johnson's Baby
20 Powder and Clubman Talc the most, correct?

21 A. That's my recollection, yes.

22 Q. And you also recall he testified that
23 he purchased a similar amount of Johnson's Baby
24 Powder and Clubman, about ten bottles each year?

25 A. I think that was one estimation, yes,

1 ma'am.

2 Q. And I think you told us earlier, but
3 I'll just reiterate, that Mr. Perry used 4 heaping
4 tablespoons of Johnson's Baby Powder each time he
5 put it on his body, right?

6 A. I didn't say that. I think he
7 testified to, you know, a large handful. He's a
8 big guy, but a large handful. I don't recall
9 saying it was 4 tablespoons, but that would
10 probably be a lot -- you know, and if that was
11 correct, it would be probably even more.

12 Q. And two to four times a day is what
13 your notes indicate, correct?

14 A. Yes. I mean, he did testify to that
15 and tell me about that.

16 Q. And when you talked to Mr. Perry, he
17 said he used Johnson's Baby Powder every day, two
18 to four times a day, heaping tablespoons, all the
19 way up until 2019, correct?

20 A. Well, in some -- some days, like when
21 he was younger and other sports, it may even have
22 been more than that if he was doing skating or
23 swimming.

24 But these were generalities over the
25 course, yes. This was something that he was a

1 frequent and regular use of --

2 Q. So sometimes even more than two to
3 four times a day?

4 A. Potentially.

5 Q. Okay. So you showed the jury this
6 slide. This is exactly as it was shown to you.

7 Do you remember that?

8 A. Yes, ma'am.

9 Q. And this is a record -- and I'm going
10 to make it bigger because my eyes are not as good
11 as the Justice's.

12 Up here at the top, do you see the
13 visit date says July the 7th of 2023?

14 A. July 11th.

15 Q. July 11th. See? My eyes are not as
16 good. July 11th of 2023, correct?

17 A. Yes, ma'am.

18 Q. All right. And if the bottom is the
19 point that you pointed out and you said -- you
20 pointed out to -- here the statement that he did
21 use a lot of talc throughout his life, correct?

22 A. That's what it says there.

23 Q. And that's what you said and that's
24 what's highlighted here, correct?

25 A. Well, that is what's highlighted

1 there. I'm not sure of --

2 Q. Right.

3 A. -- what I said.

4 Q. Well, my point was the next part that
5 says "as a swimmer" is not highlighted, and that
6 wasn't something I don't think you said.

7 The full sentence says: He did use a
8 lot of talc throughout his life as a swimmer.

9 That's what it said, correct?

10 A. That's what that part says. And
11 that's -- again, part -- but he wasn't a swimmer
12 for his entire life. We did talk to the jury
13 about -- about his swimming and his use as a
14 swimmer for sure.

15 Q. And so when Mr. Perry went to his
16 doctor at the time of his diagnosis, the talc use
17 he discussed was throughout his life as a swimmer,
18 correct?

19 A. No. I don't think I can say that. I
20 mean, there were other references to talc use.

21 But what a doctor writes, necessarily,
22 and -- I don't know what Mr. Perry said and how
23 that got transcribed, if that's all he told his
24 doctor, because it doesn't jive -- because he
25 wasn't -- the history I got from him, he did have

1 an area where he was swimming, but he had other
2 uses as well during that --

3 Q. Okay. And I just note here that
4 Dr. Gibney was the one who wrote this. So we'll
5 have a chance to talk with him tomorrow about --
6 about that conversation as well.

7 So let's move on to a different topic
8 and one that I have told the jury is the most
9 important.

10 And were you in the courtroom when I
11 did my opening statement?

12 A. Part of it, yes.

13 Q. Part of it. Did you see this?

14 A. Probably not --

15 Q. This board?

16 A. -- because I was back there.

17 Q. You were back there, okay.

18 So do you agree with the general
19 principle that "air," when we're talking about
20 exposure and we're talking about what is in the
21 air; and when we're talking about "dose," we're
22 talking about what is in the body? Is that fair?

23 A. No, not 100 percent.

24 So toxins -- an important avenue for a
25 toxin is inhalation, but there are clearly other

1 avenues. Through-the-skin absorption; by -- by
2 ingestion; by -- you know, there's topical
3 medications or things that -- you know, poisons,
4 like poison ivy, go through the skin.

5 So there are other routes besides just
6 the air. But certainly for asbestos, that is one
7 of the more important routes.

8 Q. Okay. So we're on the same page.

9 So what my point was is that
10 "exposure" and "dose" in your mind are two
11 different concepts, correct?

12 A. Yes.

13 Q. Okay.

14 A. They're related, but they're not
15 necessarily the same.

16 Q. And you agree with the general
17 statement --

18 MS. BUENO: Can you pull up Slide 12,
19 please?

20 BY MS. BUENO:

21 Q. You agree with the general statement
22 that just because someone is exposed to something,
23 it doesn't mean they get a dose of it?

24 A. Correct.

25 Q. And that's something that you've

1 testified about before, correct?

2 A. Right. They may be -- they're
3 related, but there are protective measures that
4 can be undertaken, for example.

5 Q. And you agree with me that dose
6 matters?

7 A. Sure. There's variations. But
8 these -- we consider these as a general population
9 dose-response diseases.

10 But you can still have diseases at
11 lower dose, but we do consider dose, although
12 usually it's from a medical perspective, not a
13 numerical dose.

14 Q. And the higher the dose of asbestos,
15 the higher the risk of disease, correct?

16 A. In a population. Not necessarily on
17 an individual basis.

18 Q. And while we don't know exactly what
19 the level is, Dr. Haber, you agree that there is
20 some level of asbestos at which you cannot say
21 it's sufficient to cause mesothelioma, right?

22 A. Right. If it's not differentiatable
23 from ambient in comparison to someone who's got
24 the same ambient exposure, the relative risk will
25 be the same of 1.

1 Q. And just to make sure the jury
2 understands, when you're saying the word
3 "ambient," yesterday we said "background." And
4 you use those words pretty much interchangeably,
5 right?

6 A. Yes.

7 Q. Okay.

8 A. The ambient or the background, yes.

9 Q. And you have testified and you agree
10 that a person's exposure to asbestos can be
11 insignificant or what you have called
12 "de minimis," right?

13 A. Yes.

14 Q. And de minimis exposure means it's not
15 reasonably above what would be considered a
16 background level, correct?

17 A. Right. If it's not differentiatable
18 from background, I would not -- you know, it may
19 contribute to a dose, but I would not be able to
20 say to a reasonable certainty that it was a
21 substantial factor.

22 MS. BUENO: And if you'll turn to
23 Slide 13, please.

24 BY MS. BUENO:

25 Q. You also agree with the statement that

1 there is no evidence that a de minimis dose
2 increases one's risk for mesothelioma, like
3 1 fiber or something like that?

4 A. Right. I mean, again, if it's not
5 differentiable from ambient, then the
6 comparison, the relative risk is going to be 1.
7 You compare a group and the same group, there's no
8 difference. So you wouldn't be able to say that
9 it increased the risk.

10 Q. And so while we don't know exactly
11 what the level is, you agree there is some level
12 of exposure to asbestos which you cannot say to a
13 reasonable degree of medical certainty that that
14 exposure is sufficient to cause a person's
15 mesothelioma, right?

16 A. If -- if it's not different than -- if
17 I can't tell it from background, then I won't be
18 able to say that it's a -- a cause.

19 Q. And you would agree with that and you
20 have in the past, correct?

21 A. Yes.

22 Q. All right. I want to talk a little
23 bit about more about your conversation with
24 Mr. Perry that you have in your notes that we've
25 marked as DX9341 for the record and have been

1 admitted into evidence.

2 That was the conversation you had with
3 Mr. Perry in April of this year, correct?

4 A. Yes, ma'am.

5 Q. And one of the things you discussed
6 with Mr. Perry on that phone call was his family
7 history of cancer, correct?

8 A. Yes, ma'am.

9 Q. And it is important to you as a
10 medical doctor, as part of your differential
11 diagnosis when talking to a patient, to understand
12 their family history, correct?

13 A. No, not for the differential
14 diagnosis. But for completeness, I do talk to --
15 when I talk to patients, get a family history.
16 But then we just -- I mean, we already had a
17 diagnosis. But no, it had nothing to do with the
18 differential diagnosis.

19 Q. Okay. So I misstated.

20 But you would agree a family history
21 is important, which is why you put in your notes
22 on Page 4 the family history?

23 A. Right. There are some conditions that
24 may run in a family. There may be some exposures
25 that run in a family. So I do discuss those.

1 But, you know -- and some family
2 history of cancer. I mean, one in four people are
3 going to have cancer in their lifetime. So
4 cancer, in general, is very, very common.

5 But whether that has anything to do
6 importantly in a person, it may not. But I do
7 usually try to get the family history.

8 Q. So let's talk about what you have in
9 your notes.

10 MS. BUENO: If we'll go to Slide 15.

11 BY MS. BUENO:

12 Q. This was demonstrated in your notes
13 which are in evidence about Mr. Perry's family
14 history.

15 Mr. Perry, there at the bottom of the
16 slide, we note that his mother had lung cancer and
17 uterine cancer. His father had prostate cancer.
18 An aunt on his mother's side had breast cancer.
19 His grandfather had cancer, in quotes, which we'll
20 come back to. His grandfather on his mother's
21 side had pancreatic cancer, and his grandmother
22 had colon cancer.

23 And this slide accurately reflects
24 your notes from your conversation with Mr. Perry,
25 correct?

1 A. Well, I mean, I also discussed the
2 ages at which they got these cancers and -- and
3 there's -- and some other issues. But those are
4 the generalities, sure.

5 Q. And you understand from the review of
6 the records that Mr. Perry has an uncle who was
7 also recently diagnosed with cancer?

8 A. I think I heard that, yes.

9 Q. And in your notes, you state:
10 Mr. Perry denied any family history of
11 mesothelioma, Ophthalmic cancers --

12 A. Ophthalmic.

13 Q. Ophthalmic. Thank you.

14 -- ophthalmic cancers, kidney cancers
15 or melanoma, correct?

16 A. That's what I said. And that's the
17 BAP1 syndrome, which we know he didn't have. But
18 those are the four cancers that we especially see
19 in that group.

20 Cancers like prostate cancer, almost
21 100 percent of men eventually will get prostate
22 cancer if you live long enough.

23 Q. And if we look at Mr. Perry's
24 grandfather on the left, which would be on his
25 father's side, you're aware that there are a lot

1 of records that indicate he had mesothelioma,
2 correct?

3 A. I'm aware that -- that there were some
4 representations of that, but after talking with --
5 with Mr. Perry, that was the doctor's
6 misunderstanding of -- of what he said.

7 Q. And, in fact, you're aware from the
8 review of Mr. Perry's records that there are 31
9 separate references to his grandfather having
10 mesothelioma, right?

11 A. I don't know. Again, there's -- a lot
12 of doctors will do cut-and-paste and put it in
13 there, but then the oncologist clearly also wrote
14 multiple times there is no family history of
15 mesothelioma. But I agree that -- that the
16 information from the family doctor was -- was
17 incorrect there.

18 MS. BUENO: Okay. I'm going to pass
19 up what I've marked as CX2, which is a
20 compilation of those 31 medical records.
21 I'm not seeking to offer this now.

22 BY MS. BUENO:

23 Q. But I'm going to show you a couple
24 things. I -- you said "cut-and-paste," so I feel
25 like I need to address it.

1 What I've handed you and what I have
2 marked on the green tabs to ease our way are the
3 31 medical records that talk about Mr. Perry's
4 history of his grandfather having mesothelioma.
5 And I'll draw your attention to the very first
6 one, which is dated here, you'll see, as
7 December 27th of 2011, correct?

8 A. Yes, ma'am.

9 Q. And I've highlighted in the middle the
10 part that I want to look at, which is the family
11 history. And this is a record from 12 years
12 before Mr. Perry's diagnosis of mesothelioma. And
13 you agree that there is a clear reference to his
14 paternal grandfather having mesothelioma, correct?

15 Do you see that, where I'm pointing,
16 Dr. Haber, on the left here?

17 A. Yes.

18 Q. Okay. And if you'll turn to the
19 second tab with me, I'm going to jump ahead a
20 little bit.

21 Now I'm looking at October the 13th of
22 2014, and there is a difference here, isn't there?
23 It looks like there was additional discussion with
24 Dr. -- with Mr. Perry and some additional family
25 history. But once again, it indicates the

1 paternal grandfather had mesothelioma, correct?

2 A. Right. I mean, this is the -- the
3 same doctor, the same appearance of the note. So
4 this is -- this looks very duplicative.

5 Q. It's duplicative, isn't it, but it's
6 not the same, because the first note did not have
7 as much information, and the second note had more.
8 So this is not a cut-and-paste, correct?

9 A. Right. Although there's -- it also
10 says the mother had ovarian cancer and breast
11 cancer. So there's some additional information
12 that I don't think was correct either.

13 Q. And then we have another record --
14 this is the last one I'll show -- from 2015,
15 April the 1st. And once again, it's a different
16 family history, this time by a different doctor.
17 And this family history, once again, indicates the
18 paternal grandfather had mesothelioma, correct?

19 A. Right. I mean, these are -- if you
20 look at the other -- the whole formatting, this is
21 all part of the same clinic note. But, yes, I do
22 see that.

23 Q. Okay. And so no reason to doubt 31
24 times in his medical record there's a discussion
25 of his paternal grandfather having mesothelioma?

1 A. Oh, I -- I -- again, I don't think
2 that it's in doubt that -- that it's there. It's
3 wrong. I talked with him about it, but -- and
4 there's still no relationship to him. But, yes,
5 those are in the record.

6 Q. And in your notes, which we've marked
7 for the record as DX9341, you -- you finished that
8 section with a statement that says that he denied
9 any family -- any family history of those
10 conditions, including mesothelioma, right?

11 A. Correct.

12 Q. Although, you just put cancer --

13 MS. BUENO: Can we go back to
14 Slide 15, please?

15 BY MS. BUENO:

16 Q. You just put cancer in the records for
17 his great-grandfather, correct?

18 A. His grandfather, not his --

19 Q. I'm sorry. His grandfather, correct?

20 A. Right. It was -- in further
21 discussions with Mr. Perry, it sounded like a lung
22 cancer. His grandfather had been a smoker and --
23 what sounds like a lung cancer. But he told me
24 that it was not mesothelioma, that it was in the
25 lung.

1 Q. But he doesn't know exactly what type
2 of cancer, correct?

3 A. No. He said it was in the lung. It
4 wasn't -- I don't know what type of cell type.

5 Q. Okay.

6 A. But, again, he also told me that his
7 grandfather had -- was only -- was -- already left
8 the job and didn't have any asbestos exposure that
9 he knows of. And he was already -- he was -- he
10 was deceased within four years of Michael being
11 born, and he lived in a different state.

12 So there's really no relationship. He
13 was never exposed to his grandfather from an
14 occupational perspective.

15 Q. Let's talk about brakes. You
16 mentioned that Mr. Perry had exposure to brake
17 dust when he was a teenager, correct?

18 A. Right. Between about '85 and '88, he
19 did a number -- a dozen or two dozen attempted
20 brake jobs, if you will.

21 Q. And you have read and reviewed the
22 affidavit that Mr. Perry wrote for this trial or
23 for this case talking about that, correct?

24 A. I don't particularly recall, but --

25 Q. I'm handing you what has been marked

1 DX12007.

2 MS. BUENO: And I'll ask to offer this
3 and admit it into the record. This is the
4 work history affidavit of -- of Mr. Perry.

5 (EXHIBIT DX12007, Work History
6 Affidavit of Michael Lawrence Perry, was
7 admitted into evidence.)

8 MS. BUENO: Any objection?

9 MR. ADAMS: No objection, Your Honor.

10 BY MS. BUENO:

11 Q. And just to -- to briefly review, this
12 is a affidavit that says "Work History Affidavit,"
13 and it was signed by Mr. Perry, correct?

14 A. Yes, and I -- I have -- I recognize
15 this. I have seen this.

16 Q. You have seen it. Okay. Great.

17 And so you would agree with me that
18 Mr. Perry signed indicating that from 1984 to 1987
19 was when he was working with his father on the
20 brake parts, correct?

21 A. Right, in that -- in that time frame.
22 I think I have '85 to '88 when I talked with him,
23 but in that middle to late '80s, yes.

24 Q. And this will be in evidence so the
25 jury can read it all, but I just want to highlight

1 a couple parts.

2 In Paragraph 6, it says: The products
3 I recall removing and installing on the vehicles
4 that I contend contained asbestos were as follows:
5 Bendix brake drum linings, NAPA drum brake
6 linings, Rayloc drum brake linings, NAPA asbestos
7 auto gasket kit preformed gaskets.

8 Did I read that correctly?

9 A. Yes.

10 Q. And it indicates here that the removal
11 and use of the described products caused the
12 asbestos fibers to be released when the products
13 were removed from their packaging, sanded, filed,
14 manipulated. Correct?

15 A. Well, I mean, that's what it says.
16 It's not -- that's not -- I mean, the use
17 doesn't -- the use of the product is it's a brake.
18 So you're not filing or sanding as -- as a use;
19 but the -- the sanding and filing and
20 manipulations, sure.

21 Q. That's what this says. That's --
22 that's all I'm asking you.

23 A. It says the use -- but it's not the
24 use.

25 Q. Okay.

1 A. It would be the -- it would be the
2 other factors as you are manipulating a new brake
3 or removing, potentially, an old brake.

4 Q. And it talks about blown out with
5 compressed air, and you know Mr. Perry testified
6 that's something he did?

7 A. Right. Now, that's not the new brake.
8 That would be the old brake. And most of that is
9 converted to another product, but there is still
10 some asbestos left in the -- in the dust in the
11 drum.

12 Q. And, in fact, there was a discussion
13 about the amount, but you know that Mr. Perry
14 testified that he did more than six dozen brake
15 jobs, correct?

16 A. I -- I don't know -- I don't recall
17 that number. I know that he was not good at it,
18 which is why it was only a certain number of
19 vehicles, which don't usually need to be having
20 brake jobs.

21 But -- so it was attempted brake jobs,
22 if you -- I don't know how many you actually count
23 as being an attempt. But whatever this he
24 testified to, I'm sure he'll be able to testify to
25 it now.

1 Q. And -- and we'll talk about this more,
2 and we'll talk more about the details of this.

3 But here's what I want to ask: It is
4 your opinion that Mr. Perry was exposed to
5 asbestos from his work on the brakes and that that
6 contributed to his mesothelioma, correct?

7 A. Yes. I believe so, yes.

8 Q. And this is not the first time you've
9 given that opinion, because you have testified in
10 a lot of lawsuits involving asbestos from car
11 brakes that you said caused someone's
12 mesothelioma, correct?

13 A. I don't know about a lot, but I have
14 certainly -- there have been some that I have
15 given testimony about regarding friction brake
16 products that used asbestos and -- and people
17 doing brake jobs.

18 Q. And you know that in 2020 the EPA came
19 out and said that doing the equivalent of 20 brake
20 jobs was considered to be an unreasonable risk to
21 health, correct?

22 A. If those brakes were
23 asbestos-containing brakes. Now, in the late '80s
24 and early '90s, they stopped containing asbestos.
25 But -- but, yes, if it was asbestos-containing

1 brakes, yes, I agree that that's what the EPA
2 said.

3 Q. And we know that Mr. Perry did use
4 asbestos-containing brakes?

5 A. At least as far as -- as the -- as
6 long as -- I don't know when the transition was in
7 some of the companies in the late '80s, but he
8 certainly did use some, yes.

9 Q. And so the jury has heard some numbers
10 about the amount of asbestos that is claimed in
11 the bottle, and we're going to talk about that
12 more with Dr. Longo tomorrow. But when we're
13 talking about brakes, at one time disc brakes
14 contained between 35 and 60 percent asbestos,
15 correct?

16 A. Right. But when you are doing
17 something with a brake to put it in, you just --
18 some people don't really manipulate much, but a
19 light filing -- you don't want to break it all
20 apart, because then you ruined your brake, and
21 you're not going to be able to use it for your
22 car.

23 But it's a light sanding on that
24 material that can release some. But you're not --
25 you're -- not, like, you're taking this and

1 destroying 30 to 60 percent asbestos.

2 Q. My question is easy, and we've got a
3 lot to get through. But you would agree that at
4 one time drum and disc brakes contained between 35
5 and 60 percent asbestos, true?

6 A. Yes.

7 Q. Okay. And you told us earlier that
8 Mr. Perry used compressed air on brakes, and you
9 know that in 1986 the EPA found exposures of
10 16 fibers per cc for using compressed air on drum
11 brakes, right?

12 A. Depending upon -- it -- that may be
13 true. I guess it depends on what type of braking
14 it was. But, yes, you can have significant
15 exposures from -- not the brake. It's actually
16 the brake drum. But you're -- you're cleaning out
17 the old, what was there in the past.

18 Q. What I said was true.

19 A. No. You said the brake. And you're
20 not blowing on the brake, ma'am. You're blowing
21 into the -- after you remove the brake, you blow
22 the compressed air into the drum area.

23 Q. I'm handing you what I've marked as
24 CX13. I'm not offering this into evidence, but I
25 wanted to use it to show you.

1 You're familiar with what I just
2 handed you because it's a report you issued on
3 August 28th of 2023 in a different lawsuit; is
4 that correct?

5 A. It is.

6 Q. Will you turn with me to 13.21 and go
7 with me to the second paragraph?

8 A. Yes.

9 Q. And this is something you wrote that
10 says: In 18 -- in 1986, the EPA found exposures
11 of 16 fibers per cc for using compressed air on
12 drum brake -- brake drums, correct?

13 A. Right. That's what I just told the
14 jury. You said it was the brakes. And I said,
15 "No. It was the brake drums." And that's exactly
16 what I wrote there, too.

17 Q. Now, if Mr. Perry had never used
18 cosmetic talc at all -- all right. Let's consider
19 a scenario where Mr. Perry never used cosmetic
20 talc. His only asbestos exposure was from doing
21 brake jobs. In that circumstance, you would give
22 the opinion that the brake jobs would be a
23 significant factor in his mesothelioma, correct?

24 A. If Mr. Perry got mesothelioma from
25 doing -- and did the brake jobs, then, yes, then

1 that would be the cause.

2 But you can't do the reverse and
3 say -- change exposure, I mean, what would have
4 happened if things -- if he wasn't exposed. But I
5 can say that if he did get mesothelioma, then I
6 would have attributed the mesothelioma to that
7 exposure.

8 Q. You have a -- I'm going to switch
9 gears.

10 I'm going to talk a little bit about
11 this idea that in 2017 the sky parted and all this
12 information came down, which the jury has heard
13 yesterday and today.

14 You have a number of published
15 scientific articles on your list from back in the
16 1960s and the 1970s raising the possibility that
17 cosmetic talc could be contaminated with asbestos,
18 right?

19 A. Right. There were -- there were
20 certainly some publications. They didn't identify
21 by names. You didn't know what -- what the
22 products were. But there were certainly some
23 publications that did give some evidence of
24 asbestos in some cosmetic products.

25 Q. And since you brought it up, this is a

1 perfect time to ask you about some of those
2 articles in the '70s that maybe didn't mention a
3 specific manufacturer but are relevant to our
4 discussion.

