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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean H. Toal, Circuit Court Judge

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Appellate Case No. 2025-000065  
Civil Action No. 2023-CP-40-04072

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Michael L. Perry and Lonnie Long,..... Respondents,

v.

American International Industries et al.

Of whom Johnson & Johnson; LLT Management, LLC  
f/k/a LTL Management, LLC; Kenvue, Inc.; and Johnson  
& Johnson Holdco (NA), Inc. are the ..... Appellants.

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

1 THE COURT: Yeah.

2 MR. COWAN: I urge you to save them from  
3 themselves.

4 THE COURT: I've saved you from yourself a  
5 couple times, too, sir.

6 MR. COWAN: And you've done a very good job  
7 of both. I'm telling you that this is -- this -- this  
8 article is tantamount to having a plaintiffs counsel  
9 write out a closing statement and then present it to  
10 the jury in the jury room as evidence.

11 This is a closing statement. This is a  
12 25-page indictment by a reporter concerning all manner  
13 of other hearsay. Your Honor, please.

14 THE COURT: Well, that's -- that's -- I've  
15 already made that observation.

16 MR. COWAN: And Lewin -- with regard to  
17 Lewin --

18 THE COURT: Lewin was just -- Lewin -- that  
19 was Lewin saying -- all right. About his own thinking  
20 and drawing a conclusion. I get the difference between  
21 the two.

22 MR. COWAN: Thank you.

23 THE COURT: And -- and I'm going to say to  
24 you --

25 MR. COWAN: Yes, Your Honor.

1           THE COURT:  -- that they're going to be able  
2 to argue that to the jury on the basis of what's  
3 already in evidence, you know.

4           MR. COWAN:  I understand.

5           THE COURT:  There's plenty of other  
6 foundation, and the evidence is going to be allowed in  
7 to argue to the jury, that's what the motivation was,  
8 when it stopped, and so forth and so on, and that  
9 latest press release that I put in is going to be  
10 something they can use.

11          MR. COWAN:  I understand.

12          THE COURT:  But I stick with the ruling I  
13 made for the rulings I have already observed.  I just  
14 think this goes so far beyond the pale in terms of  
15 putting in evidence a compilation of things that would  
16 not be permitted to be adversely odd, and that is why  
17 I'm not admitting it, and I will stay with that ruling.

18          MS. MCVEY:  Thank you, Your Honor.  And I  
19 appreciate you saving me from my myself, but I  
20 certainly don't need Johnson & Johnson saving me from  
21 anything.

22          THE COURT:  Well, I gotcha.  I gotcha.

23          All right.  Now, where are we?  We've done  
24 all the exhibits; right?

25          MS. MCVEY:  Yes, ma'am.

1 THE COURT: All right. You need to formally  
2 rest.

3 MS. MCVEY: Yes.

4 Your Honor, the economic loss stipulation  
5 that was read.

6 THE COURT: Yes.

7 MS. MCVEY: We marked it as 357 and it should  
8 have been marked as 358.

9 MS. GROSS: No, no, no. Your Honor -- I did.

10 So Ms. McVey read in the list of exhibits  
11 this morning and one of them was 357. We had  
12 previously marked the stipulation as 357, so we just  
13 need to switch it to 358.

14 THE COURT: Okay. That's fine. Do it up  
15 there as well and get that taken care of.

16 MS. MCVEY: I misunderstood. My apologies.

17 THE COURT: All right.

18 Now, again, are we ready to rest?

19 Here's what I would suggest you do. All  
20 right. The next thing's going to be the motion for  
21 directed verdict by defendants.

22 MS. MCVEY: Right.

23 THE COURT: And so if we'd like to take a  
24 quick break right now and let you just ponder whether  
25 everything is in that you need to have in, and let the

1 defense ponder that very same thing. Then, we'll have  
2 the official resting and we can go into our motion for  
3 directed verdict. Is that good?

4 MS. MCVEY: That would be perfect, Your  
5 Honor.

6 THE COURT: Is that good?

7 MS. MCVEY: Yes, ma'am.

8 THE COURT: All right. You know what? I  
9 would like -- yeah, at ease.

10 (Whereupon a there was a recess in the  
11 proceedings from 10:7 a.m. to 10:43  
12 a.m.)

13 THE BAILIFF: Court come to order. Remain  
14 seated.

15 THE COURT: Please be seated.

16 All right. Are we ready now?

17 MS. MCVEY: Yes, ma'am. Good morning.

18 Couple more things. We -- I marked as Court Exhibit  
19 Nos. 17 and 18 --

20 THE COURT REPORTER: 18 and 19.

21 MS. MCVEY: I'm sorry, 18 and 19 the  
22 deposition transcript -- or partial designation  
23 tran- -- I can't even talk; this is not going well --  
24 deposition transcripts of Mr. Mongon and Mr. Ruh,  
25 R-u-h.

1           Your Honor, these are relevant to the  
2 successor liability issue, and so I wanted to hand them  
3 up to you for your review.

4                         (Court Exhibits 18 & 19 were marked.)

5           THE COURT: All right.

6           MS. MCVEY: And I want to preview for you,  
7 you know, you ordered the deposition of Kenvue and  
8 Holdco to continue on Saturday.

9           THE COURT: Right.

10          MS. MCVEY: We believe, following whatever  
11 kind of verdict -- if we get a verdict here -- and you  
12 need to make a successor liability determination that  
13 we would need to brief the successor liability issue  
14 for you as well as put in some of the deposition  
15 testimony that was just taken this weekend.

16                 I just got the transcript. We haven't had a  
17 chance to even digest it yet, but I want to give these  
18 to you because I think it would be relevant to your  
19 successor liability issue, but there's more evidence to  
20 come.

21                 So I footnoted that for you to say I think we  
22 can get a jury verdict first, whatever way that goes,  
23 and then -- if you need to, then you can make successor  
24 liability once everyone has a chance to prove it.

25                 So I'd like to hand those up and I've marked

1 them as a court exhibit.

2 THE COURT: And I certainly reserve the right  
3 to hear both sides on that and see exhibits that  
4 defendants may wish to offer on that issue as well.

5 MS. MCVEY: Absolutely. Thank you, Your  
6 Honor.

7 And with that, plaintiffs rest.

8 MR. BROWN: Your Honor, before you do that, I  
9 just want to say, is -- is Your Honor bifurcating,  
10 then? Is that what Your Honor is -- is doing?

11 THE COURT: Oh, Mitch, come on.

12 MS. MCVEY: Here's -- I'm asking --

13 MR. BROWN: She is projecting that she wants  
14 to give you some additional evidence, and now she's  
15 about to, so that's what I am struggling with.

16 MS. MCVEY: Can I raise something that --  
17 I've asked Mitch about it before we started here; I've  
18 asked everybody else.

19 Here is the concern for us at this point:  
20 What we want to be able to do is get a verdict against  
21 entities that were responsible for the manufacture and  
22 sale of Johnson & Johnson's Baby Powder --

23 THE COURT: Right.

24 MS. MCVEY: -- from the time that he was  
25 first exposed in 1974 through 2019.

1 THE COURT: Right.

2 MS. MCVEY: What I understand is that  
3 Johnson & Johnson was responsible for that product  
4 through 1979, and then JJCI essentially was responsible  
5 until this period of time -- 2020?

6 MS. GROSS: 2020.

7 MS. MCVEY: 2020. But then all these other  
8 entities came along.

9 THE COURT: Right.

10 MS. MCVEY: And JJCI doesn't exist anymore.

11 THE COURT: Right.

12 MS. MCVEY: So we entered into a stipulation  
13 where I think they say -- although what I'm worried  
14 about is they're going to wiggle out of this -- that  
15 LLT is responsible for everything that JJCI did, so all  
16 that baby powder during those decades.

17 What I want to be able to do is have the jury  
18 apportion -- or not apportion -- find fault with the  
19 Johnson & Johnson defendants who were responsible for  
20 that time period. No one will give me a straight  
21 answer as to if we get the verdict against whoever we  
22 need to get a verdict against, if you find later the  
23 successor is these other entities, that we can collect  
24 that verdict.

25 THE COURT: Well, then maybe we need to try

1 that right now before we get bothered with it because  
2 I -- I -- that is how I had understood it was going to  
3 work, because I had understood that the parties had  
4 stipulated that we would deal with that issue later.

5 I got my own impression about that, which has  
6 to do with the South Carolina Doctrine of Amalgamation.  
7 And it is reinforced by the activity of the third  
8 circuit in dissolving the bankruptcy. So if we got to  
9 go into that --

10 MS. MCVEY: So I think if they will say on  
11 the record, if you get a verdict against this person,  
12 this person, this person, whatever that looks like,  
13 then, if it -- later, you can collect that verdict  
14 against -- if you find there's a successor, if that's  
15 the issue or whatever. That's my concern.

16 MS. PEPKE: Yeah. Actually --

17 THE COURT: Now, wait a minute, wait a  
18 minute, wait a minute. I can't have several people  
19 address this. The first one that started on it was  
20 Mitch, so that's the way I'm turning first.

21 MR. BROWN: Okay. So, Your Honor, the -- the  
22 successor liability claims are equitable claims. They  
23 should be not heard by the jury. Nothing about that  
24 should be in front of the jury. There has been a  
25 stipulation that has been entered into that should not

1 be read to the jury or anything.

2 MS. MCVEY: Doesn't have to be read -- sorry.

3 Sorry.

4 THE COURT: You're getting -- you can't --

5 MS. MCVEY: Sorry, that was my fault. I

6 apologize.

7 THE COURT: All right.

8 MR. BROWN: But there's a stipulation about

9 LLT being liable and agreeing that it's liable.

10 THE COURT: Yeah. All I want to know is  
11 this, Mitch, all right, the -- if I don't have to get  
12 into this right now, I won't get into this right now --  
13 but I want to be assured that whatever the jury does by  
14 way of a verdict is going to apply to people that are  
15 in position to pay the verdict, whether that's the  
16 entities themselves, the insurance companies, or a  
17 combination of it.

18 I don't want them to be able to say  
19 later -- well, whoop, that's not against the right one.  
20 The jury awarded against the wrong one, therefore, we  
21 don't have to pay. You understand what I'm saying?

22 MR. BROWN: I do understand what you're  
23 saying, Your Honor. So I can't speak for insurance  
24 companies and all that kind of thing like that. What I  
25 can say is there is a stipulation that LLT would be

1 liable for a verdict rendered against  
2 Johnson & Johnson.

3 THE COURT: Well, how about all these other  
4 entities? We got --

5 MR. BROWN: All the other entities, Your  
6 Honor, that's the part where we have tried -- at the  
7 pretrial hearing, I didn't do a great job of describing  
8 it, but that stuff can't go to the jury. It's going to  
9 confuse them. They have nothing to do with successor  
10 liability. That is for the Court and so that's why --

11 THE COURT: That -- I'm comfortable with  
12 that, and I told you at the time that, you know, I  
13 understood that. And Ms. McVey is simply expressing a  
14 worry and concern that although we said that's how  
15 we're going to handle it, that LLTI, or whatever it is,  
16 is going to be responsible, but that if there was  
17 successor liability issues involved that they would be  
18 addressed by the Court in whatever kind of equitable  
19 hearing I have to have.

20 MR. BROWN: So there are two points.

21 THE COURT: Yes.

22 MR. BROWN: One is there's already a  
23 stipulation --

24 THE COURT: Right.

25 MR. BROWN: -- about LLT.

1 THE COURT: Right.

2 MR. BROWN: They don't need to be on a  
3 separate -- their verdict form, which we haven't got to  
4 yet, but their verdict form has a line for  
5 Johnson & Johnson and another line for LLT. That is --  
6 that's getting into the madness that we don't want to  
7 get into. That's for the Court to deal with, but  
8 there's already a stipulation about that part.

9 Holdco and Kenvue are -- really definitely  
10 don't have any place in front of the jury. That is a  
11 successor liability issue for the Court to deal with  
12 after the jury is done. The jury shouldn't hear  
13 anything that's confusing.

14 THE COURT: And I'm with that.

15 MR. BROWN: Okay.

16 THE COURT: I have no problem with that.  
17 Here's all I don't want to have happen. I have a  
18 verdict form that's going to say one J&J entity and the  
19 jury -- if we do that, and the jury will declare that  
20 their verdict is for that defendant, or the verdict is  
21 going to be for the plaintiff against that defendant.

22 Now, if the verdict is against that  
23 defendant, all these other entities have the potential  
24 of being made responsible for that verdict in an  
25 equitable hearing that I will conduct.

1           And all I don't want to have happen is  
2 somehow it can be said, you know, after the jury's all  
3 gone and everything, oh, wait a minute now, you waived  
4 everything because -- you see what I'm saying?

5           MR. BROWN: Yes.

6           THE COURT: I agree with you completely that  
7 all I want to do is give the jury a Johnson & Johnson  
8 entity. They're not going to understand the niceties  
9 of all the rest of it. They don't need to. That's not  
10 for them.

11           And they're going to render a verdict for  
12 that defendant, in which case the successor is going to  
13 be bound and get the benefit of that; or it's going to  
14 award a verdict to plaintiff and, in that case, that  
15 entity is going to be bound. And then I'll have an  
16 equitable hearing about the posture of the rest of  
17 them.

18           And my immediate reaction, as I have told  
19 y'all before, is all of the rest of them would be  
20 responsible because of our Doctrine of Amalgamation.

21           But I haven't explored that in detail and I  
22 will, as I've said before, explore that if I need to  
23 and when I need to. It may very well be that if  
24 there's a verdict for the plaintiff, that the kind of  
25 lead company will be able to respond to that verdict,

1 and so be it.

2           The only thing that worries me a little bit  
3 is this: I will want to have that hearing on a free  
4 month because I don't want it to be a situation where  
5 the thing is up on appeal for many years, they go  
6 through a whole bunch more two-steps and switcheroos  
7 and whatnot, and they have a valid verdict and it  
8 doesn't get to be enforced, but, that, I can take up in  
9 an equitable hearing, I think.

10           MR. BROWN: Well, that's why I was asking the  
11 bifurcation question, because I'm looking at Johnson  
12 versus South Carolina National Bank case, which is what  
13 we had talked about, as referenced earlier.

14           And it talks about, you know, the Court can  
15 order separate trials if it wants to when there are  
16 legal claims and equitable claims. So that's what --

17           THE COURT: Or the Court can hear those  
18 equitable claims.

19           MR. BROWN: Or it can hear those equitable  
20 claims.

21           What has been confusing to me is the position  
22 of the plaintiff, as somewhat -- I thought she said --  
23 or at one point that she agreed with all that.

24           Then at other times, they have submitted  
25 things to be read to the jury that relate to this

1 issue, which we would say, no, you don't read that to  
2 the jury; this needs to be separate.

3 THE COURT: Well, I think y'all are making a  
4 mountain out of a mole hill because what's going to  
5 happen, the jury is simply being told, as it says on a  
6 lot of these documents, the Johnson entities or the  
7 Johnson composite companies and so forth and so on.  
8 They're not going to be asked to thread the needle  
9 about the little niceties of what that means.

10 MR. BROWN: Well, Your Honor, the only -- I  
11 agree with that. I do think, however, that it should  
12 just say one entity, Johnson & Johnson.

13 THE COURT: I'm hoping that's where we're  
14 going to end up.

15 MS. PEPKE: I'm inclined to agree.

16 THE COURT: We haven't decided that yet,  
17 Ms. McVey.

18 MS. MCVEY: We have -- we just talked. I  
19 think we're in a good place, but I need to put  
20 something else, because there's two phases to this  
21 trial.

22 THE COURT: Go ahead.

23 MS. MCVEY: Okay.

24 MS. PEPKE: That's fair.

25 MS. MCVEY: So if they will state on the

1 record for this first phase, for the first phase,  
2 Johnson & Johnson entities include all four, depending  
3 on --

4 THE COURT: That's what Mitch has said. He's  
5 said --

6 MS. PEPKE: To be defined by the Court.

7 THE COURT: -- to be defined by me in the  
8 equitable hearing.

9 MS. MCVEY: And we're not going to raise that  
10 Johnson & Johnson was only responsible to '79 and  
11 then --

12 THE COURT: That's correct. You don't need  
13 to do that. It's either they are or they aren't.

14 MS. PEPKE: Agreed.

15 MS. MCVEY: I'm going to get you to see even  
16 clearer on the record momentarily; and, Judge, I'm  
17 sorry to be like this, but I am petrified of what  
18 this -- tangled web we weave.

19 THE COURT: Well, listen, here's the thing  
20 that worries me about it -- and I share a little bit of  
21 that concern, too -- it's not these fine lawyers I have  
22 in front of me. I trust their honor and their  
23 integrity with what they are representing completely.  
24 It's what may happen with all the corporate  
25 machinations that go on way after we've tried this

1 case. That worries me a little bit.

2 I'll do the best I can to nail down all  
3 corners of the thing when we have the equitable hearing  
4 because I think I do have the ability -- and I think we  
5 all agree about that -- to decide in that portion of it  
6 exactly where the liabilities are.

7 And that will go forward with the judgment  
8 that is then put upon the books, whether it absolves  
9 all of them or has them liable for something.

10 MS. MCVEY: So assuming we agree on that, in  
11 this first phase, then let's -- we may not get here,  
12 but if we get here and there's a --

13 THE COURT: Doesn't appear to.

14 MS. MCVEY: Okay.

15 THE COURT: All right. Let's talk about  
16 punitives for a minute.

17 MS. MCVEY: So this is where it's different  
18 because now you have the ability to put in, in our  
19 view, the reprehensibility of the different  
20 machinations of Johnson & Johnson entities.

21 THE COURT: Right.

22 MS. MCVEY: It goes to the -- goes to all the  
23 factors that deal with punitive damages.

24 THE COURT: Yep, yep.

25 MS. MCVEY: That's No. 1.

1           No. 2, what net worth are we putting in?  
2 Because Kenvue has, like, a billion dollars.  
3 Johnson & Johnson also has, like, a billion dollars.  
4 There's a lot of information that would be relevant in  
5 the punitive phase.

6           THE COURT: Ms. McVey, I believe that I will  
7 be able to make some determinations about that when and  
8 if we get to the punitive phase.

9           And I will tell you I will make some  
10 determinations about that, even if it includes having  
11 an equitable hearing, because I will not let it go  
12 to -- if we have a punitive phase. I just don't see  
13 the necessity of doing it right now. We don't know if  
14 it's going to have a punitive phase or not. We don't  
15 even know if you're going to get a verdict, so I don't  
16 want to have to deal with what happens in the punitive  
17 phase.

18           But I can tell you this: We will make some  
19 determinations about that before we submit punitive  
20 damages to the jury.

21           MS. MCVEY: I just wanted to raise it for you  
22 because if it happens, it usually goes so fast.

23           THE COURT: All that will happen is that they  
24 will -- they will find -- because they just have one  
25 thing that's going to represent everybody, if they find

1 A, a verdict for the plaintiff, B, a monetary amount,  
2 and C, they answer the last question on my jury form --  
3 like I always do -- which is: Was the conduct of the  
4 defendants willful, wanton, and whatever. The normal  
5 formulation.

6 If they answer that question yes, then we are  
7 going to be proceeding against everybody, and everybody  
8 will make some determinations about exactly how that is  
9 to be said before we conduct the punitive damages  
10 hearing because I'll be darn sure we're going against  
11 everybody before we do that.

12 MS. MCVEY: I think that's fair.

13 THE COURT: And I think that gets y'all a  
14 chance to make these more nuanced arguments about  
15 phrases of time and who's responsible for what badness  
16 and whether that is everybody or on a successor  
17 basis -- as I think it would be -- or whether fraud is  
18 a different thing.

19 I know there are all kinds of arguments to be  
20 made about that, and I don't want to nail myself down  
21 on one side of the fence or the other on that.

22 MS. MCVEY: That's fine. I just want to  
23 raise it.

24 THE COURT: I think the fraud --

25 MS. PEPKE: Yeah, and I think we've been

1 clear, we do have arguments on who we think would be on  
2 that line.

3 THE COURT: Sure. I get that. I don't think  
4 you're precluded by not raising them right now, is what  
5 I'm saying.

6 MS. MCVEY: So if I can ask Ms. Pepke to put  
7 a clear statement on the record.

8 MS. PEPKE: Should I say --

9 MS. MCVEY: She's going to put a clear  
10 statement on the record about if we get a verdict  
11 against Johnson & Johnson, what that means.

12 THE COURT: Let's do that right now, then.  
13 Ms. Pepke.

14 MS. PEPKE: We understand that if -- we're  
15 going to put one line for the jury to determine the  
16 Johnson & Johnson defendants, which includes whoever  
17 Your Honor later decided will be liable on the  
18 successor liability theories.

19 MS. MCVEY: And regardless of the year.

20 MS. PEPKE: Regardless of the year.

21 THE COURT: Very good. That's all we needed  
22 to say. Thank you very much, Ms. Pepke. And I think  
23 that completely preserves the issue.

24 And it also has the added effect of if the  
25 jury finds for the defendant, it's found in favor of no

1 liability for any of them, so it works that way as  
2 well.

3 We agree about that?

4 MS. MCVEY: Yes.

5 MS. PEPKE: Yes.

6 THE COURT: Very good. All right. Now --

7 MS. MCVEY: I appreciate the clarity. I  
8 really do.

9 MS. PEPKE: It's confusing.

10 THE COURT: Now, we going to rest or what?

11 MS. MCVEY: We are. Your Honor, the  
12 plaintiffs rest.

13 THE COURT: All right. Very well. Okay.  
14 All right. The plaintiffs' case is completed, and we  
15 will now move to motions for directed verdict. Are you  
16 prepared now? Do you need any time?

17 MS. PEPKE: I'm prepared.

18 THE COURT: Very good. Ms. Pepke, you are  
19 recognized for the defendants' motion for a directed  
20 verdict.

21 MS. PEPKE: And Your Honor, you tell me what  
22 is easiest. I have -- I'm moving through claims and  
23 arguments. We can do one and then let them respond,  
24 which probably is easier.

25 THE COURT: I think that's easier, sure. If

1 it gets out of hand, we'll revisit.

2 MS. PEPKE: Thank you, Your Honor.

3 We have filed a motion for directed verdict  
4 as well, just for the record. And I'm going to pass  
5 that out.

6 THE COURT: Have I got a copy up here?

7 MS. PEPKE: I am bringing it to you right  
8 now.

9 THE COURT: Move this stuff out of the way.

10 MS. PEPKE: And obviously, our arguments and  
11 citations are detailed more fully in there. I'm going  
12 to try to be conscious of everyone's time here and not  
13 get into the nitty-gritty on everything. I will start  
14 with the failure to warn claim, Your Honor.

15 It is our position that plaintiffs have not  
16 met the burden on failure to warn. In South Carolina,  
17 they must establish that a warning would have avoided  
18 the harm, and they cannot do that if there's not  
19 evidence that a plaintiff would have read the warning,  
20 and there is no evidence here that Mr. Perry read or  
21 relied on a warning in the past when he was using  
22 Johnson's Baby Powder, so at the time of use.

23 What they had was evidence of Mr. Perry  
24 looking at screenshots of the label and saying what it  
25 meant to him now. That was what the evidence was. So

1 our position is under Allen versus Long Manufacturing,  
2 332 South Carolina 422, Court of Appeals 1998, they  
3 have not met their burden of showing that a warning  
4 would have made a difference in the -- in that harm  
5 that they allege caused Mr. Perry's mesothelioma.

6 MS. MCVEY: You want to go back and forth?

7 MS. PEPKE: That's -- I think --

8 THE COURT: All right. Now, we're not going  
9 in the order it is on here, so let me get to -- this is  
10 No. 3, I think.

11 MS. PEPKE: Yes, I'm sorry.

12 THE COURT: That's all right. That's all  
13 right. I just got to get to it.

14 MS. PEPKE: See if I can help you. I think  
15 it's on Page 7.

16 THE COURT: All right. You may proceed.

17 MS. MCVEY: I think she wanted to me to  
18 respond to each.

19 Is that the way you want to do it?

20 THE COURT: Yes.

21 MS. MCVEY: Okay. Sorry, Your Honor.

22 Your Honor, the evidence in this case, you  
23 heard it from Mr. Perry yesterday when he said that if  
24 he had been warned that this asbestos-containing body  
25 powder -- that No. 1, that it contained asbestos or

1 that it could cause cancer, he absolutely never would  
2 have used it.

3           The warning that they were talking about is  
4 an inhalation warning for talc in general. It's  
5 clearly not an additive warning. It doesn't warn about  
6 asbestos. It doesn't warn about the potential for  
7 cancer. And it certainly doesn't include, it can cause  
8 death in that way.

9           Your Honor, here they never warned about --  
10 about asbestos, about cancer, or anything else. And  
11 the older bottles never even had a warning on them.

12           Therefore, the evidence -- there's plenty of  
13 evidence in the record the jury can find that the  
14 warning here was -- to the extent there was a warning,  
15 was inadequate.

16           MS. PEPKE: Again, Your Honor, our point  
17 would be there was no evidence he ever read the labels,  
18 so it wouldn't have mattered what they say.

19           THE COURT: All right. Deny the motion on  
20 the basis that there is at least a scintilla of  
21 evidence.

22           And, of course, in these directed verdicts,  
23 the evidence is viewed in the light most favorable to  
24 the nonmoving party, and if there's a scintilla of  
25 evidence, that is enough to prevent the bringing of a

1 motion for a directed verdict.

2 Here, there's both testimony directly from  
3 the plaintiff, Perry, that he would have heeded a  
4 warning that mentioned the danger of asbestos or -- or  
5 the danger of death or other kind of injury.

6 And secondly, there is evidence -- that  
7 evidence is also supported by the reference to  
8 something that was said at the oyster roast that  
9 evidently was about the danger of cosmetic talc that  
10 caused him to look further and then stop using cosmetic  
11 talc, including Johnson & Johnson's Baby Powder.

12 So those two things, to me, at least present  
13 a scintilla of evidence enough to deny the motion, and  
14 I do so on failure to warn.

15 MR. BROWN: Your Honor, may I say one very  
16 brief thing?

17 THE COURT: Certainly. Certainly.

18 MR. BROWN: I appreciate that. I'm not going  
19 to try to interrupt Ms. Pepke very often here, but just  
20 briefly, the scintilla rule, I think, has been  
21 modified, so I think Your Honor wouldn't be using that  
22 standard.

23 THE COURT: What do you think the rule is  
24 now?

25 MR. BROWN: I think it would have to be

1 evidence that a reasonable person could rely on for a  
2 verdict. I don't think it could just be a scintilla  
3 any longer.

4 THE COURT: And what is your authority for  
5 that?

6 MR. BROWN: I think it's -- I can't state the  
7 name, unfortunately, of the case, but it's very recent.

8 THE COURT: Yes, it is a very recent case,  
9 and I can't recall the name either.

10 But it says that, Mr. Brown, but it also is  
11 wrapped up in some other distinctions that make me  
12 doubt that the scintilla rule has been thrown out the  
13 window completely, especially since words to that  
14 effect appear in the Rules of Civil Procedure. So  
15 that's why I think the scintilla rule has still got  
16 some viability.

17 But I will say this: There is evidence on  
18 the recognition upon which a reasonable person can rely  
19 in finding out what Mr. Perry would have done with a  
20 warning that could be relied upon for a finding if the  
21 jury choose to make such a finding, that he would have  
22 obeyed the warnings had they been placed upon the  
23 bottle.

24 MR. BROWN: Thank you, Your Honor. It's The  
25 Kitchen Planners case, just to match up.

1 THE COURT: Yep.

2 MR. BROWN: The request is that whatever that  
3 case said, we conform to that?

4 THE COURT: Yeah, yeah.

5 MS. MCVEY: Your Honor, just for the record,  
6 I think you mentioned the oyster roast and somebody  
7 told him about something. I'm not sure how much of  
8 that actually came in in front of the jury.

9 THE COURT: Oh, I think enough came in about  
10 that that they got all wound up about what could be  
11 said and who could be talked about and so forth and so  
12 on. But Mr. Perry said, right out of the stand, that  
13 after that he did research and then he terminated all  
14 use of Johnson & Johnson baby powder.

15 MS. MCVEY: Absolutely. I just want to say  
16 even without that, there's enough in the record.

17 THE COURT: Right, right. Very good.

18 All right. You may continue, Ms. Pepke.

19 MS. PEPKE: Thank you.

20 This -- this point really goes more to how  
21 the verdict form is set up, so it's going to sound a  
22 little esoteric, but it really does matter.

23 Punitive damages are not allowed for strict  
24 liability or loss of consortium claims; and so, that,  
25 we would ask to the extent the punitive damages request

1 relies on those two claims, that that be denied. And  
2 it matters because there's going to need to be  
3 directors on the verdict form, so they'd only get to  
4 punitive damages --

5 THE COURT: All they're going to be asked on  
6 in the verdict form that will be submitted now is  
7 whether the conduct of your client -- if they find a  
8 verdict for plaintiff.

9 So if they answer that number "yes," then  
10 they're going to be asked to go to the next number -- I  
11 just don't know what that number will be on the verdict  
12 form -- which is the thing that says, do you find for  
13 the plaintiff or the defendant or whatever it says.

14 And if they answer that we find for the  
15 plaintiff, against the defendant, then they're going to  
16 be asked, do you find that the conduct of the defendant  
17 was willful, reckless, and wanton.

18 That's all they're going to be asked.

19 MS. PEPKE: And I think my point is --

20 THE COURT: The award of punitive damages and  
21 the basis upon which it would be awarded would be in a  
22 second phase.

23 MS. PEPKE: I agree with that. And my  
24 only -- when I'm thinking in my head, the problem we  
25 would get into is if, by chance, they found only for

1 plaintiff on strict liability and then for defendant on  
2 negligence and fraud, then they don't even get to  
3 the --

4 THE COURT: I think the verdict form is going  
5 to make that clear. I promise you. We will revisit  
6 that again when we look at the --

7 MS. PEPKE: Thank you, Your Honor.

8 THE COURT: -- verdict form.

9 MS. PEPKE: Then I'm holding my arguments as  
10 to punitive damages as to successor liability.

11 THE COURT: Yes. Best when we get to the  
12 verdict form, we'll come back to that issue.

13 MS. MCVEY: So I don't think we need to give  
14 direction on the verdict form. Let's say they find for  
15 the plaintiff on strict liability and the defendant on  
16 negligence, and they find recklessness. That simply  
17 means is we don't go to the punitive phase because we  
18 can't get punitive damages on strict liability.

19 THE COURT: That's correct. That's correct.

20 MS. MCVEY: But if they find negligence, we  
21 go -- and they check yes, then we go to the punitive  
22 phase. That's easy.

23 THE COURT: Very easy.

24 MS. PEPKE: So we just need to put directors  
25 on.

1 MS. MCVEY: No, we don't need to put  
2 directors on it. It will be clear.

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

6 THE COURT: Correct. And I will put that --  
7 and I will then put that on the record. And I have  
8 many times, we've had plenty of them where we didn't  
9 have punitive damages.

10 MS. MCVEY: I don't think you even need to  
11 address it because we'll know what they find.

12 THE COURT: That is correct. At the time  
13 when I read the verdict and -- I will put on the record  
14 exactly that.

15 MS. PEPKE: Understood, Your Honor.

16 THE COURT: All right. Very good.

17 Now, what's your next thing?

18 MS. PEPKE: Fraudulent and fraudulent  
19 misrepresentation.

20 THE COURT: Where is that?

21 MS. PEPKE: That is the first one, Page 4.

22 THE COURT: All right.

23 MS. PEPKE: So it's critical in this claim to  
24 understand that all of the elements must be met and  
25 there are two, really, that are an issue for this

1 motion.

2 First, there has to be identified a specific  
3 representation of fact that the plaintiffs  
4 detrimentally relied on. And plaintiffs have failed to  
5 introduce any specific representation of fact that was  
6 relied on, and certainly not by Mr. Perry.

7 So what we have heard and when -- Mr. Perry  
8 testified is that as a child and growing up, his family  
9 used Johnson's Baby Powder because it was a, quote,  
10 family brand and they trusted it. But he didn't  
11 identify any specific fact that he relied on in using  
12 it.

13 THE COURT: Well, let me point out to you,  
14 Ms. Perry [sic], one of the dramatic moments in the  
15 testimony was when he looked at the jury, right to  
16 begin with, and said, I relied on the safety of this  
17 product and I was let down, or words to that effect.

18 He -- he testified about the reliance that  
19 the product was safe very early in his testimony. I  
20 think it was some kind of picture on the screen when he  
21 did that.

22 So, if you're saying that he -- that there's  
23 no evidence of a specific representation, specific  
24 representations are -- the record's replete with that,  
25 J&J advertisements and all that kind of stuff. We went

1 through all that.

2           And then when he got on the stand, that's  
3 exactly what he referred to when he said he relied upon  
4 the safety of the product and the -- that they said it  
5 was safe, to his detriment. I don't know the  
6 colloquial -- I can't quote exactly the colloquial way  
7 he described it.

8           I think there is plenty, whether it's a  
9 scintilla or, as Mr. Brown suggests, something that a  
10 reasonable person can rely upon. Either way, I think  
11 there's enough evidence in the record to support  
12 fraudulent -- to support a specific representation. So  
13 that's your first thing about fraud. I deny it.

14           MS. PEPKE: Your Honor, then I'll just rest  
15 on the brief where we point out that statements about  
16 opinion are puffery, like, it's the mildest or the, you  
17 know, purest, those would not constitute facts for  
18 purposes of this claim.

19           THE COURT: Yes, but, of course, you know, we  
20 know what -- we know that -- we know what was said,  
21 that you say is puffery.

22           But we also have a mountain of evidence in  
23 this record that Johnson & Johnson meant to say to the  
24 public, and did say to the public any number of times,  
25 there is no asbestos in that talc. Our talc is

1 completely safe, so forth and so on. So there's not  
2 only the conclusory thing that Mr. Perry refers to but  
3 the underlying position of Johnson & Johnson to the  
4 general public about that. There's all kinds of  
5 evidence in the record about that.

6 MS. PEPKE: And I think you probably already  
7 addressed -- the second point was that there's no  
8 evidence that at the time he was using Johnson's Baby  
9 Powder, that he relied on any of those specific  
10 statements of fact.

11 THE COURT: And I would say that there's  
12 evidence -- scintilla-wise, and that a reasonable  
13 person could rely upon -- that at the time he used it  
14 and all during the time he used it, as a young person,  
15 as a growing person, as an adult, that he -- it was  
16 represented to him by the company it was safe and he  
17 relied upon that.

18 MS. PEPKE: Thank you, Your Honor.

19 THE COURT: All right.

20 MS. PEPKE: That takes us to the negligence  
21 per se argument. Let me get to the page. It's our  
22 Page 9. I'm not even sure we need to address it  
23 because it wasn't included in the proposed jury  
24 instructions that plaintiff submitted as a separate  
25 kind of charge. Or --

1 THE COURT: I always charge on it, but ...

2 MS. PEPKE: -- or claim.

3 MS. MCVEY: So Your Honor, I can  
4 short-circuit, I think, you know, the argument about  
5 negligence per se is that the strict liability statute  
6 provides for that.

7 THE COURT: Right.

8 MS. MCVEY: But I don't think you need to  
9 rule on that because I don't think we're going to  
10 address it per se.

11 What we're going to have is a charge on  
12 strict liability, we're going to have a charge on  
13 negligence and a charge on fraudulent  
14 misrepresentation.

15 So I think those are the only things really  
16 needed to rule on, and my argument would be subsumed in  
17 those three causes of action.

18 THE COURT: Well, let's let her argue it  
19 because she may feel like subsumed means that somehow  
20 you can pull it back out of the box and talk about  
21 negligence per se.

22 And she wants to make it clear that she  
23 doesn't think negligence per se is justified in being  
24 placed before the jury, so go ahead with your argument.

25 MS. PEPKE: Thank you. I just need to make a

1 record on that. We believe that under the -- there's  
2 actually a case directly on point on this from the  
3 district --

4 THE COURT: Which one?

5 MS. PEPKE: District of South Carolina,  
6 federal court, Marshall v. Lowe's Home Centers. That's  
7 2016 Westlaw 4208090, District South Carolina 2016.

8 They address this exact argument and their  
9 holding was negligence per se, if you try to hook it to  
10 the strict liability statute, simply becomes  
11 duplicative and will create an inconsistent -- a chance  
12 of an inconsistent verdict. It just becomes a circular  
13 argument, that you trigger strict liability and,  
14 therefore, it triggers negligence.

15 THE COURT: This is Dave Norton's case,  
16 Mitch?

17 MR. BROWN: Judge Harwell.

18 THE COURT: Oh, Harwell. All right. I'm not  
19 thinking about the right one. All right. I'm looking  
20 in your brief at Page 10. I'm looking right at it.

21 Your brief says that you're entitled to a DV  
22 on per se because it's duplicative of your strict  
23 liability claim.

24 MS. PEPKE: It's duplicative, circular. I  
25 mean, there's a lot of different ways you can explain

1 it. It becomes duplicative because it proves itself.  
2 The minute you get strict liability, you would then  
3 necessarily get a negligence per se, which collapses  
4 into each other. If the jury's instructed on both,  
5 they could come out inconsistently.

6 MS. MCVEY: Just to be clear, we're not  
7 asking that a negligence per se charge be given.

8 THE COURT: All right. To the extent that  
9 this argument is an argument that, all right, I should  
10 not charge negligence per se, it is granted.

11 MS. MCVEY: Thank you, Your Honor.

12 MS. PEPKE: Thank you, Your Honor. That was  
13 a nice way to deal with that, Your Honor.

14 THE COURT: All right. What's the next one?

15 MS. PEPKE: I think it takes us to our design  
16 defect claim, which is -- I sure wish I would have put  
17 page numbers on this outline.

18 THE COURT: That's all right. We can get to  
19 it.

20 MS. PEPKE: I think it's our second argument,  
21 which would be Page 6.

22 THE COURT: All right. Hang on.

23 MS. PEPKE: It's a pretty straightforward  
24 argument. Design defect, of course, is a theory of  
25 product liability that rests on a claim that the

1 product as intentionally designed is defective; and, of  
2 course, Johnson's Baby Powder was not intentionally  
3 designed to include asbestos. It is essentially being  
4 alleged as a contaminant, and so, it simply doesn't fit  
5 a design defect theory of recovery upon the product  
6 liability. It's a manufacturing defect claim.

7 THE COURT: Well, I don't know. Young versus  
8 Tide Craft, I think is going to shoot that one down;  
9 but, anyway, go ahead, Ms. McVey.

10 MS. MCVEY: Your Honor, it's both a design  
11 defect and a manufacturing defect.

12 THE COURT: That's right.

13 MS. MCVEY: The design defect --

14 THE COURT: And that's what you -- you have  
15 asserted each.

16 MS. MCVEY: That's right. The design defect  
17 is that they intended to put talc in their baby powder.  
18 And the talc --

19 THE COURT: And they knew that the talc they  
20 put in had asbestos in it. They knew that the asbestos  
21 is associated from a mineralogical standpoint with  
22 talc, et cetera, et cetera, et cetera. And this we've  
23 covered in many different cases.

24 So it's design and manufacturing for that  
25 reason. Is that -- you know, all right. And -- and

1 it's -- all right. It's buttressed by the argument of  
2 alternative design, and the alternative design would be  
3 not to use the talc, but to use cornstarch.

4 MS. MCVEY: Absolutely. And that's been the  
5 evidence in this case.

6 THE COURT: I want y'all to know, by the way,  
7 that every day when I have my shower, I use  
8 Johnson & Johnson baby powder.

9 MS. MCVEY: With cornstarch?

10 THE COURT: Yes, and I began -- I began to  
11 use it in the -- I was trying to think this morning  
12 when I was taking my shower. But I think I began to  
13 use it shortly after my youngest was born in 1980,  
14 because I read something that said that -- you know,  
15 there was this thing that there might be asbestos in  
16 baby powder.

17 And I went to the drugstore the next time  
18 because I -- you know, in the south, with no air  
19 conditioning, you use baby powder all the time. And  
20 darned if they didn't have cornstarch baby powder on  
21 the shelf, and I grabbed some. I said, hmm, feels like  
22 regular old baby powder to me.

23 So I just want you to know, that's still a  
24 thing for a lot of folks in the south, but that's  
25 what -- that -- it's the design defect is the -- plays

1 into that alternative design thing, is the way I'm  
2 looking at it, Ms. Pepke.

3 MS. PEPKE: Understood. So I think that was  
4 denied.

5 THE COURT: Right.

6 MS. PEPKE: Our next argument is on Page 11  
7 and it is the argument that plaintiffs is failed to  
8 establish proximate causation. It's a very detailed  
9 argument. It goes on for many pages.

10 We're happy to rest on our briefing, if Your  
11 Honor would allow, but the argument is essentially they  
12 have --

13 THE COURT: Give me a just kind of summary.

14 MS. PEPKE: Sure, Your Honor.

15 Their expert, Dr. Madigan, did not present  
16 any epidemiology. He just presented a map that would  
17 link any kind of dose that Mr. Perry was actually  
18 exposed to -- in fact, there's been no dose calculation  
19 given for Mr. Perry.

20 And as Mr. Longo -- Dr. Longo said when he  
21 was on the stand, he couldn't even say for reasonable  
22 surety that it was Johnson's Baby Powder that caused  
23 the mesothelioma -- Mr. Perry's mesothelioma.

24 THE COURT: Well, this is, of course, the --  
25 the heart of it is the -- the Loreman-Henderson case

1 that establish that the proximate cause must be viewed  
2 in terms of substantial -- substantial factor test.

3 That's really the heart and soul of what your  
4 argument is about; and, again, at this stage in the  
5 proceeding, I think there is enough evidence -- there's  
6 a scintilla of evidence and enough evidence upon which  
7 a reasonable person could rely to submit to the jury  
8 the proximate cause issue.

9 I think it is well made out and I think the  
10 analysis upon -- the Supreme Court most recently, in --  
11 and the Court of Appeals most recently in Edwards  
12 versus Scapa Waycross supports my point in that regard.  
13 So I know you think it supports yours.

14 And I think all the right cases are cited in  
15 here, but I will send it to the jury and deny the  
16 directed verdict motion.

17 MS. PEPKE: Thank you, Your Honor.

18 We had also moved on loss of consortium, but  
19 simply because it's derivative of the claims we believe  
20 should have been dismissed, because you denied our  
21 motion on the other claims, that's obviously denied as  
22 well.

23 The remainder of --

24 THE COURT: Right, and just for the record,  
25 that is correct. Derivative of the other claims and on

1 which directed verdict has been denied. Therefore, DVS  
2 to loss of consortium is similarly denied.

3 MS. PEPKE: And then the remainder of the  
4 issues really went to the successor liability questions  
5 that we kind of hashed out, and we would save for  
6 Phase 2 if we got there. It was our argument that  
7 successor shouldn't be -- aren't liable for punitive  
8 damages and there's no direct claim of fraud or  
9 punitive damages against them for their conduct.

10 THE COURT: Right.

11 All right. One of the things I want to be  
12 sure that we talk about if we need to, at this stage,  
13 there's a whole issue I hear about the empty chair,  
14 about superseded intervening cause.

15 Mr. Brown, for example, thinks the empty  
16 chair is very, very different from superseding  
17 intervening cause.

18 I can tell you that these cases are very hard  
19 to diagram sentences of. What the nuns taught me is  
20 not sufficient to deal with some of what our Court has  
21 said, particularly in Smith versus Tiffany, but I don't  
22 blame the Court for that. The Court is very favorable  
23 to interpreting the statutory law.

24 That's what we've been doing in all of this,  
25 is it all gets back to what the legislature did when

1 they passed the so-called Tort Reform Act.

2           So I am concerned we don't lose sight of and  
3 nobody waives anything at this point with regard to  
4 their positions about empty chair and superseding --  
5 superseding intervening cause. I think empty chair is  
6 awfully hard to do in cases like this.

7           The Court has really put the clamps on being  
8 able to just -- if you were in Michigan or some of  
9 these other states and point to another one, and, boy,  
10 if that turns out to be involved, the plaintiff's just  
11 out of luck if the other one is somebody they've  
12 already settled with or can't be found or for whatever  
13 reason.

14           South Carolina is different from that. The  
15 people that are going to be the focus of the parties  
16 are those that are before this Court and this jury.  
17 And the only way you avoid that is to say that there is  
18 an empty chair out there.

19           Mr. Brown, I want to be sure that y'all cover  
20 whatever you need to cover because this is the time.

21           MS. PEPKE: I'm going to tag him in.

22           THE COURT: Because I want to make it clear  
23 that at least until I am shown otherwise, I will  
24 continue to rule as I have in all of these asbestos  
25 cases, that because of the language of Smith versus

1 Tiffany in particular, but also what is said in Machin  
2 versus Carus, although its fact pattern's a completely  
3 different one.

4 It's something -- somebody that can't be  
5 sued. It's the employer in a comp setting. But the --  
6 what I think the Court has made clear is the General  
7 Assembly tried to protect the empty chair in the  
8 statute. But what does that mean?

9 In the context of the rest of the statute and  
10 not putting in there what we think would be fair and  
11 equitable, which I have been asked many times by  
12 defense lawyers to do, but what the language actually  
13 said, it ends up that the empty chair is going to have  
14 to be some party that is not in the case.

15 That who's -- no matter how -- what badness  
16 the defendants in this case did, this outside empty  
17 chair, negligence intervened and superseded the  
18 negligence of the party that's in this claim. That's  
19 the way I read it because of the whole construct of  
20 what Smith versus Tiffany says.

21 MS. PEPKE: And I'm certainly going to tag  
22 him in in a minute.

23 THE COURT: Mitch, I just don't know that  
24 that's where I am; and, therefore, I don't want to it  
25 to be said that you waived that argument or we haven't

1 gotten there yet or anything of that nature, so that's  
2 why I'm raising it.

3 MS. PEPKE: And I want to be clear, are you  
4 asking us specifically because you're wondering who we  
5 want to put on the apportionment line? Is that what  
6 this is leading to?

7 THE COURT: Well, you're going to get there  
8 anyway because I think we've got some very different  
9 ideas about whether, and in what way, you could  
10 apportion. You can't apportion with people that are  
11 not in the case, and there's only one person in the  
12 case besides AII, so ...

13 But in -- in addition, I think to  
14 apportioning, what I think Johnson & Johnson is also  
15 arguing is that I don't care what we did, there's  
16 another cause there that had nothing to do with us.

17 Or at least that is what I interpreted by  
18 some of the submissions you've made. I don't think you  
19 can make that the way this case has been tried. But I  
20 don't want that to be a ball that's dropped because we  
21 didn't raise it at this time.

22 MS. PEPKE: I'm going to tee it up and then  
23 hand it over to him, just to make sure that Mitch is --

24 THE COURT: I'm not trying to overcomplicate  
25 this thing or throw something in that y'all hadn't

1 tried, but I don't want it to be said later on, wait a  
2 minute, you closed the door on us before we had a  
3 chance to say anything.

4 MS. PEPKE: Sure.

5 So the intervening superseding cause, I think  
6 you described that correctly, in the sense that it  
7 doesn't matter what the -- the -- the defendant in that  
8 certain case did, bad acts. There's another bad act  
9 that came in and supersedes.

10 THE COURT: Superseded it, right.

11 MS. PEPKE: That is not what we're arguing.

12 What we're arguing is we didn't do it,  
13 period. There's no asbestos in it. Even if there was,  
14 it was so low it couldn't have caused it, so there is  
15 no -- there is no bad act. It was the empty chair over  
16 here. It was the brakes. And we've given you  
17 information for that.

18 THE COURT: Is your empty chair the brake  
19 manufacturer?

20 MS. PEPKE: Yes, it is, Your Honor.

21 THE COURT: Okay. If that puts a different  
22 light on it, I will hear Ms. McVey on that; but if  
23 that's what you say the empty chair is, is the brake  
24 manufacturer, then that's a different scenario.

25 Of course we don't know who the brake

1 manufacturers were or anything about it, but that may  
2 not matter. Something else happened and the big  
3 clouds, the big black clouds are so terrible, that's  
4 what caused it. But what proof there is of that, we  
5 don't know.

6 But I am not to that point yet. I'm just  
7 trying to be safe. But if that's what you say it's  
8 going to be, then my fears will go away. I'm not  
9 worried.

10 MS. PEPKE: I'm interested to hear what you  
11 thought of my opinion.

12 THE COURT: I thought you might be getting  
13 into some of the defendants that were settled out of  
14 this kind of thing.

15 MS. PEPKE: Well, we obviously preserve  
16 our --

17 THE COURT: Yeah, but in the bigger picture,  
18 but there's been no evidence put on about any of that.

19 MS. PEPKE: We preserve our position on Smith  
20 versus Tiffany, but we understand that you have ruled  
21 the defendants will not be on that --

22 THE COURT: All right. I think I got you.  
23 Ms. McVey.

24 MS. MCVEY: And I just want to make sure in  
25 addressing the brakes, there's a couple points I want

1 to take. One, there's not a single expert that they  
2 brought in here --

3 THE COURT: There's not.

4 MS. MCVEY: -- to say that it was --

5 THE COURT: We're just talking about a  
6 scintilla of something upon which a reasonable person  
7 could rely. I think they've got a scintilla here  
8 because they got the worked on brakes and he had 62  
9 brake jobs.

10 Now, that's all they really got, but that's a  
11 scintilla, in my view, of something upon which a  
12 reasonable person could rely. Now, can they prove that  
13 so that the jury can render any kind of verdict on it?  
14 That -- that's --

15 MS. MCVEY: Well, Your Honor, and to win  
16 that, they have to show that the brakes were the cause.

17 THE COURT: Right, but you get -- they got a  
18 case to put up. If they choose not to put a case up,  
19 then you may be going to make some directed verdict  
20 motions of your own.

