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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

American International Industries et al.

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

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

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.	)	

HEARING BEFORE: THE HONORABLE JEAN H. TOAL
VOLUME I

DATE TAKEN: Tuesday, September 24, 2024

TIME BEGAN: 2:00 p.m.

TIME ENDED: 5:04 p.m.

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

REPORTED BY: Cynthia First, RPR, CRR
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P R O C E E D I N G S

- - -

THE BAILIFF: All rise.

THE COURT: Please be seated.

Just sit it up here. Thank you so much.

All right. Welcome, ladies and gentlemen.

Ms. McVey, I received one love note from
you. Do you have a supplement to that?

MS. MCVEY: Yes. These are the witnesses
that have been --

THE COURT: I would assume that the
general information, not this information, has
been shared with the other side.

MS. MCVEY: Yes, they have --

THE COURT: And this is confidential
information.

MS. MCVEY: That's right.

THE COURT: And you may give that to me,
and I will not put it in the file.

MS. MCVEY: Thank you, Your Honor. And so
that everybody is clear, for purposes of setup,
we had given them the gross amount of
settlements, and I had given you an itemized
listing of the settlements --

1 THE COURT: Yes, along with the settlement
2 agreements. So I think that will suffice for
3 the current endeavor in which we're involved.

4 This is the matter of Michael L. Perry and
5 Lonnie L. Long against American International
6 Industries, Johnson & Johnson, and others.
7 It's 2023-CP-40-04072.

8 There are seven motions, and I'm just
9 going to mention them to be sure I've got
10 everything.

11 J&J's mode of trial, successor liability
12 and amalgamation brief and motion; J&J
13 entities' motion for JNOV, new trial absolute,
14 13th juror activities, and new trial on an
15 outside remittitur.

16 3, AII's motion for JNOV, new trial
17 absolute and remittitur; and AII's motion to
18 vacate and/or set aside default.

19 5, J&J and AII motions to settle.

20 6, J&J and all motions to -- and AII
21 motions to stay execution on judgment.

22 And 7, J&J's motion to substitute new
23 HoldCo and Pecos River Talc for LLT Management.

24 All right. Is that --

25 Just one very minor question, Mr. Brown,

1 on this list of motions, and I'm just not
2 looking at it right now. I notice it says
3 substitute new HoldCo and Pecos River for LLT
4 Management. That means Red River's not
5 involved in this?

6 MS. PEPKE: Your Honor, Red River is not
7 involved in this.

8 THE COURT: Okay. Very good. I'm still a
9 little bit foggy about all that, but I'm sure
10 you all will elucidate it in the full course of
11 time. All right.

12 MS. MCVEY: It just --

13 THE COURT: Ms. McVey.

14 MS. MCVEY: For clarity, and then we can
15 discuss how to go forward.

16 For the successor liability piece, just so
17 everybody remembers, we bifurcated that issue
18 out. So the jury returned a verdict against
19 the J&J entities.

20 THE COURT: Right.

21 MS. MCVEY: And then we all briefed
22 successor liability and provided you with all
23 the evidence we believe you need to make a
24 decision.

25 THE COURT: Right, and correspond --

1 Mr. Brown and company have certain ideas about
2 who should bear this liability and who should
3 be excluded because of their view of successor
4 liability, and you have the view that all
5 should be included.

6 MS. MCVEY: Yes, ma'am. And so for
7 purposes of argument, I'm happy to do it any
8 way that we all agree on. I can present our
9 argument briefly about why we think all these
10 entities are the successors, and they can
11 respond, or we can do it a different way.
12 Because of the way it was briefed, I didn't
13 know how you wanted to do it in terms of...

14 THE COURT: Well, all right.

15 MS. MCVEY: Does that make sense? Okay.

16 THE COURT: Mr. Brown briefed successor
17 liability, I guess, first. And it was in
18 connection with a mode of trial motion that he
19 made; so I'm going to turn to him first.

20 Mr. Brown.

21 MR. BROWN: Thank you, Your Honor.

22 I am -- I think Ms. McVey --

23 THE COURT: Or I'll switch it around if
24 you prefer.

25 MR. BROWN: Yeah. Well, here's a

1 suggestion is -- it could be, you know, there's
2 a possibility, of course, that they won't agree
3 with this, but there's a possibility that the
4 Court will, you know, deal with the merits of
5 this case in a manner where you don't need to
6 reach the successor liability question. But if
7 you want --

8 THE COURT: By granting a new trial on
9 everything?

10 MR. BROWN: Right.

11 THE COURT: Right.

12 MR. BROWN: And then you don't need to --

13 THE COURT: If you want to wait till the
14 end to do that, that's fine with me, too.

15 MR. BROWN: I think that would be easier
16 to do, to put that at the end.

17 MS. MCVEY: Here's the problem with that.
18 The successor liability piece is in the JNOV.
19 So I think my preference, to be honest, would
20 be -- because I think we can do this quickly
21 and take away some of what needs to be done in
22 the JNOV motion. I'm not a stickler on that.

23 THE COURT: There's merit on both sides.
24 We'll take it now.

25 You may begin, Mr. Brown.

1 MR. BROWN: Your Honor, the only thing I'm
2 going to say about that is Ms. Pepke is
3 prepared on that particular issue, the
4 successor liability issue.

5 But the only thing I disagree with
6 Ms. McVey about is we had to fight pretty hard
7 to keep this thing from being injected into the
8 trial, this particular set of issues. And the
9 way -- one reason why I brought up this other
10 way of proceeding is because the Court has
11 never made a ruling on this whatsoever. And if
12 the Court did grant a new trial, it would
13 really be in the nature of a mistrial, almost.

14 It would be -- if the Court uses 13th
15 juror powers, for example, which I am
16 suggesting humbly that the Court hold that
17 close to your chest and hold that instead of
18 just dealing with it right out of the gate, but
19 hold it and listen to all the arguments,
20 because that one, if the Court exercises that
21 power that only the Court has, will eliminate
22 the necessity to rule on anything else. I
23 mean, anything. There won't be any reason to
24 JNOV or anything else.

25 Because of the nature of this trial, there

1 were these claims brought in, successor
2 liability claims brought into the case. They
3 were trying all through the trial and we were
4 trying to stop them all through the trial from
5 getting to those issues. They were trying to
6 put it in, and it got pushed -- ultimately, at
7 the very end, it got pushed to this hearing.

8 However, if the Court came in right now
9 and said, I'm going to grant, you know, a new
10 trial -- a new trial based on 13th juror, that
11 would just essentially be the end of this.

12 THE COURT: Well, you might very well be
13 right, but I'm going to go on and hear the
14 successor liability now.

15 MR. BROWN: Thank you.

16 THE COURT: Mr. Brown, you may proceed or
17 Ms. Pepke.

18 MS. PEPKE: You have the burden, right?

19 MS. MCVEY: I think I have the burden,
20 yes.

21 I think she agrees it may make sense for
22 me to go first --

23 THE COURT: Yes.

24 MS. MCVEY: -- and then let her respond.

25 Your Honor, I just want to begin by saying

1 we agreed with Johnson & Johnson and Mr. Brown
2 to not put the successor liability piece in,
3 and we didn't do that. The concern that we
4 had, and we have as we stand here today, is
5 about being able to collect a verdict from the
6 proper J&J entities.

7 And you recall that Johnson & Johnson
8 stood up all through this trial and said LLT is
9 the right people; that's all you need. And
10 then the Davis verdict came down. They
11 dissolved LLT and have created these new
12 entities.

13 And so when we get to it, I'm going to
14 incorporate a little bit on these motions to
15 substitute these brand-new companies, new
16 HoldCo and Pecos River. We certainly don't
17 think anybody should be substituted. If you
18 want to add them in as successors as well, then
19 we can do that. But I don't think they just
20 get to come in and create these new entities
21 and we don't know anything about them, and they
22 get to say, you have to take this. I don't
23 think that's proper.

24 But let me start from the beginning a
25 little bit. And I want to incorporate -- we

1 have given you a lot of detail and a lot of
2 evidence in our briefing about successor
3 liability and how these entities were created
4 and what they mean. And it is dense, dense
5 stuff. So I don't want to rehash all of that
6 orally with you today because I think it's too
7 confusing, and I think this issue can be solved
8 very succinctly and correctly by looking at the
9 Nationwide case.

10 And, Your Honor, that's a case that was
11 decided after Simmons versus Mark Lift by the
12 Supreme Court in 2018. And in that case, they
13 talk about when a successor can be held liable.
14 And for our purposes, we know that there's four
15 times in South Carolina a successor can be
16 responsible for a predecessor company, and that
17 is when there's a mere continuation or there is
18 fraud intended to -- how did they say it --
19 defraud creditors, right, hide from liability.

20 And what Nationwide says is while
21 commonality of ownership is a keystone of the
22 analysis for mere continuation, and almost
23 always sufficient to establish mere
24 continuation when paired with common directors
25 and officers, we stress control is an essential

1 consideration as well. Typically, ownership
2 and control are found in tandem. However,
3 there may be instances where directors or
4 officers lacking ownership exert such control
5 and influence over a corporation that their
6 continued presence after a corporate
7 acquisition is sufficient to establish
8 successor liability. However, our successor
9 liability doctrine affords protection for
10 plaintiffs in those cases where a corporate
11 sale is driven by its desire to escape the
12 predecessor's liabilities and obligations,
13 where the changing of corporate hats is tainted
14 by such fraudulent intent, the successor
15 corporation remains liable, even when the test
16 for mere continuation is not already otherwise
17 satisfied.

18 Now, here we have commonality of
19 ownership, and we've put that in the papers.
20 And I want to point you to the exact exhibits.
21 But we also have this changing of corporate
22 hats. And they said the quiet part out loud:
23 It was intended to defeat the creditors, people
24 like Mr. Perry.

25 So what we want to say and what we do say

1 and what we believe the Court should hold is
2 that HoldCo and Kenvue are the successors to
3 Old JJCI. So Your Honor will remember that
4 Johnson & Johnson made the baby powder until
5 1979. And then from 1979 until Old JJCI, they
6 started this bankruptcy two-step stuff, was
7 responsible for baby powder after 1979 through
8 at least 2019, when we know Mr. Perry stopped
9 using the powder.

10 And so we have Johnson & Johnson as a
11 defendant in this case because they exercised
12 control the entire time and they were the owner
13 and parent company. And then we have LLT, who
14 Johnson & Johnson stood up and told this Court
15 and us, don't worry about it. You've got LLT
16 in there. They're going to pay the verdict.
17 Now we know LLT has been dissolved.

18 Then you have HoldCo and Kenvue. And what
19 we are saying is HoldCo and Kenvue are the
20 successors to the Old JJCI. How do we know
21 that? Well, what Nationwide tells us, we have
22 to have commonality of ownership or
23 shareholders. So from Old JJCI to New JJCI, we
24 have internal memos and admissions that they
25 had the same ownership vertically integrated

1 under the parent Johnson & Johnson. And, Your
2 Honor, that's Exhibit 7 and Exhibit 14.
3 Exhibit 7 is the Project Plato approval memo,
4 and Exhibit 14 is the McCraw -- McGraw
5 declaration, M-C-G-R-A-W.

6 And then we have from New JJCI HoldCo to
7 Kenvue, we see that we have SEC filings. And
8 so what we know is through mid-August, it had
9 the same ownership vertically under the parent.
10 And if you look at Exhibit 11, that's the
11 Kenvue, the Ruh deposition, R-U-H, on pages 60
12 to 61. And then Exhibit 26 is the Kenvue SEC
13 form on page 4. We have that information.

14 And then we have the same ownership,
15 because they testified the stock swap converted
16 Johnson & Johnson shareholders to Kenvue
17 shareholders. And that's found in Exhibit 1,
18 which is the Mongon deposition, M-O-N-G-O-N, at
19 pages 75 and 161 and 162, and Exhibit 11, which
20 is the -- I always say his name wrong -- Ruh,
21 R-U-H, deposition, page 61, 74 to 75.

22 And I actually brought those exhibits. If
23 you want to have access to them, I'm happy to
24 hand them up.

25 THE COURT: I even had Janis put in this

1 courtroom all exhibits.

2 MS. MCVEY: Would you like me to hand
3 these up?

4 THE COURT: Yes, of course.

5 MS. MCVEY: So these are the exhibits that
6 show the continuity of ownership (handing).

7 And what Nationwide says is that's enough
8 to establish mere continuation.

9 But we also have continuity of enterprise
10 management. We have the same president,
11 Goodridge; the same treasurer, Neat; the same
12 medical officer, Dr. Kuffner, who you're very
13 familiar with. That's from Old JJCI to New
14 JJCI. And then from New JJCI HoldCo to Kenvue,
15 we have every U.S. Kenvue officer held the same
16 position for Johnson & Johnson consumer
17 segment. And we cited to all those exhibits in
18 our papers as well.

19 Continuity of enterprise, it's the same
20 personnel. Old JJCI to New JJCI, those
21 employees continued with the same location.
22 They have the same offices from Old JJCI to New
23 JJCI, and from New JJCI to HoldCo Kenvue, they
24 have the same manufacturing locations and
25 headquarters. They continue with the same

1 operations and products. And, again, that's
2 Old JJCI to New JJCI, and then New JJCI to
3 HoldCo Kenvue.

4 And so, Your Honor, we meet the really
5 hard test in South Carolina of mere
6 continuation. But we also have -- the reason
7 they were doing this is to throw a very solvent
8 company into bankruptcy to defeat these
9 creditors. And they object when we say this,
10 but two bankruptcy, two appellate courts have
11 said that the bankruptcies were filed in bad
12 faith.

13 We believe --

14 THE COURT: The soundbite that they
15 project, as I recall it, was that, oh, when the
16 bankruptcy court disapproved this thing was
17 because we were funding it too good. Well,
18 there's another way of stating that, because it
19 wasn't really a bankruptcy.

20 MS. MCVEY: They had plenty of money.

21 THE COURT: They had plenty of money.
22 They were just trying to strip it out of one
23 corporation and then make it take the
24 liabilities.

25 MS. MCVEY: That's right. And so what

1 they've done -- and you see it because we've
2 briefed it so carefully. We've given you in
3 these exhibits these charts that kind of flow
4 up and down; we've given you declarations. And
5 what we see is that it continues. They told us
6 LLT is the right one; you don't have to worry
7 about anything.

8 And why we were so worried about getting
9 stuff like that on the record is for this
10 reason: Because now it's dissolved and we have
11 these other two companies that we don't know
12 anything about. And they just say, you should
13 take it. What's the problem? We're good for
14 it.

15 Well, they've already declared bankruptcy
16 twice. We know they've taken the Red River and
17 put the ovarian cancers in that one and they've
18 bankrupted that one. So I don't know --

19 THE COURT: And what are they going to do
20 with Pecos? Is it going to take the meso
21 claims?

22 MS. MCVEY: They say that, but I don't
23 know.

24 THE COURT: Nothing's been done there yet?

25 MS. PEPKE: We served the declaration.

1 The Court should have it as well.

2 MS. MCVEY: It's in the Mr. Kim
3 declaration. I brought that with us, too.

4 The concern is that why are they doing
5 that? They make it so complicated that no one
6 knows who is right or who is wrong.

7 But under our very tough case law -- and
8 they also filed -- let me just mention this,
9 too -- and mind you, late -- an allegation that
10 you should apply Texas law.

11 THE COURT: Weren't they in Texas for a
12 couple of hours?

13 MS. MCVEY: A couple of hours. Your
14 Honor, and we responded to that brief, and I've
15 given it to you. We believe South Carolina law
16 should apply because it sounds in tort. If you
17 believe it sounds in contract, then it
18 certainly shouldn't be Texas; it should be New
19 Jersey law. And if that's the case, that law's
20 even better for us than South Carolina law
21 because it has the product line exception as
22 well. I'm happy to talk to you about New
23 Jersey law if that's what you want to go with,
24 but in my view, they've waived that choice of
25 law argument because they didn't file it until,

1 I think, a couple days ago. So I'm happy to
2 address that if they really want to go into
3 that.

4 But under Nationwide, just with the
5 commonality of ownership, managing directors,
6 everything else, we win on this issue. And on
7 top of that, even if we couldn't establish mere
8 continuation, we believe we win because of the
9 fraudulent intent, why they did this.

10 The last thing -- we cite to it in our
11 papers, but there is a case. Is it the Raymark
12 case? No. It's about Raymark, but it's called
13 Schmoll, S-C-H-M-O-L-L. I'm happy to hand it
14 up to Your Honor. We cited to it in our
15 papers, but it's the same exact thing that
16 happened here.