5 I'm handing you what I've marked as
6 DX8096, which is an article by a doctor named
7 Dr. Langer, who you talked about earlier.

8 You're familiar with this article.
9 You've read and relied on it, correct?

10 A. Right. This is Rohl/Langer/Selikoff,
11 yes, ma'am.

12 Q. Turn with me, please, to Page 12 of
13 30.

14 And to orient the jury, this is the
15 same Dr. Langer that they saw in that video clip,
16 right?

17 A. Yes, ma'am.

18 Q. And he wrote an article in 1976,
19 didn't he?

20 A. Right. I mean, this wasn't just
21 Dr. Langer. But, yes, he was one of the
22 co-authors.

23 Q. And when he wrote this -- this article
24 in 1976, if you look on Page 21, you see a chart,
25 don't you?

1 A. Yes.

2 Q. And the chart -- I want to make sure I
3 have the right one here.

4 Table 4 is what I'm looking at. Is
5 that the same one you're looking at?

6 A. Yes, ma'am.

7 Q. And Table 4 talks about some consumer
8 talcum powders that Dr. Langer and his team looked
9 at. And they are not identified by the name of
10 the company. They're just identified by number,
11 correct?

12 A. Yes.

13 Q. And when you just told the jury that
14 sometimes in the '70s there were just papers
15 talking about whether or not there was asbestos in
16 cosmetic talc but they didn't identify it, that's
17 what you're talking about, right?

18 A. Well, I mean, it's not just in the
19 '70s, but that -- the example you were asking
20 about was the '60s and '70s. And yes, the papers
21 would sit there and just -- they would have, you
22 know, either a code with a number or just a
23 number.

24 Q. And here they were looking
25 specifically for tremolite, anthophyllite or

1 chrysotile asbestos, correct?

2 A. Yes.

3 Q. And I have highlighted for the jury
4 Number 4, Number 9, Number 18 and Number 20. And
5 none of those found asbestos in those samples,
6 correct?

7 A. Right. Those -- those look like that
8 those would have been the nondetect in those.

9 Q. I'm handing you what I've marked as
10 DX8240.

11 MS. BUENO: And this, I'm asking to
12 offer into evidence.

13 BY MS. BUENO:

14 Q. And what I've handed you --

15 MS. BUENO: Is there any objection to
16 this being offered into evidence?

17 MR. ADAMS: No objection, Your Honor.

18 MS. BUENO: So 8240, Your Honor.

19 THE COURT: Admitted.

20 (EXHIBIT DX8240, Johnson & Johnson
21 document dated 11/21/1975, Subject: Talcs
22 Analyzed by Langer, was admitted into
23 evidence.)

24 BY MS. BUENO:

25 Q. So this is the key, the code, the ones

1 that tells what goes with that article; is that
2 correct?

3 A. For the -- for the American talcs, not
4 the British.

5 Q. And the American talcs I just read off
6 are 4, 9, 18 and 20. And those are Johnson &
7 Johnson products, correct?

8 A. On the American talcs, yes.

9 Q. And so Dr. Langer, whose video you
10 saw, he wrote this article in 1976 and indicated
11 that for the Johnson & Johnson samples that he
12 looked at, there was no asbestos in that talc,
13 correct? That's what this article says.

14 That's what this article says,
15 Dr. Haber, right?

16 A. There was nondetects of those American
17 samples.

18 Q. Now, that's in the '70s. But going
19 into the '80s, you know those studies continued to
20 be published about cosmetic talc, correct?

21 A. There were some, yes.

22 Q. And the record demonstrates and you're
23 aware that even the FDA tested bottles of cosmetic
24 talc off the shelves in the '70s, correct?

25 A. Yes.

1 Q. And you didn't show the jury that
2 data, but you're aware that Johnson & Johnson's
3 cosmetic talc was tested by the FDA in 1976 and no
4 asbestos was detected, correct?

5 A. Based on the methodology used, yes.

6 Q. And you're also aware that in 1994 the
7 FDA co-sponsored a two-day workshop on talc that
8 was devoted entirely to the safety of cosmetic
9 talc, correct?

10 A. Well, it was a workshop primarily
11 related to ovarian cancer and talc. And the first
12 day was eight presentations, I think only one or
13 two having to do with safety.

14 But no. There were other issues that
15 were being discussed, so I don't think the whole
16 thing was devoted to -- to safety. But I think
17 there was some discussions in that workshop.

18 Q. And you understand it was a two-day
19 event. And as you and I have discussed before,
20 the first day was inhalation disease and the
21 second day was ovarian cancer, correct?

22 A. Well, the first day didn't -- there
23 was no discussion at all on any day on
24 mesothelioma. And no, the whole thing wasn't --
25 the presentations weren't all on inhalation.

1 But certainly the second day's focus
2 was on the ovarian cancer because the NTP had come
3 out with some of the studies indicating that
4 ovarian cancer risk.

5 Q. And so you're familiar with the
6 published article that came out of that event that
7 was written by an author, Carr, C-A-R-R. You've
8 seen this before?

9 A. Yes.

10 Q. I'm handing you what I've marked as
11 DX7315. And if you'll turn with me, please, to
12 Page 3.

13 And just so the jury is oriented, this
14 is an article that came out of that 1994
15 symposium, and it talks about some of the findings
16 that were there, correct?

17 A. Well, there was actually minutes of
18 the -- it wasn't a symposium. It was a workshop.
19 And it was actual minutes that were published as
20 well.

21 But this does discuss a number of the
22 people there that are just there -- most of the
23 people were from the industry that are represented
24 here. Some lawyers, defense lawyer firms as well.

25 Q. And also people, like, from the FDA?

1 A. There were some people from the FDA,
2 yes, ma'am.

3 Q. Okay. And so if we turn to the
4 summary of the meeting, it says: The principal
5 focus of the meeting was on the latest toxicologic
6 and epidemiologic studies as they reflect on the
7 safe uses of talc in consumer products.

8 That's what the purpose of the meeting
9 was, correct?

10 A. Well, that's what it says there. But
11 the nucleus was the NTP studies on ovarian cancer.
12 That's what was discussed in the actual minutes.

13 Q. And what this published article says
14 is that in their joint evaluation, talc has proven
15 to be among the safest of all consumer products.
16 Is that correct? That's what it reads?

17 A. That's what it reads.

18 Q. And you know that the FDA continued to
19 monitor cosmetic talc over time.

20 And I showed the jury yesterday some
21 studies from 2009 and 2010 about the FDA studying
22 cosmetic talc. And you're familiar with those,
23 correct?

24 A. Yes.

25 (EXHIBIT DX7315, Document titled Talc:

1 Consumer Uses and Health Perspectives, was
2 marked for identification.)

3 BY MS. BUENO:

4 Q. And I'm handing you now what I've
5 marked as DX19.

6 MS. BUENO: That I'll seek to offer
7 into evidence, which is the FDA testing
8 from 2009 and 2010.

9 Any objection?

10 MR. ADAMS: No objection.

11 MS. BUENO: DX19 in evidence,
12 Your Honor.

13 THE COURT: Yeah, I thought these had
14 all been preadmitted, so --

15 MS. BUENO: Ours have not. Just the
16 plaintiffs', Your Honor. So that's why I'm
17 going through the exercise.

18 THE COURT: Okay.

19 (EXHIBIT DX19, Affidavit of Katherine
20 Uhl, was admitted into evidence.)

21 BY MS. BUENO:

22 Q. So you're familiar with the fact that
23 this testing, that the jury will have back in
24 evidence with you, looked at some off-the-shelf
25 cosmetic talc that was -- came out of a place in

1 Washington, D.C., right?

2 A. Yes.

3 MS. BUENO: And can we go ahead and
4 pull up Slide 18, please.

5 BY MS. BUENO:

6 Q. This is what I showed the jury.
7 You're familiar with the conclusions in the
8 studies showing that Johnson's Baby Powder had no
9 asbestos detected, correct?

10 A. Right. I don't particularly recall
11 what the methodology was. But, yes -- oh, there
12 we go. Yes, it was nondetected.

13 Q. And, in fact, I'll show the jury where
14 I got this so they see the actual document.

15 MS. BUENO: Can I go back to the ELMO?
16 Thank you so much.

17 BY MS. BUENO:

18 Q. This is the document from the FDA.
19 You see all of the different types of cosmetic
20 talc they tested. And I've highlighted here the
21 Johnson's Baby Powder, and it indicates no
22 asbestos was detected. And it's by PLM and TEM,
23 correct?

24 A. Yes.

25 Q. Two different types of microscopes?

1 A. Yes.

2 Q. Okay. All right. So since 2017,
3 there are -- have been hundreds of millions -- or
4 hundreds of thousands or millions of documents
5 available online that have been produced in this
6 litigation, correct?

7 A. Well, they're not -- if -- if you're
8 referring to the -- some of the -- the documents
9 from Johnson & Johnson that were put on the web,
10 yes, they are available but not really searchable
11 and not really a great format. But, yes, they
12 are -- they are there.

13 Q. You are -- you are aware of that, that
14 they are on a website for anyone to see?

15 A. Yeah. I -- I -- I've -- I've looked
16 at it. It is very, very hard to -- to find
17 anything because it's not searchable, but I did
18 see it.

19 Q. And since 2017, when all of this
20 information was available, the FDA has never come
21 out and said, "You know what? We need to put a
22 warning label on cosmetic talc for asbestos,"
23 true?

24 A. That is true.

25 Q. You talked to the jury this morning a

1 lot about asbestos and testing, and you showed
2 this chart where you said there was asbestos
3 findings in talc. And I want to talk to you a
4 little bit about why you were able to reach those
5 opinions.

6 So, first of all, you are a
7 pulmonologist, correct?

8 A. Internist and pulmonologist, yes,
9 ma'am.

10 Q. You are not a geologist, true?

11 A. Right. I'm actually starting to take
12 some geology courses because you guys keep asking
13 me all kinds of questions about geology. But I am
14 still not a geologist.

15 Q. And you're not a mineralogist?

16 A. I am not.

17 Q. And you can't describe how talc is
18 formed in a particular mine, can you?

19 A. I cannot.

20 Q. You are not a university professor or
21 a teacher, correct?

22 A. That is true.

23 Q. You told us that you had four
24 publications in your life, but none of those had
25 anything to do with cosmetic talc, correct?

1 A. As far as I know.

2 Q. And you are not an industrial
3 hygienist, correct?

4 A. Correct.

5 Q. You've never done any air sampling
6 related to potential asbestos?

7 A. Right. I don't do that.

8 Q. You've never conducted or participated
9 in any analysis to see if asbestos fibers were
10 released from any product?

11 A. Well, I've analyzed data, but as far
12 as doing my own bench study, no.

13 Q. You don't consider yourself an expert
14 in testing procedures for asbestos, correct?

15 A. I'm sorry. I couldn't hear what you
16 asked.

17 Q. You don't consider yourself an expert
18 in testing procedures for asbestos?

19 A. No. I'm aware of the methods and the
20 strengths and weaknesses of various microscopes
21 and methods. But, no, I don't -- I don't tell the
22 people how to do it. I don't do those testing
23 myself.

24 Q. You've never personally tested
25 Johnson's talcum powder?

1 A. I have not.

2 Q. You've never personally tested talc
3 for the presence or absence of asbestos, any
4 brand, correct?

5 A. That is correct.

6 Q. You've never examined talc under a
7 microscope ever?

8 A. Also correct.

9 Q. You've never used a TEM, the
10 transition -- transmission electron microscope,
11 correct?

12 A. Right. I think -- I mean, we had some
13 in medical school, but I never ran it. But we
14 obviously had to have an understanding of TEM.

15 Q. And, in fact, you've been asked in the
16 past about what type of testing you should use in
17 various circumstances, and your answer was, "I'm
18 not that guy." Do you remember that?

19 A. Right. I'm not going to be -- I -- I
20 am aware of -- just like a CAT scan or a chest
21 X-ray or any medical test, I'm aware of the
22 strengths and weaknesses of the tests, but I won't
23 tell the person measuring it what method that
24 they're supposed to use. But I'm aware of which
25 ones are the most reliable and which ones are the

1 least reliable.

2 Q. I want to talk quite a bit about some
3 of that testing that you showed the jury. But
4 before we do that, I have to clear up a couple
5 things you showed, just to make sure that there's
6 no confusion.

7 You were asked some questions about
8 whether or not there was epidemiology about talcum
9 powder use, and you showed a series of slides.
10 This was the first one.

11 MS. BUENO: Could I have the ELMO,
12 please? Thank you.

13 BY MS. BUENO:

14 Q. Now, this slide that you showed the
15 jury when you were asked about talc epidemiology,
16 this is about asbestos, correct?

17 A. Right. This is -- the issue is, is
18 that when you're dealing with asbestos, you don't
19 need to design a study for every single exposure
20 scenario.

21 Q. I understand, but I just want to make
22 sure there's no miscommunication.

23 When you showed the jury this slide
24 that has a list of studies, these were asbestos
25 studies, not cosmetic talc studies, correct?

1 A. These were studies of mesothelioma
2 cases, looking at exposures to asbestos from
3 wherever the asbestos was found.

4 Q. So when you go and testify to a jury
5 about a case involving brake exposure, you're just
6 as likely to show these series of slides as you
7 would be in this case? We're just talking about
8 asbestos generally. We're not talking about
9 anything related to cosmetic talc, correct?

10 A. We're talking about asbestos wherever
11 it's found. Wherever it's found, it's deadly.

12 Q. The next thing I want to ask you about
13 are these slides that you showed the jury, and I
14 want to make sure there's no confusion.

15 This was a study called Steffen,
16 S-T-E-F-F-E-N, that you showed the jury, and you
17 showed them this slide, correct?

18 A. Yes.

19 Q. And you talked to them about findings
20 in the lung of tremolite and anthophyllite in
21 talc, correct?

22 A. Well, it was the talc, tremolite
23 and/or anthophyllite in -- in those cases, yes.

24 Q. Yeah. You talked about those findings
25 in the lung, and you made it seem as if there was

1 some testing of lungs of patients. But that's not
2 what happened in this study at all, was it,
3 Dr. Haber?

4 A. Well, these are -- these are -- you
5 can have -- in -- in that particular study, it was
6 from, I think, the -- the tissues and -- at issue.
7 This was an ovarian cancer, and they're looking at
8 transvaginal talc, not going through the
9 inhalation. But there are plenty of other studies
10 looking at the same talc, tremolite and
11 anthophyllite published going back into the '80s,
12 that -- that that was consistent with talc
13 exposure. And then there have been mesothelioma
14 cases where they did look in the lungs and did
15 find the same fingerprint.

16 Q. What you showed the jury and
17 represented was a lung study was actually studied
18 from ovarian tissue, correct?

19 A. I -- I believe I said that it was the
20 tissues, but the -- we gave some other examples of
21 publications that had -- from the lung tissues.
22 But it is either in the -- it's in the tissues,
23 those three -- two noncommercial asbestos and the
24 talc.

25 Q. I hear you. But if there was any

1 suggestion that this was a lung study, that's just
2 not true, correct?

3 A. This was an ovarian paper.

4 Q. And that same paper -- this is the
5 same one, a different slide you showed for a
6 different reason. This is a study that was
7 written by Dr. William Longo, who the jury is
8 going to meet tomorrow, correct?

9 A. Yes.

10 Q. And he's the guy that's going to come
11 in and talk about how much asbestos he supposedly
12 found in bottles of Johnson's Baby Powder,
13 correct?

14 A. Yes, and -- and Mr. Perry.

15 Q. And -- and you -- and Mr. Perry?

16 A. Yes.

17 Q. He -- excuse me? Tell me what you
18 mean by that.

19 A. It is my understanding that -- that he
20 tested some of the -- I mean, I heard you
21 yesterday, but that he found -- that he examined
22 the lung --

23 Q. Okay. So you're talking about this
24 tissue digestion that he's going to talk about
25 that we haven't -- we don't have any information

1 on, correct?

2 A. Well, I --

3 Q. Did he share it with you?

4 A. I -- I've seen a copy of it.

5 Q. Have you talked to Dr. Longo about it?

6 A. I have not.

7 Q. We haven't either. So we'll do that.

8 A. Okay.

9 Q. But Dr. Longo did talk to us under
10 oath a few weeks ago. Were you aware of that?

11 A. I -- I --

12 Q. You didn't read that testimony?

13 A. I -- no, I have not.

14 Q. Okay. So you didn't hear the
15 testimony when he said he wasn't going to be able
16 to come to this jury and talk about Mr. Perry's
17 lung tissue because he wouldn't have time to get
18 it done. You're not aware of that?

19 A. I'm not. But, obviously, he managed
20 to find time. Maybe something changed in his
21 schedule.

22 Q. Surprise, surprise.

23 Now, what about Dr. Longo and this
24 Steffen study? Did you talk to him about that?

25 A. No. I've not -- I've never talked

1 with Mr. -- with Dr. Longo.

2 Q. Did you know that Dr. Longo told us
3 just a couple of weeks ago that he is not going to
4 rely on this study to come talk to this jury? Did
5 you know that?

6 A. I don't know what he's going to be
7 testifying about and what he needs to rely on.

8 Q. So if Dr. Longo is not going to come
9 in and rely on this study that he wrote, there's
10 no reason for you to be relying on these
11 conclusions, is there?

12 A. I guess it just depends on what issue.

13 But this is -- this had to do with the
14 exposures and the exposure scenarios. But, again,
15 of other exposures that I've seen, this would be
16 in line with that.

17 Q. You're not a guy that does exposure
18 studies. You already told us that, right?

19 A. Right. I don't find them particularly
20 helpful.

21 Q. And this study, by the way, the one
22 that was written by Dr. Longo, it was also written
23 by a lot of other people who are paid by plaintiff
24 lawyers to come in and talk to juries; is that
25 right?

1 THE COURT: Ms. Bueno, approach,
2 please.

3 (Bench conference off the record.)

4 BY MS. BUENO:

5 Q. I want to move on to the Decades of
6 Evidence chart. This is the chart that you told
7 the jury that has all of this information about
8 asbestos and talcum powder. And this is, just to
9 be clear, a chart that was put together by
10 attorneys, correct?

11 A. Well, it -- along with my assistance
12 and approval and going through documents and
13 checking this for accuracy.

14 Q. And the title of this that was offered
15 into evidence is "Decades of Evidence of Asbestos
16 Content in Johnson & Johnson Products."

17 Do you agree with that title,
18 Dr. Haber?

19 A. Well, we're going back into the 1940s
20 assuming evidence of asbestos and continues
21 through 2021.

22 Q. No. I'm just trying to --

23 A. So there's a lot of evidence --

24 Q. Do you agree with the title that this
25 is an accurate reflection of what is in this

1 chart?

2 A. I'm not following what -- I mean, this
3 does span decades. This is the testing showing
4 evidence of asbestos in either Johnson & Johnson's
5 product or the talc that Johnson & Johnson used
6 for its product.

7 Q. And you know that Johnson & Johnson
8 disputes the accuracy of this chart? You
9 understand that?

10 A. Right. And I've seen Johnson &
11 Johnson's sworn responses to each entry, and I've
12 looked at every one of them.

13 MS. BUENO: Can we pull up Slide 20?

14 BY MS. BUENO:

15 Q. This is a slide you've seen before,
16 but the jury hasn't. And in fact, this is the
17 first time they're hearing this concept. So I
18 want to make sure that we understand.

19 MS. BUENO: That's not it. 20. There
20 we go. There we go. That was it. Sorry.

21 I saw 19 in the lower corner, but
22 you -- you're -- you got it.

23 BY MS. BUENO:

24 Q. All right. So this is a slide that
25 shows different minerals. And on the bottom are

1 the six asbestos minerals that you talked to the
2 jury about, correct?

3 A. Yes.

4 Q. And on the top are versions of those
5 minerals that are not asbestos, true?

6 A. Yes. Because they're not fibers.

7 Q. And the amphiboles -- there's a big
8 box around the five on the left, and those are
9 called "amphiboles." And that is the family of
10 amphiboles that you told the jury about, correct?

11 A. The family of amphiboles that make up
12 asbestos, yes.

13 Q. And you agree that not all amphiboles
14 are asbestos?

15 A. Right. Now, in --

16 Q. That's -- that's fine. That's --
17 that's the answer.

18 THE COURT: Wait a minute. Wait a
19 minute. He gets to explain his answer.

20 Go ahead, Dr. Haber.

21 THE WITNESS: Thank you, Your Honor.

22 It needs to be in fibrous form.

23 However, when the -- when you have one, you
24 often have the other.

25 So if you have the asbestos fibers of

1 tremolite, you often, when you look at it,
2 see the nonfibrous tremolite in the same --
3 because it's all occurring in the earth.

4 BY MS. BUENO:

5 Q. But you don't look at it, right?
6 You're not the guy that looks under the
7 microscope?

8 A. That is correct.

9 Q. All right. So you --

10 A. But I look at the testing that people
11 have done that do those sorts of tests.

12 Q. Understood. But you agree that there
13 can be tremolite that is not tremolite asbestos,
14 true?

15 A. That is true.

16 Q. And there can be anthophyllite that is
17 not anthophyllite asbestos, true?

18 A. Correct.

19 Q. And that would be the same for
20 everything on here. You can have a rock, a
21 mineral in the earth, that's one of those top
22 minerals that is not asbestos, true?

23 A. Well, some of them, we -- for ease, we
24 have different names. So, like, crocidolite is
25 always asbestos. Chrysotile is always asbestos.

1 But we don't have a nonasbestos chrysotile. It's
2 called something else.

3 Q. So the amphibole family, just saying
4 something is an amphibole, it can either be
5 nonasbestos or asbestos, right?

6 A. Right. Or, in nature, usually both.

7 Q. And on your Decades of Evidence Of
8 Asbestos Content chart, there are some entries
9 where you just say "amphiboles," correct?

10 A. Yes.

11 Q. There's one there. It looks like
12 Number 13 is one where you just say "amphiboles."
13 It looks like Number 14 is one, "amphiboles."
14 Number 16 is one that says "amphiboles."

15 And if I go through this entire list,
16 they just say "amphiboles." But nowhere does it
17 say "amphibole asbestos," correct?

18 A. Well, it just depends on what was
19 being tested. A lot of times they were testing
20 for asbestos, but they just said "amphiboles
21 present" or they said "tremolite" or they said
22 "fibrous tremolite." I tried to be as -- as -- if
23 it said -- whatever it said, that's what's put on
24 there.

25 Q. And you included it in your charts and

1 you counted it as asbestos whether or not it was
2 asbestos or nonasbestos. If it just said
3 "amphibole," you put it on there?

4 A. I did, because when you look at the
5 publications and the data from these people who do
6 this testing, they discuss this, that when you see
7 one form, the nonasbestos form, you -- nonasbestos
8 variety, you see the other.

9 Q. And you learned that in your recent
10 geology course?

11 A. No. I've read that -- I've read that
12 multiple times from -- from a number of authors.

13 And, in fact, the publications from
14 Harper look at the asbestos samples. And when you
15 look at it, there's -- there's parts of the true
16 asbestos that we know is asbestos that would be
17 other minerals.

18 Q. Now, this chart has nothing to do with
19 medicine or health. This is just a chart of words
20 you saw in documents, correct?

21 A. Well, no. I think that's being a
22 little simplistic about it.

23 In order for a physician to be able to
24 understand where someone got an exposure, they
25 have to have an understanding of the material

1 asbestos, where it is, where it came from, just
2 like if it came from a brake or if it came from
3 talc or if it came from -- from insulation.