21 MS. MCVEY: I understand that.

22 THE COURT: And that would be the time to  
23 explore these matters.

24 MS. MCVEY: Perfect. And just to the extent  
25 that we were talking about the verdict form at all, the

1 brake manufacturers, of course, could not go on this  
2 verdict form.

3 THE COURT: That's correct.

4 MS. MCVEY: Okay. Thank you, Your Honor.

5 THE COURT: But, you know, if you were to  
6 find an intervening superseding cause and it was  
7 identified as such, you could find it as such, then you  
8 wouldn't have to put it on the verdict form. It would  
9 be proof that it wasn't their fault.

10 MS. MCVEY: It would be a defense verdict.

11 THE COURT: They said -- their whole deal is,  
12 it wasn't our fault. Period. End of conversation.

13 MR. BROWN: Your Honor, the way we interpret  
14 it, without -- I know you've already read the brief, so  
15 I won't go through the brief, but is the plaintiffs --

16 THE COURT: Do what?

17 MR. BROWN: I'm sorry. The plaintiff  
18 shows --

19 THE COURT: Come up here to the mic, Mitch --  
20 Mr. Brown.

21 MR. BROWN: Thank you.

22 The plaintiff, Your Honor, shoulders the  
23 burden of proof and causation.

24 THE COURT: Yes.

25 MR. BROWN: And that can't be shifted over to

1 the defendant, that basic proof of causation and fact.  
2 Okay. And so if there is evidence, which there was,  
3 both factual evidence from the witness himself, the  
4 plaintiff, and from experts, that talked about it, in  
5 his exposure, Dr. Longo was one, there might have been  
6 others.

7 MS. PEPKE: Haber.

8 MR. BROWN: Haber. Then that issue of  
9 that -- this is not -- asbestos was not the cause.  
10 Instead, there's an alternative evidence of a different  
11 cause.

12 MS. PEPKE: The Johnson's Baby Powder wasn't  
13 the cause.

14 MR. BROWN: Yeah, the asbestos -- the  
15 evidence of asbestos related to Johnson's Baby Powder  
16 was not the cause -- thank you, Ms. Pepke, for fixing  
17 my sentence there -- but instead, the brake dust  
18 evidence was the cause.

19 THE COURT: Of the mesothelioma?

20 MR. BROWN: Yes. That evidence has come in.  
21 The plaintiff has the burden -- once that -- once that  
22 comes in, our argument is, first, in the briefing, we  
23 think the parties should be put on the verdict form.  
24 But understanding the Court doesn't agree with that,  
25 then at least we get to the empty chair, where we can

1 say as a cause of fact matter, they have the burden of  
2 proving that this evidence that came in, you know, that  
3 wasn't the cause.

4 THE COURT: Right.

5 MR. BROWN: And so that is the defense that  
6 the statute preserves for us to make that empty chair  
7 defense, so that's what we are asserting.

8 But what Ms. McVey said a minute ago was it  
9 was our burden to prove something. That's not --

10 THE COURT: It would be, if the -- empty  
11 chair is an affirmative defense.

12 MR. BROWN: That's the part I don't agree  
13 with, Your Honor.

14 THE COURT: Well, see, now, I -- that's what  
15 I spent from about 2:30 forward this morning doing, is  
16 looking at that very thing.

17 MR. BROWN: The -- the Supreme Court cited  
18 some Tennessee law that they adopted, said they agreed  
19 with. I looked back at some of that law. They're  
20 really talking about a series of things that the  
21 plaintiff has a duty to prove. I don't think if  
22 there's no evidence, you know, that -- that anyone else  
23 had a causative fact that is fair, probably, to point  
24 at that person.

25 THE COURT: Yeah. And here's the problem:

1 We don't have any -- in this particular thing, we don't  
2 have any quantification, not one piece of  
3 quantification evidence, other than some clouds. We  
4 don't have any evidence as to -- we got somebody saying  
5 brake dust puts out a lot more asbestos than talc, if  
6 it puts out any. But they don't quantify.

7 I mean, that -- that's what we got. Very  
8 slim sort of thing, a suggestion that, hey, it's  
9 brakes. The brakes are bad. But nothing was put up at  
10 all to quantify that, and that's where I'm going to  
11 have some problems.

12 MS. PEPKE: Your Honor, the numbers got a lot  
13 in trial, but we -- there was evidence and  
14 quantification. Dr. Longo provided the quantification,  
15 and not only in his report --

16 THE COURT: Dr. Longo said that some brakes  
17 could emit 40 percent -- that rather than this point  
18 blah, blah, blah percent that is contained in talc,  
19 that brakes, and some other industrial thermal  
20 installation exposures could emit 40 percent of  
21 whatever he said, some big number; right?

22 MS. PEPKE: Yes.

23 THE COURT: That's certainly in there.

24 MS. PEPKE: It was exposure.

25 THE COURT: But it wasn't quantified as to

1 this exposure at all, nor was the empty chair  
2 identified. That's the part that I really got the  
3 heartburn about.

4 MS. PEPKE: But they were.

5 MR. COWAN: Could I jump in here, Your Honor?

6 THE COURT: I'm telling you, you guys, you  
7 know --

8 MS. PEPKE: I'll say it. The affidavit  
9 identified -- that was submitted identified Bendix as  
10 the -- as the brakes.

11 MR. COWAN: And NAPA Rayloc. It's in  
12 evidence.

13 THE COURT: Well, it identified a  
14 manufacturer, but it didn't give you anything about  
15 volume or when it was used or anything like that.  
16 That's what I've got such a problem about.

17 In this J&J case, there was a lot of  
18 information about how much you used. In fact, Longo  
19 said he thought it was 5 tons over the course of his  
20 lifetime.

21 MS. PEPKE: He gave the same information on  
22 brakes.

23 THE COURT: Huh?

24 MS. PEPKE: He gave the same information on  
25 brakes as Mr. Perry.

1 THE COURT: Well, I have to look at that, but  
2 I can tell you that I think you've got a lot of  
3 problems with identifying the empty chair.

4 MS. MCVEY: Could I respond?

5 THE COURT: Yeah, I'm going to let you  
6 respond at a certain point. We had three different  
7 arguments up here.

8 MS. MCVEY: I know. My head was spinning.

9 Just briefly, Your Honor. The evidence in  
10 this case is that the -- the exposure that Mr. Perry  
11 had to Johnson & Johnson's Baby Powder on its own is  
12 enough to cause the development of this mesothelioma.  
13 All right?

14 Now, Dr. Longo and others did say that the  
15 brakes could have contributed; right? They say that.  
16 Not one person comes in here, not one, and says it was  
17 the sole cause. Not one.

18 THE COURT: Then that's what the -- that --  
19 that's the distinction. If it were just a contributing  
20 cause, you know, we know, classically, that what people  
21 say in terms of dose is every dose counts towards the  
22 ultimate cumulative dose you get.

23 But that's not what we're talking about here.  
24 We're trying to identify a particular source as a  
25 source that would have superseded and intervened, no

1 matter how much baby powder the -- it would -- this  
2 exposure would have superseded all the exposure to J&J.

3 MS. MCVEY: That's right. And -- and, Your  
4 Honor, it's important because there are a couple of  
5 things. One, the digestion showed tremolite and  
6 winchite.

7 THE COURT: Yes.

8 MS. MCVEY: Brakes are made of chrysotile.

9 THE COURT: Yes.

10 MS. MCVEY: No one -- they didn't have an  
11 expert that said brakes were the sole cause; right?

12 THE COURT: That's correct.

13 MS. MCVEY: Their experts don't even say it's  
14 a cause at all. So what they rely on are what our  
15 expert said, and our expert said it certainly  
16 contributed. It could have.

17 THE COURT: Yes.

18 MS. MCVEY: But Johnson & Johnson's Baby  
19 Powder was a substantial factor in the development of  
20 this disease.

21 THE COURT: Right.

22 MS. MCVEY: But it certainly wasn't -- the  
23 brakes were not the only cause. They weren't the thing  
24 that caused it, and they have no expert testimony to  
25 dispute any of that; and, in fact, theirs is the exact

1 opposite.

2           So I'm now interested to see how they argue  
3 it, because it's a difficult argument for them to make  
4 when their own experts won't do it, but I think they're  
5 entitled to make the argument perhaps, but they're not  
6 entitled to put anybody on the verdict form.

7           MS. PEPKE: We're not asking for that.

8           THE COURT: We're not talking verdict form.

9           MS. MCVEY: But even then, an intervening or  
10 superseding cause? It's not an intervening or  
11 superseding cause.

12           MS. PEPKE: We haven't asked for --

13           THE COURT: Well, y'all don't talk to each  
14 other, please. Please.

15           Are you finished --

16           MS. MCVEY: I think --

17           THE COURT: -- Ms. McVey?

18           MS. MCVEY: Yes, ma'am.

19           THE COURT: Good. Take your seat.

20           Ms. Pepke.

21           MS. PEPKE: Okay. There was a lot that went  
22 on there; but, as to the brakes, if the jury believes,  
23 as we offered, that there was either no -- no asbestos  
24 in Johnson's Baby Powder or not sufficient, the  
25 ultra-trace asbestos in there was not sufficient to

1 cause mesothelioma.

2 Dr. Longo was asked on the stand, "If that is  
3 assumed, is it your testimony that brakes could have  
4 been the cause of mesothelioma alone?"

5 MR. COWAN: That was Haber.

6 MS. PEPKE: Haber, sorry. Haber.

7 So is there is that testimony that went to  
8 the jury. If the jury believes what we have said, they  
9 could give their -- his testimony that it was brakes.  
10 Now, that's part one.

11 Part two, it is -- I think it's very -- we're  
12 in dangerous territory where we start collapsing  
13 intervening superseding cause with empty chair. It is  
14 not the same. And when we collapse them, we shift  
15 burdens that shouldn't be shifted. Empty chair is  
16 saying that -- not us, them.

17 THE COURT: And that's what you're saying.

18 MS. PEPKE: It is.

19 THE COURT: You're saying by the way, not us,  
20 but he does have mesothelioma. Them. Exactly what  
21 you're saying.

22 MS. PEPKE: It's a negation of what they are  
23 saying about us. So you can look at it in two  
24 different ways.

25 THE COURT: You can't negate what they're

1 saying about you by saying anything about the brakes.  
2 You either have asbestos or you don't. You say you  
3 don't have asbestos; they say you do.

4 And then you have a volume that would have  
5 been sufficient to cause the mesothelioma, or you  
6 don't. You say no to both those things.

7 MS. PEPKE: So but the evidence of brakes,  
8 not only is it for an empty chair, but it's also to  
9 undercut, to attack, the reliability of the experts  
10 they have presented.

11 That carries no burden on us. We simply say,  
12 you didn't rule this -- you couldn't rule this out.  
13 You got all this evidence, Dr. Haber, Dr. Longo, and  
14 you couldn't rule it out.

15 And in fact, it's your testimony that this  
16 could have caused it all by itself without Johnson's  
17 Baby Powder. That requires no burden on us whatsoever  
18 to offer that evidence.

19 THE COURT: Well, I don't hear the entire  
20 testimony that way, Ms. Pepke. But be that as it may,  
21 I think where we are in this thing is that the next  
22 time we will visit this matter is probably on the jury  
23 verdict form.

24 But I hear all of what you all say and you  
25 know what my general feeling about this thing is. But

1 I don't think I'm required to make any further ruling  
2 about it at that time, am I?

3 MS. MCVEY: No, ma'am.

4 THE COURT: All right.

5 MR. BROWN: Your Honor, the only other thing  
6 I would mention is, for example, Ms. Pepke went over  
7 what Dr. Longo said in part. The jury's entitled to  
8 believe part of what he says and not part of what he  
9 says.

10 THE COURT: I understand. I'm going to  
11 charge that up to the Nth degree.

12 MR. BROWN: Right, right. So the part they  
13 could believe is that the brakes caused the disease.  
14 The part that they might not believe is that the J&J  
15 Baby Powder contributed to the disease. So that is  
16 certainly a possibility for the jury to consider.  
17 That's why this needs --

18 THE COURT: Yeah, and the big issue here is  
19 whether the argument is some vague unassigned, you  
20 know, justification by way of dividing the  
21 responsibilities or apportion the responsibilities  
22 between the two of them, or whether it's a claim that,  
23 don't matter what we did, they are the cause. That's  
24 the issue. That's the problem.

25 MR. BROWN: And the only -- the statute

1 itself, as everybody knows, says: "A defendant" --  
2 this is subsection D of the -- of the contribution  
3 statute, says: "A defendant shall retain the right to  
4 assert that another potential tortfeasor, whether or  
5 not a party, contributed to the alleged injury or  
6 damages and/or may be liable for any or all of the  
7 damages alleged."

8 THE COURT: Right. I know what it says, and  
9 I also know the detailed discussion of that contained  
10 in now Chief Justice Kittredge's writing in Smith v.  
11 Tiffany.

12 MR. BROWN: Right.

13 THE COURT: What else do we need to do?

14 MS. MCVEY: No, I think we're good. This is  
15 the end of your directed motion.

16 We have thoughts on jury charge, but we can  
17 get to that when we get to it.

18 THE COURT: All right. Well, the bottom line  
19 is the directed verdict motions are denied.

20 MS. MCVEY: Thank you. And --

21 THE COURT: All rights preserved. And so now  
22 we go to --

23 MS. FLYNN: Your Honor, I did have a verdict  
24 motion.

25 THE COURT: Yes, ma'am.

1 MS. MCVEY: How is she moving for -- just for  
2 clarity --

3 MS. FLYNN: I will address that.

4 MS. MCVEY: Okay.

5 MS. FLYNN: We're not moving on causation. I  
6 am not arguing causation. I am just arguing  
7 sufficiency of the causes of action as set forth in the  
8 pleadings.

9 THE COURT: You're going to have to do it  
10 where I can hear you. Ms. McVey, just wait for a  
11 minute. Let me see what it is she's going to say.

12 All you can do is to argue about the economic  
13 damages. You can't -- there's no other argument you  
14 can make about liability because you're in default.

15 MS. FLYNN: I understand your position on  
16 default, Your Honor. The default --

17 THE COURT: It's a ruling. I have made a  
18 definitive ruling on that. You have continued to argue  
19 that you're not in default and all the other papers you  
20 have submitted, including the paperwork you submitted  
21 to the South Carolina Supreme Court.

22 I have definitively ruled that you were in  
23 default on the first amended complaint. You are not  
24 served with the second or the third amended complaint  
25 because you had already been placed in default on the

1 first amended complaint.

2           So any argument about whether you are still  
3 in the default, I have already rejected. If you are  
4 making that motion again, I reject it. I deny your  
5 ability to go forward on any premise that you are not  
6 in default.

7           MS. FLYNN: I understand your ruling, Your  
8 Honor.

9           THE COURT: All right.

10           MS. FLYNN: My point and what our directed  
11 verdict motion is made on is the default admits only  
12 what has been well pleaded. It does not forfeit the  
13 rights of a defendant except as to matters necessarily  
14 admitted. So if the cause of action in a complaint is  
15 not sufficiently stated, then it cannot -- it goes  
16 beyond the allegations of the complaint and doesn't go  
17 against me.

18           Any judgment thereon, except as a dismissal,  
19 would be the only allegations of the complaint, is what  
20 I'm saying.

21           THE COURT: Well, I find that the allegations  
22 of the complaint are completely -- on specific as to  
23 AII or all causes of action, and therefore, it is -- I  
24 granted a default. The time for contesting that grant  
25 is long since past. That was done in the fall

1 sometime, as I recall it.

2 And so your ability to argue that is long  
3 since foreclosed by the granting of the default  
4 judgment -- or the granting of the motion to place you  
5 in default.

6 MS. FLYNN: I understand the Court's ruling  
7 on that, Your Honor. Our position was just that the  
8 miss -- fraudulent misrepresentation was not well  
9 pleaded in the complaint nor were the punitive damages,  
10 and those -- those are the two positions.

11 I think that they -- I don't seek conspiracy  
12 any longer in their charges or on the verdict form. So  
13 our position was that those two causes of action were  
14 not well pleaded --

15 THE COURT: What -- that's just a kind of big  
16 vague thing. What do you mean by that?

17 MS. FLYNN: I will get to my argument, Your  
18 Honor. I just didn't want to -- view in the light most  
19 favorable to the plaintiff, the complaint fails to  
20 state a cause of action for fraudulent  
21 misrepresentation.

22 There's no requisite factual basis set forth.  
23 Rather, the cause of action is just stated in a very  
24 conclusory fashion, and that isn't sufficient. It sets  
25 forth -- there are nine factors, Your Honor. Those

1 factors must be shown by clear, cogent, and convincing  
2 evidence. And failure to prove any of those factors  
3 is -- is fatal.

4           So the complaint sets forth against all  
5 defendants in a conclusory fashion with no  
6 distinguishing among any of the defendants or  
7 identification of specific representation that was made  
8 by AII versus anybody else. So we think that the  
9 directed verdict is warranted as to fraudulent  
10 misrepresentation on that basis.

11           THE COURT: All right. Well, A, I -- all  
12 right. I don't see what authority or right you have to  
13 make that motion at this time because are you in  
14 default. Had you answered, you could have raised the  
15 sufficiency of the pleading in a motion to dismiss or a  
16 motion for summary judgment. You have tried to do that  
17 as well.

18           But you -- you ignore the effect of a  
19 default, and you've defaulted as to the well-pleaded  
20 facts. The facts are well pleaded, but your arguments  
21 about the sufficiency of the evidence on which those  
22 facts rest moves beyond simply pleading issues and into  
23 motions for summary judgment issues, which you are not  
24 entitled to pursue because you defaulted. That's my  
25 ruling.

1 MS. FLYNN: Okay, Your Honor.

2 THE COURT: So motion is denied.

3 MS. FLYNN: Did you want to hear anything on  
4 punitive damages at this time? We filed a brief on  
5 that. I'm happy to --

6 THE COURT: I don't think you need to talk  
7 about that right now because we're not there.

8 MS. FLYNN: I meant as to our brief, our  
9 directed verdict motion. We plead -- because there's  
10 not cause, there's not specific conduct alleged, so  
11 it's a due process argument in that regard.

12 THE COURT: Yes, ma'am, that -- well, that  
13 ship has sailed many years ago. I could cite a bunch  
14 of cases, but I won't. I deny it, taken into account  
15 that argument.

16 MS. FLYNN: We have filed a brief. I don't  
17 know if you would like a copy.

18 THE COURT: Of course I would.

19 Boy, I tell you, that appellation is  
20 misapplied. Look at this for AII as opposed to anybody  
21 else in this case.

22 MS. FLYNN: The brief is only ten pages, Your  
23 Honor.

24 THE COURT: Well, what is the rest of this  
25 stuff?

1 MS. MCVEY: It's probably our very well-plead  
2 complaint.

3 THE COURT: Yes, that's exactly what it is.

4 MS. MCVEY: That's what I was thinking it  
5 might be. Thank you.

6 THE COURT: Yes.

7 Yes, it's all 102 pages of your complaint.

8 All right. All right. What else?

9 MS. MCVEY: So I think you denied the  
10 directed verdict motions of both AII and  
11 Johnson & Johnson.

12 THE COURT: That's correct.

13 MS. MCVEY: And so now we move on to the  
14 defendants' case.

15 Well, they need to rest.

16 THE COURT: All right. Defendant, you may  
17 proceed.

18 MS. PEPKE: Defendants rest.

19 THE COURT: All right. The defendant rests.

20 MS. MCVEY: And, Your Honor, we would move  
21 for directed verdict in this case because the only  
22 testimony in this case in evidence is that  
23 Johnson & Johnson that Mr. Perry used  
24 Johnson & Johnson's Baby Powder for decades, 40-plus  
25 years, that the asbestos -- that the talc contained in

1 this -- these Johnson & Johnson's Baby Powders were  
2 from three mine sources: Vermont, Italy, and China.

3           We had testimony and evidence in this case  
4 that those source mines were contaminated with  
5 asbestos, that the asbestos would have gotten into the  
6 Johnson & Johnson's Baby Powder and that Mr. Perry used  
7 that baby powder that was contaminated for decades,  
8 that the evidence in this case is -- the only evidence  
9 in this case is that the Johnson & Johnson's Baby  
10 Powder that he used over decades was a substantial  
11 factor in the development of his mesothelioma.

12           We showed both regular, frequent, and  
13 proximate exposure. And under the Edwards v. Scapa  
14 case, that we more than met that burden.

15           So, Your Honor, we have proved both asbestos  
16 content, exposure, and everything else. We proved that  
17 Johnson & Johnson never supplied a warning about the  
18 danger of asbestos in their product. And, in fact,  
19 today, apparently, it would say it doesn't need a  
20 warning because it didn't have asbestos in it.

21           They provided no expert testimony, they  
22 called no witnesses in their case in chief and, Your  
23 Honor, for those reasons, we believe that we're  
24 entitled to a directed verdict both on the design  
25 defect, the manufacturing defect, and the failure to

1 warn defect in both strict liability and negligence.

2           As to the fraud causes of action, there are  
3 nine factors as you know, that get us to the fraud  
4 case. And I can walk through each one of those. But  
5 fraud is an intentional perversion of the truth for the  
6 purpose of inducing another in reliance upon it, to  
7 part with some valuable thing belonging to him or to  
8 surrender a legal right.

9           So you have to prove a couple -- you have to  
10 prove nine things. A representation --  
11 Johnson & Johnson, over and over and over and over,  
12 through decades, represented that its product was pure,  
13 that it was safe, and that it didn't contain asbestos.  
14 And even when confronted with the testing showing  
15 asbestos, they batted that down, they hid that in the  
16 regulators, and showed that it was, in fact, safe and  
17 put that out to the public.

18           We have demonstrated that was, in fact,  
19 false, that the product was not pure, nor was it safe.  
20 We proved its materiality, no question about that. We  
21 proved over and over and over again that  
22 Johnson & Johnson, while it was representing to the  
23 public that its product was safe and pure, knew,  
24 through all sorts of testing many times over decades,  
25 that that representation was, in fact, false.

1           The next factor would be the intent that the  
2 representation be acted upon. Here, Johnson & Johnson  
3 showed over and over again, put it up there a million  
4 times, this baby powder is a sacred cow. It's the  
5 golden goose. We have to protect it at all cost to  
6 keep the enterprise alive, and they did that by hiding  
7 how dangerous their product was.

8           We had to prove that the hearer was ignorant  
9 about the truth or its fallacy. You heard from Michael  
10 Perry that if he had any idea that asbestos could be in  
11 their product, that he never would have used it, and he  
12 relied upon their representation.

13           We had to prove that the hearer had a right  
14 to rely on that. And he certainly was a consumer of  
15 this product, and he had the right to rely on  
16 representations that was made. And then we had to  
17 prove the hearer's consequent and proximate injury.  
18 Because of the way they committed fraud and the  
19 fraudulent misrepresentation, Mr. Perry continued to  
20 buy baby powder for decades. He continued to use it  
21 multiple times a day, and that caused his mesothelioma.

22           And, Your Honor, we believe that we're  
23 entitled to a direct verdict on the fraudulent  
24 misrepresentation as well.

25           THE COURT: All right. Ms. Pepke.

1 MS. PEPKE: Thank you, Your Honor. I'll  
2 correct that we didn't put on a case -- we put on  
3 evidence through Mr. Hopkins -- Dr. Hopkins,  
4 Dr. Kuffner, and we just went through a slew of  
5 exhibits that were admitted on behalf of defendants.

6 MR. COWAN: Dr. Mann.

7 MS. PEPKE: And Dr. Mann. So --

8 THE COURT: And -- and Hopkins.

9 MS. PEPKE: I thought I said that. I  
10 apologize if I didn't. Dr. Hopkins, Dr. Kuffner,  
11 Dr. Mann, and the exhibits that were admitted this  
12 morning.

13 There is plenty of testimony that asbestos --  
14 that the jury could believe that asbestos was not  
15 present in Johnson's Baby Powder at the time Mr. Perry  
16 used it. There is plenty of testimony that even if it  
17 were at the levels that plaintiffs allege, that it's  
18 ultratrace. It could not cause mesothelioma.

19 There is -- on the -- on the issue of  
20 causation, just alone, the jury does not have to  
21 believe the experts they presented. They can believe  
22 part of it. They can believe part of their experts,  
23 that it was brakes that was the sufficient cause and  
24 not believe that -- their experts' testimony that it  
25 was Johnson's Baby Powder that had asbestos in it at

1 all.

2           On fraud, Your Honor, we just argued this.  
3 Our position, and the jury could believe, Mr. Perry  
4 didn't rely on any particular factual statement. And  
5 there is evidence from Dr. Hopkins and Dr. Kuffner  
6 disputing that the facts that they point to were false  
7 at all.

8           In fact, the evidence was, through  
9 Dr. Hopkins and Dr. Kuffner, that it was safe -- and  
10 Dr. Mann, that it was safe, that there was no asbestos  
11 in the cosmetic talc, and there is an issue to go to  
12 the jury on that. There was numbers thrown up there  
13 about tremolite or asbestos that was in ore or in  
14 industrial talc, and it's all disputed as to whether  
15 any of that was towards cosmetic talc.

16           And there is no evidence that Mr. Perry  
17 relied on any of these statements at the time he was  
18 using the Johnson's Baby Powder.

19           Now, I understand you denied our directed  
20 verdict motion on that on the other -- on the flip  
21 side, but the jury could certainly find that  
22 Mr. Perry's testimony did not sufficiently establish  
23 that he read or relied on any factual statement at the  
24 time.

25           THE COURT: All right. All right.

1 Plaintiffs motion for directed verdict is denied. I  
2 find that on -- whether the standard be a scintilla of  
3 evidence or evidence upon which a reasonable person  
4 could rely, this is a hotly-contested case, the  
5 defendants' contest has mostly come by way of  
6 cross-examination of Plaintiffs' witnesses and the  
7 introduction of -- through witnesses or by agreement, a  
8 good deal of evidence that places in legitimate contest  
9 before the jury, issues of both asbestos content in  
10 Johnson's Baby Powder, the -- Mr. Perry's reliance, on  
11 the elements of fraud, the elements of design, the  
12 elements of failure to warn, in such a fashion that  
13 plaintiffs' motion for directed verdict should be  
14 denied. All right.

15 MS. PEPKE: I think I technically need to  
16 renew our directed verdict in full.

17 THE COURT: Yes, all right. That's correct.

18 MS. PEPKE: So I do that now?

19 THE COURT: All right. Yes, you may.

20 MS. PEPKE: Defendants renew their directed  
21 verdict in full on all the points we contain in your  
22 brief.

23 THE COURT: Very good. And I believe those  
24 points were again repeated in your opposition to  
25 Plaintiffs' motion for directed verdict. And on both

1 bases, I rule that the case is going forward to the  
2 jury with sufficient showing on each side to put these  
3 issues in contest before the jury.

4 Ms. --

5 MS. FLYNN: AII also renews our directed  
6 verdict motion, Your Honor.

7 THE COURT: Very good. And on the same basis  
8 as decided before, upon in the case of AII, it is in  
9 default, and therefore, the well-pleaded affirmative  
10 defense of the complaint are established by the  
11 default. And on that basis alone, any -- no directed  
12 verdict is further needed. Liability has already been  
13 established by the default.

14 All right. When we come to the submission of  
15 the case to the jury, there needs to be special  
16 instructions given about the ambit of their authority.  
17 I have already told them some things as the case  
18 started, but it will be made clear to the jury that the  
19 jury's posture with respect to AII is limited to  
20 termination of the economic damages.

21 MS. MCVEY: And on economic, yes.

22 THE COURT: All right.

23 MS. MCVEY: Yes, Your Honor, thank you. And  
24 just for the record, I also want to note for the record  
25 that as to AII's argument on directed verdict, that our

1 complaint was, in fact, well plead against all causes  
2 of action against AII, including punitive damages.

3 THE COURT: Yes. I -- I so ruled.

4 MS. MCVEY: Thank you, Your Honor.

5 THE COURT: Okay. Now, where are we? Are we  
6 now finally down to our jury charges --

7 MS. MCVEY: I think we're down to jury  
8 charges.

9 THE COURT: -- and the verdict form?  
10 You want to break for lunch and come back?

11 MS. MCVEY: I think so, so no one gets  
12 crabby.

13 THE COURT: And here is what I would say. I  
14 don't think we need our court reporter for our charge  
15 conference.

16 MS. MCVEY: They're going to want that.

17 MR. COWAN: Yes, Your Honor.

18 THE COURT: You want --

19 MR. BROWN: I think we have to.

20 THE COURT: Why? I generally have -- I don't  
21 let the general public come in and talk -- just sit in  
22 here and talk, and then I decide. And when I decide  
23 what the jury charge is going to be, all right, you can  
24 submit your objections on the record, and they will be  
25 noted and -- and denied, and we'll move forward.

1           Why do you need --

2           MR. BROWN: Well, there are a couple of --  
3 there's several rulings -- for example, apportionment  
4 and whether that's on the verdict form, the Court will  
5 need to make rulings.

6           THE COURT: Well, I mean, I would summarily  
7 put those on the record, but all the details of us  
8 squabbling back and forth about language, I'm not going  
9 to have the court reporter record all that. I never  
10 have.

11          MS. PEPKE: Just for the record then, it  
12 would be our position that it should be preserved and  
13 with the objections -- line item objections and  
14 arguments that are made --

15          THE COURT: I have never done that in any  
16 case I have ever tried. What happens is each side  
17 submits proposed charges. Generally, I don't preside  
18 over a charge conference. I let my court -- my law  
19 clerk do it, and they know what my position on these  
20 things are. And they -- they then come with me about  
21 what I need to decide, and my law clerk and I sit there  
22 and I decide. And then I issue the charge I'm going to  
23 give. And I don't have a hearing on each and  
24 everything about the charge. I'm not doing that.

25          MS. PEPKE: Then I will state, for the

1 record, that our red line -- or black-line version of  
2 the Plant had a lot of footnotes noting our objections  
3 that we adopt those as objections on the record.

4 THE COURT: Certainly. I don't want to  
5 preserve any position you have. I just don't see the  
6 need for a court reporter to sit here and -- while we  
7 talk about wording and all that kind of thing. Your  
8 legal positions about that are going to be stated in  
9 your alternative to whatever it is that I decide the  
10 charge is going to be in something that's going to be  
11 submitted before I give the charge and put on the  
12 record, just like we have always done.

13 MS. MCVEY: I am agreeable to that, of  
14 course. I mean, I tell you, they have filed more paper  
15 and proffers. I assume you could proffer something  
16 else about this, but I have --

17 THE COURT: I'm not going -- that -- I don't  
18 have to even have a charge conference.

19 MS. MCVEY: I agree.

20 THE COURT: A charge conference is just  
21 trying to get us together to see if we can get some --  
22 and understand what your positions are about wording,  
23 but the charge is mine. I give the charge. And if  
24 it's not in conformance with what you want charged or  
25 don't want charged, then you say that, generally, by an

1 alternative submission. And it can contain footnote  
2 fuss want it to or whatever, but I'm not going to have  
3 the details of us going back and forth about language.

4 MS. PEPKE: Understood your ruling, Your  
5 Honor.

6 THE COURT: You understand?

7 MS. PEPKE: And I will note that we filed a  
8 set of proposed instructions that did not follow Plant  
9 that would capture our red-line proposals --

10 THE COURT: Yes, that's all very well --

11 MS. PEPKE: Just stating it on the record.

12 THE COURT: And all I'm trying to do is  
13 facilitate -- when I have these charge conferences, all  
14 I'm trying do is facilitate having somebody then put  
15 that down in one thing and get it up for me. And then  
16 y'all will know when I read it out, that's what the  
17 charge is. And you can make buku exceptions if you  
18 haven't already covered them in what is filed.

19 I'm not going to have her take down all  
20 that -- sitting around the table. I don't even have my  
21 robe on, much less I'm going to have my golf shirt on  
22 and sit down with you all and go over what each side  
23 wants in the charge. I will say, okay, I'm going to do  
24 that or I'm not going to do that. And then we are  
25 going to put that in writing.

1           And then when you get that document, you're  
2 going to file something that says, hey, this is what I  
3 want. She's wrong.

4           MS. FLYNN: I just want to join in J&J's  
5 objection on that just --

6           THE COURT: Well, I've never done that, and I  
7 don't know a judge in the country that's ever done  
8 that. I'm not doing that.

9           MS. BUENO: Your Honor, while we have our  
10 court reporter then --

11          THE COURT: Yes.

12          MS. BUENO: -- let me just -- two quick  
13 items.

14          THE COURT: Sure.

15          MS. BUENO: First, for closing argument  
16 tomorrow --

17          THE COURT: Yes.

18          MS. BUENO: -- I'm assuming you told the jury  
19 to come back at 9:30?

20          THE COURT: That's right.

21          MS. BUENO: Can you tell us how much time  
22 you're going to give for each side and what the time  
23 limit is?

24          THE COURT: Oh, yes. Let's have each of you  
25 tell me what you want, and I'll tell you what I'm going

1 to do.

2 MS. BUENO: I think an hour-and-a-half would  
3 be plenty.

4 THE COURT: All right. Ms. McVey.

5 MS. MCVEY: You just jumped right in front of  
6 me.

7 The plaintiffs would like an hour-and-a-half  
8 in the first half and 30 minutes in rebuttal --

9 THE COURT: Right.

10 MS. MCVEY: -- just because of the extent of  
11 the evidence that we've put forth.

12 THE COURT: All right.

13 MS. MCVEY: And we think that's reasonable  
14 based on where we are in having to do this.

15 THE COURT: All right.

16 MR. COWAN: We would just ask for the time to  
17 be split evenly. So if you're going to give two hours,  
18 then we would like two hours as well.

19 THE COURT: I usually give a little more to  
20 the plaintiff because they've got the burden of proof.

21 MR. COWAN: Yes.

22 THE COURT: So what I'm going to do is this:  
23 I'm going to give the plaintiff an hour-and-a-half on  
24 the first go. I'm going to give Defendant J&J an hour  
25 and 15 minutes on their response. And I'm going to

1 give AII, with trepidation in my heart, 15 minutes and  
2 instruct that they may only talk about economic  
3 damages. And I am going to tell the jury they're  
4 already determined to be liable.

5 MS. MCVEY: Then, Your Honor, we could have  
6 some rebuttal time of 30 minutes?

7 THE COURT: Yes.

8 MS. MCVEY: Okay.

9 THE COURT: Now, here's the other thing,  
10 though, charges -- can -- do we need -- charges, I  
11 think we just need to go back and forth, then I'm going  
12 to make a determination, and y'all will put it on the  
13 record.

14 MS. MCVEY: I agree.

15 THE COURT: And you will know that  
16 determination by the time we finish. I'm going to have  
17 your charges and your charges sitting side by side, and  
18 we going to go through them and decide what we going to  
19 do. And I'm going to instruct one of you to produce a  
20 final for me. And then y'all will have the rest of the  
21 day to file whatever you want to.

22 But do we need to have on the record any  
23 discussion about the form -- the verdict form?

24 MS. MCVEY: I think we can do that off the  
25 record as well and then --

1 THE COURT: And then put it on the record  
2 after. That's what I think. So what -- that's all to  
3 say, Madam Court Reporter --

4 MS. BUENO: Oh, not yet, Your Honor.

5 THE COURT: I know, we not going to let her  
6 go until you --

7 MS. BUENO: Okay. Okay.

8 THE COURT: They have some other things they  
9 want to put on the record. When that's done and we  
10 adjourn for lunch, we going to come back in and work on  
11 the charges and the verdict form. You don't need to be  
12 here for that. But what I would suggest be done is we  
13 gather at 9:00 tomorrow before the closing arguments  
14 start because they will need to be absolutely assured  
15 that they know -- now, they're going to know, for  
16 purposes of preparing them tonight, but they -- they  
17 need to know what I'm putting on the record about that  
18 before.

19 So if you could be here by 9:00 o'clock. And  
20 if we need you earlier after we've completed all this,  
21 we'll let you know, but I think 9:00 will be  
22 sufficient. So really, it's going to be written things  
23 that can be given to you on everybody's position.

24 THE COURT REPORTER: Okay.

25 THE COURT: All right.

1 Now, Ms. Bueno.

2 MS. BUENO: So, Your Honor, I heard you say  
3 plaintiffs will have an hour-and-a-half for their first  
4 session.

5 THE COURT: Right.

6 MS. BUENO: You had said an hour and 15 --

7 THE COURT: For y'all, 15 for them, and then  
8 the half -- what did you say? You wanted half an hour  
9 to reply.

10 MS. MCVEY: Half an hour to reply.

11 MS. BUENO: And so because plaintiffs have  
12 two hours, I would request an hour-and-a-half, Your  
13 Honor. I think that's --

14 THE COURT: I understand and I deny that, but  
15 I'm going to give you an hour and 15 minutes.

16 MS. BUENO: Okay. There is another issue  
17 that we think will likely come up tomorrow, so I wanted  
18 to raise it now.

19 THE COURT: Certainly.

20 MS. BUENO: It relates to an adverse  
21 inference for a missing witness. And I draw Your  
22 Honor's attention to case that I'm sure you're familiar  
23 with, *Gonzalez*. I have a case -- may I approach, Your  
24 Honor?

25 THE COURT: Certainly.

1 MS. BUENO: And the reason I bring this is  
2 because, in 2014, the Supreme Court of South Carolina  
3 made very clear in the *Gonzalez* case -- and I have  
4 tabbed it for Your Honor -- that because of the risk of  
5 unfairness that an adverse inference could impose, we  
6 hold today that a party's invocation of the missing  
7 witness rule should be limited to fact witnesses and  
8 should not be applied to opinion witnesses.

9 And so what happened in this case is that  
10 there were discussions about the fact that the  
11 defendants failed to bring their expert witness, and  
12 that was done in argument. And the Court held that  
13 that was prejudicial and held that there is such an  
14 inference that can be argued about fact witnesses but  
15 not experts.

16 And the reason I raise this, Your Honor, is  
17 because plaintiff should not be able to get up in  
18 closing arguments tomorrow and indicate that we did not  
19 call a fact -- or excuse me, we did not call an expert  
20 witness who would have said X, Y, and Z, or that the  
21 plaintiffs -- or the jury should be able to think that  
22 our experts would have said something adverse to our  
23 interests.

24 They have every right, Your Honor, to stand  
25 up and say we didn't bring an expert. That's not what

1 I'm saying, but what I'm saying is for them to go a  
2 step further and say, they didn't bring an expert  
3 because they wouldn't have supported what they're  
4 saying in this room or they didn't bring an expert  
5 because they would have said something about asbestos  
6 being in talc or they didn't bring an expert because  
7 they would have said something contrary to whatever our  
8 arguments are. That is a step too far.

9           If they want to make that -- that argument  
10 about our failure to bring a fact witness, I think  
11 *Gonzalez* lets them do it, but the South Carolina  
12 Supreme Court has been clear that the rules are  
13 different for experts. So I raise this now to avoid  
14 needing to interrupt tomorrow.

15           THE COURT: All right. Hang on for a minute.

16           Here's the bottom line of what Justice Beatty  
17 concluded in this thing, I think: "Because of the risk  
18 of unfairness that such adverse inferences could  
19 impose, we hold today that a party's invocation of the  
20 missing witness rule should be limited to fact  
21 witnesses, and it should not be applied to opinion  
22 witnesses, particularly psychiatric experts,  
23 because" --

24           And then it says, "Because a jury instruction  
25 carries with it the financial information of a judge

1 learning in the law; and, therefore, usually has more  
2 impact on the jury than arguments of counsel, we hold  
3 the best practice is that use of the missing witness  
4 rule should be limited to counsel's argument and a jury  
5 instruction on the matter should not be given."

6           That's what -- what this thing was aimed at  
7 was giving a jury instruction that, if you didn't call  
8 a witness, it's presumed that the witness would say  
9 such-and-such and so-and-so. And so it's the  
10 presumption that was -- I think the heart and soul of  
11 *Gonzalez* is particularly a delicate thing in a criminal  
12 case, of course, with constitutional issues involving  
13 the proof of guilt beyond a reasonable doubt as  
14 something that influences the analysis.

15           And I think that is much underscored by the  
16 policy reasons recited by many of the state's. Don  
17 cites -- Justice Beatty cites a Connecticut case.  
18 Public policy jury instructions should not be given  
19 regarding the missing witness rule. And that's, I  
20 think, what this whole thing is geared toward: Don't  
21 give a jury instruction now.

22           Now, arguing that the failure to cause  
23 them -- call them means something, let's talk about  
24 that for a minute.

25           All right.

1 MS. BUENO: And, Your Honor --

2 THE COURT: What -- and I am with you,  
3 Ms. Bueno, in asking you to explain further.

4 What is it -- I won't give an instruction on  
5 a presumption. I can tell you that right now. That  
6 will never be done so. You are safe on that. I think  
7 *Gonzalez* speaks to that. But how about jury argument?

8 MS. BUENO: Yeah, and I think *Gonzalez* was  
9 about jury argument, that the Court --

10 THE COURT: Why did it say what I just read?

11 MS. BUENO: Well, because it also talked  
12 about how it would apply in an instruction. But in  
13 this particular case, it was during closing arguments  
14 that both the state and the Defendant *Gonzalez* invoked  
15 the missing witness rule, and the state told the  
16 jury -- and I'm looking at Page 629 of this opinion,  
17 which for the record, is *in re Gonzalez* 409 S.C. 621,  
18 2014.

19 And on Page 629, it says, "During closing,  
20 the State told the jury that *Gonzalez* was entitled to  
21 get an independent evaluation and that he had obtained  
22 one from Dr. Martin. The State then argued,  
23 'Dr. Martin is not here.' The State would submit to  
24 you that you can draw an inference from his not being  
25 here that if he was here, his testimony would have been

1 adverse to Gonzalez."

2           So this is exactly what I fear is going to  
3 happen here, that plaintiffs are going to stand up and  
4 say, you heard about Dr. Sanchez, we asked Dr. Longo  
5 about them, Dr. Sanchez was one of Johnson & Johnson's  
6 experts and they didn't bring him. And ask yourself  
7 why they didn't bring him. They probably didn't bring  
8 him because he was not going to help their case or he  
9 was going to say X, Y, and Z, or whatever they can come  
10 up with.

11           And *Gonzalez* stands for the principle that  
12 that is exactly what should not happen. And if Your  
13 Honor looks, it's the same page I tabbed for you --

14           THE COURT: Well, you know, what this is  
15 aimed at, the missing witness rule has to do with the  
16 witness that is in the control of the adverse party.  
17 That's what the missing witness -- this thing -- this  
18 witness was not in control of the defendant in  
19 *Gonzalez*.

20           MS. BUENO: It's exactly right, which is why  
21 the Court's --

22           THE COURT: But your witness that they're --  
23 that they want to argue about, Sanchez, and all those  
24 other folks about which -- has been received in  
25 evidence information as to what their opinions are.

1           They're going to argue, hey, they didn't  
2 testify, so you can assume they didn't back up what  
3 they're saying.

4           MS. BUENO: Your Honor, Gonzalez was their  
5 expert witness. So this Dr. Martin was, indeed, the  
6 expert witness. The -- it's exactly the same posture.  
7 And so, why they made the distinction --

8           THE COURT: I will read *Gonzalez*.

9           MS. BUENO: Great.

10          THE COURT: But I can tell you my reaction is  
11 that they are a not asking for a jury instruction, and  
12 I think that's what *Gonzalez* was aimed at.

13          MS. MCVEY: And, Your Honor, just for the  
14 record -- I'll let you read it and I'm going to read it  
15 carefully, too -- but what Ms. Bueno just read is that  
16 the closing argument of counsel was you can infer,  
17 based on the adverse -- that it would have been  
18 adverse.

19          THE COURT: Yeah.

20          MS. MCVEY: That's not what we're doing here.  
21 What's already been in front of the jury, without  
22 objection, by the way, is Dr. Sanchez's opinion and --  
23 who else was it? Oh, Alexander.

24          THE COURT: Right.

25          MS. MCVEY: Your Honor, that's already --

1 that's without objection. That's already in front of  
2 the jury.

3 THE COURT: Right. You're not going to be  
4 arguing an inference.

5 MS. MCVEY: No.

6 THE COURT: You're going to be arguing, the  
7 evidence shows blah, blah, blah with regard to the  
8 experts and they didn't call them to say anything --

9 MS. MCVEY: And they didn't bring them.

10 THE COURT: They didn't bring them. They can  
11 argue that.

12 MS. BUENO: And, Your Honor, I don't see a  
13 problem with that. What I'm concerned about and why I  
14 raised is them standing up there and speculating about  
15 what experts would have said that is not before the  
16 jury.

17 THE COURT: I understand and, you know, we'll  
18 cross that bridge when we come to it, if we come to it.

19 I don't think they're going to do that. I  
20 think they got -- and I think you can look specifically  
21 at Sanchez and Alexander. Those are the ones they're  
22 going to say, hey, this is what the evidence that was  
23 put in says what their opinion was. They haven't  
24 called them to say anything different than that.

25 And that's not what you're concerned about.

1 You're concerned that they're going to say, you can  
2 draw on an inference, and they're -- they just going to  
3 talk about what evidence is in front of the jury and  
4 what opinion.

5 MS. BUENO: And to be clear, I'm not  
6 suggesting they're going to say those words "that you  
7 can draw an inference." But I think *Gonzalez* stands  
8 for the principle that if it's an expert witness, you  
9 cannot comment on the fact that they're missing and  
10 suggest what they would have said.

11 THE COURT: Oh, no, no, no, I don't think it  
12 says that all. I said that the -- all it says is you  
13 can't draw an adverse inference, but it does not say,  
14 if their opinion is in evidence in the case, that you  
15 can't say, hey, if they're not here to affirm it, so  
16 that's what the opinion is, and that's what it's going  
17 to be and so forth and so on.

18 MS. MCVEY: And I think we can comment on  
19 that they didn't call any experts. I think that's fair  
20 game.

21 THE COURT: Yeah.

22 MS. BUENO: And I said at the beginning, I  
23 think that is fair for them to say.

24 THE COURT: Then I don't think we got a  
25 problem here.

1 MS. BUENO: Well, I think it would be great  
2 if we can -- if we need another discussion, I will have  
3 this with me tomorrow.

4 THE COURT: Sure. I will read it in more  
5 detail. I'm just scanning it quick.

6 MS. BUENO: All right. Thank you.

7 MR. COWAN: Your Honor, I don't know if this  
8 needs to be on the record, but I have the final  
9 defendants' exhibits. Should I -- for the jury.

10 THE COURT: Oh, sure, sure, sure.

11 MR. COWAN: I don't know if they want --  
12 obviously, they want to check them out and we want to  
13 check outs theirs.

14 THE COURT: Yeah, yeah, yeah, absolutely.

15 MR. COWAN: But I think she wants to get that  
16 done today.

17 MS. MCVEY: I do. Just put them over here,  
18 and then we'll go -- go -- yours are good then.

19 MR. COWAN: You haven't because we added the  
20 one --

21 MS. MCVEY: Okay. So those are good to go.  
22 Your Honor, tomorrow on the record in front of the  
23 jury, we would like to rest officially.

24 THE COURT: Yes.

25 MS. MCVEY: Okay. And then the defendants

1 can do the same, but I just want to make sure that's in  
2 front of the jury.

3 THE COURT: Yes.

4 MS. MCVEY: And the closing argument.

5 THE COURT: Of course. We already have, on  
6 the record, the arguments. But I will repeat: The  
7 arguments and rulings are on record, and they are  
8 repeated here as if -- as we used to say in legislative  
9 drawing -- and I drew through for many of them --  
10 (latin spoken) printed word for word.

11 MR. BROWN: Your Honor, I mean, I don't know  
12 what "we would like to rest" officially means. I mean,  
13 they have already rested. So if she -- if -- if she  
14 can say something -- or you can tell the jury that the  
15 evidence is fully submitted and all that, but to repeat  
16 this entire process, we just --

17 THE COURT: We're not going to repeat the  
18 entire process. Now, wait a minute, Mitch. Don't be  
19 getting back into that. That's where I about lost my  
20 mind yesterday.

21 We've already said and we went through all of  
22 this and we put it on the record. When the jury comes  
23 back, we are simply going to say, on the record, the  
24 parties have each rested, and --

25 MR. BROWN: That's fine.

1 THE COURT: -- appropriate motions have been  
2 made and ruled upon by the Court and are in the record.

3 MR. BROWN: Thank you.

4 MS. MCVEY: I just want to make sure that I  
5 can stand up, or one of us stands up, and says that  
6 plaintiffs have rested.

7 THE COURT: That's fine.

8 MS. MCVEY: That's what I wanted to say.

9 THE COURT: They are going to do the same  
10 thing. And I'm going to say, those matters have been  
11 fully placed on the record yesterday and are repeated  
12 here as if I repeated them all.

13 MS. MCVEY: Perfect. Thank you.

14 THE COURT: Yeah.

15 MR. BROWN: That's fine.

16 THE COURT: I think we understand each other.

17 MS. MCVEY: What time do you want us back?

18 THE COURT: All right. You go. Be gone.

19 (Proceedings were adjourned at 12:23  
20 p.m.)

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CERTIFICATE OF REPORTER

I, Kristy Clark, Registered Professional Reporter and Notary Public for the State of North Carolina, 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 13th day of August, 2024, at Chapin, Lexington County, South Carolina.