17 THE COURT: Yes, I had cited that once
18 during argument, but I don't have it right at
19 hand. I'd appreciate it.

20 MS. MCVEY: Absolutely (handing).

21 THE COURT: Yeah.

22 MS. MCVEY: And, Your Honor, in our view,
23 in addition to Nationwide, that case addresses
24 what should happen when this kind of
25 maneuvering is done, totally defeat these

1 asbestos liabilities. And in that case, in the
2 Raymark case, they really were almost out of
3 money. In this case, there's no question that
4 Johnson & Johnson and all its various
5 entities --

6 THE COURT: Well, another thing that
7 you've pointed out in this Schmoll case is
8 "fraudulent" seems to be such a loaded word
9 sometimes, and judges are very reluctant to
10 find fraudulent except in the most extreme
11 circumstances.

12 But fraudulent in this kind of analysis is
13 a proxy for restructuring to escape liability.
14 That is regarded as fraudulent, as I understand
15 the analysis.

16 MS. MCVEY: That's exactly right. And
17 that's what our Nationwide case talks about as
18 well.

19 So, Your Honor, based on the totality of
20 circumstances -- and I certainly don't mean to
21 waive any arguments we've made in our briefs by
22 not arguing to it here, but I know we're a
23 little bit on time so I want to get right to
24 the heart of the matter.

25 THE COURT: I want you to know I finished

1 the previous matter with all of its
2 complexities by 11:00 -- or 11:30.

3 MS. MCVEY: You're kidding.

4 THE COURT: Yes.

5 MS. MCVEY: That's impressive.

6 THE COURT: We got some agreement.

7 MS. MCVEY: I did mention to Mr. Brown
8 that we ought to do as in appellate court and
9 have our little timers sitting right here so we
10 have to get buzzed out.

11 I'm happy to answer any other questions
12 and maybe respond to Ms. Pepke when she comes
13 up, but I just wanted to cut to what I think is
14 the heart of this, the successor liability
15 issue.

16 THE COURT: Thank you.

17 MS. MCVEY: Thank you, Your Honor.

18 THE COURT: Ms. Pepke, so glad to see you
19 again. Welcome back.

20 MS. PEPKE: I'm glad to be here, Your
21 Honor.

22 THE COURT: I really enjoyed you and your
23 colleague trying this case with me.

24 MS. PEPKE: You were a pleasure as well.
25 Thank you.

1 THE COURT: Thank you.

2 MS. PEPKE: I will try to be as brief as
3 Ms. McVey, but I may take just a hair longer
4 because there's a lot to parse through here.

5 I want to emphasize to begin with
6 something that seems to be overlooked quite a
7 bit or brushed aside.

8 Plaintiffs have a verdict against
9 Johnson & Johnson. Johnson & Johnson has never
10 declared bankruptcy. They are going to have
11 their judgment fulfilled if it holds up. There
12 is simply no question about that.

13 As to the successor liability issues, Your
14 Honor, the work has largely been done for the
15 Court if the Court chooses to exercise comity
16 by the Third Circuit and if the Court would
17 also look to the Washington State court and the
18 California courts, two California courts, who
19 have extensively analyzed this transaction and
20 found that there is no fraud of the type that
21 you're talking about in terms of trying to
22 avoid creditors or defeat creditors. And in
23 the Washington and California courts -- and
24 those opinions are attached to A, B, and C to
25 our motion. I can pass them up if you'd

1 like -- they did a successor liability analysis
2 applying the same four factors that South
3 Carolina applies, and they found no successor
4 liability.

5 And we would urge Your Honor to please,
6 you know, look at those, especially the Third
7 Circuit. I'm going to hit some of the
8 highlights of that, because in the interest of
9 comity, I think it's very difficult to reach
10 any other decision here without casting an
11 aspersion or rejecting findings the Third
12 Circuit has made.

13 As Ms. McVey said, we did raise a choice
14 of law issue. I'm not going to spend a lot of
15 time on that. I do think the Court has an
16 obligation to look at choice of law. I don't
17 know that it was right or recall ever we were
18 required to address it before now, because it
19 was not in the jury instructions. It wasn't
20 required. The first time choice of law came up
21 in any substance was here. We raised it. I
22 encourage Your Honor to make that decision, but
23 also visit, as Ms. McVey did, on Texas law.

24 MS. MCVEY: South Carolina.

25 MS. PEPKE: South Carolina law.

1 I will note, however, that Texas law, the
2 part where they did the divisional merger, is a
3 legitimate law that the Third Circuit has
4 absolutely recognized as a legitimate way to
5 organize and reorganize a corporation. In
6 fact, what the Third Circuit says about that is
7 that no one doubts that the Texas state law
8 divisional merger did, in fact, pass talc
9 liabilities to LTL.

10 And why in this court would we recognize
11 the effectiveness of this state law
12 transaction, but at the same time ignore other
13 transactions that funded LTL's assets?

14 And from that, the Third Circuit finds
15 that because of that transaction, the debts
16 allocated -- the transaction allocated LTL
17 responsibility for essentially all liabilities
18 of old consumer, JJCI, tied to talc-related
19 claims. That meant, among other things, it
20 would take the place of Old JJCI in the current
21 and future talc lawsuits.

22 HoldCo, by contrast, inherited, quote,
23 none of Old JJCI's talc-related liabilities.
24 That's the Third Circuit 64 F.4th 84, 2023
25 opinion.

1 And as they concluded -- this is the
2 bankruptcy court in New Jersey -- it is LLT who
3 is the proper defendant and can and should be
4 substituted for Old JJCI.

5 Now, on those points, that the whole
6 divisional merger is a legitimate
7 reorganizational approach for companies to take
8 in Texas, plaintiffs failed to explain why any
9 other conclusion should be reached.

10 Now, under South Carolina law, the general
11 rule, of course, is that when a company sells
12 its assets to another company, the acquiring
13 company is not liable for the debts of the
14 selling company. The Simmons case, of course,
15 states that.

16 And plaintiffs and I actually agree on
17 another point. Nationwide is very important,
18 and I encourage the Court, again, to spend time
19 with Nationwide, because in that case, it was
20 reviewing a lower court case in which the lower
21 court has said we can look at continuity of
22 management, continuity of officers, or
23 continuity of ownership. And Nationwide says,
24 oh, no, no, no. Our prior case law in Simmons
25 says there's a conjunction there, not a

1 disjunction. It's continuity of management,
2 continuity of officers, and ownership. And
3 ownership is very important. And when I get to
4 that step, I'll tell you why.

5 But let's start at the beginning, the four
6 exceptions to the general rule in South
7 Carolina. First, of course, are the expressed
8 and implied assumption of liabilities. And
9 that's what we have with LLT and now Pecos
10 River. And I'll get to Pecos River in more
11 substance later. But there's an express
12 assumption of those liabilities.

13 So there isn't a question as to successor
14 liability in LLT and Pecos River. It's
15 responsible at least for the compensatory part
16 of the damages.

17 On the second and third exceptions,
18 they've really been collapsed under South
19 Carolina law, and under most states' law.
20 That's the mere continuation of a de facto
21 merger exception. And this is the Nationwide
22 case. That was the exception that Nationwide
23 was examining. Look at continuity of
24 management, of personnel, and of ownership.

25 Now, here we look at each corporation

1 separately, so we have HoldCo we need to make a
2 decision for and Kenvue we need to make a
3 decision for. And they are different, and we
4 can't lump them together.

5 On HoldCo, there has been no showing of
6 the continuity of personnel or employees. It
7 is a holding company. It has no day-to-day
8 operations.

9 Now, plaintiffs keep comparing Old JJCI to
10 New JJCI and saying that does it. If we
11 compare these two, that gets us there. But no.
12 The comparison is Old JJCI to HoldCo, Old JJCI
13 to Kenvue. And we can't collapse, and that's
14 what happens throughout the brief. They say,
15 well, HoldCo or Kenvue have the same managers
16 and officers as Johnson & Johnson in their
17 consumer division.

18 Well, that's not the right comparison.
19 We've got to be real careful that we're
20 comparing the right entities, because Kenvue
21 had its own board separate from JJCI, from Old
22 JJCI. Kenvue has its own investors. It has
23 its separate portfolio of brands, operations,
24 and employees. That's Plaintiff's Exhibit 10,
25 the Mongon deposition.

1 But most importantly, as the Nationwide
2 court did, I encourage the Court to focus on
3 ownership, because Kenvue is a publicly traded
4 company. Old JJCI was a wholly owned
5 subsidiary of Johnson & Johnson. Kenvue is
6 publicly traded, and J&J maintains a minority
7 shareholder position in Kenvue. That's
8 Plaintiff's Exhibit 29. That's Kenvue's S4
9 from 2023. I believe October 2023, but I'm not
10 sure what month.

11 So we do not have continuity --

12 THE COURT: So what did HoldCo have?

13 MS. PEPKE: HoldCo is a holding company.

14 THE COURT: Well, what is it holding?

15 MS. PEPKE: It holds interest in other
16 companies. And so it receives --

17 THE COURT: Like what?

18 MS. PEPKE: It receives dividends. I wish
19 I knew all of its assets --

20 THE COURT: But they're all
21 Johnson & Johnson-related entities.

22 MS. PEPKE: Yes, they are all
23 Johnson & Johnson-related entities.

24 THE COURT: Right. And what's excluded
25 from its holdings?

1 MS. PEPKE: I don't know how to answer
2 what's excluded from its holdings, but I do
3 know --

4 THE COURT: Well, J&J used to be just one
5 company. And there came a time, the plaintiffs
6 contend, for purposes of escaping liability and
7 insulating the big J&J and its assets as much
8 as possible from these talc/asbestos lawsuits.
9 So they created this series of companies.
10 That's their theory. And they say there's
11 continuity of interest and continuity of
12 management, continuity of control, whatever --
13 continuity in every way with these companies.

14 But what was their purpose?

15 MS. PEPKE: Well, their purpose -- I'm
16 going to quote you what the Third Circuit found
17 their purpose to be. And they actually found
18 their third -- their purpose to be a legitimate
19 purpose.

20 THE COURT: Which was what?

21 MS. PEPKE: It is -- I'm going to quote
22 it.

23 "It is a valid bankruptcy purpose because
24 it sought to resolve talc liabilities by
25 creating a trust, a 524(g) trust, for the

1 benefit of claimants."

2 THE COURT: All right.

3 MS. PEPKE: So it operated under the
4 bankruptcy code and it found that to be a
5 legitimate interest. It also --

6 THE COURT: All right. And then the
7 bankruptcy court disapproved it.

8 MS. PEPKE: No. I'm sorry, Your Honor. I
9 respectfully disagree. The bankruptcy court
10 and the Third Circuit both agree that that is a
11 valid reason to do it. What they found -- let
12 me back up one second.

13 Let me define good faith for you, how the
14 court in the Third Circuit defined it, because
15 it's important.

16 In a Chapter 11 bankruptcy case, it can't
17 be dismissed if it was not filed in, quote,
18 good faith. But "good faith" is somewhat of a
19 misnomer in bankruptcy law. Subjective intent
20 is not determinative. Rather, good faith
21 requires, among other things, a debtor in
22 financial distress.

23 And that is what they focused on, that it
24 was so well-funded that there was clearly no
25 attempt to evade claimants, that they had

1 plenty of funds to make those payments. They
2 found no bad -- subjective bad faith or intent
3 to defraud claimants.

4 THE COURT: Whether they found bad faith
5 or not, it's kind of like the use of fraud as
6 opposed to escape liability. The purpose was
7 to confine liability to a newly created
8 corporation. And that, the Third Circuit
9 found, was not compatible with the use of
10 bankruptcy law because it wasn't a bankrupt
11 corporation. It had all this money.

12 Now, you choose to put the gloss on that,
13 that that was because they were so well-funded,
14 they could do this anyway. But the bottom-line
15 finding is that it was, in effect, a bad faith
16 activity. It's in that same category of things
17 for which you can ignore the new corporation as
18 a successor. It amounts to the same thing.
19 They were using bankruptcy law concepts to
20 restructure how their liabilities were going to
21 work. And the bankruptcy court said, no, you
22 can't use us to do that.

23 MS. PEPKE: Your Honor --

24 THE COURT: You may think they said they
25 were good people or bad people or what. I

1 think the courts have gotten away from using
2 pejorative terms like "fraud" or "bad faith,"
3 but rather saying the law can't be used this
4 way.

5 MS. PEPKE: Your Honor, I've spent a lot
6 of time worrying about this exact point. And
7 so I have taken an extremely deep dive into
8 this, more than I am comfortable admitting.

9 But we can also -- we must also be very
10 careful not to collapse fraud as it's defined
11 for purposes of the South Carolina exception
12 with bad faith in bankruptcy. They are very,
13 very different things.

14 THE COURT: But our court said in
15 Nationwide, using that very analysis, looking
16 at bad faith and fraud, that some people talk
17 about it that way, but what we simply say is
18 this: You can't do it this way.

19 MS. PEPKE: Well, what they said, Your
20 Honor, is that fraud is -- I believe from
21 Nationwide or Simmons. It's from one of those.
22 "Fraud for purposes of exception is the
23 fraudulent purpose of escaping liability."

24 THE COURT: Escaping liability. And
25 there's no doubt in the world that these things

1 were set up to escape liability, to -- or let's
2 put it in a more -- a way you like better,
3 which is to confine liability in one entity.
4 But that methodology has been disapproved.

5 MS. PEPKE: The methodology --

6 THE COURT: And it's been disapproved on
7 the basis that it was an attempt, an improper
8 attempt, to confine liability to an entity that
9 can't be approved for that in bankruptcy law or
10 here in regular law.

11 MS. PEPKE: I am for the Court to go back
12 and read the New Jersey opinion, the Third
13 Circuit 2023 opinion and the Third Circuit 2024
14 opinion.

15 THE COURT: I promise you I've got both
16 those things so marked up, you wouldn't believe
17 it.

18 MS. PEPKE: I've read them myself, too.

19 THE COURT: They look like my
20 granddaughter Ruthie marked on them.

21 MS. PEPKE: I am firmly convinced that is
22 not what the courts found. What the courts
23 found is they could, in fact, use the Texas
24 divisional merger to achieve that end.

25 In fact, the New Jersey bankruptcy court

1 said they encouraged it. The only problem was
2 that there was too much funding at the time.
3 But -- this is what the New Jersey court
4 says -- they applauded doing it this way, and
5 they originally approved this because the
6 benefits of the bankruptcy trust under 524(g)
7 compared to mass tort litigation were
8 significant:

9 "1, the possibility it could resolve
10 claims more quickly from a cost and time
11 perspective. 2" -- I'm quoting from the court.

12 THE COURT: Well, what were they referring
13 to when they talked about mass tort litigation?
14 I'll tell you exactly what they were referring
15 to there. Not the case we're trying here, the
16 mesothelioma case. They're talking about the
17 ovarian cases. And that's the way it now
18 stands, that what they're trying to do is
19 confine the ovarian to some kind of mass tort
20 resolution. Meso sits out there just kind of
21 flapping in the wind in all this reorganization
22 left with a hole, if you all have your way
23 about it.

24 MS. PEPKE: At the time of this opinion,
25 they were talking about both mesothelioma and

1 ovarian.

2 THE COURT: That's not what's happening
3 now, though.

4 MS. PEPKE: We can get to that in a
5 second.

6 But the point is these courts said you
7 can, in fact, use the divisional merger in
8 Texas to achieve this end.

9 THE COURT: I understand the way you
10 looked at it.

11 MS. PEPKE: Well, Your Honor, I would
12 suggest and firmly believe that the fraud, as
13 it's defined for purposes of exceptions,
14 successor liability absolutely has not been
15 met. And that is what Washington has found,
16 the court in Washington; that is what the two
17 California courts have found, that there is
18 absolutely no evidence of attempt to avoid --
19 and I'm passing those three cases -- attempts
20 to avoid (handing) --

21 THE COURT: Thank you, ma'am.

22 MS. PEPKE: -- satisfying their creditors'
23 debts. There has been no finding by the Third
24 Circuit, the New Jersey bankruptcy court, the
25 Washington court, or the two California courts

1 that there has been fraud or an attempt to
2 evade paying those debts.

3 And I do get very passionate about that
4 because I truly believe it. It was a way to
5 reorganize. That is what Chapter 11 is. This
6 is not a dissolution under Chapter 7. It is a
7 reorganization and an establishment of a trust.