4 But doctors have to have an
5 understanding to be able to -- to know how to --
6 to ask patients how to recognize where they have
7 risks; how to know what diseases that they might
8 have, where they might -- where the toxins
9 occurred.

10 Q. And you told us that dose matters.
11 And my point, as I wrap up this section on this
12 chart, is that you included even just one single
13 fiber of asbestos in your chart, like you did on
14 Number 36 [sic], correct? If there's one fiber,
15 you included it?

16 A. Well, it has nothing to do with one
17 fiber or not. I mean, they're the ones that are
18 doing the testing, whether by TEM -- when you do a
19 TEM, they're taking a tiny, tiny, tiny amount.

20 And, yes. When they're looking at
21 high magnification, you might only see one fiber.
22 But if they reported asbestos present, whether
23 it's one fiber they see or five fibers that they
24 see, it's still asbestos present.

25 Q. And just because you include it in

1 this chart doesn't mean that you have made a
2 determination or anybody has made a determination
3 that that sample would be a hazard to health,
4 true?

5 A. Well, I think asbestos in a powdered
6 product used in the home is a hazard to health.

7 Q. I'm going to finish with this. You've
8 been very critical of Johnson & Johnson in your
9 testimony today. But you agree that it's a good
10 thing for companies to test their products, right?

11 A. Sure. If they take that information
12 and -- and do something with it, yes.

13 Q. You have not seen a single cosmetic
14 talc company that has more testing of its product
15 than Johnson & Johnson, right?

16 A. I think that is true.

17 Q. And you understand that Johnson &
18 Johnson did more testing and surpassed the
19 industry standards of the cosmetic talc industry
20 over the years, right?

21 A. Right. They did, I think, about 400
22 TEMs as opposed to the Industry Standard J4-1,
23 which was missed asbestos 87 percent of the time.

24 Q. And it's a good thing -- it's a good
25 thing for a company like Johnson & Johnson to

1 reach out and hire the very best labs in the
2 country and use the best microscopes and do the
3 most testing of anybody. That's something that
4 you approve of, correct?

5 A. I do. Again, it also depends on -- on
6 using the -- the best equipment and also the best
7 methods when using that equipment and making that
8 information available.

9 Q. And there is no question in your mind
10 that the documents you have reviewed for Johnson &
11 Johnson demonstrate that we surpassed and exceeded
12 the Industry Standard J-41, correct?

13 A. Right. They did more than just the --
14 the J-41, which is the XRD.

15 Q. And it's a very good thing for a
16 company like Johnson & Johnson to explore
17 different mines in search for the highest quality
18 talc, correct?

19 A. I'm not sure that's a medical opinion,
20 but I think that -- that seems reasonable for
21 anybody to say, yeah, sure.

22 Q. Now, you're just going to give medical
23 opinions?

24 A. No, but I -- I -- you're asking me,
25 you know, it's a good thing about exploring mines,

1 but, again, yes, I would hope that -- that you
2 would use a mine that doesn't contain any
3 asbestos, sure.

4 Q. And you have seen documents in your
5 review showing that Johnson & Johnson went to
6 mines in different places like North Carolina and
7 California and determined that those were not
8 suitable for Johnson's Baby Powder? You've seen
9 those documents?

10 A. I have.

11 MS. BUENO: Just one moment. Thank
12 you.

13 See how fast this amazing team is? If
14 I could use the ELMO.

15 Judge, take a look at this. What do
16 you think? They did some super quick work
17 here to make sure that I was right and that
18 we could get this -- that we could get this
19 slide in.

20 BY MS. BUENO:

21 Q. It looks like we've replaced the
22 Equate bottle and the Ammens bottle. Just want to
23 make sure -- this is then an accurate reflection,
24 correct, Dr. -- Dr. Haber?

25 And I want to go back --

1 A. I -- I don't know if these -- what --
2 the years or whatever, but I -- I do agree that
3 those two don't say that they were the nontalc
4 variety.

5 MS. BUENO: Thank you. Thank you.

6 So it looks like we've got -- we've
7 got a slide we can use here going forward.

8 Thank you so much, Dr. Haber. I
9 appreciate your time.

10 THE WITNESS: You're welcome.

11 * * *

12 MS. FLYNN: Judge Toal.

13 THE COURT: Yes?

14 MS. FLYNN: Before redirect occurs, we
15 wanted to reserve going on whether AII --

16 THE COURT: Having read what's been
17 asked, I think everything he wanted to have
18 asked has been covered.

19 MS. FLYNN: I do have some additional
20 topics. I'm happy to proffer those now, if
21 you'd like.

22 THE COURT: Let's don't interrupt his
23 cross-examination -- I mean, his redirect
24 for that. Wait until this witness is off
25 and give the jury their midafternoon break,

1 and then we can hear it.

2 MS. FLYNN: Yes, Your Honor. Thank
3 you.

4 MR. ADAMS: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. ADAMS:

7 Q. Dr. Haber, you were just asked by
8 Johnson & Johnson if it was good to test. Do you
9 remember that?

10 A. Yes.

11 Q. Is it good to rig the test?

12 A. No.

13 Q. Is it good to sell an
14 asbestos-containing baby powder for 134 years and
15 never tell the American public about it?

16 A. No.

17 Q. Is it good to perform a test and say
18 you can write down finding 16 separate asbestos
19 fibers in a powdered product put on babies in a
20 microscopic sample and then write down that it
21 wasn't there?

22 MS. BUENO: Objection, Your Honor.
23 Lacks a foundation.

24 THE COURT: Overruled.

25 THE WITNESS: Yeah, this is -- what's

1 called the 70/24 method. And, no, that --
2 they could literally find 16 fibers of
3 asbestos and say that they didn't exist.
4 So I don't think that's a good thing.

5 BY MR. ADAMS:

6 Q. And that might not sound like that
7 many fibers, right? Only 16. Not too many?

8 A. We're talking in micrograms --
9 actually, nanograms of -- it's a billionth, and
10 it's a tiny, tiny amount. And, you know, when you
11 start talking about grams, we're talking about a
12 lot of fibers.

13 Q. If you find 16 asbestos fibers in a
14 microgram from a bottle of Johnson's Baby Powder,
15 how many millions of asbestos fibers does that
16 mean there are in a bottle?

17 A. Billions.

18 Q. Was it a good thing for Johnson &
19 Johnson to adopt that testing method for over 40
20 years?

21 A. No.

22 Q. You were asked some questions and you
23 said on direct examination that when you find one
24 of these -- I don't even know if anyone followed
25 it -- that there was this PowerPoint put up, and

1 the top row was sort of the chunky, blocky
2 tremolite, anthophyllite, actinolite, and below
3 was the fibrous form. Do you remember that?

4 A. Yes.

5 Q. And then you were asked these
6 questions about, well, if you find one, an
7 amphibole, you know you have the fiber form as
8 well. Do you remember that?

9 A. Yes.

10 Q. And then the Johnson & Johnson lawyer
11 said something about, oh, did you learn that in
12 one of your geology classes? Do you remember
13 that?

14 A. I do.

15 Q. Did you learn it from literally the
16 supplier of talc to Johnson & Johnson?

17 A. That's one of the sources, yep.

18 Q. What are we looking at here?

19 A. This is from Richard Zazenski and --
20 which is Rio Tinto Minerals, which is a supplier.
21 And he says: Geologically, it doesn't make sense
22 to me that you can have a mineral deposit that
23 just contains, quote, "nonasbestiform" tremolite.
24 If a deposit contains nonasbestiform tremolite,
25 there is also asbestiform tremolite naturally

1 present as well.

2 Q. And so when you said that if you have
3 one, you have the other, were you literally
4 referring to Rio Tinto Minerals, who supplied talc
5 to Johnson & Johnson?

6 A. That's exact same concept, yes.

7 Q. You were asked a bunch of questions
8 about brakes, brake work that Mr. Perry did with
9 his father in the mid to late '80s. Do you
10 remember that?

11 A. I do.

12 Q. And there was a lot of back-and-forth,
13 but I think ultimately you said he had some
14 asbestos exposure from that. Is that fair?

15 A. Yes.

16 Q. You also said on direct examination
17 that for over 50 -- well, for about five decades,
18 Mr. Perry had asbestos exposure from Johnson &
19 Johnson's talc. Do you remember that?

20 A. Yes.

21 Q. Do they both count in his development
22 of mesothelioma or only one?

23 A. No. They -- they -- both. I mean,
24 you -- it's as if you were to take a -- a glass
25 and you're just -- you're pouring water into it

1 here, that the glass will -- will get those
2 cumulative doses.

3 And so these are cumulative doses. It
4 adds -- you have your background, and then you're
5 going to have whatever doses that you have that
6 will add up one on top of the other. One does not
7 exonerate or -- or make another one disappear.

8 Q. And so if Mr. Perry had some exposure
9 to asbestos in the background there, he had
10 exposure from brakes, he maybe had some other
11 exposure he had from talc, from other talc
12 products, what do you do with all those exposures?
13 Do you go back and say certain ones of these don't
14 count, or -- or do you do something else?

15 A. No. As a physician, we -- we consider
16 the cumulative dose as being the causative dose.
17 Because as you're breathing in the asbestos, it's
18 causing the damage that we saw yesterday from
19 Dr. Brody, and -- and it's an ongoing process.
20 You can't decide which asbestos fiber did
21 something and which didn't. So we say the
22 cumulative dose is what caused it.

23 Q. And this is a slide we have, kind of
24 hokey, but it illustrates that concept, that the
25 drops -- if you have enough, they overwhelm the

1 glass, and you develop the disease. Is that fair?

2 A. Correct.

3 Q. You're aware that in these cases both
4 sides have hired expert witnesses, and once we
5 rest our case, Johnson & Johnson is going to bring
6 their experts? Are you familiar with that?

7 A. Yes.

8 Q. Okay. I was a little surprised to
9 hear Ms. Bueno ask you so many questions about
10 brakes when her own expert that she hired in the
11 case said they didn't count. Are you familiar
12 with someone named Dr. Dominik Alexander?

13 A. I am.

14 Q. Did you know that we deposed him in
15 this case, I did with Ms. Bueno there?

16 A. I believe I did hear that you did
17 that.

18 Q. This is a portion of his deposition
19 transcript in the case where he indicates he was
20 retained by Johnson & Johnson.

21 A. Yes.

22 Q. And he indicates under oath:

23 Mr. Perry -- was --

24 The question I asked is: Was

25 Mr. Perry placed at an increased risk of the

1 disease mesothelioma from any exposure to
2 asbestos-containing brakes?

3 And Dr. Alexander, the Johnson &
4 Johnson expert, said: No.

5 Do you know why Johnson & Johnson
6 asked you so many questions about asbestos brakes
7 when their own expert said they didn't contribute
8 to Mr. Perry's disease?

9 MS. BUENO: Objection, Your Honor.

10 THE COURT: If he knows.

11 MS. BUENO: The question was, does he
12 know why I asked the question.

13 THE COURT: I don't think he used your
14 name. He's talking about Johnson &
15 Johnson.

16 MS. BUENO: No. He said Johnson &
17 Johnson's lawyer. He's talking about me,
18 Your Honor.

19 THE COURT: Overruled.

20 THE WITNESS: I think they're trying
21 to -- actually, I -- I'm not sure I can
22 say. I -- I'm sorry. I can speculate, but
23 I can't know.

24 BY MR. ADAMS:

25 Q. You were asked some questions about

1 Mr. Perry's treating doctor, Dr. Gibney. Do you
2 remember that?

3 A. Yes.

4 Q. And you read and relied on his
5 deposition. Do you remember?

6 A. I did.

7 Q. And I think you were asked some
8 questions about whether he was an expert in
9 products and knew all the asbestos-containing
10 products and which ones contained and which ones
11 didn't.

12 Do you remember that generally?

13 A. Yes.

14 Q. And he said, "I'm not an expert in
15 talc and whether it contains asbestos." Is that
16 fair?

17 A. Right.

18 Q. Dr. Gibney did say -- well, let me ask
19 you this. What did Dr. Gibney say about if the
20 person has a documented history of exposure to
21 asbestos in a powdered product?

22 A. Then it's the asbestos in it that they
23 get the mesothelioma.

24 Q. You were asked a bunch of questions
25 about the FDA and some testing.

1 Did the FDA say asbestos in talc was
2 safe?

3 A. No.

4 Q. This is a document, 386, that's in
5 evidence.

6 You're familiar with the 2019 when the
7 FDA found asbestos in Johnson's Baby Powder,
8 right?

9 A. Yes.

10 Q. What did they say about the asbestos
11 in that Johnson's Baby Powder in 2019? The FDA.

12 MS. BUENO: Your Honor, I object to
13 the slide. I think there's missing a zero,
14 and I think it's an important one. It
15 should be at .00002 percent. Four zeroes.

16 MR. ADAMS: Ms. Bueno is correct,
17 Your Honor.

18 THE WITNESS: Yeah. I was about to
19 point that out, too.

20 THE COURT: Wait a minute. If she's
21 correct, then take that slide down.

22 MR. ADAMS: Yes, Your Honor.

23 THE COURT: Sustained.

24 MR. ADAMS: Yes, Your Honor.

25 THE COURT: All right.

1 MR. ADAMS: Okay.

2 BY MR. ADAMS:

3 Q. Okay. When the FDA found --

4 A. Correct.

5 Q. -- 0.00002 percent asbestos in
6 Johnson's Baby Powder in 2019, what did they say
7 about the baby powder?

8 A. Poisonous and/or deleterious and it's
9 adulterated.

10 Q. You were asked some questions by
11 Ms. Bueno about tissue testing and this Steffen
12 study where they said tremolite and anthophyllite
13 are a fingerprint of talc exposure in folks with
14 cancer.

15 Do you remember that?

16 A. Yes.

17 Q. And then you -- Ms. Bueno from
18 Johnson & Johnson asked, "Well, they didn't
19 actually do a tissue digestion in this specific
20 study." Is that true?

21 A. Correct.

22 Q. But there were other studies that you
23 referenced that the lawyer for Johnson & Johnson
24 didn't ask you about, right?

25 A. That's true.

1 Q. I know it's a little hard to read, but
2 this is the Moline study that you discussed,
3 Emory, another Moline study, and additional
4 studies.

5 What do these studies have to do with
6 tissue digestion and finding cosmetic talc?

7 A. Right. So these are all related to --
8 these are patients with mesothelioma, and they did
9 the tissue digestion.

10 And these were patients who had --
11 most of them had just exposures -- known exposures
12 to asbestos through talcum powder use, and they
13 had tissues done at autopsy finding the presence
14 of talc and the noncommercial amphiboles tremolite
15 and anthophyllite.

16 Q. Did Johnson & Johnson reference that
17 exact concept in their own documents?

18 A. Yes.

19 Q. Have you read, relied and considered
20 on this Johnson & Johnson document?

21 A. I have. And, again, it's the same
22 concept. 1997, mesothelioma patients, both talc
23 fibers and tremolite fibers were detected.

24 Q. And I'll just skip ahead in the
25 interest of time. But what does Johnson & Johnson

1 say about the fact that tremolite and talc fibers
2 are detected in folks with mesothelioma?

3 A. Because tremolite and anthophyllite
4 are known contaminants of talc, this data suggests
5 that rare cases of mesothelioma among women with
6 no other identifiable exposure might be related to
7 exposure to cosmetic talc.

8 Q. Now, they reference women there.
9 What's the connection between women and cosmetic
10 talc?

11 A. They're the heavier user.

12 Q. Okay. And so if a man used cosmetic
13 talc all over his body for over 40 years, is there
14 anything about him being a man instead of a woman
15 which would make the asbestos in the talc react in
16 his body differently?

17 A. No. Once it gets into the body,
18 there's -- there is no difference.

19 Q. Langer. We went back to Langer, and I
20 just want to -- Langer was the guy from Mount
21 Sinai who found asbestos in Johnson's Baby Powder
22 in 1971, right?

23 A. Yes.

24 Q. Okay. And then on
25 cross-examination -- or in opening statement, the

1 lawyer for Johnson & Johnson said, "Well, he took
2 it back."

3 Do you remember that?

4 A. I do.

5 Q. And then we showed clips from a
6 deposition from a few years ago where he said,
7 "No. I never took it back. I found it."

8 Do you remember all that?

9 A. Yeah. Last year, yes.

10 Q. Okay. And then the lawyer for Johnson
11 & Johnson showed you --

12 MR. ADAMS: The ELMO? Langer? On the
13 ELMO?

14 BY MR. ADAMS:

15 Q. -- this article by Dr. Langer five
16 years later, where it looks like he tested some
17 additional samples of Johnson's Baby Powder and
18 didn't find asbestos in those specific samples,
19 fair?

20 A. Correct.

21 Q. Is there anything in this article
22 where he says, "When I find" -- "found asbestos in
23 1971 in Johnson's Baby Powder, I take that back"?

24 A. No.

25 Q. Okay. Also, this table was shown with

1 the key, and the ones that were Johnson & Johnson
2 were highlighted and -- without the asbestos.

3 Do you remember that?

4 A. Yes.

5 Q. There was also this Number 1 sample,
6 where they found tremolite and anthophyllite in
7 those levels, fair?

8 A. Yes.

9 Q. And then this key was shown to you by
10 Ms. Bueno with what those products were.

11 Are you with me?

12 A. Yes.

13 Q. Okay. And Number 1, the one they
14 found the asbestos in in this specific study, was
15 something called "Cashmere Bouquet."

16 Are you with me?

17 A. Yes.

18 Q. Where did the talc come from in
19 Cashmere Bouquet?

20 A. Italy. It was one of their main
21 sources.

22 Q. And so even in this subsequent paper
23 by Dr. Langer -- well, let me ask you this. For
24 how many years did Johnson & Johnson use Italian
25 talc in its baby powder?

1 A. Over 50.

2 Q. For -- when Mr. Perry used Johnson's
3 Baby Powder in 1979, what was the talc that
4 Johnson's Baby Powder was using in the baby
5 powder -- Johnson & Johnson using in the baby
6 powder?

7 A. Around that time would have -- they
8 would have converted to the Vermont.

9 Q. And then was there a period of about
10 seven months in '79 where they were using a
11 different talc during a strike?

12 A. Yes. They were using Italian during
13 the strike.

14 Q. Okay. And so was Mr. Perry exposed to
15 the Italian talc -- the same Italian talc in
16 Cashmere Bouquet that was in Johnson's Baby Powder
17 and they found asbestos in the study?

18 MS. BUENO: Objection, Your Honor.
19 There is no foundation or evidence for that
20 question. "Was Mr. Perry exposed?" was the
21 question.

22 THE COURT: Yes.

23 MR. ADAMS: I'll rephrase, Your
24 Honor --

25 THE COURT: Yes.

1 MR. ADAMS: -- to make it clearer.

2 BY MR. ADAMS:

3 Q. The Italian talc that they found
4 asbestos in, Dr. Langer in this study, was
5 Mr. Perry exposed to the exact same Italian talc
6 in Johnson's Baby Powder?

7 MR. BERGER: Same objection.

8 THE COURT: Overruled.

9 THE WITNESS: It's the same source
10 mine, yes.

11 BY MR. ADAMS:

12 Q. You were asked all these questions
13 about Mr. Perry's family history of cancer and how
14 some other folks in his family had developed
15 cancer.

16 Do you remember that?

17 A. I do.

18 Q. Does that mean the -- Mr. Perry's
19 exposure to asbestos in Johnson's Baby Powder
20 didn't contribute to his mesothelioma?

21 A. No. It had nothing to do with it.
22 Again, most of those were common cancers like
23 prostate cancer.

24 Q. There was a reference to ovarian
25 cancer in Mr. Perry's mom.

1 Do you remember that?

2 A. I do.

3 Q. Did Mr. Perry's mom use talc?

4 MS. BUENO: Objection, Your Honor.

5 THE COURT: On what basis?

6 MS. BUENO: On the fact that we had a
7 pretrial motion on this issue.

8 THE COURT: Approach.

9 (Off-the-record conference.)

10 THE COURT: There's been an objection
11 made to asking these questions of this
12 witness about the mother's ovarian cancer.
13 These questions are being found -- asked on
14 the foundation of a slide that Ms. Bueno
15 put into evidence. She now objects on the
16 basis of a pretrial about ovarian cancer.

17 She opened the door to the question
18 about the mother's ovarian cancer once she
19 put that slide up on the screen in her
20 cross-examination of this witness, and
21 therefore her objection is not well taken
22 and is overruled.

23 MS. BUENO: And may I --

24 THE COURT: That's it. I've ruled,
25 Ms. Bueno.

1 MS. BUENO: Thank you.

2 THE COURT: All right. This -- my
3 dear members of the jury, this matter, I
4 think, is just about over. But you need a
5 break, and you're going to get a break
6 right now. I don't care how much longer
7 this thing is going.

8 So all right. The jury is going to
9 take their midafternoon break. Be back at
10 3:15.

11 * * *

12 (The jury exits the courtroom at
13 3:00 p.m.)

14 * * *

15 THE COURT: All right. The court will
16 be in recess. My timer shows that
17 Mr. Adams has about five minutes left on
18 his redirect examination. All right. Be
19 at ease.

20 * * *

21 (Whereupon, there was a recess in the
22 proceedings from 3:00 p.m. to 3:09 p.m.)

23 * * *

24 THE BAILIFF: The court will come to
25 order. All rise, please.

1 THE COURT: Please be seated.

2 All right. Okay. Ms. Flynn, what --
3 all right. Ms. Flynn, what -- what have we
4 got here?

5 MS. FLYNN: Yes, Your Honor. I just
6 want to make sure the court reporter can
7 hear me. Stephanie Flynn for American
8 International Industries.

9 I think that the problem and the
10 disconnect we're having here is -- is
11 obviously -- this is the liability portion
12 of the trial against Johnson & Johnson.

13 THE COURT: That's correct.

14 MS. FLYNN: And the issue is that --
15 my understanding is the actual damages are
16 also kind of being compressed into the same
17 phase, and we're allowed to participate in
18 the damages portion of the case.

19 So that creates a situation for us
20 that when we get to the time of the
21 verdict, we're going to be on the form with
22 J&J, and the only thing that they will have
23 heard will be about J&J. They won't have
24 heard that AII is not J&J, that AII --

25 THE COURT: Well, that has nothing to

1 do with damages. You are liable. You are
2 liable for both regular tortious conduct
3 and a variety of aggravated tortious
4 conduct for all of them. So you're liable
5 for all of that.

6 Some of the conduct for which you are
7 liable will, without further finding, be a
8 platform for punitive damages to be
9 requested by the plaintiff, because that is
10 one of the consequences of defaulting on
11 this thing as if you had admitted all the
12 averments of the complaint.

13 The averments of the complaint contain
14 liability issues that are the platform for
15 actual damages and the liability issues
16 that are the platform for punitive damages.
17 You have been found to have committed all
18 of those acts.

19 The only thing that you got -- that
20 you can deal with is damages that Mr. Perry
21 has suffered. So far, I haven't heard
22 anything that gets into that. About as
23 close as it gets is his suffering the
24 doctors have talked about.

25 I'm not going to allow you to

1 repetitively question and string this trial
2 out, and particularly in light of the
3 issues that we're facing with the weather
4 issues, by -- just so American will have a
5 presence, get up and go into things that
6 are already testified to both sides. I can
7 instruct the jury in such a way that they
8 will understand that those damages apply to
9 you.