\_\_\_\_\_  
Kristy Clark  
Registered Professional Reporter  
Notary Public  
State of North Carolina  
My Commission expires:  
March 20, 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, )  
 ) Case No.  
vs. ) 2023-CP-40-04072  
 )  
AMERICAN INTERNATIONAL )  
INDUSTRIES, ET AL., )  
 )  
Defendants. )

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TRIAL BEFORE: THE HONORABLE JEAN H. TOAL  
DAY 7

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DATE TAKEN: Wednesday, August 14, 2024  
TIME BEGAN: 9:00 a.m.  
TIME ENDED: 5:25 p.m.  
LOCATION: Richland County Judicial Center  
1701 Main Street  
Courtroom 3B  
Columbia, South Carolina  
REPORTED BY: Cynthia First, RPR, CRR  
EveryWord, Inc.  
P.O. Box 1459  
Columbia, South Carolina 29202  
803-212-0012

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P R O C E E D I N G S

- - -

THE COURT: The defendants have requested two things.

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

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

THE COURT: You may.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. BUENO: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MS. PEPKE: That's good.

25 THE COURT: If you think of something

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

4 MS. PEPKE: Thank you.

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

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

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

12 MS. MCVEY: Right.

13 THE COURT: Okay. All right.

14 Ms. Flynn?

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

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

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

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

1 up here.

2 MS. FLYNN: I apologize for that.

3 THE COURT: That's all right.

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

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

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

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

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

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

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

24 THE COURT: Well, then --

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

1 our case to publish the medical stipulation.

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

3 MR. BROWN: That's fine.

4 THE COURT: I try to accommodate --

5 MS. PEPKE: I know --

6 THE COURT: And then you --

7 MS. MCVEY: It's just --

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

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

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

14 THE COURT: Exactly.

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

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

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

22 MS. FLYNN: I understand, Your Honor.

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

25 MS. FLYNN: Sometime this morning. I

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

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

7           Where are they right now?

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

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

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

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

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

1 THE COURT: I'm glad you have.

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

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

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

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

10 THE COURT: Who is printing them?

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

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

15 MS. FLYNN: They are.

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

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

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

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

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

4 - - -

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

6 MS. MCVEY: Yes, ma'am.

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

11 Is that Mr. Allen?

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

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

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

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

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

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

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

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

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

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

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

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

17 MS. MCVEY: Okay.

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

20 All right.

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

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

1 now.

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

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

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

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

13 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

25          Ms. Bueno?

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

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

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

1 any mess about that.

2 MS. MCVEY: Thank you, Your Honor.

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

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

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

19 MS. MCVEY: Thank you.

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

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

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

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

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

9 THE COURT: All right.

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

14 THE COURT: Very good.

15 - - -

16 (Court Exhibit 20 admitted into  
17 evidence.)

18 - - -

19 (Court Exhibit 21 admitted into  
20 evidence.)

21 - - -

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

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

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

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

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

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

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

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

22 - - -

23 (Discussion off the record.)

24 - - -

25 MR. COWAN: We made a mistake earlier in

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

5 - - -

6 (Discussion off the record.)

7 - - -

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

13 THE COURT: Yes. Yes, absolutely.

14 MR. BROWN: Thank you very much.

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

19 MR. BROWN: Thank you.

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

23 MR. BROWN: Thank you.

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

1           Shut that door.

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

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

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

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

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

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

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

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

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

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

18 MS. MCVEY: But only actual damages.

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

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

24 THE COURT: Sure.

25 MS. PEPKE: They have been filed.



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

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

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

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

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

21          What do you have in mind?

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



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

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

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

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

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

25           Please be seated. I turn first to the

1 plaintiff.

2 Ms. McVey.

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

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

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

15 I call for the defendant, Ms. Pepke.

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

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

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

5 Ms. Bueno.

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

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

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

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

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

21 THE COURT: Ms. McVey.

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

25 THE COURT: Very good. Again, I heard

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

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

11 MR. ADAMS: Yes, ma'am.

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

14 - - -

15 CLOSING ARGUMENT BY MR. ADAMS

16 - - -

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

1 here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8           MS. BUENO: Objection, Your Honor.

9           THE COURT: Approach.

10                   (Whereupon a bench conference was  
11 held.)

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

16           THE COURT: Okay.

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

20           THE COURT: Reply.

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

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

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

5 MS. MCVEY: I think --

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

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

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

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

21 THE COURT: Yes.

22 MS. BUENO: Please, yes.

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

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

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

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

13                           (Bench conference concluded.)

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

22           And you may continue, Mr. Adams.

23           MR. ADAMS: Thank you, Your Honor.

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

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

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

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

13                         (Whereupon a bench conference was  
14                         held.)

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

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

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

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

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

10 MS. BUENO: We were talking about experts.

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

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

16 MS. MCVEY: Thank you.

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

19 MS. MCVEY: Thank you.

20 MS. BUENO: Thank you.

21 (Bench conference concluded.)

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

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

4 You may continue.

5 MR. ADAMS: Thank you, Your Honor.

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

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

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

1 is twofold.

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

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

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

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

1 terminal cancer.

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

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

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

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

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

25 The first section on the verdict form is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 powder year after year.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 It would have been bad enough to just bury

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 But Johnson & Johnson did.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 They contacted Johnson & Johnson. They

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 "Yes."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25                   Erionite, which I know you never heard of,

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

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

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

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

25 Johnson & Johnson's own documents say this

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

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

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

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

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

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

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

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

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

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

1 Perry's lung.

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

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

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

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

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

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

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

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

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

9 MS. BUENO: Objection, Your Honor.

10 THE COURT: Approach.

11 (Whereupon a bench conference was  
12 held.)

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

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

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

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

24 MS. MCVEY: Exactly.

25 MR. ADAMS: Right.

1 THE COURT: I'll overrule the objection.

2 (Bench conference concluded.)

3 THE COURT: Objection is overruled.

4 MR. ADAMS: A total loss.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18          MS. BUENO: Objection, Your Honor.

19          THE COURT: Approach.

20                         (Whereupon a bench conference was  
21                         held.)

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

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

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

4 THE COURT: All right.

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

10 THE COURT: Overruled.

11 (Bench conference concluded.)

12 THE COURT: The objection is overruled.

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

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

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

25 This is what Lonnie hand drew to Michael

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

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

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

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

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

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

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

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

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

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

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

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

6           MS. BUENO: Objection, Your Honor.

7           THE COURT: Approach.

8                         (Whereupon a bench conference was  
9           held.)

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

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

17          THE COURT: Ms. Pepke?

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

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

1 (Bench conference concluded.)

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

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

12 MR. ADAMS: Thank you, Your Honor.

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

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

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

25 And they never told the moms. They never

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that conclude your presentation?

2 MR. ADAMS: Yes, Your Honor.

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

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

13 Please stand for the departure of the  
14 jury.

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

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

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

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

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

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

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

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

5 MR. BROWN: That's all right.

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

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

14 Ms. McVey?

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

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

1           them. That's a curative instruction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14          THE COURT: Yes. That's true.

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

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

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

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

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

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

9           MR. BROWN: Your Honor --

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

13          MS. MCVEY: Thank you.

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

18          MR. BROWN: Thank you, Your Honor.

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

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

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

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

9           THE COURT: Yes.

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

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

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

19          THE COURT: Now, that's legitimate.

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

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

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

24          MS. MCVEY: Right, because --

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

1 MS. MCVEY: Sorry.

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

6 MS. MCVEY: Sorry, Judge.

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

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

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

16 MR. BROWN: Your Honor, I --

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

25 Now, the standard for the punishing

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

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

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

17 MS. MCVEY: Thank you, Judge.

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

21 THE COURT: All right.

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

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

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

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

18 So I overruled that objection.

19 MS. FLYNN: I understand, Your Honor.

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

23 MS. MCVEY: Thank you, Judge.

24 THE COURT: With all peace and love.

25 (Whereupon there was a recess in the

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

2 THE COURT: Please be seated.

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

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

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

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

1           what the verdict form was going to look like.

2           I've lived through those bad old times.

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

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

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

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

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

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

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

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

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

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

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

17          So, Ms. McVey, briefly.

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

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

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

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

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

12          MS. MCVEY:   Absolutely.

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

15          Ms. Pepke.

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

1 on the verdict form?

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

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

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

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

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

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

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

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

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

19 MS. PEPKE: Thank you, Your Honor.

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

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

25 THE COURT: All right. Ms. Flynn.

1 Bring in the jury.

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

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

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

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

10 MS. MCVEY: Do you want it now?

11 MS. BUENO: Yes.

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

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

18 THE BAILIFF: Jury is seated, Your Honor.

19 THE COURT: Thank you, ma'am.

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

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

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

3 All right. Ms. Flynn.

4 MS. FLYNN: Thank you, Your Honor.

5 - - -

6 CLOSING ARGUMENT BY MS. FLYNN

7 - - -

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

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Thank you, Ms. Flynn.

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

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

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

8 MS. BUENO: May I proceed?

9 THE COURT: Yes, ma'am.

10 - - -

11 CLOSING ARGUMENT BY MS. BUENO

12 - - -

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

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

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

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

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

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

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

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

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

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

25           The evidence here is clear, and we're

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

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

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

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

1 trial.

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

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

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

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

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

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

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

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

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

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

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

3 Can everybody see that okay? Okay.

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

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

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

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

1 mesothelioma.

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

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

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

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

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

1 another one, winchite. Winchite.

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

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

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

15 Well, we asked him.

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

19 "That's correct."

20 Dr. Longo has never found it.

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

25 They showed you this slide. They showed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 fingerprint doesn't match.

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

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

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

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

25           But what we have and what they brought you

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

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

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

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

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

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

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

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

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

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

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

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

4            "Correct."

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

7            And this was my question:

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

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

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

15           That's my bad handwriting there.

16           And then I asked him -- I said:

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

21           "Correct."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But in opening statement, I explained to

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

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

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

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

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

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

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

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

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

25           These are the Tic Tacs from Dr. Madigan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 purpose. No question.

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

8 And just to put this in context, when I  
9 hear "quadrillion fibers," it's hard for me to  
10 kind of figure out what that means. So what we  
11 said to ourselves was, if we took fibers and  
12 put it into seconds, that's more manageable for  
13 me.

14 So 23,700 seconds instead of fibers is 7.5  
15 hours. Okay? Dr. Brody told us there's a  
16 billion asbestos fibers in our lungs, and if we  
17 do that in seconds, that's 31 years.

18 What about the quadrillions in the brakes?  
19 Over 31 million years. So we're talking about  
20 the difference between 7.5 hours and 31 million  
21 years when we're talking about the amount of  
22 fibers.

23 And here is a slide that Dr. Longo showed  
24 you. On the left we have what he says is in  
25 the average museum bottle, .004 fibers per cc;

1 and on the right is his own testing of brakes,  
2 10,000 times higher when you get to 36 fibers  
3 per cc.

4 If we are talking about dose -- and we  
5 should be because dose matters -- what does  
6 this tell us? What was his dose?

7 And we're going to get to the jury charges  
8 here in a minute, but you're going to be asked  
9 about substantial factor. Substantial factor.  
10 There is no question, when you look at dose,  
11 that brakes were a substantial factor, and  
12 there is no question that Johnson's Baby Powder  
13 was not.

14 And I'll stop right there and say there  
15 was a statement by counsel that, when you hear  
16 substantial factor when you're looking at that  
17 jury form, anything over 1 percent is  
18 substantial. And he may believe that. That's  
19 not the law. That is not the law that  
20 Justice Toal is going to give you. That just  
21 came from him. There's nothing to say  
22 1 percent is substantial. I could get up here  
23 and say, folks, I think 51 percent is  
24 substantial. You know what? That's not the  
25 law either. That's not the law. So don't

1 listen to what I say or any counsel says about  
2 the law. Justice Toal will give you that law.

3 Why am I doing this? Why am I talking so  
4 much about brakes? Because Dr. Haber proved to  
5 you my point. I said to him -- and I know this  
6 is long, but it's important for me to read it  
7 word for word so you remember what he said.

8 "Q Now, if Mr. Perry had never used  
9 cosmetic talc at all -- all right? Let's  
10 consider a scenario where Mr. Perry never used  
11 cosmetic talc. His only asbestos exposure was  
12 from doing brake jobs. In that circumstance,  
13 you would give the opinion that the brake jobs  
14 would be a significant factor in his  
15 mesothelioma, correct?"

16 So what I'm asking there is take the  
17 cosmetic talc out of it; what caused this man's  
18 mesothelioma?

19 And Dr. Haber said:

20 "A If Mr. Perry got mesothelioma from  
21 doing -- and did the brake jobs, then, yes,  
22 then that would be the cause. But you can't do  
23 the reverse. You can't say change exposure. I  
24 mean, what would have happened is if" --  
25 buh-buh-buh.

1           But then he said.

2                         "But I can say that, if he did  
3 get mesothelioma, then I would have attributed  
4 the mesothelioma to that exposure."

5           Dr. Haber. If he never used cosmetic  
6 talc, the brakes caused his cancer.

7           What did Dr. Longo tell you? Dr. Longo  
8 told you that those brakes are contaminated  
9 with what? Tremolite. Tremolite.

10           It's plaintiffs' burden to prove this  
11 case. They have to do it by the weight of the  
12 evidence. And they have to prove, for every  
13 single question on that verdict form, cause.  
14 They have to prove cause.

15           And you're going to hear this instruction  
16 from the Court about substantial factor. A  
17 substantial factor. The evidence has shown  
18 that Johnson's Baby Powder, even if you believe  
19 what plaintiffs have said, that was not a  
20 substantial factor when you think about dose.

21           And this is what I really want to draw  
22 your attention to. These are the questions --  
23 1, 3, and 5 -- on the jury form. I know you  
24 probably can't read this well right now, but  
25 you're going to be holding that in your hands,

1 each one of you. These are the three questions  
2 that you have to answer about Johnson &  
3 Johnson.

4 And if you answer no to each of these, as  
5 I think you should, your job is over. That's  
6 it. And each and every one of them, whether it  
7 be negligence, strict liability, or fraud, asks  
8 a question about causation because no matter  
9 what the conduct is that they're alleging, they  
10 have to prove cause. Cause. Did the Johnson's  
11 Baby Powder cause his cancer?

12 And they have to prove cause not just for  
13 some person out there that used this product.  
14 The instructions the Court will say is the  
15 proximate cause of plaintiff Michael Perry's  
16 injuries.

17 So if you make the determination that they  
18 haven't proven their case because of the tissue  
19 testing, the dose problem, and the brakes --  
20 and I think the evidence is there, folks -- if  
21 you make that decision that they have not  
22 proven that Johnson's Baby Powder is the cause,  
23 then the answer to every single question is no,  
24 and your job is over. Your job is over.

25 And you might be hearing two different

1 stories right now, right? Because you're  
2 hearing plaintiffs talking -- you're hearing  
3 plaintiffs talking all about Johnson & Johnson  
4 conduct, aren't you? And you're hearing me  
5 talking about Mr. Perry and cause. And we're  
6 kind of like two ships, right? But I'm going  
7 to address some of these allegations with you  
8 now.

9 I think that the cause is clear, and I  
10 could just stop now and you could go back to  
11 the jury room and do your deliberations and  
12 determine that Johnson & Johnson should have  
13 the verdict in this case, because plaintiffs  
14 have not proven their case, but I'm not going  
15 to do that because you deserve an answer to  
16 some of these allegations about this company.

17 I told you I was emotional this morning  
18 hearing about some of the argument, and I was,  
19 and it's happened throughout trial. And so I'm  
20 going to try to give you, in my short time with  
21 you -- and I'm getting notes telling me to move  
22 on -- but I'm trying to give you some ideas  
23 about what this all means.

24 Could I have the ELMO, please. Actually,  
25 before you do that -- before you do that,

1 Mr. Loebbaka.

2 I don't know if you can see this slide.  
3 This is Dr. Mann. Remember when Dr. Mann was  
4 testifying? And this is a screenshot from when  
5 plaintiffs were asking him questions. And they  
6 showed him this document, and it's an important  
7 one. And I put that plaintiff exhibit sticker  
8 up there because I want you to look at this.  
9 It's Plaintiffs' Exhibit 347.

10 This is how they showed it to Dr. Mann,  
11 and they showed it to Dr. Kuffner the exact  
12 same way. And they showed it with the slide --  
13 well, just real quick, before you do that, I  
14 know it's so hard to see here, but at the very  
15 bottom of the slide it's cut off after the  
16 highlight that says, "Contain trace amounts of  
17 asbestos." Are you able to see that? It's  
18 that line.

19 So as an example, I want to show you what  
20 that document says after that.

21 TECHNICIAN: Is it on?

22 MS. BUENO: It's on.

23 There we go. It's warming up. Thank you  
24 very much.

25 All right. So the place that I have

1           stopped -- or not highlighted here, "Contain  
2           trace amounts of asbestos," that is where they  
3           stopped showing this document. Okay? But read  
4           the whole document.

5           Dr. Blount, who you heard about this  
6           morning from plaintiffs' counsel, it goes on to  
7           say -- and you'll have this back there with you  
8           so you can read it yourself -- "However,  
9           Dr. Blount said that all powder she tested,  
10          including Johnson & Johnson Baby Powder, were  
11          well below acceptable limits as defined by OSHA  
12          and that she considered Vermont talc as some of  
13          the purest talc available. In addition,  
14          Dr. Blount stated she did not think that  
15          whatever amounts of asbestos that might --  
16          might -- be present in baby powder was harmful,  
17          that the concern about talc was blown out of  
18          proportion, and that she has a very high  
19          opinion of Johnson & Johnson Baby Powder."

20          An example -- I can't do every one, but an  
21          example of reading the document and seeing  
22          really the context for it, which I think is  
23          just so important.

24          Can we go back to the slides? Defendants'  
25          Exhibit 7694.

1           And, Your Honor, if we're going to take a  
2 lunch break, you just tell me; otherwise, I'm  
3 rocking and rolling and I'll keep going.

4           MS. PEPKE: I think we have about 30  
5 minutes.

6           MS. BUENO: Do you want me to keep going?

7           THE COURT: Hang on for a minute. You  
8 have about 30 minutes left?

9           MS. BUENO: I do.

10          THE COURT: And then, of course, we have  
11 reply by the plaintiff.

12          So I'm going to ask you, Madam Foreperson,  
13 do you want to take a break now for lunch?

14          JURY FOREPERSON: Keep going.

15          THE COURT: Keep on going.

16          MS. BUENO: If anyone needs one, let me  
17 know.

18          THE COURT: You may proceed.

19          MS. BUENO: So a couple more documents to  
20 kind of show you what's going on. I have put  
21 these numbers up there because I encourage you  
22 to go back and look at them if you have any  
23 questions.

24          Now I'll go to the ELMO, please. 7694.

25          This is Defense Exhibit 7694. You've

1 heard a lot about this whole industrial versus  
2 cosmetic talc thing. And I want you to keep in  
3 mind that the mine at the Windsor Minerals that  
4 you heard about had both industrial and  
5 cosmetic. And that matters. And I'm going to  
6 tell you right now why it matters.

7 This is a document from the president of  
8 Windsor Minerals, who you heard about from  
9 counsel this morning. And he talks about what  
10 is cosmetic talc. He says, "The samples which  
11 are relevant to the production and sale of  
12 cosmetic talcs in the U.S. and Canadian markets  
13 are those bearing the letters HC as part of  
14 their prefix." As part of their prefix.

15 Now, do you remember back in school when  
16 we learned prefixes and suffixes? Prefix came  
17 before; suffix came after. Right? Prefix,  
18 cosmetic talc. Keep that in mind.

19 The next exhibit I'm showing you is 8111.  
20 This is a document that talks about roofing  
21 material at Windsor Minerals. And it talks  
22 about the talcs for roofing materials, and it  
23 mentions HC. And where does it mention? A  
24 prefix or a suffix? Suffix, at the end. Do  
25 you see that?

1           Why am I bringing this up and spending my  
2 time with you on this?

3           Well, can we go to the slide now?

4           That's the one that said HC in the prefix;  
5 this is the one that said roofing materials  
6 with HC in the suffix. And this is what they  
7 showed Dr. Gibney.

8           You remember Dr. Gibney, the treating  
9 physician that came into this courtroom by Zoom  
10 to talk to you, who had never seen a  
11 Johnson & Johnson company document in his life.  
12 And the representation was made that would it  
13 be ethical for a company like Johnson & Johnson  
14 to put asbestos in our baby powder? And it got  
15 real dramatic, showing him this document,  
16 saying that the HC meant cosmetic talc.

17           Folks, that's not true. Look at this one,  
18 Plaintiffs' 125. It's actually a chart on the  
19 back of a document that has a cover page that  
20 makes clear it's industrial talc. It talks  
21 about crud and sediment in the ore body. This  
22 is not cosmetic talc.

23           Other examples. You've seen slides like  
24 this one. I pulled this out with Dr. Kuffner,  
25 and he explained to you that the three deaths

1 that were discussed had to do with inhalation,  
2 right? Babies who, unsupervised, got ahold of  
3 a Johnson's Baby Powder product and bottle and  
4 really hurt themselves and died as a result,  
5 which is absolutely tragic, which led us to put  
6 a warning label on the bottle, as Dr. Kuffner  
7 explained to you. But if this is suggested  
8 that this somehow has to do with this case, it  
9 does not.

10 And I encourage you to look at this  
11 document as well. They put it up there this  
12 morning as well.

13 And here's one I want to take a minute on  
14 because you've seen this multiple times. This  
15 is another example of taking things out of  
16 context and distorting the truth. This is P19.  
17 Please look at this one. You've seen this  
18 document. You've heard about it. These  
19 allegations that Johnson & Johnson told the FDA  
20 that we could have substantial asbestos in our  
21 baby powder.

22 And the allegation was we knew it, we said  
23 it could be substantial, we told that to the  
24 FDA. And that was one of the examples you  
25 heard this morning of us being willful and

1           wanton and reckless. This is what we're  
2           talking about.

3           And when you read this document, this  
4           document indicates that the FDA asked Johnson &  
5           Johnson to do an exposure assessment. This was  
6           not us saying it; they asked us. It's all  
7           outlined here. They asked us to do it, and we  
8           did that.

9           And, of course, what was not shown to you  
10          in this document, which I can show you now, in  
11          a discussion with the FDA and Johnson &  
12          Johnson, right, this document says, "It was  
13          brought out that critical review of all the  
14          world literature failed to show any evidence of  
15          adverse health effects following the normal use  
16          of cosmetic talcs."

17          And it goes on to say that Dr. Fuller  
18          stressed Johnson & Johnson's policy of full  
19          cooperation with the FDA and that, if the  
20          results of any scientific studies show any  
21          question about the safety of talc,  
22          Johnson & Johnson will not hesitate to take it  
23          off the market.

24          There has been allegations in this case  
25          that Johnson & Johnson knew there was

1           substantial asbestos in our baby powder and  
2           that we just sold it anyway, that the tens of  
3           thousands of employees and doctors and  
4           scientists -- that Johnson & Johnson somehow  
5           knew this and they were all in on it and all  
6           kept the secret in a quest for a lot of money,  
7           and that it went on for decades and decades and  
8           there wasn't one whistleblower, somebody who  
9           said, wait a minute, I think we have a problem  
10          here.

11                 Think about what is being alleged in this  
12          courtroom. There is not evidence to support  
13          that. And I wish I could go through every  
14          single document and every single slide -- let's  
15          go back to the slide.

16                 I wish I could go through all of this and  
17          point out why, whether it's ellipses like this,  
18          dot, dot, dot, or whether it's the cutting and  
19          the pasting of words and putting them in order,  
20          why that is not the way you need to look at  
21          scientific evidence.

22                 And that the documents back with you in  
23          the jury room, there's just going to be a  
24          portion of the millions of pages that are out  
25          there. I can't show you every one.

1           But I can tell you that for the  
2           allegations of conduct, the fraud claims, the  
3           willful, the wanton, the reckless, they have a  
4           standard. Plaintiffs must prove this to a  
5           higher standard.

6           They must prove by clear and convincing  
7           evidence that Johnson & Johnson did all of  
8           these acts that they allege. And they cannot  
9           do that. And I encourage you to look at those  
10          documents and not rely just on attorney  
11          argument in how the story is woven together.

12          Let's just think for a minute, common  
13          sense. Counsel said it this morning, chief  
14          justice is going to say it later today. This  
15          case asks you to rely on your common sense.

16          If you were a company and you knew that  
17          there was something dangerous in your product,  
18          would you test it? Would you exceed the  
19          industry standards? Would you put your  
20          documents out for everything to see?

21          That's what's happened here. You've seen  
22          that Johnson & Johnson had a very robust  
23          testing program. You heard that we didn't just  
24          stop with the J-41 system. Counsel said today  
25          that was Johnson & Johnson's testing program,

1 but that's not what the evidence shows.

2 The evidence shows we went above that. We  
3 exceeded that standard. And even their expert,  
4 Dr. Haber, said Johnson & Johnson exceeded  
5 J-41. We did more than that.

6 So if the statement was made this morning  
7 that we just stuck with J-41 and didn't do  
8 anything more, that's flat wrong and that's  
9 contradicted by the evidence in this case.

10 You heard that the FDA tested in 1976, no  
11 asbestos in Johnson's Baby Powder.

12 In 1994 there was a symposium of hundreds  
13 of folks that gathered together, toxicologists,  
14 mineralogists, FDA. We talked about those  
15 meeting minutes. What did they conclude?

16 In 1994 they concluded that talc was among  
17 the safest of all consumer products and that  
18 the probability of human risk is likely  
19 nonexistent. You've heard that from  
20 Dr. Kuffner, and you saw the article.

21 You also heard that in 2010 the FDA just  
22 went and bought some bottles of Johnson's Baby  
23 Powder off the shelf, as they did, to do their  
24 testing. Once again, no asbestos in Johnson's  
25 Baby Powder.

1           Think about this: If you wanted to be a  
2           company that was willfully and wantonly and  
3           recklessly just out selling a dangerous  
4           product, would you just manufacture a lot of  
5           bottles and just put it on the shelf for  
6           anybody to test?

7           It doesn't sound like a good way to hide  
8           evidence to me. Look, this -- this product was  
9           on the market and available to test, and  
10          evidence shows the FDA had a regular testing  
11          program and did not find asbestos.

12          And you also heard that there are  
13          thousands of documents that have been made  
14          available from Johnson & Johnson that are just  
15          online for the world to see. Okay?

16          I want you to think about this for a  
17          second. You've seen a lot of documents. I  
18          know you have. All of those -- everything  
19          you've seen is online and was available even  
20          before you walked into this courtroom. Every  
21          single document that we made available, we made  
22          public.

23          And yeah, it was at the time when we were  
24          being sued and had to turn over documents. But  
25          we said, "Here. Have them. Let's put them

1 online for the world to see." The FDA can look  
2 at them, OSHA, the EPA, doctors. Anybody can  
3 look at these documents.

4 And do you know what? Even after  
5 publishing all of those documents, there is no  
6 warning label on cosmetic talc for asbestos  
7 today.

8 Now, we stopped selling it, and I'll get  
9 to that. But even today this product is on the  
10 market without a warning label. And when I say  
11 "this product," just so I'm clear, not  
12 Johnson's Baby Powder -- I'll talk about  
13 that -- but cosmetic talc, no warning for  
14 asbestos even today --

15 Now, 2019, there was testing by the FDA  
16 and there was small amounts of chrysotile found  
17 in September. You've heard about this. I  
18 don't need to belabor it. But Dr. Kuffner came  
19 over here and told you that he was overseas and  
20 he flew home. This was a major issue for  
21 Johnson & Johnson in 2019, because it had never  
22 happened before.

23 The FDA had been doing decades of testing  
24 of our talc off the shelf. And for the very  
25 first time, they found what they believed to be

1 trace amounts of chrysotile. And you heard  
2 that Johnson & Johnson acted quickly and  
3 removed that single lot of Johnson's Baby  
4 Powder. And it was what was called a Class II  
5 recall.

6 We had some back and forth about that, you  
7 remember. But the Class II recall means that  
8 it was temporary or medically reversible  
9 adverse health consequences, where the  
10 probability of serious adverse health  
11 consequences is remote. That was the FDA  
12 regulatory language for that Class II.

13 But what's important to note here is this  
14 was just one lot, right, one group of  
15 manufacturer, with this sub/ultra trace  
16 amounts. And what was the type of asbestos  
17 that was found? I'll back up one.

18 Chrysotile. Chrysotile. Chrysotile,  
19 which was not in Mr. Perry's tissue. But  
20 Johnson & Johnson decided to do the right thing  
21 and, out of an abundance of caution, took this  
22 lot off the market.

23 Now I misplaced my clicker.

24 Thank you, sir.

25 As Dr. Kuffner explained to you, the

1 decision to take that one lot of Johnson's Baby  
2 Powder off the market had nothing to do with  
3 the ultimate decision to take the product --  
4 talc product off the market entirely in the  
5 U.S. the next year. Okay?

6 What did he tell you? In 2020  
7 Johnson & Johnson made the decision to stop  
8 selling talc. Okay? May of 2020.

9 And he explained to you that that decision  
10 was made by the businesspeople. He said the  
11 decision was not made by him and the medical  
12 department. It was not a safety decision.

13 And there's a document that's DX0027  
14 that's in evidence that is the press release  
15 from Johnson & Johnson when we made the  
16 decision to stop selling this product. And it  
17 talks about why.

18 And you can read it for yourself, but it  
19 talked about the fact that demand for  
20 talc-based Johnson's Baby Powder in North  
21 America has been declining due in large part to  
22 changes in consumer habits and fueled by  
23 misinformation around the safety of the  
24 product.

25 The same misinformation that we've seen in

1           this courtroom led to declining sales because  
2           when people hear this -- these allegations,  
3           even though they're untrue and unfounded, and  
4           you now know that because you've at least seen  
5           some evidence, but of course the sales  
6           declined. Of course the sales declined.

7                     And as a business decision, it was made to  
8           take this product -- this talc product off the  
9           market. It had nothing to do with safety. And  
10          Dr. Kuffner, the chief medical officer, came  
11          here and testified to you because he believes  
12          in the safety of this product and he believes  
13          in this company.

14                    Plaintiffs want you to say that we're  
15          reckless and wanton and willful, deceptive,  
16          deliberately trying to hurt patients like  
17          Mr. Perry. But their own expert had to admit  
18          that he hasn't seen a single cosmetic talc  
19          company that did more testing than  
20          Johnson & Johnson.

21                    And you've heard about these studies of  
22          the talc miners and millers, the ones that were  
23          in the mill breathing in talc all day every day  
24          and in the mine. And the evidence showed there  
25          was no increased risk of mesothelioma for those

1 patients.

2 And who was the one person they brought in  
3 to try to contradict that? It was Dr. Madigan,  
4 right, the statistician, the epidemiologist who  
5 came by Zoom.

6 But I showed him that International Agency  
7 for Research on Cancer. And I indicated to him  
8 that they had written the studies of talc  
9 miners and millers are considered to be the  
10 best source of evidence, and he had to admit  
11 he'd seen it before.

12 And he was the one that picked at it and  
13 said, well, they actually found mesothelioma in  
14 those patients. But then remember, I took the  
15 actual article and I put it under here and we  
16 looked at it together. It was that article  
17 from Vermont talc mining and milling, where it  
18 indicated there was no asbestos in those mines.  
19 There was no asbestos, but there was  
20 mesothelioma.

21 And I asked him, "You're not aware of any  
22 peer-reviewed published epidemiological study  
23 that has ever concluded that  
24 Johnson & Johnson's talc caused mesothelioma?"

25 "Yeah, yeah. I'm not aware of such

1 stuff."

2 And there is none. There's no study out  
3 there. The science is not there. The science  
4 is not there. These allegations are not true.  
5 I don't know how else to sing it from the  
6 rooftops.

7 Otherwise, Dr. Gibney -- if there's one  
8 thing you think about as you go back into the  
9 jury room today, maybe it's Dr. Gibney because  
10 he's a treating physician for Mr. Perry, right?  
11 He works at Medical University of South  
12 Carolina.

13 He told us that he's one of 50 surgeons in  
14 the country that does this specialized  
15 mesothelioma surgery. This guy is at the top  
16 of his game. He knows more about mesothelioma  
17 than most people, even other specialists.

18 And he had never ever seen a published  
19 study saying cosmetic talc contains asbestos.  
20 He'd never even heard any of his colleagues say  
21 that cosmetic talc has asbestos in it.

22 What is the strength of the science if the  
23 specialists in the field dealing with  
24 asbestos-related diseases don't know what the  
25 plaintiff lawyers are telling you?

1           All those documents that went online in  
2           2017, like I said, when the skies kind of  
3           parted, according to plaintiffs' lawyers, and  
4           all of a sudden the truth became known, that  
5           was seven years ago.

6           And do you think that one of the foremost  
7           mesothelioma surgeons in the entire country  
8           doesn't have access to the latest and greatest  
9           information? He does. He does.

10          And he does not know -- he's never seen,  
11          he's never heard what you're hearing. There's  
12          no truth to this. There's no science to this.  
13          He doesn't ask his patients whether or not they  
14          used talc.

15          If Dr. Gibney thought that there could be  
16          asbestos in talc, wouldn't that be something on  
17          the checklist he talks to his patients about?  
18          He doesn't.

19          And he told us that the note about use of  
20          talc as a swimmer in the past that you'll see,  
21          that that was something Mr. Perry told him  
22          about. And I asked him, "You're not here to  
23          say that Mr. Perry's mesothelioma was caused by  
24          Johnson's Baby Powder?"

25          "No."

1           Now, when he's asked a question by  
2 plaintiffs' counsel, which you saw this  
3 morning, which is if there was a lot of  
4 asbestos in Johnson's Baby Powder and he used  
5 it his whole life, couldn't that have been the  
6 cause?

7           Well, any reasonable doctor would be like,  
8 yeah, if he was exposed to lot of asbestos.  
9 But that wasn't his testimony. He said no, he  
10 is not offering the opinion that Johnson's Baby  
11 Powder was to blame.

12           So I know we did not bring any witnesses,  
13 but we didn't need to because the witnesses  
14 that were called by plaintiffs demonstrate that  
15 they cannot prove their case. When you go back  
16 to the jury room and you're thinking about the  
17 scales, you're thinking about what the evidence  
18 is -- the brakes, the dose information, the  
19 tissue test results showing that that  
20 fingerprint doesn't match and can't be  
21 Johnson's Baby Powder, the talc miners and  
22 millers, the lack of science, the epidemiology  
23 and all of the experts -- we didn't need to  
24 make you stay for three more days to hear the  
25 same thing over and over again.

1           The evidence is clear. Everything I told  
2 you in opening statement that the evidence will  
3 show was shown.

4           I want to end on a couple points that are  
5 important to you as you go back to the jury  
6 room.

7           You heard about damages, meaning the money  
8 that plaintiffs are requesting. And you're  
9 going to be instructed about actual damages.  
10 The damages you are being asked to provide are  
11 those to put Mr. Perry in the same position  
12 they were in before the incident or accident.

13           The idea here is money to make Mr. Perry  
14 and Mr. Long whole. That's what you're being  
15 asked to do.

16           There were some numbers that were filled  
17 in here by plaintiff lawyers. And I just want  
18 to make sure you're clear.

19           In the verdict form there is a stipulation  
20 that you saw that Johnson & Johnson agreed and  
21 stipulated to economic damages. Now, we did  
22 not agree that you should award them. I want  
23 to make sure this is clear.

24           It's \$3.3 million. The stipulation was  
25 not that we think we owe that. I think we owe

1 zero because I think you should put a verdict  
2 for Johnson & Johnson.

3 What a stipulation means is that we agreed  
4 that that is the number, right? You're going  
5 to see the number for medical expenses. It's  
6 about \$500,000. Mr. Johnson, the economist  
7 that came, said about 2.8 million for economic  
8 damages, loss of social security, loss of  
9 income, et cetera.

10 And you notice we didn't cross-examine  
11 Mr. Johnson; the AII lawyer did. Well, that's  
12 all because we agreed to this. We basically  
13 said we're not going to quibble with your  
14 numbers.

15 We're not going to stand up there and try  
16 to say, oh, it's 50 grand less or that medical  
17 record shouldn't apply. We're not going to do  
18 that. We agreed to the 3.3 million if you find  
19 in plaintiffs' favor for economic damages.

20 But the other numbers that were put up  
21 there by plaintiff lawyers were his suggestions  
22 and not found in anything, right? You as  
23 jurors would have the ability to decide the  
24 amounts.

25 So just because somebody put something up

1 here doesn't mean that there's any basis for  
2 it. This is a decision that you would make  
3 independently if you decide Johnson & Johnson  
4 is to blame.

5 And you know what? I don't think you get  
6 there. Because if you answer no to the  
7 question on proximate cause, if you find that  
8 plaintiffs have not met their burden to prove  
9 that Johnson's Baby Powder was the cause of his  
10 cancer, you do not answer this question at all.  
11 You don't even get there.

12 I showed you this last week, and I think  
13 it's fitting to end on this.

14 Johnson & Johnson is here defending itself  
15 with the spotlight on Johnson's Baby Powder.  
16 Plaintiffs have told you that Johnson's Baby  
17 Powder is used more than any other talc.  
18 They've told you that Johnson's Baby Powder is  
19 to blame for his cancer.

20 And I don't think there's any question why  
21 they've chosen a company like  
22 Johnson & Johnson, right? Each and every one  
23 of you had heard of us before you walked in  
24 this room. I think it's pretty clear why we  
25 are in the crosshairs and why we're here.

1           But we're defending ourselves for a reason  
2 because we think the claims have no scientific  
3 merit and they are false. And this allegation  
4 that this company somehow knew that we had  
5 poison in our product and we sold it anyway and  
6 we were out to kill people for decades is just  
7 false. It's not supported by the documents.

8           And, please, please, if you have any  
9 questions about that, go back and read those  
10 documents. You're going to have plenty of  
11 them. Look at what they say because what you  
12 have heard from counsel in argument is not what  
13 is in the evidence.

14           And let me leave you with this: I thought  
15 it was interesting when we were talking with  
16 Mr. Perry and Mr. Long about what happened when  
17 they went to their doctor and got this  
18 diagnosis the very first time.

19           You heard Mr. Perry say that his doctor  
20 gave him a little warning. If you're going to  
21 go and get on the internet, don't just go  
22 anywhere looking but go to a reputable site.

23           She told him go to the National Institutes  
24 of Health. Go there, look only there, and find  
25 your answers there. And you heard he did go

1           there.

2                   There was no discussion of Johnson's Baby  
3           Powder. There was no discussion of cosmetic  
4           talc causing mesothelioma. And we know from  
5           Mr. Long that the internet research continued.  
6           It was during that research that they came to  
7           believe that Johnson's Baby Powder was to  
8           blame. That's why we're here.

9                   But the doctor -- the doctor told him to  
10          look for advice at the NIH, which would not  
11          have pointed him here.

12                  And Dr. Gibney -- Dr. Gibney did not tell  
13          you that Johnson's Baby Powder was to blame.

14                  I'm so thankful for you for listening. I  
15          know it's been a long morning already, and I  
16          appreciate you giving me an opportunity to  
17          defend Johnson & Johnson about these claims.

18                  We take them very seriously. We are  
19          disturbed by what you heard this morning. And  
20          I just want you to know that this company is  
21          defending itself because Johnson's Baby Powder  
22          did not cause Mr. Perry's cancer. Thank you  
23          very much for your time.

24                  THE COURT: Now, Mr. Adams, how much time  
25          is allotted to you?

1 MR. ADAMS: 30 minutes.

2 THE COURT: 30 minutes. I just wanted to  
3 let you know that.

4 Now, the question comes, I had thought to  
5 begin with that we would be finished more  
6 quickly than we were. And some of the things  
7 that I had to take up with the lawyers outside  
8 your presence extended that time; so blame that  
9 on me.

10 But I at least want to give you the option  
11 to retire and have lunch or you can stay this  
12 extra 30 minutes and we'll take a very lengthy  
13 period of time for you to have your lunch and  
14 relax before we come back for my charge and  
15 deliberations. So your call.

16 JURY FOREPERSON: Let's go ahead and break  
17 and eat lunch.

18 THE COURT: Very good. All right.

19 The jury will break for lunch. We'll try  
20 to make it fairly short. So it's now 1:20.  
21 Why don't we try to come back by about 2:10, if  
22 we can.

23 Now, one thing that's very important to  
24 keep in mind. Please do not talk about the  
25 case. You're not there yet.

1           Thank you so much. You may go to your  
2 jury room.

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

5           (The following proceedings were held  
6 outside the presence of the jury:)

7           THE COURT: All right. The court will be  
8 at ease. Anything for me before I go eat my  
9 lunch? Very good. I'm apologetic as I can be  
10 that we had to break, but I could see some  
11 restlessness developing; so blame me.

12           Court will be in recess.

13           And Ms. McVey --

14           MS. MCVEY: Yes, ma'am.

15           THE COURT: -- I have now examined this  
16 and know what's in it. This is Ms. Flynn's  
17 confidential submission to you. It is three  
18 years' worth of tax returns and does provide a  
19 lot more information than the other information  
20 that's been provided. And I'm giving it to you  
21 now (handing).

22           And if there's anything to put on the  
23 record, we'll do that at another time. But I'm  
24 giving it to you for your examination right  
25 now.

1 MS. MCVEY: Thank you, ma'am.

2 THE COURT: And I know you will keep it  
3 confidential in accordance with the rules I  
4 have made.

5 MS. MCVEY: Absolutely.

6 THE COURT: Wait a minute. One thing.  
7 What is this?

8 THE LAW CLERK: I believe it is AII's --

9 THE COURT: Is this all the same thing?

10 THE LAW CLERK: Yes, ma'am.

11 THE COURT: I've got defendant American  
12 International's objections to the jury charge  
13 and the jury verdict form. I've got a lot of  
14 different copies of it. I've got one for me.  
15 I'm going to give these back to you, Ms. Flynn  
16 (handing).

17 Off the record.

18 - - -

19 (Whereupon there was a recess in the  
20 proceedings from 1:20 p.m. to 2:05 p.m.)

21 THE LAW CLERK: This is another court  
22 exhibit.

23 THE COURT REPORTER: This is 23.

24 - - -

25 (Court's Exhibit 23 admitted into

1 evidence.)

2 - - -

3 THE COURT: On the record so we can do  
4 these objections. I have received J&J  
5 defendant's objections to the Court's final  
6 jury charges and related final Court's verdict  
7 form. And this is dated August the 14th, 2024.  
8 It's been electronically filed in the records  
9 of the case. I'm going to give it to our court  
10 reporter so that we can be sure it's  
11 memorialized in the record.

12 Similarly, I have defendant American  
13 International industry's objection to the jury  
14 charge in verdict form, and it was  
15 electronically filed August the 14th, 2024.  
16 I'm going to give that to the court reporter as  
17 a memorialization of the objections to the  
18 charges and the verdict form.

19 And that -- in addition to that, there  
20 have been other arguments made and objections  
21 lodged with respect to the damage issue and the  
22 charge with regard to reckless, willful, and  
23 wanton and the defendant's projections made  
24 through Mr. Brown that more needed to be said  
25 to the jury.

1           I put upon the record earlier the reason  
2 why I'm not going to do anything, and I  
3 detailed those rulings at that time. So I just  
4 draw your attention to the fact that they are  
5 also included in the exceptions to the verdict  
6 form and the charges.

7           All right. And then with respect to  
8 Ms. McVey, Ms. McVey has filed a copy of the  
9 charges in the Sarah Plant case. And that is  
10 her -- that would have been her preferred  
11 version of the charge.

12           So to the extent that represents an  
13 objection to what is charged, preserving her  
14 position for any appellate review, I've  
15 received the Plant charges and be sure that the  
16 court reporter has them for her purposes,  
17 Ms. McVey.

18           MS. MCVEY: I will, Your Honor. And I  
19 have not yet filed them, but I will.

20           THE COURT: Very good. I'm going to give  
21 these to you now, Madam Court Reporter. That's  
22 J&J and American --

23           MS. PEPKE: For clarity, Your Honor, that  
24 was a ruling that you --

25           THE COURT: Yes. I've ruled against the

1 two defendants on a good many issues related to  
2 the charges and the verdict form, and they have  
3 memorialized their position about that in the  
4 memos I have just referred to, and I have  
5 denied the requests made in those memos. So I  
6 have made a ruling that is now preserved for  
7 purposes of appeal.

8 MS. PEPKE: Thank you, Your Honor.

9 MS. MCVEY: And also granted some of their  
10 requests as well.

11 THE COURT: Well, I certainly have. So  
12 far they haven't appealed that.

13 Now, anything else that we need to do?  
14 Let's talk for a minute about how we're going  
15 to proceed. I'm really just going to let the  
16 jury kind of guide me here. We will have this  
17 close by the plaintiff, and that will take  
18 about 30 minutes, as I was advised before we  
19 took the break. And if they'll let me, I will  
20 just go right into the charge, which is what I  
21 prefer to do, so that they'll be here about an  
22 hour before they then take their break, go to  
23 the jury room, having the exhibits submitted,  
24 et cetera, et cetera. That's how I'm going to  
25 roll unless something else takes place that I

1 don't know about.

2 MS. MCVEY: Yes, Your Honor. And the  
3 parties have agreed that the exhibits that are  
4 in those three white bankers boxes and the  
5 expandable file on top are the cumulative  
6 plaintiff and defense exhibits.

7 THE COURT: Yes. So Mr. Clerk and Madam  
8 Bailiff know that these will be the documents  
9 that are taken into the jury room as exhibits  
10 at the appropriate time when I indicate that  
11 that is to be done.

12 THE CLERK: Yes, Your Honor.

13 MR. BROWN: Your Honor, we have one  
14 court's exhibit we'd just like to make which  
15 relates to the objection that you overruled  
16 about the putting the numbers onto the slide.  
17 This is a screenshot of it.

18 Mr. Adams, when he put the number up on  
19 the slide, he didn't say audibly, I don't  
20 think, the numbers. So unless we make this as  
21 a court exhibit, it doesn't show up.

22 THE COURT: I kind of remember that he  
23 did, but in any event, I'll accept that as a  
24 court's exhibit to memorialize --

25 MS. MCVEY: We have no objection to that

1 at all.

2 THE COURT: No objection. So you just  
3 submit that as an exhibit in support of your  
4 objection that I overruled.

5 MR. BROWN: Thank you, Your Honor.

6 - - -

7 (Court's Exhibit 24 admitted into  
8 evidence.)

9 - - -

10 (Court's Exhibit 25 admitted into  
11 evidence.)

12 - - -

13 (Court's Exhibit 26 admitted into  
14 evidence.)

15 - - -

16 THE COURT: I have a page out of -- I  
17 guess it's out of one of y'all's learned  
18 transcripts.

19 MR. COWAN: That was something I showed  
20 Your Honor yesterday. You can throw it out.  
21 Thank you.

22 THE COURT: Are we ready? Y'all do that  
23 for a minute. I'll be right back.

24 - - -

25 (Discussion off the record.)

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THE COURT: Y'all done? Bring me the jury.

(The jury entered the courtroom at this time.)

THE BAILIFF: Jury seated, Your Honor.

THE COURT: Thank you, ma'am.

Ladies and gentlemen, the jury will now have the conclusion of closing arguments. I will then come down to the podium and just proceed right into giving you the charge.

And then here's what happens. You'll go to the jury room. We will take our alternates and place them in a different room because we don't want to let you go. You know, we want you here until the very end in case your services are needed. So we'll put you in another room. If your services were needed because of anything that happened, I will make the appropriate instructions about how to proceed and how to involve someone who's coming back into the deliberations. So no fears about that.

Again, expressed through the clerk's office concerns about is this going into next

1 week? The answer to that is still absolutely  
2 not. As I told y'all, even if I had to declare  
3 a mistrial, which would kill me with this  
4 lengthy trial, rather than go back on my word  
5 to you, I would do that. So be peaceful about  
6 all that.

7 I think that's all I need to tell you.

8 Mr. Adams, whose name I have butchered  
9 many times but he always says it's okay, you  
10 may proceed.

11 MR. ADAMS: Thank you, Your Honor.

12 - - -

13 REBUTTAL ARGUMENT BY MR. ADAMS

14 - - -

15 MR. ADAMS: Long stretch, everybody.

16 Thank you for bearing with us.

17 One of the things you just heard is that  
18 no epidemiology studies says talc causes  
19 mesothelioma. Sounds pretty bad, right, for  
20 us, except they chose their words very  
21 carefully. They said talc. Because we know  
22 that talc containing asbestos fibers gives  
23 folks the disease Michael Perry has. That's  
24 from the World Health Organization and IARC.

25 You also heard about these miners and

1 millers, and folks in the mine don't get the  
2 disease, according to Johnson & Johnson; so it  
3 must be safe. Except they do. A disease  
4 that's only one or two per million for the  
5 folks in Johnson & Johnson's Vermont talc mine,  
6 the talc that Mr. Perry breathed for over three  
7 decades, it's not one in a million, it's one in  
8 2 million.

9           Then they talk about Dr. Gibney. Maybe  
10 you remember opening statement, Johnson &  
11 Johnson said, pay attention to Dr. Gibney.  
12 They tried to co-opt him. They tried to say he  
13 was their witness.

14           Then he came and literally said there's  
15 asbestos in the baby powder that gave Michael  
16 Perry this disease. He called their company  
17 unethical because they concealed the asbestos  
18 from doctors and nurses for decades, not just  
19 by keeping quiet but by going to the doctors  
20 and nurses and telling them it wasn't there.

21           But they said Dr. Gibney, who's a surgeon,  
22 he didn't know about asbestos in talc. Why  
23 would they say that? Does that prove there's  
24 not asbestos in their talc because a doctor  
25 didn't know about it? Or do their own records

1 finding asbestos in their talc over and over  
2 and over and over and over again, hundreds and  
3 hundreds of times? Why would they stand, look  
4 at you, and say because Dr. Gibney didn't know  
5 when they concealed it from doctors, maybe it  
6 wasn't there. It's just not straight. Over  
7 and over it's there.