8 So, Your Honor, that's why you've got to
9 be very careful when, in plaintiffs' brief, for
10 example, plaintiffs said -- they cite to
11 Exhibit 7, which is a memo on this Project
12 Plato reorganization. And the plaintiffs
13 characterize it as "stating a purpose of
14 avoiding talc liabilities."

15 And that's just wrong. First of all, the
16 memo doesn't say it. Second of all, it says
17 it's to fund LLT so that the claims can be
18 satisfied and administered through the
19 bankruptcy court.

20 THE COURT: But it is an attempt -- if all
21 this had not taken place, you'd have big J&J up
22 there, just like big Janssen, responsible for
23 their own torts. There's no question but what
24 these torts, in the finding of the jury, were
25 committed by J&J. And there's no question but

1 what the vast bulk of the information that came
2 before the Court for consideration and before
3 the jury was information about the activities
4 of J&J well before any of this took place.

5 What possible reason could there be? It's
6 not the goodness of their heart to make funds
7 available. Funds are available if you've got
8 the big J&J, completely available. So then
9 what was the purpose of creating these various
10 different corporations and confining the
11 liability of -- all liability of J&J, taking
12 that liability out of J&J? They're no longer
13 responsible under -- in fact, old J&J doesn't
14 exist anymore -- taking J&J's liability and
15 putting it in some new entity which will be
16 funded only as they see fit to fund it.

17 They can't be -- that's not done for any
18 benefit to creditors. That is done for the
19 benefit of Johnson & Johnson. It has to be.

20 MS. PEPKE: That is not what the
21 bankruptcy court found. That is simply not.
22 They said there was a benefit to the creditors.
23 What the bankruptcy court did is they --

24 THE COURT: What was the benefit they
25 found to the creditors?

1 MS. PEPKE: What the bankruptcy court did
2 is they looked at every verdict, every verdict
3 that had come down. And they said, well, this
4 many have been defense verdicts. This many
5 have been in this range. Then you have some
6 runaway ones over here. Then they're all
7 getting appealed, and then they're getting
8 reversed, and we're going back down.

9 And the bankruptcy court said there is a
10 legitimate interest, the claimant's interest,
11 as well as --

12 THE COURT: And tell me what that interest
13 is when they had a complete access to all these
14 funds on an unlimited basis when it was all in
15 Old JJCI or whatever you call it and
16 Johnson & Johnson. What possible benefit could
17 it be to the --

18 I mean, that's a very attenuated sort of
19 thing by going through all the verdicts and
20 saying which one is good and which one is bad,
21 and which ones they're going to win and which
22 ones they're going to lose. The plaintiffs
23 don't care about that. All they care about,
24 the claimants, is having the funds of the
25 entity that caused the tort to occur available.

1 And this is an attempt to limit that.

2 MS. PEPKE: First, Your Honor, there is no
3 limit on the J&J. J&J is not part of this.
4 Johnson & Johnson is separate apart from this
5 bankruptcy. It is -- their liability is to
6 Johnson & Johnson. It does not run through
7 LLT. That's why I led with that. That's over
8 here. It's not tied up in this.

9 THE COURT: Yes, but they transferred
10 these claims to this, to something other than
11 Johnson & Johnson.

12 MS. PEPKE: Johnson & Johnson did not.
13 JJCI did. Johnson & Johnson --

14 THE COURT: No matter who did it, it's no
15 longer in Johnson & Johnson.

16 MS. PEPKE: No. The claims before 1979 --
17 Mr. Perry was born before 1979 and used
18 Johnson's Baby Powder before 1979 -- those are
19 directly to Johnson & Johnson.

20 MS. MCVEY: But after.

21 MS. PEPKE: It's everything after, but the
22 jury didn't distinguish and have a judgment
23 against Johnson & Johnson.

24 THE COURT: Now, Ms. McVey.

25 MS. MCVEY: I'm sorry. I was just trying

1 to help.

2 THE COURT: Don't help.

3 MS. MCVEY: My apologies.

4 MS. PEPKE: I'm going to again quote what
5 the bankruptcy said about the benefits to the
6 claimants.

7 THE COURT: Well, I think we know what
8 your position is. Let's move on.

9 MS. PEPKE: All right. Moving on.

10 I do not think the exceptions have been
11 met. They are the same exceptions that were
12 applied by the courts that I just passed up to
13 you. We encourage the Court to follow those
14 rulings.

15 Amalgamation was also raised in the brief.
16 Ms. McVey did not address it. I don't
17 necessarily know that we need to. It's pretty
18 focused extensively in the briefs. It is a
19 very different thing. It has to do more with
20 enterprises and ongoing companies that are all
21 in existence, and it doesn't really fit the
22 facts here.

23 The last thing in their brief is discovery
24 sanctions. I can address that.

25 Or do you want to do that?

1 MS. MCVEY: I just want to speak to it.
2 You can address it now, but I really want to
3 speak to it since some of the evidence has come
4 in after -- however you want to do it. I can
5 speak to it first. The Perry depositions of
6 HoldCo and Kenvue. Does that make sense?

7 MS. PEPKE: Yes.

8 So the discovery sanctions they requested
9 are -- first of all, there should be no
10 sanctions. And the reason for that is that if
11 you look at their successor liability brief,
12 99 percent of it relies on evidence they
13 already have. There are about 10 citations to
14 the discovery deposition ordered in the middle
15 of trial, the one that John Kim showed up for
16 as representative of HoldCo and Kenvue. And
17 all of those citations are either just saying
18 that it occurred or it was produced or what he
19 said. But anything substantive was also
20 supported by something they already had. Okay?
21 So they had what they needed for this.

22 Now, but the sanctions they asked for
23 would require this Court to make findings that
24 simply are not supported by the facts. So the
25 sanctions -- even if Your Honor found a

1 discovery violation, it would not be the
2 sanctions they're asking for, which is actually
3 for a court of law to find facts that are
4 flatly contrary to what the documents say.

5 MS. MCVEY: I'm going to withdraw our
6 motion for sanctions, but additional discovery.
7 I should have made that clear. I'm sorry.
8 Sorry, sorry, sorry.

9 MS. PEPKE: So that -- okay. They've
10 withdrawn their sanctions. I'll suggest it was
11 because of my beautiful argument --

12 MS. MCVEY: It was. It was.

13 MS. PEPKE: -- when we talked to the
14 client.

15 I think what Ms. McVey is referring to,
16 and she did mention it in her argument, that
17 after -- right around the time that the verdict
18 came down, there was another corporate
19 reorganization where LLT -- I actually
20 diagrammed it. No one wants to see this. It
21 took me a minute.

22 But LLT underwent another divisional
23 merger under Texas law. The end result was
24 three different corporations: Red River, which
25 took the talc ovarian claims and in a

1 prepackaged -- and that means that the majority
2 of the plaintiffs involved agreed with this
3 bankruptcy -- are taking it to the bankruptcy
4 court. I think there was a hearing on Friday.
5 There's another hearing today, right now, to
6 see if that's going to be approved.

7 But then they put the talc mesothelioma
8 liabilities into Pecos River. And all of those
9 agreements, the funding agreements, the
10 obligations to pay, they took those in from LLT
11 as to the mesothelioma.

12 THE COURT: Let me just ask you a
13 question, a simple question, that I still don't
14 understand the answer to.

15 What's the purpose of putting these claims
16 in various things and then bankrupting them?
17 The purpose is, as I understand it, not just to
18 limit claims; the purpose is to put holds on
19 litigation for bankrupt corporations. That's
20 the part of it that, to me, is the most
21 egregious, because I've lived through that in
22 these dockets. I finally got McBrayer/Hood
23 settled. That was one of the older cases that
24 we had on the docket, and it was delayed for
25 years because of holds that were generated by

1 activity on J&J's part that was geared towards
2 trying to use bankruptcy as a means of managing
3 its exposure in meso litigation. And I don't
4 think that's appropriate under any point of
5 view.

6 I won't point fingers and call it
7 fraudulent or something like that, but it's not
8 any kind of proper corporate purpose that
9 serves anything other than trying to limit its
10 liability, and evade its liability, and evade
11 even coming to terms with that in the trial.
12 And that's what's influencing a lot of my
13 thinking here, to be quite honest with you.

14 MS. PEPKE: I hear you. I think we need
15 to be careful between -- again, the words --
16 words matter, right? That's our profession.
17 Words matter.

18 It is not improper to attempt to manage
19 your liabilities.

20 THE COURT: But it's improper to try to
21 escape established liability after that
22 established liability occurs by trying to
23 manipulate your corporate existence to avoid
24 trial on issues and to avoid liability on
25 issues or limit the amount of liability on

1 issues. And Nationwide says that quite
2 clearly.

3 MS. PEPKE: Well, if the trial hadn't
4 happened, there hadn't been established
5 liability. So but --

6 THE COURT: The case -- a piece of
7 litigation -- let's not talk about trial yet.
8 Let's talk about the frustration that is felt
9 of having a normal litigation docket ground to
10 a halt by activity that in the end turns out to
11 not have been proper. It never should have
12 been put on hold. It wasn't a proper
13 bankruptcy.

14 MS. PEPKE: Your Honor, a review of the
15 documents will clearly support a finding that
16 that was not the -- the intent of doing this
17 wasn't to gain some kind of --

18 THE COURT: Intent doesn't get into it if
19 you use the analysis that Nationwide is talking
20 about. It can be one way of divining whether
21 something is fraudulent. But the other is with
22 the intent or effect of avoiding liability,
23 legitimate liability.

24 MS. PEPKE: There was never -- there is no
25 document that supports a conclusion that it was

1 an attempt to avoid liability.

2 Now, the stay was a result of the
3 bankruptcy, but that was not the objective of
4 the bankruptcy. The objective of the
5 bankruptcy was to manage the liabilities.

6 THE COURT: Translation: Limit the
7 liability.

8 MS. PEPKE: Manage, resolve them more
9 quickly overall.

10 I understand Your Honor is focused on this
11 kind of time, right, these three years that you
12 were affected. I get that.

13 What the company and the bankruptcy courts
14 and JJCI and J&J are looking at is this
15 timeline.

16 THE COURT: Well, if you look at that
17 timeline again, Ms. Pepke, the problem I've got
18 with this is that if you look at that timeline
19 and there were none of these various corporate
20 reorganizations, the plaintiff would have the
21 same recourse that it always had to
22 Johnson & Johnson or Old JJCI, whatever it is.
23 It would have unlimited recourse not affected
24 by what they've gotten -- verdicts they got in
25 other places or by holds, by bankruptcy, or

1 anything else. And this activity of trying to
2 change the corporate forms was intended to
3 limit that or had the effect of limiting that.
4 It has --

5 And limiting takes a lot of forms. It
6 takes the form of delaying trials. And people
7 die during the meantime. It has the effect of
8 lowering their horizons for possible settlement
9 of the case or their horizons for how they
10 could go before a jury and actually get an
11 award, an impact sometimes far greater if
12 they're still alive when they go to the jury.

13 So I'm looking at the very practical
14 things that have occurred in this particular
15 docket and this particular case that we're
16 talking about right now because of the
17 manipulations of change in corporate structure.
18 And I'm not saying it's sinful or anything
19 else, but I am saying that it is the classic to
20 recognize successor liability under these
21 circumstances.

22 MS. PEPKE: We obviously disagree on that
23 point.

24 And as to this case, I would note there
25 was no delay. In fact, this case got tried

1 very quickly. It was not stayed by the
2 bankruptcy. So I would point that out. There
3 is no impact on Mr. Perry because of this.

4 Second of all, while some plaintiffs, Your
5 Honor, might be able to traverse the system and
6 get a verdict and then withstand five more
7 years on appeal, and then maybe get tossed back
8 down to start all over, what the bankruptcy
9 court does when they put these funds in a trust
10 is they even it out. We're going to --
11 everyone is going to have their claims paid if
12 they meet the parameters of the bankruptcy
13 trust fund.

14 So there's not zeros in these \$250 billion
15 verdicts that we kind of even it out. That's
16 what the court said, it ensures a more balanced
17 recovery among claimants, and it reserves funds
18 for future claimants. So that's what I was
19 talking about. I know it's easy to focus here,
20 but the bankruptcy court is saying, here,
21 because mesothelioma has a huge latency period.

22 THE COURT: Absolutely.

23 MS. PEPKE: So we're not -- we're going to
24 still see these. And the bankruptcy court
25 says, absolutely, it's legitimate to create a

1 fund that is going to exist and will be funded
2 and will cover this instead of this.

3 THE COURT: But you're saying the
4 bankruptcy court disapproved it because they
5 said all that was legitimate, but they put too
6 much money in it?

7 MS. PEPKE: That is precisely what they
8 said.

9 THE COURT: I know that's what you say
10 they said.

11 MS. PEPKE: I am not going to get you off
12 of that.

13 THE COURT: That's right. Ms. Pepke, I
14 think we've gone around the same barn a couple
15 times here.

16 MS. PEPKE: We are. I actually don't know
17 how we got back there. I was going to try to
18 talk about Pecos River.

19 Well, I'll let you say it, but I think
20 they're going to ask for more discovery related
21 to Pecos River. I did file a declaration that
22 set forth the transaction, but I'll let
23 Ms. McVey address that.

24 MS. MCVEY: Thank you.

25 Your Honor, I find it -- it's hard for me.

1 I have a lot of big feelings about this
2 bankruptcy, so I want to be careful how I say
3 this.

4 But the bankruptcy judge doesn't get to
5 take away, say, good job, Johnson & Johnson,
6 you had a gabillion dollars. You had a
7 gabillion dollars. You could pay all these
8 claimants. But because you had so much money,
9 we're going to take it away.

10 What a bankruptcy does is it doesn't pay
11 the cases that have merit. It says whether you
12 have a case that has merit or not, everybody
13 gets pennies on the dollar. Be happy. What
14 are you whining about? Be happy. Everybody
15 gets pennies on the dollar. It's better for
16 everybody. Look how efficient this is.

17 It's outrageous. It's actually
18 outrageous.

19 And so this idea that Johnson & Johnson
20 and JJCI should be rewarded for this behavior,
21 when they have more money than they could ever
22 get rid of, no matter how many verdicts they
23 get, is outrageous. And so I want to push back
24 on that.

25 And I just wanted to quote from the Third

1 Circuit, the 2023 order about this.

2 "Simply put, a debtor does not meet the
3 more exacting gateway requirement and limited
4 by this circuit with respect to good faith,
5 which would allow LTL to take advantage of the
6 tools available under the bankruptcy code to
7 resolve its present and future talc
8 liabilities. Therefore, for the reasons
9 expressed below, the Court grants the motion
10 seeking dismissal of the within bankruptcy
11 proceeding as having been filed in bad faith."

12 That's what they said.

13 So whether the bankruptcy -- and, look,
14 Judge Kaplan, I think, is a very smart guy in
15 New Jersey, but he believes that bankruptcy
16 should be for everybody because everybody gets
17 paid. That's not what our Constitution says,
18 and it shouldn't be allowed to happen here.

19 Now, Mr. Perry's case has not been delayed
20 by bankruptcy yet -- yet. But I will remind
21 you that after we had posttrial hearings in the
22 Plant case, Whittaker, Clark & Daniels declared
23 bankruptcy before you entered your order.
24 Johnson & Johnson stood up and said, LTL is the
25 right people. Don't worry about it. And the

1 day we got our verdict, it's dissolved.

2 So they put forth these declarations that
3 say, What is your problem? Why are you guys
4 always whining? We're telling you who the
5 right people are. And then they dissolve them.
6 I have no idea what Pecos has or doesn't have.
7 They've put a declaration about all of these
8 entities as we've gone along and all of a
9 sudden, magically, they disappear again.

10 So the Washington and Oregon courts, those
11 court orders came down before -- the Kenvue and
12 HoldCo 30(b)(6) depositions, the first time
13 those were ever done was in the Perry case.
14 And you remember when we had one, you had a
15 hearing motion to compel. They took it on a
16 Saturday while we were in trial during this
17 case, and we still didn't get all the answers
18 that we needed. They still weren't clear. And
19 we filed a subsequent motion in McBrayer and we
20 resolved that case, and so that has been denied
21 as moot.

22 But now they want to substitute out these
23 folks as the successors, if that's what you
24 determine. I have no idea what they are. So I
25 think we can do discovery on Pecos and whoever

1 else they're saying should be in here.