10 I cannot think of anything you could
11 say right now on the few things that touch
12 damages, which are primarily at this point
13 some testimony about the pain and suffering
14 of Mr. Perry.

15 The other things that are going to be
16 are going to be agreed-to figures about his
17 damages. That's really the heart and soul
18 of the actual damages. The other parts of
19 the actual damages are the pain and
20 suffering.

21 I can't think of anything you could
22 ask on behalf of American that's going to
23 add to the jury's understanding of your
24 conduct, because your conduct is already a
25 platform for his pain and suffering.

1 MS. FLYNN: I understand the Court's
2 position on this. We are operating under
3 the first amended complaint as the Court
4 has ruled that we are in default on --

5 THE COURT: Yes, ma'am, and that's the
6 one I'm talking about.

7 MS. FLYNN: And the plaintiffs are
8 still required to prove the well-pleaded
9 allegations of their complaint.

10 THE COURT: Yes, ma'am.

11 MS. FLYNN: In other words, if -- if,
12 for instance, their facts in the complaint
13 don't substantiate cause of action for
14 conspiracy or don't -- they don't allege
15 anything specific that we've done, any
16 conduct that we've done to --

17 THE COURT: That's an argument about
18 liability, and I'm not going to listen to
19 that right now. Liability has been
20 established. If you want to take some time
21 to deal with this when we are putting out
22 the formal verdict, we can do it.

23 I am not going to -- we are almost
24 ready to get back to this, and every time
25 we get about ready, you pop up and want to

1 introduce something that so far I haven't
2 seen any necessity for taking care of. And
3 damages is all you're supposed to be
4 talking about right now, not liability.

5 So don't talk to me about these damage
6 issues --

7 MS. FLYNN: I understand, Your Honor.

8 THE COURT: -- and particularly as
9 they may affect punitive damages, because
10 we're not there yet. We will have some
11 time to talk about that.

12 We're talking about actual damages
13 right now in this portion of this
14 proceeding, and I cannot think of anything
15 we've talked about so far except his pain
16 and suffering. It's been mentioned in a
17 very concise sort of way. I can't imagine
18 what you would want to ask that would
19 benefit American International.

20 MS. McVEY: And, Your Honor, just for
21 the plaintiffs' perspective, if Ms. Flynn
22 wanted to ask Dr. Haber whether or not
23 Mr. Perry actually had any pain and
24 suffering, if she wanted to ask about the
25 actual surgeries, whether or not it was

1 actually causative or that his cancer is
2 terminal or any of those things, but my
3 hunch is that that's not what AII wants to
4 do.

5 THE COURT: What is it you want to
6 ask, Ms. Flynn?

7 MS. FLYNN: Had the opportunity
8 arisen, we would have asked -- we would
9 have pointed out that AII is not J&J,
10 that he understands that American
11 International --

12 THE COURT: What does that have to do
13 with any issue that represents --

14 MS. FLYNN: It goes to amount of
15 liability. We have not admitted amount --

16 THE COURT: We're not talking about
17 amount right now.

18 MS. FLYNN: And in addition to that,
19 he's got a long list of prior medical
20 history that we would have raised to --
21 just to go to quality of life and/or
22 possible life expectancy issues.

23 MS. McVEY: And, Your Honor, again, of
24 course, there's no expert testimony from
25 anybody saying that any of that showed a

1 decreased lifespan. I think they can ask
2 about damages. They can't ask about
3 causation. They can't ask about --

4 THE COURT: Correct.

5 MS. McVEY: -- liability.

6 So I think if she wants to proffer
7 what she wants to ask, but it seems to me
8 none of that is actually relevant to the
9 actual damages in the case.

10 THE COURT: Well, I agree with that,
11 and so far, that is my ruling. So anything
12 you want to proffer, do it. But I want to
13 get back to this jury right now.

14 MS. FLYNN: Okay. And, Your Honor, I
15 think what we would ask is just maybe there
16 could be a limiting instruction so that the
17 jury understands that this is the liability
18 portion of the trial as it relates to
19 Johnson & Johnson on the second amended
20 complaint.

21 THE COURT: I'm going to do that.
22 You're asking something very specific,
23 though. It has nothing to do with
24 liability. It has only to do with damages.
25 And what you're really asking me is for

1 something that has to do with punitive
2 damages, and we are not in that ballpark at
3 all right now. Okay?

4 MS. FLYNN: I understand, Your Honor.

5 THE COURT: All right.

6 MS. FLYNN: Thank you.

7 THE COURT: Thank you.

8 MS. BUENO: Your Honor.

9 THE COURT: Yes?

10 MS. BUENO: We do have a proffer for
11 this witness, and I don't know if you want
12 to do it at the end of the day. I just
13 want to do a proffer on this -- the library
14 exposures and things that you excluded and
15 what we would have asked --

16 THE COURT: That -- you best do that
17 at the end of the day. We don't need to do
18 that now.

19 MS. BUENO: Yeah. Yeah. That's fine.
20 I just wanted to make sure you understood.

21 THE COURT: All right. All right.
22 Bring back the jury, please, sir.

23 THE BAILIFF: Yes, ma'am.

24 (The jury enters the courtroom at
25 3:16 p.m.)

1 THE BAILIFF: The jury is seated,
2 Your Honor.

3 THE COURT: All right. Thank you,
4 sir.

5 Mr. Adams to complete his redirect
6 examination.

7 MR. ADAMS: Thank you, Your Honor.

8 BY MR. ADAMS:

9 Q. Dr. Haber, before we broke, we were
10 discussing this medical record that Johnson &
11 Johnson put up that indicated Mr. Perry's mother
12 had ovarian cancer. Do you remember?

13 A. I do.

14 Q. Who did Mr. Perry learn how to use
15 Johnson's Baby Powder from?

16 A. His mother.

17 Q. Did Mr. Perry's mother also use a
18 product called Shower to Shower?

19 A. She did.

20 Q. What is that, and who made it?

21 A. That is another talcum powder product
22 made by Johnson & Johnson.

23 Q. You were asked a number of questions
24 by Johnson & Johnson about microscopes. Remember
25 how it was like you haven't tested it or used it

1 or know about it. Do you remember all that?

2 A. I do.

3 Q. Have you relied on the testing from
4 experts in microscopy in Johnson & Johnson's own
5 files?

6 A. Yes.

7 Q. Are you familiar -- are you familiar
8 with Walter McCrone and Associates?

9 A. Yes.

10 Q. Do they know about microscopes?

11 A. Yes. McCrone is a -- was a very
12 reputable laboratory.

13 Q. What did they find in Johnson &
14 Johnson's Vermont talc that it used in the baby
15 powder for over 30 years?

16 A. Chrysotile 15 times; fibrous
17 tremolite, which is asbestos, 4 times.

18 Q. This is a document that referenced
19 this Sperry Rand lab. Have you seen this?

20 A. I have.

21 Q. Have you read and relied on this
22 slide, Exhibit 114?

23 A. Yes.

24 Q. This Sperry Rand, do they know about
25 microscopes?

1 A. Yes.

2 Q. What did they find in Johnson &
3 Johnson's Shower to Shower product in 1972?

4 A. Asbestos.

5 Q. You were asked about Dr. Longo. Do
6 you remember that?

7 A. Yes.

8 Q. And you were asked a bunch of
9 questions, did you know Dr. Longo said this, and
10 did you know Dr. Longo said that, and he said
11 something in his deposition about how he wouldn't
12 have time.

13 Do you remember all that?

14 A. I do.

15 Q. And then you said, "Well, he" -- "he
16 found time to digest the tissue."

17 A. Correct.

18 Q. In Michael Perry's body?

19 A. Yes.

20 Q. And did he find tremolite and talc in
21 Michael Perry's own body?

22 MS. BUENO: Objection, Your Honor.

23 This is not evidence. We haven't
24 talked to Dr. Longo yet about his findings.
25 This should not be the conduit for how this

1 evidence comes into trial.

2 THE COURT: Counsel -- Counsel, you
3 have asked many, many questions about
4 things that are not in evidence by other
5 testimony today.

6 I overrule the objection.

7 You may continue, Mr. Adams.

8 THE WITNESS: Yes, he did.

9 MR. ADAMS: No further questions.
10 Thank you. That's all I have, Your Honor.

11 THE COURT: Dr. Haber, we thank you
12 very much for your testimony in this
13 matter, and you are excused.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Ladies and gentlemen of
16 the jury, it's going to take them a minute
17 to formulate this.

18 But the next piece of evidence you
19 will be hearing is testimony taken from
20 another videotaped testimony of
21 Dr. Hopkins, who is a long-time employee of
22 Johnson & Johnson as a corporate
23 representative. No longer in that
24 position, but he held it for many years.
25 And they're going to set up that video and

1 then play it.

2 Now, this isn't live. So, Mr. Clerk,
3 we won't be swearing Dr. Hopkins.

4 But I am certain that we'll be given
5 some information that will tell us that
6 Dr. Hopkins is giving us this videotaped
7 material under oath.

8 MR. ADAMS: Yes, Your Honor.

9 THE COURT: Very good.

10 All right. You may proceed.

11 (Whereupon, the videotaped deposition
12 of John Hopkins, Ph.D., was played in open
13 court.)

14 DIRECT EXAMINATION

15 BY MR. PANATIER:

16 Q. Go ahead and introduce yourself. Tell
17 us your name.

18 A. My name is John Hopkins.

19 Q. All right. And you are the corporate
20 representative for both Johnson & Johnson and
21 Johnson & Johnson Consumer Inc., correct?

22 A. Correct.

23 Q. All right.

24 (Video stopped.)

25 THE COURT: Halt. Turn the sound down

1 just a little bit.

2 MS. McVEY: You got it.

3 (Resumed video.)

4 BY MR. PANATIER:

5 Q. You do not currently work for

6 Johnson & Johnson, right?

7 A. That is correct.

8 Q. Or any Johnson & Johnson entity, true?

9 A. That is also correct.

10 Q. But you are a private consultant to

11 Johnson & Johnson, true?

12 A. In this -- in this case, yes.

13 Q. Okay. And you have been a private

14 consultant to Johnson & Johnson on numerous

15 occasions, fair?

16 A. Several occasions, yes.

17 Q. All right.

18 A. Yes.

19 Q. When was the last year that you were

20 actually employed by Johnson & Johnson?

21 A. 2000.

22 Q. During that time in the '50s, '60s,

23 '70s, and then till 1989, Johnson & Johnson owned

24 the mines in Vermont that it sourced from,

25 correct?

1 A. They did own the Vermont mine, yes.

2 Q. The main source of Johnson & Johnson's
3 Baby Powder from the '70s until 2003 was Vermont,
4 correct?

5 A. The main source, yes.

6 Q. From 2003 to the present, the source
7 of the talc in Johnson's Baby Powder has been
8 Chinese, correct?

9 A. It's from the Guangxi Zhou mine in
10 China.

11 Q. Right. Now, Johnson & Johnson also
12 made a product called "Shower to Shower," correct?

13 A. They -- they did, yes.

14 Q. The sources for Shower to Shower
15 matched the sources for Johnson's Baby Powder from
16 1960 to 2012, correct?

17 MR. BICKS: Sources of what?

18 MR. PANATIER: Talc.

19 THE WITNESS: Sources of talc. The
20 majority of talc was Vermont talc, but it
21 was also some Italian talc.

22 BY MR. PANATIER:

23 Q. Johnson & Johnson corporate in New
24 Brunswick, New Jersey, made all health and safety
25 policy decisions with regard to asbestos and talc

1 issues, correct?

2 A. Yes.

3 Q. Okay. Now, Johnson & Johnson also has
4 a number of subsidiary companies, true?

5 A. That is true, yes.

6 Q. One of those is Johnson -- Johnson &
7 Johnson Consumer Inc., correct?

8 (Video stopped.)

9 THE COURT: Turn it down a little bit.

10 MS. McVEY: Too loud?

11 THE COURT: Yes.

12 (Resumed video.)

13 BY MR. PANATIER:

14 Q. Correct?

15 A. That is correct, yes.

16 Q. But between the companies, between
17 Johnson & Johnson, the baby products company, and
18 Johnson & Johnson Consumer Inc., obviously, with
19 regard to health and safety issues, any testing
20 that happened with regard to the talc that was
21 being manufactured and sold, all of that would've
22 been shared between those companies; is that fair?

23 A. Yes.

24 Q. Okay. Johnson & Johnson wouldn't get
25 a test result and then not share it with the

1 subsidiaries, correct?

2 A. That is correct.

3 Q. All right. Because it was important
4 that a subsidiary that might actually physically
5 be manufacturing the product understand and know
6 the testing results, correct?

7 A. Correct.

8 Q. All right. And vice versa. If one of
9 the subsidiaries got a testing result, they would,
10 of course, share that with Johnson & Johnson,
11 right?

12 A. They would, yes.

13 Q. All right.

14 A. Yes.

15 Q. As the corporate representative of
16 both Johnson & Johnson and Johnson & Johnson
17 Consumer Inc. --

18 A. Yes.

19 Q. -- it would be your expectation that
20 all of the data with regard to health and safety
21 of talc products would be shared equally, fair?

22 A. That's a reasonable expectation.

23 Q. And that would be your expectation,
24 true?

25 A. That would be my expectation.

1 Q. Okay. I've asked you this before.

2 Johnson & Johnson had and still has a very large
3 medical library, true?

4 A. Correct.

5 Q. They had subscriptions to the Journal
6 of the American Medical Association, The New
7 England Journal of Medicine, Lancet, The New York
8 Academy of Sciences and so forth, correct?

9 A. Yes.

10 Q. Do you believe that Johnson & Johnson
11 was a responsible company?

12 A. I do.

13 Q. And as a responsible company, do you
14 believe that Johnson & Johnson would have stayed
15 abreast of that literature?

16 A. Johnson & Johnson would've stayed
17 abreast of any literature that was relevant at the
18 time.

19 The company's never sold asbestos, so
20 they're hardly likely to be world experts in
21 asbestos disease. But any well-qualified medical
22 professional or toxicologist would have some
23 background knowledge of asbestos disease and
24 asbestos.

25 Q. So in the early 1970s, it's fair to

1 say that researchers at Johnson & Johnson were
2 quite interested in the subject of asbestos,
3 correct?

4 A. Yes.

5 Q. All right. You have said that the
6 needle-like structure of asbestos and asbestiform
7 minerals is the quality that gives it the ability
8 to imbed in pulmonary tissue and potentially lead
9 to mesothelioma, correct?

10 A. That -- that is an opinion in the
11 medical literature.

12 Q. And that's an opinion you've given as
13 a toxicologist?

14 A. Yes.

15 Q. That's an exhibit that I showed you
16 during your deposition when we talked last summer,
17 right?

18 A. Yes.

19 Q. Okay. And this is dated June 17th,
20 1976 [sic], and it's a Johnson & Johnson memo,
21 correct?

22 A. Yes.

23 Q. All right.

24 A. June -- June 17th, 1966.

25 Q. It says: References made to the

1 attached note from Mr. J. Dettre forwarding an
2 article by Drs. Hughes and Kalmer which appeared
3 in June 1966, American Journal of Diseases of
4 Children. Baby powder represents the cornerstone
5 of our baby products franchise.

6 And we've seen where Johnson & Johnson
7 refers to the baby powder as a franchise, correct?

8 A. It's -- it's another word from the
9 marketing group, yes.

10 Q. Yes, okay.

11 In addition, we have a large
12 investment in a talc mine.

13 And we've talked about that, they
14 owned the Vermont mines by this point, right?

15 A. They did, yes.

16 Q. Talc literally is a mineral that is
17 pulled out of the ground, right?

18 A. Yes.

19 Q. Okay. It's not something organic, is
20 it?

21 A. Correct.

22 Q. Now, this is a Johnson & Johnson memo,
23 and this is authored by Bruce Semple.

24 Do you see that on the second page?

25 A. Yes, yes.

1 Q. Who's Bruce Semple?

2 A. He was the M.D. who's medically
3 qualified, medical director.

4 Q. All right. So he's the medical
5 director, right?

6 A. In '76, yes. In '76 he was, yes.

7 Q. Do you see that this was with regard
8 to a telephone conversation they had with the
9 chief of the pathology section for NIOSH?

10 A. Yes.

11 Q. Now, NIOSH is the National Institute
12 for Occupational Safety and Health, correct?

13 A. Yes.

14 Q. Okay. And just for a little bit of
15 background, he says at the top: I identified
16 myself and the reason for phoning. He was
17 pleasant and cooperative. He recalled being
18 phoned around Wednesday, March 17th, 1976, by a
19 woman whom he thought was from a Cincinnati
20 newspaper. Okay. So we know he had had a
21 conversation with this person, correct?

22 A. Yes.

23 Q. Go down to the highlight. She then
24 asked him about asbestos, and he said that this
25 was a different problem and that he would not

1 recommend using talc on babies because of the
2 possibility of asbestos inhalation, regardless of
3 the contamination level. He felt that this would
4 constitute an unnecessary risk. And that was the
5 opinion of the chief of the pathology section for
6 NIOSH, correct, sir?

7 A. Well, that was -- that was Dr. Groth's
8 opinion. That's what he said --

9 Q. Right.

10 A. -- in that letter.

11 Q. Right. That's what I asked you, that
12 that was the opinion of the chief of the pathology
13 section for NIOSH, correct?

14 A. That was his opinion --

15 Q. All right.

16 A. -- in '76.

17 Q. Johnson & Johnson was aware and is
18 aware that cornstarch was used -- used as a body
19 power in the late 1800s, correct?

20 A. It -- cornstarch has been used in --
21 in some body powder uses, yes, since the --
22 turn -- turn of the last century.

23 Q. Johnson & Johnson understands that an
24 infant will inhale talc into their lungs when they
25 are powdered with Johnson's Baby Powder, correct?

1 A. It's theoretically possible.

2 Q. I'm going to hand you your transcript.
3 This is from August 15th, 2017, in the Herford
4 case as well as a few others. I'll direct you to
5 Page 67 and 68 there.

6 A. Okay.

7 Q. And then there you were asked a series
8 of questions, and here's the questions you were
9 asked:

10 At Page 67, line 25: "Sir, Johnson &
11 Johnson has understood for decades that when talc
12 powder is used on an infant or a child, they will
13 inhale some of the talc into their lungs?"

14 Your answer: "There is always the
15 possibility that when the talc is used we will
16 inhale talc."

17 Me: "And it's not really a
18 possibility, right?"

19 You: "Yes."

20 Me: "I mean, it happens?"

21 Your answer: "It happens, yes."

22 Did I read that correctly, sir.

23 A. The word "happens" related to the
24 possibility, it -- it's a possibility that it
25 happens, yes.

1 Q. Johnson & Johnson understood that it
2 would be very, very bad for business and Johnson &
3 Johnson's reputation if it ever came out that baby
4 powder or any of its talc products ever contained
5 asbestos, correct?

6 A. That is correct.

7 Q. Johnson & Johnson has approximately
8 250 test results it has received internally from
9 the 1950s to the 2000s reporting actinolite,
10 tremolite, chrysotile, anthophyllite and asbestos
11 in various combinations in both its source ore and
12 finished products, correct, sir?

13 A. There are several questions there.
14 Would -- would you clarify that question?

15 Q. Yeah.

16 A. It's not clear.

17 Q. Sure. And I'm just asking --

18 A. Break it -- break it down.

19 Q. Yeah. Johnson & Johnson has over 250
20 tests that it's received internally reporting on
21 asbestos minerals or asbestos content in its
22 source ore or finished product, correct?

23 A. Yeah, rephrase the question. When you
24 say "asbestos in the product," is that what you're
25 saying?

1 Q. Listen to the question. No. And --
2 and I'll give you some background. You and I have
3 spent probably 2 1/2 full days going through every
4 report in Johnson & Johnson's records and writing
5 them down on charts, haven't we?

6 A. We have, yes.

7 Q. Okay. And along the line when I wrote
8 them down on those charts, I said, "You'll tell me
9 if I'm writing this down inaccurately," right?

10 A. Yes.

11 Q. Okay. And we verified that those
12 charts that I did at your deposition and then at
13 trial, that those were act -- those accurately
14 reflected what was actually written in the papers,
15 correct?

16 A. They -- what was written in the papers
17 were test results.

18 Q. Right. Right. And you and I have
19 been through test results from the '50s to the
20 2000s. Fair?

21 A. We have looked at test results, yes.

22 Q. And let's just -- let's just see if we
23 can agree on the number of test results. We've
24 looked at over 200 test results --

25 A. Yes.

1 Q. -- where they have been looking for
2 asbestos, correct?

3 A. They have been looking for asbestos,
4 yes.

5 Q. All I'm talking about right now is,
6 Johnson & Johnson was in possession from the 1950s
7 to the 2000s of over 200 test reports on their
8 talc? We can start there. Right?

9 A. Yes.

10 Q. And those test reports were all
11 looking for either asbestos minerals, just the
12 minerals, such as tremolite, actinolite,
13 anthophyllite, right?

14 A. Yes.

15 Q. Here's -- here's the best way to do
16 this. I'm going to just read some of the things
17 from the chart that you and I went through and ask
18 you if we -- if you and I reported that on the
19 chart.

20 1957, amphibole; 1958, amphibole
21 variety tremolite; 1958, tremolite in flotation,
22 two dozen tremolite; 1959, 60 results for
23 tremolite; 12/1959, run of mill 2 percent
24 tremolite and Number 2 -- that was Italian Number
25 2 -- 1 percent tremolite, 28 tremolite. Correct?

1 First page?

2 A. Yes.

3 Q. Second page, 1961, disproportionately
4 high amphibole in one hole, correct?

5 A. Well, one hole relates to a test bore
6 when -- when the geologists are looking to find
7 out the quality of the mine where it extends over
8 several acres, and a hole or bore hole would tell
9 you where you could go and where you'd avoid.

10 Q. Right. And in one of the holes, they
11 found disproportionately high amphibole, correct?

12 A. And that -- that was obviously an area
13 to be avoided as far as mining was concerned.

14 Q. Right. And every single time that I
15 wrote something down, it was directly from one of
16 the reports that Johnson & Johnson had, right?

17 A. You -- you wrote -- you wrote what was
18 written from a report.

19 Q. October 10, 1967, serpentine, .25 to
20 1.5 percent, correct?

21 A. That's what was written.

22 Q. Okay. May 10, 1971, sample 344L,
23 which was Johnson's Baby Powder, correct?

24 A. Yes.

25 Q. Okay. This was Colorado School of

1 Mines. They said free nontalc needles, right?

2 A. That's what was written.

3 Q. And then four days later, they said
4 the nontalc needles were tremolite, correct?

5 A. Well, again, I can't remember what
6 was -- what you wrote. That was what was written
7 on the -- on the blackboard -- on the whiteboard,
8 yes.

9 Q. And you and I have been through those
10 reports two times already?

11 A. We have, yes.

12 Q. Okay. July 1975, McCrone has four
13 confirmed asbestos results in the fines of the
14 cosmetic ore, correct?

15 A. Again, you wrote what's -- you -- you
16 read out what you wrote that -- last -- last year.

17 Q. And I wrote that directly from a
18 report that Johnson & Johnson had, correct?

19 A. I believe that is the case.

20 Q. Okay. And then there were two more
21 confirmed asbestos in the sediment, correct?

22 A. Yes.

23 Q. Okay. Then in November of 1975,
24 McCrone found, quote, "fibers of asbestos," six
25 amphibole in cosmetic talc, correct?