8 Dr. Blount, they showed you something  
9 where she said she didn't think asbestos was a  
10 health hazard, their mineralogist. She knows a  
11 lot about finding asbestos in talc. She's a  
12 mineralogist. She's not a medical doctor. She  
13 doesn't know. But it was there.

14 And then the lawyer for Johnson & Johnson  
15 showed you some documents that they said that  
16 maybe I used scissors. Remember that? They  
17 said I used scissors and I cut out parts.

18 They've had the documents for 70 years.  
19 What do you think I cut out? The word "not"  
20 right before asbestos? Just kidding. Psych.  
21 The word "asbestos" is there. Do you think, if  
22 I cut out something, they wouldn't have got up  
23 and shown you? They've had them for 70 years.  
24 There was asbestos in their baby powder.

25 But they showed you this document, and

1           they said this is our industrial talc.

2           Mr. Adams showed you this document and he said  
3           talc samples confirmed asbestos and then had  
4           this big long list.

5                     Folks, that was our industrial stuff.  
6           That's what they just told you. It wasn't  
7           true. But it doesn't matter because they put  
8           industrial talc in the baby powder.

9                     But let's take a look -- and the reason  
10          they told you it was industrial because they  
11          said, look, it has this HC acronym on it; so it  
12          must be industrial. So this industrial talc  
13          that we took out of the Vermont mine, the exact  
14          same mine where they got the talc for the baby  
15          powder, maybe we tried to mislead you.

16                    Except what we know is that this was in  
17          the sediments and the fines in this document,  
18          and I'll show it to you in just a second. And  
19          we know that the sediment and the fines was  
20          only created when they floated the talc. The  
21          only talc they floated was the cosmetic. I  
22          don't know if that made any sense to anybody.

23                    This is in the sediment and the fines, and  
24          I'll show you it on the next document. The  
25          sediment and the fines were only created when

1 they floated the talc, and they only floated  
2 the cosmetic talc. That's what was in the baby  
3 powder.

4 "Q You told me that industrial were not  
5 floated, right? You told me that?

6 "A I believe they're not floated.

7 "Q We know that, because we have fines  
8 and sediment, these were floated. And we know  
9 that there was one, two, three, four, five,  
10 six, seven, eight, nine findings of confirmed  
11 asbestos in the fines, correct, sir?

12 "A You've read what was written on that  
13 report.

14 "Q And I've counted, right?

15 "A You've counted correctly.

16 "Q And we know that in the sediment we  
17 have one, two, three, four, five. That's a  
18 total of 14 results for asbestos, correct?

19 "A Correct."

20 Confirmed asbestos in the fines of the  
21 sediment, the thing that was only created when  
22 they floated the talc, and they only floated  
23 the cosmetic. That's what they put in baby  
24 powder. He says it twice.

25 "Q The industrial talc was not floated,

1 correct?

2 "A That is my understanding."

3 But it doesn't matter at all anyways  
4 because they put industrial talc in baby powder  
5 anyways. And if you didn't think Dr. Haber  
6 told the truth or he made that up, we have  
7 their own documents that I showed you about the  
8 talc not being over 90 percent talc -- that's  
9 industrial talc -- and they didn't bring anyone  
10 to say Dr. Haber was wrong.

11 Then they told you that this winchite,  
12 this winchite proved they didn't do it.  
13 Remember that? They had a big board and they  
14 did the fill in the blanks and all that.  
15 Except their own expert found winchite in  
16 Johnson's Baby Powder, winchite in the powder  
17 in Johnson's Baby Powder.

18 Then they said, don't believe our own  
19 expert who didn't come. That was an old  
20 bottle. Except their own expert found winchite  
21 in the bottles over and over again, and so did  
22 Dr. Longo.

23 To put a bow on this, your lab finds  
24 winchite; Longo's lab finds richterite. You're  
25 seeing the same thing, right? That's not

1 Mr. Adams. That's not our experts. That's  
2 their expert under oath. Dr. Longo found  
3 richterite in the Italian, the Vermont, and the  
4 Chinese. Every type of talc Mr. Perry breathed  
5 from Johnson's Baby Powder had richterite in  
6 it, which Dr. Sanchez, their own expert, says  
7 the exact same thing; it's winchite.

8 But Mr. Perry was also exposed to Italian  
9 talc when he was most vulnerable, the first  
10 four years of his life at least, from '69 to  
11 '73. The talc that was put on him every day as  
12 an infant from Johnson & Johnson was Italian  
13 talc, and it was probably past '73 because when  
14 they stopped making Italian, they didn't just  
15 pull it all off the shelves; they kept selling  
16 the inventory.

17 And then they went back to Italian talc in  
18 1979 for another year. At least five years,  
19 probably more, the most vulnerable years for  
20 Mr. Perry, he was exposed to Italian talc. And  
21 the peer-reviewed published literature about  
22 Johnson & Johnson's Italian talc in a  
23 peer-reviewed scientific paper says it's  
24 contaminated with winchite.

25 That's the tremolite in Johnson's Baby

1 Powder and the tremolite in Michael Perry's  
2 lung. That's the talc in Johnson's Baby Powder  
3 and the talc in Michael Perry's lung. And  
4 that's the winchite in Johnson's Baby Powder  
5 and the winchite in Michael Perry's lung. The  
6 winchite proves they did it.

7 The next thing they told you is it wasn't  
8 enough. They said occupational levels, the PEL  
9 from OSHA, .1, it never got above the PEL. But  
10 OSHA said the PEL is not safe for the disease,  
11 mesothelioma, anyways even if that were true.  
12 Did OSHA say that it was safe for the disease  
13 mesothelioma? No. It was the opposite. They  
14 said even at .1, it was not.

15 And so they came up to you and they tried  
16 to say, because it was below the OSHA PEL,  
17 which it wasn't, by the way, but even if it  
18 was, OSHA says that's not safe. That's for  
19 grown men in a factory. That's for grown men  
20 in a power plant. This was babies. It's not  
21 safe.

22 Johnson & Johnson did all this math for  
23 you. They excluded the Round 1 testing, which,  
24 by the way, was Italian that he breathed. They  
25 only did the museum samples. They did the

1 lowest number. They did all that stuff to try  
2 to get this low number.

3 But when they weren't in court and they  
4 weren't challenged, they said the numbers were  
5 way higher.

6 "Q But Johnson & Johnson has actually  
7 done some experimental calculations where  
8 they've estimated what the dose of asbestos a  
9 person would get would be if they used talc  
10 that had a very small bit of asbestos, about  
11 ten parts per million, correct?

12 "A I believe so, yes.

13 "Q Yes. And they calculated that. That  
14 would create a dose of between 4.5 to 9.3  
15 fibers per cc for the adult and .16 to .18  
16 fibers per cc in a baby, correct?

17 "A I believe that's been stated."

18 Those are massive exposures. There's no  
19 organization on earth that says that's safe for  
20 anybody, let alone a baby. There's no one on  
21 earth that they could get to come say that's  
22 safe because no one on earth would.

23 Then they talked about epidemiology and  
24 the fact that Johnson & Johnson, for the  
25 hundred-plus years they were selling this baby

1 powder, never paid for an epidemiology study,  
2 never conducted an epidemiology study, never  
3 followed any of the people using their powder  
4 for an epidemiology study.

5 But it doesn't matter because epidemiology  
6 proves they played a role in Michael Perry's  
7 mesothelioma. Do y'all understand the only way  
8 they win is if they played zero role? They  
9 wanted to be the biggest, the strongest, the  
10 most --

11 MS. BUENO: Objection, Your Honor.

12 THE COURT: Approach.

13 (Whereupon a bench conference was  
14 held.)

15 MS. BUENO: The objection is he just said  
16 the only way we win is if we played zero role,  
17 which is not the law. The law is substantial  
18 factor. He's now trying to say that anything  
19 above zero is substantial, which is not what  
20 you are going to instruct them.

21 MS. MCVEY: Judge, you're going to  
22 instruct them what "substantial factor" means.  
23 It doesn't have to be the biggest role. It's  
24 in expert testimony and undisputed there was a  
25 substantial factor in this case. He doesn't

1 have to say they were the biggest exposure.

2 MS. BUENO: That wasn't my objection. He  
3 said anything above zero, and that's not the  
4 law.

5 THE COURT: I understand your argument. I  
6 have listened to the testimony. I will  
7 overrule your objection.

8 MS. MCVEY: Thank you.

9 THE COURT: Objection is overruled.

10 (Bench conference concluded.)

11 MR. ADAMS: Witnesses for  
12 Johnson & Johnson under oath say 4.5 to 9.3  
13 fibers per cc.

14 Look at these numbers. 0.1 fibers per cc,  
15 quadrupling of the risk. I showed you this  
16 already, but this is everything. This is it.  
17 The epi shows the levels from their powder  
18 gives people this disease, not a doubling of  
19 the risk, a quadrupling of the risk, an  
20 eightfold increase, a 28-fold increase, a  
21 fraction of what their corporate representative  
22 just told you people are exposed to.

23 And it's not just their corporate  
24 representative. And it wasn't just fibers; it  
25 was fibers per cc. That's why he admitted to

1           it under oath, that whole thing where they  
2           tried to make it disappear. He said it under  
3           oath.

4                   Gordon 2014. It was Italian. 22 of the  
5           50 samples were Italian talc, the exact same  
6           thing Johnson & Johnson put in its powder for  
7           the first four years of Michael's life. And in  
8           1979 it was the exact same talc from the exact  
9           same mine they did that study with. It was 1.9  
10          fibers per cc, orders of magnitude higher than  
11          all these epi studies we just looked at.

12                   They told you that Dr. Longo didn't rely  
13          on this paper, this peer-reviewed paper with no  
14          citation. Do you know why they didn't have a  
15          citation? Because he never said that ever. He  
16          didn't say he doesn't rely on this. That's not  
17          in this case. You can ask for a readback. You  
18          can ask to see it. It doesn't exist. Those  
19          numbers are way higher.

20                   But it doesn't matter because Dr. Haber  
21          came.

22                   "Between .1 to 4 fibers per cc is my  
23          estimate of what people were exposed to from  
24          Johnson's Baby Powder."

25                   It's undisputed. If a corporate rep got

1           it wrong, if all the peer-reviewed studies got  
2           it wrong, if everyone got it wrong, why didn't  
3           they bring someone to say it to your face? Why  
4           didn't they bring an expert to say, "Everybody  
5           got it wrong; I'm going to straighten it out."

6           After that, they did the OSHA thing, OSHA  
7           said it's safe. Well, that's not true. Then  
8           they did the winchite thing. Well, that's not  
9           true. Then they did the fibers per cc dose  
10          thing. Well, that's not true.

11          Then they tried to say, well, the  
12          exposures were lower in the background. The  
13          exposure to asbestos from our powder were lower  
14          than background.

15          They said Dr. Brody said background, and  
16          they had some number, was safe. They left out  
17          the part where I came back and asked him  
18          questions and said, "If they knew that  
19          background number and said someone was exposed  
20          to it their whole life, would that be safe?"  
21          He said no.

22          But it doesn't matter because the  
23          background, we learned, is short-fiber  
24          chrysotile; it's not tremolite. When you  
25          compare the amount of tremolite in their baby

1 powder to the amount of tremolite in the  
2 background there, it's a million times more  
3 than in baby powder. It's not below  
4 background. It's a million times more.

5 And then they tried to say this was  
6 100 percent brakes and other talc when their  
7 own expert said the brakes didn't count at all.  
8 Zero. Understand why they didn't bring him?

9 And we could go through this whole  
10 exercise of comparing the brakes to the talc,  
11 the 70 brake jobs, at least 18,000 uses of  
12 Johnson's Baby Powder if he just used it once a  
13 day. He did brakes for three years, J&J for  
14 50.

15 Brakes are in a resin binder; Johnson's  
16 Baby Powder is a powder. Brakes are mostly  
17 chrysotile. I don't know if you noticed, but  
18 they did this whole thing about how there  
19 wasn't chrysotile in Mr. Perry's lungs; so  
20 maybe it didn't come from the powder. But  
21 brakes were 99.9 percent chrysotile.

22 They took a tiny little sliver of his lung  
23 and looked at it. It doesn't mean it wasn't  
24 there, but what they found is exactly what was  
25 in the bottle of Johnson's Baby Powder. J&J

1 was mostly tremolite. Brakes were outdoors.  
2 The powder was in the home. Brakes weren't on  
3 a baby; the powder was.

4 But it doesn't matter. It really doesn't  
5 matter at all because the undisputed testimony  
6 is that it's the total dose of asbestos that  
7 causes the disease. The total dose, all of it  
8 counted. Of course the brakes counted. Of  
9 course they count.

10 He worked with brakes; he was exposed to  
11 asbestos. He breathed it into his body. It  
12 was part of his dose. They counted. But so  
13 did the asbestos from the baby powder that he  
14 breathed for 50 years. It's the cumulative  
15 dose that counts, the total dose. You can't go  
16 back and start deleting asbestos exposures.

17 It would be like if someone had lung  
18 cancer and they smoked Camels for 10 years,  
19 Marlboros for three, and Kents -- Kools for 50  
20 or whatever, and they got lung cancer. You  
21 can't go back and say, oh, the Kents didn't  
22 count, the Marlboros didn't count; it was just  
23 the Kools. That's not how science works.

24 Asbestos is exactly the same. It's all  
25 the cigarettes that caused the lung cancer, and

1           it's all of the asbestos that gave Michael  
2           Perry mesothelioma. And it's a hundred percent  
3           undisputed. This is medical stuff, folks. Why  
4           didn't they bring a doctor to say it's not a  
5           cumulative-dose disease, it didn't count, it  
6           was too little?

7                     And that's what the law says too.  
8           Proximate cause doesn't mean the only cause.

9                     There's another slide -- and you'll get it  
10          from the judge as soon as I'm done -- and I'm  
11          almost done, I promise -- that says multiple --  
12          there can be multiple causes. I lost it. But  
13          you'll hear it. You'll have it back there.  
14          The law says the same thing.

15                    We heard from Johnson & Johnson about how  
16          they won't attack Mr. Perry. They won't attack  
17          someone who's sick. And they said they won't  
18          do that because they know that it would anger  
19          you.

20                    But then they got up and they did that  
21          whole bottle thing. Remember, 10 bottles of  
22          J&J, 10 bottles of Clubman, 8 bottles of  
23          something else. Why?

24                    Then they said, well, he had a bottle from  
25          the '70s and he had a bottle of Johnson's Baby

1 Powder from 2004. So -- so what? What are  
2 they saying? He made it up? He lied? He  
3 didn't really use their powder? He had it in  
4 his home, and he has it in his body. The talc  
5 and the asbestos in their powder is in his  
6 body, and that's all you need to know.

7 Thank you so much for listening to us. I  
8 appreciate you so much. Please value Michael  
9 Perry's life. Thank you.

10 THE COURT: Move the ELMO. Don't be  
11 blocking the jurors. There you go.

12 MR. ADAMS: Do you need a mic, Your Honor?

13 THE COURT: Thank you.

14 - - -

15 JURY CHARGE GIVEN BY CHIEF JUSTICE TOAL

16 - - -

17 THE COURT: Ladies and gentlemen of the  
18 jury, I am now going to give you the jury  
19 charge. It's just a little bit easier for you  
20 to hear me if I come down here. So I'm not  
21 planning on making any arguments of any kind;  
22 I'm just going to give you the jury charge.

23 Charge 1, Role of the jury. Ladies and  
24 gentlemen, I'm going to charge you on the law  
25 that applies to the case and the law that

1 applies to the facts of this case. And it is  
2 your duty to find the facts from the evidence.

3 And to those facts, you must apply the law  
4 as I give it to you. And you must decide this  
5 case based on the evidence and the law.

6 You should not be concerned with what the  
7 law should be but what it is. And you must not  
8 be interested in this case by any personal  
9 likes or dislikes or any undue sympathy or  
10 prejudice.

11 And that means you must decide this case  
12 solely on the evidence before you according to  
13 the law. You will remember that you took an  
14 oath to do just that when we began this trial.

15 So follow my instruction. You must follow  
16 all of them and not single out some and ignore  
17 the others because they are all equally  
18 important.

19 Please don't read into these instructions  
20 or into anything I may have said or done during  
21 the course of this trial any indication as to  
22 what I think the facts are or what I think your  
23 verdict should be because, under our system of  
24 justice, you the jury are the sole and  
25 exclusive judges of the facts.

1           And I'm not going to intrude on your  
2           constitutionally guaranteed right to determine  
3           the facts, just as I know you're not going to  
4           intrude on my responsibility as your judge  
5           under the Constitution to charge you as to what  
6           the law is.

7           Now, ladies and gentlemen, how do you  
8           decide what the facts are? You do it by  
9           evaluating or weighing the evidence you have  
10          heard during this trial. And there's no way  
11          for you to weigh the evidence in any literal  
12          sense. I'm not going to give you a set of  
13          scales to go back and conduct experiments.  
14          That's not what I'm talking about.

15          You weigh and evaluate the evidence simply  
16          by using your good common sense, your sense of  
17          logic and reason, your life experiences. And  
18          you bring those things to bear on the evidence  
19          you've heard during this case.

20          And once you do that, you will be able to  
21          determine the true facts of this case. And  
22          once you determine -- done that, you will be  
23          able to take the law as I'm about to give it to  
24          you and apply that law to the facts, and you  
25          will be able to reach a decision and a verdict

1 in this case.

2 In deciding the facts of this case, you  
3 must not be swayed by any bias or prejudice or  
4 favor as to any party. Our system of justice  
5 does not permit jurors to be governed by  
6 prejudice or sympathy or public opinion. This  
7 case should be considered and decided by you as  
8 an action between two parties of equal standing  
9 in the community, of equal worth, and holding  
10 the same or similar stations in life.

11 A corporation is entitled to the same fair  
12 trial at your hands as a private individual.  
13 All persons, including corporations, stand  
14 equal before the law and are to be dealt with  
15 as equals in the court of justice.

16 So you must not consider as evidence any  
17 statement of counsel made during the trial.  
18 Statements of counsel do not constitute  
19 evidence. Rather, counsel is articulating the  
20 position and the contentions of his or her  
21 client. And this rule applies to the opening  
22 statements of counsel and the closing  
23 arguments.

24 Attorneys are officers of the court.  
25 Attorneys have the absolute right and duty to

1 bring matters to the attention of the Court by  
2 way of objections. So don't be upset or  
3 disturbed by counsel because of an objection.  
4 Our trial procedure includes the objection  
5 process as a means of controlling the evidence;  
6 in other words, letting in proper evidence and  
7 keeping out improper evidence. So counsel by  
8 objecting are simply performing their role in  
9 the trial of the case.

10 Now, once the Court makes a ruling on an  
11 objection, the jury is bound by that ruling.  
12 If an objection is sustained, the question is  
13 improper; and if the objection is overruled,  
14 the question is proper.

15 In that regard, the jury must not under  
16 any circumstances derive any inference to any  
17 ruling made by the Court on objections as to  
18 any opinion the Court may have on the case.

19 The judge does not have an opinion on the  
20 evidence and is not entitled to an opinion  
21 under the law. The judge is performing her  
22 role in the trial of the case.

23 As to any questions to which an objection  
24 was sustained, you must not speculate on what  
25 the answer might have been or the reason for

1 the objection.

2 Burden of proof. I told you at the  
3 beginning of the case that plaintiffs have the  
4 burden of proving their case. And the burden  
5 of proof in a civil case is by means of greater  
6 weight or preponderance of the evidence.

7 And that means that the plaintiffs, in  
8 order to obtain a verdict, must produce  
9 evidence which, considered in light of all the  
10 facts, leads you to believe that what they are  
11 claiming is more likely true than not.

12 A better way to visualize it perhaps is to  
13 envision a set of scales. And if you put the  
14 plaintiff and the defense evidence on opposite  
15 sides of the scale, in order to receive a  
16 verdict, the plaintiff would have to tip the  
17 scales in their favor.

18 If those scales tip in the plaintiffs'  
19 favor even slightly, the most minute portion,  
20 then the plaintiffs would be entitled to a  
21 verdict because the greater weight would be on  
22 their side.

23 However, after you review the evidence, if  
24 the scales are evenly balanced and there's not  
25 a greater weight on either side or the scales

1 are tipped even slightly in the defendant's  
2 favor, then the defendant would be entitled to  
3 a verdict because the plaintiff would not have  
4 proved his case by the greater weight or  
5 preponderance of the evidence.

6 Now, in connection with my charge on  
7 burden of proof, I charge you that a party's  
8 allegations -- that is, the stated case or  
9 defense -- may be proved by any evidence  
10 regardless of whether that evidence is brought  
11 out or introduced by an opposing party or by  
12 the opposing party's witness.

13 That is to say, a party in proving the  
14 claim or defense is not limited solely to the  
15 defendant -- to the testimony given by that  
16 party's own witnesses but may rely on any  
17 evidence that's been presented and introduced  
18 by the opposing party and upon any testimony  
19 elicited from the opposing party's witnesses on  
20 direct or cross-examination.

21 Now, some of you may be familiar with the  
22 burden of proof in a criminal case. Before the  
23 state can convict someone of a crime, they must  
24 prove each element of that crime beyond a  
25 reasonable doubt.

1           And this is not a criminal case,  
2 obviously, so that phrase, "beyond a reasonable  
3 doubt," which is one of the highest standards  
4 of proof the law knows, it has no place in this  
5 civil case. The standard of proof that you  
6 must use and the yardstick you must apply is  
7 the burden of the greater weight of the  
8 evidence.

9           Now, let's talk about evidence. You must  
10 decide what the facts are from the evidence.  
11 And the evidence consists of sworn witness  
12 testimony, exhibits, and we've also had  
13 something called stipulations in this case.

14           And a stipulation is simply an agreement  
15 by the parties that a certain fact exists  
16 without necessity of further proof. And you  
17 must take a stipulation as conclusive evidence  
18 of a fact so that -- the only things you can  
19 use in determining what the facts are are  
20 witness testimony, exhibits, stipulations, and  
21 court-ordered instructions. Nothing else is  
22 evidence.

23           We have had excellent lawyers in this  
24 case. This is the cream of the crop in this  
25 country that you and I have had the privilege

1 of hearing in a Richland County courtroom. And  
2 they have zealously advocated for their  
3 clients' positions.

4 But, again, they're not witnesses. So  
5 what they say is not evidence. If you remember  
6 something differently than the way the lawyers  
7 remember it, your memory controls. What they  
8 have said and argued in this case is very  
9 important for you to listen to because, as I  
10 said at the outset, they are trying to help you  
11 understand the evidence. But do keep in mind,  
12 what they say is not itself evidence.

13 Now, stipulations. There is an economic  
14 loss stipulation. The plaintiffs and  
15 defendants stipulate that the total current  
16 economic loss is \$3,329,973.05. And you will  
17 have this figure in the jury room with you.

18 Plaintiffs and defendant AII stipulate  
19 that the reasonable and necessary past medical  
20 bills, which is another element of loss, as a  
21 result of Michael Perry's mesothelioma  
22 diagnosis and treatment are \$510,620.05.

23 So when you saw those two figures added  
24 together in argument, that's what is meant,  
25 that those are -- if you're going to award

1 anything, that's what you'd consider in making  
2 your award.

3 Direct and circumstantial evidence. In  
4 any type of case, there are different types of  
5 evidence. And what I'm discussing now is  
6 direct as opposed to circumstantial evidence.  
7 I'm going to give you a definition for each.

8 Direct evidence is the testimony of a  
9 witness who claims to have actual and direct  
10 knowledge of the facts such as an eyewitness.  
11 It's evidence that, if believed, immediately  
12 establishes a fact.

13 Another type of evidence is circumstantial  
14 evidence. I'm sure you've heard that term.  
15 Circumstantial evidence is indirect evidence.  
16 Put another way, circumstantial evidence is  
17 proof of a chain of facts and circumstances  
18 from which you could find that another fact  
19 exists even though it hasn't been proven to you  
20 directly. In modern parlance, we call that  
21 connecting the dots.

22 The law makes no distinction between the  
23 weight or value to be given either direct or  
24 circumstantial evidence. You may consider both  
25 kinds of evidence in this case.

1           By way of an example, if a witness  
2 testified that the witness saw it was raining  
3 outside, that would be direct evidence that  
4 it's raining.

5           But if a witness testified that the  
6 witness saw someone enter the room wearing a  
7 raincoat covered with drops of water and  
8 carrying a wet umbrella, that would be  
9 circumstantial evidence from which you could  
10 conclude that it was raining.

11           Where circumstantial evidence is relied  
12 upon, it is incumbent upon the party presenting  
13 the evidence to show the existence of such  
14 circumstances as would justify the inference  
15 that a particular event actually occurred and  
16 not to leave questions to speculation or  
17 conjecture.

18           If the circumstances are proved to your  
19 satisfaction, you may infer a fact from those  
20 circumstances. But the circumstances must lead  
21 to the conclusion with reasonable certainty.  
22 If the circumstances are not proved to your  
23 satisfaction, then you shouldn't infer the  
24 facts.

25           Evidence, evaluating witness testimony.

1           You must consider all of the evidence in  
2           deciding what the facts are.  And if there has  
3           been evidence that's been stricken from the  
4           record or if I told you to disregard it, that  
5           material is no longer a part of the record or  
6           evidence in the case and you can't consider it  
7           in your deliberations.

8                     But you must, as judges of the facts,  
9           determine the credibility of all evidence.  So  
10          as I told you at the beginning, for every  
11          witness who testifies and every exhibit that is  
12          admitted, you will have to determine whether  
13          those things are worthy of belief.  And how do  
14          you do that?

15                    In a case of a witness who testified, I  
16          can give you some general guidelines.  First,  
17          you may consider whether the witness had some  
18          interest in the outcome of the case, whether  
19          they had some bias or prejudice towards someone  
20          or some issue in the case, whether they had  
21          something to gain by their testimony.

22                    Second, you may consider what opportunity  
23          the witness had to observe the things they were  
24          here to tell you about.

25                    Third, you may consider how the witness

1 evidence or testimony stacks up against other  
2 evidence in the case. Is it consistent or  
3 inconsistent?

4 Fourth, you may consider the demeanor on  
5 the stand of the witness. Was the witness  
6 hesitant or forthright in their testimony?

7 Fifth, you may certainly use what you'd  
8 call your day-to-day life to determine whether  
9 someone is telling you the truth because you  
10 didn't surrender your common sense when you  
11 walked into this courtroom last week.

12 I will tell you this: You may believe  
13 everything a witness says; you may believe  
14 nothing a witness says; you may believe parts  
15 of a witness's testimony; you may disbelieve  
16 other parts; you may believe the one witness  
17 over the several; or you may believe the  
18 several over the one.

19 But you certainly don't decide this matter  
20 of credibility simply by counting up the  
21 witnesses on one side or the other because your  
22 sole objective, ladies and gentlemen, is to  
23 determine the truth in this case. And it does  
24 not matter to you whether that truth comes from  
25 a witness for the plaintiff or for the

1 defendant.

2 Now, expert testimony. You've heard  
3 testimony from people who have been described  
4 and qualified as experts. They were qualified  
5 as experts because they, by reason of their  
6 education, training, or experience, achieved  
7 some expertise in their given field. And they  
8 can state their opinion on matters in their  
9 field. And they may state their reasons for  
10 their opinions.

11 But expert testimony, as I told you when  
12 we had the very first expert qualified, must be  
13 judged by you just as any other testimony in  
14 this important respect. And that is that you,  
15 the jury, are the sole judges of the  
16 credibility of the witness. You may believe a  
17 witness's testimony and accept it, or you may  
18 reject it, or you may give it whatever weight  
19 you think it deserves.

20 Expert witnesses and causation. Now, when  
21 someone relies on expert testimony to show a  
22 causal connection between an injury and the  
23 subsequent condition, the testimony must meet  
24 the most probably rule.

25 It's not sufficient to say the condition

1 in question possibly could have come or might  
2 have come from the injury. Expert must go  
3 further and testify that, taking into  
4 consideration all the facts, it is his or her  
5 professional opinion that the result in  
6 question most probably came from the cause  
7 alleged.

8 Deposition testimony. You've also heard  
9 testimony presented through depositions. And I  
10 just want to remind you that deposition  
11 testimony is entitled to the same weight and  
12 consideration as if that witness had been here  
13 and testified from the stand.

14 Taking notes. Now, some of you have been  
15 taking notes during the trial, and I gave you  
16 an instruction on that. I just want to remind  
17 you that the notes are for your own personal  
18 use, and notes certainly don't overcome  
19 another's independent recollection of the  
20 testimony. They're not to be used in place of  
21 your memory.

22 Multiple defendants. The plaintiffs in  
23 this case are Michael Perry and his husband,  
24 Lonnie Long. And there are multiple defendants  
25 in this trial, the Johnson & Johnson entities

1 and American International Industries.

2 Plaintiffs contend that Johnson & Johnson  
3 entities is responsible for Johnson's Baby  
4 Powder during all the years of its use in this  
5 case.

6 You should decide the case against each  
7 defendant separately as if it were a separate  
8 lawsuit. Each defendant is entitled to  
9 separate consideration of its defenses.

10 Now, I have found as a matter of law that  
11 American International Industries, AII, is  
12 liable. So you don't have to make that  
13 liability determination. They are liable.

14 The Court has already determined that  
15 American International Industries, the company  
16 responsible for Clubman talc products, is  
17 liable to Michael Perry on each of the causes  
18 of action pled against them, specifically  
19 negligence, strict liability, fraudulent  
20 misrepresentation.

21 The Court has determined that Clubman  
22 asbestos-containing talc products was defective  
23 and unreasonably dangerous and was a  
24 substantial factor in the development of  
25 Michael Perry's mesothelioma.

1           The Court has determined that American  
2 International Industry's conduct was willful,  
3 wanton, and reckless, meaning American  
4 International Industries acted with a conscious  
5 indifference to the rights and safety of  
6 others.

7           Now, while these are issues you must  
8 decide against Johnson & Johnson, you are  
9 instructed that American International  
10 Industries is liable to the plaintiffs in this  
11 case. Your task -- your only task as to AII is  
12 to determine the total amount of damages that  
13 Michael Perry and Lonnie Long have suffered.

14           Summary of the plaintiffs' claims. This  
15 is a claim for damages stemming from  
16 personal -- from a personal injury that has  
17 been alleged. And I want to go over with you  
18 the various claims that have been made in this  
19 case.

20           The plaintiffs Michael Perry and Lonnie  
21 Long are seeking to recover damages for  
22 personal injury arising out of alleged exposure  
23 of Michael Perry to asbestos from the  
24 defendant's products. Plaintiffs' claims in  
25 this case are based on several theories:

1 negligence, strict liability, and fraudulent  
2 misrepresentation.

3 There are three different ways a company  
4 can be strictly liable under the law of this  
5 state: design defect, manufacturing defect,  
6 and warning defect. And the plaintiff must  
7 only prove one of those defects to establish  
8 defendant's liability under strict liability.

9 The plaintiffs are not required to prove  
10 all of these theories to recover. Proof of a  
11 claim under any one of these theories would  
12 enable you to find the plaintiffs are entitled  
13 to a verdict. But the plaintiffs must meet  
14 their burden of proof as to at least one of  
15 these theories against at least one of the  
16 defendants in order to recover. If you find  
17 they have not, then the verdict would be --  
18 then the defendant would be entitled to a  
19 verdict.

20 Negligence. The first theory of the  
21 plaintiffs is one of negligence. The focus on  
22 the negligence is on the conduct of each of the  
23 defendants. In order to prevail under this  
24 claim, the plaintiffs must prove by the greater  
25 weight of the evidence that the defendant

1 failed to exercise due care in some respect.

2 If you're having a hard time with the  
3 phrase "negligence," you can substitute the  
4 word "careless" because it really means  
5 essentially the same thing. It means the  
6 failure to act as a reasonably prudent person  
7 would act under the same or similar  
8 circumstances or doing something that a  
9 reasonable person would not do under the same  
10 or similar circumstances.

11 You must first determine if the defendant  
12 owed the plaintiffs a duty of care. A  
13 defendant will owe the plaintiff a duty of care  
14 when the defendant knows of the risk of harm  
15 posed by its product. This may be met by  
16 showing the defendant was aware of the danger  
17 and failed to take reasonable steps to correct  
18 it.

19 A manufacturer is held to the skill of an  
20 expert in the field as to the products itself  
21 and is charged with an expert's knowledge of  
22 materials and processes used in the industry.

23 A manufacturer has a duty to stay aware of  
24 current standards and scientific knowledge in  
25 the industry; and therefore, since the seller

1 assumes the duties of a manufacturer, a seller  
2 is held to the skill of an expert in the field  
3 as well and has a duty to stay aware of current  
4 standards and scientific knowledge in the  
5 industry.

6 Although evidence of industry standards  
7 may be considered as evidence of the standard  
8 of care, an industry can't set its own  
9 unreasonable standards. An entire industry may  
10 lag behind in adoption of new and available  
11 products or safety features, and the failure to  
12 use due care, even if no one in the industry  
13 uses due care, does not excuse negligence.

14 It is for you to decide whether the  
15 standard of care was proper considering what a  
16 reasonable person would have done under similar  
17 circumstances.

18 If you find the defendant owed the  
19 plaintiff a duty of care, then the next thing  
20 the plaintiffs must prove by the greater weight  
21 of preponderance of the evidence is that the  
22 defendant breached that duty of care by a  
23 negligent act or omission.

24 In deciding whether the defendant breached  
25 the duty of care, you should consider whether

1 the defendant has filed the normal and  
2 customary procedures in the industry in light  
3 of the defendant's expertise and ability to see  
4 and appreciate the product and its cause.

5 If the defendant failed to exercise  
6 reasonable care in fulfilling any of its  
7 duties, the defendant would be responsible for  
8 the injuries to any person the defendant should  
9 expect to use the product, assuming the  
10 injuries have been proven to have been  
11 proximately caused by that breach. This burden  
12 may be met by showing that the manufacturer was  
13 aware of the danger and failed to take  
14 reasonable steps to correct it.

15 In an action based on negligence,  
16 plaintiffs must also prove that the product was  
17 in a defective condition, unreasonably  
18 dangerous to the user, when it left control of  
19 the defendant and the defect caused the  
20 plaintiff's injury.

21 Now, the next thing is the duty of product  
22 manufacturers themselves.

23 A manufacturer owes a duty of care in the  
24 manufacture of its product proportionate to the  
25 dangers involved in the product's use. A

1 manufacturer of a product may, under a claim or  
2 design that makes it dangerous for use for  
3 which it's made, owe a duty to use reasonable  
4 care in the adoption of a safe plan or design  
5 those users you would expect to use the  
6 product. A seller owes the duty to conduct  
7 adequate tests and inspections of its product  
8 to discover latent defects or defects that are  
9 not visible or apparent on reasonable  
10 inspection.

11 Now, if a seller had reason to know that  
12 the product was likely to be dangerous or  
13 defective, a seller owes a duty to exercise and  
14 use reasonable care, inspecting and testing the  
15 product, before selling.

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

23 But defendant can, however, be liable for  
24 an alleged defective product it did not design,  
25 recommend, specify, require, manufacture, sell,

1 or place in the stream of commerce. In  
2 deciding whether the defendant had a duty to  
3 test the product, you should consider the  
4 defendant's ability to conduct tests at the  
5 time the product was sold.

6 A seller of a defective product has a duty  
7 to warn users of the product and any dangers  
8 created by the product with which the  
9 manufacturer is or should be aware at the time  
10 the products are sold.

11 A supplier of a product who knew or should  
12 have known that the product might be dangerous  
13 during its foreseeable use and has a reason to  
14 believe that the ultimate user would not  
15 appreciate the danger has a duty to clearly and  
16 understandably warn the ultimate user of the  
17 danger.

18 Now, a seller is required only to warn  
19 about dangers that are unreasonable or which  
20 are dangerous beyond the expectation and  
21 general knowledge of an ordinary person who  
22 uses the product with an ordinary common  
23 knowledge about the product's characteristics.

24 In other words, there's a duty to warn not  
25 when scientific certainty is established but

1 when a reasonable person would want to be  
2 informed of the risks. In deciding whether the  
3 directions or instructions or warranties are  
4 adequate, you should consider their location,  
5 language, and size.

6 Strict liability, the elements.

7 Second theory I want to go over with you  
8 is strict liability. The plaintiffs' claims  
9 are that the defendant should be held strictly  
10 liable for the plaintiffs' injuries; and to  
11 recover under the strict liability, the  
12 plaintiff must prove three things by the  
13 greater weight of the evidence.

14 First, the product was in a defective  
15 condition, unreasonably dangerous to the  
16 plaintiff.

17 Second, that at the time of the injury,  
18 the product was essentially in the same  
19 condition as when it left the defendant's hand.

20 Third, the plaintiffs were injured by the  
21 product.

22 Strict liability means liability without  
23 fault. Under the law, the theory of strict  
24 liability says that, even if a defendant used  
25 due care, the defendant may still be

1 responsible for the plaintiff's injuries.

2 In other words, it does not matter whether  
3 the defendant was negligent or not negligent.  
4 If the products were defective and unreasonably  
5 dangerous whether they left defendant's hands,  
6 the defendant is liable, even if all reasonable  
7 care was used in making and selling the product  
8 and even if the plaintiff did not buy the  
9 product from any of the defendants or enter  
10 into a contract with the defendant because the  
11 plaintiffs do not have to show negligence under  
12 the theory of strict liability. The plaintiffs  
13 must only prove the product was defective and  
14 unreasonably dangerous when it was placed in  
15 the stream of commerce. So your focus should  
16 be on the product itself and not the conduct of  
17 the defendant.

18 The defect must exist at the time that it  
19 leaves defendant's control. The existence of a  
20 defect is crucial because a manufacturer is not  
21 an insurer against all risk of injury  
22 associated with the product. In a products  
23 liability case against a manufacturer, the  
24 plaintiffs have the burden of proving that the  
25 product in question was defective at the time

1           when the defendant had possession or control of  
2           it or when the product was delivered or  
3           purchased.

4                    There's no duty on a manufacturer to  
5           furnish a product which will not wear out. A  
6           party who sells a product in a defective  
7           condition unreasonably dangerous is subject to  
8           liability for physical harm caused to the user  
9           if the manufacturer is engaged in the business  
10          of producing or selling a product and it is  
11          expected to reach and reaches the consumer  
12          without a substantial change in its condition.

13                   So if you find it was probable that a user  
14          would be injured by the product and the injury  
15          was not reasonably perceivable to the user, the  
16          product is defective. You cannot find the  
17          product is defective if it's only possible that  
18          such an injury would occur.

19                   In deciding whether a product is  
20          unreasonably dangerous and defective, you  
21          should consider the dangers that would be  
22          reasonably anticipated by a typical user of a  
23          product of this kind. Then you should decide  
24          whether the particular product involved in this  
25          case has a tendency for causing dangers beyond

1           that that an ordinary user with common  
2           knowledge of the product's characteristics  
3           would anticipate. And you should also consider  
4           whether the dangers associated with the use of  
5           the product outweigh the usefulness of the  
6           product, the costs involved for adding safety,  
7           and the likelihood and seriousness of the  
8           injury and the obviousness of the danger.

9                     Now, many products cannot be made  
10           completely safe for their use. If a product is  
11           useful and desirable and properly prepared and  
12           manufactured and packaged and accompanied by  
13           adequate warnings and instructions, they cannot  
14           be said to be defective. The fact that a  
15           product can be made safer alone does not make  
16           the product unreasonably dangerous.

17                    In order for a defendant to be  
18           responsible, the product must have been in a  
19           condition not contemplated by the ultimate  
20           user, which would be unreasonably dangerous to  
21           that user when the product was used in a  
22           foreseeable manner, including any intended use  
23           of the product at the time it left defendant's  
24           hands.

25                    Now, there are three kinds of product

1 defects: design defects, manufacturing  
2 defects, and warning defects.

3 Plaintiffs allege that defendant's  
4 products have all three of these types of  
5 defects. You only need to find one of these  
6 defects, however, to find the defendant  
7 strictly liable. And I will give you  
8 instructions on each one of these defects.

9 Design defect. To prove a defective  
10 condition, the plaintiff must prove that the  
11 defendant sold the product and at the time of  
12 sale it was unreasonably dangerous to the user.  
13 A defect does not have to be a manufacturing  
14 error. With a design defect, there's nothing  
15 wrong with the manufacturing product and the  
16 product is made according to its design;  
17 however, there's a flaw in the product's  
18 design. The plaintiffs must prove that the  
19 product as designed was in a defective  
20 condition, unreasonably dangerous. The test is  
21 not whether the product could be made safer but  
22 whether its design was unreasonably dangerous.

23 Now, you must balance the utility of the  
24 risk inherent in the design of a product with  
25 the magnitude of the risk to determine the

1           reasonableness of the manufacturer's action in  
2           designing the product.

3           A product is unreasonably dangerous and  
4           defective if the danger associated with the use  
5           of the product outweighs the utility of the  
6           product. Numerous factors must be considered  
7           when determining whether a product is  
8           unreasonably dangerous, including the  
9           usefulness and desirability of the product, the  
10          cost of adding additional safety, the  
11          likelihood of potential seriousness of the  
12          injury, and the obviousness of the danger.

13          The plaintiff must also prove the  
14          existence of a reasonable alternative design.  
15          If the plaintiff does not show that the  
16          defendant could have designed the product in an  
17          alternative manner that would have eliminated  
18          the defect, plaintiff cannot recover under the  
19          claim of design defect.

20          Strict liability manufacturing defect.

21          Plaintiffs also contend that defendant's  
22          products were defectively manufactured. A  
23          manufactured defect exists when the product  
24          doesn't conform to the manufacturer's design  
25          standard and specifications and the flaw makes

1 the product more dangerous and, therefore,  
2 unfit for its intended or foreseeable use.

3 This type of defect is not a defective  
4 design but a defective execution of the design.  
5 When a manufacturing defect is claimed, the  
6 test of whether a product is or is not  
7 defective is whether the product is  
8 unreasonably dangerous to the consumer or user  
9 given the conditions and circumstances that  
10 foreseeably attend the use of the product.

11 Now, strict liability warning defect.

12 The product may also be defective if the  
13 defendant failed to warn or failed to provide  
14 adequate instruction to the user. Product is  
15 not defective for failure to warn of the  
16 obvious. Seller is not required to warn with  
17 respect to products when the danger or  
18 potential danger is generally known and  
19 recognized.

20 A product can't be deemed either defective  
21 or unreasonably dangerous if the danger  
22 associated with the product is one that  
23 product's users generally recognize.

24 A product may, by reason of its nature and  
25 use, be -- a product may be, by reason of its

1 nature and use, unreasonably dangerous unless  
2 proper instructions and warnings are supplied  
3 for its intended use. In those cases, a seller  
4 or manufacturer must give an appropriate  
5 warning of any dangerous conditions likely to  
6 be encountered. The warning must be one that  
7 would cause a reasonable person to use caution  
8 proportionate to the potential danger.

9           There is a particular need for sufficient  
10 warning when there is a representation that the  
11 product in question is not dangerous. A  
12 product may be found defective if the product  
13 is unreasonably dangerous in the hands of the  
14 user without suitable warning. A manufacturer  
15 or seller is not required to warn about defects  
16 of a product unless the manufacturer knew or  
17 should have known about the defects when the  
18 product was sold.

19           Now, state of the art. Something you must  
20 consider in assessing the defendant product and  
21 conduct is the state of the art at the time the  
22 products left the defendant's hands. The issue  
23 of due care, as well as the breach of any  
24 warranty, must be assessed in light of the  
25 circumstances existing at the time of sale.

1           In order for plaintiffs to prove their  
2 product's liability action, they must show the  
3 product was in a defective condition at the  
4 time they left the hands of the particular  
5 seller. The product must be measured against  
6 standards existing at the time of sale.

7           State of the art includes all the  
8 reasonably available scientific knowledge on  
9 the subject at the given time. And this  
10 includes scientific, medical, engineering, or  
11 other knowledge that may be available. State  
12 of the art includes the element of time, what  
13 is known, and when this knowledge was  
14 available.

15           If a product is nondefective under the  
16 standards existing at the time of its  
17 manufacture, the manufacturer does not have a  
18 postsale duty to warn. You should return a  
19 verdict in favor of the plaintiffs only if,  
20 considering the state of the art existing at  
21 the time defendant's products were sold, the  
22 product was sold in a defective condition.

23           Causation. Under any products liability  
24 theory of recovery -- negligence, strict  
25 liability, or fraudulent misrepresentation --

1 the plaintiff must establish that the product  
2 defect was a proximate cause of the injuries  
3 sustained.

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

15 In a negligence claim, plaintiffs must  
16 prove by a greater weight of the preponderance  
17 of the evidence that defendant's negligence  
18 proximately caused an injury to the plaintiff  
19 and the damages suffered were proximately  
20 caused by the defendant's breach of its duty of  
21 care.

22 Proximate cause is conduct that produces a  
23 natural chain of events and in the end brings  
24 about an injury. And it is the direct cause of  
25 the injury.

1           To prove the defendant's negligence  
2 proximately caused plaintiff's injury,  
3 plaintiffs must first prove something called  
4 causation in fact. That is proved by showing  
5 the defendant's negligence was a substantial  
6 factor in causing the injury.

7           The plaintiff must also prove something  
8 called legal cause, and that is proved by  
9 showing the injury was foreseeable. That means  
10 the injury occurred as a natural and probable  
11 consequence of the defendant's negligence.

12           The plaintiffs must prove that some injury  
13 from the defendant's negligence was  
14 foreseeable, but they do not have to prove the  
15 particular injury that occurred -- the  
16 particular injury that occurred was  
17 foreseeable. However, a defendant cannot be  
18 held responsible for something that could not  
19 have been expected to happen.

20           There can be more than one cause.  
21 Proximate cause does not mean the only cause.  
22 Defendant's actions can be a proximate cause of  
23 plaintiff's injury if defendant's conduct was  
24 at least one of the direct causes of the  
25 injury. Where two or more causes combine to

1 produce an injury, a defendant is not relieved  
2 from liability for negligence because it's  
3 responsible for only one of the causes. It is  
4 sufficient that its negligence or fault is a  
5 substantial factor in causing the injury.

6 Consequently, if a defendant's negligence  
7 is a proximate cause of an injury to another,  
8 the fact that the negligence of a third party  
9 occurred with its own negligence to produce the  
10 harm does not relieve it of liability. In such  
11 cases each wrongdoer is in breach of the duty  
12 of care owed to the plaintiff because the  
13 negligence of each contributed to produce an  
14 injury. They can all be liable.

15 Under South Carolina law, a defendant is  
16 entitled to assert that other persons or  
17 entities caused or contributed to the alleged  
18 injury or damage. The matter of others'  
19 alleged fault in causing the plaintiffs'  
20 injuries has been raised by the defendants, and  
21 it's proper for you to consider the actions of  
22 others but only insofar as plaintiff have made  
23 their -- have met their burden of proof.

24 Eggshell plaintiff. A defendant who is  
25 negligent must take the plaintiff as he finds

1 him, even though a defendant may not have been  
2 on a notice of any particular -- any peculiar  
3 susceptibility to injury on the part of the  
4 plaintiff. If the defendant's conduct was such  
5 as to come out of a failure to exercise due  
6 care to a person of ordinary susceptibility, he  
7 would be liable for all damages suffered by the  
8 plaintiff notwithstanding the fact that those  
9 damages were unusually extensive because of the  
10 peculiar susceptibility on the part of the  
11 plaintiff.

12           Fraudulent misrepresentation. Fraud is an  
13 intentional perversion of the truth for the  
14 purpose of inducing another in reliance upon it  
15 to part with some valuable thing belonging to  
16 him or to surrender a legal right. Fraud is a  
17 false representation of a matter of fact,  
18 whether by words or by conduct, by false or  
19 misleading allegations, or by concealment of  
20 that which should have been disclosed which  
21 deceives and is intended to deceive another so  
22 that he will act upon it to his legal injury.

23           To recover for fraud, the plaintiffs must  
24 have relied on the misrepresentation. In order  
25 to prove fraudulent misrepresentation,

1 plaintiff must show the following elements:

- 2 1. A representation;
- 3 2. Its falsity;
- 4 3. Its materiality;
- 5 4. Knowledge of the falsity or reckless  
6 disregard of the truth or falsity;
- 7 5. The intent that the representation be  
8 acted upon;
- 9 6. The careless ignorance of its falsity;
- 10 7. The hearer's reliance upon the truth;
- 11 8. The hearer's right to rely; and
- 12 9. The hearer's consequent and proximate  
13 injury.

14 Plaintiffs must prove each of these  
15 elements of fraudulent misrepresentation by  
16 clear and convincing evidence.

17 And I'm going to tell you about clear and  
18 convincing evidence because these others have  
19 to be proved by the greater weight of  
20 preponderance, but when you get into fraud,  
21 it's a different standard. It's called clear  
22 and convincing evidence.

23 As I've explained to you, in evaluating  
24 whether the defendants were negligent, strictly  
25 liable, or in breach of implied warranty, the

1           burden of proof is simply the greater weight or  
2           the preponderance of the evidence.

3                     But plaintiffs' fraud claim must be proven  
4           by higher burden -- clear and convincing  
5           evidence.

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

17                    Clear and convincing is something more  
18          than simply the greater weight of the evidence;  
19          it's something less than beyond a reasonable  
20          doubt. Clear and convincing evidence is proof  
21          that leaves you firmly convinced -- clear and  
22          convincing proof establishes in your mind not  
23          only the fact is probable but that it is highly  
24          probable.