2 But for our purposes of today, because I
3 think a judgment has to be entered quickly in
4 this case if you're going to enter one, and I
5 know you're going to hear all the posttrial
6 motions, because I don't know what they're
7 going to do next.

8 We have proven mere continuation. There's
9 overlapping ownership, substantial overlapping
10 ownership. When you look at it in the
11 deposition, in one place it says 90 percent.
12 Other places it says 80.1 percent. You'll see
13 it all in those exhibits. But we have proven
14 mere continuation. And we have certainly
15 proven that the changing of corporate hats is
16 tainted by such fraudulent intent to defeat
17 these creditors. That's what they've been
18 trying to do.

19 And so they kept saying, listen,
20 Johnson & Johnson is not a big deal. You have
21 a verdict against Johnson & Johnson. But
22 remember what happened when JJCI went through
23 all this divisional merger, and then LTL went
24 to bankruptcy? They also put a hold against
25 any case against Johnson & Johnson. It'll get

1 tucked up into the bankruptcy estate. That's
2 what Whittaker, Clark & Daniels has done for
3 Brenntag and all these other ones in the
4 bankruptcy estate. That's what they're doing.

5 I don't know what they're going to do. I
6 hope -- I really hope they don't declare
7 bankruptcy again for these talc mesotheliomas.
8 It would be an injustice. But we are entitled
9 to have successor liability found because we've
10 proven it and have a judgment entered so we can
11 attempt to collect for our plaintiff as we go
12 through this appellate process.

13 THE COURT: Thank you, Ms. McVey.

14 MS. MCVEY: Thank you.

15 THE COURT: All right. Okay. J&J's mode
16 of trial, successor liability. All right.

17 Next, J&J's motion for JNOV.

18 MR. BROWN: May it please the Court, Your
19 Honor.

20 THE COURT: Yes, sir.

21 MR. BROWN: Mitch Brown. I was going to
22 talk about some of these new trial bases and
23 one directed verdict bases. We're not going to
24 raise, obviously, all the different arguments
25 in this hearing, Your Honor, that we have in

1 our briefing, so we'll rely on the briefing for
2 those.

3 But I want to say one quick thing about
4 what was said that I thought was important
5 about the prior argument. One is it doesn't
6 matter to Mr. Perry yet. So we're talking
7 about something that hasn't affected Mr. Perry
8 and their speculation that it might affect
9 Mr. Perry. I would suggest the Court could
10 simply deal with this, depending on what the
11 Court does. If the Court grants our motions
12 and eliminates this verdict, there's nothing to
13 do on any of that that you just heard for an
14 hour and 15 minutes.

15 If the Court does something else with the
16 verdict, you can deal with it with a binding
17 question. You still don't need to get into
18 this whole, you know, looking behind what the
19 bankruptcy courts are doing and trying to
20 figure out whether they're doing that correctly
21 or not. That's all their job.

22 Nobody can stop the fact that the federal
23 statute creates a stay when somebody files a
24 bankruptcy. It just does. It's not anybody's
25 evil intent. And to the extent anybody says it

1 was an evil intent, that's the bankruptcy
2 court's exclusive jurisdiction to say that
3 wasn't --

4 THE COURT: Yes, but, Mr. Brown,
5 bankruptcies don't come like a deus ex machina
6 out of heaven when someone qualifies. The only
7 way a bankruptcy court gets into this affair at
8 all is for the alleged bankrupt to go to them
9 and ask for what in my day was called "the
10 protection of bankruptcy." That -- in fact,
11 that's what the old petition used to be,
12 Petition for the Protection of Bankruptcy for
13 XYZ Corp.

14 MR. BROWN: I'm just suggesting, Your
15 Honor, that there's a way to deal with
16 Mr. Perry, and there's the lack of necessity to
17 get into all of these things these other courts
18 are literally right now, as I understand it,
19 hearing and dealing with.

20 THE COURT: I mean, they're changing every
21 time. They've changed a couple times, once
22 when the case was -- before the case went to
23 the jury and two times since the case has gone
24 to the jury.

25 MR. BROWN: Well, I'm going to move on if

1 I can, Your Honor, to the JNOV/new trial and
2 the issues. I'm not going to deal with all of
3 them, but I'm going to deal with some of
4 them --

5 THE COURT: All right.

6 MR. BROWN: -- in particular.

7 The first one is -- and what I'd like Your
8 Honor to please do is what I said in the
9 beginning of this hearing, is to keep in mind
10 Your Honor's exclusive powers. All you have to
11 say is "I don't agree with the verdict on the
12 facts." That's literally it for the 13th
13 juror. I mean, it's literally a sentence.

14 I had one of these in Charleston where
15 I -- I won't name this person, a really fine
16 Charleston lawyer had a \$30 million verdict. I
17 got hired to come in on posttrial motions. He
18 hadn't interrupted anything at all that the
19 plaintiff's lawyer had done in closing, and we
20 were left with nothing but the 13th juror
21 doctrine.

22 And the judge said, "I've got to say, this
23 verdict is a runaway verdict and I've got to
24 use the 13th juror doctrine." And when it's
25 used properly, as the Court knows how to use

1 it, it's unassailable, and the Court can do it.
2 And nobody's going to appeal that. Nobody's
3 going to be able to appeal that successfully,
4 and that's the end of it.

5 Now, I would like to ask Your Honor to
6 consider the other arguments which, in our
7 opinion, result in either JNOV or a new trial
8 absolutely. I'd like Your Honor to consider
9 that you have available that 13th juror option
10 to take, and then you don't have to write a
11 hundred-page order, like we filed these
12 hundred-page briefs.

13 The first one I'd like to bring up is the
14 substantial factor causation. I'm going to try
15 to be quick on this, but it's very important.

16 In South Carolina, unlike many other
17 states, we have a strong emphasis on proving
18 probability of causation. Your Honor knows
19 that we don't recognize *res ipsa loquitur*. We
20 don't recognize -- I think Your Honor wrote
21 this case. I can't remember the name of it,
22 but we don't recognize The Lost Chance
23 Doctrine. That's a doctrine -- I think it is
24 in Illinois and some other states. We don't
25 recognize that. Instead, we require

1 probability of causation.

2 And what do we require in a toxic tort
3 case? We require causation in fact. We
4 require proximate cause. We require general
5 causation proof. We require specific causation
6 proof. That proof has to be, in a toxic tort
7 case like this one, expert testimony that is
8 reliable.

9 And Your Honor has presided and I've dealt
10 with and argued the Carter Watson case where it
11 was unreliable expert testimony. And when that
12 was the only testimony supporting liability,
13 the Court correctly said, "We have to enter
14 judgment. That's the only testimony we have in
15 that case."

16 We have substantial factor causation
17 requirement in South Carolina for these toxic
18 tort cases. What does that mean? It's
19 interesting that Mr. Adams stated to the jury,
20 and I'm sure Your Honor remembers this, that it
21 meant anything more than zero. That's not
22 right. That is simply incorrect.

23 The case law is very clear. And I can
24 hand up -- Your Honor is very familiar with
25 these cases. I'm going to hand up, if I can,

1 the Glenn case. Thank you, Your Honor
2 (handling). If you look on page -- at the
3 bottom right, page 7.

4 THE COURT: All right. I got it.

5 MR. BROWN: And I've marked this on the
6 other copy. I gave one to Ms. McVey.

7 In the middle there of the Glenn case,
8 there's this discussion about a restatement of
9 second of torts, and it's a discussion about
10 that restatement with proof. And it says in
11 that little place I've marked:

12 "As the comments of restatement second
13 note, if other actors' conduct is the
14 predominant factor in bringing the harm at
15 issue, then the defendant's action is not a
16 substantial factor in causing the harm and thus
17 it is not the legal cause of the harm."

18 That is important because in this case we
19 had this brake dust evidence. Mr. Adams,
20 apparently misunderstanding, because I think if
21 he understood that, he wouldn't have said what
22 he did. I don't think he would have
23 deliberately misstated what -- what substantial
24 factor causation means to the jury. If he did,
25 that would really be a problem.

1 But I think he just didn't realize that if
2 the fact-finders found that the brake dust was
3 a predominant factor, that meant the talcum
4 powder can't be a substantial factor. And
5 that's the law as stated in Glenn.

6 So what happened in this case? What was
7 the evidence? I think I'd like to refer you to
8 Dr. Haber's testimony. And we'll see, I think,
9 by looking at it that it doesn't conform to
10 South Carolina law. He was a specific
11 causation expert.

12 If I can hand this up, Your Honor.

13 THE COURT: All right.

14 MR. BROWN: (Handing.) This is an excerpt
15 from the trial transcript where he was asked
16 questions. I don't know who was asking him
17 these questions at the deposition. I don't
18 know if it was Mr. Adams or whoever it was.
19 But it's very consistent with what Mr. Adams
20 said to the jury about if it's anything more
21 than zero, which isn't the proper legal stance.

22 And he says -- he's asking Haber: "So if
23 Mr. Perry had some exposure in the background,
24 he had some exposure from brakes, he maybe had
25 some exposure if he had talc, from other talc,

1 what do you do with all those? Do you go back
2 and say certain ones of these don't count or do
3 you do something else?"

4 Well, I just got through reading from
5 Glenn that sometimes you don't count the
6 causation as a factor because it doesn't rise
7 to the level of, quote, substantial factor.
8 That's what I just got through reading.

9 What did Dr. Haber say? He said: "No.
10 As a physician, we consider the cumulative dose
11 as being the causative dose. Because you're
12 breathing in the asbestos, it's causing the
13 damage. We can't decide which asbestos fiber
14 did something and which didn't, so we say the
15 cumulative dose is what caused it."

16 Your Honor, that is just not consistent
17 with the legal standards in South Carolina.

18 There's another page where Mr. -- where
19 Dr. Haber said: "A minimal exposure, a brief
20 exposure, a seemingly inconsequential exposure
21 is capable of causing mesothelioma."

22 These things are complete -- completely
23 contradictory to the legal standard that the
24 court has adopted. He's giving you a doctor's
25 view of what -- of what he thinks, but that's

1 not in conformity with the legal standard. And
2 what we have to say, well, what do you do about
3 that? You've got David Norton's Haskins case.
4 This expert, Bedrosian, testified exactly the
5 same way, Your Honor.

6 THE COURT: That was a big battle about
7 each and every exposure. There's a real big
8 difference analytically about those two things.

9 The Court has made it clear that each and
10 every exposure is not the same thing as
11 substantial exposure. And Norton's case and
12 the times I have discussed it, and frankly the
13 time the Court discussed that particular thing
14 in the very case you've cited to me, Glenn,
15 that was the distinction is you can't get an
16 expert who says that each and every exposure is
17 the absolute cause. It is a cumulative dose.
18 It's the accumulation of all the exposure to a
19 particular product and whether that exposure
20 would be enough to cause mesothelioma.

21 In this case, you had several tons of
22 exposure to Johnson & Johnson baby powder. So
23 it really would not be difficult for the jury
24 to look at exposure from the standpoint of the
25 evidence that was given. And then you look at

1 the charge that I gave on that.

2 MR. BROWN: Your Honor, let me break that
3 down into two things. One thing I should have
4 said when I started off is in the Glenn case
5 and Jolly case and the Stewart case, all of
6 which Your Honor presided over, we're dealing
7 with products that you know for a fact they all
8 contained asbestos: The valve, the gaskets, or
9 the fabric or whatever it had to be. So you
10 knew for a fact that it had that.

11 What we're dealing with in this case,
12 according to the evidence put in in this case,
13 is that some bottles of baby powder may contain
14 an ultra trace of asbestos and some bottles
15 don't contain an ultra trace.

16 THE COURT: That's not the only evidence
17 that was given. That is the consistent
18 approach that Johnson & Johnson has taken to
19 trying these cases. First approach is we never
20 had any asbestos in our talcum powder. And to
21 this good day, that is the basic thing that is
22 said: There is no asbestos in our talc.

23 Their own records belie that in all kinds
24 of ways. Their own records going back years
25 and years ago indicate that they found

1 tremolite and other kinds of asbestos products,
2 because these products -- these minerals occur
3 in combination with asbestos in the natural
4 mining setting.

5 So I don't think, Mr. Brown, it's correct
6 to say that if you show more than one exposure
7 to more than one source of asbestos, that
8 somehow or another that negates the showing
9 that the plaintiff inhaled much, much, much
10 beyond what you would normally expect a normal
11 folk's volume over many years of a product that
12 they put on evidence to show contained
13 asbestos.

14 And, you know, the one -- it's in some
15 bottles; it's not in other bottles. There is
16 that, but there is on the other side of that
17 information that suggests that the mines from
18 which these products were gotten contained
19 asbestos and that over a long period of time, a
20 small bit of this asbestos could cause
21 mesothelioma.

22 And when you couple that with the fact
23 that mesothelioma is a signal cancer, and it is
24 almost always caused by asbestos, then you look
25 at the other sources for Mr. Perry. And one

1 source was 72 or 76 brake jobs as a shade tree
2 mechanic vis-à-vis years and years and years of
3 exposure to Johnson & Johnson's Baby Powder
4 which they contend and the experts contend had
5 asbestos in it.

6 So I don't think it's -- I am not
7 following the notion that somehow all they had
8 by way of proof was some very limited
9 exposures, because I don't think that -- there
10 was a lot of contest on either side about what
11 the exposures were and how much they were. But
12 they had plenty of proof on their side that a
13 jury could use to come to the conclusion that
14 they came to.

15 MR. BROWN: The last point I'm going to
16 make about this, Your Honor, is there were --
17 one, two, three, four -- I think four different
18 cases we cited in briefing where a manufacturer
19 made a product, some of the product contained
20 asbestos and some did not, and there wasn't any
21 ability to tell whether the plaintiff had
22 gotten it from the ones that had the asbestos
23 in it or gotten near the ones that did.

24 All four of those cases we cited in the
25 briefings, the Court said, you're not able to

1 create a triable issue of fact because you
2 can't show probability when you've got this
3 possibility like that.

4 And so those cases say that. And that's
5 very different from Jolly and Glenn and the
6 other cases in which the Court presided where
7 you're talking about frequent, regular,
8 proximate contact with something that everybody
9 says, yeah, it had asbestos in it.

10 Now, what Your Honor has stated, with all
11 due respect, is frequent, regular, proximate
12 cause with Johnson's Baby Powder, but not
13 necessarily with Johnson's Baby Powder that had
14 asbestos in it. That is -- that part of the
15 evidence is missing, Your Honor, in our view.

16 The last point on this one is Dr. Haber,
17 as I've handed up, he literally says, "We
18 consider the cumulative dose as being the
19 causative dose."

20 And the last case I'm going to hand up on
21 this is the Stewart case, where the Supreme
22 Court -- I will say they sure did rule on that
23 quickly. However, they did state that
24 Dr. Frank did not rely on the cumulative dose
25 theory as the basis for his opinion. That is

1 not the same as here.

2 And so, Your Honor, with all of that --

3 THE COURT: Well, but read on what they
4 said: "The trial court properly allowed
5 Dr. Frank to explain to the jury that as the
6 amount of asbestos accumulates in the body, the
7 likelihood of developing mesothelioma
8 increases."

9 MR. BROWN: Yes. And nobody disagrees
10 with that. With that said --

11 THE COURT: That's what this jury was
12 told. They weren't just told about --
13 cumulative dose was one thing that was talked
14 about, but that was elucidated on to talk about
15 what it means if over time you continue to
16 inhale material that contains asbestos. It
17 accumulates, and it gets in the lungs, and it
18 stays there.

19 MR. BROWN: That -- Your Honor, what the
20 cases have held, in my reading and
21 understanding of them, is they have said it's
22 okay to describe the scientific process whereby
23 as -- and this is literally the words of the
24 state Supreme Court -- "As the amount of
25 asbestos accumulates in the body, the

1 likelihood of developing mesothelioma
2 increases."

3 Yes, everyone agrees with that. As
4 asbestos accumulates in the body, the
5 likelihood increases.

6 What Dr. Haber said is something
7 different. He didn't say that background
8 information. He gave that as his specific
9 causation basis: "We consider the cumulative
10 dose as being the causative dose."

11 And that's the point I'm trying to make,
12 Your Honor. Maybe I'm not doing a good job.
13 But when you take the Glenn restatement cite
14 that I gave you where they specifically said,
15 if there's -- in context, if there's a
16 dominating factor, and the jury thinks that
17 that's a dominating factor, the other factor is
18 disregarded as a substantial factor. Haber
19 says you can't do that. He specifically says,
20 "No, you have to count every single fiber."
21 That's what he says.