1 A. Well, that's what you wrote back in
2 August.

3 Q. And that's directly from the report,
4 correct?

5 A. That is.

6 Q. And then July 7th, 1971, Colorado
7 School of Mines reported less than a percent of
8 tremolite and actinolite in six of seven samples,
9 correct?

10 A. That is -- that is what you wrote back
11 in August of last year, yes.

12 Q. Directly from the report that you've
13 seen?

14 A. From a report, yes.

15 Q. Right. July 29th, 1971, Vermont talc,
16 trace amounts of fibrous tremolite and actinolite,
17 independent labs show negligible trace fibrous
18 minerals. That's directly from that report, is it
19 not, sir?

20 A. Well, again, you wrote what was
21 written from a report.

22 Q. That Johnson & Johnson had?

23 A. You -- you read out exactly what you
24 wrote last year.

25 Q. Right. Which was directly from a

1 report that you and I were looking at, correct?

2 A. From a report.

3 Q. Let's go ahead and go down to another
4 report.

5 9/3/71, less than 0.001 percent
6 asbestos in the medicated powder and chrysotile in
7 Shower to Shower. And that was the McCrone
8 report, correct, sir?

9 A. Again, you're -- you're quoting what
10 you wrote last fall.

11 Q. Right. And I'm quoting directly from
12 the reports that you and I went through one by
13 one, correct?

14 A. From a report, yes.

15 Q. Okay. October 27, 1972, McCrone has
16 two reports regarding 108 and 109T, which were
17 Johnson's Baby Powder, correct?

18 A. They had a report, yes.

19 Q. Okay. And they found half a percent
20 tremolite in one and .2 to .3 percent tremolite in
21 the others, right?

22 A. Well, again, you're -- you're reading
23 out what -- what you wrote on the whiteboard last
24 fall.

25 Q. So here's the thing. You're -- you're

1 Johnson & Johnson today. You understand that,
2 right?

3 A. Yes.

4 Q. And you're Johnson & Johnson Consumer
5 Inc., correct?

6 A. Yes.

7 Q. I'm not, am I?

8 A. No.

9 Q. I'm not Johnson & Johnson.

10 A. No.

11 Q. Right? To your knowledge, have I ever
12 worked for Johnson & Johnson?

13 A. No.

14 Q. Alice Blount was a consultant to
15 Johnson & Johnson, correct? Correct, sir?

16 A. She -- I believe she may have been a
17 consultant at some point.

18 Q. Okay.

19 A. Or she may have consulted.

20 Q. Yeah. That is a published
21 peer-reviewed article from 1991 entitled
22 "Amphibole Content of Cosmetic and Pharmaceutical
23 Talcs," right?

24 A. That is -- that is the title of the
25 article, yes.

1 Q. And do you know, looking at the key at
2 the back, that Sample I is J&J, Johnson's Baby
3 Powder? Correct?

4 A. Well, there's a -- there's a
5 handwritten note to say that Sample I is Johnson's
6 Baby Powder.

7 Q. Line 7: "As far as the presence of
8 asbestiform minerals, Alice Blount published that
9 in 1991 she found asbestos in Johnson's Baby
10 Powder, correct?"

11 And your answer was: "She claims to."
12 Correct?

13 A. Yes.

14 Q. Okay. You represented earlier --
15 let's go back to what you said, sir.

16 You said, "There has never been a
17 report of asbestos in Johnson's Baby Powder."

18 That's not true, is it?

19 A. There needs to be -- when we talk
20 about a report, a report in scientific terms
21 should always be validated, should be proven,
22 should be reproducible.

23 This particular study by Alice Blount
24 was using a very experimental method, and no one
25 has one has ever confirmed that method. I've not

1 seen any other publication using that method which
2 confirmed it. So any test method needs to be
3 validated to be sure that it's relevant.

4 Q. Sir, you stated that there was no
5 report of asbestos in Johnson & Johnson's Baby
6 Powder. Did you not?

7 A. There is a report where a -- an author
8 using a very experimental method claims to have
9 found asbestos in the product.

10 Q. And as far as you know, in the
11 peer-reviewed literature, that claim, as you call
12 it, is completely unrefuted, correct?

13 A. Yes. I -- as I said, I'm not aware
14 that anyone wrote a letter to the editor.

15 Q. Let's look at -- and she -- she not
16 only found it in the baby powder, she found it in
17 source talc, too, correct?

18 A. She claimed to have found it --

19 Q. Right.

20 A. -- by her experimental method.

21 Q. Do you know who RJ Lee is?

22 A. I do, yes.

23 Q. You, Johnson & Johnson, have hired
24 RJ Lee in these cases to help defend you, correct?

25 A. Correct, yes.

1 Q. You haven't seen reports by RJ Lee
2 where they have actually used that exact method,
3 your experts --

4 A. I --

5 Q. -- have used that exact method, to
6 determine asbestos in talc?

7 A. I've not seen the reports, no.

8 Q. This will be Exhibit 15. You've seen
9 that before, right?

10 Here you go.

11 A. Yes.

12 Q. Right?

13 And this is Dr. Nashed writing to
14 Goudie, and he says: I thought tremolite was
15 mistakenly identified in view of similarity to
16 sodium sesquicarbonate. Right?

17 A. Yes. That's what's written.

18 Q. And what Al writes back is: There are
19 trace quantities present confirmed by both by
20 McCrone and Bill Ashton. Levels are extremely low
21 but occasionally can be detected optically. This
22 is not new.

23 Is that what he wrote?

24 A. That's what he wrote, yes.

25 Q. Now, Johnson & Johnson has stated that

1 there should never, ever, ever be any asbestos in
2 baby powder, right?

3 A. Yes.

4 Q. Okay. Not a single fiber, right?

5 A. That the product should be free of
6 asbestos.

7 Q. Meaning zero?

8 A. Yes.

9 Q. And we know from the testing that
10 there's tremolite in both the Italian and Vermont
11 talc ore, correct?

12 A. We know there's nonasbestos tremolite
13 in the talc ores --

14 Q. I'm asking you about tremolite. I'm
15 not going to call it "asbestos" unless it says
16 "asbestos," okay?

17 A. Fine. Then the answer's yes.

18 Q. Okay. So the answer's yes. There is
19 extensive testing demonstrating tremolite in the
20 Italian and Vermont ore, correct?

21 A. Correct.

22 Q. And by 1972 there was a robust record
23 of tremolite being in Johnson & Johnson ores,
24 correct?

25 A. There is -- we've just agreed. There

1 is traces of tremolite in the ores.

2 Q. You and I characterized it -- I asked
3 you to characterize it as a robust record by 1972,
4 and you agreed with that before. Are you
5 disagreeing with that now?

6 A. No. Not disagreeing, no.

7 Q. Okay.

8 A. There's a record, yes.

9 Q. All right, sir. This will be
10 Exhibit 16. And you've seen that before. That's
11 a letter from Alice Blount to Luzenac, right?

12 A. Yes.

13 Q. And you know Luzenac is what later
14 became Imerys, their talc supplier?

15 A. That is correct, yes.

16 Q. Okay. Now, go to the bottom.

17 She says: As I told Slim Thompson,
18 I've analyzed many talc samples (only a few
19 reported), and often blind in that I did not know
20 their sources at the time the analyses were done.

21 I do not believe I am misrepresenting
22 these talcs. For individual deposits, the shape,
23 distribution and quantity remains fairly constant
24 over time.

25 Turn to the next page. She's got a

1 key. And we see Sample I is what?

2 A. It says "Windsor, Vermont's baby
3 powder."

4 Q. Johnson & Johnson has always told the
5 public that there's never been a single fiber of
6 asbestos in any of its talc, right?

7 A. In the baby powder products, Shower to
8 Shower products, yes.

9 Q. Correct, it told that to customers,
10 right?

11 A. Yes.

12 Q. You're not disputing that Johnson &
13 Johnson represented to doctors and nurses that
14 there was no asbestos in the product, correct?

15 A. I'm not disputing that, no.

16 Q. Okay. And this is McCrone writing
17 about a report of its investigation for asbestos
18 in talc to Windsor Mineral Company, correct?

19 A. Yes.

20 Q. Windsor Minerals was, of course, owned
21 by Johnson & Johnson, correct?

22 A. Yes.

23 Q. Okay. And that was the -- the company
24 that ran the mining out of the Vermont mines,
25 correct?

1 A. They did, yes.

2 Q. All right. And if you turn the page,
3 sir, it has a description of sample content of the
4 fines.

5 And you've told me that the fines
6 versus the sediment, the fines are what end up
7 going into the product, correct? The sediment
8 does not?

9 A. The sediment does not.

10 Q. They found, in their own words,
11 confirmed asbestos, visual. They found it in one,
12 two, three, four, five, six, seven, eight, nine
13 different samples, correct?

14 A. They found it in nine different
15 samples.

16 Q. Okay. And if you turn the page, sir,
17 to the sediment, they found it in one, two, three,
18 four, five different samples there. Correct, sir?

19 A. They found it in five different
20 samples.

21 Q. This is just -- just a few months
22 later. It's another report to Windsor Minerals
23 from McCrone, correct?

24 A. Yes.

25 Q. Okay. And it's dated November 5th,

1 1975, true?

2 A. Yes.

3 Q. They also have a report of fibers of
4 asbestos in the fines and in the sediment on the
5 second page. Correct, sir?

6 A. They do report their examination of
7 talc samples, yes.

8 Q. Okay. And their words they use is
9 "fibers of asbestos." Correct, sir?

10 A. They use those words.

11 Q. And they found in the fines one, two,
12 three, four, five, six, seven, eight, nine, ten
13 different results, right?

14 A. Yes.

15 Q. And in the sediment one, two, three,
16 four results for asbestos, correct?

17 A. Yes.

18 Q. Okay. Now go back to the front.

19 He actually says: This letter will
20 supplement a report of July 1975 on a series of
21 talc ore samples which we have analyzed for you.

22 Table 1 shows the actual fiber counts
23 and the approximate equivalent concentration in
24 parts per million of the amphibole particles which
25 we have found in these samples.

1 Some of these seem rather high. One
2 had ten and one had nine amphiboles. Most of
3 these come in bundles of one, two or three fibers
4 with anywhere from two to five amphiboles in a
5 bundle.

6 Now, sir, you know that if you see
7 asbestos in a bundle it's not nonasbestos, if it's
8 in bundles?

9 A. That's a reasonable explanation.

10 Q. Johnson & Johnson is also aware that
11 McCrone repeatedly reported finding asbestos in
12 Johnson & Johnson-sourced talc in the '70s, '80s,
13 and '90s, correct?

14 A. As I said a little while ago,
15 Johnson & Johnson has -- had several talc mines
16 and talc ores, so it would not be unusual to find
17 traces of asbestos in industrial talcs.

18 Q. That's the January 14th, 1975, letter
19 authored by Mr. Zeitz, who is the manager of
20 research and development at Windsor, correct?

21 A. Yes, he was. Yes.

22 Q. And it talks about a six-month ore
23 study on asbestiform content, true?

24 A. Yes.

25 Q. Okay. And the highlighted portion

1 there says that: The samples represented by both
2 the industrial materials produced at Gassetts and
3 the West Windsor mill sites and the ore used in
4 the cosmetic production (HC). Correct?

5 A. That's what is written, yes.

6 Q. Okay. And we saw -- in the results
7 from July and November of 1975, we saw asbestos
8 reported by McCrone in both the GI, WI, and HC
9 designated samples, correct?

10 A. Correct.

11 Q. In the mid 1970s, there was one ore
12 body. It was Hammondsville, true?

13 A. In the West -- in the West Windsor,
14 yes, there was one ore body for cosmetic talc.
15 I'm -- I'm now aware that there are other -- other
16 mine areas that were used in West Windsor that
17 were industrial mines --

18 Q. Sir --

19 A. -- and they owned other mines.

20 Q. And the FDA finds -- and what the FDA
21 finds is 107 fibers of tremolite per milligram,
22 right?

23 Answer: That's what it says, right?

24 A. That's what it says, yes.

25 Q. Okay. And, of course, I asked you,

1 and I'm sure you still know the answer, how many
2 milligrams are there in a -- in a gram?

3 A. A thousand.

4 Q. A thousand. So if they're finding 107
5 fibers of tremolite per milligram, that's 107,000
6 fibers of tremolite per gram, correct, sir?

7 A. Yes.

8 Q. And that's what the FDA found,
9 correct?

10 A. That's what was reported in --

11 Q. Okay.

12 A. -- in the 1970s.

13 Q. So Johnson & Johnson has a
14 zero-tolerance policy for any asbestos in its
15 talc, correct?

16 A. Yes.

17 Q. The reason is that no mother or father
18 would ever buy talc for use on themselves or their
19 children if they knew it had a single fiber of
20 asbestos in it, correct?

21 A. Yes.

22 Q. Johnson & Johnson knows that asbestos
23 in its talc could make people sick because
24 Johnson & Johnson knows asbestos is a carcinogen
25 and can cause mesothelioma, correct, sir?

1 A. That is correct.

2 Q. And Johnson & Johnson knows there's no
3 safe level of asbestos exposure, especially for
4 children, correct, sir?

5 A. Again, there is no known safe level.

6 Q. That's right. Especially for
7 children, correct?

8 A. Yes.

9 Q. Johnson & Johnson would never have
10 advocated for test methods that allowed asbestos
11 to be present, would they have?

12 A. Again, it's speculation. Without
13 knowing what such methods were or whether they
14 were relevant or validated, it's speculation.

15 Q. And so he proposes this. Johnson &
16 Johnson, you've already told me, understands that
17 any asbestos could be dangerous if it was allowed
18 in the talc, correct?

19 A. Yes, but it was always Johnson &
20 Johnson's policy to have zero asbestos.

21 Q. This is from Johnson & Johnson, okay,
22 to Dr. Nashed -- to Dr. Schaffner at the FDA,
23 right?

24 A. Yes.

25 Q. And this isn't a memo of a meeting.

1 This is a direct communication between Johnson &
2 Johnson and the FDA, true?

3 A. Yes.

4 Q. Okay. Let's see what Johnson &
5 Johnson concluded and communicated to the FDA.
6 The calculation shows that a substantial safety
7 factor can be expected with talc containing
8 1 percent asbestos fibers. Right? And w/w means
9 weight for weight, right?

10 A. It does.

11 Q. Therefore, methods capable of
12 determining less than 1 percent asbestos in talc
13 are not necessary to assure the safety of cosmetic
14 talc, correct?

15 A. Based -- based on that calculation, as
16 requested by the FDA, that was the authors'
17 summary, conclusion.

18 Q. And that's -- that's Dr. Nashed, and
19 he -- he plus Dr. Ashton were the main two guys at
20 Johnson & Johnson that were sort of driving the
21 issues having to do with talc and asbestos,
22 correct?

23 A. Yes.

24 Q. Okay. And he writes to the FDA and
25 says: Methods capable of determining less than

1 1 percent asbestos in talc are not necessary to
2 assure the safety of cosmetic talc, correct?

3 A. That was his opinion.

4 Q. That's Johnson & Johnson's opinion
5 communicated to the FDA, correct?

6 A. That was -- that was what he wrote.

7 Q. So they're sort of saying something
8 different to the FDA than you're telling me that
9 they believed internally; is that true?

10 A. My -- my interpretation of what
11 they're saying is, following a request from FDA to
12 do a hypothetical calculation, that even assuming
13 there's 1 percent asbestos in talc, it would still
14 be what was recognized at that time to be safe.
15 Having said that, the company's policy was and
16 still is no detectable asbestos.

17 Q. The question is: Johnson & Johnson,
18 according to you, had a policy of zero tolerance
19 internally of none detected. They were not
20 advocating that to the FDA. They were advocating
21 something different, correct, sir?

22 A. My interpretation is that they were,
23 in a sense, reassuring FDA that even if there were
24 1 percent asbestos, it would still assure the
25 safety.

1 Q. They say something pretty direct.
2 They say: Methods capable of determining less
3 than 1 percent asbestos in talc are not necessary
4 to assure the safety of cosmetic talc.

5 Can we agree that they said that?

6 A. They said that.

7 Q. Johnson & Johnson communicated with
8 the FDA hundreds of times, right?

9 A. There was a strong dialogue with FDA,
10 yes.

11 Q. Right. They provided thousands of
12 pages of data, right?

13 A. They did, yes.

14 Q. Question: The FDA at no time has had
15 any right to go into a company's files to
16 investigate cosmetic talc, correct?

17 Your answer: Correct.

18 Page 166 at the top. 166, sir.

19 A. Okay. Yes.

20 Q. Was that your answer, sir?

21 A. That's what -- that's what I said,
22 yes.

23 Q. You see this is the meeting of the
24 talc subcommittee of the CTFA, March 15th, 1976?

25 A. Yes.

1 Q. So the FDA said, "Would you share your
2 periodic analyses with us?"

3 And the CTFA said, "We'll seriously
4 consider it." Right?

5 A. That is what is written.

6 Q. And that would be a responsible thing
7 to do, right?

8 A. To seriously consider it.

9 Q. This is March 31st, '76. This is 16
10 days later, right?

11 A. Yes.

12 Q. Right. Johnson & Johnson is at this
13 meeting too, correct?

14 A. Yes, they're one of a dozen, maybe
15 more than a dozen people there.

16 Q. The subcommittee agreed on the success
17 of the presentation of summary reports given to
18 the FDA. Dr. Estrin suggested the subcommittee
19 should not obligate itself to give periodic
20 reports to FDA but urged members to build their
21 database so that at some time in the future the
22 subcommittee can decide whether the time is right
23 to present FDA with an update on industry
24 analysis.

25 Did I read that right?

1 A. You did, yes.

2 Q. When did Johnson & Johnson begin to
3 give periodic reports of their actual internal
4 analyses to the FDA?

5 A. I don't know.

6 Q. They never did, did they?

7 A. I don't -- I don't know, and I'm not
8 going to speculate.

9 Q. I'll ask it slightly differently.
10 What evidence do you have that they did provide
11 periodic reports of all of their analyses of their
12 talc to the FDA?

13 A. I don't have that evidence here.

14 Q. You're not aware of any evidence that
15 they ever did, correct?

16 A. I -- I don't have the answer to that.

17 Q. Okay. If you don't have the answer,
18 you don't have any evidence that they ever did,
19 correct?

20 A. Again, I don't have the evidence. I
21 don't have --

22 Q. Right.

23 A. -- the evidence.

24 Q. Okay. All right. Now, the FDA wanted
25 to regulate asbestos in talc in the early 1970s.

1 They even proposed a regulation, correct, sir?

2 A. Yes.

3 Q. You were asked this question on
4 August 17th: The closest we saw to them getting
5 there was the FDA's proposed regulation in '73,
6 which the CTFA convinced them not to go forward
7 on -- on the promise of self-regulation, correct?

8 And your answer was: Yes.

9 MR. BICKS: All right.

10 THE WITNESS: Yes --

11 BY MR. PANATIER:

12 Q. Okay. All right.

13 A. -- no, that's fine. That's what I'm
14 saying. CTFA is a self-regulating body, so the
15 promise would be to go -- go forward to
16 self-regulate.

17 Q. Right. It's not governmental
18 regulation, correct?

19 A. That's correct, yes.

20 Q. Now, Johnson & Johnson was very keen
21 on trying to get their method out before the FDA
22 got a method out, correct?

23 A. Well, Johnson & Johnson was a member
24 of CTFA who were working on a methodology with --
25 in -- in agreement with FDA to develop

1 methodologies so that they were keen to get
2 everyone agreeing on -- on a good test method.

3 Q. Johnson & Johnson was concerned that
4 the FDA would propose and regulate using a very
5 sensitive method, correct?

6 A. I -- I don't have that. If you've got
7 a document which says that Johnson & Johnson is
8 concerned, then let's see it.

9 Q. Do you see this memo -- internal memo
10 at Johnson & Johnson, sir?

11 A. Yes.

12 Q. Right? And they're writing to the
13 CTFA and someone at Clairol, right?

14 A. Yes.

15 Q. And what Johnson & Johnson says is:
16 The tac [sic] -- talc task force has completed the
17 process of development of analytical procedures
18 for determining the presence of chrysotile and
19 tremolite in talc.

20 We believe it is critical for the CTFA
21 to now recommend these methods to the FDA before
22 the art advances to more sophisticated techniques
23 with higher levels of sensitization.

24 Did I read that right?

25 A. You read what was written, yes.

1 Q. They wanted to get their method out
2 there before more sensitive methods came along.
3 That's literally what they say, isn't it?

4 A. Again, it's what -- it's what is
5 written.

6 Q. This is an October 15 report, 1974.
7 '74, that's mid-'70s, right?

8 A. More or less. Not quite, but, yes.

9 Q. And this memo is entitled "Talc/Powder
10 Safety Studies Review Meeting."

11 And there's a bunch of people at this
12 meeting, right?

13 A. Yes.

14 Q. Those are all J&J people? They're not
15 FDA people?

16 A. Yes.

17 Q. Okay. If you will go to the second
18 page, sir, please, under "Asbestos Identification
19 CTFA Task Force."

20 Do you see that?

21 A. Yes.

22 Q. It says: The analytical schemes
23 utilizing X-ray diffraction and DTA proposed by
24 the task force were outlined. Grave concern was
25 expressed by the meeting with the inclusion of TEM

1 as an alternative followup to optical dispersion
2 if the sample fails DTA and passes optical.

3 So they expressed grave concern about
4 the use of TEM, right?

5 A. Well, this particular individual
6 expressed grave concern. And --

7 Q. And who is that particular individual?

8 A. Mr. Lee.

9 Q. Right. And who is Mr. Lee?

10 A. He was a scientist.

11 Q. Right. Now, you know that the
12 method -- the methods that were actually adopted
13 by the CTFA and Johnson & Johnson for the
14 detection of asbestos in talc actually had some
15 serious shortcomings. Did they not?

16 A. The methods adopted, CTFA J4 method,
17 is the one that's still used today. It's also
18 used in the U.S. Pharmacopeia. So it has -- it
19 has a lot of the history of valid use. So I'm not
20 sure where the shortcomings are.

21 Q. Does it look for chrysotile?

22 A. It doesn't -- it doesn't look for
23 chrysotile specifically.

24 Q. Okay. Now, you know that CTFA did a
25 round-robin to, as you would say, try to

1 validate --

2 A. Yes.

3 Q. -- J4, correct?

4 A. Yes.

5 Q. Do you see, sir, that this is dated
6 January 20th, 1977? It's a progress report to the
7 CTFA scientific advisory committee concerning the
8 task force on round-robin testing of consumer
9 talcum products, right?

10 A. Yes.

11 Q. Okay. And you can see down on the
12 second page -- go ahead and go to the second page,
13 sir -- they identify that they're going to spike
14 two samples, two standard talc samples, with
15 asbestos, and then they're also going to use seven
16 different then-being-manufactured cosmetic talc
17 products.

18 Do you see that?

19 A. Yes.

20 Q. Okay. So J&J is telling CTFA to
21 destroy his copy of the table once he looks at it,
22 right?

23 A. Yes, it's what's written.

24 Q. These were tests for asbestos of
25 then-being-manufactured talc products, correct?

1 A. They're -- if you go back to the
2 previous exhibit, what -- what we said was the --
3 the point is to verify instrument detection
4 sensitivity. That's Exhibit 32.