25                    Actual damages, personal injury. If you

1 find the plaintiffs have met their burden of  
2 proving at least one of these theories --  
3 negligence, strict liability -- by the greater  
4 weight of the evidence, or that the plaintiffs  
5 have made their clear and convincing burden as  
6 to fraudulent misrepresentation and that the  
7 damages were proximately caused by the  
8 defendant's conduct or product, then you would  
9 move on to assess damages.

10 That is how much money the defendant  
11 should be required to pay. Actual damages are  
12 designed to compensate a party for their loss  
13 and to make that party as a whole as -- as  
14 whole -- to make the party whole as near as  
15 money can do so and to put him in the same  
16 position as he was or they were prior to the  
17 incident or accident occurring.

18 Actual damages include actual losses and  
19 expenses that the plaintiffs have suffered  
20 because of defendant's wrong.

21 Actual damages include several areas that  
22 are recognized by the law. In a personal  
23 injury action, plaintiffs may recover necessary  
24 and reasonable expenses caused by the injury,  
25 such as the amounts necessary for medical

1 treatment.

2 Persons who suffer personal injury because  
3 of misconduct in another is entitled to recover  
4 the reasonable value of medical care and  
5 expenses for the treatment of the injury at the  
6 time of trial as well as those reasonably  
7 certain to be incurred in the future.

8 Accordingly, a plaintiff may recover  
9 amounts incurred for past and future medical  
10 care, including hospital, physician, nursing  
11 care costs, medicine, or other out-of-pocket  
12 anticipated expenses, such as vocational,  
13 physical, or other rehabilitation.

14 Pain and suffering is also an element of  
15 these actual damages, and it's properly  
16 considered under the law. Pain and suffering  
17 compensates the plaintiff for physical  
18 discomfort, emotional response to the sensation  
19 of pain caused by the injury.

20 There's no definite standard I can give  
21 you for determining the amount of damages.  
22 You, the jury, will have to use your calm,  
23 reasonable judgment to determine them in light  
24 of your own experiences, in light of testimony  
25 and evidence presented in this case.

1           Another form of damages is enjoyment -- is  
2           loss of enjoyment of life. This compensates  
3           the plaintiff for limitations on the ability to  
4           participate in and derive pleasure from normal  
5           activities of daily life.

6           Another category is mental suffering, that  
7           is, compensation for shock, fright, anxiety,  
8           emotional upset.

9           Actual damages for the plaintiff who has  
10          been physically injured include pain and  
11          suffering both past and future as well as  
12          mental anguish. Mental anguish is something  
13          more than mere disappointment or anger or worry  
14          or embarrassment or resentment.

15          While it may include all of these, it also  
16          includes the mental sensation of pain resulting  
17          from painful emotions such as grief, wounded  
18          pride, shame, disparagement and humiliation.  
19          It may also be composed of fright, nervousness,  
20          grief, anxiety, and worry from an ordeal.

21          Actual damages, loss of consortium.  
22          Plaintiffs also claim loss of consortium  
23          damages due to the injuries received by Michael  
24          Perry's husband, Lonnie Long.

25          The companionship or the society of a

1 spouse are not articles of commerce that can be  
2 weighed or measured or bought or sold. No  
3 expert is competent to testify as to their  
4 value, and there is nowhere we can go to  
5 determine their market price, of course. And  
6 consideration on which they're based is not  
7 monetary.

8 But Lonnie Long is entitled to  
9 compensation and money for his loss. Loss of  
10 consortium includes affording services provided  
11 by the other spouse, love and companionship,  
12 affection, society, sexual relations, comfort,  
13 solace, and guidance. Plaintiff Lonnie Long is  
14 entitled to recover the value of those services  
15 of Michael Perry which have been lost,  
16 including the loss of his society and  
17 companionship in his home.

18 Now, future damages. In determining the  
19 amount of compensation for someone personally  
20 injured by another's conduct, it is proper to  
21 consider past, present, and future aspects of  
22 the injury. The injured party may recover  
23 those future damages that are reasonably  
24 certain to result.

25 The principle underlying the compensation

1 is -- there's only one action that can be  
2 brought and therefore only one recovery had.  
3 So it may be, depending on your view of the  
4 evidence, proper to consider future damages,  
5 future medical expenses, pain and suffering  
6 that will, with reasonable certainty, result.

7 The plaintiff is never entitled to recover  
8 speculative damages, and that is damages that  
9 you arrive at by guesswork.

10 The plaintiff has a burden of proving the  
11 existence and causation and the amount of  
12 damages, which he does not have to prove to a  
13 mathematical certainty. Instead, the plaintiff  
14 must present to you evidence that's sufficient  
15 to allow you to make a reasonable approximation  
16 of damages. That is, plaintiff must prove the  
17 damages to a reasonable degree of certainty.

18 Any future damages you award must be  
19 reasonably calculated to -- as a result of the  
20 alleged injury or damage sustained, and they  
21 must be reduced to their present cash value.

22 I will charge you in this case that  
23 Michael Perry is a 54-year-old male with a life  
24 expectancy, according to the South Carolina  
25 Code of Laws, of 25.65 years. This is a factor

1           you may consider along with any other facts and  
2           circumstances that may bear on his health and  
3           longevity, including his occupation, habits,  
4           and health.

5           Willful and wanton and reckless conduct.  
6           There's one question on the jury form that asks  
7           about willful, wanton, or reckless conduct. A  
8           defendant's conduct is reckless or willful or  
9           wanton if there was a conscious failure to  
10          exercise due care or conscious indifference to  
11          the rights and safety of others or reckless  
12          disregard to the rights and safety of others.

13          This must be established by clear and  
14          convincing evidence, which is something more  
15          than simple greater weight of the evidence and  
16          something less than beyond a reasonable doubt.

17          Clear and convincing proof is proof that  
18          leaves you firmly convinced. Clear and  
19          convincing proof establishes in your mind not  
20          only that a fact is probable but that it is  
21          highly probable.

22          Jury deliberations. Now, I'm through with  
23          my instructions on the law. And I just want to  
24          give you some final instructions on your  
25          deliberation.

1           Before we do that, I want to remind you  
2           that you were chosen in this case not to be  
3           partisans or advocates for either the plaintiff  
4           or defendants.

5           You were chosen because all of them  
6           believed you could be fair and reasonable. You  
7           could be a juror who can decide this case  
8           without any kind of bias or prejudice.

9           So you're the judges, the judges of fact.  
10          And your sole interest is to determine the true  
11          facts from the evidence in this case and take  
12          the law as I just gave it to you and apply it  
13          to those facts. And you will ultimately be  
14          able to reach a verdict.

15          You should know that the record is closed  
16          now. There's not going to be any more  
17          witnesses. There's not going to be any more  
18          exhibits. So if something was referred to  
19          during the trial such as a particular document  
20          and you don't have it back there as an exhibit,  
21          I can't give it to you now. But you're going  
22          to have all the exhibits, of course, that have  
23          been introduced. They will go back into the  
24          jury room with you.

25          So keep in mind the record is closed. You

1           have to make your decision based on the  
2           exhibits you have and your memory of the  
3           evidence.

4           A jury, if you look up the word in the  
5           dictionary, would be defined as a company of  
6           people sworn to render a true verdict. And  
7           that is what you've been called upon to do, to  
8           determine the true facts of this case.

9           Ladies and gentlemen, you each have a vote  
10          in this case. Your vote is actually that.  
11          It's your vote and no one else's vote. Don't  
12          be afraid to change your mind if the discussion  
13          you're going to have persuades you that you  
14          should because that's what deliberation is all  
15          about.

16          But don't surrender an honestly and  
17          conscientiously held belief simply to get this  
18          case over with or to reach a unanimous verdict  
19          because these parties have waited a long time,  
20          and this is their day in court. And I know you  
21          recognize the importance of it to them. And we  
22          appreciate the seriousness and respect you have  
23          shown everyone in this case and your patience  
24          with all of us.

25          The verdict form. Now, the verdict form

1 I'm going to go over with you briefly.

2 Under the constitution of this state, a  
3 jury verdict must be unanimous. And unanimity  
4 is mandated. Every single juror must agree on  
5 the jury verdict. It can't be any split or  
6 divided vote in any form or fashion, so 11 to  
7 1, 10 to 2, 9 to 3. Every juror must agree on  
8 the jury verdict.

9 And when the foreperson of the jury -- and  
10 that is you, Madam Foreperson. When you write  
11 down what the verdict is -- that's what you'll  
12 do after all have voted on the various things  
13 that are on this jury form -- and sign your  
14 name, that assures this Court that the verdict  
15 is a unanimous verdict.

16 Now, I thank you all for your attention to  
17 me and your patience with me. Don't start  
18 deliberating about this case until you receive  
19 the exhibits. That will be your signal that  
20 you can start talking about this case.

21 Believe it or not, as long as I've been up  
22 here talking, I may have left something out.  
23 If I have, my friends the lawyers will be quick  
24 to remind me of that.

25 So what I want you to do is go back to

1           your jury room. When you get the exhibits,  
2           that will be your sign that you can begin to  
3           deliberate. And I will also have the first  
4           bailiffs and court personnel deliver to you so  
5           you each will have a copy of the verdict form  
6           and a copy of these charges that I have just  
7           read to you.

8                        So with that, you may go to your jury  
9           room. Please do not deliberate until all of  
10          these materials have been placed in your jury  
11          room. Thank you very much.

12                       Mr. Bailiff, I know you're going to take  
13          our very patient friends who are the alternates  
14          into a place --

15                       THE BAILIFF: We're going to put them next  
16          door right here.

17                       THE COURT: Alternates, if you would stay  
18          in place.

19                       Jury, if you will depart.

20                       And then they'll take you, my friends the  
21          alternates, into a separate room now.

22                       Mr. Bailiff, these alternates may want to  
23          go into the jury room and get materials that  
24          they have in there that they would like to  
25          have. So all may go to the jury room to begin

1 with, including the alternates, and then you  
2 show them where they are to then sit. Make  
3 sense?

4 Very good.

5 (The jury exited the courtroom at  
6 this time.)

7 (The following proceedings were held  
8 outside the presence of the jury:)

9 THE COURT: Before you finish -- please be  
10 seated.

11 All right. I'll turn first to the  
12 plaintiffs.

13 Plaintiffs?

14 MS. MCVEY: No issues from us, Your Honor,  
15 other than what was previously raised.

16 THE COURT: Thank you.  
17 Defense? Mr. Brown?

18 MR. BROWN: Yes, Your Honor. Thank you.

19 We think there is a problem here, Your  
20 Honor, because of the overruling of Ms. Bueno's  
21 objection which went to a law issue which  
22 belongs solely to the Court.

23 Ms. Bueno objected to the closing argument  
24 that the only way that our client would win is  
25 if it had zero role. And the Court overruled

1           that objection.

2                   And the Court's charge tells the jury  
3           that, once the Court has made a ruling, the  
4           jury is bound by that and so on.

5                   So this is, Your Honor, prejudicial to us  
6           because we don't think that is the law. And  
7           I'd like to tell you quickly why. In the *Glenn*  
8           case --

9                   THE COURT: Well, before you get there,  
10          let me just stop you for a moment.

11                   Number one, the jury heard none of what  
12          the basis for the objection was. That was at  
13          sidebar. They didn't hear zero role or  
14          anything else.

15                   I overruled the objection because there  
16          was not some suggestion of zero role. I did  
17          not interpret the argument to be that way. And  
18          therefore, I did not think it was supported.

19                   You are objecting to something that had  
20          been said, and I did not agree with your  
21          interpretation of what had been said. And on  
22          that basis, I denied your motion.

23                   MR. BROWN: Your Honor, we --

24                   THE COURT: And I understand you may see  
25          it differently, and you can put on the record

1           briefly what you think.

2           MR. BROWN: Very briefly.

3           THE COURT: Yes, sir.

4           MR. BROWN: Anything that is essentially  
5           the same which Mr. Adams, we think, said, such  
6           as any part of a cumulative dose, that is  
7           essentially the same as anything more than  
8           zero, which is what we object is not the law.

9           And the reason it's not the law is the  
10          *Glenn* case itself says that if other actors'  
11          conduct is the predominant factor in bringing  
12          the harm at issue, then the defendant's action  
13          is not -- underlining that word -- a  
14          substantial factor in causing the harm.

15          So Mr. Adams' recitations that anything  
16          more than zero or any part of a cumulative dose  
17          is a substantial factor is just not consistent  
18          with the law, Your Honor.

19          THE COURT: All right.

20          Go ahead, Ms. McVey.

21          MS. MCVEY: Your Honor, you charged the  
22          jury properly on the law.

23          THE COURT: No question about that. I  
24          charged them extensively about substantial  
25          factor, a cause, et cetera, et cetera.

1           MS. MCVEY: A hundred percent. We had  
2 expert testimony saying that Mr. Perry's  
3 exposure to Johnson & Johnson Baby Powder was a  
4 substantial factor.

5           THE COURT: Correct.

6           MS. MCVEY: The idea of cumulative dose is  
7 a scientific fact. That was established in  
8 *Glenn* and *Jolly* and every other case that's  
9 been decided. This is an argument they are  
10 making right now that maybe they can take up on  
11 appeal and make it.

12           But for purposes of our jury charge and  
13 when the jury can start deliberating, that time  
14 is now. This is not going into that.

15           THE COURT: I agree. And, again, I think  
16 they have on the record very much so. When  
17 Ms. Bueno made the objection, she articulated  
18 it on the record.

19           I did not allow the jury to hear all of  
20 that. And, again, I didn't think that's what  
21 had been said. But in the meantime, I then  
22 charged the jury as I charged the jury.

23           I believe if there was any slight issue  
24 there, the combination of what I explained  
25 about the weight to be given to arguments to

1 the jury as well as what I explained about the  
2 law itself cured any potential problem in that  
3 regard.

4 Now, I understand the defendants think  
5 differently, and I respect that. And I believe  
6 your objection is fully preserved. So I don't  
7 think it was improper for them to raise it  
8 again. I have no dilemmas with that at all.

9 MS. MCVEY: Thank you, Your Honor.

10 THE COURT: Thank you. Is there anything  
11 else?

12 MS. FLYNN: Yes, I have one. For Charge  
13 Number 4, Your Honor, this relates to the  
14 stipulation.

15 THE COURT: Just a second. Charge  
16 Number 4, economic loss.

17 MS. FLYNN: Yes, Your Honor. During the  
18 middle of the charge you inserted some language  
19 that said, "If you add those figures together,  
20 those are what you award." And what you --

21 THE COURT: No, no. I did not say that.  
22 I absolutely disagree with that. They had been  
23 shown up on the thing a figure for economic  
24 loss that was different from that number. And  
25 I simply told them that the figure they had

1           been shown was the combination of the  
2           \$3,329,000 figure and the \$510,000 figure.

3           I made it abundantly clear to them that  
4           they can award anything or nothing. It's up to  
5           them.

6           But I simply, since it had been put up --  
7           a number that was different from that  
8           \$3,300,000 number, I explained to them that the  
9           figure on the board was a combination of those  
10          two figures. And I believe that to be correct  
11          to the penny. So I overrule your objection.

12          MS. FLYNN: Your Honor, if I may, I think  
13          the stipulations were to past medical expenses.  
14          The number put up on the record included  
15          additional future medical expenses.

16          THE COURT: That was not in what I'm  
17          talking about. And I know what I'm talking  
18          about. They put up several different figures.

19          But one of the figures they put up was  
20          past economic loss and current medical  
21          expenses. And the combination of those two  
22          figures was put up on the board. And that is  
23          what I was explaining to the jury.

24          So I, again, overrule your objection.

25          MS. FLYNN: Your Honor, the only thing I

1 would ask would be for a curative instruction  
2 that would say that the \$510,000 is included in  
3 the stipulation that J&J made, that 3.3.

4 THE COURT: No, I didn't say that; I said  
5 it was the addition of those two things.

6 I'm not going to do this anymore,  
7 Ms. Flynn. I think you have very adequately --  
8 I'm not going to bring this jury out again and  
9 instruct them on this. So I note your  
10 objection, and I overruled it.

11 MS. FLYNN: Thank you, Your Honor.

12 THE COURT: All right. Anything else?

13 MS. MCVEY: Not from the plaintiffs.

14 THE COURT: My dear bailiffs, you may take  
15 the exhibits and the verdict forms and the  
16 charges to the jury. And I know the clerk will  
17 help you.

18 THE BAILIFF: Yes, ma'am.

19 (Whereupon there was a recess in the  
20 proceedings from 3:44 p.m. to 5:16 p.m.  
21 while the jury deliberated.)

22 THE COURT: Listen up. I've got two notes  
23 from the jury.

24 Note Number 1, "Judge, it seems clear that  
25 we will not be reaching a verdict in the next

1 hour or two. As a result, we would like to  
2 know the process for if/when we adjourn for the  
3 evening and how the process goes from here.  
4 Thanks for any insight. Juror 31," the  
5 foreperson of the jury.

6 And this second note is kind of related to  
7 that.

8 It says, "I wanted to ask, if we don't  
9 finish today, is it possible for us to start a  
10 little later, about 10:00 a.m. I have a very  
11 important doctor's appointment that I need to  
12 attend for a procedure I have coming up on the  
13 26th. If I miss this appointment, I won't be  
14 able to obtain my procedure I had planned for a  
15 few months. Appointment is for some abdominal  
16 lab results, Number 37, Brandy Brown."

17 So let's go to the first one and talk  
18 about this a little bit.

19 What they're saying -- the first thing  
20 they say is, "Judge, it seems clear that we  
21 will not be reaching a verdict in the next hour  
22 or two." Okay. It's 5:20 now.

23 I generally have followed the practice, as  
24 you know, of trying to let jurors go about 5:30  
25 unless there's some reason to believe that

1 things can move along. I don't think there's  
2 any reason to believe things are going to move  
3 along quite that quickly. So my inclination  
4 would be to have them come back.

5 Now, when we -- we'll talk about Brandy  
6 Brown in a minute. We could -- I don't want to  
7 restrict her in any way. And, frankly, I would  
8 go on and let her go and put in an alternate so  
9 she can be sure that there is no kind of issue.

10 MS. MCVEY: Judge, I think we can start at  
11 10:00 to accommodate her.

12 THE COURT: We could start at 10:00. I  
13 just want to have some clarity that that is  
14 absolutely going to be okay because I don't  
15 want her to try to rush things.

16 Obviously, she's going to get some tests  
17 done, and then she can leave. I mean, we all  
18 have had operations before. We know how that  
19 is. That's not going to be any long office  
20 visit. It's going to be whatever lab work  
21 needs to be put into motion is what I'm  
22 guessing.

23 So if y'all don't mind starting at 10:00,  
24 we can certainly do that.

25 MS. MCVEY: We don't mind at all starting

1 at 10:00.

2 THE COURT: We've got Thursday and Friday.

3 So I first turned to Ms. McVey. And what  
4 I hear you saying, Ms. McVey, is that it would  
5 suit you to let them go now and then come back  
6 at 10:00.

7 MS. MCVEY: Absolutely.

8 THE COURT: I now go to you, Ms. Bueno, or  
9 anybody that would like to speak on y'all's  
10 behalf.

11 MS. BUENO: I think that's fine, Your  
12 Honor. I agree that we should get some clarity  
13 to make sure 10:00 a.m. is a realistic start so  
14 we have that information. But assuming she can  
15 be here at 10:00, I think that's great.

16 THE COURT: Bring me the jury, including  
17 the alternates. Let's seat them, and then  
18 we'll have just a little bit of confab before  
19 we deal with this.

20 THE CLERK: Yes, Your Honor.

21 THE COURT: Be at ease.

22 (The jury entered the courtroom at  
23 this time.)

24 THE COURT: All right. You're bringing  
25 the alternates in as well.

1 THE BAILIFF: Yes, ma'am.

2 THE COURT: They're coming in this way.

3 THE BAILIFF: Jury is all seated.

4 THE COURT: Thank you very much, members  
5 of the jury. The first inquiry -- and I just  
6 put it in the record and I'll tell you what  
7 we've come to on this. This says, "Judge, it  
8 seems clear that we will not be reaching a  
9 verdict in the next hour or two. As a result,  
10 we would like to know the process if/when we  
11 adjourn for the evening and how the process  
12 will go from here. Thanks for any insight.  
13 Your foreperson."

14 It is now almost 5:25; and as you know, my  
15 preference has been every day to have 5:30 be  
16 kind of a cutoff thing, and I presume that's  
17 why this note has come at this moment in time.

18 I have asked the plaintiff and defendant,  
19 and they are perfectly willing to have you go  
20 now. So that's no problem.

21 Now, we have one other thing that has been  
22 asked of one of you jurors who said, "I want to  
23 ask, if we don't finish today, is it possible  
24 for us to start a little later, about 10:00? I  
25 have an important doctor's appointment that I

1 need to attend for a procedure coming up."

2 She's got labs, apparently, to be done.

3 And here's what I have to say about that.

4 We will start at 10:00. That's not a problem.

5 But also I want to tell the juror who has made  
6 the inquiry that not to feel rushed because we  
7 do have alternates. And if you -- it turns out  
8 that the unexpected develops and you cannot be  
9 here by 10:00, then we can just use one of our  
10 alternates. So be peaceful about that and do  
11 what your doctors want you to do about the test  
12 that you need to have for your procedure.

13 Is there any -- is anyone unclear about  
14 what I have said?

15 Madam Foreperson, is that an adequate  
16 answer to your question?

17 JURY FOREPERSON: We're good.

18 THE COURT: You're good? All right. Then  
19 we'll see you at 10:00. And, again, for our  
20 juror that has to have some preliminary tests,  
21 I've been through all that myself many times,  
22 know exactly how it is. You think you're just  
23 going to go in and out, but sometimes it  
24 doesn't work that way. Please have the comfort  
25 of knowing that, if something unexpected

1 happens, we can use one of our alternates.

2 All right. You are dismissed for the day.  
3 See you tomorrow morning. Hope you have a  
4 pleasant evening. Now, of course, as you know,  
5 please don't discuss the case. Please don't do  
6 any independent research. And do have a  
7 pleasant evening.

8 (Jury exited the courtroom at this  
9 time.)

10 THE COURT: I'm going to give these notes  
11 to the court reporter.

12 - - -

13 (Court's Exhibit 27 admitted into  
14 evidence.)

15 - - -

16 (Court's Exhibit 28 admitted into  
17 evidence.)

18 - - -

19 THE COURT: All right. My lawyers, you do  
20 have a pleasant evening, and I hope it's not  
21 quite as much of a scramble as it has been in  
22 the late evening, early morning for you  
23 throughout the trial so far. Put your feet up,  
24 relax, maybe have a libation.

25 MS. BUENO: The Court too.



1 (Proceedings were adjourned at 5:25 p.m.)

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## CERTIFICATE OF REPORTER

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

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 14th day of August 2024, at Chapin, Lexington County, South Carolina.

---

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

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF  
COMMON PLEAS  
FOR THE FIFTH  
JUDICIAL CIRCUIT

- - -

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

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TRIAL BEFORE: THE HONORABLE JEAN H. TOAL  
DAY 8

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DATE TAKEN: Thursday, August 15, 2024  
TIME BEGAN: 10:00 a.m.  
TIME ENDED: 5:28 p.m.  
LOCATION: Richland County Judicial Center  
1701 Main Street  
Courtroom 3B  
Columbia, South Carolina  
REPORTED BY: Cynthia First, RPR, CRR  
EveryWord, Inc.  
P.O. Box 1459  
Columbia, South Carolina 29202  
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P R O C E E D I N G S

- - -

(The following discussion was held  
outside the presence of the jury:)

THE COURT: This is a note from one of the  
jurors. This is 355. She says: "Dear Judge  
Toal, I am a Master's student at Clemson  
University, and I am currently working on my  
thesis. I am having to grow flowers  
hydroponically in our lab, and one of my  
classmates reached out to me to say they were  
dying. I would really appreciate if I could be  
excused today so I can get back to Clemson as  
soon as I can and try to salvage my plants.  
These have taken me months of work as I've had  
to track all of their water/energy/nutrient  
intake, and I'm worried if I don't get back  
ASAP, they might wilt further.

"On a side note, thank you for looking out  
for us, the jurors, the past two weeks. It has  
been a very interesting experience. I am not  
sure if it changes anything, but I am an  
alternate juror.

"Thank you, Mary Kathryn Gillespie."

1           And, of course, I will dismiss her. Bring  
2 Ms. Gillespie out.

3           THE BAILIFF: Yes, ma'am.

4           (Juror No. 355 entered the courtroom at  
5 this time.)

6           THE COURT: Good morning, Ms. Gillespie.  
7 I've read your note to counsel, of course. And  
8 I can't get you out of here quickly enough. I  
9 understand completely. And I hope you drive  
10 safely up to Clemson and are able to get your  
11 plants back to where they need to be.

12          JUROR NUMBER 355: We present to a sponsor  
13 tomorrow on our thesis research.

14          THE COURT: No, no, no.

15          JUROR NUMBER 355: I'm stressing out.

16          THE COURT: Quite honestly, it wouldn't  
17 make any difference whether you were an  
18 alternate or regular juror. I absolutely will  
19 dismiss you from your service. And thank you  
20 very much for everything you've done to help us  
21 out with this. Your role is a very important  
22 one. Thanks for the kind words in the note.  
23 So take care.

24          JUROR NUMBER 355: Thank you. I  
25 appreciate it.

1 THE COURT: You're dismissed.

2 JUROR NUMBER 355: Thank you.

3 - - -

4 (Court's Exhibit 29 admitted into  
5 evidence.)

6 - - -

7 THE COURT: Now, give me a minute more.

8 MS. MCVEY: Judge, I'm just wondering, if  
9 the jury is here, can we bring them out and do  
10 whatever you're going to do, then let them go  
11 to start deliberating while we argue the  
12 mistrial motion?

13 THE COURT: Yes, of course.

14 THE CLERK: The one juror who is at the  
15 medical appointment, I've got in contact with  
16 them, and they're now leaving. They're in  
17 Lexington.

18 THE COURT: Where is she leaving, in  
19 Lexington?

20 THE CLERK: Yes, ma'am.

21 THE COURT: That's too far away. You call  
22 her back and tell her I will dismiss her.

23 THE CLERK: Okay.

24 MS. MCVEY: I think we should wait.

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

1 don't know what traffic is like in Lexington  
2 coming here. We've got two more alternates.

3 MS. MCVEY: I know, but they haven't been  
4 in the deliberations, and so they may have to  
5 start over.

6 THE COURT: They're going to have to start  
7 over.

8 MS. MCVEY: Respectfully, we would request  
9 that we wait.

10 THE COURT: Well, I hear you. I mean,  
11 Lexington, it's going to take her another 30  
12 minutes to get here, wouldn't you think?

13 THE CLERK: 20 to 30 minutes possibly.

14 MS. MCVEY: I think that's better than  
15 starting over.

16 THE COURT: We're going to lose a lot of  
17 steam by starting over with whatever they did.  
18 I mean, they have about an hour and a half of a  
19 go at it. I don't see that as any big deficit  
20 personally.

21 MS. MCVEY: Comparing an hour and a half  
22 to 20 minutes, I just think it makes sense to  
23 wait.

24 THE COURT: I'm going to turn to  
25 Ms. Bueno. Ms. Bueno.

1           MS. BUENO: I think that it probably makes  
2 sense to get them started. I worry about her  
3 getting here late and having, you know,  
4 delayed --

5           THE COURT: I mean, we can't get them to  
6 start until she gets here. If we don't go on  
7 and dismiss her and put somebody else in there,  
8 we're going to lose all that time. You're not  
9 saving any time by doing that because we can't  
10 get started.

11          MS. BUENO: And given that we have two  
12 alternates still, you were kind enough to give  
13 us four. So we're in a position --

14          THE COURT: With respect, Theile, I don't  
15 think I'm going to accede to that.

16          MS. MCVEY: I understand. I will say that  
17 I have -- I extremely -- I really do object to  
18 that. You're talking about an hour and a half  
19 of deliberation versus waiting 20 to 30  
20 minutes, and that math doesn't track.

21                 And so respectfully we would ask that you  
22 wait. She said she wanted to come back. She's  
23 been a part of the jury. I think we ought to  
24 give her a chance to do it. And I don't mean  
25 to be difficult with the court.

1 THE COURT: You're being difficult.

2 MS. MCVEY: I'm being difficult?

3 THE COURT: Yes.

4 MS. MCVEY: Okay.

5 THE COURT: With peace and love and all  
6 respect.

7 MS. MCVEY: This jury has been sitting  
8 here for almost two weeks. She has been in  
9 this courtroom. She's indicated she wanted to  
10 come back and deliberate. We think we ought to  
11 give her a chance to do that. I don't mean to  
12 be difficult, but I think it's --

13 THE COURT: I hear you. Of course, you're  
14 all difficult. Now I've got another mistrial  
15 I've got to mess with.

16 MS. MCVEY: I only filed one motion for  
17 mistrial.

18 THE COURT: I got that.

19 Here's what I'm going to do. We'll let  
20 them sit there for a little bit longer. I'm  
21 not going to decide what I'm going to do.  
22 Let's see what happens in the next 20 minutes.  
23 Meanwhile, I'm going to talk about this  
24 mistrial thing for a little bit.

25 MS. MCVEY: That would be great.

1           THE COURT: Now, give me a moment and let  
2 me complete my perusal of this thing.

3           And I can tell you right now without  
4 completely finishing this, I'm not going to  
5 allow them to continue to deliberate until I  
6 decide this mistrial motion. So that's the  
7 first thing I say.

8           This mistrial motion also carries with it  
9 objections to the charges and it cites cases  
10 that say that if the judge doesn't correct it.  
11 So I've got to decide whether I'm going to  
12 correct it with additional charges and have  
13 them begin deliberations again. So that solves  
14 my problem with the juror thing.

15           What I've got to do is hear this mistrial  
16 motion, and I am going to hear this mistrial  
17 motion right now.

18           And I say that without making a  
19 determination as I sit here as to whether or  
20 not all of what was done when the mistrial  
21 motion was made before, and I then charged the  
22 jury is preserved given some of the arguments  
23 that are being made now, which seem to me to be  
24 very additional to what was said when we were  
25 talking about the charge and so forth. We're

1 going to go through this thing and see exactly  
2 what's to be done.

3 Ms. Pepke, are you the one that's going to  
4 be arguing this?

5 MS. PEPKE: I believe so.

6 THE COURT: Come on forward.

7 MS. PEPKE: Thank you, Your Honor. May it  
8 please the court.

9 THE COURT: You've got a lot of things put  
10 in here. And the first one you've got saying  
11 he misstated substantial factor to the jury,  
12 and then you get into several issues with  
13 regard to charges.

14 So let's start with what was said.

15 MS. PEPKE: Yes, Your Honor.

16 So this does stem from an objection we  
17 made during closing that was overruled. But  
18 upon receiving the transcript, it was very  
19 clear what had happened; and so we wanted to  
20 bring it to Your Honor's attention.

21 THE COURT: Yeah, that's what's got me  
22 in --

23 MS. PEPKE: So that's what triggered --

24 THE COURT: That's what worries me a  
25 little bit, because these arguments were not

1           made in this depth -- let's put it that way --  
2           when we had a sidebar. And now you've had the  
3           benefit of a transcript and are asking for a  
4           do-over of the mistrial motion that you made  
5           then. You made a mistrial motion then.

6           MS. PEPKE: We did.

7           THE COURT: And I ruled on it. And now  
8           you're seeking a do-over because you've got a  
9           transcript and you've got a lot of other things  
10          you think support it. Whether that's the right  
11          thing or the wrong thing, I don't know, but  
12          that's got me -- gives me a little bit of angst  
13          because it puts me in the position of projected  
14          to have made a mistake that you can examine  
15          after the fact of the ruling. But I don't get  
16          to have that privilege because I'm tied to what  
17          I did at the time. So I need for you to come  
18          up while I address that with you.

19          MS. PEPKE: Let me see if I can address  
20          that, Your Honor.

21          THE COURT: Good.

22          MS. PEPKE: So I think, first of all, I'm  
23          going to reframe it a little bit. What we  
24          heard was that we heard at the time that  
25          counsel for plaintiff says to the jury, "Do

1 y'all understand that the only way that they,"  
2 meaning Johnson & Johnson, "win is if they  
3 played zero role?"

4 We objected at the time, and there was a  
5 sidebar. And at the sidebar, there appeared to  
6 be some confusion over what maybe the court  
7 heard versus what we thought we heard. And our  
8 objection was overruled based on, I believe,  
9 the court's understanding that he didn't quite  
10 say that or he didn't --

11 THE COURT: That's right. And that was my  
12 understanding at the time.

13 MS. PEPKE: And of course we disagree.  
14 And then when we received the transcript last  
15 night, it was confirmed that what we heard is  
16 exactly what was said to the jury.

17 And so we thought it appropriate to bring  
18 that to Your Honor to confirm, yes, what we  
19 heard was exactly what was said. And it is a  
20 complete misstatement of the law.

21 And then because the objection was  
22 overruled, it left the impression with the jury  
23 that the court had approved of what he said.

24 THE COURT: See, there's where I think  
25 you've got to be careful. Those side bars were

1 deliberately done out of the presence of the  
2 jury. They were sitting there, but they heard  
3 nothing about zero and any of that kind of  
4 stuff, the argument of why a mistrial motion  
5 was made. All they heard was "objection; we  
6 have a motion." And then I took you to the  
7 sidebar, and I do that deliberately. I don't  
8 like to send them in and out, but I don't let  
9 them hear all of that.

10 MS. PEPKE: With respect, Your Honor, they  
11 knew exactly what the problem was.

12 THE COURT: I don't think so, and I  
13 absolutely will tell you I reject that as any  
14 valid thing. I deliberately shielded the jury  
15 by going to a confidential sidebar. And I do  
16 not think they had any exposure to the grounds  
17 for your motion for mistrial.

18 MS. PEPKE: Well, for the record, I'll go  
19 on and state our request would be that they be  
20 given an instruction that there was a  
21 misstatement of the law by plaintiffs' counsel  
22 during closing, and because of that, you are  
23 clarifying what substantial cause means and  
24 that you read the quote from the Glenn case  
25 that substantial cause, the pertinent --

1           THE COURT: You've got substantial factor,  
2 and then you've got causation.

3           MS. PEPKE: Yes, substantial factor. And  
4 others' conduct is the predominant factor in  
5 bringing you the harm at issue, and the  
6 defendants' action is not a substantial factor  
7 in causing the harm.

8           That would be our request, that that  
9 curative instruction be read.

10          THE COURT: And, of course, I'm going to  
11 hear from the plaintiffs, but I can tell you  
12 that I'm very inclined to do that.

13          MS. MCVHEY: No.

14          THE COURT: Don't be saying anything yet,  
15 Ms. McVey. You're going to have to listen.

16          Mr. Adams went close to the line several  
17 times during this thing with pejorative  
18 adjectives used and things of that nature.  
19 That flirts with things that are going to put  
20 the record in a problem. I'm not trying to  
21 punish you. Frankly, I'm trying to save your  
22 case by correcting that in front of the jury.

23          Now that I've seen this thing, zero factor  
24 is not the test. Now, I'm going to hear from  
25 you about how that can legitimately be used.

1           And I'm not going to hear from you now, because  
2           Ms. Pepke is still telling me about this thing.  
3           But I would be very inclined to give them an  
4           instruction and tell them to start over.

5           MS. PEPKE: That is our position. We  
6           think it's supported by the case law. We have  
7           a case cite in here where a similar  
8           misstatement of the law was given and not  
9           corrected.

10          THE COURT: It's Simmons. It was a  
11          criminal case.

12          MS. PEPKE: It was a criminal case.

13          THE COURT: And no curative instruction  
14          was given. And that was the basis for the  
15          court's ruling that it couldn't be cured now  
16          because they pointed out the error, and I think  
17          they may have even made a request and the judge  
18          wouldn't do it. I think there's a way to cure  
19          that.

20          MS. PEPKE: Right, which is why we felt we  
21          had to file it.

22          THE COURT: I'm not fussy about that.

23          MS. PEPKE: And then, of course, the  
24          second issue in the motion is, as you pointed  
25          out, it's the same issue we raised in the past,

1 but also is now confirmed after we read the  
2 transcript, and the multiple references by  
3 plaintiffs' counsel using the very inflammatory  
4 language and pejorative terms throughout  
5 closing, that clearly were headed in asking for  
6 punitive damages without using the actual word  
7 "punitive." So that was simply an end run  
8 around it to inflame the jury, accusing us of  
9 heinous acts, of killing -- and all sorts of  
10 references to harm to other people, which, of  
11 course --

12 THE COURT: What are you talking about  
13 there?

14 MS. PEPKE: When he went through the  
15 litigation against -- that we had denied that  
16 we had been doing this in the past litigation,  
17 in harming other people, and we were lying  
18 while we were killing people.

19 THE COURT: I don't recall lying while  
20 we're killing people.

21 MS. PEPKE: It was lying. There was.  
22 And, Your Honor, for those reasons we would  
23 reurge the court to give consideration to  
24 instructing the jury about the difference  
25 between actual damages and punitive damages,

1 and that punitive damages are not to be  
2 considered in this stage of the trial. We  
3 submitted -- in our original request for  
4 charge, there was an instruction titled No  
5 Punitive Damages that we would reurge.

6 THE COURT: Do you have that attached to  
7 this or can you supply it?

8 MS. PEPKE: I don't think it's attached,  
9 but I do have it here. I might have my notes  
10 all over it.

11 THE COURT: We'll get to that. I mean,  
12 I'm just saying before I make a complete  
13 decision on that, I want to look at that and  
14 see what that would say.

15 So basically your motion is a motion for  
16 mistrial on two bases. One, they played zero  
17 role, and other arguments surrounding that by  
18 Mr. Adams is in direct conflict with the  
19 substantial factor. And I think you also made  
20 the argument that it also gets into the each  
21 and every exposure thing where our court has  
22 said cumulative factor is okay, but each and  
23 every exposure's got its problems.

24 MS. PEPKE: That is correct.

25 THE COURT: And I understand all that.

1 MS. PEPKE: Right. And as to the second  
2 part of the motion, the punitive versus actual  
3 damage, I also was referring to reference to  
4 harm to other people, the continual vein of  
5 harming babies, the implication that we were  
6 directing these actions towards babies and our  
7 conduct was hurting babies. Clearly  
8 inflammatory.

9 THE COURT: Well, let me see if I -- let  
10 me parse this just a little bit and see if I  
11 understand the argument. All right. Is it  
12 your argument that it is completely improper to  
13 say that the conduct that they allege J&J  
14 engaged, which was knowing that they had  
15 asbestos in their product and doing anything  
16 about it, not taking it off the market or being  
17 more assiduous about trying to eliminate it, or  
18 using an alternate design, cornstarch, is it  
19 your argument that it is improper to talk about  
20 the harm to other people that was occasioned by  
21 J&J, that they can only talk about the harm to  
22 Mr. Perry?

23 MS. PEPKE: I think that is part of the  
24 argument. It certainly --

25 THE COURT: Tell me what the basis for

1           that is. It's quite common in just regular old  
2           garden variety automobile wreck cases to talk  
3           about the harm, the potential harm to others by  
4           the conduct. All right. And, you know, I  
5           remember very well defendant trucking companies  
6           where that's always an argument that's made as  
7           to, you know, you hurt this person; it's also  
8           bad conduct and has potential to harm others.

9                     I don't know of any case that says that  
10           can't be done. I think what you're saying is  
11           it's a predicate to punitive damages, and you  
12           think it's wrong to have it in the actual  
13           damage case?

14                    MS. PEPKE: Two-part. I do think it is  
15           problematic since this same jury is going to  
16           be -- could be moving to a Phase II punitive  
17           where the --

18                    THE COURT: But you're --

19                    MS. PEPKE: But the fact -- the problem in  
20           this stage is that it was combined with all of  
21           the inflammatory language about how this has  
22           been going on against these other people in  
23           litigation.

24                    THE COURT: What's wrong with that?

25                    MS. PEPKE: Well, first of all --

1           THE COURT: You have to try your complete  
2 factual case in the first phase. The punitive  
3 phase is very limited. All right. It is  
4 limited to whatever you want to discuss about  
5 the defendant you think should be punished for  
6 their conduct. But it doesn't have -- it is  
7 not -- all the factual predicate, what happened  
8 and what kind of conduct it was, is in your  
9 case in chief and you can't go back -- I would  
10 not let the plaintiff go back and do that in  
11 the punitive damage case.

12           MS. PEPKE: Fair enough as to that point.  
13 And the point of the mistrial motion is that  
14 was done, but it's really the second part  
15 that's problematic. So you have them saying  
16 they've been doing this, they've been doing  
17 this, they've been denying it or lying and it's  
18 been harming all these people, combined with  
19 the inflammatory language they used to  
20 characterize the conduct, which is what you  
21 mentioned before. It could be for heinous  
22 acts, told dying people under oath lies, it was  
23 shameful, lying to the American public, stolen  
24 lives, stole the lives, willful and wanton is  
25 the most important.

1           THE COURT: Willful and wanton and all  
2 that kind of thing and aggravated conduct can  
3 all be argued in the case in chief. What I  
4 told them is don't use pejorative language.  
5 That's probably too fancy a word to use, but  
6 these people are smart enough, they understood  
7 what I was saying. Don't use inflammatory  
8 language when you do it.

9           And I didn't want to underline it by  
10 repeating it all. I simply said, "Don't use  
11 inflammatory language. And your objection is  
12 sustained on that basis." I think they got the  
13 point. So I'm not -- that part of the ruling,  
14 I think, is okay.

15           What I'm grappling with here is the actual  
16 and punitive damages charge. Tell me what, in  
17 addition to what you just talked about, would  
18 make me want to go back and charge them on this  
19 is not a punitive damage phase.

20           MS. PEPKE: Sure.

21           THE COURT: Again, you know, it's an irony  
22 that you all are doing that because this was  
23 the great request of the defense bar that the  
24 bifurcation occur so that the jury is not --  
25 punitive damages and punishing is not discussed

1 with them in the first part of the case.

2 MS. PEPKE: Well, you know, that leads to  
3 another kind of interesting issue because this  
4 is almost like a modified bifurcation. You  
5 know, under the statute you could read it to  
6 say that a true bifurcation would have been  
7 that the jury wouldn't have heard any of the  
8 conduct of defense.

9 THE COURT: Yes, but the fault evidence  
10 has to be in there for the actual part of the  
11 case, even if it's aggravated fault and  
12 aggravated conduct. That all goes in the  
13 actual damage part of the case.

14 MS. PEPKE: We're not disagreeing. But  
15 when that happens, you have this kind of -- how  
16 do I want to say -- like fictional world where  
17 we're talking about all the stuff that makes  
18 people, especially laypeople --

19 THE COURT: But, Ms. Pepke, it relates  
20 specifically to several of the causes that  
21 require elevated proof and elevated finding of  
22 fault such as strict liability and things of  
23 that nature.

24 MS. PEPKE: And I agree with you. I think  
25 what the problem is, as a lay juror, you hear

1 all of this stuff and you don't know what to do  
2 with it. You feel like you're being asked to  
3 award punitive damages, and then you see this  
4 Question Number 8 on the jury verdict form that  
5 says: Do you find this --

6 THE COURT: You characterize the conduct.

7 MS. PEPKE: And you don't know that  
8 there's a Phase II coming up, but you feel like  
9 you're supposed to do something with all this  
10 information.

11 THE COURT: They do just what I ask them  
12 to do. I want you to find about the character  
13 of the conduct. What's wrong with that?

14 MS. PEPKE: Because they don't -- we're  
15 expecting them to truly understand what actual  
16 damages mean.

17 THE COURT: Yeah, and I think we've given  
18 them a pretty good charge about that. It's  
19 both compensatory and noneconomic.

20 MS. PEPKE: And with all due respect, I  
21 know lawyers who have trouble understanding the  
22 difference between what compensatory means when  
23 you get it combined with the charges of  
24 willful, wanton, and reckless conduct. We  
25 simply want them to know --

1           THE COURT: I have no doubt about it, and  
2 I don't think the court does, and I don't think  
3 any of the lawyers who try these cases do. And  
4 I can't do anything. I can't train them as  
5 lawyers, but I can explain what I want them to  
6 do. And what I want them to do is characterize  
7 the conduct. I think I take far greater risk  
8 of running afoul of what I've been asked to do  
9 by way of bifurcating --

10           MS. PEPKE: Understood.

11           THE COURT: -- if I start mentioning  
12 punitive damages.

13           Now, talking about this other thing, now  
14 that I've seen the record -- I'll see what  
15 Ms. McVey has to say -- but I'm very inclined  
16 to do that.

17           MS. PEPKE: Thank you, Your Honor.

18           THE COURT: Thank you so much. Ms. McVey.

19           MS. MCVEY: Thank you, Your Honor. So, of  
20 course, I just got this motion this morning  
21 when we walked in.

22           THE COURT: I know. Me, too.

23           MS. MCVEY: So I haven't had a chance to  
24 go through the transcript and pick out all the  
25 things that we talked about, right? So that's

1 important because they nit-picked one sentence.

2 They nit-picked one sentence.

3 And at the same time you remember that  
4 Johnson & Johnson's conduct -- I mean,  
5 Johnson & Johnson's -- we'll get to conduct  
6 momentarily. But Johnson & Johnson essentially  
7 argued each and every fiber. That's what they  
8 argued. And I'm going to get to what we argued  
9 in a second. They argued it's all brakes.  
10 They argued Dr. Brody said 18 million fibers  
11 are already in their lungs. That's what they  
12 argued, right, every fiber. They did this  
13 calculation of if it was this many  
14 Johnson & Johnson by seconds, it would be this  
15 many fibers in brakes, and all that kind of  
16 stuff.

17 THE COURT: Well, they also argued no safe  
18 level.

19 MS. MCVEY: Exactly.

20 THE COURT: That, to me, is the most  
21 pertinent thing. Their witnesses, their  
22 employees, Mann and Hopkins both repeatedly  
23 said there's no safe level of exposure and our  
24 product does not contain asbestos.

25 Dr. Kuffner, even after 2017, said exactly

1           that.

2           MS. MCVEY: Right. So when we talk about  
3 the context of this, they're arguing the empty  
4 chair, right? They're arguing the empty chair,  
5 which means that Johnson & Johnson had no role  
6 in this, period.

7           What Mr. Adams is talking about when he's  
8 arguing this, he told them what substantial  
9 factor is. And I'm going to talk about what  
10 you charged about what substantial factor is  
11 because it's important to this. He also argued  
12 the basic science that Dr. Haber talked about  
13 and the others talked about, right, which is  
14 the cumulative dose. That's science. It's not  
15 the standard, of course, but it's the science.

16          THE COURT: No, he argued cumulative dose.  
17 I don't think -- I'm not nervous that each and  
18 every exposure was somehow made the test.

19          MS. MCVEY: But that's what they argued,  
20 though.

21          THE COURT: I know. I already told  
22 Ms. Pepke, I don't think that's what was said.  
23 I think it was put in the proper context of  
24 cumulative dose.

25          MS. MCVEY: Mr. Adams' argument, I agree.

1 THE COURT: No question.

2 MS. MCVEY: I'm just saying if we're going  
3 to talk about the different standards that were  
4 argued, they argued each and every. They  
5 argued each and every. We argued something  
6 that talks about all the doses count. They do  
7 count. It's a basic scientific fact. They do  
8 count.

9 And when you said -- when we went up to  
10 sidebar and I said, "Judge, that's his  
11 argument, and you're going to charge them on  
12 causation," which you did.

13 Now, they really -- what they really are  
14 trying to get you to charge is essentially  
15 but-for causation.

16 THE COURT: Yes, and I'm not doing that,  
17 of course, because it's not authorized.

18 MS. MCVEY: When you look at the Charge  
19 Number 29 -- 20 on causation on page 20, what  
20 you charged this jury is that the plaintiffs  
21 must prove that the plaintiff's exposure to  
22 asbestos in defendants' product was of such  
23 frequency, regularity, and duration that it was  
24 a substantial factor in bringing about the  
25 disease or injury. The mere fact that an

1 injury or accident occurred standing alone does  
2 not permit you to draw a conclusion that an  
3 injury or accident was caused by anyone's  
4 negligence or breach of -- there's a typo -- or  
5 strict liability, and that what our burden was.

6 And then it went on to talk about the  
7 empty chair in that last paragraph in the  
8 charge. We also talked about there could be  
9 more than one cause. That's Charge Number 21.  
10 And down here you talk about how the defendants  
11 assert that it was all the brakes.

12 Bringing this jury in to give another  
13 charge on causation --

14 THE COURT: No. What I would do with the  
15 jury, just so you understand, is I would  
16 recharge what I charged before.

17 MS. MCVEY: But then you're focusing only  
18 on causation as opposed to the conduct, as  
19 opposed to damages.

20 THE COURT: No, I don't think so.

21 MS. MCVEY: Judge, I really -- I have  
22 been, not with you, but in many charges where a  
23 judge has brought out and charged one charge  
24 that the defendants think is the best charge  
25 for them, and it puts way too much focus on it

1 and it's unfair. If you're going to charge,  
2 you have to recharge the entire thing, and  
3 that's unfair to make this jury sit through  
4 that for another 45 minutes.

5 THE COURT: I hear you.

6 MS. MCVEY: I'm going to go back then and  
7 I'm going to pick out all the things that they  
8 did, and I'm going to ask you to charge on some  
9 other stuff. I can do that. I'll do that. We  
10 didn't move for a mistrial because I didn't  
11 want a mistrial on this case.