22 So he is contrary to the law on this
23 topic. And the Court should, at a minimum,
24 grant a new trial on that basis or, as I've
25 already said, the Court can grant a new trial

1 of the 13th juror.

2 This, Your Honor, also will cover, you
3 know, the charging errors that we submitted
4 were made relating to this substantial factor
5 issue. We thought that the Court should have
6 charged that language from Glenn, telling the
7 jury that -- with all due respect, we thought
8 the Court should have said, "Now, jury, if you
9 find that a predominant -- you know, something
10 else was predominant, then you can't find that
11 the other factor is a substantial factor."

12 The reason that was especially important
13 in this case is because of what Mr. Adams,
14 unfortunately, said to the jury several times,
15 where he said, you know, "if it's anything
16 greater than zero." And that's just not right.
17 And so that needs to be -- that would be our
18 first basis.

19 I'm going to let Ms. McVey respond to that
20 unless Your Honor wants me to --

21 THE COURT: No, no.

22 MS. MCVEY: It's going to be Rachel.

23 MS. GROSS: So Your Honor anticipated a
24 lot of my responses, so I'm going to try to go
25 through this as quickly as possible, but a

1 couple of quick things in response to what
2 Mr. Brown just said.

3 I don't want to continue to harp on the
4 successorship issues. That's already been
5 argued by Ms. McVey --

6 THE COURT: Then don't do that.

7 MS. GROSS: Okay.

8 THE COURT: I've got to be home by 5:00
9 today. I'm just telling y'all that.

10 MS. GROSS: The only thing I want to ask,
11 Your Honor, is why do you think they're trying
12 to avoid you ruling on it? They're trying
13 really hard to have Your Honor avoid ruling on
14 the issue, and I just wonder why.

15 The next thing I'll note is Mr. Brown's
16 commentary at the beginning. And I don't know
17 if he was trying to insinuate this, but he used
18 the term "runaway verdict" when trying to tell
19 Your Honor you had the power to be the 13th
20 juror in this case. This wasn't a runaway
21 verdict. It wasn't. The trial record speaks
22 for itself, but we actually asked for more
23 money than what the jury found, a unanimous
24 finding. The jury used their own common sense,
25 and they came and used their best judgment to

1 come to a unanimous verdict.

2 In terms of the substantial factor
3 arguments that Your Honor anticipated a lot of
4 my responses on, this was not a verdict based
5 on res ipsa. The jury didn't unanimously find
6 for Mr. Perry because me and Mr. Adams and
7 Ms. McVey stood up and told them it is because
8 we say it is. That's not what happened here.

9 The first thing I'll say is, when
10 Mr. Adams -- there's this continued
11 recharacterization of what Mr. Adams said in
12 his closing, which Your Honor dealt with when
13 it came up. It was either at the beginning of
14 the day or the end of the day; I don't quite
15 remember. But Ms. McVey explained it to you.
16 What Mr. Adams was doing in that part of the
17 closing was he was commenting on
18 Johnson & Johnson's continued attempt to use
19 the 72 brake jobs as the sole cause of
20 Mr. Perry's mesothelioma, meaning the empty
21 chair. Mr. Adams was commenting on the empty
22 chair defense that Johnson & Johnson persisted
23 in using throughout the entire trial, and
24 that's all. And he didn't say it several
25 times. He said it once. The issue's already

1 been argued in front of Your Honor. You dealt
2 with it, so we can set that aside.

3 What it seems like Johnson & Johnson is
4 continuing to do is what defendants have done
5 in asbestos litigation several times before in
6 South Carolina, which is this continued attempt
7 to try to conflate the each and every opinion
8 with that of substantial factor.

9 Dr. Haber testified to a lot more than
10 what Mr. Brown just argued in terms of
11 substantial factor. Dr. Haber testified about
12 Dr. Hillerdal's peer-reviewed published paper.
13 He testified about reentrainment, what happens
14 when you use a talc powder product in the home
15 that has asbestos in it, and it settles down in
16 the ground, and it's re-stirred up in the air,
17 and you're breathing it over and over and over
18 again and you can't get it out. And he cited a
19 peer-reviewed published paper about that.

20 He testified about the OSHA PEL level, the
21 .1, and how that was never actually designed to
22 make sure that people were safe.

23 He testified that the length and duration
24 of a person's exposure to asbestos matters,
25 especially in the context of a talc powder user

1 like Michael, because the higher dose of
2 exposure to asbestos, it keeps happening over
3 and over and over again because they're not
4 only exposed to it when they're using it on
5 themselves, but because of the concept of
6 reentrainment. It's in the home.

7 He testified about the second paper,
8 another peer-reviewed published piece of
9 literature, where he talked about the levels of
10 exposure for a Johnson's Baby Powder user for
11 four years, and he testified that in that
12 peer-reviewed paper, the exposure level to
13 asbestos is between .38 and 5.18 fibers per
14 cc-years of asbestos exposure, which
15 substantially increases the user's risk of
16 getting mesothelioma, and then compared it to
17 Mr. Perry's use of almost 50 years.

18 Then Dr. Haber testified that his opinion
19 to a reasonable degree of medical certainty was
20 that the range of exposures Mr. Perry had to
21 Johnson's Baby Powder was between .1 to 4
22 fibers per cc of asbestos.

23 Dr. Haber also continued. He testified --
24 I mean, I could go on all day about the things
25 Dr. Haber testified to. He testified, in fact,

1 about the rate exposure. He testified to that
2 and said, yeah, it contributed to his
3 cumulative dose for sure.

4 Then he testified that Michael Perry
5 specifically was an above-average user of
6 Johnson's Baby Powder, that his first exposure
7 to asbestos was from Johnson's Baby Powder.

8 Dr. Haber did a lot more than what we were
9 just told. And the most important thing is
10 that Dr. Haber's cumulative dose testimony is
11 completely consistent with what the court
12 affirmed in Jolly, Dr. Frank did. It's exactly
13 the same. It's not this each and every theory
14 that they're trying to conflate, that they
15 continue to try and conflate, no matter how
16 many times the appellate court here says that's
17 not what they're doing.

18 The Haskins case that Mr. Brown cited,
19 Your Honor already keyed into it. I don't want
20 to spend much time on it. That case is such an
21 outlier. It was cited in Jolly. I believe the
22 Harvard Law Review article that analyzed it and
23 deconstructed it was cited in Jolly, and then
24 Jolly explained why the Haskins case was so
25 wrong. Then it was addressed again in Glenn.

1 Again, what they said about this Haskins
2 case outlier related to Dr. Bedrosian was that
3 the judge was trying to completely limit what
4 you can do in an asbestos case. It's not
5 relevant at all to what happened here.
6 Dr. Haber did not give each and every
7 testimony. He gave cumulative dose testimony,
8 which is consistent with substantial factor.
9 It's been affirmed by the state appellate court
10 several times.

11 To address this issue of, well, plaintiffs
12 have this giant hole in their evidence about
13 this probability that we can't show all the
14 bottles that may have had asbestos in it,
15 everybody's so hung up on Dr. Haber that
16 they're completely forgetting that Dr. Madigan
17 testified. Dr. Madigan is a statistician. He
18 was qualified by this Court as a statistician.
19 And Dr. Madigan actually did explain the
20 concept that while every bottle may not have
21 asbestos in it, here's how you talk about the
22 probability. Remember the Tic Tacs? And he
23 had me take it out and show it to the jury, and
24 say if it's orange, it's this; if it's yellow,
25 it's this. And he explained how binomial

1 distribution works when assessing how many
2 bottles of Johnson's Baby Powder would have had
3 asbestos in it statistically. And then he gave
4 a number. He said 400.

5 So plaintiffs very much did address that
6 concept in the trial. We're just all really
7 focusing on Dr. Haber and completely forgetting
8 about Dr. Madigan.

9 I don't know -- are we going to talk about
10 anything else or --

11 MR. BROWN: Yeah.

12 MS. GROSS: Okay. So I think that's all I
13 needed to say, Your Honor, about what Mr. Brown
14 has raised thus far.

15 THE COURT: Very good.

16 MR. BROWN: Your Honor, what the Tic Tacs
17 doesn't do is it doesn't account for the --
18 whether the ultra trace that may have been in a
19 bottle are -- or more than one bottle, maybe,
20 whether that ultra trace was actually inhaled.
21 That's just -- that's another factor that, you
22 know, you can't do this Tic Tacs thing and put
23 evidence in.

24 THE COURT: Well, did y'all bring that out
25 on cross-examination? No.

1 MR. BROWN: I think we did. Yeah, I think
2 Ms. Bueno did, but anyway.

3 THE COURT: One of the things that's
4 troublesome about this is that you all made the
5 decision not to put on a case. And I think
6 that decision was prefigured pretty clearly by
7 some of the things that happened right before
8 the trial began, including all the dispute
9 about are you going to ever give us the names
10 of your experts. And then as we started the
11 trial, what about the experts?

12 I was trying to do what I always do with
13 these cases, figure out who's going each day.
14 And up until the time that J&J finally
15 announced it was not going to put on a case,
16 there was this continued back-and-forth about
17 who the witness is going to be and whatnot.

18 The characterization that was made by your
19 team was you forced us to do that with all
20 these terrible rulings you made, so we're just
21 not going to put on a case. I don't think the
22 record supports that at all.

23 But be that as it may, a case was not put
24 on. So the experts that are up there, the only
25 ones that are up there are the ones the

1 plaintiffs put up there. And some of these
2 nuances that you're talking about that
3 matter -- and that could have been attacked.
4 He -- you're suggesting a line of attack in the
5 arguments you're making right now, but it
6 wasn't done, because no other experts were
7 offered. And that's the thing that continues
8 to bedevil me when I look at this case, is why
9 in the world you'd do that.

10 MR. BROWN: Your Honor, Ms. Bueno is
11 prepared to talk about this. We can either do
12 that right this second while Your Honor's got
13 it on your mind, but I'm watching the clock.

14 THE COURT: All right.

15 MR. BROWN: And I've got a couple other
16 things.

17 THE COURT: Well, go ahead.

18 MR. BROWN: Okay. So one is we've got to
19 talk about the closing arguments of the
20 plaintiffs' counsel. Mr. Adams obviously was
21 incredibly persuasive with the jury, but we
22 think it's in part because he was making an
23 argument or a series of arguments calculated to
24 arouse passion or prejudice, which is
25 prohibited under South Carolina law.

1 He also -- the other way of saying this
2 was stated in the Branham case. I remember
3 Your Honor arguing that case and Your Honor
4 asking a question of plaintiffs' counsel, "Why
5 did you have to guild the lily?" I remember
6 that as clear as day. And Your Honor could
7 have very well asked that same question in this
8 case many times.

9 In Branham, the Court said if you make an
10 argument designed to inflame the prejudice,
11 then the verdict ends up being passion rather
12 than reason.

13 The Howle versus PYA/Monarch case, which
14 cites to a case called Edwards versus Lawson,
15 which also cites back to the Carver versus
16 Bolton, those cases talk about giving numbers
17 and saying, you know, you're really not
18 supposed to tell the jury my opinion is you
19 ought to award this much or, in my opinion, you
20 should award this much. You have to stress
21 repeatedly to the jury they can do -- you know,
22 they're the finders of fact. And if you give
23 them any type of a per diem analysis or
24 whatever you have to explain, that's all it is,
25 and you're not suggesting that they do a

1 specific number and all of that. And if you
2 do, it's reversible error. He did it over and
3 over.

4 And what I'd like to show Your Honor is
5 that in addition to all of the, you know,
6 things about you couldn't find an expert on
7 earth to come in and help you to -- you know,
8 they were unconscionable, shameful, tried to
9 kill babies and all of this.

10 In addition to that, Ms. Gross mentioned
11 the jury awarded less than they wanted, less
12 than they asked for. I don't think so. I
13 think the jury gave him what he asked for
14 exactly. And here's how I get there. If you
15 look at what the jury awarded, Your Honor, they
16 awarded -- and I tried to figure this out. I
17 spent a good bit of time looking at this thing,
18 because it was weird numbers.

19 But if you look at -- the total actual
20 damage of the verdict was \$32,656,250. All
21 right. The easiest part of figuring out what
22 did they do -- and this goes to grossly
23 excessive verdicts, Your Honor. So I'm
24 transitioning a little bit now from closing
25 argument problems, which I think there are

1 many, to it's a grossly excessive verdict,
2 which requires a new trial, just like the
3 closing arguments require a new trial.

4 When you look at where did they get
5 \$9,618,750 from for the consortium claim
6 verdict? Well, we know exactly where they got
7 it from. It came from Mr. Adams telling them,
8 quote, "I think half of Michael's loss is
9 appropriate. That's what I think." He did
10 say, "You could do more, you could do less, you
11 could do anything," but he said, "That's what I
12 think."

13 Now, when you say, well, what did they
14 put? They put exactly half of the noneconomic
15 damages to Mr. Perry. That is not based --
16 that's not a verdict based on Your Honor's
17 instructions. Your Honor instructed the jury
18 to consider the services, the loss of society,
19 and all the things Your Honor told the jury.
20 And instead they didn't do that. They just
21 said, well, you know, Mr. Adams, very
22 four-square and persuasive, he said put half;
23 so that's what we're doing, put half.

24 That is not a proper verdict, Your Honor.
25 It has to be jettisoned.

1 So then you look at the next thing. Where
2 did \$19,237,500 in noneconomic damages come
3 from? Well, that one was a puzzle for a little
4 bit, but I think I know where it came from. If
5 you multiply \$750,000 times the mortality
6 tables, 25.65 years, you multiply those two
7 numbers, you get that exact number. Okay. So
8 why did they -- why did they put 750,000
9 instead of what Mr. Adams said, 2 million per
10 year?

11 Well, the reason is Your Honor instructed
12 them that they must reduce future damages to
13 present value. And so you say, well, what were
14 they trying to do? How were they trying to
15 reduce the present value? When the AII folks
16 had the economist testify, and he came up and
17 testified, he talked about present value
18 formulas and using zero-coupon bonds, and he
19 talked about ranges or percentages that you
20 would use for present value, one of which is
21 3.75. I don't know that he used that exact
22 number, but he talked about a range. If you
23 put 3.75 in there, it comes out to 750,000.

24 I mean, so I think that's what the jury
25 did. They gave him exactly what Mr. Adams

1 asked for. The only thing they didn't give
2 what he asked for was the punitive damages
3 amount, but on all the rest of it, they gave
4 him exactly what he asked for.

5 Your Honor told them arguments are not
6 evidence. You have to base your verdict on
7 evidence. You can't base it on an argument.
8 And he just said, I think you should put these
9 numbers in, and that's what they did.

10 And so, Your Honor, we think for all those
11 reasons, it's got to be a new trial. And even
12 on the last one, 3.8 million for economic
13 damages, where did that come from? Mr. Adams
14 asked -- he literally said, "I think the number
15 you should write down is 3.8 million." Where
16 he got that from was taking the J&J past and
17 future economic damages stipulation, which was
18 3.2 -- 329,700 -- I'm sorry. That's not right.

19 Anyway, he took the J&J past and future
20 economic damages stipulation and he added it to
21 the stipulation that AII made about 510,000.
22 And when he added those two things together, he
23 got 3.8. And he told the jury, "You need to
24 put 3.8 in that blank." That's what they
25 wrote.

1 So, Your Honor, for all those reasons --
2 they disobeyed the Court's instructions. I
3 agree with you, they seemed to be attentive,
4 but what they were really attentive to was
5 Mr. Adams.

6 THE COURT: How about the punitive
7 damages?

8 MR. BROWN: Punitive damages, I think
9 Ms. Bueno is prepared for that.

10 THE COURT: All right. Ms. Bueno.

11 MS. BUENO: Good afternoon, Your Honor.

12 THE COURT: Good afternoon. Welcome back.

13 MS. BUENO: Thank you. Nice to be here.

14 I will address punitive damages. I will
15 also address the tissue testing issue. I will
16 address the spontaneous mesothelioma
17 case-specific opinions that were struck
18 pretrial. And after all of that, I will talk
19 about your question about bringing the case.

20 THE COURT: Okay. It's got to be clip,
21 clip, clip.

22 MS. BUENO: I will do that.

23 Let's start with punitive damages. This
24 is outlined starting on page 74 of our brief.
25 I think the brief tells you what our arguments

1 are, but here is what -- and Mr. Brown already
2 covered some of the issues that are outlined.