5 So my read of that is that you --
6 you're looking at how confidential that should be.
7 If you're verifying the detection sensitivity of
8 one manufacturer versus another, you -- you may
9 not want that to be public -- public knowledge.
10 It's competitive information, so...

11 Q. And, by the way, we know Johnson &
12 Johnson was one of the products tested, right?

13 A. Yes.

14 Q. All right, sir. This is a memo from
15 April 21, 1977, from John Schelz to participants
16 of the round-robin, right, where they were trying
17 to validate J4-1.

18 A. Yes.

19 Q. Two or three of the labs have found
20 that three of the different products, the
21 commercial products, have failed J4-1, correct?

22 A. He's reporting that, yes.

23 Q. Those round-robins were being done on
24 then-current-production products, correct?

25 A. Yes. But we did use an optical light,

1 microscopy polarized light.

2 Q. We understand. Optical light became
3 part of CTFA, right?

4 A. Polarized lights, yes.

5 Q. Now, you know that, as a result of the
6 round-robin that was conducted, Mr. Schelz from
7 Johnson & Johnson actually concluded that they had
8 no assurance after the round-robin that it was
9 accurate, reliable or practical, correct?

10 A. Let's read that. Can we read which
11 document --

12 Q. Yeah, sure. Here, I'll give this to
13 you.

14 Okay. So at the bottom, just go ahead
15 and read the highlighted portions for us.

16 A. Dr. Schelz opened the meeting by
17 asking participants to introduce themselves.

18 And then it says: The task force
19 objective as.

20 Q. Okay.

21 A. 1, determining whether or not any 1976
22 production of talc contain asbestiform amphibole
23 contaminants.

24 And, 2, test and verify the CTFA
25 method J4-1 for this purpose. Assurance that the

1 method is accurate, reliable and practical.

2 He then reported that these objectives
3 have not yet -- underlined "not yet" -- been
4 achieved.

5 Q. And that is in -- is that March or May
6 of '77?

7 A. May --

8 Q. May --

9 A. -- of '77.

10 Q. Okay. May of '77.

11 They -- using their method that they
12 adopted a year earlier in 1976, one of seven labs
13 identified the spiked tremolite, correct?

14 A. That is correct.

15 Q. I asked you this before. Johnson &
16 Johnson's stated policy is that because asbestos
17 is so dangerous, it will use the most sensitive
18 testing methods available, correct?

19 A. Yes.

20 Q. This is dated May 16th, 1973, correct,
21 sir?

22 A. Yes.

23 Q. The heading here is "Pre-Concentration
24 of Asbestos Followed By XRD Analysis, the Pooley
25 Method," correct?

1 A. He was experimenting at that time with
2 a concentration method, yes.

3 Q. Right. And what Johnson & Johnson
4 writes here is: This technique has not been
5 written up yet. But evidently, when applied to
6 Vermont talc, .05 percent of tremolite type is
7 found. The limitation of the method is that it
8 may be too sensitive.

9 Correct, sir?

10 A. That is what is written.

11 Q. Okay. You can set that aside.

12 When you're looking for something like
13 asbestos, you want the most sensitive technique to
14 be able to find it. Correct, sir?

15 A. You -- you want a sensitive
16 technique --

17 Q. Okay.

18 A. -- to find asbestos, yes.

19 Q. Sir, you know that your own
20 consultants recently have said that Johnson &
21 Johnson's method for looking for asbestos in talc
22 by TEM is not optimal, correct?

23 A. I'm not aware of that.

24 Q. Okay.

25 A. No. I'm not aware of that at all.

1 Q. Do you see the date on this? It's a
2 contract manufacturing audit report of RJ Lee,
3 March 12 -- March 2012, right?

4 A. Yes.

5 Q. And you told me when I first showed
6 you this back in August that Johnson & Johnson
7 does audits of its different vendors, correct?

8 A. Yes.

9 Q. Okay. Go ahead and turn to the
10 page -- it's 5 of 7. And do you see, under
11 "Observation from the Audit," it says: There was
12 evidence of deficiencies in the document control
13 process.

14 But go down to Number 4.

15 It says: There was no current TM7024
16 for asbestos at the site.

17 Now, that's Johnson & Johnson's test
18 method, correct?

19 A. Yes.

20 Q. Okay. RJ Lee also indicated that the
21 test method was not an optimal method for asbestos
22 testing.

23 Did I read that right?

24 A. You read what was written.

25 Q. Okay. And so you are aware now that

1 RJ Lee has said that your test method for asbestos
2 is not optimal; is that correct?

3 A. Well, TM7024 is one of several test
4 methods for asbestos.

5 Q. It's Johnson & Johnson's only TEM test
6 method, correct?

7 A. It -- it is the TEM method that's
8 used, yes.

9 Q. Now, first of all, there's never been
10 a warning about asbestos on any Johnson & Johnson
11 talc product, correct?

12 A. Correct.

13 Q. All right. And the truth is that
14 Johnson & Johnson never shared its positive
15 findings for asbestos, any positive findings, in
16 its talc ore bodies with the FDA, correct?

17 A. I don't know the answer to that.

18 Q. Okay.

19 A. I do know that extensive documentation
20 was supplied to FDA.

21 Q. Johnson & Johnson certainly provided
22 dozens or even hundreds of reports and literature
23 that it chose to send to the FDA, correct?

24 A. They did, yes.

25 Q. Okay. As you sit here right now, can

1 you tell us how many of the positive results were
2 actually supplied to the FDA?

3 MR. BICKS: By Johnson & Johnson?

4 MR. PANATIER: By Johnson & Johnson.

5 That's right.

6 THE WITNESS: I don't have an answer
7 to that. I don't know.

8 BY MR. PANATIER:

9 Q. Same question for JJCI.

10 A. It's the same answer.

11 Q. Okay. And by the early '70s, just
12 with regard to tremolite, okay, Johnson & Johnson
13 had numerous supports of tremolite in its Vermont
14 and Italian ore, correct?

15 A. Correct.

16 Q. Johnson & Johnson actually knew that
17 it couldn't get rid of elongated tremolite and
18 actinolite that it was finding in its talc ore,
19 correct?

20 A. On what basis? You'd need to clarify
21 that.

22 Q. If you look at Page 427, Line 9, you
23 were asked this question: Now, Johnson & Johnson
24 acknowledges that their flotation, their
25 beneficiation processes, were never able to remove

1 all asbestiform or asbestos to the extent it was
2 present, correct?

3 And what was your answer?

4 A. Correct.

5 Q. Okay. Now, Johnson & Johnson tried
6 all sorts of different methods to try to get rid
7 of asbestiform minerals it was finding, correct?

8 A. They -- they used flotation process as
9 a means of improving the quality of talc, yes.

10 Q. They -- it -- and it does improve it,
11 correct?

12 A. It does, yes.

13 Q. But they knew it couldn't get rid of
14 all the asbestiform minerals that were present to
15 the extent that they were found, correct, as you
16 stated in your deposition?

17 A. That's -- that's a reasonable -- a
18 reasonable summary.

19 Q. Johnson & Johnson tried flotation,
20 thermal decomposition, and even destruction to try
21 to get rid of tremolite that it was finding,
22 correct?

23 A. Well, I would not use the word
24 "tremolite." We -- we use the word "asbestiform"
25 or "asbestos."

1 Q. All right. And that's fine. I'm
2 asking you now -- I'm asking you another question
3 based on other documents you and I have talked
4 about. I'm not talking about the deposition.

5 A. Okay.

6 Q. So -- so the question is this:
7 Johnson & Johnson -- and, typically, it was with
8 Pooley and the Colorado School of Mines. They
9 asked Pooley and the Colorado School of Mines to
10 attempt thermal decomposition of chrysotile and
11 tremolite, correct?

12 A. Yes.

13 Q. And they asked Pooley to destroy the
14 tremolite that was present, correct?

15 A. Yes.

16 Q. And then they even tried to add
17 certain reagents to their flotation, correct?

18 A. To improve the separation, yes.

19 Q. Right. To try to pull any
20 asbestiforms out of it, right?

21 A. The aim of the flotation process was
22 to improve the quality of the talc, which floats
23 to the top of the product.

24 Q. I asked you whether or not the people
25 who were running the flotation endorsed a new

1 reagent system in the middle of the '70s to
2 improve the safety of the talc they were making.
3 Did they do that?

4 A. They -- they tried -- they evaluated
5 several different reagent systems.

6 Q. All right, sir. You and I have been
7 through this document before, correct?

8 A. Yes.

9 Q. It's entitled "Confidential, New
10 Reagent Systems - Plant Trial at Windsor
11 Minerals," right?

12 A. Yes.

13 Q. And under the introduction on the
14 second page, it says: Windsor Minerals has been
15 actively engaged in a froth flotation research
16 program for the past year and a half. This
17 program has developed two flotation reagent
18 systems which offer substantial advantages to the
19 Windsor flotation process from an economic, purity
20 and potential health hazard point of view. Right?

21 A. Yes.

22 Q. All right. Do you see near the top of
23 the page it says January 29, 1974, the second or
24 third paragraph?

25 A. Yes.

1 Q. Okay. Under summary and remarks, the
2 second paragraph says: The use of citric acid in
3 the depression of chrysotile asbestos and other
4 mineral species has been developed at Windsor
5 Minerals in response to the potential need for a
6 means to exclude extremely low levels of these
7 contaminants from the finished product of the
8 beneficiation process.

9 Did I read that right, first of all?

10 A. You did, yes.

11 Q. And he goes on. He says: The use of
12 these systems is strongly urged by this writer to
13 provide the protection against what are currently
14 considered to be materials presenting a severe
15 health hazard and are potentially present in all
16 talc ores used at this time.

17 Did I read that right?

18 A. Yes. He used the word "potentially
19 present."

20 Q. Yeah.

21 A. Yes.

22 Q. And he is endorsing the use of these
23 reagents in order to help with that, correct?

24 A. That's -- that's his opinion, yes.

25 Q. All right. Do you agree that fibrous

1 anthophyllite and chrysotile asbestos have been
2 found in association with the Hammondsville ore
3 body?

4 A. I'd -- I'd need to see the results
5 before --

6 Q. Okay. Sure. This is --

7 A. -- I comment on that.

8 Q. Can you read that highlight for us
9 aloud?

10 A. Although the data was accumulated for
11 specific mineral species, fibrous anthophyllite,
12 the same results can be predicted for other
13 fibrous amphibole minerals and chrysotile asbestos
14 found in association with the Hammondsville ore
15 body whose surfaces expose a substantial
16 concentration of magnesium and hydroxyl groups as
17 reactive sites.

18 Q. And he is the one that's advocating
19 the endorsement of this new reagent system,
20 specifically to try to get asbestiforms out,
21 correct?

22 A. He is endorsing this as a means of
23 cleaning it up, yes.

24 Q. And this is a communication between
25 Nashed and the Department of Health, Education and

1 Welfare, correct?

2 A. It is, yes, yes.

3 Q. All right. And he's -- he's writing
4 to the federal government, isn't he?

5 A. Yes.

6 Q. And then he lists the assumptions,
7 right?

8 A. If these assumptions are permitted in
9 the regulation, they will be the basis for
10 regulation with regards to cosmetics and drugs
11 containing talc. The assumptions we believe to be
12 incorrect are talc --

13 Q. Number 1.

14 A. -- talc can be processed to remove
15 asbestiform particles.

16 Q. Okay. So we are going to stop there.

17 He says to the federal government: We
18 believe the assumption that talc could be
19 processed to remove asbestiform particles is
20 false, correct?

21 A. That's an incorrect assumption --

22 Q. Yes.

23 A. -- that he's stated.

24 Q. The assumption that is incorrect is
25 that it can be removed, correct?

1 A. Correct.

2 Q. Now, Johnson & Johnson actually wrote
3 to customers when customers had questions, didn't
4 they?

5 A. Yes.

6 Q. And what's the date of that?

7 A. November 27th, 1974.

8 Q. All right. And who's it from?

9 A. Someone called John Infante from the
10 medical services.

11 Q. Okay. And so he's writing to this
12 person who has written a letter, right?

13 A. It's a response to someone who's
14 written a letter, yes.

15 Q. So let's go to the first sentence I
16 highlighted: The talc ore then undergoes a
17 cleansing procedure known as "flotation" that
18 involves many separate washing operations to
19 remove any impurities which might be present.

20 They've already told the federal
21 government that they can't wash or float out all
22 the asbestiform, correct?

23 A. Yes.

24 Q. The question that we've been bandying
25 around here is: Johnson & Johnson made the

1 decision to write and say they washed the -- the
2 talc, right?

3 A. That was part of a paragraph --

4 Q. Okay.

5 A. -- yes.

6 Q. And the washing they're talking about
7 is the beneficiation process, correct?

8 A. Yes.

9 Q. Okay. You have said, as the corporate
10 representative for Johnson & Johnson, that
11 Johnson & Johnson acknowledges that their
12 flotation, their beneficiation process, was never
13 able to remove all asbestiform or asbestos to the
14 extent it was present, correct?

15 A. That is correct.

16 Q. Now, Johnson & Johnson has actually
17 done some experimental calculations where they've
18 estimated what the dose of asbestos a person would
19 get would be if they used talc that had a very
20 small bit of asbestos, about 10 parts per million,
21 correct?

22 A. I believe so, yes.

23 Q. Yes. And they calculated that that
24 would create a dose of between 4.5 to 9.3 fibers
25 per cc for the adult and .16 to .18 fibers per cc

1 in diapering a baby, correct?

2 A. I believe -- I believe that's --
3 that's been stated.

4 Q. Okay. And you and I have talked about
5 that two times before already. Fair?

6 A. We have, yes.

7 Q. Okay. Now, Johnson & Johnson funded
8 much of the scientific research that it now relies
9 on to defend itself in lawsuits, right?

10 A. Some research was supported by
11 Johnson & Johnson, yes.

12 Q. Scientific research should be unbiased
13 and independent, correct?

14 A. Yes.

15 Q. Okay. You know that Johnson & Johnson
16 initiated and funded the Rubino study in 1976,
17 correct?

18 A. They -- they helped fund the study,
19 yes.

20 Q. And they did that, they initiated it
21 and funded it, specifically so they could control
22 it, correct?

23 A. No. I don't think --

24 Q. This is a memo by D.R. Petterson at
25 Johnson & Johnson, right?

1 A. Yes.

2 Q. October 26th, 1973, true?

3 A. Yes.

4 Q. And the subject is: The
5 epidemiological study of workers in Italian talc
6 mines. Right?

7 A. Yes.

8 Q. That would be the Rubino study,
9 correct?

10 A. I would believe that's the case, yes.

11 Q. There weren't any others at that time,
12 correct?

13 A. I'm not aware of any others, no. No.

14 Q. Okay. Look at what -- look at what
15 Mr. Petterson puts on Number 1 right there.

16 He says: I think it important that we
17 originate this study and therefore control the
18 work. Right?

19 A. Well, the next sentence in that
20 point --

21 Q. Wait, wait, wait. I'm asking you
22 about -- I'm asking you about the sentence I asked
23 you about.

24 Did they say "control the work," sir?

25 MR. BRICKS: Answer the question.

1 THE WITNESS: The sentence states: I
2 think it's important that we originate this
3 study and therefore control the works.

4 BY MR. PANATIER:

5 Q. Let's be clear. Someone else, not
6 Rubino, would be reviewing the protocol. And this
7 is someone who would be proposed by Johnson &
8 Johnson, right?

9 A. Quite possibly, yes. But, again,
10 Professor Rubino, if he was not happy with the
11 protocol, would tell you where to take it. So --

12 Q. Did Johnson & Johnson say they should
13 initiate this study so they can control the work?
14 Did they say that?

15 A. They do not say that.

16 Q. Okay. Let's just read it, then,
17 because I think we're both having a little trouble
18 with English, then.

19 I think it important that we originate
20 the study and therefore control the work.

21 Did they say that?

22 A. That's what was written.

23 Q. All right, sir. Do you see that
24 that's the protocol for the Italian study?

25 A. It's called a "draft." It's a draft.

1 Q. Draft what?

2 A. Well, it's a draft of a -- of an
3 article which is called "Title: An
4 Epidemiological and Prospective Clinical Study of
5 Talc Millers of the Talc and Graphite Val Chisone
6 Company."

7 Q. Right. That's the draft protocol for
8 Rubino, correct?

9 A. It's just a draft.

10 Q. Okay. And then what does the
11 highlight say?

12 A. Workers who are observed to be acutely
13 ill or who are recovering from an acute illness
14 will not be immediately included in this study.

15 That's normal.

16 Q. Rubino was looking to see if people
17 were sick from --

18 A. He was.

19 Q. The first Rubino study was a morbidity
20 study, wasn't it?

21 A. A morbidity study. Have a look -- let
22 me have a look. This is a -- this is a morbidity
23 study.

24 Q. Right. And that means a study of
25 illness, right?

1 A. Yes.

2 Q. So anyone who was acutely ill was not
3 included in a study that was designed to look for
4 people who were ill, correct?

5 A. Depends on what kind of illness they
6 had. If they had a severe -- if they had a heart
7 attack or -- or a brain tumor or something, then
8 they would be acutely ill.

9 Q. Does --

10 A. So they'd be excluded.

11 Q. Does cancer make you acutely ill?

12 A. Usually, yes.

13 Q. This is a Johnson & Johnson memo,
14 October 30th, 1974, true?

15 A. Yes.

16 Q. Under the heading "The October 7th
17 Meeting": Rubino gave his talk before the 37th
18 Congress of the Italian Society of Occupational
19 Diseases.

20 So this is in Italy, right?

21 A. Yes.

22 Q. So Bill Ashton is saying that Rubino
23 carried out Hildick-Smith's instructions, correct?

24 A. Yes.

25 Q. And specifically didn't mention

1 Johnson & Johnson, true?

2 A. Or even Val Chisone.

3 Q. Or even Val Chisone, right?

4 A. Yes.

5 Q. Okay.

6 A. Yes.

7 Q. Now go to the next page, the
8 publication of the proceeding talk: Rubino asked
9 me to transport the Italian version to you so we
10 all can have the opportunity to comment on it or
11 adjust it for publication in Italy under the
12 proceedings of Rubino's society.

13 So we're not talking about translating
14 right now because they're talking about publishing
15 it in Italy, correct?

16 A. In the Italian version, yes.

17 Q. That's right.

18 I have some mineralogical comments
19 which I told to Stefano.

20 Now, Stefano was sort of the
21 go-between between Rubino and J&J, right?

22 A. He was the point of contact, yes.

23 Q. The first page of the article has to
24 be carefully revised. The mention of two genetic
25 sources of talc and the phrase which indicates

1 that talc of dolomitic origin has fibrous mineral
2 content must be deleted. It is important that
3 Rubino refer only to high-grade cosmetic talc and
4 avoid paragenetic mineral matters.

5 Did he write that?

6 A. That is what is written.

7 Q. So they said they wanted to initiate
8 the work so they can control it, correct?

9 A. Yes.

10 Q. They have reviewed the protocol,
11 Johnson & Johnson has, correct?

12 A. It would appear so, the draft
13 protocol.

14 Q. Right.

15 A. It's been reviewed, yes.

16 Q. Right. They have attended the meeting
17 where Rubino spoke at, correct?

18 A. In Italian, yes.

19 Q. They have -- they gave him
20 instructions not to mention Val Chisone or them,
21 correct?

22 A. Yes.

23 Q. They passed along -- Johnson &
24 Johnson, a company, passed along their edits
25 through a middleman to Rubino, correct?

1 A. 'Cause the middleman spoke Italian.
2 Johnson & Johnson didn't. Stefano is a -- the
3 point-of-contact man who spoke Italian as well as
4 English.

5 Q. The question is whether or not they
6 offered edits to Rubino.

7 A. They did.

8 Q. Do you see that this is a letter from
9 Johnson & Johnson, Hildick-Smith, to Umberto
10 Stefano, who is sort of a go-between between
11 Rubino and Johnson & Johnson, right?

12 A. Yes.

13 Q. Okay. Do you see the handwriting at
14 the top? It's to William Ashton, isn't it?

15 A. Yes.

16 Q. And it says: Bill, Gavin
17 Hildick-Smith informed me that Stefano is writing
18 the English manuscript for Rubino's Society of
19 Occupational and Environmental Health paper.
20 Stefano is to approach Rubino on this addition.
21 We all appreciate the delicacy of this approach.

22 Do you see that?

23 A. That's what's handwritten, yes.

24 Q. He literally says: I have taken the
25 liberty of including a discussion and conclusion

1 for Professor Rubino's paper.

2 Does he not? Is that what he says?

3 A. He does say that.

4 Q. Okay. And then at the top, he says:

5 We all appreciate the delicacy of this approach.

6 And the delicacy being that the
7 company has written a discussion and conclusion
8 for what is supposed to be an independent
9 researcher, correct?

10 A. What it states, a "handwritten letter"
11 relates to an addition, the approach on the
12 addition which we appreciate the delicacy of.

13 Q. Let me ask you this question. Does
14 Hildick-Smith or Bill Ashton or anybody else from
15 Johnson & Johnson, do any of them appear as the
16 co-author of Rubino's paper?

17 A. No.

18 MR. PANATIER: This will be
19 Exhibit 47.

20 BY MR. PANATIER:

21 Q. Here you go, sir.

22 All right, sir. March 31st, 1975.
23 Again, this is from Hildick-Smith to George Lee,
24 right?

25 A. Yes.

1 Q. Okay. It says: Attached are a letter
2 and manuscript received from Professor Rubino.
3 The manuscript is intended for publication in the
4 Journal of Occupational Medicine. The manuscript
5 should be scrutinized by our statisticians and
6 reviewed for factual accuracy.

7 Now, sir, Johnson & Johnson is now
8 reviewing Rubino's work before it's submitted to a
9 journal, correct? Correct?

10 A. Correct that they've been offered a
11 copy of the manuscript to review.

12 Q. In the scientific process, then,
13 before Professor Rubino even submits it for peer
14 review, a company, an international company that
15 makes the product from which -- from the mines
16 that he's looking at, is actually reviewing it?
17 Is that what's happening?

18 A. Well, you say a "company." The -- the
19 person who has received it is Dr. Hildick-Smith,
20 who is a very highly qualified medical
21 professional. And --

22 Q. At Johnson & Johnson?

23 A. At Johnson & Johnson, with ability and
24 expertise to comment. So he's received it and
25 he's commenting on it.

1 Q. Is Rubino independent still?

2 A. Yes.

3 Q. Rewrite is mine. I have in mind to
4 send the manuscript when edited for factual
5 accuracy to a science writer who will hold it in
6 confidence and -- what's the word he uses there?

7 A. And rewrite it.

8 Q. -- rewrite for the Journal of
9 Occupation Medicine, right?

10 A. Yes.

11 Q. Sir, Roger Miller, he was the
12 president of Windsor Millers -- Windsor Minerals,
13 correct?

14 A. He was, yes.

15 Q. Okay. Now, earlier in the day, I was
16 showing you some of the reports of where McCrone
17 found, quote, "confirmed asbestos," end quote,
18 fibers of asbestos in the ore.

19 And you said, "Well, it could have
20 come from Clifton."

21 Do you remember that?

22 A. Yes. There were -- there was an
23 industrial mine or mines, yes.

24 Q. Okay. And I asked you. I said, "Are
25 you saying that that mine was being run at that

1 time?"