12 But the idea that Mr. Adams was talking  
13 pejoratively about Johnson & Johnson while  
14 arguing the basic facts of this case, and  
15 Ms. Bueno stood up and called Michael Perry a  
16 liar --

17 THE COURT: Which they did.

18 MS. MCVEY: They did. They didn't use the  
19 word "liar," but they said essentially he went  
20 on ebay or wherever and found these bottles  
21 from 1970 and miraculously put them in his  
22 house. That's what they argued. Is that  
23 pejorative? It is. It is. They went online,  
24 they researched, and then all of a sudden the  
25 spotlight came down on Johnson & Johnson. And

1           why did they do it?  Because Johnson & Johnson  
2           is a big company.  She sit there and said, "Why  
3           do you think they sued us?  Because we're a big  
4           company."  That's pejorative.  It's argument.  
5           I think she's entitled to do it just like we're  
6           entitled to make argument.

7                     And that thing about the previous  
8           litigation that was shown up there where they  
9           swore under oath that their baby powder didn't  
10          contain asbestos and tremolite --

11                    THE COURT:  I don't think there's anything  
12          improper about that.

13                    MS. MCVEY:  It was in evidence.  The jury  
14          had already seen it.

15                    THE COURT:  That's correct.

16                    MS. MCVEY:  So we can nit-pick words.  I'm  
17          happy to go back and do that.  But if you bring  
18          this jury out and you charge them again on just  
19          causation, it is unfairly prejudicial to us.

20                    THE COURT:  Let's go back to where this  
21          thing focused to begin with.  And it focused  
22          on -- here is what they focused on.  This is  
23          the transcript of record, page 2048.  This is  
24          Mr. Adams speaking, and he's talking about the  
25          massive exposures, part of the argument that

1 talks about how big the dose was over the  
2 years; they never put in any epidemiology  
3 studies. And then he says, "But it doesn't  
4 matter because epidemiology proved -- proves  
5 they played a role in Michael Perry's  
6 mesothelioma. Do y'all understand the only way  
7 they win is if they played zero role? They  
8 wanted to be the biggest, the strongest, and  
9 the most" --

10 "Objection." And then Ms. Bueno:

11 "Objection. He just said the only way we win  
12 is if we play zero role, which is not the law.  
13 The law is substantial factor."

14 And then you said you're going to instruct  
15 them on substantial factor.

16 And I said, "I understand your argument.  
17 I've listened to the testimony. I will  
18 overrule your objection. Objection is  
19 overruled."

20 Now, that's the whole thing in terms of  
21 the part that talks about zero. And the more I  
22 think about it, the more I think that zero role  
23 could be construed in a way that makes it an  
24 improper argument, because it at least  
25 potentially may conflict with the test, which

1 is substantial factor.

2 MS. MCVEY: Which you charged them on.

3 THE COURT: Which I charged them on. And  
4 what I intend to do is recharge substantial  
5 factor.

6 MS. MCVEY: Your Honor, I understand.  
7 You've already charged them on that.

8 THE COURT: Yeah. And I think that is as  
9 easy a thing to charge and is as nondirective  
10 as you could possibly make it. It's simply a  
11 charge on something they know about. It  
12 doesn't push things one way or another. Both  
13 sides agree that substantial factor is the  
14 test.

15 MS. MCVEY: Right. And we argued  
16 substantial factor --

17 THE COURT: Ms. McVey, I understand that  
18 you don't want me to do that. Okay. I get  
19 that.

20 MS. MCVEY: Thank you. I am glad you do,  
21 and I think it's unfair.

22 THE COURT: I understand.

23 MS. MCVEY: It's unduly prejudicial. And  
24 when we talk about the role, it's the role that  
25 the exposure took place in causing this cancer.

1           That's what he's talking about. I don't even  
2           know how you're going to bring them out and  
3           say, "Hey, I'm going to recharge substantial  
4           factor." Why?

5           THE COURT: Watch me.

6           MS. MCVEY: What are you going to say  
7           about why?

8           THE COURT: I'm not going to say anything  
9           about why.

10          MS. MCVEY: I'm just asking because now  
11          you're going to bring them out and charge one  
12          thing --

13          THE COURT: That's right.

14          MS. MCVEY: -- and I'm asking you, if  
15          you're going to do that, you charge the entire  
16          thing again.

17          THE COURT: The whole charge?

18          MS. MCVEY: Yes, ma'am.

19          THE COURT: Oh, no. I'm not going to do  
20          that.

21          MS. MCVEY: Because now you're focusing  
22          only on one charge --

23          THE COURT: I know.

24          MS. MCVEY: -- which is unduly  
25          prejudicial.

1           THE COURT: Because I think he made an  
2 argument that could -- I'm not saying  
3 completely is, but could be misleading.

4           Now, what I can do is say, "I just want to  
5 clarify something. An argument was made by the  
6 plaintiff that the only way Johnson & Johnson  
7 wins is if they played zero role. And I want  
8 to make it clear to you that the causation  
9 standard is this," and then charge them  
10 substantial factor.

11           MS. MCVEY: I think that's even more  
12 prejudicial if you say the plaintiff argued  
13 this, and now I'm going to charge you this.

14           THE COURT: Well, that's why I'm doing it.  
15 Do you think zero role was the proper thing to  
16 say?

17           MS. MCVEY: That's not what he said.

18           THE COURT: Here is the transcript. The  
19 transcript says -- and I'm going to read it one  
20 more time word for word into the record.

21           "They never paid for an epidemiology  
22 study, never conducted an epidemiology study,  
23 never followed any of the people using their  
24 power for an epidemiology study. But it  
25 doesn't matter because epidemiology proves they

1           played a role in Michael Perry's mesothelioma.  
2           Do y'all understand the only way they win is if  
3           they played zero role?"

4           MS. MCVEY:   Which is --

5           THE COURT:   That's what he said.  And that  
6           at least has the potential to conflict with the  
7           causation standard of substantial factor.

8           MS. MCVEY:   I understand.  Role is  
9           substantial factor.  Role is substantial  
10          factor.

11          THE COURT:   But zero role is not the  
12          standard.  It's not -- they can win if they  
13          played some role, but it wasn't a substantial  
14          factor.

15          MS. MCVEY:   But you charged them on that  
16          again.

17          THE COURT:   I'm going to charge them  
18          again.

19          MS. MCVEY:   I just want to be clear for  
20          the record.  I'm really not trying to be  
21          argumentative with you.

22          THE COURT:   I understand.

23          MS. MCVEY:   I think this is a really big  
24          deal.  I do.

25          THE COURT:   Yeah.

1 MS. MCVEY: And if you come in and say,  
2 "The plaintiffs' counsel made this argument.  
3 That's improper. I'm going to charge you  
4 again," that's incredibly prejudicial.

5 THE COURT: Well, I may not do that. I  
6 take that into account what you say.

7 MS. MCVEY: And, Judge, he's not saying  
8 zero gets them anything. He's saying more,  
9 more than zero.

10 THE COURT: You said, "Do y'all understand  
11 the only way they win is if they played zero  
12 role?"

13 MS. MCVEY: So if they played zero role,  
14 they win, no question.

15 THE COURT: He says the only way they  
16 win --

17 MS. PEPKE: Your Honor --

18 MS. MCVEY: Please don't interrupt me.

19 MS. PEPKE: I am sorry.

20 MS. MCVEY: I mean it.

21 THE COURT: He said only way.

22 MS. MCVEY: Right, which means more than  
23 zero. Which means more than zero.

24 THE COURT: I understand your argument.

25 MS. MCVEY: Okay. Do you want to talk

1 about anything else?

2 THE COURT: That's all I plan to deal  
3 with. The rest of it about inflammatory  
4 language and everything, I ruled on. And I'm  
5 sticking by that ruling, and I'm not going to  
6 revisit it. I'm not going to say anything  
7 further to them about it. All I'm going to do  
8 is recharge substantial factor.

9 MS. MCVEY: I'm not finished quite yet. I  
10 would like to know, if you don't mind, exactly  
11 what you're going to say because I am worried  
12 that you're going to say something about  
13 plaintiffs' counsel.

14 THE COURT: I'll tell you that here in a  
15 minute. Let me see what Ms. Pepke says in  
16 reply.

17 MS. PEPKE: Thank you, Your Honor. I  
18 think I need to state for the record to make  
19 sure our request is preserved.

20 THE COURT: Yes, ma'am.

21 MS. PEPKE: So our first request is that  
22 we do believe --

23 THE COURT: You want a mistrial. I  
24 gotcha.

25 MS. PEPKE: Yes, we want a mistrial. If

1 the court is denying that, we would request the  
2 Glenn language be used. If the court is  
3 denying that, then we would request that the  
4 original substantial factor --

5 THE COURT: And what Glenn language are  
6 you talking about?

7 MS. PEPKE: Sorry. From Glenn, if other  
8 actor's conduct is the predominant factor  
9 bringing -- in bringing the harm at issue, then  
10 the defendants' actions --

11 THE COURT: Wait a minute. I'm looking at  
12 page 2?

13 MS. PEPKE: Yes, Your Honor.

14 THE COURT: The court in Glenn stated the  
15 pertinent part, "If other actor's conduct is a  
16 predominant factor in bringing the harm at  
17 issue, then the defendants' action is not a  
18 substantial factor in causing the harm."

19 I will not charge that, and the reason is  
20 that is the court's analysis of the thing, but  
21 I don't think that is a directive to charge.  
22 And that's not what I charged in Glenn. I did  
23 charge substantial factor. That's what they  
24 were looking at. And so I declined to charge  
25 their analysis. I'll just charge substantial

1 factor as I did before.

2 MS. PEPKE: Thank you, Your Honor. I  
3 understand your ruling.

4 And so in light of that, we would agree  
5 with what Your Honor was previously discussing  
6 you might do, was that there has to be some  
7 context given to the jury as to why you state  
8 what was misstated on the record and then give  
9 the charge.

10 THE COURT: Okay. Here's what I'm going  
11 to do. I'm going to bring the jury out and I  
12 am going to say to them, "Ladies and gentlemen  
13 of the jury, I want to recharge on one part of  
14 my causation charge. You have the whole charge  
15 there in the jury room with you, of all the  
16 charges I gave. And I'm looking now at page 20  
17 of the charges, and 21. And I just want to  
18 read one part of that to you, but you have the  
19 whole charge in your room to consider. And  
20 that is the plaintiffs must prove that the  
21 plaintiffs' exposure to asbestos in the  
22 defendants' product was of such frequency,  
23 regularity, and duration that it was a  
24 substantial factor in bringing about the  
25 disease or injury. The mere fact that the

1 injury or accident occurred standing alone does  
2 not permit you to draw a conclusion that the  
3 injury or accident was caused by anyone's  
4 negligence, breach of warranty, or strict  
5 liability."

6 Wait a minute.

7 MS. MCVEY: You can take out "breach of  
8 warranty."

9 MS. PEPKE: You can take out "breach of  
10 warranty."

11 THE COURT: I'll take out "breach of  
12 warranty," right?

13 MS. PEPKE: Yep.

14 THE COURT: I'm just going -- I take it  
15 back. What I'm going to do is just charge,  
16 "The plaintiffs must prove the plaintiffs'  
17 exposure to asbestos in defendants' product was  
18 of such a frequency, regularity, and duration  
19 that it was a substantial factor in bringing  
20 about the disease or injury."

21 And then I am going to charge, "The mere  
22 fact that an injury or accident occurred  
23 standing alone does not permit you to draw a  
24 conclusion that an injury or accident was  
25 caused by anyone's negligence or strict

1 liability."

2           And then I'm going to say -- then I'm  
3 going to draw their attention to Charge 21, and  
4 I'm going to say proximate cause does not mean  
5 the only cause. The defendants' actions can be  
6 a proximate cause of plaintiff's injury if  
7 defendants' conduct was at least one of the  
8 direct causes of the injury. Where two or more  
9 causes combine to produce an injury, the  
10 defendant is not relieved from liability for  
11 negligence because it is responsible for only  
12 one of the causes. It is sufficient that its  
13 negligence or fault is a substantial factor in  
14 causing the injury."

15           And I think I'll read the rest of it.  
16 "Consequently, if a defendants' negligence is  
17 the proximate cause of injury to another, the  
18 fact that the negligence of a third party  
19 occurred with its own negligence to produce the  
20 harm does not relieve it of liability. In such  
21 cases each wrongdoer is in breach of the duty  
22 of care of the plaintiff. And because of the  
23 negligence each occurred to produce the injury,  
24 they can all be liable."

25           That's what I'm going to do.

1           MS. MCVEY: You read my mind. I was going  
2 to ask you to charge the more than one cause of  
3 injury, as well.

4           THE COURT: So I'm going to charge out of  
5 the causation charge what I read you, which is  
6 the second full paragraph of Charge 20,  
7 striking out "breach of warranty."

8           And then I'm going to charge there can be  
9 more than one cause, 21, the first paragraph.  
10 And that's what I'm going to do.

11          MS. MCVEY: Can I ask you to add one more  
12 sentence, and that is just the beginning -- or  
13 at the end, "No one charge is more important  
14 than any other charge"?

15          THE COURT: I can do that. Let me get  
16 that thought down here.

17          I'm going to -- what I will say about that  
18 is this, I will say, "No one charge is more  
19 important than any other charge. So as I said  
20 in the beginning, follow my instructions. You  
21 must follow all of them and not single out some  
22 or ignore others because they are all equally  
23 important."

24          MS. PEPKE: And, Your Honor, will you be  
25 giving any context as to why you're making --

1 THE COURT: I'm not going to give any  
2 context. I don't think I need to do that.

3 MS. PEPKE: Our position is, under  
4 Simmons, it would be required to give them some  
5 context.

6 THE COURT: Now, wait a minute. I don't  
7 think Simmons said that. You got Simmons, the  
8 case sitting there? Matt, you got that?

9 MS. MCVEY: Wait. I didn't hear what you  
10 said. I'm sorry.

11 MS. PEPKE: Under the Simmons case --

12 THE COURT: Simmons is a criminal case in  
13 which the case was reversed because of a  
14 failure to correct by recharging.

15 MR. BOGAN: I only have it electronically.  
16 I'd be happy to --

17 THE COURT: Bring it up here to me. Matt,  
18 do you mind bringing it up here?

19 MR. BOGAN: I don't. I'm going to bring  
20 it up.

21 MS. MCVEY: What are you asking me to do  
22 with this?

23 MR. BOGAN: She asked for a copy of the  
24 case.

25 MS. MCVEY: But what are you asking the

1 point of the case to be?

2 MR. BOGAN: We want the court to give  
3 context. In Simmons the court was reversed  
4 because it didn't give a corrective charge,  
5 because the lawyer misstated the law. And we  
6 believe because the law had been stated, the  
7 judge has to correct it and explain why she's  
8 corrected it.

9 THE COURT: Explain why, but I don't know  
10 if that's in Simmons. Let me look.

11 MS. MCVEY: Judge, if we go down that far,  
12 I'm going to then want you to correct what  
13 Ms. Bueno said, as well.

14 MR. BOGAN: And, Judge --

15 THE COURT: Wait a minute. I can't do all  
16 these things at one time. What are you talking  
17 about what Ms. Bueno said?

18 MS. MCVEY: Ms. Bueno argued each and  
19 every fiber. She argued that. And so if  
20 you're going to correct it, then I want to go  
21 and make sure we're going to correct hers, as  
22 well.

23 THE COURT: Are you going to make a  
24 mistrial motion on that?

25 MS. MCVEY: I'll move for a mistrial

1           because she misargued the law. Or you can  
2           correct it.

3           THE COURT: Matt, it's not cooperating.  
4           Can you show me here?

5           MS. PEPKE: I've got it pulled up,  
6           Simmons.

7           MR. BOGAN: I have it, too. It's in PDF,  
8           Judge. You can just use your finger or the  
9           arrow, either way. It's kind of like an iPad.

10          THE COURT: Okay. I got it.

11          MR. BOGAN: Yes, ma'am.

12          THE COURT: Y'all just bear with me for a  
13          minute.

14          MR. BOGAN: And, Judge, I will tell you I  
15          think that's the implication drawn from that  
16          case. I don't think you'll find a quote that  
17          says --

18          THE COURT: I remember Simmons, and I  
19          don't think I am either, but it's been a while.  
20          This is an oldy but a goody. It's a 1998.

21          You know, I wrote the State versus Arnold  
22          and Plath. That's where they're getting all  
23          this from.

24          MS. MCVEY: Judge, I need to put something  
25          on the record that I don't think I made very

1 clear, if you'll give me two seconds to do  
2 that.

3 THE COURT: Let's take a look and see. In  
4 State v. Plath and State v. Arnold, I think  
5 that's where all this is coming from. Just  
6 take a look at it during Theile's turn.

7 Okay, Theile.

8 MS. MCVEY: Your Honor, I just want to  
9 make sure, because I don't think I've argued it  
10 well or at all.

11 In order for the empty chair, in this case  
12 the brakes, to be the proximate cause, the sole  
13 cause, in order for them to win on the brakes  
14 issue, it has to be the sole cause.

15 THE COURT: Yes. They don't agree with me  
16 about that, but I think it's -- the empty chair  
17 is superseding intervening cause. It's got to  
18 be -- no matter what badges you deal with,  
19 there was a superseding intervening cause.  
20 They haven't gotten close to pointing that  
21 finger.

22 MS. MCVEY: That's what he's arguing.  
23 When he's talking about the only way they get  
24 off is if they have zero cause, that's what  
25 he's arguing. He's arguing the empty chair.

1 And that's really important here.

2 He talked about substantial factor and how  
3 they're responsible when there's substantial  
4 factor. And what he's arguing there is empty  
5 chair because that's their defense.

6 THE COURT: That's true. That's true.  
7 Their defense is something else -- he's gotten  
8 mesothelioma; we're not sure it's caused by  
9 asbestos, but if it is, it didn't come from us.

10 MS. MCVEY: It only came from the brakes.

11 THE COURT: It came from the brakes. So  
12 that's the empty chair. The brakes are the  
13 empty chair.

14 MS. MCVEY: They said none -- it can't be  
15 the powder, because none of the powder had it.

16 THE COURT: That's right.

17 MS. MCVEY: So it has to be the only other  
18 thing that he was exposed to was asbestos.

19 THE COURT: Empty chair was the brakes.  
20 No question about that.

21 MS. MCVEY: And that's what he's talking  
22 about. And they did abandon the genetics.  
23 Mr. Adams is reminding me. So they're arguing  
24 the only cause is the empty chair.

25 THE COURT: Yeah, that's right. We don't

1           apportion.  So if you are a cause, a proximate  
2           cause, then your liability can be evaluated on  
3           that basis, and we told the jury that.

4           Empty chair, you've got to show that  
5           somebody else is -- no matter what you did,  
6           somebody else was responsible for the  
7           mesothelioma.  That's the pitch they made about  
8           the brake thing.

9           MS. MCVEY:  And that's what he's arguing,  
10          the only reason they get off.

11          THE COURT:  Well, it's a pitiful way to  
12          argue it.  I should have done something to get  
13          it clarified.  So here's what I'm going to do.  
14          I am going to charge substantial factor,  
15          because I think I've got to do that to not run  
16          afoul of Simmons.  I don't think Simmons in  
17          this context makes me go all the way to the end  
18          and say, talk about the zero, because then I've  
19          got to talk about the empty chair, and I  
20          haven't charged it.  Nobody asked me to charge  
21          empty chair.

22          MS. MCVEY:  Well, you kind of charged it.  
23          You charged they allege that somebody else is  
24          at fault, and to the extent you believe that --  
25          it's in there.

1           THE COURT: I'm not thinking that what  
2 they zeroed in on, if you want to use that  
3 term, is something they said undermines  
4 substantial factor.

5           So I'm not going to get into empty chair.  
6 I'm just going to deal with substantial factor.  
7 That's the basis upon which they pitched this  
8 thing. And I'm going to cure it by charging  
9 substantial factor again. And there can be  
10 more than one cause, and that's it.

11          MS. MCVEY: Last two things I'll say and  
12 then I'll stop. After these arguments were  
13 made --

14          THE COURT: Yes.

15          MS. MCVEY: -- you charged exactly what  
16 you're going to recharge.

17          THE COURT: Exactly. And I think that by  
18 itself cures it.

19          MS. MCVEY: Absolutely. That's the  
20 dilemma.

21          THE COURT: That's the dilemma, but I  
22 don't see where -- if I thought for a moment  
23 that singling this charge out would do some  
24 harm to the plaintiff's case, I wouldn't do it.  
25 But I just don't see that it does any harm to

1 recharge them on this.

2 So with that -- and I think I get to  
3 evaluate that in deciding how to charge it.  
4 And, frankly, I think I would step into the  
5 plaintiff's business big time if I put it  
6 so-called in context, which is what they want  
7 to do, with knocking out the zero thing,  
8 because that thing gets into saying, "But wait  
9 a minute. There's empty chair." I'm not going  
10 to do that.

11 MS. MCVEY: I appreciate that. And just  
12 note my objection for the record because --

13 THE COURT: Sure.

14 MS. MCVEY: -- I think this charge you're  
15 going to give was the exact charge you already  
16 gave after this argument.

17 THE COURT: That's right.

18 MS. MCVEY: Number two, I just want to  
19 make sure on the record we're clear. Mr. Adams  
20 never said that they were liars or lied or any  
21 of that stuff. It's not in the transcript. So  
22 they keep talking about him using pejorative  
23 terms and that kind of thing.

24 THE COURT: The pejorative terms, I made  
25 Ms. Pepke tell them to me when she argued it

1 before. And they were specific words that were  
2 used. I told her I didn't think "catastrophic"  
3 was tough, but some of the other words that  
4 were used I thought were a little bit around  
5 the bend.

6 MS. MCVEY: I say that because when she  
7 stood up, she called us crazy. I mean, "crazy"  
8 is in the transcript.

9 THE COURT: Yes.

10 MS. MCVEY: So I don't think one side used  
11 pejorative and the other side, if you're  
12 calling those kind of --

13 THE COURT: I don't think we need to get  
14 there because I cured that.

15 MS. MCVEY: Listen, a hundred percent.  
16 I'm just saying you didn't have to cure it  
17 about what they said.

18 Here is why it matters. I don't want  
19 somebody using this transcript to somehow say  
20 that Ben Adams was pejorative. He wasn't.

21 THE COURT: I understand that. And, quite  
22 frankly, I have reserved to the end what  
23 further I say about the exchange that was had.  
24 I'm going to put something on the record that I  
25 think will cure all that.

1 MS. MCVEY: Thank you.

2 THE COURT: I don't want anybody going  
3 away from this trial being harmed because they  
4 lost their temper.

5 MS. MCVEY: Thank you.

6 THE COURT: And I hope that includes me.

7 MS. MCVEY: Well, I lost mine, too, so  
8 it's fair. Will you absolve me, too?

9 THE COURT: Te absolvo. Anyway, I'm doing  
10 what I told you.

11 Matt.

12 MS. MCVEY: We've got to get going.

13 Please --

14 MR. BOGAN: Well, she asked me to do that.

15 THE COURT: What you got?

16 MR. BOGAN: Matt Bogan for  
17 Johnson & Johnson. Justice Toal, the Plath  
18 case referenced the Goolsby case, which I can  
19 hand Your Honor.

20 THE COURT: Yeah, hand it up to me. Am I  
21 remembering right?

22 MR. BOGAN: I think you've got to get some  
23 context, because that's Goolsby from. And I  
24 highlighted where the jury was told to  
25 disregard the comments.

1           THE COURT: Well, I mean, the bottom line  
2 of the case, though, of course, was that  
3 although the able judge in his discretion  
4 denied the motion, he took every precaution  
5 possible to ensure that this somewhat  
6 impertinent remark -- this is the one about  
7 nobody is going to be electrocuted again in  
8 Time Magazine and all that kind of stuff --  
9 although provoked by appellate's counsel, we  
10 disagree. A curative instruction and trial  
11 judge's directive to the jury to disregard the  
12 remark was ineffective.

13           MR. BOGAN: So they said disregard it and  
14 it was confirmed after the judge did it.

15           THE COURT: Right. This thing is a little  
16 bit different, and here's what I think. The  
17 zero thing can be read a couple of different  
18 ways. And one of those ways is what Ms. McVey  
19 has been arguing is empty chair. And I think  
20 that's a fair argument.

21           It might also be read, as Ms. Pepke  
22 argued, to say the only way they win the  
23 causation battle is if they weren't at all  
24 responsible. And I'm going to solve that by  
25 charging substantial factor because in asbestos

1 cases, it's not but for, it's substantial  
2 factor; it's a substantial factor. I'm not  
3 going to tell them why I'm doing that, and I  
4 don't think I need to do that. And I think I  
5 open a rat's nest if I do, because then I've  
6 got to explain if you take it to be zero means  
7 the only way they win is if they have  
8 absolutely no responsibility, that's wrong.  
9 Everything has to be a substantial factor in  
10 causation. I'm not going to get into that.  
11 That just muddies the water to much. And I  
12 think the main thing to emphasize is what it  
13 takes to find that they are the cause of the  
14 injury claimed. So that's how I'm going to do  
15 it.

16 MR. BOGAN: Your Honor, I understand your  
17 ruling. We respectfully disagree with it. I  
18 think that instruction will cure it. After you  
19 instruct the jury, we will raise our objection  
20 for the record that we didn't think you cured  
21 it. Thank you, Your Honor.

22 THE COURT: That's fine. Now,  
23 Mr. Bailiff, is everybody here?

24 THE BAILIFF: Yes, ma'am.

25 MS. MCVEY: I want to make sure --

1 THE COURT: Wait a minute. You've got  
2 some kind of note?

3 THE BAILIFF: Yes.

4 THE COURT: Let me see the note. I want  
5 to tell you one thing, that's the most  
6 dangerous part of trials, in my opinion, is  
7 notes.

8 MS. MCVEY: I think it may be curative  
9 instructions.

10 THE COURT: A very pertinent question, by  
11 the way. This is from the foreperson. Do all  
12 of us have to agree on each question before  
13 we move on to the next or do we go with the  
14 majority? Is that our decision? We want to  
15 make sure we are abiding by the law. Of  
16 course, they have to agree on each thing as you  
17 go through, no question about that. And I will  
18 so instruct.

19 MS. MCVEY: I think, can you say -- also,  
20 I think they can answer however they're going  
21 to answer, but they can move to the next  
22 question without answering the first one and  
23 come back. Do you see what I'm saying?

24 THE COURT: They can discuss it however  
25 they want to. When they take their final vote

1 for the verdict, then each question has got to  
2 be unanimous. I'll explain it to them that  
3 way.

4 MS. MCVEY: And, finally, I think I heard  
5 you correctly saying that you're just going to  
6 charge substantial factor --

7 THE COURT: And it's more than one cause.

8 MS. MCVEY: -- without any narrative or  
9 context.

10 THE COURT: I am not going to provide  
11 context. I have looked at the cases Matt  
12 cited, and I think it's a close matter. But  
13 with what we're dealing with here, I don't  
14 think it's necessary to pinpoint the zero  
15 remark because I think it has two possible  
16 meanings, one of which is perfectly okay, one  
17 of which is not. And we're going to duly  
18 complicate things and confuse things more to  
19 point that out. But I can achieve the same  
20 objective, I think, by repeating the causation  
21 substantial factor, and there can be more than  
22 one cause, realizing that the defendant takes  
23 exception to that.

24 MS. MCVEY: Understood. And particularly  
25 in response to this question about isolating

1 one charge to give them again, we find to be  
2 unduly prejudicial and we object to it.

3 THE COURT: Very good.

4 MS. MCVEY: And just to be clear, the  
5 motion for mistrial is denied?

6 THE COURT: Yes, the motion for mistrial  
7 is denied.

8 Bring me the jury.

9 THE BAILIFF: Yes, ma'am.

10 (The jury entered the courtroom at this  
11 time.)

12 THE BAILIFF: Jury is seated, Your Honor.

13 THE COURT: Thank you, sir.

14 - - -

15 JURY CHARGE BY CHIEF JUSTICE TOAL

16 - - -

17 THE COURT: And I think the first thing is  
18 you know that we had to have our Clemson  
19 Master's student, we had to let her go, just in  
20 case you were wondering about that. Her plants  
21 were wilting that she has spent her whole  
22 thesis working on, and she needs to get up to  
23 Clemson right now to see if she can revive them  
24 because they're measuring every piece of  
25 nutrient and they're getting all the rest of

1           that.  So because of that, I did excuse her  
2           with our thanks for everything she's done.  And  
3           she is an alternate, so the main composition of  
4           the jury, of course, remains as it is.  But  
5           thank goodness we still have two more  
6           alternates with us, and we may very well need  
7           them.

8                        Now, this is a question from your  
9           foreperson on behalf of the jury as a whole:  
10          "Do all 12 of us have to agree on each question  
11          before we move on to the next or do we go with  
12          a majority?  Is that our decision?  We want to  
13          make sure we are abiding by the law."

14                      First of all, let me say that with respect  
15          to the verdict form, when you finally decide on  
16          your verdict, you must go down each one of  
17          these questions that we've got on the jury form  
18          and you must answer each one of them, and it  
19          has to be a unanimous vote.

20                      Now, you will spend a whole lot of time  
21          talking about this and deliberating, and I'm  
22          not giving you any limitations on how you  
23          discuss these matters.  But I'm saying to you  
24          that when you reach the final verdict, you must  
25          go to each question, and each question must be

1           agreed to however you answer it, "yes" or "no."  
2           Each question must be answered by all 12 in  
3           complete unanimity, all in complete agreement.

4           Am I making sense?

5           THE JURY: Yes.

6           THE COURT: And in addition to that,  
7           before you return to deliberations, I want to  
8           recharge you something that is in your charge.  
9           And remember that you have your charges there.  
10          And, Madam Foreperson, if you just want to know  
11          where I'm going and put it in your notes, I am  
12          on page 20 of the charge, and it's a charge  
13          about causation. And I want to read you  
14          something specific out of it that's on page 20.  
15          And then I'm going to read you something out of  
16          Charge Number 21, which is on page 21.

17          So the first thing is: I charge you that  
18          the plaintiff must prove that the plaintiff's  
19          exposure to the asbestos in defendants' product  
20          was of such a frequency, regularity, and  
21          duration that it was a substantial factor in  
22          bringing about the disease or injury. The mere  
23          fact that the injury or accident occurred  
24          standing alone does not permit you to draw a  
25          conclusion that the injury or accident was

1           caused by anyone's negligence or strict  
2           liability.

3           And I further charge you that proximate  
4           cause does not mean the only cause. The  
5           defendants' actions can be a proximate cause of  
6           the plaintiff's injury if the defendants'  
7           conduct was at least one of the direct causes  
8           of the injury. Where two or more causes  
9           combine to produce an injury, a defendant is  
10          not relieved from liability for negligence  
11          because it's responsible for only one of the  
12          causes. It is sufficient that its negligence  
13          or fault is a substantial factor in causing the  
14          injury.

15          Consequently, if a defendants' negligence  
16          is a proximate cause of the injury to another,  
17          the fact that the negligence of a third party  
18          occurred with its own negligence to produce the  
19          harm does not relieve it of liability. In such  
20          cases each wrongdoer is in breach of the duty  
21          of care over the plaintiffs. And because the  
22          negligence of each concurred to produce the  
23          injury, they can all be liable.

24          So with that, I ask you to go and continue  
25          your deliberations with much thanks from all of

1 us.

2 Please stand while the jury retires to the  
3 jury room.

4 (The jury exited the courtroom at this  
5 time.)

6 (The following discussion was held  
7 outside the presence of the jury:)

8 THE COURT: All right.

9 MS. PEPKE: I think, for the record, I am  
10 being told --

11 THE COURT: Yes. Ms. Pepke.

12 MS. PEPKE: For the record, Your Honor, I  
13 just preserve our objections. We stand by our  
14 motion for mistrial. We don't think that was  
15 curative of the error we raised, and that the  
16 Glenn language should have been used. So we  
17 stand on our prior objections.

18 THE COURT: Thank you, Ms. Pepke. And the  
19 motion is denied with all rights preserved,  
20 both as they were explained in the initial  
21 motion made yesterday and in the record, and as  
22 further amplified. And I do not find that the  
23 argument that is made is some new argument.  
24 It's simply an expansion of an argument that  
25 was made yesterday. So both motions are

1 recognized as proper and both have been denied.

2 MS. PEPKE: Thank you, Your Honor.

3 THE COURT: Ms. McVey.

4 MS. MCVEY: Your Honor, just for the  
5 record, we of course object to singling out one  
6 charge. Mr. Adams' argument was totally  
7 appropriate and proper in dealing with empty  
8 chair defense that Johnson & Johnson itself  
9 raised, and that by focusing on just causation,  
10 we've been prejudiced by that.

11 THE COURT: And I will say on the record,  
12 as I did when we discussed this before, that  
13 you are -- the language we are talking about is  
14 a particular piece of language in Mr. Adams'  
15 argument to the -- closing argument to the jury  
16 where he said, "Do y'all understand the only  
17 way they," meaning Johnson & Johnson, "win is  
18 if they played zero role?"

19 I have determined that that language could  
20 be read to refer to the empty chair or it might  
21 be referring to the causation. I have chosen  
22 to cure any possible error, and I don't think  
23 there is something that really needs to be  
24 cured. I have chosen to cure it without  
25 discussing the specific language used, but

1           rather recharging the jury on substantial  
2           factor and there could be more than one cause.

3           I have not been asked to say anything  
4           further about empty chair or any of that kind  
5           of thing, so I've not done that. And of course  
6           the plaintiff -- the defendant feels that that  
7           is not enough, that I should have gone further,  
8           I should have zeroed in on the zero language, I  
9           should have discussed it specifically with the  
10          jury, and given, in addition to the charge I  
11          gave, the analytical wording of Glenn, of the  
12          recent Glenn opinion. And I declined to do  
13          that as I feel that's simply court analysis,  
14          not the kind of thing that should be charged to  
15          the jury.

16          MS. MCVEY: Thank you, Your Honor. And  
17          last thing. Then I'll sit down, I promise. I  
18          was handed this motion for mistrial as I walked  
19          in this morning with no forewarning.

20          THE COURT: Yes.

21          MS. MCVEY: So I was unable to go through  
22          the entire transcript to point out each  
23          inappropriate argument that they made in both  
24          arguing the law and how they described both the  
25          plaintiff and plaintiffs' counsel.

1 THE COURT: Yes.

2 MS. MCVEY: So I note for the record,  
3 depending on what happens here, we may want to  
4 revisit this.

5 THE COURT: Understood.

6 MS. MCVEY: So for that reason.

7 Last thing. I did notice my husband  
8 walked in. Tell him that I have not totally  
9 misbehaved this morning when I got real mad.

10 THE COURT: What?

11 MS. MCVEY: I was a little misbehaving  
12 this morning. Ian walked in and I don't want  
13 to get in trouble.

14 THE COURT: I know you'll keep her in a  
15 calm and friendly mood, Ian.

16 MR. MCVEY: (Inaudible.)

17 THE COURT: Ian, Bill says every day to  
18 me, "Be nice." Sometimes it has effect, and  
19 sometimes it does not.

20 All right. One thing that -- I mean, you  
21 can't control everything, but it is a kindness  
22 if you produce something like this, even if you  
23 have to send it to them in the middle of the  
24 night, to send it. But that being said, I  
25 don't think you lost any steam about the

1 arguments you made, Ms. McVey. So thanks very  
2 much for that.

3 Anything else we need to put on the  
4 record?

5 MR. BOGAN: Your Honor, we did the best we  
6 could. We got a transcript late last night.  
7 The court reporter got it to us last night, so  
8 we apologize for the delay.

9 THE COURT: I understand. I'm not  
10 pointing any negative fingers. No problem.  
11 It's all done in the heat of battle. I stayed  
12 up late and got up early in this case myself.

13 Be at ease.

14 (Whereupon there was a recess in the  
15 proceedings from 11:15 a.m. to 2:26 p.m.)

16 THE COURT: All right. Bring me the jury.

17 (The jury entered the courtroom at this  
18 time.)

19 THE BAILIFF: The jury is seated, Your  
20 Honor.

21 THE COURT: Very well. Bring the verdict  
22 to me. I understand you have a verdict?

23 JURY FOREPERSON: We do.

24 THE COURT: Good. Mr. Bailiff, if you'll  
25 bring that verdict to me, I will then hand it

1 to the clerk after I have read it.

2 THE BAILIFF: Here, Your Honor (handing).

3 THE COURT: Got it?

4 All right, Mr. Clerk, you may publish the  
5 verdict.

6 THE CLERK: Yes, Your Honor.

7 - - -

8 JURY VERDICT

9 - - -

10 THE CLERK: In the State of South  
11 Carolina, County of Richland, in the Court of  
12 Common Pleas, Fifth Judicial Circuit, Class  
13 Action Number 2023-CP-40-04072. Michael L.  
14 Perry and Lonnie L. Long, Plaintiffs, versus  
15 Johnson & Johnson and American International  
16 Industries, Defendants.

17 Negligence. We the jury find Defendant,  
18 the Johnson & Johnson entities, were negligent  
19 and its negligence was a proximate cause of the  
20 Plaintiff Michael Perry's injuries: Yes.

21 We the jury find Defendant American  
22 International Industries, AII, was negligent  
23 and its negligence was a proximate cause of the  
24 Plaintiff Michael Perry's injuries: Yes.

25 Strict liability. We the jury find

1 Defendant, the Johnson & Johnson entities, are  
2 strictly liable for selling defective products  
3 that was a proximate cause of Plaintiff Michael  
4 Perry's injuries: Yes.

5 We the jury find Defendant American  
6 International Industries, AII, is strictly  
7 liable for the selling -- for selling defective  
8 products that was a proximate cause of  
9 Michael -- Plaintiff Michael Perry's injuries:  
10 Yes.

11 Fraudulent misrepresentation. We the jury  
12 find Defendant, the Johnson & Johnson entities,  
13 engaged in the fraudulent misrepresentation in  
14 selling its products and that fraudulent  
15 misrepresentation was a proximate cause of  
16 Plaintiff Michael Perry's injuries: No.

17 We the jury find Defendant American  
18 International Industries, AII, engaged in  
19 fraudulent misrepresentation in selling its  
20 products and that fraudulent misrepresentation  
21 was a proximate cause of Michael Perry's  
22 injuries: Yes.

23 Damages. If you answered "yes" to any of  
24 the questions 1 through 6, please state the  
25 amount of actual damages that have been proven

1 by the greater weight of the evidence. Michael  
2 Perry's economic loss, past and future,  
3 \$3,800,000. Michael Perry's other damages,  
4 past and future, 19,337,000 --

5 THE COURT: Check that, Mr. Clerk. Say  
6 again. Look at that. 19 million how much?

7 THE CLERK: 19,300,00 -- 237,000.

8 THE COURT: That's right. I have  
9 19,230,000 -- 37,500. Isn't that correct?

10 THE CLERK: Yes, Your Honor.

11 THE COURT: All right. And continue.

12 THE CLERK: Lonnie Long's loss of  
13 consortium damages, past and future,  
14 \$9,618,750.

15 Willful, wanton, and reckless conduct. If  
16 you answered "yes" to questions 1, 2, 5 or 6,  
17 please answer this question as to any defendant  
18 for which you answered "yes."

19 We the jury find by clear and convincing  
20 evidence that the conduct of the following  
21 defendants was willful, wanton, and reckless:  
22 Johnson & Johnson, yes. American International  
23 Industries, AII, yes. Signed Juror 31,  
24 Foreperson.

25 Madam Forelady, was this the verdict of

1 the entire jury?

2 JURY FOREPERSON: Yes.

3 THE COURT: Shall the jury be polled?

4 MS. MCVEY: Not from the plaintiff, Your  
5 Honor.

6 THE COURT: Shall the jury be polled?

7 MS. BUENO: Yes, please.

8 THE COURT: Poll the jury.

9 THE CLERK: Yes, Your Honor.

10 THE COURT: And what that means is that  
11 each of you will be asked if that's your  
12 verdict and if it's still your verdict. So  
13 what happens is, starting with the foreperson,  
14 you'll stand and you will be polled, and each  
15 one will be polled so that we verify that each  
16 individual, that this is your -- this was your  
17 verdict and it's still your verdict. Do you  
18 understand?

19 Very good. You may poll the jury.

20 THE CLERK: Yes, Your Honor.

21 Juror 31, Forelady, was this your verdict?

22 JURY FOREPERSON: Yes.

23 THE CLERK: Is this still your verdict?

24 JURY FOREPERSON: Yes.

25 THE CLERK: Juror 37, was this your

1 verdict?

2 **JUROR NUMBER 37:** Yes.

3 THE CLERK: Is it still your verdict?

4 **JUROR NUMBER 37:** Yes.

5 THE CLERK: Juror 40, was this your

6 verdict?

7 **JUROR NUMBER 40:** Yes.

8 THE CLERK: Is this still your verdict?

9 **JUROR NUMBER 40:** Yes.

10 THE CLERK: Juror 253, was this your

11 verdict?

12 **JUROR NUMBER 253:** Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR NUMBER 253: Yes.

15 THE CLERK: Juror 51, was this your

16 verdict?

17 **JUROR NUMBER 51:** Yes.

18 THE CLERK: Is this still your verdict?

19 **JUROR NUMBER 51:** Yes.

20 THE CLERK: Juror 78, was this your

21 verdict?

22 **JUROR NUMBER 78:** Yes.

23 THE CLERK: Is this still your verdict?

24 JUROR NUMBER 78: Yes.

25 THE CLERK: Juror 235, was this your

1 verdict?

2 **JUROR NUMBER 235:** Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR NUMBER 235: Yes.

5 THE CLERK: Juror 166, is this your

6 verdict?

7 **JUROR NUMBER 166:** Yes.

8 THE CLERK: Is it still your verdict?

9 **JUROR NUMBER 166:** Yes.

10 THE CLERK: Juror 360, was this your

11 verdict?

12 **JUROR NUMBER 360:** Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR NUMBER 360: Yes.

15 THE CLERK: Juror 191, was this your

16 verdict?

17 **JUROR NUMBER 191:** Yes.

18 THE CLERK: Is it still your verdict?

19 **JUROR NUMBER 191:** Yes.

20 THE CLERK: Juror 296, was this your

21 verdict?

22 **JUROR NUMBER 296:** Yes.

23 THE CLERK: Is it still your verdict?

24 **JUROR NUMBER 296:** Yes.

25 THE CLERK: Juror 50, is this your

1 verdict?

2 **JUROR NUMBER 50:** Yes.

3 THE CLERK: Is it still your verdict?

4 **JUROR NUMBER 50:** Yes.

5 THE CLERK: The jury's been polled, Your  
6 Honor.

7 THE COURT: Ladies and gentlemen of the  
8 jury, let me tell you what will now happen.  
9 You have answered Question Number 8 on the  
10 verdict form, willful, wanton, and reckless  
11 conduct, "yes." Your answer "yes" entitles the  
12 plaintiff to proceed to present their request  
13 for punitive damages.

14 What we will do is this: I'll send you  
15 back to your jury room. I will verify details  
16 with the plaintiff as to exactly what they are  
17 to present. It will be limited. I believe  
18 that we will finish today, but I'm not going to  
19 rush you about that any more than I rushed you  
20 about the decision you've just given to me.

21 So what I would like you to do now is  
22 retire to your jury room. Alternates, retire  
23 to your alternates room. Do not further  
24 discuss what might happen in the punitive stage  
25 until I give you instructions about that. And

1 I thank you so much.

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

4 (The following discussion was held  
5 outside the presence of the jury:)

6 THE COURT: Ladies and gentlemen, please  
7 be seated. I turn first, Mr. Bogan, to you and  
8 your defense team. I know you will want to --  
9 even though we don't have a complete verdict  
10 yet, I know you may want to note motions with  
11 regard to the verdict we've just received. I  
12 will advise you that I intend to ask you again,  
13 after we receive whatever we receive with  
14 respect to the punitive phase, and you may  
15 repeat those motions again at that time, just  
16 noting for the record. I will turn to you now  
17 for any motions you may wish to make on the  
18 record or note on the record.

19 MR. BOGAN: Your Honor, we'd like 10 days,  
20 if Your Honor will give us 10 days.

21 THE COURT: Yes, I will. And I've already  
22 spoken with Mr. Bogan about that. I will note  
23 that you have post-trial motions that you wish  
24 to make with respect to defendants' position  
25 challenging the verdict. Those are noted as

1           having been requested and made with details to  
2           follow within 10 days. All right.

3           Now, let's talk about how we're going to  
4           proceed --

5           MS. FLYNN: Your Honor, I need to make  
6           post-trial motions, as well.

7           THE COURT: What's that?

8           MS. FLYNN: I need to make post-trial  
9           motions, as well.

10          THE COURT: Yes, and I wrote the same  
11          thing for you, that you desire to make  
12          post-trial motion, that they will be noted as  
13          having been requested. And you will have 10  
14          days to make them in detailed form.

15          MS. FLYNN: The only other thing, Your  
16          Honor, I believe that I need to raise is an  
17          inconsistent verdict as it relates to the  
18          fraudulent misrepresentation.

19          THE COURT: You're going to do that in the  
20          motions that you make. And you had indicated  
21          before that you would do that; so I fully  
22          expect that you will do that. And I note that  
23          you are requesting that you be allowed to make  
24          those motions. You will be. I'll note it for  
25          the record now. And then after you've had a

1 chance to submit them in writing, with full  
2 citations, we will argue them.

3 MS. FLYNN: I believe inconsistent verdict  
4 needs to be raised before the jury leaves, so I  
5 just wanted to raise that.

6 THE COURT: I understand that. That's why  
7 I'm accepting it as having been raised now.

8 MS. FLYNN: Thank you, Your Honor.

9 THE COURT: And I'll do the same for  
10 Johnson & Johnson if it has any thoughts about  
11 the matter. I think that's really more  
12 something Ms. Flynn is raising than you would  
13 raise.

14 But I would say to you, both you,  
15 Mr. Bogan, and you, Ms. Flynn, obviously there  
16 will be all kinds of motions you will want to  
17 make not only globally about the propriety of  
18 the verdict, but about any inconsistencies,  
19 impermissible amount, not consistent with the  
20 evidence, motivated by passion or whatever.  
21 All of those things that you would naturally  
22 raise and challenge in the actual damage  
23 verdict will be fully protected and able to be  
24 raised. And normally I don't do it until the  
25 whole case is over and then decide on

1           punitives, but you know how sticky these things  
2           can get sometimes, so I just want to be sure I  
3           put in the record that you are requesting that  
4           all those motions be raised. And they will be  
5           submitted to me and I will conduct a hearing on  
6           them at the appropriate time.

7           MS. FLYNN: As long as that is preserved.

8           THE COURT: Absolutely. Now, let's talk  
9           about how we proceed now. What I would like to  
10          understand is what plaintiff intends to offer.  
11          I would like to be very focused and limited  
12          about this. I don't want to have a huge, long  
13          thing, because I think South Carolina in  
14          particular is very focused now and rather  
15          conservative about its approach to punitive  
16          damages. As we know, we have a punitive damage  
17          statute now that was passed in 2010. The  
18          punitive damages are, first of all, capped at  
19          500,000 with the additur. And at the present  
20          time, as you know, every year the Department of  
21          Fiscal Affairs and Revenue in South Carolina  
22          pursuant to the statute reviews the damage  
23          statute, which is Section 15-32-200, et seq, of  
24          the South Carolina Code of Laws, and has a  
25          punitive damage limitation which increases

1           annually with the Consumer Price Index. And  
2           this year, for -- it's set every year at the  
3           end of the year. And for the applicable  
4           setting, which is December the 20th --  
5           December 2023, using a CPI at an annual  
6           percentage rate and a cumulative index  
7           adjustment from December 2010, the punitive  
8           damage limitation is now \$699,761. So that is  
9           the -- instead of 500,000, which was written  
10          into the original statute, the fiscal office  
11          adjustment turns that figure into 699,761.

12                 MS. MCVEY: Right, but the cap is that  
13          number.

14                 THE COURT: Or greater, or three times  
15          greater.

16                 MS. MCVEY: Or three times the actual  
17          damages.

18                 THE COURT: Actual damages, right. The  
19          cap is the greater of that number that I just  
20          read you or three times the amount of the  
21          actual damage verdict. And the actual damage  
22          verdict would be for Michael Perry the  
23          combination of \$3,800,000 and \$19,237,500. For  
24          Long, \$9,618,750.

25                 And I ask you this. Do you get punitives

1 on a loss of consortium?

2 MS. PEPKE: No, Your Honor.

3 THE COURT: I don't think you do. So  
4 really the only thing we're looking at then is  
5 punitive damages with respect to the economic  
6 loss and other actual damages.

7 MS. MCVEY: And I don't think for our  
8 purposes today that matters because you'll  
9 apply it afterwards. We're not going to tell  
10 the jury about the cap.

11 THE COURT: Yes. Well, I'm putting this  
12 on the record and I'm saying, as the statute  
13 requires me to, that the jury should not be  
14 told of these limitations. And I take the  
15 position that the jury should not be -- well, I  
16 want to hear you on what the jury may be told.  
17 The jury may be told something about the  
18 financial status of Johnson & Johnson and AII.  
19 And I want to let you just in brief terms tell  
20 me what that's going to be like so I can put  
21 some time limits on it, both for the  
22 presentation and the cross-examination. And  
23 then I want to understand what's your position.  
24 Mr. Adams, either I'm going to talk to her  
25 or you're going to talk to her.

1           MS. MCVEY: I'm sorry. He was trying to  
2 give me the time limit.

3           THE COURT: Don't do the time limit yet.  
4 What I'm doing right now is trying to  
5 understand what you believe -- and I'm going to  
6 ask the defendants the same question -- what  
7 both sides believe is proper to be said to the  
8 jury about the amount sought.