3 The general principles governing
4 punitives, we talked about three different
5 areas or considerations. Number one is
6 reprehensibility, number two is ratio, and
7 number three is comparable civil penalties.

8 Under each of those topics, we believe
9 that the punitive verdict shocks the conscience
10 and should be overturned.

11 So here, starting with the comparable
12 civil penalties. Plaintiffs, in their
13 response, they cite several other verdicts that
14 they say should allow the Court to find that
15 this verdict was comparable. One of the ones
16 they cite, the Lee case up in Oregon, was
17 vacated recently. I know Your Honor is aware
18 of that. That was vacated. The Garcia case,
19 which they cite, which was a Cook County case
20 earlier this year, that is currently being
21 considered by Judge Sherlock there after
22 posttrial arguments, and we are hopeful that
23 that verdict will either be remitted or
24 overturned and vacated as well. And the Lanzo
25 case, which they cite from New Jersey, was

1 reversed on appeal.

2 So I point that out only to say that when
3 we're looking at comparable verdicts, it's
4 important to understand there's more to the
5 story. And they did not include multiple
6 verdicts where the jury did not find for
7 punitive damages, and a zero punitive damages.
8 So when we're talking about comparable civil
9 penalties, I think it's important to note that.

10 We should also note that one of the
11 considerations, when we're talking about
12 punitive damages, is deterrence. And, as Your
13 Honor knows and as we've briefed and discussed,
14 this product, Johnson's Baby Powder and talcum
15 powder, is no longer on the market.

16 Going to ratio. Ratio was an argument
17 that plaintiffs made. They said, hey, the
18 ratio here works. The punitive damages award
19 of \$30 million was very comparable one on one
20 with the compensatory damages. But what Your
21 Honor knows is that in this courthouse, a
22 \$32 million compensatory award is very high and
23 excessive compared to what Your Honor has seen
24 and what Your Honor has dealt with already in
25 other cases on remittitur or additur. And that

1 is cited in our briefs as well, and Your Honor
2 knows it well.

3 And the reason I bring this up is because
4 in a mesothelioma case, when you're dealing
5 with compensatory damages, there is no reason
6 that Mr. Perry's mesothelioma from a
7 compensatory standpoint had any greater value
8 than any of the other plaintiffs that Your
9 Honor has seen in this courtroom. And as we
10 briefed and discussed on our briefs, and Your
11 Honor is well aware, if you're dealing with
12 compensatory damages in the millions of dollars
13 range or even the \$1.5 million range, and if
14 that is the true comparable value in this
15 courthouse, then when we look at ratio of a
16 \$30 million punitive award, it is significantly
17 greater.

18 And then the first principle that we
19 discussed, reprehensibility, there has been no
20 showing of reprehensible behavior on the part
21 of Johnson & Johnson. What did the evidence
22 show in this trial? It showed that the company
23 adhered to and exceeded industry standards.

24 And I'll point out, Your Honor, that there
25 was no finding of fraud by this jury. And I

1 think that's important when we're discussing
2 punitive damages. Although they checked yes
3 for the willful, wanton question, which I know
4 Ms. Pepke will address, there was no finding of
5 fraud. And I'll submit that when you actually
6 look at the evidence that was presented to this
7 jury, there is no basis for reprehensibility.
8 There just certainly is not. When you take out
9 attorney argument, when you take out the
10 statements in closing argument, when you look
11 at just what was provided as far as evidence to
12 the jury, there is nothing to support that
13 punitive award.

14 So with that, I'll move on, unless Your
15 Honor has any questions about punitive damages.

16 The second issue I'm going to discuss is
17 tissue testing. This is in our briefing as
18 well. This is the late tissue digestion that
19 was done by Dr. Longo. I know Your Honor is
20 very well aware. I'm going to give you a very
21 brief recap of what happened in the timeline,
22 which I think is important.

23 Mr. Perry's surgery was done in August of
24 2023, which was more than a year ago.

25 Plaintiffs did not have Dr. Longo or any other

1 expert look at the tissue at that time. It
2 wasn't until June of 2024, just this year, that
3 defendants asked for the tissue that plaintiffs
4 decided to have their experts look at it as
5 well. There was some back-and-forth, as Your
6 Honor is aware, that ultimately led you to
7 enter a court order on July 10th of 2024. And
8 let's remember where we were there. That was
9 less than a month before the start of trial on
10 July 10th, where Your Honor said, yes, here is
11 the tissue division order that was allowed to
12 be sent to the hospital to start that division
13 process.

14 And we waited and we waited and we waited,
15 and that tissue division had not occurred,
16 which caused defendants to file on July 23rd a
17 motion to exclude the tissue testing. What we
18 said to Your Honor is it's just too late.
19 Trial is less than two weeks away. We don't
20 have time to do it.

21 And if Your Honor remembers, that motion
22 was filled with citations from Dr. Longo
23 himself. Plaintiffs' expert, Dr. Longo,
24 testified in his deposition on July 16th, and
25 he was asked, starting on page 37, line 15:

1 "How long would that analysis take you once you
2 actually received the materials?"

3 His answer: "It just depends on what
4 our -- I mean, our workload, but usually it is
5 two- to three-week -- maybe three-week time,
6 and that's being optimistic."

7 And then he went on to say: "Oh, that's
8 when we would start it and finish, because we
9 do a fairly extensive analysis on the tissue
10 samples."

11 So July 16th, Dr. Longo says, "I need two
12 or three weeks after I get the tissue." He
13 hadn't even gotten it by the 23rd. We filed a
14 motion. And when was that motion heard? It
15 was heard the first day I met you, July 30th,
16 for our pretrial arguments. And it was at that
17 argument that plaintiffs informed us for the
18 first time that the division had actually been
19 done and overnighted and was sitting on our
20 expert's doorstep that day, July 30th, which
21 was news to us.

22 And as I informed the Court at that
23 hearing, that was too late. We already had one
24 expert, Dr. Roggli, tell us earlier in the
25 month that he could not get it done before

1 trial. So we scurried around to find another
2 expert, Dr. Geyer, who was going to be able to
3 do it, but because we didn't get it till the
4 30th, he said, "Oh, no, there's no way I can
5 get this done, not before the 16th of August."

6 Because here's the point, Your Honor.
7 This is a process that takes time, where the
8 tissue has to be analyzed, and it has -- it
9 goes through a series of scientific steps that
10 even Dr. Longo admitted would take weeks.

11 So that was the day of pretrial where Your
12 Honor denied our motion to exclude that
13 testing. And you said at that time that you
14 were going to deny that and let that to
15 continue. But you gave us the ability to bring
16 that back to you if our expert was not going to
17 be able to complete the digestion. And that's
18 what we did. We came to you on the first day
19 of trial, and here is what I said in the trial
20 transcript, starting on page 147, line 3:

21 I said: "Your Honor, we cannot start this
22 trial and provide an opening statement without
23 understanding what testimony Dr. Longo is going
24 to come into this courtroom and talk to the
25 jury about."

1 And you said, starting on line 8: "Well,
2 I disagree with that." And on line 14, you
3 said: "In terms of knowing what Dr. Longo
4 says, my bet is -- just a bet -- that as
5 experienced as you lawyers are in this little
6 particular slice of evidence, that what
7 Dr. Longo says is going to come as no surprise
8 to you."

9 To which I answered: "It will come as a
10 surprise to me, Your Honor, because he said
11 less than three weeks ago that he was not able
12 to get this done."

13 And we had a back-and-forth, and the Court
14 said: "And you're going to, I think, pretty
15 well be able to guess what he found."

16 I said, on page 148, line 3: "I am not
17 able to guess."

18 To which the Court responded: "Well,
19 then, I'm sorry for that, but I'm not going to
20 do anything about not admitting this evidence,
21 and I'm not doing anything about excluding the
22 mention of this evidence in opening statement."

23 So that's what happened at the start of
24 trial.

25 When Dr. Longo took the stand, my trial

1 partner, Mr. Cohen, asked -- Cowan, sorry --
2 asked Dr. Longo, started to ask him about the
3 timing to question the reliability. And he
4 went in to question the reliability of this
5 tissue testing where Dr. Longo said he would be
6 able to do it.

7 And Your Honor cut that off and said:
8 "Counsel, all of this was subject to a ruling
9 by me. This is not appropriate area of
10 questioning for Dr. Longo." And you did not
11 permit Mr. Cowan to question Dr. Longo about
12 what we thought was a rush job.

13 Then, Your Honor, as you well know, what
14 Dr. Longo actually found in that tissue that we
15 didn't know at the time of opening statements
16 was a surprise. It was a surprise. It was a
17 surprise to all of us because he found
18 winchite, which is something Dr. Longo has
19 never, ever found in Johnson's Baby Powder.

20 Now, I think what Your Honor was
21 suggesting in the pretrial and on day one,
22 where you said, "I bet you can guess what he
23 found," I think Your Honor was probably
24 suggesting that Dr. Longo generally finds the
25 same thing, actinolite, anthophyllite, and

1 tremolite, that ATA, which is generally what
2 Dr. Longo has found and what is in these
3 trials. But here we had a situation where what
4 he found in the tissue was completely
5 different, and it did cause a significant
6 change of strategy for the defendants.

7 And then, during closing argument,
8 plaintiffs' counsel stood up and he said, when
9 in discussion of the tissue testing -- this is
10 when he made the comment about "We looked in
11 Michael Perry's body and we found the exact
12 talc and the exact asbestos that was in
13 Johnson's Baby Powder that he breathed for 50
14 years."

15 And then he went on in line 22 of page
16 1884: "In this country you can almost buy
17 anything. You can pay people to eat bugs on TV
18 or marry someone that you've never met. You
19 can pay experts to come into court and say
20 smoking doesn't cause lung cancer, arsenic in
21 the water doesn't cause leukemia. If you can
22 afford it, you can pay for almost anything.

23 "Once we realized what was in Michael
24 Perry's lungs, they couldn't find an expert on
25 earth to come into this court and tell you they

1 didn't do it."

2 And of course I objected at that time. We
3 had a sidebar. And Your Honor did give an
4 instruction to the jury, but in defendant's
5 opinion, the instruction did not cure the
6 prejudice that was caused. What Your Honor
7 said was: "Ladies and gentlemen of the jury, I
8 have partially granted defendant's motion. And
9 what I have granted is this: Discussion of
10 failure to call an expert is completely
11 permitted, but the assertion that they couldn't
12 find any expert is not something that is in
13 evidence, and therefore I'm striking that. And
14 you may continue, Mr. Adams."

15 And so I recognize that Your Honor did
16 give that instruction, but that did not cure
17 the problem with what happened in this tissue
18 testing. Dr. Longo's surprise findings, our
19 inability to talk to him about the reliability
20 of that, and then these statements, the
21 compilation of all of these problems really did
22 cause fundamental problems for defendants in
23 the trial.

24 And then, Your Honor, that was actually
25 compounded when Dr. Kuffner, the corporate

1 representative, was not permitted to testify
2 about winchite, or lack thereof, in Johnson's
3 Baby Powder based on his personal knowledge of
4 the documents that are in Johnson & Johnson's
5 files.

6 THE COURT: Oh, come on, now. You all
7 have cited a lot of things that you think I did
8 that were completely wrong in the trial of this
9 case, but the Kuffner thing particularly is
10 concerning to me.

11 You decided not to offer expert witnesses,
12 but you offered the corporate rep and then
13 tried to turn him into an expert. He cannot
14 be -- I never qualified him as an expert. I
15 was not ever asked to qualify him as an expert.
16 This business of he was testifying of his own
17 personal knowledge is malarkey. You were
18 trying to turn him into an expert to say
19 whatever it is you wanted him to say about
20 winchite and how rare it is to be found in
21 anyplace, and it's 50 years old, whatever he
22 was going to say.

23 I resent very much being cited as somehow
24 putting the thumb on the scales of justice with
25 respect to Dr. Kuffner. You tried to turn him

1 into the expert that you decided not to put up
2 on the stand. That was your choice as counsel
3 to try this case the way you tried it. And to
4 come in on the back end and cite my examination
5 of Kuffner and my direction that he not testify
6 to expert matters is something that I believe
7 was totally proper and was not motivated by any
8 attempt to injure your case at all. But I
9 followed the case that was presented to me and
10 was not presented.

11 MS. BUENO: Your Honor, what we were
12 suggesting that we were seeking to do, which I
13 understand Your Honor disagrees, we were
14 seeking to ask him questions as the chief
15 medical officer --

16 THE COURT: He can't testify as the chief
17 medical officer. He can't be qualified to
18 testify as that because that would be asking
19 him to testify as an expert. You did not offer
20 him as an expert. You offered him as a
21 corporate representative. And his medical
22 background was not the issue upon which he was
23 offered. He was offered as a 30(b)(6) witness
24 and the representative of the corporation with
25 respect to its corporate practice.

1 MS. BUENO: Your Honor, understanding your
2 comments, I will move on.

3 THE COURT: All right.

4 MS. BUENO: But I will only say that had
5 he been permitted to -- had we been permitted
6 to ask him questions as a fact witness, given
7 his knowledge and role at the company, he would
8 have been able to testify about what the
9 documents say about findings of winchite or not
10 findings of winchite in various mines. That
11 would have been a question asked.

12 THE COURT: Well, I can tell you that I've
13 looked at that, too. I have looked at this
14 record a good deal in preparing for this thing.

15 He was not going to testify as a fact
16 witness because there are not documents in the
17 record that talk about winchite in the way you
18 just talked about it. He was going to be your
19 expert to say what he wanted to say about
20 winchite and whether it's something that is
21 appropriate to look at as a cause -- as
22 indicating the presence of asbestos in
23 Mr. Perry's lungs.

24 And you can slice that and dice that any
25 way you want to, but I do agree that you ought

1 to move on because there is no way I'm going to
2 be convinced after looking at this record in a
3 good deal of detail that he was being offered
4 to have these discussions about the kinds of
5 asbestos or non-asbestos and so forth that was
6 in Mr. Perry's lungs. He was being asked that
7 as an expert or attempting to be offered as an
8 expert.

9 MS. BUENO: The final point on the tissue
10 testing relates to the Court's exclusion of
11 evidence of an alternative source of asbestos,
12 which was the old library. And Your Honor
13 recalls that there has been testimony in
14 Mr. Perry's deposition, which was subject to
15 plaintiffs' motion in limine number 10, which
16 has been fully briefed, related to alternative
17 exposure. This is in our motion on page 65.

18 THE COURT: Yeah, this is a library that
19 was in an Embassy Suites or something that he
20 was -- or in some kind of facility where he was
21 a bartender?

22 MS. BUENO: No. No, Your Honor. I think
23 there was a misunderstanding of Your Honor,
24 because you've mentioned that bartender comment
25 earlier, too.

1 No. He worked at the Embassy Suites. He
2 worked for Hilton properties.

3 THE COURT: Right.

4 MS. BUENO: There was an old library right
5 next to it.

6 THE COURT: Right, an old library right
7 next to it. And that's the source of all his
8 mesothelioma?

9 MS. BUENO: No, Your Honor. What he
10 testified to in depth -- and I know Your Honor
11 has the deposition transcript and all the
12 briefing of the plaintiffs' motion in limine
13 10 -- is that he spent a lot of time there
14 because that's where they stored the furniture
15 for the hotel.

16 THE COURT: Yes, ma'am.

17 MS. BUENO: So he would have to go over,
18 and he was present when the workers were moving
19 the furniture around.

20 THE COURT: And what kind of evidence were
21 you going to offer about the asbestos in the
22 old library?

23 MS. BUENO: Well, Your Honor, Dr. Longo
24 testified -- and this is also in our motion
25 starting on page 65. When he was asked about

1 sources of winchite, he was talking about an
2 insulation and other -- and we could have
3 talked about that.