2 And you said, well, you believed it
3 was, right?

4 A. And what date was that?

5 Q. That was 1975. And I'll let you look
6 at this, but then he says that Clifton ceased to
7 operate in 1973.

8 Do you disagree with that?

9 A. If that's what he stated, then --

10 Q. I'll let you look at it.

11 A. He was the president. Yes. He -- he
12 stated it was closed in '73.

13 Q. Sir, do you see that this is a
14 Johnson & Johnson memo? At the top, it says:
15 Worldwide Study?

16 Do you see that?

17 A. Yes.

18 Q. All right. And do you see at the very
19 bottom they're talking about the Italian studies,
20 right?

21 A. Yes.

22 Q. Italian data. It says: Develop
23 long-term human exposure data on the safety of
24 Italian talc through the Val Chisone Pinerolo
25 operations (oldest and largest records available

1 in the world).

2 And then it says: Purpose, to
3 maintain good name of talc and compromise
4 Selikoff-type allegations. Right?

5 A. You read what was written.

6 Q. Now, Dr. Selikoff was someone who had
7 come out in the 1960s and was sort of a pioneer
8 with regard to asbestos disease and people who
9 were exposed to it, correct?

10 A. He had -- he had published in the
11 '60s.

12 Q. Right. And Johnson & Johnson was
13 aware of his work in the '60s, correct?

14 A. That's a reasonable assumption, yes.

15 Q. Well, first of all, he was at
16 Mount Sinai, correct?

17 A. Yes, he was.

18 Q. This is a letter from Ashton to
19 Luzenac, and we have seen him write to Luzenac a
20 few times, right?

21 A. Yes.

22 Q. And here he's writing about an article
23 written by Paoletti in Italy, true?

24 A. Yes.

25 Q. Now, I'm sure you've read that article

1 by Paoletti, right?

2 A. Yes.

3 Q. And here Ashton is writing to Luzenac,
4 and he says: Attached is a copy of a paper which
5 is very important to the talc industry in your
6 territory. It alleges that a substantial number
7 of talcs contain fibers and/or asbestos. It is
8 published by a reputable organization in Rome. It
9 has just appeared in this month's issue of
10 "Regulatory Toxicology and Pharmacology" here in
11 the States. Right?

12 So that's our framework, which is,
13 he's talking about the Paoletti article where they
14 found asbestos and/or fibers in talcs from Italy,
15 true?

16 A. He is -- yes, he is talking about that
17 article, yes.

18 Q. Okay. So that's Bill Ashton. Now,
19 you know that he actually tried to come up with
20 ways to compromise Paoletti, didn't he?

21 A. I mean, I don't have evidence of that.

22 Q. There's Exhibit 51. Here's a copy.

23 All right. You see that, sir? This
24 is a month later, right?

25 A. Yes, it's a month later.

1 Q. The -- the letter that Ashton wrote to
2 Luzenac was September 26th, '84, and here he's
3 writing an internal memo, 10/23/84, right?

4 A. Yes.

5 Q. Okay. And can you see on the second
6 page under "Talc," he says: I spoke to some of
7 the ASTM and ISO officials about the uncomfortable
8 business aspects of the recent Paoletti article
9 hoping they might have some ideas on how to
10 compromise it.

11 Did he say that?

12 A. Yes.

13 Q. And a month earlier he acknowledged
14 that this had come from a reputable organization,
15 Paoletti's article, didn't he?

16 A. He did, yes.

17 Q. Johnson & Johnson was evaluating
18 alternatives to talc throughout the '60s, '70s,
19 and '80s, right?

20 A. Yes, they looked at cornstarch.

21 Q. Right.

22 A. Yes.

23 Q. This is entitled "Talc Alternatives,"
24 right?

25 A. Yes.

1 Q. It says, under "Background": There
2 are several reasons requiring an increase in
3 research for an acceptable alternative to talc in
4 our body dusting powders. Those reasons are
5 related to the increasing likelihood that the
6 following events will occur: Number 1, Federal
7 regulations. Right?

8 A. That's what is written.

9 Q. Okay. And then: Number 3, Increased
10 pressure from consumer advocates can require such
11 high expenditures for technical support needed to
12 compromise them that our profits can approach
13 diminishing returns.

14 Did I read that right?

15 A. You read what was written.

16 Q. Third time someone at Johnson &
17 Johnson has used the term "compromise" in terms of
18 either scientists or consumer advocates, correct?

19 A. Correct. And I've said before that
20 the word "compromise" in this speaker's meaning,
21 in my view, comes out to challenge.

22 Q. They keep choosing the word
23 "compromise," though; isn't -- isn't that true?

24 A. I presume it's the same individual,
25 but the answer is: He uses that word.

1 Q. Yeah, you -- you presume it's -- it's
2 Bill Ashton, correct?

3 A. I don't have evidence, but -- on this
4 particular one, there's no author. But on the
5 others, it was Mr. Ashton.

6 Q. You've been given a document -- an
7 internal document from Johnson & Johnson, dated
8 April 9th, 1969. Do you see that?

9 A. '69, yes.

10 Q. And it is -- the subject is:
11 Alternative domestic talc sources. And it says:
12 File Number 101.

13 And I've shown you this before, right?

14 A. I believe so, yes.

15 Q. Okay. This is from Bill Ashton, true?

16 A. Correct.

17 Q. He's writing to Dr. Hildick-Smith.

18 Now, Dr. Hildick-Smith, was he a medical doctor?

19 A. Yes, he was.

20 Q. Okay.

21 (Video stopped.)

22 MR. ADAMS: Your Honor, I'm sorry to
23 interrupt. I don't know if we want to take
24 another just brief break or just keep
25 plowing through. But I know some folks

1 might be feeling a little tired. It's a
2 lot of video.

3 THE COURT: Well, I am trying -- I am
4 trying very hard to not keep them past 5:00
5 because that's what I told them I was going
6 to try to do, and I'm sticking with that.

7 Would y'all like to stand up and kind
8 of stretch for a minute, or do you want a
9 break? If you want a break, that's fine.
10 Or how about just stand up for a minute and
11 let's kind of stretch.

12 THE BAILIFF: I have a few that need
13 to go to the restroom.

14 THE COURT: Well, that's good. That's
15 fine. Let's take a break -- let's take a
16 ten-minute break. I think that's better.

17 (The jury exits the courtroom at
18 4:31 p.m.)

19 THE COURT: All right. Be at ease.

20 * * *

21 (Whereupon, there was a recess in the
22 proceedings from 4:31 p.m. to 4:39 p.m.)

23 * * *

24 THE COURT: All right. Good. Bring
25 the jury.

1 (The jury enters the courtroom at
2 4:39 p.m.)

3 THE BAILIFF: The jury is seated,
4 Your Honor.

5 THE COURT: Thank you, sir.

6 All right. We are going to play the
7 remaining portion that the plaintiffs have
8 designated out of Mr. Hopkins's testimony.
9 I'm thinking it will wrap up about 5
10 minutes or 10 minutes after 5:00. I will
11 then dismiss you for the day.

12 Weather looks very decent and
13 promising. There's going to be some rain.
14 But the wind is low. It's going down
15 tonight. I believe tomorrow will be fine.

16 We'll revisit everything tomorrow.
17 But so far, what I've looked at and one of
18 our folks here has looked at on various
19 platforms indicates that Wednesday,
20 Thursday and Friday may be okay. So we'll
21 all keep looking. But your safety is
22 paramount, and it always will be.

23 All right. You may continue.

24 (Playing video.)

25 BY MR. PANATIER:

1 Q. You've been given a document, an
2 internal document from Johnson & Johnson dated
3 April 9th, 1969. Do you see that?

4 A. '69, yes.

5 Q. And it is -- the subject is:
6 Alternative domestic talc sources. And it says:
7 File Number 101.

8 And I've shown you this before, right?

9 A. I believe so, yes.

10 Q. Okay. This is from Bill Ashton, true?

11 A. Correct.

12 Q. He's writing to Dr. Hildick-Smith.
13 Now, Dr. Hildick-Smith, was he a medical doctor?

14 A. Yes, he was.

15 Q. Okay. He says: Pete, we have to firm
16 up the position the company should have on the
17 presence of mineral tremolite in talc. Your staff
18 will have to do this for us since the obligations
19 to that mineral have been mainly medical or
20 clinical as opposed to chemical or physical.

21 The reason we have to firm up our
22 position is that we have moved into high gear on
23 some alternative talc sources, and it is normal to
24 find different levels of tremolite in many U.S.
25 talcs.

1 And, in fact, sir, we have -- you and
2 I have gone through numerous tests where tremolite
3 has been found in Johnson & Johnson's Italy and
4 Vermont talcs, correct?

5 A. What we do know is that in the -- the
6 mines there may be presence of tremolite,
7 nonasbestos tremolite, yes.

8 In this document written in '69,
9 that -- they use that word, yes.

10 Q. Historically, in our company,
11 tremolite has been bad because it has needle-type
12 crystals. Our position has been that these can
13 stand on end, penetrate the skin and cause
14 irritation; consequently, talcs exceeding trace
15 contents have never been approved.

16 Over the past year or two, the medical
17 literature has made reference to potential hazards
18 of talcs containing tremolite. And I have seen
19 some articles under the umbrella of environmental
20 health agencies from here and abroad which
21 pinpoint severe objections to the mineral in
22 talcum powders.

23 So now they're talking about a health
24 response to tremolite, correct, sir?

25 A. Well, they -- they're saying that the

1 medical literature has made reference to potential
2 hazards of talc.

3 Q. Sure. Then he says -- then he says:
4 Some varieties of it -- meaning tremolite -- match
5 asbestos, and I gather there has been a lot of
6 attention given to the hazards of inhaling
7 minerals of that type lately.

8 There is nothing we can do about the
9 confused state of affairs on tremolite from the
10 mineralogical and chemical points of view as far
11 as historical literature is concerned. The
12 question is: How bad is tremolite medically, and
13 how much of it can safely be in a talc base we
14 might develop?

15 Right? He asks those questions of the
16 medical department of Johnson & Johnson, true?

17 A. Yeah.

18 Q. Thank you.

19 A. Not an unreasonable question to -- to
20 raise.

21 Q. I agree. Let's see what the answer
22 is, okay? So he receives an answer about six days
23 later. Do you see that, that there is a response
24 from T.M. Thompson, M.D.?

25 A. Yes.

1 Q. And the doctor inside Johnson &
2 Johnson writes back to Bill Ashton. And this,
3 again, it says -- it has a project code 101,
4 right?

5 A. Yes.

6 Q. The doctor says: Your inquiry of
7 April 9th, 1969, addressed to Dr. G. Hildick-Smith
8 has been referred to my attention for reply. Over
9 the years, I've reviewed the literature on hazards
10 relating to inhalation of talc particles on
11 several different occasions.

12 In your memorandum, you indicate that
13 tremolite does have needle-type crystals and that
14 our position has been that these could penetrate
15 the skin and cause irritation.

16 Actually, to the best of my knowledge,
17 we have no factual information on this subject.
18 It would seem logical that it could occur,
19 although whether or not it would be of clinical
20 significance would be conjectural.

21 So the doctor at Johnson & Johnson
22 actually says, the whole point of poking your
23 skin, we don't really have data on that, right?

24 A. That's -- that's true today.

25 Q. Okay.

1 A. Yes.

2 Q. We have been concerned to a much
3 greater extent with regard to possible dangers
4 relative to the inhalation of the talc with a
5 spicule or a needle-like crystalline structure as
6 compared to the flat platelet-type crystalline
7 structure.

8 Furthermore, we have occasionally
9 received inquiries from various individuals,
10 including General Johnson --

11 Now, he was an executive at Johnson &
12 Johnson, right?

13 A. He was, yes.

14 Q. -- and several pediatricians
15 expressing concern over the possibility of the
16 adverse effects on the lungs of babies or mothers
17 who might inhale any substantial amounts of our
18 talc formulations.

19 So not only have people inside the
20 company been concerned about dangers to breathing
21 this, but pediatricians and mothers, correct?

22 A. Okay. Yes. We've --

23 Q. Okay.

24 A. -- received inquiries from General
25 Johnson and several pediatricians. They were --

1 they were the only two who've raised that
2 question, yes.

3 Q. Okay.

4 In the past, we have replied to the
5 effect that since our talc is essentially all of
6 the platelet-type crystalline structure and is of
7 a size that would not likely -- not be likely to
8 enter the pulmonary alveoli -- those are the air
9 sacs in the lungs.

10 A. In the very bottom of the lungs, yes.

11 Q. We would not regard the usage of our
12 powders as presenting any hazard.

13 Obviously, if we do include tremolite
14 in more than unavoidable trace amounts, this sort
15 of negation of such inquiries could no longer
16 pertain.

17 In other words, if they had any more
18 than trace amounts of tremolite, you couldn't go
19 around saying that the stuff was safe, right?

20 A. That's what Dr. Thompson wrote in
21 1969.

22 Q. Let's skip to the big paragraph there
23 on the second page.

24 Since pulmonary diseases, including
25 inflammatory fibroplastic and neoplastic

1 diseases -- now, that's cancer, right?

2 A. Yes.

3 Q. -- appear to be on the increase, it
4 would seem to be prudent to limit any possible
5 content of tremolite in our powder formulations to
6 an absolute minimum.

7 To the best of my knowledge, we have
8 never been faced with any litigation involving
9 either skin or lung penetration by our talc
10 formulations.

11 Some years ago, we were faced with a
12 more or less serious problem resulting from what
13 we consider to have been an unjust accusation of
14 danger due to the presence of a small amount of
15 boric acid in our talc.

16 This created such a furor that we were
17 more or less compelled to remove boric acid from
18 the formulation.

19 It is conceivable that a similar
20 situation might arise if it became known that our
21 talc formulations contained any significant amount
22 of tremolite.

23 Since the usage of these products is
24 so widespread and the existence of pulmonary
25 disease is increasing, it is not inconceivable

1 that we could become involved in litigation in
2 which pulmonary fibrosis or other changes might be
3 rightfully or wrongfully attributed to inhalation
4 of our powder formulations. I'll stop right now.

5 In 1969, Johnson & Johnson's company
6 doctor warned Johnson & Johnson about possible
7 litigation because of what was in the product,
8 correct?

9 A. He said what might be in the
10 product --

11 Q. That's right.

12 A. -- if it contained any significant
13 amounts of tremolite.

14 Q. Right. And the doctor warned you,
15 Johnson & Johnson, about that in 1969, true?

16 A. If it contained -- if it contained
17 significant amounts of tremolite.

18 Q. Okay.

19 A. Yes.

20 Q. It might be that someone in the law
21 department should be consulted with regard to the
22 defensibility of our position in the event that
23 such a situation could ever arise.

24 It is my personal feeling that until
25 we have at least substantial evidence, based on

1 animal work, to the effect that the presence of
2 tremolite in our talc does not produce adverse
3 effects, we should not extend its usage beyond an
4 absolute minimum previously mentioned.

5 Is that what the doctor from Johnson &
6 Johnson said?

7 A. He did state that, yes.

8 Q. How many other times after this did
9 Bill Ashton consult with Dr. Thompson?

10 A. I don't know.

11 Q. After any of the positive test results
12 that came back from the '70s or '80s, were any of
13 those sent to Dr. Thompson?

14 A. I don't know. I don't think he was
15 still employed in the '80s in -- in Johnson &
16 Johnson.

17 Q. Now, Johnson & Johnson has never
18 attempted to follow the customers of Johnson &
19 Johnson who purchased talc to see if they
20 developed any disease, correct?

21 A. I'm not aware of that.

22 Q. Isn't it true, sir, that in the
23 mid-1970s Johnson & Johnson actually went to the
24 FDA and told them that their belief was that a
25 substantial amount of asbestos could be safely

1 allowed in baby powder?

2 A. That's not how I've seen the
3 phraseology.

4 Q. This is a memo from January 18th,
5 1974, true?

6 A. Yes.

7 Q. Okay. And this is a memo, a Johnson &
8 Johnson memo. It's authored by Hildick-Smith and
9 Nashed. And it's about a meeting that they had
10 with the commissioner of the FDA, right?

11 A. Yes.

12 Q. Okay. And look at the second page,
13 please, sir. There's a paragraph about
14 Dr. Eiermann.

15 And what Johnson & Johnson told the
16 FDA was: Our very preliminary calculation
17 indicates that substantial asbestos can be allowed
18 safely in a baby powder.

19 Do you see that?

20 A. Taking that sentence at its full
21 context, it relates to --

22 Q. First, tell me whether the sentence is
23 there.

24 A. Well --

25 Q. First, tell me whether the sentence is

1 there. We're going to find that out, okay?

2 A. The sentence is there.

3 Q. Okay.

4 A. Our very preliminary calculation.

5 Q. Right. They say: Our very
6 preliminary calculation indicates that substantial
7 asbestos can be allowed safely in a baby powder.
8 Correct?

9 A. Based on the theoretical --
10 theoretical studies that were conducted in that
11 paragraph.

12 Q. Right. Johnson & Johnson did
13 calculations that the FDA asked them to do?

14 A. Yes.

15 Q. And they came back on the basis of
16 those calculations and opined to the FDA that a
17 substantial amount of asbestos can be allowed
18 safely in baby powder, did they not?

19 A. Based on those theoretical
20 calculations, that was the -- that was the
21 comment, yes, the summary.

22 Q. Has Johnson & Johnson -- first of all,
23 advocating that a substantial amount of asbestos
24 could be safely allowed in baby powder is
25 completely antithetical to Johnson & Johnson's

1 stated policy of zero tolerance, is it not?

2 A. Nowhere does it say there they're
3 advocating it. It says that preliminary
4 calculations -- and that was based on the FDA's
5 request to do some -- run some numbers --
6 indicated that it could be or can be allowed, but
7 that's never been Johnson & Johnson's policy.

8 Q. Okay.

9 A. This is a response to a request from
10 FDA to run some numbers.

11 Q. Right. And Johnson & Johnson reached
12 the conclusion that a substantial amount of
13 asbestos could be safely allowed in baby powder,
14 and they told that to the FDA, right?

15 A. They -- they told it -- it's based on
16 the allowable daily amount of 5 fibers per mil,
17 which is the OSHA limit for industrial exposure.

18 If you use that as your benchmark,
19 your starting point, then you would be way under
20 that figure. And, therefore, the preliminary
21 calculation using the math would indicate that
22 substantial asbestos can be allowed safely in baby
23 powder.

24 However, that is not and never has
25 been the Johnson & Johnson position. This -- this

1 is merely a response to the FDA's request to run
2 those numbers and compare what they would look
3 like compared to the OSHA limits.

4 Q. Does Johnson & Johnson agree that
5 there shouldn't ever have even been a conversation
6 about whether or not asbestos should be in a baby
7 powder? Do you agree with that?

8 A. If FDA and Dr. Eiermann at FDA raised
9 that as an issue, you can't say, "We're not going
10 to talk about this." You -- you merely give an
11 answer to the best of your ability, and that's
12 what was done in this case.

13 This was a response to Dr. Eiermann at
14 FDA and his colleagues at FDA to come up with some
15 numbers as to how diapering babies compared to
16 exposure to fibers in an industrial application.

17 Q. When you talk about asbestos fibers,
18 they're extremely small. You can't see them with
19 the naked eye, individual fibers, can you?

20 A. No.

21 Q. Well, I mean, in 2004, a news station
22 sent off -- sent off a -- a bottle of Johnson's
23 Baby Powder to a lab, an independent lab, and they
24 found it, didn't they?

25 A. They claimed to have done. But I'm

1 aware of that a TV station or a radio station did
2 claim to send off samples to a lab. But --

3 Q. And I --

4 A. -- was -- was that lab validated to do
5 the studies?

6 Q. And they reported .01 percent
7 anthophyllite asbestos in Johnson's Baby Powder,
8 did they not?

9 A. They reported that, but my
10 understanding is the methodologies they used
11 were -- were not appropriate for that particular
12 test procedure.

13 Q. I'm sorry. Where -- where did you get
14 that from?

15 A. I've -- I've read that report, and I'm
16 told that they used different methodologies.

17 Q. Told by who?

18 A. By who? Who told me?

19 Q. Yeah, yeah. Told -- you said you were
20 told by who they use different methodologies.

21 A. I've seen the reports, and the
22 methodologies they used were -- did not include
23 the TEM methodologies that would -- you would
24 expect to use. That's -- that was my
25 understanding.

1 Q. You said that the -- the analyst --
2 the lab that did the work for the TV station in
3 2004 didn't use TEM.

4 This is Exhibit 56. That's the report
5 from the television station attaching the lab's
6 work, if you'll turn to the flag. What kind of
7 analysis did they do on the -- on the Johnson's
8 Baby Powder, sir?

9 A. Let me read it. Well, they only used
10 TEM on this one.

11 Q. And that report is uncontroverted to
12 this date, correct?

13 A. I've not seen anything that confirms
14 it or refutes it.

15 Q. Let me ask you a question. The -- the
16 way that Johnson & Johnson does its -- its
17 testing, the TEM testing -- its electron
18 microscopy --

19 A. Yes.

20 Q. -- is to take a composite of
21 everything that was produced per quarter and to
22 analyze that, correct?

23 A. It's part of the procedure, yes.

24 Q. Right. Okay. And what it does
25 otherwise with non-TEM is it waits until it fills

1 two silos, and then it does a composite of that by
2 J4, XRD, and PLM, true?

3 A. Yes.

4 Q. Each silo is 2 -- 325 tons, correct?

5 A. Yes.

6 Q. So if we want to kind of understand
7 what the routine testing is, here's what we have.
8 Johnson & Johnson does XRD and PLM for every
9 650 tons that is made, correct?

10 A. Correct.

11 Q. And then they do TEM for four times a
12 year, correct?

13 A. Correct, yes.

14 Q. The talc is sold, and then the TEM is
15 done on the composites, correct?

16 A. On the composites, yes.

17 Q. All right.

18 * * *

19 Q. Good afternoon, tell us your name,
20 please.

21 A. My name is John Hopkins.

22 Q. And --

23 (Video stopped.)

24 THE COURT: What's going on?

25 MR. ADAMS: That concludes the

1 plaintiffs' portion, the J&J designations.

2 THE COURT: Right. All right.

3 Defense, of course, has their own
4 designation running about an hour of
5 timestamps --

6 MS. BUENO: I believe that's correct,
7 Your Honor.

8 THE COURT: Okay. Well, ladies and
9 gentlemen of the jury, we are going to
10 conclude the need for your services at this
11 time. At the present, it is my intention
12 to go forward at 9:30 as per usual.

13 Mr. Clerk, who is in charge of the
14 jurors' information system?

15 THE CLERK: I am, Your Honor.

16 THE COURT: Very good.

17 Well, I will communicate with the
18 clerk in the event that there's something
19 that needs to be put on the information
20 system. Right now, my bet is no, based on
21 everything I'm looking at.

22 So, you may retire to your jury room.
23 Thank you so much for your service, again.
24 This is tough sledding and technical
25 sledding, and you-all are paying attention

1 marvelously. And I appreciate that more
2 than I can say. And I'm sure I speak on
3 behalf of all the parties when I say that.

4 So have a wonderful evening, and we'll
5 see you tomorrow morning.

6 (The jury exits the courtroom at
7 4:57 p.m.)