9           The Supreme Court of South Carolina has  
10 turned increasingly restrictive about that.  
11 And I think that I would like to hear you say  
12 what you think you're entitled to do in terms  
13 of asking for a number from the jury. Because  
14 we've now got some writings that seek to  
15 confine that. So I'd like each side to give me  
16 some reaction as to what you think should be  
17 presented both by way of financial status of  
18 the two corporations and about the punitive  
19 damages requested, specifically whether a  
20 number may be asked for. So go ahead.

21           MS. MCVEY: Sorry, Your Honor.

22           THE COURT: Go ahead.

23           MS. MCVEY: So two things. The new  
24 evidence that we're going to put on is simply  
25 the economist talk about net worth type

1 numbers.

2 THE COURT: How long do you think that's  
3 going to take?

4 MS. MCVEY: We were just talking about  
5 that. I think 20 minutes of direct.

6 THE COURT: Yes.

7 MS. MCVEY: Maybe half an hour at the  
8 most.

9 THE COURT: Yes.

10 MS. MCVEY: And I don't know what they  
11 would want to cross him with on that. And then  
12 five minutes of redirect if needed.

13 THE COURT: Yes.

14 MS. MCVEY: What we request is a  
15 five-minute opening essentially --

16 THE COURT: Yes.

17 MS. MCVEY: -- put the economist on, and  
18 there would be some kind of closing where we  
19 could ask for or suggest a number.

20 Your Honor, I went back and looked at  
21 Glenn. I e-mailed to both you and Mr. Bogan --  
22 I didn't e-mail Stephanie. I'll do that right  
23 now -- what you charged in Glenn on the  
24 punitive phase.

25 THE COURT: Yes.

1           MS. MCVEY: Because I know we went all  
2 through it then. I saw Mr. Graham walk in. I  
3 know he was there, as well. I'll forward that  
4 to everybody. So we would request that same  
5 charge.

6           THE COURT: Yeah. I think it's the same  
7 charge I also gave in Weist and Bond. I've  
8 given it several times, of course.

9           MS. MCVEY: Your Honor, in Glenn I  
10 certainly suggested a number for the jury to  
11 come back with, which we're entitled to do. I  
12 read the cases that Johnson & Johnson cited in  
13 their motion for a mistrial motion about what  
14 could be suggested. The court certainly says  
15 you can make comparisons, you can make  
16 analogies, you can suggest a number. They  
17 allow you to do that. And we would think just  
18 to give the jury some context, we should be  
19 able to do that. It's clearly in the jury's  
20 province about what the proper number is. But  
21 we're allowed to suggest and plan to do that.

22           In terms of what could be gotten into  
23 about the net worth, we're familiar, of course,  
24 with the limitations that the Branham case set  
25 forth. But we believe that the economist

1           should be able to talk about the net worth  
2           numbers that apply to Johnson & Johnson and put  
3           that in some context.

4           THE COURT:   What do you mean specifically  
5           by that?

6           MS. MCVEY:   Well, what I mean is what that  
7           net worth number means.  It might be sales.  It  
8           might be -- you know, allow some context about  
9           that.

10          THE COURT:   You mean the data that the  
11          economist used to come forward with a net worth  
12          projection?

13          MS. MCVEY:   Right.

14          THE COURT:   I see.

15          MS. MCVEY:   AII is a little bit trickier  
16          because --

17          THE COURT:   We're going to take up the  
18          question of sanctions for them because they  
19          have not cooperated to any great degree with  
20          the kind of normal information you would get.

21          MS. MCVEY:   And they gave us some tax  
22          returns, but they're real funky; they're  
23          unsigned.

24          THE COURT:   Yes, they're not verified.  
25          It's very unsatisfactory.  I agree with you.

1 MS. MCVEY: So I think we'll come up with  
2 something on that. Our economist can be  
3 available at 3:30. He'll have to appear  
4 remotely. I think by the time we get the  
5 verdict form situated, the charge situated,  
6 he'll be here ready to go.

7 THE COURT: All right. And let me just  
8 look for a minute. Did you e-mail me the  
9 Glenn?

10 MS. MCVEY: Yes.

11 THE COURT: I've got punitive damages  
12 here.

13 MS. MCVEY: Stephanie, I didn't e-mail  
14 that to you. I'll do that right now.

15 THE COURT: Hang on. I see the charge.

16 MS. MCVEY: That's just from the start of  
17 our conversation when we argued a bunch of  
18 stuff. If you go down about 20 pages, you'll  
19 see what you actually charged the jury.

20 THE COURT: Yes. And how about the  
21 verdict form?

22 MS. MCVEY: I think I have the same one  
23 that we used in Glenn that I can modify. I can  
24 e-mail it to y'all so everybody can see it.  
25 And I'll just say I'm sure there's going to be

1 objection to it, but the Glenn punitive charge  
2 has been upheld at this point.

3 THE COURT: Yes, it has.

4 MS. MCVEY: And I apologize --

5 THE COURT: A lot of what's been done has  
6 been done by our court since then. I was kind  
7 of looking through a state -- a Campbell versus  
8 State Farm lens.

9 MS. MCVEY: Does anybody else want a copy  
10 of this?

11 MS. PEPKE: What she charged in Glenn?

12 THE COURT: Mitch, you made all the  
13 arguments in Glenn about what should be done.

14 MS. PEPKE: I'm going to let Mr. Brown  
15 handle that part of it, but when Your Honor is  
16 ready for me to --

17 THE COURT: I'm trying to get to what I  
18 charged.

19 Theile, where is the charge? What page?

20 MS. MCVEY: Starting on -- okay. So if  
21 you look at page 32 --

22 THE COURT: Okay. Let me get there. All  
23 right. I see this charge.

24 Now, then we go to -- now that we've had a  
25 preliminary discussion, Mr. Brown, I'll go to

1           you.

2           MR. BROWN: Your Honor, our first position  
3           on this is that the verdicts in the case  
4           already reflects that punitive damages have  
5           been awarded. The court, with all due respect,  
6           should have told them that there's a punitive  
7           phase coming up.

8           THE COURT: Sure, I understand.

9           MR. BROWN: So that's our first position.

10          THE COURT: Yes. All right. I decline to  
11          find that the verdict already reflects  
12          punitives on the basis of the rulings I've  
13          already made, but you're certainly entitled to  
14          have that in the record.

15          MS. FLYNN: I join, Your Honor.

16          THE COURT: Ms. Flynn joins in that.

17          MR. BROWN: There's also a case, Your  
18          Honor might have authored it, called Durham  
19          versus Benson -- it might be Benson versus  
20          Durham. But in that case, the Supreme Court  
21          held that they reversed a punitive award  
22          because there was evidence put in was  
23          against -- had to do with third-party harm.  
24          And in this case, Your Honor, there has been an  
25          abundance of third-party harm asserted in the

1 case, including to people that are not  
2 Mr. Perry, such as mothers, babies. He's not a  
3 mother or a baby, and there was lots and lots  
4 of evidence in this case --

5 THE COURT: I understood the argument.

6 MS. FLYNN: I join in that, as well.

7 THE COURT: My approach to that would be  
8 to solve it in the charge.

9 MR. BROWN: And our position, Your Honor,  
10 as you can guess, is you can't unring that  
11 bell, and you won't be able to charge them  
12 effectively that they can't consider any of  
13 that kind of evidence in the punitive phase.

14 THE COURT: Are you saying that they  
15 therefore could not have considered it in the  
16 actual damage phase? I will note that you did  
17 not object on that basis to the receipt of what  
18 you now call third-party harm evidence in the  
19 actual damage case because it was part of the  
20 proof about the character of the defendants'  
21 conduct, as well as the direct issue of  
22 negligence and strict liability.

23 So I note that you are now saying the  
24 third-party harm was one of the foundations for  
25 the award of punitive damages, and I would

1 solve that in my charge. But I reject the  
2 argument that they've already awarded punitive  
3 damages, and I indicate with respect to  
4 third-party harm -- is that Durham?

5 MR. BROWN: I think it is Durham.

6 THE COURT: I'll look at it in a minute.  
7 I reject the argument that it can't be solved.  
8 I'm going to look at Durham, and it might solve  
9 it with some sort of charge if I think it's  
10 warranted.

11 MR. BROWN: Your Honor, we think -- I  
12 don't have a list in front of me, but I think  
13 we might have objected in a motion in limine.  
14 We certainly made mistrial motions based on  
15 inappropriate evidence.

16 THE COURT: You did. You did. I take it  
17 back. Yes, you did. You raised that.

18 MR. BROWN: Thank you.

19 MS. MCVEY: Can I respond just to that  
20 little --

21 MR. BROWN: The cite for Durham is 360  
22 South Carolina 639.

23 Your Honor --

24 THE COURT: South Carolina or Southeast?

25 MR. BROWN: South Carolina.

1           THE COURT: That's fine.

2           MR. BROWN: And, Your Honor, on the net  
3 worth -- I hope I'm not messing up Ms. Pepke on  
4 something. But, you know, this is a worldwide  
5 organization that we're talking about,  
6 depending upon who we're talking about. And  
7 also talc is only a single product that they  
8 used to sell. And they don't sell it anymore,  
9 as you know. And for that -- for that original  
10 reason, Your Honor, net worth numbers and  
11 talking to an economist about J&J's worldwide  
12 other products and all this kind of stuff, that  
13 is out of bounds. That is not going to be  
14 constitutional. It's not fair because you're  
15 punishing somebody who already stopped selling  
16 the product as well.

17           So, Your Honor, really, based on this  
18 actual damages verdict, we would respectfully  
19 request that the punitive damages charge is not  
20 warranted whatsoever.

21           THE COURT: All right. I understand the  
22 argument there. Of course I will deny the  
23 motion to prevent punitive damages for being  
24 sought because it's already in the verdict.

25           In addition, the economist discussion of

1 net worth is not per se out of bounds because  
2 it's unconstitutional in my view. Do you have  
3 some argument on that, Ms. Pepke?

4 MS. PEPKE: I do, but I don't want to step  
5 on her --

6 THE COURT: Well, let Ms. McVey hear your  
7 argument first, and then she can respond to all  
8 of it.

9 MS. MCVEY: I just wanted to respond to  
10 the baby-mother thing real quick because I  
11 think we're moving on to net worth about the  
12 evidence that came in.

13 THE COURT: The harm to others,  
14 third-party harm?

15 MS. MCVEY: Right. The difference here,  
16 of course, is the evidence was that Michael  
17 Perry's mother used it on him when he was a  
18 baby. That's why all that is relevant.

19 THE COURT: I think it's a predicate to  
20 the explanation of what their -- your position  
21 was about the knowing and intentional nature of  
22 the conduct.

23 MS. MCVEY: Exactly.

24 THE COURT: I will not rule that there's  
25 some impropriety about the verdict, either

1           presently received of actual damages or the  
2           seeking of punitive damage based on the need to  
3           exclude third-party harm, because I think the  
4           third-party harm, as they term it, is simply an  
5           indication of the character of the conduct.

6           MS. MCVEY: Thank you, Your Honor.

7           MS. FLYNN: Before we move on to another  
8           motion, I wanted to join in the motion, Your  
9           Honor, that Mitch Brown made, on behalf of AII  
10          to the extent applicable.

11          I also wanted to point out that we don't  
12          think punitives are appropriate. AII no longer  
13          sells any talc-based products either. We  
14          haven't sold talc-based products for seven  
15          years, so it couldn't constitute a deterrence.

16          THE COURT: I understand. I will just say  
17          on the issue of we no longer sell it, I reject  
18          that as a proper basis for not allowing the  
19          seeking of punitive damages. The fact that you  
20          no longer sell the product does not minimize  
21          your responsibility for actual punitive damages  
22          in the material that I've read.

23          So I would reject that, and your objection  
24          is noted.

25          MS. FLYNN: And we also want to just renew

1           our due process concerns that punitive damages  
2           haven't been proven against AII.

3           THE COURT: Well, they have been --

4           MS. FLYNN: I understand.

5           THE COURT: That's a premature one,  
6           Ms. Flynn. You're going to have to see what  
7           they do attempt to prove there.

8           Now, Ms. Pepke.

9           MS. PEPKE: Thank you, Your Honor. I  
10          would call the court's attention to two things.  
11          First of all, we did file a motion to exclude  
12          their economist's testimony on the finances to  
13          the extent it's anything other than the net  
14          worth number. So that is on file and has been  
15          pending.

16          THE COURT: Tell me your authority for  
17          that.

18          MS. PEPKE: It's Branham. I want to point  
19          the court to this exact language in Branham.

20          THE COURT: All right.

21          MS. PEPKE: After a very thorough  
22          analysis, the court came to the conclusion --

23          THE COURT: Hang on a minute. Where is my  
24          little notebook that's got all the cases in it?  
25          Have I got Branham in there? Nope.

1 MS. PEPKE: I have several.

2 THE COURT: Just hand it up to me. I've  
3 got it here somewhere.

4 MS. PEPKE: I have several copies.

5 MS. MCVEY: I can e-mail it to you. Do  
6 you want me to e-mail it to you real quick?

7 THE COURT: Yeah. I just can't find it  
8 real quick.

9 MS. MCVEY: You've got a copy.

10 MS. PEPKE: (Handing.)

11 THE COURT: Thank you so much. I just  
12 want to be able to follow along.

13 MS. PEPKE: And I'll direct the court's  
14 attention to the actual page 15. I don't know  
15 what the cite page is, but page 15.

16 THE COURT: Page 15?

17 MS. PEPKE: Yes, Your Honor.

18 THE COURT: All right. I got it.

19 MS. PEPKE: So after a thorough analysis  
20 of all this different information that had been  
21 offered, which included stuff like assets and  
22 per-day sales and all these extrapolated  
23 figures, the court ultimately concluded that  
24 evidence concerning net worth appears to be the  
25 only safe harbor. That is the safe harbor.

1 THE COURT: Hang on. Where is it?

2 MS. PEPKE: So at the top of the second  
3 column, quote, evidence concerning net worth  
4 appears the safest harbor.

5 So reference to the defendants' assets has  
6 little to do with actual harm sustained by the  
7 plaintiff. It specifically addressed in the  
8 previous analysis in the left-hand column all  
9 of the stuff they had.

10 THE COURT: I am not tracking with you.

11 MS. PEPKE: (Indicating.)

12 THE COURT: This is Supreme Court, Branham  
13 versus Ford Motor Company. Let's see yours.  
14 Is this 701 Southeast 5?

15 MS. PEPKE: My copy is just from a  
16 different printout.

17 THE COURT: Yeah, so it's not page 15?  
18 Which page is it?

19 MS. PEPKE: On yours here, I've got it  
20 highlighted.

21 THE COURT: So it's "Because the Supreme  
22 Court has discovered"?

23 MS. PEPKE: Yes, that's the paragraph  
24 where we start.

25 THE COURT: Okay. Tell me where you want

1 me to start.

2 MS. PEPKE: In that paragraph, go to the  
3 second sentence beginning, "Evidence."

4 THE COURT: Concerning net worth?

5 MS. PEPKE: "Appears to be the safest  
6 harbor."

7 THE COURT: Hang on. Let me read this.  
8 Because the U.S. Supreme Court discovered that  
9 a state's damage award implicates federal  
10 subject to due process, this court is not the  
11 final arbiter to determine what financial  
12 evidence is proper in assessing punitive  
13 damages. This is South Carolina Supreme Court  
14 speaking. Evidence concerning net worth  
15 appears the safest harbor.

16 MS. PEPKE: And if you'll note --

17 THE COURT: While the U.S. Supreme  
18 Court -- there can be no serious doubt  
19 concerning financial evidence of salary,  
20 compensation of defendants' corporate officers.  
21 Branham went far beyond the pale in submitting  
22 evidence of former senior management pay.

23 That was prejudicial. So let me see if I  
24 can understand. I don't want to take forever  
25 here, because I don't want to keep the jury

1           waiting, but let me see if I can understand  
2           exactly what you have -- what the economist is  
3           going to do.

4           MS. PEPKE: Well, we would stipulate to  
5           the net worth number. That's public knowledge.

6           THE COURT: That's generally how they try  
7           it. I really haven't had anybody present  
8           evidence in the punitive damage part.

9           MS. PEPKE: If you'll see in Branham, in  
10          the column before what they had tried to do is  
11          submit evidence of income, revenues, cash flow,  
12          per-day sales. And the court rejected all  
13          that, as well.

14          THE COURT: That's right.

15          MS. MCVEY: Where do they reject that? I  
16          don't see them rejecting --

17          THE COURT: Branham presented evidence of  
18          Ford's net worth, income, revenues and cash  
19          flow, in 2005, the net worth was so-and-so.  
20          Branham extrapolated those figures per week,  
21          per day, per hour. The court has approved the  
22          use of defendants' net worth in ability to pay  
23          factor. All right.

24          And then it says this court has not  
25          addressed the propriety of extrapolating

1 financial data in the manner introduced at  
2 trial. The Court of Appeals directly addressed  
3 this issue and found no abuse of discretion in  
4 the admission of per-day earnings of a  
5 defendant. It has found -- nor has it found  
6 abuse of discretion in admitting per-day  
7 operating revenue or per-day net income. These  
8 Court of Appeals decisions have not been tested  
9 since 2003.

10 Then they go into an analysis of what  
11 happened post the --

12 MS. PEPKE: Correct.

13 THE COURT: -- Orangeburg Company case.  
14 And they say the Supreme Court has -- it says  
15 the court of appeals decision has been tested  
16 through the lens of State Farm versus Campbell.  
17 That's when they then go into all this. And I  
18 think what they're saying is net worth and the  
19 extrapolations from net worth are okay.

20 What else did you plan to do besides that?

21 MS. MCVEY: So it's just the extrapolation  
22 of net worth. But I want to be clear about  
23 what that is, what we believe it is, so that  
24 we're on the same page.

25 THE COURT: All right.

1 MS. MCVEY: So it would be for five --  
2 we're talking about a five-year lens a little  
3 bit. We're talking about total sales, net  
4 earnings, net worth, cash on hand, cash flow,  
5 capital expenditures, free cash, dividends  
6 paid, stock repo purchases, R&O expenditures,  
7 advertising expenditures, available line of  
8 credit, and stock market valuation.

9 And then the same information for Kenvue,  
10 but through a three-year lens, because they've  
11 only been --

12 THE COURT: I'm worried about that because  
13 when you get into figures outside of what net  
14 worth is, with several of those are going to be  
15 like stock value, dividends, and things of that  
16 nature, investments -- cash on hand would  
17 probably be within that work. But a lot of  
18 what you're reading are additional -- they're  
19 certainly financial indicators for a company.  
20 But what the court is telling us is that that  
21 is restricted now.

22 MS. MCVEY: I agree. So they called out  
23 specifically the salaries, right, of  
24 executives. And I think that's fair. We're  
25 not going to ask any of that stuff about CEO

1 pay.

2 MS. PEPKE: Also they call out assets. It  
3 said cautionary observation -- in State Farm  
4 the United States Supreme Court, as cautionary  
5 observation, the reference to defendants'  
6 assets has little to do with the actual harm  
7 sustained by the plaintiff.

8 And, Your Honor, the net worth number only  
9 comes in for purposes of ability to pay.

10 THE COURT: The ability to pay is the  
11 whole thing. The baseline is a punishing  
12 award. And ability to pay simply is the  
13 touchstone in the analysis of how they can be  
14 punished or the extent to which they can be  
15 financially punished if the jury decides to do  
16 that.

17 MS. PEPKE: Exactly. So going into  
18 assets, which cash on hand is --

19 THE COURT: I don't need any further  
20 argument about this. I am going to restrict  
21 the information that can be put to the jury on  
22 net worth.

23 MS. PEPKE: And we will stipulate to net  
24 worth.

25 THE COURT: And that's where I think I'm

1 going with it. I just don't see any sense in  
2 imperilling this whole situation by getting  
3 into it. Justice Kittredge is off of this.  
4 He's now the chief. He takes a very  
5 stay-in-your-lane view of what we do with what  
6 the Supreme Court tells us. And I'm going to  
7 stay there.

8 Now, I have got some big indigestion with  
9 AII on this, because AII never gave us any net  
10 worth information.

11 MS. FLYNN: I strongly, strongly disagree.

12 THE COURT: Show me what it is. I don't  
13 want a strongly-disagree-type argument. I want  
14 to see exactly what you gave them that deals  
15 with net worth.

16 MS. FLYNN: Absolutely. We have a whole  
17 spreadsheet that literally says "net worth."

18 THE COURT: Well, let me see it.

19 MS. MCVEY: Judge, I'm asking  
20 Johnson & Johnson what they think the --

21 THE COURT: What's that?

22 MS. MCVEY: I would like to know what  
23 Johnson & Johnson would stipulate to for net  
24 worth.

25 THE COURT: Yeah. I want those figures

1 right now. I want to see them.

2 MS. PEPKE: It's in their report. We  
3 didn't contest what he said the net worth  
4 number was. So that is in their expert's  
5 report.

6 THE COURT: Tell me what the net worth --  
7 I just want to know what net worth figure we're  
8 going to put in front of the jury.

9 MS. MCVEY: Judge, we also want to talk  
10 about Kenvue. It's time to talk about Kenvue,  
11 because they moved a lot of money into Kenvue.

12 THE COURT: It's net worth. And net worth  
13 is going to be of all the Johnson & Johnson  
14 entities. I've already said that. So you're  
15 going to get a shot at all of them, because I  
16 believe in amalgamation. They disagree with me  
17 about that, but the net worth figures should  
18 include net worth of everybody.

19 MS. PEPKE: Well, that's a different  
20 issue, Your Honor.

21 THE COURT: I'm not going to spend all day  
22 on this.

23 MS. PEPKE: I understand, but Question 8  
24 only asked willful and wantonness of  
25 Johnson & Johnson, and that's the verdict. So

1 Johnson & Johnson's net worth is with them.

2 THE COURT: It says that  
3 Johnson & Johnson, because we decided to refer  
4 to all the Johnson & Johnson folks as  
5 Johnson & Johnson entities. I don't view the  
6 use of that term in Question 8 as some  
7 limitation on what the other -- what entities  
8 were asked to have actual damages. If 8 is all  
9 you've got, all I can tell you is the future  
10 damages form will say Johnson & Johnson  
11 entities.

12 MS. MCVEY: And, Your Honor, so -- I'm  
13 sorry. But Kenvue, the net worth that our  
14 economist would testify to for 2024 would be  
15 10.2 billion.

16 THE COURT: 10.2 billion for Kenvue.

17 MS. MCVEY: For 2024.

18 THE COURT: How about J&J?

19 MS. MCVEY: I have three years of Kenvue  
20 if you want that.

21 MS. PEPKE: It's only appropriate to give  
22 one.

23 THE COURT: Don't interrupt her. We're  
24 going to do this in a civilized way.

25 MS. MCVEY: 2023 is 11.2 billion. 2022 is

1 20 billion.

2 THE COURT: 11 point what?

3 MS. MCVEY: 11.2.

4 THE COURT: What's going to the jury is  
5 10.2 billion for Kenvue and 11.2 for  
6 Johnson & Johnson.

7 MS. MCVEY: Well, I don't have  
8 Johnson & Johnson's number. That was for  
9 Kenvue.

10 THE COURT: Kenvue was 10.2 billion.

11 MS. MCVEY: For 2024.

12 THE COURT: Yeah. And I want the last  
13 number for -- oh, these are all Kenvue numbers?  
14 I just want one number for Kenvue, 2024.

15 MS. MCVEY: That's fine. And the  
16 Johnson & Johnson number is 358 billion.

17 MR. COWAN: No, no, no. Net worth,  
18 70 billion as of March 31st, 2024. That's in  
19 your expert --

20 THE COURT: Friends, we're not going to do  
21 this this way. Now, if she gives a number, and  
22 you disagree with it, Mr. Cowan, you're going  
23 to tell me.

24 MR. COWAN: I apologize, Your Honor.

25 THE COURT: Let's do this in an organized

1 way. Ms. McVey, you propose to put before the  
2 jury Kenvue 10.2 billion, right?

3 MS. MCVEY: Yes, ma'am.

4 THE COURT: And what do you propose to put  
5 to J&J?

6 MS. MCVEY: I'm just looking now.

7 THE COURT: I mean, that's an enormous  
8 figure. I don't see why we're griping about  
9 this. That's plenty to put in front --

10 MS. MCVEY: I was making sure it was  
11 right. So 70 billion.

12 THE COURT: 70 billion. All right. Now,  
13 what are you going to say about AII?

14 MR. BROWN: Your Honor, may I say one  
15 thing first?

16 THE COURT: Yes.

17 MR. BROWN: It's going to be an error to  
18 put Kenvue's numbers and all that into this,  
19 because that is putting the cart before the  
20 horse. The court hasn't determined the  
21 amalgamation issue yet.

22 THE COURT: I have determined it.

23 MR. BROWN: Oh.

24 THE COURT: I have determined it. I'm not  
25 going to sit here and have y'all waste time.

1           If you're telling me that I can't decide fully  
2           on the Kenvue issue until I decide  
3           amalgamation, I'm going to tell you I regard  
4           them as amalgamated.

5           MS. PEPKE: We would also reurge our prior  
6           argument that he successors are not subject to  
7           punitive damages, so their net worth would be  
8           irrelevant on that as well because they aren't  
9           the ones that should pay punitive damages.

10          MS. MCVEY: Your Honor, just to get this  
11          going, I think what we can stipulate to is just  
12          using Johnson & Johnson's net worth number.

13          THE COURT: That's fine. We're going to  
14          use Johnson & Johnson's net worth number of  
15          70 billion. All right.

16          Now, what are we going to use for AII?

17          MS. MCVEY: And we -- I'm sorry. Tell me  
18          what you think the net worth of AII is.

19          MS. FLYNN: And this is all, obviously,  
20          subject to confidentiality, which --

21          THE COURT: Speak up now, Ms. Flynn.

22          MS. FLYNN: Yes, Your Honor. I just  
23          wanted to note for the record this is subject  
24          to confidentiality, so I will want to know --

25          THE COURT: Ms. Flynn, we are now in the

1 trial of this case. It's going to be in the  
2 record of this case and it's going to be in the  
3 public, because I don't have private  
4 confidential trials.

5 Now, I want the number of their net worth,  
6 and I want you to speak into the microphone so  
7 I can hear it. I don't want any other words  
8 about confidential.

9 MS. FLYNN: The number --

10 THE COURT: It's not confidential. They  
11 are going to put it in front of the jury.  
12 That's as public a forum as they can be.

13 MS. FLYNN: I understand that, Your Honor.  
14 I understand that. I just want to be sure  
15 about the confidentiality --

16 THE COURT: Ms. Flynn, you talk real fast  
17 and real low and I can't hear you. And I need  
18 to hear you about this.

19 MS. FLYNN: The number that we have for  
20 net worth for 2023 is 76 million.

21 THE COURT: 76 million? All right.

22 MS. FLYNN: We would join Your Honor in  
23 the motion in limine made by the  
24 Johnson & Johnson defendants.

25 THE COURT: I'm not going back and plow

1           that ground. I went through those things a  
2           long time ago. We don't need to go through  
3           that again.

4           MS. FLYNN: I don't intend to reargue it,  
5           Your Honor.

6           THE COURT: Good.

7           MS. MCVEY: Your Honor, if they're willing  
8           to stipulate to the 76 million being the net  
9           worth, then we don't need to -- we can just  
10          take the stipulation.

11          THE COURT: That's where I'm going with  
12          this thing. What I'm saying is to me we've got  
13          a stipulated number for J&J, we've got a  
14          stipulated number for AII. We're going to  
15          allow plaintiff to publish those stipulated  
16          numbers to the jury and say whatever small  
17          thing needs to be said before we submit it to  
18          the jury.

19          Now, let's talk about timing. You've got  
20          other things?

21          MS. PEPKE: I never got my chance to  
22          respond to Ms. McVey's argument that they could  
23          ask for a specific amount of punitive damages.

24          THE COURT: All right. What's your  
25          position about that?

1           MS. PEPKE: I would say that under South  
2 Carolina Rule of Civil Procedure, Rule 8, that  
3 they are not permitted to. While plaintiff may  
4 ask for a sum certain for actual damages,  
5 claims for punitive or exemplary damages shall  
6 be in general terms only and not for a stated  
7 sum.

8           THE COURT: I agree with that. That's  
9 exactly what it said. That's why I said to  
10 begin with that I had indigestion about any  
11 attempt to ask for a specific number.

12          MS. MCVEY: Your Honor, I think we need to  
13 be able to make suggestions.

14          THE COURT: No, I'm not going to let you  
15 do that, because I won't imperil the verdict in  
16 that way. You have to speak in generalities  
17 just like the rule says. And asking for a  
18 specific number is not generalities. Also  
19 suggesting.

20          MS. MCVEY: For the record, I understand  
21 your ruling. In Glenn I clearly made a  
22 suggestion to the jury.

23          THE COURT: I know.

24          MS. MCVEY: And it was affirmed.

25          THE COURT: Nobody raised that. We didn't

1 get into that at all, so what ain't raised --

2 MS. PEPKE: I will raise it.

3 THE COURT: That's right. You have raised  
4 it and I agree with that. So now let's talk  
5 timing.

6 MS. MCVEY: I want to talk clarity.

7 THE COURT: Yes, ma'am.

8 MS. MCVEY: Can we make clear that the net  
9 worth -- I'm sorry -- that the number that they  
10 should bring back should punish and deter and  
11 make sure this never happens again? This is  
12 the punishment phase.

13 THE COURT: That's right. You can make  
14 those arguments, but let's not get pejorative  
15 about it and crazy about it and argue all this.

16 MS. MCVEY: I get it, but what they're  
17 calling pejorative I disagree with.

18 THE COURT: I understand that, but let's  
19 not get into they lied for years and things of  
20 that nature.

21 MR. BROWN: I think there is a case, Your  
22 Honor, that you should not send the message,  
23 you can't do this, send the message --

24 THE COURT: Right. Don't use the word  
25 "send a message" or anything of that nature.

1 Let the community send the message and all that  
2 kind of thing, that's not permitted on the  
3 criminal side and it's not now permitted on the  
4 civil side. And that is a result of some later  
5 rulings by the court when I was still on the  
6 court.

7 MS. MCVEY: I just want to make sure the  
8 record is clear that Ben never said they lied,  
9 ever. It's on --

10 THE COURT: If I hear that one more time.

11 MS. MCVEY: They keep saying it. I'm  
12 scared to death it's going to --

13 THE COURT: And I say it because I don't  
14 want any slips to be made in getting into any  
15 pejorative language.

16 MS. MCVEY: And we didn't say it. That's  
17 all I wanted to say.

18 THE COURT: Well, *exempli gratia*, don't  
19 say it.

20 What I want to be done is to talk in  
21 general terms about the jury making an award  
22 that reflects what you say their ability to pay  
23 is. And that is what I want you to be focused  
24 on. And that's what you will be focused on.

25 MS. MCVEY: Of course. And, Your Honor, I

1 did have a copy of the verdict form. It's the  
2 same one that we used in --

3 THE COURT: Glenn?

4 MS. MCVEY: -- Glenn (handing).

5 THE COURT: All right.

6 MS. PEPKE: This is an honest question. I  
7 don't understand the blank in front of it. Is  
8 it an X?

9 THE COURT: Let me see it before y'all get  
10 into that, please.

11 All right. Now, what is it you're having  
12 to worry about, Ms. Pepke?

13 MS. PEPKE: The blank that comes before  
14 the "For Michael Perry" on each one, I'm not  
15 clear what the jury is supposed to -- are they  
16 supposed to put an X there?

17 THE COURT: Check. They're supposed to  
18 check it. I'll tell them they're just supposed  
19 to check "For Michael Perry." That  
20 indicates -- if they just put the amount in  
21 there, I don't want there to be any ambiguity.  
22 So I do that always. I have them check the  
23 "For Michael Perry," and then I have them put  
24 in the amount. That's just the way I do it.

25 MR. BROWN: Your Honor, they have the

1 right to award zero. And I don't know if  
2 that's in Your Honor's charge. We proposed  
3 charges, and we did propose punitive damages  
4 charges. I don't think we got to it in the  
5 charge conference.

6 THE COURT: I did not, and I'm not going  
7 to get into it, but I am going to change this  
8 form. It has to reflect -- well, what I will  
9 tell them is this. I will tell them that they  
10 check if they're wanting to award Michael Perry  
11 punitive damages. What I'm going to tell them  
12 is they can put zero in there.

13 MS. MCVEY: Yeah.

14 MR. BROWN: Right. They are not required  
15 to award a number.

16 THE COURT: They're not required to award  
17 anything. So they can put zero if they want to  
18 or they can put a number.

19 MS. PEPKE: And just for a clean record,  
20 could we get a ruling on rejecting our -- if  
21 that's Your Honor's order. We had submitted  
22 our own post charges.

23 THE COURT: I haven't even seen it.

24 MS. MCVEY: I e-mailed you all the Glenn  
25 charge just so we have it.

1 THE COURT: Hang on. All these bunch of  
2 pages on punitive damages?

3 MS. MCVEY: That's why I suggest, Your  
4 Honor, so we don't spend any more time on it.

5 THE COURT: Are y'all serious about this?  
6 That would be -- you've got 21 pages of charges  
7 on punitive damages.

8 MS. MCVEY: Do you have an extra copy?

9 MS. PEPKE: I don't even have a copy.

10 THE COURT: Oh, man, I'll tell you this is  
11 not a helpful submission to me. I am not  
12 thinking about charging all this stuff.

13 MS. MCVEY: That's why we would suggest we  
14 use Glenn. It was aptly argued in a prior  
15 case.

16 THE COURT: Where is Glenn?

17 MS. MCVEY: I think it's electronic. I  
18 can have it printed out if we need to.

19 THE COURT: Yes, because I'm going to let  
20 them take it back with them as I did the other  
21 charges. Wait a minute. I may have it here.  
22 No.

23 I should have done this beforehand. I'm  
24 not going to make that mistake again. That's  
25 on me. We've been sitting right here all that

1           damn length of time and I should have done  
2           this.

3           MS. MCVEY: Judge, I'm going to e-mail it  
4           to Ryan, and he can print it out. I only have  
5           the PDF, so I'm going to have to cut it off a  
6           little bit. Ryan can probably do that for me.

7           THE COURT: Okay. I got it. You just  
8           gave it to me. Where the heck did I put it?

9           MS. MCVEY: I didn't have it printed. I  
10          e-mailed it to you.

11          THE COURT: Yeah, that's right, you  
12          e-mailed it to me.

13          MS. MCVEY: Amy, I e-mailed it to you,  
14          too, if that's helpful.

15          THE COURT: Yeah, I got it. Wait a  
16          minute. Here's what I've got. Here's what  
17          I've got: Ladies and gentlemen, I hope you've  
18          had a pleasant evening. Let me begin by  
19          explaining to you how this phase of the trial  
20          will work. When the plaintiff brought this  
21          lawsuit, the plaintiff asked for actual and  
22          punitive damages. The way I handle these kinds  
23          of cases, particularly complex cases like this,  
24          is that I bifurcate. And that's just a fancy  
25          word for I divide the case. And the first

1 thing that is presented to you is actual  
2 damages. That would involve first whether the  
3 defendant is liable. And that is based on  
4 whether the activities of the defendant  
5 proximately caused the injury that the  
6 plaintiff alleges was suffered.

7 You've now gone through that phase. I  
8 don't talk about punitive damages in that phase  
9 or have that presented because I don't want to  
10 impact your decision about the issues of  
11 liability. At the end of your verdict form, I  
12 always ask in the first phase of the trial,  
13 after you've been -- after you've been  
14 instructed, I ask about clear and convincing  
15 evidence. I ask you whether the conduct of any  
16 defendant that you find is liable and that you  
17 award damage -- or actual damage, I ask whether  
18 that conduct was willful, reckless, and wanton.  
19 And you have found that it was. And that is  
20 the precursor or predicate for moving to this  
21 phase of the trial.

22 This is the last phase of the trial. It  
23 is a short phase of the trial. So please be  
24 assured to begin with we're not talking about  
25 any lengthy process. I'll begin this phase by

1 giving you some instructions about punitive  
2 damages. Then I will turn to the plaintiff to  
3 open the plaintiff's case on punitive damages,  
4 which will be rather short. And I'll start by  
5 reading to you a stipulation about the  
6 defendant. So that's how we're going to  
7 proceed. Plaintiff will present their case.  
8 Defendant will present its case. They will be  
9 rather short. And then they are permitted to  
10 make an argument to you. And then I will give  
11 you whatever other charges I may need to give  
12 you, which will be very brief. I think this  
13 can all be accomplished with dispatch.

14 So let me begin with these instructions.  
15 As I have told you, if you award actual damages  
16 against the defendant, you may also consider an  
17 award of punitive damages. You've already  
18 crossed the first hurdle, which is you found  
19 the conduct was willful, reckless, and wanton.  
20 Punitive damages are intended to punish the  
21 defendant for willful, reckless, and wanton  
22 misconduct, and prevent the defendant and  
23 others from committing similar acts in the  
24 future. Punitive damages can only be awarded  
25 when the conduct of the defendant has been

1 something more than mere negligence. The  
2 evidence must clearly and convincingly  
3 establish that the defendant was reckless,  
4 willful, or wanton, meaning it was a conscious  
5 failure to exercise due care or asbestos  
6 fibers.

7 I don't know why that's in there.

8 MS. MCVEY: That might have been a typo.

9 THE COURT: It should say conscious  
10 failure to exercise due care or conscious  
11 indifference to the rights and safety of others  
12 or reckless disregard of the rights and safety  
13 of others. South Carolina has a statute on this  
14 subject. I will read pertinent portions to  
15 you. Statute is Code Section 15-32-520, and it  
16 is entitled Bifurcated Trials Clear and  
17 Convincing Evidence Standard, Factors for  
18 Liability Determinations. A, in all actions  
19 tried before a jury involving punitive damages,  
20 if requested by any defendant against whom  
21 punitive damages are sought, must be conduct --  
22 must be conducted in a bifurcated manner before  
23 the same jury. I have conducted it that way.

24 In the first phase of a bifurcated trial  
25 the jury shall determine liability and

1           compensatory damages and the amount of  
2           compensatory or nominal damages. In this case  
3           you determined compensatory damages. Evidence  
4           relevant only to the issue of punitive damages  
5           is not admitted in the first stage. Punitive  
6           damages may be awarded only if the plaintiff  
7           proves by clear and convincing evidence that  
8           its harm was as a result of the defendants'  
9           willful, wanton, and reckless conduct. That  
10          has been done.

11                 In the second stage of a bifurcated trial,  
12          the jury shall determine whether the defendant  
13          is liable for punitive damages, and if  
14          determined to be liable, the amount of punitive  
15          damages. In determining the amount of punitive  
16          damages, the jury may consider all relevant  
17          evidence, including but not limited to the  
18          defendants' degree of culpability.

19                 2, the severity of harm caused by the  
20          defendant;

21                 3, the duration of the conduct;

22                 4, the defendants' awareness of any  
23          concealment by the defendant;

24                 5, the existence of similar past conduct;

25                 6, the profitability of the conduct of the

1 defendant;

2 7, the ability -- defendants' ability to  
3 pay;

4 8, the likelihood that the award will  
5 deter the defendants and others from acting in  
6 like conduct.

7 These are the pertinent portions of the  
8 statute.

9 I turn to Ms. McVey and I begin by reading  
10 to you this financial disclosure. Then it says  
11 net worth information for two calendar years.  
12 All right. And then McVey goes and makes her  
13 pitch. And then Mr. Reid made his reply. And  
14 then --

15 MS. MCVEY: A short rebuttal.

16 THE COURT: You made a rebuttal. And then  
17 I sent them to the jury room, and that was it.  
18 I don't think I made any further charges. So  
19 that's what I did, and that's what I propose to  
20 do this time.

21 MS. PEPKE: When would they be instructed  
22 about that they can award zero?

23 MS. MCVEY: It's in there.

24 MS. PEPKE: Was it in there?

25 MS. MCVEY: It doesn't say "zero," but it

1 says you don't have to award any damages.

2 THE COURT: Yeah, I'll make sure they know  
3 that. Has the form been reprinted for me to  
4 give to the jury?

5 MS. MCVEY: The jury charges?

6 THE COURT: No.

7 MS. MCVEY: What changes did you want me  
8 to make? I'm sorry. I missed it.

9 THE COURT: You've got the verdict form  
10 for me, right?

11 MS. MCVEY: Yes.

12 THE COURT: The question is -- this has  
13 typos all in it, this does.

14 MS. MCVEY: I need just a second to  
15 convert it to a Word document. And let me type  
16 in the proper numbers for the stipulation. And  
17 then I'll try to fix the typos very quickly.

18 THE COURT: All right. Let's get it done  
19 as quick as you can.

20 MR. BROWN: Your Honor, there's one part  
21 of that charge -- in addition to the other  
22 objections we filed earlier, there's one part  
23 of that charge that I really, really don't  
24 think is appropriate in this case, and it's  
25 talking about deterring others. And in this

1 case you've got --

2 THE COURT: I agree. I'll take that out.  
3 I don't need it.

4 MS. MCVEY: Wait, wait. That's part of  
5 the statute. Why is it not applicable here?

6 MR. BROWN: It's not applicable here and  
7 it shouldn't be here. There were screenshots  
8 of numbers and multitudes of different talc  
9 products that Mr. Perry used.  
10 Johnson & Johnson should not be punished for  
11 that --

12 THE COURT: No, no, no.

13 MS. MCVEY: That's not what they're  
14 talking about.

15 MR. BROWN: -- with a number to deter all  
16 the other companies from making their talc.

17 THE COURT: I don't think that's what it  
18 means.

19 MS. MCVEY: I don't either. And they used  
20 that slide, not us.

21 MR. BROWN: It's Mr. Perry's testimony.

22 THE COURT: We're arguing about things  
23 that don't make any difference.

24 MS. MCVEY: That language is in the  
25 statute.

1 THE COURT: Yeah, it is in the statute.

2 MR. BROWN: Well, in this case we object  
3 to it.

4 THE COURT: Okay. I gotcha.

5 MS. PEPKE: For the record, has the court  
6 overruled our request for our own jury charge  
7 that we submitted to the court that's rejected  
8 by the court?

9 THE COURT: If I could ever find it. Oh,  
10 yes, this 21-page document? Yes. All right.  
11 I have never seen a charge of that length.  
12 This is a 21-page document with all kinds of  
13 abstruse discussion of legal principles and  
14 relationships between various kinds of damages,  
15 and so forth and so on, and no punishment for  
16 corporate location and a bunch of things that  
17 aren't relevant. So it has many irrelevant  
18 things, it has many things that are wordy, and  
19 it has many things that I don't think you  
20 really want because I don't think they're  
21 consistent with the limitations that I think  
22 are present as a result of the Branham case.  
23 So for that reason, I reject it.

24 MS. PEPKE: Thank you, Your Honor.

25 And as to the motions in limine that were

1           made before court, is it the court's position  
2           that those have been confirmed for this  
3           Phase II, as well?

4           THE COURT: Absolutely. Absolutely.

5           MS. MCVEY: I'm sorry. I missed that.

6           THE COURT: Any objections that were made  
7           in the motions in limine are now repeated in  
8           the trial of the case and repeated in the  
9           punitive phase trial of the case. And yes, to  
10          the extent that there's some suggestion that we  
11          do that, because there's some suggestion in  
12          some of the cases that if you don't repeat the  
13          rulings, that the motions in limine doesn't  
14          count. So I repeat all of those rulings here.

15          MS. FLYNN: If you could please confirm  
16          that for AII, as well.

17          THE COURT: Yes, for AII, as well.

18          MS. PEPKE: And you are prohibiting us  
19          from further argument under Rule 43 on those  
20          motions?

21          THE COURT: Yes. Thank you.

22          MS. FLYNN: Same for AII?

23          MS. MCVEY: I'm going to keep that in my  
24          back pocket now that I know that's a thing.

25          THE COURT: That was Walter Bristow's

1 favorite rule.

2 MS. MCVEY: I didn't know. Your Honor,  
3 we're tweaking these charges right now. I'm  
4 sorry, Stephanie.

5 MS. FLYNN: I'm just confirming the same  
6 for AII.

7 THE COURT: Yeah, yeah, absolutely. And  
8 renewal and appropriate rulings in this phase  
9 of the case, as well, yes.

10 MS. PEPKE: All right. So can we get a  
11 little more clarity about how it's going to  
12 roll?

13 THE COURT: I'm going to bring the jury in  
14 here.

15 MS. PEPKE: You'll bring the jury in.

16 THE COURT: I'll bring the jury in. And  
17 I'm going to do just like I did in the Glenn  
18 case. I'm going to give them the explanation  
19 of how this thing is going to work. Where does  
20 that start, 32?

21 MS. MCVEY: I'm so sorry. What was the  
22 question?

23 THE COURT: She's trying to find out how  
24 this is going to roll. And I'm telling her I'm  
25 going to do just what I just finished reading

1 out of the Glenn case. And she's entitled to  
2 have that. She wants that on the record so she  
3 can say that she objects to it.

4 I am going to have them please be seated;  
5 hope you had a pleasant break. And then I'm  
6 going to recite that that I just read to you  
7 about when the plaintiff brought this lawsuit,  
8 she asked for actual and punitive damages. The  
9 way I handle these cases, I'll tell them about  
10 the bifurcation situation.

11 And then I'm going to give them the  
12 charge. And then I'm going to go over the  
13 verdict form with them. And I will be sure to  
14 emphasize in both the charge and the verdict  
15 form that it is not required to award any  
16 punitive damages; zero can be put there.

17 MS. MCVEY: You already say it in there.

18 MS. PEPKE: And then is there an opening?

19 THE COURT: And then I will turn to the  
20 parties and I will have Ms. McVey make her  
21 argument. And let's talk about timing. You  
22 said you could do it in 20 minutes? We're not  
23 going to use the economist now, right?

24 MS. MCVEY: No, we're not going to use the  
25 economist. We're going to stipulate to the net

1           worth.

2           THE COURT:   Which I will agree.

3           MS. MCVEY:   So it will be in as part of  
4           your instructions.

5           THE COURT:   Right.

6           MS. MCVEY:   Then we'll argue, I think, 20  
7           minutes at most.

8           THE COURT:   Yes.

9           MS. MCVEY:   And in the argument he may use  
10          some documents that we believe are relevant  
11          to --

12          THE COURT:   You may use the ELMO or videos  
13          and everything you want.

14          MS. MCVEY:   So 20 minutes, and then  
15          whatever they would want, and then a short  
16          rebuttal.

17          THE COURT:   My idea would be to go to them  
18          for 20 minutes.

19          Well, Ms. Bueno, tell me what you want.

20          MS. BUENO:   Well, I guess I'm a little  
21          unclear about the parameters of the evidence.  
22          I mean, they've already had a liability finding  
23          on the reckless, wanton, willful conduct. So  
24          our opinion would be that they shouldn't go  
25          through and go through a bunch of documents

1 again to establish that finding.

2 THE COURT: Yes, I agree with that. I  
3 don't think they're going to do that. I'm  
4 familiar with how they'll do it. They'll talk  
5 a little bit about the conduct.

6 MS. MCVEY: We're going to show the jury  
7 some documents that we think shows  
8 reprehensibility. It's still going to be  
9 within a 20-minute parameter.

10 THE COURT: They're entitled to do that.

11 MS. PEPKE: But they have already made  
12 that decision.

13 MS. BUENO: That's where I'm hung up here.

14 THE COURT: You have been in many trials  
15 where many people have argued the punitive  
16 damages, and they have not been limited to just  
17 saying here's the net worth; please punish  
18 them.

19 They are allowed to talk about the  
20 aggravated nature of the conduct. That's what  
21 he's going to do.

22 MS. BUENO: Okay. I just -- they have  
23 already made a finding. And so the purpose of  
24 this stage, in my mind, is how much, right?

25 THE COURT: Well, the purpose of this

1           thing is two things. Number one, it's the  
2           finding that the conduct was reckless, willful,  
3           and wanton. They can talk about that and what  
4           its implications are as they lead into the  
5           discussion of why they should be punished and  
6           their ability to pay. I will allow it.

7           MS. BUENO: Understood.

8           MS. PEPKE: To be clear, we do object to  
9           that. And I understand Your Honor is now  
10          overruling our objection.

11          THE COURT: Yes, that's right.

12          MS. BUENO: So given the nature of this  
13          phase, I would ask Your Honor to please revisit  
14          your ruling about the response to the Citizens'  
15          Petition which came out in 1986. I know you  
16          said that the motions in limine apply here, but  
17          I do think it's important for the jury to  
18          understand that the issues that were alleged in  
19          this case were brought before the FDA, and  
20          there was actually a response letter issued  
21          saying that a warning label was not necessary.  
22          And that was not involving Johnson & Johnson.

23          THE COURT: I would overrule your  
24          objection and your request that you be allowed  
25          to go back into that. That's actual damage

1 evidence. It's before the jury. Well, let's  
2 see. How much is it before the jury? You  
3 weren't allowed to go into that.

4 MS. BUENO: We weren't allowed to talk at  
5 all about the fact in 1986 the FDA considered  
6 the issues that were alleged in this trial.

7 THE COURT: Right. And having ruled it  
8 out of the liability portion, I will not allow  
9 it to be argued in the punitive portion.