4 THE COURT: What kind of evidence did you
5 have about the character of the asbestos, if
6 any, in the library?

7 MS. BUENO: The character as far as the
8 fiber type?

9 THE COURT: Yes.

10 MS. BUENO: None.

11 THE COURT: Well, then, I don't really
12 understand this argument at all.

13 MS. BUENO: Well, winchite wasn't
14 something that plaintiffs alleged was in
15 Johnson's Baby Powder until they find --

16 THE COURT: I think we --

17 MS. BUENO: -- this tissue testing.

18 THE COURT: Again, I think we've gone
19 around the block.

20 MS. BUENO: Okay. So that's the
21 conclusion of my argument on the tissue
22 testing. But to sum it up, given the late
23 inclusion of the evidence and the Court's
24 failure to exclude it, it was a surprise. We
25 did not know --

1 THE COURT: Okay. That's fine. I
2 understand.

3 MS. BUENO: And the last issue I'll
4 address before we talk about our case or our
5 decision not to bring a case is the exclusion
6 of the case-specific opinions of Dr. Weill and
7 Dr. Diette. And I know Your Honor is very
8 familiar with this. This was an issue that
9 started back in the Johnson case with
10 Dr. Attanoos, and the history developed up
11 until the Plant trial, where there was an order
12 where the Court excluded certain opinions of
13 Dr. Diette and Dr. Weill. I know Your Honor is
14 familiar with that, and I have the order here
15 as well if you'd like to see it.

16 But what Your Honor did at that time was
17 suggest that neither Dr. Diette or Dr. Weill
18 could offer a case-specific opinion saying that
19 that particular plaintiff had spontaneous or
20 naturally occurring mesothelioma. And you
21 included in the order a list of reasons why
22 they could not offer that opinion and things
23 that they had failed to review.

24 So in preparation for the Perry case,
25 defendants reviewed Your Honor's order and made

1 an effort to cure the perceived deficiencies.
2 And Dr. Weill and Dr. Diette, as evidenced in
3 their reports, went and reviewed a lot of
4 different material, background material,
5 reports, all of Dr. Longo's testing, et cetera.
6 And then they came to their opinions.
7 Dr. Diette would have been prepared to testify
8 that there was no objective evidence of
9 asbestos exposure from talc, that it was not
10 plausible that asbestos from talc caused
11 Mr. Perry's cancer. If he did have asbestos
12 exposure from other sources -- I'm sorry -- if
13 he did not have asbestos exposure from other
14 sources, then it would have been naturally
15 occurring. He would have also testified that
16 he possibly had a hereditary risk, given his
17 young age and family history.

18 Dr. Weill would have opined that
19 Mr. Perry's cancer was naturally occurring. He
20 would have assumed, even if he assumed trace
21 amounts of asbestos in talc, which he looked at
22 Dr. Longo's report and said even if you assume
23 what he's saying is true, I do not believe that
24 the talcum powder was the cause of the
25 mesothelioma. And he would have explained that

1 based on the epidemiology, based on Dr. Bird's,
2 Dr. Barlow, and Dr. Pierce's reports, as well
3 as the other medical literature.

4 And I'll point out that in plaintiffs'
5 response to this posttrial motion, they
6 suggested that Dr. Weill was somehow not an
7 expert in mesothelioma and hadn't seen
8 patients, which is just not true. He was
9 deposed in this case by the Dean Omar firm on
10 July the 18th of 2024, and he talked about
11 seeing mesothelioma patients in his practice
12 and how he had in his practice diagnosed
13 patients with spontaneous or naturally
14 occurring mesothelioma when he was able to rule
15 out other types of potential exposures.

16 These were the opinions that we wanted to
17 offer and that Your Honor excluded prior to
18 trial. And when Your Honor did that, Your
19 Honor, at the plaintiffs' request, entered the
20 same order as you did in the Plant case,
21 despite the fact that we had cured those
22 perceived deficiencies by allowing those
23 experts. And we think that the Court's
24 decision to exclude those case-specific
25 opinions was problematic and did not allow us

1 then to have the case-specific defenses that we
2 sought to put on.

3 Now, Your Honor did allow, as part of the
4 Plant order as well as the order in this case,
5 an opportunity for either of these experts to
6 opine generally on spontaneous mesothelioma.
7 But Dr. Brody already did that. Plaintiffs
8 brought Dr. Brody as their first expert, and he
9 had already talked about the fact that
10 spontaneous mesothelioma or naturally occurring
11 mesothelioma can happen, although it's rare.

12 So we didn't need to bring Dr. Weill or
13 Dr. Diette to come in and provide the same
14 testimony that Dr. Brody already did when their
15 hands were tied behind their back and they were
16 not able to offer to a reasonable degree of
17 medical certainty their opinions about
18 causation in this case. And we believe that
19 was also an error that compounded the problems
20 and should result in a new trial, along with
21 the late tissue testing.

22 And so that brings me now to my final
23 point, Your Honor, which answers your question
24 and concern about maybe we weren't ever
25 planning on bringing a case in the first place.

1 I heard you mention that, and I can tell you
2 that that's absolutely not the case.

3 This case took a lot of different twists
4 and turns. In the pretrial hearing, we weren't
5 sure if you were even going to enter that
6 McBrayer spoliation order. You did. At that
7 time in the pretrial hearing on July 30th, I
8 don't know if you remember -- it's in the
9 record -- I stood up and I said, Your Honor,
10 we're not going to do anything to trigger that
11 order. I could not have been more clear by
12 broadcasting to Your Honor and plaintiffs that
13 that was not the case we were going to try.

14 But I wasn't able to say at that point
15 that I wasn't going to bring Dr. Sanchez
16 because we had this outstanding tissue
17 digestion issue when the plaintiffs said the
18 pathology is on our expert's doorstep. I was
19 prepared to tell Your Honor and plaintiffs at
20 that --

21 THE COURT: What is this in aid of?

22 MS. BUENO: This is in aid of Your Honor's
23 suggestion --

24 THE COURT: I did not charge spoliation to
25 the jury.

1 MS. BUENO: Understood, Your Honor.

2 THE COURT: That was a motion you all
3 made. Y'all did not want spoliation charged.
4 I indicated to begin with that I would use the
5 McBrayer-Hood spoliation, but I decided after
6 the trial unfolded as it did that I would not
7 do that.

8 And you're saying that somehow what you
9 requested and I operated on that basis and did
10 not charge it is somehow in error?

11 MS. BUENO: Your Honor, during the
12 pretrial, it was --

13 THE COURT: I can decide those matters
14 pretrial. Now I'm also, I guess, being cited
15 for having too thorough a bunch of pretrials
16 and try to rule on things, and then if I change
17 my mind during the course of trial, after the
18 trial unfolds, that that's somehow an error. I
19 don't understand that. I don't understand that
20 argument.

21 MS. BUENO: Your Honor, I will address the
22 spoliation. I'm happy to do it. But my
23 argument here is more about what experts we
24 were going to bring.

25 THE COURT: Well, Bethany Johnson is a

1 very good example of that. I did limit the
2 testimony of Attanoos because Attanoos defied
3 me in court and would not obey the limitations
4 I put on his testimony.

5 But they had other witnesses that
6 testified. And it was a J&J case, and it was a
7 verdict for the defendant.

8 MS. BUENO: Understood.

9 Your Honor, my point here is that I think
10 there was a suggestion that perhaps we were not
11 being forthcoming with the Court or plaintiffs
12 about which experts we were bringing in.

13 THE COURT: Well, you weren't.

14 MS. BUENO: We were --

15 THE COURT: I was very unhappy about that
16 because I try to plan these things for the
17 number of days, and I take up half the time
18 with arguments about whether you're going to
19 disclose things.

20 MS. BUENO: Your Honor, the record is so
21 clear. I stood up every day for multiple days
22 in a row, asked, if not begged, Your Honor to
23 let us bring a witness, Dr. Barlow, on the
24 Friday -- the first Friday.

25 THE COURT: Yes, ma'am. That's not --

1 you've got on the record what you think about
2 that. If that's something you cite as a trial
3 error, that's fine, but you are misconstruing
4 that situation.

5 What I wasn't going to let you do is
6 interrupt the plaintiffs' case to put on
7 Barlow.

8 MS. BUENO: Exactly.

9 THE COURT: Okay. Well, I understand. If
10 you think that's --

11 MS. BUENO: All I --

12 THE COURT: Wait a minute. I'm not going
13 to hear any more argument about that. If you
14 think that's an error, that's fine, but you
15 were not forbidden from putting that witness
16 up. That's not correct.

17 MS. BUENO: And, Your Honor, what I'm
18 saying right now -- and I said "argument," but
19 perhaps that's the wrong word. I wanted to
20 clarify for Your Honor and for plaintiffs and
21 others that throughout this trial, we did have
22 questions about whom we were going to bring
23 based on scheduling issues, based on new tissue
24 testing, based on Your Honor's rulings
25 throughout trial. It was a moving target until

1 ultimately we decided that it was in our best
2 interest not to put on a case.

3 THE COURT: All right.

4 MS. BUENO: But to the extent there is any
5 suggestion that somehow on the -- before trial
6 started that that was our plan, that's just
7 demonstrably false. So I wanted Your Honor to
8 know.

9 THE COURT: All right.

10 MS. BUENO: Thank you. Do you have any
11 questions for me?

12 THE COURT: No, ma'am.

13 MS. BUENO: Thank you.

14 MS. GROSS: Anybody else or is it my turn?

15 MS. PEPKE: I have two other issues to
16 address, but I think it's probably best --

17 THE COURT: I'm going to tell you, I am --
18 you know, this thing could be done on briefs.
19 I don't have to conduct these things at length
20 as I do.

21 But y'all have got to be respectful of my
22 time a little bit. I've got other things in my
23 life I've got to tend to, and one of them is my
24 grandchildren that I've got to keep this
25 afternoon because my daughter is in Los Angeles

1 and her husband has got to go to a professional
2 meeting tonight. So I've my own schedule as
3 well.

4 Ms. Gross, briefly.

5 MS. MCVEY: Judge, you need to leave at
6 4:45?

7 THE COURT: No. If I leave at 5:00, John,
8 I think, will be there at 5:15.

9 MS. GROSS: I'm going to be quick. I am
10 going to bounce around. I feel a little bit
11 like I'm aiming with buckshot, so if Your Honor
12 needs to stop me if I'm going too fast, just
13 let me know. Okay?

14 The first thing that was just discussed by
15 Mr. Brown was Mr. Adams' closing.

16 THE COURT: Mr. Adams' closing is quite
17 problematic, in my view. I still have a lot of
18 heartburn about that. The argument he makes
19 about -- that is the most impactful on what I'm
20 thinking about now revolves around the argument
21 he made about how the jury came to what they
22 came.

23 MS. GROSS: I understand.

24 THE COURT: But we had an extensive
25 pretrial in which things like killing people

1 and so forth were ruled out. My motion in
2 limines always make it clear what is
3 appropriate and not appropriate to say.

4 I had a lot of moving targets and a lot of
5 things to manage in this thing when the closing
6 arguments were taking place. And the biggest
7 pressure was trying to get that case to the
8 jury so they could come with a verdict within
9 the time frame that I had told them we would
10 use.

11 So I will confess that I tried to keep
12 that closing argument moving despite the fact
13 that it seemed to me like every other minute
14 there was another objection to what Adams was
15 saying. Some of that was occasioned by the
16 fact that Adams could not obey my instructions
17 and was way too volatile about some of the
18 things he was saying. I sustained some
19 objections.

20 But don't spend a whole lot of time on
21 trying to justify Adams to me.

22 MS. GROSS: I don't intend to, Your Honor.
23 All I was actually going to say is that, as
24 Your Honor noted, there were a lot of
25 objections throughout the plaintiffs' closing,

1 many, many of which --

2 THE COURT: I don't know another case I've
3 ever tried where I've had that many objections.
4 Now, given that I've got some problems with the
5 way Mr. Adams conducted that argument, I was
6 very, very disheartened by that.

7 MS. GROSS: All I was going to point out
8 to Your Honor about the closing was two things:
9 One, something you've already touched on, there
10 were many, many, many objections, many of which
11 were sustained. You sustained many objections,
12 and you provided many curative instructions to
13 the jury throughout plaintiffs' --

14 THE COURT: Yeah. Those apparently are
15 wrong now, too.

16 MS. GROSS: Well, that's their argument,
17 not mine.

18 My argument is you provided several
19 curative instructions to the jury, which, if
20 anything, sort of hindered the plaintiffs. I'm
21 not saying it did; I'm just saying to the
22 extent that they want to cry about it, our
23 opinion is that legally your curative
24 instructions did exactly what they were
25 intended to do, which is to cure any perceived

1 issues with what plaintiffs' counsel was
2 saying.

3 The second thing I will say, and then I
4 will move on to the next topic of record. The
5 trial record speaks for itself about the
6 closing arguments.

7 Mr. Brown did -- I'm not good at math, but
8 that was real fancy math, but he's just
9 guessing at what the jury did. He's just
10 guessing. What the record says is that
11 Mr. Adams suggested \$2 million a year. He did
12 not get that. He did not get that. And then
13 the other number was the stipulation that they
14 agreed to.

15 So there really is no proof that
16 Johnson & Johnson has that Mr. Adams'
17 statements were calculated to inflame prejudice
18 other than they just don't like the number.

19 And that transitions into the next
20 arguments, which are sort of the punitive
21 damages argument and this verdict was so crazy
22 high. Ms. Bueno made the point \$32 million for
23 a Phase 1 finding is rather high for this
24 courthouse, but we've conveniently skipped
25 over the Plant verdict last year.

1 THE COURT: And the Weist verdict before
2 that.

3 MS. GROSS: Correct. And I'm just naming
4 just Plant because that was the talc case.
5 That case was in this courthouse with Your
6 Honor, \$29 million and excess. So \$32 million
7 is not so crazy high for a talc case in this
8 courthouse before you, number one.

9 Number two, Ms. Bueno walked you through
10 the Gamble analysis, right, the Gamble factors
11 that during posttrial motions time, the Court
12 evaluates -- uses to evaluate punitive damages
13 number.

14 First was the reprehensibility. Well,
15 first she started backward. She started with
16 the third factor, which is the comparable
17 verdicts, and she said we cited a bunch, and
18 then she made sure to remind Your Honor that
19 the Lee verdict was vacated in Oregon. But
20 what she left out was that the Lee verdict was
21 vacated in Oregon for no reason to do with the
22 amount found by the jury. I don't want to get
23 into it because it's a separate issue, but it
24 had absolutely nothing to do with the number
25 that the jury found in their verdict. That's

1 number one.

2 And, number two, again, she left out
3 Plant, which was 29 million just in
4 compensatory Phase 1.

5 The second one she discussed was
6 reprehensibility. And she said, well, there's
7 no showing of reprehensibility for
8 Johnson & Johnson in this trial record. And we
9 very much beg to differ on that. There was
10 evidence that Johnson & Johnson knew its talc
11 was contaminated, that it contained asbestos.
12 Patel in 1958 told them, your talc has
13 tremolite in it. There was the 1973 document
14 where Roger Miller from Windsor Minerals said
15 the clean line approach for asbestos-only is
16 over. That was trial Exhibit Number 3.

17 Trial Exhibit Number 49 was the 1997
18 document -- it's pretty memorable -- where
19 Johnson & Johnson writes in response to a
20 lawsuit internally that the majority of
21 asbestos bodies isolated from the lungs of
22 women in the population who had tremolite and
23 anthophyllite and had no other asbestos
24 exposure were getting it from the talc.

25 Then there's also evidence that

1 Johnson & Johnson knew exposure to asbestos
2 causes disease. It's the most basic concept in
3 asbestos litigation. Exhibit 49, again,
4 Johnson & Johnson testified through Hopkins,
5 the video we played at the trial, that
6 Johnson & Johnson would have knowledge of
7 asbestos disease and asbestos, of course.

8 The third thing, Johnson & Johnson knew
9 Johnson's Baby Powder was inhaled by end users
10 of the product. Dr. Hopkins again testified
11 during video -- through his video during this
12 trial that Johnson & Johnson knew infants, knew
13 babies inhaled the talc during Johnson's Baby
14 Powder application.

15 You also had trial Exhibit Number 7, which
16 was the 1969 Furor memo in which
17 Johnson & Johnson noted in the record it knew
18 needle shapes of tremolite made it especially
19 respirable and capable of entering the
20 pulmonary space.

21 The fourth thing, Johnson & Johnson failed
22 to warn. Dr. Hopkins testified again through
23 his video that there was never any warning
24 about asbestos on any Johnson's Baby Powder
25 product despite several reports by the early

1 1970s that there was tremolite in both
2 Johnson & Johnson's Italian and Vermont mine,
3 and we saw photos of Mr. Perry's bottles that
4 he found in his home. Remember, we put the
5 photos up. One of them didn't have a warning
6 on it at all. The other one had that warning
7 about, you know, be careful your baby isn't
8 inhaling. Dr. Kuffner kind of brushed it off
9 and said it was because the tops kept popping
10 off which was the real reason for that little
11 warning, but one of the bottles didn't even
12 have a warning on it at all.