8 THE COURT: All right. Lawyers, the
9 thing that I'm looking at is, I'm wondering
10 do we need to go on and deal with it, is
11 the motion to compel and all that kind of
12 thing with respect to the 30(b)(6) from --
13 for Kenvue, et cetera.

14 I have tried to speed-read this stuff
15 while I'm sitting here, and I have made a
16 few little notes. What do we want to do?
17 Do we want to try to cover that today or --
18 Ms. McVey, you are the moving party.

19 MS. McVEY: I am, Your Honor. I
20 haven't even had a chance yet to read
21 that -- what they were supplying to you
22 yet.

23 THE COURT: Oh, okay. Well, in that
24 event, we -- we will cover it tomorrow.

25 MS. McVEY: And what I want to try to

1 come to some thought process with, with us
2 tomorrow and we'll raise with you tomorrow
3 morning, perhaps early, is, you know, I'm
4 still of the belief that without you even
5 having to decide the successor liability
6 issue right now, we can put forth a lot of
7 this evidence in our case in chief because
8 it deals with all the underlying cases,
9 too.

10 THE COURT: Right.

11 MS. McVEY: But what I would like to
12 do is kind of talk to -- to Ben and Rachel
13 and get a sense of -- of what that looks
14 like tomorrow and what we need to do.

15 I do think the motion to compel needs
16 to be heard and granted. The witness is
17 not -- we don't have to argue this now.
18 But we believe there's more information
19 that we're due. And if you're ultimately
20 deciding the successor liability issue,
21 you'll need that.

22 THE COURT: All right. Well, why
23 don't we just see where we stand tomorrow
24 morning.

25 Anything else that you-all can think

1 of that I may need.

2 Yes, ma'am?

3 MS. BUENO: Oh, not on that,
4 Your Honor.

5 THE COURT: That's what I'm asking.
6 Anything else?

7 MS. BUENO: Okay. Yes. I just -- I
8 asked for a quick moment to do a proffer
9 for Dr. Haber. Two items. If I had been
10 permitted, based on Motion in Limine
11 Number 19, the citizens petition, I would
12 have cross-examined Dr. Haber on that when
13 I was talking about the FDA, and I would
14 have entered that into evidence with him.

15 THE COURT: Yes, ma'am.

16 MS. BUENO: And, also, on motion in
17 Limine Number 10, which was the alternate
18 exposures --

19 THE COURT: Yes.

20 MS. BUENO: -- you denied -- or I'm
21 sorry -- you granted plaintiffs' Motion
22 Number Limine 10 -- motion to Limine Number
23 10. We were not permitted to question
24 Dr. Haber about alternative exposures in
25 the hotel environment where --

1 THE COURT: Right.

2 MS. BUENO: -- Mr. Perry worked --

3 THE COURT: Right.

4 MS. BUENO: -- particularly in a
5 library next to one of his hotels --

6 THE COURT: Yes.

7 MS. BUENO: -- where he had testified
8 and told his doctor about potential
9 asbestos exposure.

10 THE COURT: Yes.

11 MS. BUENO: We have briefed that. We
12 are filing a proffer. I'll pass it up to
13 you now.

14 THE COURT: Very good.

15 MS. BUENO: This will be on file, but
16 I'd like to go ahead.

17 THE COURT: Well, I accept the
18 proffer. As you know, my -- the foundation
19 for my ruling on this matter is that there
20 was no evidence to suggest -- to do
21 anything more than say that there was
22 asbestos at the library. There was no
23 evidence that he went in there, that there
24 was any exposure situation with respect to
25 his work at the Embassy Suites. He was

1 bartender. There was no evidence that he
2 was involved in any situations that would
3 involve exposure to asbestos or liberation
4 of it or anything of that nature.

5 MS. McVEY: And nor was there any
6 expert testimony at all suggesting that it
7 was --

8 THE COURT: I understand, but she's
9 got her own contentions about this, and I
10 am going to accept her proffer.

11 MS. BUENO: Thank you, Your Honor.

12 THE COURT: And, frankly, if you want
13 to just go ahead and place the proffer into
14 evidence --

15 MS. BUENO: That's fine, Your Honor.

16 THE COURT: -- I'll --

17 MS. BUENO: We can do that right now
18 and --

19 THE COURT: -- I will accept it.

20 MS. PEPKE: Court exhibit --

21 THE COURT: Give it to the court
22 reporter.

23 MS. McVEY: I just want to make sure
24 it's not going to the jury.

25 MS. BUENO: Oh, no, no.

1 THE COURT: Oh, no, no.

2 MS. BUENO: No, no, no.

3 THE COURT: Of course not.

4 MS. BUENO: This is -- this will be
5 court exhibit whatever we determine it to
6 be.

7 THE COURT: Yes. That will be the --

8 MS. BUENO: It will be 3.

9 THE COURT: -- next court exhibit,
10 Madam Court Reporter. I think it's
11 Number 3, would it not be?

12 THE REPORTER: Yes.

13 (COURT EXHIBIT 3, Proffer provided by
14 Attorney Bueno regarding Motion in Limine
15 Numbers 10 and 19, was marked for
16 identification.)

17 MS. BUENO: And the factual
18 contentions are included, and to the extent
19 they differ with what the Court said, they
20 are included.

21 THE COURT: Excellent. And I am going
22 to put on the record now, the defendants do
23 not agree with my viewpoint of the facts,
24 and they have well recited their point of
25 view about that in the proffer that is

1 made. So it's there for the review by the
2 appellate court but is not going to the
3 jury.

4 MS. BUENO: Thank you.

5 THE COURT: Are we covered?

6 MS. BUENO: Oh, let's talk a little
7 bit about tomorrow, if we could.

8 - - -

9 (Proceedings were adjourned at 5:02 p.m.)

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1 CERTIFICATE OF REPORTER

2

3 I, Cindy A. Hayden, Registered Merit
4 Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify:

6 That the foregoing proceeding was taken
7 before me on the date and at the time and location
8 stated on Page 1 of this transcript; that the
9 deponent was duly sworn to testify to the truth,
10 the whole truth and nothing but the truth; that
11 the testimony of the deponent and all objections
12 made at the time of the examination were recorded
13 stenographically by me and were thereafter
14 transcribed; that the foregoing deposition as
15 typed is a true, accurate and complete record of
16 the testimony of the deponent and of all
17 objections made at the time of the examination to
18 the best of my ability.

19 I further certify that I am neither
20 related to nor counsel for any party to the cause
21 pending or interested in the events thereof.
22 Witness my hand, this 6th of August, 2024.

23

24

25

26 Cindy A. Hayden,
27 Registered Merit Reporter
28 Notary Public
29 State of South Carolina at Large
30 My Commission expires:
31 July 27, 2030

32

33

34

35

36

37

1 STATE OF SOUTH CAROLINA
2 COUNTY OF RICHLAND

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

3 - - -
4 MICHAEL L. PERRY AND LONNIE)
L. LONG,)
5)
Plaintiffs,)
6)
vs.)
7)
AMERICAN INTERNATIONAL)
8 INDUSTRIES, ET AL.,)
9 Defendants.)

Case No.
2023-CP-40-04072

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11 TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
DAY 3
12

13
14 DATE TAKEN: Wednesday, August 7, 2024
15 TIME BEGAN: 9:06 a.m.
16 TIME ENDED: 5:02 p.m.
17 LOCATION: Richland County Judicial Center
18 1701 Main Street
Courtroom 3B
Columbia, South Carolina
19
REPORTED BY: Cindy A. Hayden, RMR, CRR
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I N D E X

	PAGE
BARRY C. GIBNEY, D.O.	
DIRECT EXAMINATION BY MS. GROSS	696
CROSS-EXAMINATION BY MS. BUENO	719
CROSS-EXAMINATION BY MS. FLYNN	731
REDIRECT EXAMINATION BY MS. GROSS	734
RECROSS-EXAMINATION BY MS. BUENO	742
DAVID MADIGAN, Ph.D.	746
DIRECT EXAMINATION BY MS. GROSS	746
CROSS-EXAMINATION BY MS. BUENO	781
REDIRECT EXAMINATION BY MS. GROSS	802
WILLIAM E. LONGO, Ph.D.	813
DIRECT EXAMINATION BY MR. ADAMS	813
CROSS-EXAMINATION BY MR. COWAN	888
REDIRECT EXAMINATION BY MR. ADAMS	976

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
PLAINTIFF	Curriculum Vitae of Barry C.	704
626	Gibney, D.O.	
DX12000.88-	MUSC Health record dated	725
91	9/29/23	
DX12000.397-	Curriculum Vitae of Barry C.	725
400	Gibney, D.O.	

1 P R O C E E D I N G S

2 * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MS. FLYNN: Okay.

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

20 THE COURT: Ms. Flynn.

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

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

25 MS. FLYNN: He could have responded

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

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

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

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

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

1 this trial as --

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

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

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

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

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

7 MS. FLYNN: I believe -- no.

8 THE COURT: No?

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

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

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

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

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

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

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

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

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

19 MS. McVEY: Yes, ma'am.

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

25 And do you-all know anything about the

1 coverage in this case?

2 MS. McVEY: I don't.

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

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

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

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

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

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

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

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

18 THE COURT: Okay. That's great.

19 MS. FLYNN: -- to the medical.

20 THE COURT: That --

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

23 MS. FLYNN: The medical.

24 MS. McVEY: But not the --

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

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

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

8 THE COURT: Yes. I --

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Well --

24 MS. McVEY: I didn't lie.

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

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

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

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

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

22 MS. FLYNN: Understood.

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

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

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

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

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

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

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

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

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

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

12 MS. FLYNN: Dr. Gibney --

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

17 THE COURT: Okay.

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

19 THE COURT: Right.

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

25 What I think Ms. Flynn -- not

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

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

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

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

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

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

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

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

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

18 THE COURT: Right.

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

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

3 MS. FLYNN: Correct.

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

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

14 THE COURT: Now you have it.

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

21 THE COURT: All right.

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

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

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

1 don't have to bother you again.

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

7 MS. FLYNN: I understand, Your Honor.

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

11 MS. FLYNN: Thank you, Your Honor.

12 THE COURT: All right.

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

18 THE COURT: Yes.

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

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

24 MS. McVEY: Thank you, Your Honor.

25 I just want to just briefly remind you

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

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

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

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

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

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

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

1 to do with them.

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

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

8 MS. McVEY: That's right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 THE COURT: All right. Ms. Bueno.

25 MS. BUENO: Ms. Pepke will address

1 this, Your Honor.

2 THE COURT: All right. Ms. Pepke.

3 MS. PEPKE: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MS. PEPKE: I took this off

6 Ms. Bueno's list because this is

7 important -- it's an important motion.

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

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

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

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

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

25 But they only focused on: So what did

1 you do in addition to that?

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

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

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

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

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

4 MS. PEPKE: Let me address that.

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

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

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

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

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

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

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

21 MS. PEPKE: Let me --

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

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

1 which was what the ask was.

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

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

13 MS. PEPKE: Well they --

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

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

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

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

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

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

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

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

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

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

20 THE COURT: Right.

21 MS. PEPKE: -- to plaintiffs.

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

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

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

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

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

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

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

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

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

5 THE COURT: All right.

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

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

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

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

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

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

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

20 MS. PEPKE: I know.

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

24 MS. PEPKE: No.

25 THE COURT: Your position is that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MS. PEPKE: Thank you, Your Honor.

25 I want to clarify one other thing.

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

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

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

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

21 MS. PEPKE: Thank you.

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

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

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

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

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

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

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

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

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

18 THE COURT: Absolutely.

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

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

24 Does that suit The Court okay?

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

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

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

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

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

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

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

15 She can transcribe it.

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

18 THE REPORTER: Yes.

19 THE COURT: Very good.

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

23 MS. McVEY: It is.

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

1 you?

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

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

6 The Court will be in recess.

7 MS. McVEY: Thank you so much.

8 * * *

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

11 * * *

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

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

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

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

25 So what I am prepared to do is to

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

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

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

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

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

14 THE COURT: All right.

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

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

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

25 MS. BUENO: Yes.

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

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

5 THE BAILIFF: Yes, ma'am.

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

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

11 THE BAILIFF: Yes, Your Honor.

12 THE COURT: All right. Be at ease.

13 MS. McVEY: Thank you, Your Honor.

14 (Off-the-record conference.)

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

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

19 THE COURT: Thank you.

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

25 And we've got this trial that probably

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

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

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

7 Now, please be seated, Counsel.

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

12 MS. GROSS: Yes, Your Honor.

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

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

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

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

20 THE COURT: What's that?

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

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

25 THE COURT: Barry Gibney, Dr. Gibney,

1 members of the jury.

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

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

6 THE COURT: Very good.

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

12 You may proceed, Ms. Gross.

13 MS. GROSS: Thank you, Your Honor.

14 * * *

15 DIRECT EXAMINATION

16 BY MS. GROSS:

17 Q. Good morning, Dr. Gibney.

18 A. Good morning, ma'am.

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

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

23 THE COURT: Oh.

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

1 of South Carolina.

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

5 THE WITNESS: Oh. Sorry.

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

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

12 THE WITNESS: I do.

13 THE CLERK: Thank you.

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

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

18 * * *

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

22 BY MS. GROSS:

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

1 morning, please.

2 A. Yes, ma'am.

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

7 Q. Do you know Michael Perry?

8 A. I do, yes.

9 Q. How do you know him?

10 A. I was his surgeon.

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

13 A. For approximately one year now.

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

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

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

21 A. No, ma'am.

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

24 A. Malignant pleural mesothelioma.

25 Q. What is malignant pleural

1 mesothelioma?

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

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

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

8 A. Yes, ma'am.

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

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

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

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

22 A. Yes, ma'am.

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

25 A. Yes, ma'am.

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

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

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

14 Q. Are you board-certified?

15 A. Yes, ma'am.

16 Q. In what?

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

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

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

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

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

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

13 A. In Boston, Massachusetts.

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

16 A. Harvard Medical School.

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

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

1 pleural mesothelioma.

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

5 A. Yes, ma'am.

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

9 A. Yes, ma'am.

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

13 A. I would say at least 100.

14 Q. What is the NIH?

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

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

19 A. Yes, ma'am.

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

21 A. Yes, ma'am.

22 Q. Have you received any?

23 A. I have, yes.

24 Q. How many?

25 A. One.

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

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

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

8 A. Yes, ma'am.

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

12 A. Yes, ma'am.

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

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

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

19 A. Yes, ma'am.

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

22 A. Yes, ma'am.

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

1 literature?

2 A. Yes, ma'am.

3 Q. How many times?

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

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

8 A. Yes, ma'am.

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

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

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

16 A. Yes.

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

20 MS. GROSS: Do you have an objection?

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

23 THE COURT: Very good.

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

1 admitted into evidence.)

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

7 THE COURT: Thoracic surgery?

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

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

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

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

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

20 MS. GROSS: Thank you, Your Honor.

21 BY MS. GROSS:

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

25 A. To the best of our knowledge, it

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

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

6 A. None that I'm aware of.

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

9 A. Not that I'm aware of.

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

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

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

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

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

25 A. I have not.

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

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

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

7 A. I am unaware of any.

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

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

11 Q. So it's terminal, correct?

12 A. Yes, ma'am.

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

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

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

22 A. Yes, ma'am.

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

1 understand that?

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

3 Q. Do people with mesothelioma suffer?

4 A. Yes, ma'am.

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

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

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

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

1 drowning that most of these patients experience.

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

5 A. Almost uniformly.

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

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

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

15 Q. Is mesothelioma aggressive?

16 A. Yes, ma'am.

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

19 A. Yes, ma'am.

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

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

25 Q. Did you get to know Michael as a

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

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

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

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

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

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

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

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

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

3 BY MS. GROSS:

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

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

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

12 Q. Was it also in his diaphragm?

13 A. Yes, ma'am.

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

18 A. Yes. That is --

19 Q. Did I say that right?

20 A. Yes, ma'am.

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

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

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

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

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

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

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

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

25 And then after we remove it from the

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

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

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

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

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

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

22 Q. How did you do that?

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

1 case.

2 Q. How long is this surgery, typically?

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

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

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

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

14 A. Yes, ma'am.

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

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

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

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

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

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

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

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

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

21 A. Yes, ma'am.

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

24 A. Oh, he did, yes.

25 Q. Tell us why you think that.

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

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

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

11 A. Yes, ma'am.

12 Q. Such as?

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

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

21 A. Breathing less frequently.

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

24 A. Yes, ma'am.

25 Q. Do you remember which kind?

1 A. I believe oxycodone.

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

4 A. Unfortunately, yes.

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

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

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

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

22 Are you an expert in asbestos
23 products?

24 A. No, ma'am.

25 Q. Are you an expert in what products had

1 asbestos in them and when?

2 A. No, ma'am.

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

7 A. I believe so, yes.

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

13 A. I would imagine so, yes.

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

17 A. I believe so, yes.

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

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

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

24 MS. BUENO: Thank you, Your Honor.

25 May I begin, Your Honor?

1 THE COURT: All right.

2 MS. BUENO: Thank you.

3 Good morning, ladies and gentlemen.

4 * * *

5 CROSS-EXAMINATION

6 BY MS. BUENO:

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

8 A. I'm well.

9 Q. Are you able to see me?

10 A. Yes, ma'am.

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

15 A. I do, ma'am.

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

20 A. Okay.

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

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

1 very much, yes.

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

5 A. That is correct.

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

9 A. Yes, ma'am.

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

12 A. That is correct.

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

16 A. Correct.

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

20 A. That is correct, ma'am.

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

24 A. That is correct.

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

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

4 A. I do not believe so. No.

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

8 A. Yes, ma'am.

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

12 A. I do not recall, unfortunately.

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

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

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

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

23 BY MS. BUENO:

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

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

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

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

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

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

13 Do you see that note?

14 A. I do, yes.

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

18 A. Yes, ma'am.

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

22 A. That is correct, ma'am.

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

1 A. That is correct.

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

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

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

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

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

13 A. Correct.

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

18 A. Yes, ma'am.

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

22 A. That is correct.

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

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

1 but I believe so.

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

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

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

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

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

13 A. That is correct.

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

16 A. It seems, yes.

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

20 A. That sounds correct.

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

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

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

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

12 THE COURT: Yes. Any objections?

13 MS. GROSS: No objection, Your Honor.

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

17 MS. BUENO: Thank you, Your Honor.

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

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

24 BY MS. BUENO:

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

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

3 A. Yes, ma'am.

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

7 A. That is correct.

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

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

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

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

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

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

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

1 Johnson's Baby Powder; is that correct?

2 A. Yes.

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

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

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

10 A. That is correct.

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

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

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

21 A. Yes, ma'am.

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

25 THE COURT: Redirect, Ms. Gross?

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

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

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

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

13 THE REPORTER: I can't hear you.

14 MS. FLYNN: I'm so sorry.

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

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

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

23 THE COURT: What is that?

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

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

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

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

13 THE COURT: Let's do that.

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

16 THE COURT: Huh?

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

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

23 MS. McVEY: I agree.

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

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

4 MS. GROSS: Yes.

5 THE COURT: All right.

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

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

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

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

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

1 rather than liability.

2 She can't deny that AII is liable.

3 They are liable as a matter of law.

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

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

10 -- with Dr. Gibney.

11 Make sense? All right. Thank you.

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

14 * * *

15 CROSS-EXAMINATION

16 BY MS. FLYNN:

17 Q. Good morning, Dr. Gibney.

18 A. Good morning.

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

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

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

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

4 BY MS. FLYNN:

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

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

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

15 A. Yes, ma'am.

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

18 A. That is correct, ma'am.

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

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

25 Q. And I understand that that surgery

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

2 A. I believe it did, yes.

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

7 A. Can you repeat your question?

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

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

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

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

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

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

1 the best-behaved of a bad disease.

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

6 THE COURT: Thank you, Ms. Flynn.

7 All right. Redirect examination.

8 Ms. Gross.

9 MS. GROSS: Yes, Your Honor.

10 * * *

11 REDIRECT EXAMINATION

12 BY MS. GROSS:

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

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

17 A. Yes, ma'am.

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

21 A. Yes, ma'am.

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

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

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

3 A. Yes, ma'am.

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

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

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

12 A. Yes, ma'am.

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

18 Do you remember those?

19 A. Yes, ma'am.

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

1 A. I think so, yes.

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

4 A. Yes, ma'am.

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

8 A. I believe so, yes.

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

12 A. I believe so, yes.

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

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

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

22 A. I've never heard this term.

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

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

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

6 Are you with me so far?

7 A. Yes, ma'am.

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

12 Are you with me?

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

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

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

20 Q. Why do you say that?

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

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

4 So I would say it's unethical.

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

8 MS. BUENO: Objection, Your Honor.

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

12 THE COURT: Overruled.

13 MS. GROSS: Thank you, Your Honor.

14 BY MS. GROSS:

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

22 Is that unethical?

23 MR. BUENO: Objection, Your Honor.

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

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

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

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

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

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

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

18 MS. GROSS: Yes, Your Honor.

19 THE COURT: All right.

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

25 THE COURT: Overruled. Just first

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

3 BY MS. GROSS:

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

6 A. I see a document, yes.

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

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

12 Q. Perfect.

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

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

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

20 A. Yes, ma'am.

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

25 MS. BUENO: Objection, Your Honor.

1 THE COURT: Overruled.

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

5 BY MS. GROSS:

6 Q. Perfect.

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

12 A. No, ma'am.

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

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

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

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

25 MS. BUENO: Thank you, Your Honor.

1 This will be very fast.

2 * * *

3 RE CROSS-EXAMINATION

4 BY MS. BUENO:

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

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

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

13 A. That is correct, ma'am.

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

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

22 MS. BUENO: Okay.

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

1 says.

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

5 MS. BUENO: Last question.

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

8 BY MS. BUENO:

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

12 A. That is correct.

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

16 A. That is correct.

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

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

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

1 this by virtual platform.

2 THE COURT: Yes, sir.

3 All right.

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

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

10 MS. GROSS: Ten minutes.

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

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

18 Please stand for the departure of the
19 jury.

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

22 THE COURT: All right. Be at ease.

23 MS. McVEY: Thank you, Your Honor.

24 * * *

25 (Whereupon, there was a recess in the

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

2 * * *

3 THE BAILIFF: All rise.

4 THE COURT: Please be seated.

5 All right. Bring out the jury.

6 THE BAILIFF: Yes, ma'am.

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

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

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

13 MS. GROSS: Yes, Your Honor.

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

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

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

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

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

1 to you at this time.

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

7 THE WITNESS: I do.

8 * * *

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

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

14 THE WITNESS: David Madigan.

15 * * *

16 DIRECT EXAMINATION

17 BY MS. GROSS:

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

19 A. Yes, I can. Good morning.

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

23 A. Sure. I'm David Madigan.

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

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

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

5 A. Correct.

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

11 A. That's right.

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

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

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

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

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

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

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

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

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

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

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

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

1 to health care.

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

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

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

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

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

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

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

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

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

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

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

1 statistics and epidemiology.

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

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

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

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

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

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

1 MS. BUENO: Thank you, Your Honor.

2 MS. GROSS: All right.

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

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

10 BY MS. GROSS:

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

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

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

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

25 A. I sure do.

1 Q. Okay. Wonderful.

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

7 A. Right.

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

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

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

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

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

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

1 directly from the U.S. Geological Survey.

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

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

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

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

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

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

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

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

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

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

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

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