10 MS. BUENO: And then the same request I  
11 will make for two other documents that Your  
12 Honor excluded -- and I understand your ruling,  
13 but there was the Health Hazard Evaluation that  
14 we wished to get in, where the company made an  
15 exposure assessment following the 2019 FDA  
16 finding, and then there was another document  
17 called The Comprehensive Review that was done  
18 by Dr. Kuffner, where he reviewed the totality  
19 of evidence. And I understand that Your Honor  
20 had excluded those, but now that we're talking  
21 about this reprehensibility issue, I do think  
22 it's important for the jury to understand some  
23 of the efforts the company has done in recent  
24 years to analyze these issues. And it really  
25 does go to mitigation, Your Honor.

1 THE COURT: I will allow that.

2 MS. MCVEY: Hold on a second, Your Honor.

3 I really object to that for one reason: We  
4 weren't allowed to cross Kuffner on that;  
5 there's no context for it; it's expert opinion  
6 that the jury has never seen. So now it's just  
7 going to be counsel arguing without any context  
8 to it. That's inappropriate at this stage.

9 THE COURT: All right. I'm going to  
10 overrule that and I'm going to allow her to  
11 refer to those two things.

12 MS. BUENO: So may we seek to admit those  
13 two documents now? I don't have the number in  
14 front of me. I'll get them and we'll put it on  
15 the record.

16 THE COURT: Are they huge documents?

17 MS. BUENO: The Health Hazard Evaluation I  
18 believe is 17 pages, and The Comprehensive  
19 Review is indeed a very big document. And what  
20 it does is it has a compilation -- it's about,  
21 I think, 250 pages. And then it has hundreds  
22 of pages of exhibits, which we don't need to  
23 offer. But I would suggest that we offer The  
24 Comprehensive Review document, which outlines  
25 the company's position after a full analysis of

1 all of the data. And I think it's important  
2 for the jury to see that when they're  
3 considering why the company has come here and  
4 defended these claims in this case.

5 THE COURT: Just a minute.

6 MS. MCVEY: I'm so sorry.

7 THE COURT: It's going to be a tit for  
8 tat. If I start letting you do that, I'm going  
9 to let them put in additional different  
10 evidence about reprehensibility and so forth.  
11 I'm not going to do that. I'm going to rest on  
12 what was in the liability trial in chief, and  
13 I'm going to stick with those rulings. So I  
14 will not allow that to be admitted.

15 MS. BUENO: So just to be clear, you are  
16 excluding from Phase II the Health Hazard  
17 Evaluation, the Citizens' Petition and The  
18 Comprehensive Review?

19 THE COURT: That's right.

20 MS. BUENO: We have actually issued  
21 proffers on those for Phase I, and so I would  
22 ask the record to reflect that we are  
23 reoffering the proffers for the purpose of  
24 Phase II, because we certainly think that.

25 THE COURT: All right. I'm not going to

1 go on forever with this. I have heard enough  
2 and I've ruled enough, and we're going to get  
3 this jury in here to do this.

4 MS. PEPKE: Do we need a few minutes?

5 MS. BUENO: Yes. Could we just have a  
6 break and a few minutes to gather our thoughts?

7 THE COURT: Certainly. Let's talk about  
8 your time first. They want --

9 MS. MCVEY: 20 minutes.

10 THE COURT: -- 20 minutes. And then you  
11 want 10 in reply?

12 MS. MCVEY: 10 in reply, yes.

13 THE COURT: I'm going to give them --  
14 you'll have 20 minutes to open. They'll have  
15 30 minutes to do their thing. And you'll have  
16 10 minutes in reply.

17 MS. BUENO: Will that be shared with AII?

18 THE COURT: That will be shared with AII.  
19 You can work that out.

20 MS. BUENO: Thank you.

21 MS. MCVEY: And, Your Honor, we're trying  
22 to tweak these. It's a little slow going with  
23 a PDF trying to be converted. So I'm trying.

24 MS. BUENO: And we do need a copy of that  
25 before we start. We'll print it when we get

1           it.

2           THE COURT:  Of course.  They're working  
3           hard.  I should have done this when I had all  
4           that length of time.  Live and learn.

5                         (Whereupon there was a recess in the  
6           proceedings from 3:44 p.m. to 3:58 p.m.)

7           THE COURT:  After I've read the pertinent  
8           portions of the statute, I say, I turn to  
9           Mr. Adams to begin the plaintiffs' presentation  
10          of its case in the punitive damages phase.  And  
11          I begin by reading to you this financial  
12          disclosure.  This disclosure is made on behalf  
13          of Johnson & Johnson.

14                       Financial data condition of defendant.  
15          Defendants' net worth information for the past  
16          calendar year is sufficient for the scope of  
17          the topic of defendants' financial condition.  
18          The year is 2023.  The defendants' net equity  
19          for fiscal year 2003 is \$70 billion.  This  
20          disclosure is made on behalf of AII.  It's net  
21          worth for 2023 is \$76 million.  Mr. Adams is  
22          recognized for the plaintiff.

23                       MS. MCVEY:  That's fine, Your Honor.  I  
24          wanted to raise one tiny thing with you about  
25          they raised Rule 8 about suggesting a number.

1 THE COURT: Yes.

2 MS. MCVEY: Do you recall that? That Rule  
3 8 is for pleadings.

4 THE COURT: What's that?

5 MS. MCVEY: Rule 8 is for pleadings. It  
6 doesn't talk at all -- it's just for how you  
7 plead it in a complaint. I just pulled it up  
8 and I wanted you to look at it (handing). It's  
9 not --

10 THE COURT: Ms. Pepke?

11 MS. PEPKE: Your Honor, I think it's quite  
12 clear that they can ask on actual damages for  
13 specific numbers, but as to punitive numbers,  
14 they are only allowed to ask for general, both  
15 in the pleadings, but also in front of the  
16 jury.

17 THE COURT: Well, I'm going to say that  
18 that's how it's going to be done. I don't  
19 think it makes a particle of difference. I  
20 think we're arguing over something that's not  
21 going to make a huge amount of difference in  
22 what they do or don't do on the punitive  
23 damages. I am not going to allow them to ask  
24 for a particular number, but they're going to  
25 probably do something that suggests just that

1           because they're going to talk about net worth  
2           and what it would take to punish someone with  
3           that kind of net worth, and so forth and so on,  
4           and you've got to use your judgment, blah,  
5           blah, blah, blah. So I think that's going to  
6           be said and I think that's going to be fine.

7           MS. MCVEY: Thank you, Your Honor. We do  
8           believe and have in the past argued numbers  
9           that the jury should award for punitive  
10          damages. Rule 8 only applies to pleadings, and  
11          that's clear.

12          THE COURT: Well, I think you're probably  
13          right, but in a superabundance of caution,  
14          that's the way I'm going to do it.

15          MS. MCVEY: Fair enough. Thank you,  
16          Judge.

17          MS. PEPKE: Are we on the record?

18          THE COURT: Yes. I've got my verdict  
19          forms.

20          MS. MCVEY: I'd love to get going because  
21          it's 4:00 now.

22          THE COURT: I've got the verdict forms and  
23          I will go over them with the jury.

24          MR. BROWN: Your Honor, on the  
25          amalgamation ruling, we are just wanting to

1 make sure that the court received our directed  
2 verdict arguments about successor liability and  
3 that you are rejecting all of those arguments  
4 because --

5 THE COURT: Well, it doesn't make any  
6 difference now, Mitch, because I didn't let  
7 them put Kenvue in. So don't come to me with  
8 that now. We're just putting J&J on this.

9 MS. MCVEY: That's right. And I  
10 understand that we are going to brief for you  
11 following this verdict the successor liability  
12 amalgamation, which then you would make a  
13 ruling after you see it.

14 THE COURT: That's correct.

15 MR. BROWN: I thought you said you had  
16 already made the ruling.

17 THE COURT: No. I said I was just going  
18 to go with J&J. And I think Theile would renew  
19 her request that we put in the number for  
20 Kenvue.

21 MS. MCVEY: That's right. That's exactly  
22 right, just so we can move this along.

23 THE COURT: So we don't have anything to  
24 worry about with that. In terms of enforcement  
25 of the judgment, we may have some rulings about

1 amalgamation on that and successor liability  
2 and that kind of thing. For this purpose,  
3 Mitch, I don't think you've got anything to  
4 worry about. They withdrew it.

5 MS. MCVEY: Can we get everybody in so we  
6 can get going if you're ready.

7 THE COURT: I'm ready.

8 MS. MCVEY: I'll go get everybody.

9 Judge, I want to make sure. You said we  
10 can't say a number, but certainly we can argue  
11 percentages of net worth, that sort of thing.

12 THE COURT: Oh, yeah, yeah.

13 Mr. Adams, this is such a huge number that  
14 I don't see why y'all would try to skirt into  
15 anything that gets in the way of that.

16 MR. ADAMS: I just don't want to get in  
17 trouble, Your Honor.

18 THE COURT: If you're going to have good  
19 common sense, then I think we can do business.

20 MS. MCVEY: We want to make sure that  
21 we're not saying what you don't want us to say.  
22 That's the only reason.

23 THE COURT: You're going to argue about  
24 what it takes to punish a company that's this  
25 big. So go right ahead. Have at it.

1 - - -

2 (Discussion off the record.)

3 - - -

4 THE COURT: Bring me the jury.

5 THE BAILIFF: Yes, ma'am.

6 (The jury entered the courtroom at this  
7 time.)

8 THE BAILIFF: Jury is seated, Your Honor.

9 THE COURT: Thank you, sir. You're so  
10 tall and I'm so short.

11 - - -

12 JURY CHARGE BY CHIEF JUSTICE TOAL

13 - - -

14 THE COURT: All right. Ladies and  
15 gentlemen, first let me say that this delay is  
16 not the lawyers' fault. I blame this on  
17 myself. I should have, while y'all were  
18 deliberating, done this, but I kind of don't  
19 like to get ahead of myself and jinx things.  
20 So we'll just blame it on a Catholic  
21 superstition.

22 Ladies and gentlemen, let me first begin  
23 by explaining how this phase of the trial will  
24 work. When the plaintiff brought this lawsuit,  
25 the plaintiff asked for actual and punitive

1 damages. And the way I handle these type of  
2 cases, particularly when they're complex, is  
3 that I bifurcate. And that is just a fancy  
4 word for I divide the case into the first thing  
5 that is presented to you, which is actual  
6 damages. And that would involve, first,  
7 whether the defendant is liable. That's based  
8 on whether the activities of the defendant  
9 proximately caused the injury that the  
10 plaintiff suffered.

11 Now, you've gone through that phase. And  
12 I don't talk about punitive damages in that  
13 phase or have that presented because I don't  
14 want that to impact your thoughts when you're  
15 just dealing with liability. So I stay away  
16 from talking about punitive damages.

17 Now, at the end of your verdict form you  
18 will notice, and I always ask in that first  
19 phase, after you have been instructed about  
20 clear and convincing evidence, I ask you  
21 whether the conduct of any defendant that you  
22 find is liable and that you award actual  
23 damages against, whether that conduct was  
24 willful, reckless, and wanton. And you have  
25 found that it was. And that is the precursor

1 or predicate for moving this case to this phase  
2 of the trial.

3 This is the last phase of the trial. It  
4 is a short phase of the trial. So please be  
5 assured that to begin with we're not talking  
6 about any lengthy process. In this phase I'm  
7 giving you some instructions about punitive  
8 damages. And then I will turn to the plaintiff  
9 to open their case on punitive damages, which  
10 will be rather short and a strictly limited  
11 time. And I'll start by reading you a  
12 stipulation by the defendants. So that's how  
13 we're going to proceed. Plaintiffs will  
14 present their case. Defendants will present  
15 their case. They will both be rather short.  
16 And then they are permitted to make a closing  
17 argument to you. And I may need to give you  
18 other instructions, but I don't think so. The  
19 ones I'm going to give you will suffice.

20 So we will begin with these instructions.  
21 As I have told you, if you award actual damages  
22 against the defendant, you may also consider  
23 and award punitive damages. You've already  
24 crossed the first hurdle, which is you have  
25 found that the conduct was willful, reckless,

1 and wanton. Punitive damages are intended to  
2 punish a defendant for willful, reckless, and  
3 wanton misconduct and to prevent the defendant  
4 and others from committing similar acts in the  
5 future. Punitive damages can only be awarded  
6 when the conduct of the defendant has been  
7 something more than mere negligence. The  
8 evidence must clearly and convincingly  
9 establish that the defendant was reckless or  
10 willful or wanton, meaning there was a  
11 conscious failure to exercise due care or a  
12 conscious indifference to the rights and safety  
13 of others or reckless disregard for the safety  
14 of others.

15 Now, there's a statute on that, a law, and  
16 I'm going to read portions of that to you. The  
17 statute is Code Section 15-32-520, and it's  
18 entitled Bifurcated Trials Clear and Convincing  
19 Evidence Standard, Factors for Liability  
20 Determination. In all actions tried before a  
21 jury involving punitive damages, if requested  
22 by any defendant against whom punitive damages  
23 are sought, the punitive damage phase must be  
24 conducted in a bifurcated manner before the  
25 same jury. I have conducted it that way. In

1           the first phase of the bifurcated trial, the  
2           jury shall determine the liability for  
3           compensatory damages and the amount of  
4           compensatory or nominal damages. In this case  
5           you have determined compensatory damages.  
6           Evidence relevant only to the issue of punitive  
7           damages -- evidence only relevant to the issue  
8           of punitive damages is not admitted in the  
9           first stage. Punitive damages may be awarded  
10          only if the plaintiff proves by clear and  
11          convincing evidence that his harm was a result  
12          of willful, wanton, and reckless conduct, and  
13          that has been done.

14                 In the second phase of the bifurcated  
15          trial, the jury shall determine if the  
16          defendant is liable for punitive damages, and  
17          if determined to be liable, the amount of  
18          punitive damages. In determining the amount of  
19          punitive damages, the jury may consider all  
20          relevant evidence, including but not limited to  
21          defendants' degree of culpability, the severity  
22          of the harm caused by the defendant, the  
23          duration of the conduct, the defendants'  
24          awareness and any concealment by the defendant,  
25          the existence of similar past conduct, the

1 profitability of the conduct of the defendant,  
2 the defendants' ability to pay, the likelihood  
3 that the award would deter the defendant or  
4 others from like conduct. Those are the  
5 pertinent portions of the statute.

6 Now, in a minute I'm going to turn to  
7 Mr. Adams to begin the plaintiffs' presentation  
8 of the case in this punitive damages case. And  
9 I'm going to begin by reading you this  
10 financial disclosure. This disclosure is made  
11 on behalf of Johnson & Johnson. Financial  
12 data, condition of defendant. Defendants' net  
13 worth information for the past calendar year is  
14 sufficient for the scope of the topic of the  
15 defendants' financial condition. The year is  
16 2023. The defendants' net equity for fiscal  
17 year 2023 is \$70 billion. This disclosure is  
18 made on behalf of AII. Its net worth for 2023  
19 is \$76 million.

20 Now, I also have a punitive damages form.  
21 And in a moment, I'm going to give that to your  
22 foreperson of the jury, each one of you. And,  
23 of course, just like we did before, you'll fill  
24 it out at the end. It's a pretty simple form.  
25 It says, "As to Plaintiff Michael Perry's claim

1           against Defendant Johnson & Johnson entities  
2           for punitive damages, we the jury, by unanimous  
3           consent, find." And you check "Michael Perry"  
4           there. And then you would put in the amount of  
5           blank punitive damages. You could put zero  
6           there. It's not mandatory that you award  
7           punitive damages. Or you can put a figure that  
8           you think should be awarded considering the  
9           arguments of the parties and the instructions I  
10          have given you.

11                   And then it says, "As to Plaintiff Michael  
12          Perry's claim against Defendant American  
13          International Industries for punitive damages,  
14          we the jury, by unanimous consent, find" --  
15          check "Michael Perry," and then there's a blank  
16          for punitive damage. You can put zero there or  
17          you can put the amount that you think should be  
18          awarded as punitive damages. And the amount,  
19          of course, depends on considerations that I  
20          just read you in my instructions and arguments  
21          that the parties will make to you as they make  
22          their presentation.

23                   So, Madam Foreperson, I am going to hand  
24          you at this time blank verdict forms (handing).  
25          I don't have a printed out copy of the charge I

1 just made to you, but the stipulation you can  
2 just write down in your notebook, Madam  
3 Foreperson, the net worth of Johnson & Johnson  
4 is \$70 billion, and the net worth of AII is  
5 \$76 million.

6 JURY FOREPERSON: Million?

7 THE COURT: That's AII, 76 million; J&J,  
8 70 billion. All right? Very good.

9 Now, Mr. Adams, you may proceed.

10 MR. ADAMS: Thank you.

11 - - -

12 CLOSING ARGUMENT BY MR. ADAMS

13 - - -

14 MR. ADAMS: There's no more phases. This  
15 is it, I promise. And it's supershort. It's  
16 real short, but it's real important. I know  
17 you all probably thought we were going to go  
18 home. We're not allowed to tell you if you  
19 check "yes" on 8, there's another phase. I'm  
20 going to talk to you for about five minutes.  
21 You've already heard the stipulations. J&J  
22 will talk to you, and then you'll be done.  
23 It's one question on the verdict form, and no  
24 more phases.

25 Thank you so much for your deliberations.

1 Thank you for taking us so seriously. Thank  
2 you for finding that the wrongful conduct of  
3 Johnson & Johnson played a role in the cancer  
4 that's going to take Michael Perry's life.  
5 Thank you for valuing Lonnie Long's claim and  
6 the loss that he's had. But most of all, I  
7 just want to thank you for valuing Michael  
8 Perry's life. Thank you so much.

9 This phase is about something completely  
10 different. It's about punishment and  
11 deterrence. You compensated Michael and Lonnie  
12 already for their loss. That's done. This  
13 phase is just about punishing the company.  
14 Companies are not like human beings. They're  
15 not made of flesh and blood. And so when a  
16 company does something horrible and hurts  
17 somebody, you can punish the company with  
18 money. That's what this is about, punishment  
19 and deterrence.

20 I talked about money damages that come  
21 with a receipt. Remember that the paycheck  
22 losses, the funeral expenses, the medical  
23 bills, that's one kind. The other kind was the  
24 type of money damages that don't come with a  
25 receipt, the human loss in the case. This is a

1 third kind, money in a verdict to punish the  
2 company and to tell them, "Don't ever do  
3 anything like this again. Don't ever do  
4 anything like this again." That's what this is  
5 about.

6 But in order to do that, you have to know  
7 how much money the companies have because  
8 you're not allowed to destroy the company with  
9 your verdict. It can't -- it can't be so much  
10 that it would destroy the company, but it can't  
11 be so little that they don't feel it at all.  
12 It has to be actual punishment that will deter  
13 them from doing this again.

14 And so --

15 MR. BROWN: Objection, Your Honor.

16 THE COURT: Yes. I think your objection  
17 is "it has to be."

18 MR. BROWN: Yes.

19 THE COURT: And I agree with you. It  
20 doesn't have to be any amount; and therefore  
21 your objection is sustained. Strike that from  
22 the record.

23 MR. ADAMS: Sorry about that. You don't  
24 have to punish them at all.

25 We believe the evidence, selling the worst

1 carcinogen in human history to children, is  
2 worth punishing.

3 MS. PEPKE: Objection, Your Honor. May I  
4 approach?

5 THE COURT: You may.

6 (Whereupon a bench conference was  
7 held.)

8 MS. PEPKE: I believe I heard him say,  
9 "selling it to children," which would be asking  
10 them to punish the harm to other people.

11 MS. MCVEY: He used it as a child. His  
12 mother used it on him as a child. This is the  
13 punishment phase.

14 THE COURT: Then use those terms. Don't  
15 say, "selling it to a child."

16 MS. PEPKE: I would object to punishing  
17 Johnson & Johnson for harm to other people.

18 THE COURT: Well, deterring that is what  
19 they are asking for. And that they can ask.

20 MS. PEPKE: Overruled?

21 THE COURT: Overruled.

22 MS. MCVEY: Thank you, Your Honor.

23 (Bench conference concluded.)

24 THE COURT: Proceed, Mr. Adams.

25 MR. ADAMS: Yes, Your Honor. Thank you.

1           You all have to come up with the number on  
2 your own. We're not allowed to tell you a  
3 number, but I just want to put some of the  
4 numbers in context, if I can. That  
5 \$70 billion, that's what it looks like. I have  
6 trouble sort of understanding that number.  
7 It's seventy thousand million dollars.  
8 1 percent of \$70 billion is \$70 million.  
9 That's 1 percent. One of the ways that  
10 sometimes I think about it is if you got rid of  
11 the million, it would be 70,000. That's kind  
12 of a number that we can understand, 70,000. If  
13 somebody had \$70,000, and they sold something  
14 that caused a person's death, and we were  
15 wondering what would be appropriate to fine  
16 them for that conduct, \$70 for someone with  
17 70,000 in this case would be the same as  
18 70 million, just to put the numbers in context.

19           MS. BUENO: Objection, Your Honor.

20           THE COURT: Overruled.

21           MR. ADAMS: But it's up to you. I hope  
22 you all will do something -- you did such a  
23 good job compensating Michael Perry, but  
24 they're listening closer than they've ever  
25 listened right now. This is the most important

1 thing to the company, what you do right now.  
2 And I know you're tired, and you're probably  
3 tired of hearing me talk, and you're tired of  
4 sitting here, and you're tired of it all. This  
5 is the most important part to this company.

6 Please stay with us, please do the right  
7 thing, and please tell this company, "Don't  
8 ever do anything like this again."

9 Thank you so much.

10 MR. BROWN: Your Honor, I object to "doing  
11 the right thing."

12 THE COURT: Overruled.

13 All right. Ms. Bueno.

14 MS. BUENO: Ms. Flynn is going to start,  
15 Your Honor.

16 THE COURT: Very good. Ms. Flynn for AII.

17 - - -

18 CLOSING ARGUMENT BY MS. FLYNN

19 - - -

20 MS. FLYNN: Ladies and gentlemen of the  
21 jury, as I told you before, I've only been able  
22 to talk to you about damages. And that's  
23 because AII was found to be in default in this  
24 case. And what that means is that AII, my  
25 company, did not respond to plaintiffs' legal

1 claim within the required time frame.

2 MS. MCVEY: Objection, Your Honor.

3 THE COURT: I'll tell you what. Approach.

4 (Whereupon a bench conference was  
5 held.)

6 THE COURT: Tell me what the objection is.

7 MS. MCVEY: She just said the only reason  
8 they are here is because they were in default  
9 and didn't file timely.

10 THE COURT: Ms. Flynn, I've told you what  
11 I told the jury is that the law, by law, you've  
12 been found liable. Please don't do that again.  
13 Sustained.

14 MS. MCVEY: Thank you, Your Honor.

15 (Bench conference concluded.)

16 THE COURT: Objection is sustained.

17 MS. FLYNN: I did tell you before that AII  
18 is here by operation of law. Sadly, I did not  
19 have the opportunity to truly defend this  
20 company before you. Had I been able to do so,  
21 I would have told you that they are a  
22 family-owned company in California. It was  
23 started by a man named Mr. Ryzman who  
24 immigrated to the United States. And he  
25 basically went door to door -- he started the

1 company going door to door selling false nails  
2 and eyelashes. He would literally wear them  
3 himself and go door to door, and that's how his  
4 business started. Today that's still AII's  
5 main business. They're still located in  
6 California, one building, a family-owned  
7 company.

8 For a brief period of time, from 1987 to  
9 2017, they sold Clubman talc. While I was not  
10 able to put on evidence or defend AII in this  
11 case, the plaintiffs could have put on a case  
12 against AII, and they did not. They showed you  
13 no evidence that there was ever any asbestos in  
14 the pharmaceutical-grade talc that they elected  
15 to use, they showed you no evidence that AII  
16 intentionally ignored or disregarded any  
17 information that any pharmaceutical --

18 MS. MCVEY: Objection, Your Honor.

19 THE COURT: Yes, the objection is  
20 sustained. They have been -- ladies and  
21 gentlemen of the jury, by operation of law,  
22 they have been found liable, and they have been  
23 found liable on the averments of the complaint,  
24 which includes multitudinous discussion of the  
25 content of their Clubman talc. And they are

1           liable for injuries suffered as a result of the  
2           content of their talc. And that is how the  
3           matter was pled, and by law they have been  
4           found liable for that.

5                     You may proceed. Objection is sustained.

6                     MS. FLYNN: Ladies and gentlemen, in this  
7           final phase of trial, you do not have to award  
8           damages. Punitive damages are intended to  
9           punish a defendant for extraordinary and  
10          outrageous misconduct and to prevent the  
11          defendant from committing similar acts in the  
12          future. Punitive damages can only be awarded  
13          when the evidence clearly and convincingly  
14          establishes that the defendant was actually  
15          reckless and willful and wanton.

16                    Now, over the last week and a half,  
17          Mr. Perry's -- almost two weeks now --  
18          Mr. Perry's lawyers have showed you evidence  
19          related to Johnson & Johnson. Please  
20          understand that AII is not associated with  
21          Johnson & Johnson, and the evidence that you  
22          saw does not apply to us and should not be  
23          considered against American International  
24          Industries.

25                    The situation in which we find ourselves

1 does not reflect the reality of AII's business  
2 practices. And the heart of the case as to AII  
3 is essentially this: We've not been shown to  
4 have done anything wrong and should not be  
5 punished.

6 MS. MCVEY: Objection, Your Honor.

7 THE COURT: By operation of law, AII has  
8 been found liable for a tort, the commission of  
9 a wrong, the infliction of an injury on  
10 Mr. Perry. It is not correct to argue that  
11 they have not been shown to have done anything  
12 wrong. By operation of law, they have been  
13 found to have injured Mr. Perry.

14 So the objection is sustained.

15 MS. MCVEY: Thank you.

16 MS. FLYNN: To award punitive damages  
17 against AII in this case would be like going  
18 into a room where something is broken and  
19 beating your kid over it. It's not right. We  
20 ask ourselves if it's fair to punish someone  
21 without knowing anything about them.

22 In conclusion, I ask you to consider the  
23 lack of evidence that's been presented to you  
24 against AII. We respectfully request that you  
25 refrain from punishing a company that you heard

1 nothing about and please place a zero next to  
2 AII on the verdict form. I apologize. I'm a  
3 little bit nervous. This is a big deal for the  
4 company, and so I just ask that you please take  
5 a look at the evidence and place a zero next to  
6 AII's name. Thank you.

7 THE COURT: Thank you, ma'am.

8 Ms. Bueno. Ms. Bueno for Defendant  
9 Johnson & Johnson.

10 MS. BUENO: Thank you, Your Honor.

11 THE COURT: Yes, ma'am.

12 - - -

13 CLOSING ARGUMENT BY MS. BUENO

14 - - -

15 MS. BUENO: Thank you, ladies and  
16 gentlemen, for the last two weeks of your time.  
17 I am so appreciative of the time and energy you  
18 put into this case, and we hear you. On behalf  
19 of Johnson & Johnson, we hear you. We respect  
20 your decision and we appreciate you being here.  
21 We needed you. We had a dispute that we could  
22 not resolve outside of the courtroom, which is  
23 why we needed you and your service. And we  
24 thank you for it.

25 You're here in this stage to figure out

1           whether to punish Johnson & Johnson. And the  
2           conduct that you're considering is the  
3           company's conduct, not mine. So if I did  
4           something in this trial, if I asked a question  
5           in cross-examination, if I took an action that  
6           you thought was inappropriate, you hold that  
7           against me. I ask you not to punish my client  
8           for it.

9                     And I'm going to spend a little time today  
10           talking to you about the evidence you've heard,  
11           because what you're being asked to do is figure  
12           out whether or not a company is reprehensible.  
13           And so I want to talk through some of the  
14           evidence you heard that I'd ask you to think  
15           about as you're figuring out what number, if  
16           any, to put on that line.

17                    You heard about Johnson & Johnson doing  
18           more than any other cosmetic talc company. You  
19           heard that we exceeded industry standards. We  
20           did more when we tested our talc. And I'm not  
21           going to go through and do my whole closing  
22           argument again. That's not appropriate here  
23           and I don't want to waste your time. But I ask  
24           you to remember that it wasn't just  
25           Johnson & Johnson, but it was the FDA who was

1 looking at our products bought off the shelves,  
2 that symposiums were held, not with  
3 Johnson & Johnson, but with the FDA and  
4 specialists and toxicologists who looked at the  
5 issue and determined that cosmetic talc was not  
6 a health hazard. And I ask you to remember  
7 about other testing you've seen, the fact that  
8 we put documents on the Web for anybody to look  
9 at. There was not an effort to conceal the  
10 information.

11 And I ask you to remember Dr. Kuffner. We  
12 did not bring an expert witness to this trial,  
13 as plaintiffs pointed out over and over again,  
14 but we brought the head doctor of a large  
15 company, Dr. Kuffner. And Dr. Kuffner, when I  
16 asked him about the allegations in this  
17 courtroom about Johnson & Johnson hiding  
18 information from the FDA and not telling the  
19 FDA our findings, he told you that that was not  
20 true. And he said, "That's not true, and so I  
21 reviewed the company documents. And I also  
22 talked about my time in the company from 2006  
23 until today. And that's not how the company  
24 behaves."

25 And this is a big company, no question.

1           \$70 billion is a lot for a net worth. But that  
2           amount is for a lot of different subsidiaries,  
3           tens of thousands of employees. And I heard  
4           counsel say that a company is not flesh and  
5           blood. And, you know, that's technically  
6           correct, but it is, right? We're talking about  
7           conduct of people, of people. And there's a  
8           lot of people that make up this company,  
9           doctors and scientists from all over the world.

10                    So that big number you hear is not related  
11           to talc, it's not related to talc sales. And  
12           keep in mind, if you will, please, that the one  
13           time the FDA found asbestos in talc, that small  
14           amount, within two days this company made the  
15           decision to take that lot off the market  
16           immediately. And Johnson & Johnson no longer  
17           sells talc, talc-based Johnson's Baby Powder.  
18           And so one of the things that Justice Toal told  
19           you was the purpose of punitive damages in part  
20           is to deter, which means to stop behavior from  
21           continuing. This product is no longer on the  
22           market.

23                    Dr. Kuffner, the head doctor, I also asked  
24           him about the allegations in this courtroom and  
25           the fact that there are claims that

1 Johnson & Johnson knew there was asbestos and  
2 sold it anyway. And I asked him what he  
3 thought about that. And he told you that he  
4 was insulted by that allegation because, as a  
5 physician, he's dedicated his whole life to  
6 caring for patients, protecting patients, as  
7 have the other physicians and nurses and  
8 pharmacists on the safety team. And so it goes  
9 against who we all are as health care  
10 professionals. And so, yeah, it cuts right to  
11 the heart when I hear that.

12 Look, I wasn't back with you in the jury  
13 room, obviously. I have no idea how you came  
14 to check "yes" for Question Number 8, whether  
15 you thought our conduct was willful, whether  
16 you thought it was wanton, whether you thought  
17 it was reckless. I don't know the severity of  
18 your feelings about this. But one thing I know  
19 for sure is that a lot of the documents that  
20 you saw in this trial were from many decades  
21 ago. They were from the '70s, '60s, a time  
22 when the people who are currently at this  
23 company were not there. And the people who  
24 were there are no longer with the company.  
25 This company is a different company today. So

1 if your goal is to punish conduct that happened  
2 those decades ago, I'd just ask you to take  
3 that into consideration, as well.

4 And, again, as the judge told you and as  
5 you heard, you don't have to award punitive  
6 damages in this case. You have already given a  
7 large award to Mr. Perry and Mr. Long, which we  
8 respect, and we thank you again for your time.  
9 I wish there was more I could say and answer  
10 questions for each of you. I wish I could sit  
11 there and hear your decision and why. And I  
12 can't do that; so I don't know what I can say  
13 right now, other than thank you, and thank you  
14 for being here. On behalf of  
15 Johnson & Johnson, thank you.

16 THE COURT: Thank you, Ms. Bueno.  
17 Mr. Adams in reply?

18 MR. ADAMS: Thank you, Your Honor.

19 - - -

20 REBUTTAL ARGUMENT BY MR. ADAMS

21 - - -

22 MR. ADAMS: They told you they hear you,  
23 "We hear you. We hear you." And then they  
24 went and they reargued what you've already  
25 seen, that the FDA said it was okay, that they

1 didn't really know, that it wasn't so bad, that  
2 they exceeded industry standards with the tests  
3 that said you could find a billion asbestos  
4 fibers in a bottle and say it wasn't there.

5 They haven't heard you at all. If they  
6 heard you, they would have got up and said,  
7 "We're sorry. We'll never do it again." But  
8 they got up and they said, "We exceeded  
9 industry standards." They haven't heard a  
10 thing. Please make them hear you.

11 My math was wrong. 1 percent is  
12 \$700 million. .1 percent is 70 million.  
13 Please make them hear you.

14 MR. BROWN: Your Honor, we object. May I  
15 approach?

16 THE COURT: Yes.

17 (Whereupon a bench conference was  
18 held.)

19 MR. BROWN: It's just the same.

20 THE COURT: You've obviously given them a  
21 number. I understand that. Overruled.

22 MS. MCVEY: Thank you.

23 (Bench conference concluded.)

24 THE COURT: Objection is overruled.

25 MR. ADAMS: They said they never hid it

1 from the FDA. You've seen Dr. Hutchinson's  
2 report in the '70s, where he found the same  
3 asbestos that everyone else had found. They  
4 hid the report and they convinced the FDA  
5 everybody else got it wrong. And then they got  
6 away with it for 70 years. And they just got  
7 up in front of you and said, "This happened a  
8 long time ago." It happened a long time ago  
9 because they hid it from the American public  
10 for 70 years.

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

20 This happened a long time ago? I'm going  
21 to leave you with this. This didn't happen a  
22 long time ago. This is May 9th, 2020, after  
23 the FDA found it, found the asbestos, took  
24 pictures of it. They sent it to RJ Lee.  
25 RJ Lee found the same thing, and then they told

1 the American public it wasn't there. And you  
2 know what they did next? They sent out this  
3 press release saying, "We're taking it off the  
4 market, but it's not because it's not safe."  
5 And then they said, "Existing inventory will  
6 continue to be sold through retailers until it  
7 runs out." Sell it all, even the last drop.  
8 Sell it. Sell all of it, and get up and take  
9 zero responsibility after you told them they  
10 are responsible.

11 Please do the right thing. Thank you so  
12 much.

13 THE COURT: Thank you, Mr. Adams.

14 Ladies and gentlemen of the jury, you may  
15 retire to your jury room.

16 JURY FOREPERSON: May I ask you a  
17 question?

18 THE COURT: Yes, ma'am. Do you have it in  
19 written form there?

20 JURY FOREPERSON: Yes, ma'am.

21 THE COURT: Let the bailiff bring it to  
22 me. Thank you.

23 THE BAILIFF: (Handing.)

24 THE COURT: All right. "To be clear, who  
25 does the money from punitive damage get paid

1 out to?" Signed by the foreperson of the jury.

2 Approach.

3 (Whereupon a bench conference was  
4 held.)

5 THE COURT: I'm supposed to tell them to  
6 Mr. Perry; is that right?

7 MS. MCVEY: Yeah.

8 THE COURT: Very good.

9 MS. PEPKE: It's a complicated question.  
10 It doesn't all go to Mr. Perry, but I don't  
11 know what their --

12 THE COURT: No, no, no. It's all his.  
13 Out of that he pays his attorneys' fees, but it  
14 all is his.

15 MS. MCVEY: Taxes.

16 THE COURT: Absolutely that will not be  
17 said.

18 MS. MCVEY: He pays tax on it.

19 THE COURT: Absolutely.

20 (Bench conference concluded.)

21 THE COURT: Thank you, ma'am. The answer  
22 to your question is: To Mr. Perry.

23 All right. You may go to your jury room.

24 (The jury exited the courtroom at this  
25 time.)

1                   (The following discussion was held  
2                   outside the presence of the jury:)

3                   THE COURT: Court will be at ease.

4                                   - - -

5                   (Court's Exhibit 32 admitted into  
6                   evidence.)

7                                   - - -

8                   THE COURT: Anything else that needs to be  
9                   done? Mitch?

10                  MR. BROWN: Your Honor, we just renew the  
11                  motion for mistrial that we previously made.  
12                  And, in addition, to the closing argument,  
13                  objections were made.

14                  THE COURT: Of course. Of course, as I  
15                  would expect. Motion is denied.

16                  MS. MCVEY: Nothing from us other than to  
17                  note the total improper argument that Ms. Flynn  
18                  made on behalf of AII, to tell the jury that  
19                  they were only here because they were in  
20                  default, weren't allowed to put on any  
21                  evidence. All of that kind of stuff I think is  
22                  beyond the pale.

23                  THE COURT: I agree that was beyond the  
24                  pale. I hope I instructed the jury correctly  
25                  about that. I was shocked by that argument

1           because it is the law that they are  
2           responsible. And they can't get up here and  
3           say, "We really didn't do any of this, and the  
4           only reason we're here is because of a default  
5           just because we didn't get our pleadings in on  
6           time."

7                        That is not the implication. The  
8           implication, as I have ruled consistently  
9           throughout this entire matter, is that AII is  
10          liable for everything that was averred in the  
11          complaint. It has been proved. It is beyond  
12          any doubt.

13                      And, Ms. Flynn, that -- I mean, that is  
14          sanctionable conduct, as far as I'm concerned,  
15          to make that kind of argument to the jury.  
16          Making it to me has frustrated me throughout  
17          this entire thing because I know what the law  
18          is. And the law is that it's not some kind of  
19          little technical thing, but really we're not so  
20          bad. It is an admission. The penalty for not  
21          answering a complaint timely is that everything  
22          that's been said in the complaint is proved  
23          against your client. It is a fact, an unable  
24          to be controverted fact.

25                      So that was a very improper argument. And

1 I thought about saying something to the jury  
2 about that, but there's no percentage in that  
3 either, in my view. But, yes, you're correct,  
4 Ms. McVey. And, you know, I think it was  
5 beyond the pale.

6 MS. FLYNN: If I may just address. The  
7 court has used the word "default" at least  
8 twice, maybe three times, in front of the jury.  
9 So I know that the court has -- perhaps not  
10 intentionally. I'm not sure -- but the word  
11 "default" has come in.

12 THE COURT: Well, what's the big deal  
13 about that? Because what you were trying to do  
14 is tell them, "Well, default is just some  
15 little technical thing that we didn't get our  
16 papers in on time," kind of like, "Teacher, the  
17 dog ate my homework."

18 It is not that. It is something quite a  
19 bit more serious than that. It is positive,  
20 irrefutable proof that your client was guilty  
21 of fraud, negligence, strict liability, and  
22 that's been proved. And you cannot minimize  
23 that in front of the jury by saying, "Well,  
24 it's just a little default." That's the  
25 problem with it.

1           And I clarified that for the jury. To the  
2 extent I used the word "default," I told them  
3 exactly what that meant, that it was proved.

4           MS. MCVEY: And, Your Honor, I just want  
5 to remind the court that when AII made their  
6 motion to lift default, it wasn't some little  
7 technicality they didn't reach in the  
8 complaint. Instead what they wrote, and signed  
9 affidavits and put in front of Your Honor and  
10 filed publicly for everyone to see, is they  
11 made these heinous allegations against both me  
12 personally and Trey Branham.

13           THE COURT: That's correct.

14           MS. MCVEY: And instead of just saying,  
15 "We dropped the ball," or something else  
16 happened, or "We didn't do what we were  
17 supposed to do," they somehow made it our fault  
18 publicly.

19           THE COURT: Yes.

20           MS. MCVEY: So to come in here and argue  
21 "We just simply didn't answer the complaint" is  
22 super-outrageous to me. It's totally improper.  
23 But it also kind of misses all the bad stuff  
24 that they did from start to finish.

25           THE COURT: I agree with everything that's

1           been said and find it bad conduct that I don't  
2           approve of.

3           MS. MCVEY: Thank you, Your Honor.

4           THE COURT: All right.

5           MR. BROWN: Your Honor, we have a court  
6           exhibit we'd like to make, which is the  
7           document that Mr. Adams showed that had a  
8           number written on it.

9           THE COURT: Yes. I did not consider that  
10          violation of my thing because he can talk about  
11          net worth and what it means and what  
12          percentages of net worth are. I don't think  
13          that was encompassed in what I said at all, so  
14          I consider it proper argument. But certainly  
15          you can make a court exhibit of it to be sure  
16          that it's memorialized in the record that that  
17          is what he wrote on there and showed it to the  
18          jury. No problem.

19          MS. MCVEY: Thank you, Your Honor. We  
20          also got permission from you to use a  
21          percentage of net worth.

22          THE COURT: I understand. I considered it  
23          proper, but Mitch is very much entitled to make  
24          a record of it.

25          MS. MCVEY: Absolutely. I handed it to

1 him for the record.

2 THE COURT: Very good. Thank you.

3 - - -

4 (Court's Exhibit 33 admitted into  
5 evidence.)

6 - - -

7 (Court's Exhibit 34 admitted into  
8 evidence.)

9 - - -

10 THE COURT: Be at ease.

11 (The jury entered the courtroom at this  
12 time.)

13 THE COURT: Bring in the jury.

14 THE BAILIFF: The jury is seated, Your  
15 Honor.

16 THE COURT: Thank you, sir.

17 Madam Forelady, do you have a verdict?

18 JURY FOREPERSON: Yes.

19 THE COURT: Very good. Would you please  
20 give it to the bailiff and he will take it to  
21 the clerk.

22 THE BAILIFF: (Handing.)

23 THE COURT: All right. It's in order.

24 Mr. Clerk, publish the verdict.

25 THE CLERK: Yes, Your Honor.

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JURY VERDICT ON PUNITIVE DAMAGES

- - -

THE CLERK: In the State of South Carolina, County of Richland, in the Court of Common Pleas, Fifth Judicial Circuit, Civil Action Number 2023-CP-40-04072, Michael L. Perry and Lonnie L. Long versus American International Industries and Johnson & Johnson, punitive damages. As to Plaintiff Michael Perry's claims against Defendant Johnson & Johnson entities for punitive damages, we the jury, by unanimous consent, find, check, for Michael Perry in the amount of \$30 million punitive damages. As to the Plaintiff Michael Perry's claims against Defendant American International Industries for punitive damages, we the jury, by unanimous consent, find, check, for Michael Perry in the amount of \$760,000 punitive damages. Signed Juror 31, Foreperson.

Madam Forelady, is this the verdict of the entire jury?

JURY FOREPERSON: Yes.

THE COURT: Shall the jury be polled,

1 Plaintiff?

2 MS. MCVEY: Not from the plaintiff, Your  
3 Honor.

4 THE COURT: Shall the jury be polled,  
5 Defendant?

6 MS. BUENO: No, Your Honor.

7 THE COURT: All right. Ladies and  
8 gentlemen of the jury, you have completed your  
9 service. And what an absolutely wonderful job  
10 you have done. Alternate jurors, this couldn't  
11 have been done without you, too. It's all part  
12 of a system that has to work together to  
13 produce a result in such a complicated matter  
14 as this.

15 It's just been my honor to have you serve  
16 in this court. I don't say this to every jury,  
17 but you're a very special jury. I haven't seen  
18 this attentiveness to detail and done in an  
19 uncomplaining manner, with certainly a lot of  
20 personal sacrifice in your life these last two  
21 weeks. So I thank you. And the people of  
22 Richland County and the people of the State of  
23 South Carolina thank you for your service.

24 You are dismissed.

25 (Jury dismissed from the courtroom.)

1                   (The following discussion was held  
2                   outside the presence of the jury:)

3                   THE COURT: All right. Please be seated.  
4                   For the plaintiffs, anything to place upon the  
5                   record?

6                   MS. MCVEY: No, Your Honor, nothing to do  
7                   with the verdict. The only thing I did want to  
8                   ask you is if you wanted us to submit briefing  
9                   and evidence to you about successor  
10                  liability/amalgamation issues.

11                  THE COURT: Yes, because the defendants  
12                  have submitted rather fulsome briefs on this  
13                  subject already, and I think you have those.  
14                  And I think you would want to submit something  
15                  because I am sure we will have argument about  
16                  those things again in the post-trial motions  
17                  material that will be submitted within 10 days.

18                  MS. MCVEY: And we're happy to get a brief  
19                  to you. I think we can do it next week, which  
20                  would make sense.

21                  THE COURT: That would be fine. You at  
22                  some point will receive what Mr. Brown has  
23                  filed as well and can react as you see fit.

24                  MR. BROWN: So I think we jointly are  
25                  moving for the 10 days.

1           THE COURT: That's correct. That's  
2 correct. And you should conform to this 10-day  
3 window, as you should, Ms. Flynn. And then we  
4 will go from there in terms of scheduling  
5 arguments.

6           MR. BROWN: And Mr. Bogan reminds me, that  
7 means August 26th.

8           THE COURT: That's correct. That is  
9 correct, Matt.

10          MR. BROWN: For post-trial. Thank you,  
11 Your Honor.

12          MS. FLYNN: AII has the same 10 days?

13          THE COURT: Of course. Of course.  
14 Nothing, Ms. McVey?

15          MS. MCVEY: Nothing else.

16          THE COURT: One final thing I want to  
17 place upon the record. I said some mighty  
18 fierce things earlier this week or last week  
19 about Mr. Adams. And I felt them in my heart,  
20 because I just don't like that kind of  
21 repartee, even if it's out of my presence. And  
22 I thank you, Mr. Adams, for conforming your  
23 conduct to our rules of civility. I decline to  
24 consider any sanction for your conduct. I  
25 think the conduct's been cured by your further

1 participation in this trial. And like all of  
2 these lawyers in this case, I respect all of  
3 you more than I can say.

4 MS. MCVEY: Thank you, Judge.

5 THE COURT: Court will be adjourned.

6 MS. MCVEY: Thank you, Judge.

7 - - -

8 (Court's Exhibit 35 admitted into  
9 evidence.)

10 - - -

11 THE COURT: I want order in this courtroom  
12 right now. Take your seats.

13 All right. I want counsel to take your  
14 seats at counsel table, please.

15 MS. BUENO: Your Honor, this is not  
16 necessary.

17 THE COURT: Take your seats at counsel  
18 table.

19 MS. MCVEY: Your Honor --

20 THE COURT: Take your seats at counsel  
21 table. Where is --

22 Now, Mr. Bogan, you came and addressed me.  
23 I want you to stand and tell me what you told  
24 me.

25 MR. BOGAN: I said at the end of this

1 case, Your Honor, my co-counsel, Ms. Bueno,  
2 went to shake Mr. Adams' hand, and he refused  
3 to. He refused to do that after you just  
4 admonished him for his behavior. And then he  
5 had an exchange with her. I couldn't hear, but  
6 I watched the interaction. That's what I told  
7 Your Honor. It's on the record.

8 THE COURT: All right. Sit, Ms. McVey.  
9 I'm not hearing from you at this time.

10 Mr. Adams, Mr. Adams, please stand. I  
11 just sat here at the end of this case and put a  
12 te absolvo, a good old Latin phrase for you are  
13 absolved and forgiven, on the record so that  
14 this thing would not follow you around.

15 And then Ms. Bueno sticks out her hand to  
16 be civil and offer you her hand, and you  
17 continue to treat her badly.

18 MR. ADAMS: No.

19 THE COURT: Why did that happen?

20 MR. ADAMS: And I explained what happened.

21 THE COURT: You can tell me. And I swear  
22 if there's anything other than the truth that  
23 emanates out of this, we're going to have some  
24 real troubles. I consider you delivering these  
25 remarks to me on your oath as a lawyer.

1           MR. ADAMS: Ms. Bueno came up to me and  
2 did try to shake my hand.

3           THE COURT: Yes, sir.

4           MR. ADAMS: Which was very gracious.

5           THE COURT: Yes, it was.

6           MR. ADAMS: And what I said to Ms. Bueno  
7 is "I respect you as a lawyer. You are an  
8 amazing, amazing lawyer," which I do believe.  
9 "You are an incredible lawyer, but when you try  
10 to destroy my career, I cannot shake your  
11 hand."

12          THE COURT: Shame on you.

13          MR. ADAMS: That's it.

14          THE COURT: Shame on you. That did not  
15 need to be said, Mr. Adams. I dealt with it on  
16 the record. I expected you to behave in a  
17 civil manner instead of having to have one more  
18 na-na-na-na-boo-boo to stick it back to her.  
19 And I am very, very unhappy with that. And I  
20 can tell you I'm going to deal with it.

21                 Now, I can't believe that I put on the  
22 record, trying to bring some peace and love to  
23 this situation, and put on the record what I  
24 did. You're bringing shame on yourself; you're  
25 bringing shame on Ms. McVey and Ms. Gross, two

1 of the finest lawyers I know. I don't know  
2 what's in your head. You had that -- I thought  
3 you just kind of lost your temper a little bit,  
4 but then you've got to put that final dig in.

5 You went skating close to the line when  
6 you made your final arguments to the jury. I  
7 tried to just kind of ameliorate that as best I  
8 could. I am very, very unhappy with your  
9 conduct.

10 MR. ADAMS: I am sorry, Your Honor. I am  
11 sorry.

12 THE COURT: Well, I want you to turn to  
13 Ms. Bueno right now and unconditionally express  
14 your apologies to her for your conduct just a  
15 minute ago and during the course of this trial.  
16 I want to hear it right now.

17 MR. ADAMS: I am sorry.

18 MS. BUENO: Apology accepted.

19 MR. ADAMS: I do think you're a great  
20 lawyer.

21 MS. BUENO: And you are as well.

22 THE COURT: All right. That's the end of  
23 this. Court will be adjourned.

24 - - -

25 (Proceedings were concluded at 5:28 p.m.)

## CERTIFICATE OF REPORTER

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

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 15th day of August 2024, at Chapin, Lexington County, South Carolina.

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