13 Next thing, Johnson & Johnson failed to
14 adequately test. We heard in the record that
15 Johnson & Johnson chose not to adopt heavy
16 liquid separation because it wasn't in the best
17 interest of the company. We talked about
18 TM7024, the testing method that
19 Johnson & Johnson developed where you can
20 intentionally undercount the asbestos. You can
21 have 16 asbestos fibers in this tiny little
22 microcosm sample of a bottle and say, oh, it's
23 not there, because of this TM7024 testing
24 method.

25 You also had trial exhibits and testimony

1 entered into the trial record that
2 Johnson & Johnson influenced scientists and
3 suppressed information. Dr. Hopkins testified
4 that Johnson & Johnson knew it would be really
5 bad for business if people ever found out that
6 Johnson's Baby Powder had asbestos in it. He
7 testified no parents would ever buy it if there
8 was even ever one fiber of asbestos in the baby
9 powder.

10 You have the 1974 document where
11 Johnson & Johnson told the FDA that a
12 substantial amount of asbestos can be allowed
13 safely in a baby powder.

14 You have the testimony about
15 Johnson & Johnson claiming internally, well, we
16 had a zero asbestos tolerance policy
17 internally, but then they turned around and
18 told the FDA that you don't need to have a
19 testing method that finds less than 1 percent
20 asbestos in talc because it's not necessary to
21 ensure the safety of the product.

22 And then you have the final, which is
23 probably the easiest point, which is that there
24 was a safer alternative available the entire
25 time this product was sold. Cornstarch was a

1 known alternative to talc since the 1800s.
2 Johnson & Johnson knew it. Dr. Hopkins
3 testified about it and there's trial exhibits
4 about it.

5 So the notion that there was no showing
6 and there's absolutely nothing in the record
7 that Johnson & Johnson was reprehensible is
8 demonstrably false. And obviously the jury
9 agreed.

10 And then the last point is the notion of
11 this ratio. Lucky for us, Your Honor wrote the
12 Mitchell versus Fortis Insurance Company case,
13 385 S.C. 570 2009.

14 THE COURT: I'm very familiar with it.

15 MS. GROSS: Very familiar with it. I'm
16 sure you are. And you actually remitted the
17 punitive award in that case. I've studied it.
18 You remitted the punitive verdict to be
19 consistent of a ratio of 9.2 to 1. And then
20 Your Honor wrote: "We believe" -- in this case
21 it was a \$10 million award in comparison with
22 compensatory.

23 You wrote: "We believe a \$10 million
24 award in this case satisfies due process and
25 comports with South Carolina law. We are also

1 certain that a \$10 million award will
2 adequately vindicate the twin purposes of
3 punishment and deterrence that support the
4 imposition of punitive damages."

5 So I think that pretty clearly addresses
6 the notion of the ratio. The ratio here
7 between the punitive finding and the
8 compensatory finding in Phase 1 is very much
9 within the bounds of what Your Honor wrote in
10 the Mitchell versus Fortis case.

11 I think that touches on the notion of this
12 grossly excessive verdict. Is there anything
13 before I move on to the next topic?

14 THE COURT: Move on, because we're at
15 almost 4:30 now, and I've still got Ms. Flynn
16 hanging around here.

17 MS. GROSS: I'm going to dispense with the
18 tissue digestion really quickly. The Court
19 allowed it. Your Honor allowed it. Your Honor
20 knew about Dr. Longo's testimony at the time of
21 the pretrial hearing. The Court allowed it.

22 And what you clipped Dr. Kuffner from --
23 what you clipped them from being able to ask
24 Dr. Longo about -- excuse me -- was the timing.
25 Ms. Bueno was right about that, because you

1 said, "I ordered it. You don't get to ask him
2 about that."

3 What they could have done was they could
4 have crossed him on Dr. -- they could have
5 crossed Dr. Longo on his methodology. They had
6 all the ability in the world to do that. They
7 either chose not to or whatever, but you can't
8 redo trial strategy and trial choices in a
9 posttrial motion.

10 All you kept them from asking about was
11 the timing of it because you allowed it with
12 full information. There was nothing new at
13 that point in time. You knew all about this
14 when you ruled on it at the pretrial hearing.
15 They made a choice to not press him on his
16 methodology. That's at their own peril.

17 THE COURT: And that would have been a way
18 to meet the issue of reliability --

19 MS. GROSS: Yes, ma'am.

20 THE COURT: -- because that's what they
21 say about that issue.

22 MS. GROSS: Yes, ma'am.

23 The tissue split issue where they
24 complained about the delay, that wasn't us.
25 That was MUSC.

1 THE COURT: That was MUSC. I understand
2 that.

3 MS. GROSS: Good. And to compound that, I
4 didn't even open on tissue digestion. I stood
5 up and I said, "I'm not going to open on it
6 because they don't have it yet." They did.
7 They opened on it. I did not.

8 Then they make this big deal about the --
9 he found the winchite, right? What they've
10 neglected to mention to the Court is that
11 Dr. Longo had found richterite in Johnson's
12 Baby Powder several times. And Dr. Sanchez,
13 their own expert who they chose not to call,
14 had also found winchite in Johnson's Baby
15 Powder and had further testified that when you
16 find winchite and richterite, it's the same
17 thing.

18 This wasn't some surprise that Dr. Longo
19 found the winchite. It wasn't the first time
20 it was ever found in Johnson's Baby Powder.
21 Okay?

22 And Dr. Kuffner did testify about
23 winchite. You let him answer questions about
24 what he had seen in the documents, because that
25 is proper as a fact witness. Where you stopped

1 it as Your Honor got onto it when you were
2 talking with Ms. Bueno just a minute ago was
3 you would not allow him to explain geology
4 opinions to the jury, because that would make
5 him an expert, because it would have required
6 him to have knowledge and skill to testify
7 about what this winchite finding means. He
8 can't do that.

9 They were trying to launder geology
10 opinions through Dr. Kuffner. The Court
11 properly stopped that from happening. You did
12 allow Dr. Kuffner to properly testify about
13 what he had seen as a fact witness in the
14 documents. They could have called Dr. Sanchez
15 to explain the winchite finding. They chose
16 not to.

17 And then this notion of the old library
18 exclusion, Your Honor kept it out because they
19 didn't have a single expert who would say it
20 contributed to his mesothelioma. You can't
21 just throw it at the wall and inject it into
22 the jury box. It was properly excluded. They
23 want to sort of rebrand it and say, well,
24 because Longo found winchite and said at some
25 point that that could be found in building

1 materials -- they could have crossed him on it.
2 They didn't.

3 And then that sort of transitions into the
4 Dr. Weill and Dr. Diette exclusion. Because I
5 argued these motions in Plant, I'm very
6 familiar with exactly what was argued to Your
7 Honor and why your order reads the way it
8 reads. So I want to talk about Dr. Diette.

9 When we deposed him in this case, we asked
10 him: "Did your methodology change from Plant
11 and Payne at all?"

12 And he said: "Nope. It's the same."
13 That's a quote: "Nope. It's the same." It's
14 in the brief. His methodology didn't change.

15 They did try to fix some of it, but what
16 they neglected to tell you is they completely
17 shield their experts from reviewing any
18 Johnson & Johnson documents. They gave them
19 some more expert reports to read, sure, but
20 they don't review any Johnson & Johnson
21 documents, none.

22 And then they wanted to have Weill and
23 Diette come in here and give this "diagnosis of
24 exclusion" is what Your Honor called it, and
25 say, well, I didn't see any evidence that the

1 talc -- that Johnson's Baby Powder had asbestos
2 in it, so it must have been this other stuff.
3 It must have been genetics or whatever we can
4 get into the jury box.

5 When you compare that to Dr. Haber, who
6 did review all the Johnson & Johnson documents,
7 documents that are good for us and bad for us,
8 right, he reviewed all of it, and the medical
9 records and all the stuff. There was no error
10 on the Court's part. And as Ms. Bueno pointed
11 out, Dr. Weill and Dr. Diette still could have
12 come and testified about spontaneous
13 mesothelioma, which is exactly what
14 Dr. Feingold did when you limited him in the
15 same way in the Plant trial. He came and he
16 testified about spontaneous mesotheliomas, and
17 the jury heard all about it. They could have
18 called Dr. Weill and Diette. You did not
19 preclude them. All you said is you can't give
20 this diagnosis of exclusion.

21 And when Dr. Weill in particular --
22 Ms. Bueno brought up that he was relying on
23 this paper by Dr. Burns and Dr. Barlow.
24 Dr. Barlow could have come and testified. We
25 didn't move to exclude Dr. Barlow at all, not

1 at all. She wasn't even partially limited.
2 They could have brought Dr. Barlow to testify
3 about this .1 percent is the worst-case
4 scenario thing that Dr. Weill relies on. They
5 want to say it's because you wouldn't let them
6 interrupt our case on a Friday right before the
7 jury went home for the weekend, which is
8 exactly why they wanted to do it, to bring
9 Dr. Barlow. That's just not accurate.

10 They wouldn't accommodate our experts.
11 That's why we had to call Dr. Madigan remotely.
12 Your experts make it work. They had two
13 weeks -- well, I guess they had a whole week to
14 figure this out. They could have brought
15 Dr. Barlow to testify about the opinions that
16 they wanted to say Dr. Weill relied on. They
17 chose not to call these experts.

18 And then they want to come up here and say
19 our hands were tied behind our back. You
20 didn't strike a single expert. They spent a
21 lot of time on their brief about Dr. Sanchez.
22 I asked you to strike Dr. Sanchez, and I argued
23 for it hard, and I lost. All Your Honor did at
24 the pretrial was say he has to lay a
25 foundation, which is the way experts are

1 supposed to work. I'd love to see
2 Johnson & Johnson's reaction if Dr. Longo took
3 the stand and testified to a bunch of stuff
4 without laying a foundation. I think we both
5 know what would happen.

6 Your Honor was very clear about the
7 spoliation order, this McBrayer-Hood spoliation
8 order. Your Honor was very clear that you were
9 not entering the order at the pretrial. You
10 said, "I'm not entering it." The order was not
11 entered, full stop. It was never entered at
12 any time during the jury -- to us, to the jury.
13 It was never entered.

14 But interestingly, it didn't stop
15 Johnson & Johnson from getting into evidence
16 stuff about the negative testing, right,
17 because they crossed Dr. Haber on it and
18 elicited -- and they did it broad strokes.
19 They toed the line as close as they could get,
20 but they crossed Dr. Haber on what a good
21 company does and all the good testing methods,
22 blah, blah, blah, all this stuff about negative
23 testing. And then, as Your Honor heard from
24 Ms. McVey, they tricked us with the Dr. Hopkins
25 testimony. So all the stuff about the negative

1 testing came in from Dr. Hopkins anyway. So
2 they still got everything in to the jury about
3 Johnson & Johnson's so-called negative testing
4 anyway. To this whole crying foul about the
5 spoliation order and Your Honor committed all
6 this error is just not accurate. Your Honor
7 was very clear. They got it in to the jury
8 anyway. There was no error.

9 I think I just kind of blasted through
10 everything really quickly, because I know
11 you're in a hurry, but do you have any
12 questions?

13 THE COURT: No.

14 MS. GROSS: Okay. I'll take my seat.

15 THE COURT: I'm going to turn to
16 Ms. Flynn. Please make it quick, Ms. Flynn.

17 Ms. Stephanie Flynn on behalf of AII.

18 MS. FLYNN: Yes, Your Honor. Thank you.

19 And we did file reply briefs on Friday,
20 and I sent those to Your Honor by e-mail. I
21 did bring a couple of extra copies today.

22 THE COURT: Yes, ma'am. I saw them.

23 MS. FLYNN: Okay. So I do think we really
24 largely covered -- I'm glad we filed those
25 reply briefs, so hopefully that will help you

1 out.

2 THE COURT: Yes. I think a good deal of
3 what you argued derivative of what
4 Johnson & Johnson argued has been covered. All
5 right. You do have some things that are
6 specific to the AII verdict, so go ahead.

7 MS. FLYNN: I do, yes, Your Honor. And I
8 wanted to start out by saying we do adopt the
9 arguments made by Johnson & Johnson --

10 THE COURT: Yes, I know.

11 MS. FLYNN: -- to the extent relevant to
12 us, obviously.

13 As you know, Your Honor, we moved during
14 the trial for a directed verdict on the issues
15 of fraudulent misrepresentation and punitive
16 damages. The basis for that is because default
17 does not mean that the pleadings are beyond
18 reproach. AII can still attack the sufficiency
19 of those, so that's what we were doing during
20 the trial.

21 We do have a problem with the fact that
22 the allegations in the pleadings were made in a
23 global conclusory way. Asbestos cases are so
24 different from most of the cases that you see
25 in these courtrooms and that --

1 THE COURT: Ms. Flynn, I don't think it's
2 necessary for you to argue much of that. You
3 could not accept the entire time this case was
4 tried what a default means. A default means
5 that you are liable. It's not just the
6 averments of the complaint and their
7 specificity or lack of. It is a finding of
8 complete liability for what it is alleged his
9 injury is, and the fact -- and the allegation
10 that you caused it. That cannot be contested
11 any further.

12 And a lot of what was done was an attempt
13 to revisit that or try to redefine what a
14 default means and what liability means.

15 So I understand you have arguments about
16 that, but I think my rulings are pretty clear
17 about that. And I know you disagree with me,
18 and that's fine. You've got a record on your
19 brief on that. I would move on to some other
20 things.

21 MS. FLYNN: Thank you, Your Honor. I will
22 do that.

23 The other -- moving beyond to that --
24 moving beyond that, obviously, we've argued as
25 the third point for our JNOV that AII was not

1 in default on the inoperative.

2 THE COURT: Yes, you argued that because
3 you answered the amended complaint, you are not
4 in default, and you've cited some law that you
5 think supports your point of view about that.

6 That's not the law of South Carolina, in
7 my view. I've ruled that way in the course of
8 trial, and my views have not changed since
9 then.

10 So, again, I think there was no error by
11 the Court in not recognizing your attempt to
12 answer the amended complaint.

13 MS. FLYNN: I understand, Your Honor. And
14 our only point on that would be that there is
15 no law in South Carolina. The plaintiffs cited
16 law from five states, five other states, where
17 we have cited South Carolina federal law that
18 does agree with us. And South Carolina has
19 precedent to say that you can look to federal
20 law when there's no state law on the issue.
21 That's what we did, and the South Carolina
22 District Court agrees with us on this. So
23 those are the cases we cited. We think the
24 Court should look to those cases and not to
25 case law from other states.

1 THE COURT: All right.

2 MS. FLYNN: As grounds for a new trial,
3 Your Honor, we moved on the basis that we had
4 no notice that this was essentially going to
5 turn into a combined damages hearing and trial
6 situation against Johnson & Johnson. There are
7 certain notice requirements under Rule 55(b).
8 The plaintiff first should apply to the Court
9 for a default judgment. In addition to that,
10 they have to serve AII, per Rule 5(a), by
11 First-Class Mail.

12 This is not a permissive rule. We think
13 that the Court's order on our default judgment
14 also required them to do the same thing. We
15 think that the trial subpoena that was served
16 on me by FedEx is not sufficient in that regard
17 to accomplish what's intended by this rule.

18 Plaintiffs argue that this is a
19 technicality, that there was no actual harm to
20 us because we were here and we did participate
21 in the trial. And I certainly understand that
22 argument. The problem with that is that if AII
23 is not relieved from its technicality --

24 THE COURT: Let me ask this: You were
25 aware for many, many months that this case had

1 been set for trial when it was set for trial,
2 were you not?

3 MS. FLYNN: Yes, Your Honor.

4 THE COURT: I put out those orders at the
5 beginning of the year. This was way into the
6 year. So you had been notified, and you knew
7 from the very beginning that your client was in
8 default. By the time you got this case, you
9 knew your client was in default, and you knew
10 the trial had been set at the time it was set.
11 So I don't understand the contention that
12 somehow or another you weren't knowledgeable.

13 In addition to that, we had many
14 pretrials. We had many motions hearings on
15 this case. You attended them. We had pretrial
16 on this case. This was not something where
17 there was some sneaky effort to at the last
18 minute suddenly schedule a trial at which your
19 default would be a part of the equation for
20 liability.

21 MS. FLYNN: I think that --

22 THE COURT: So it's not a mere
23 technicality. It's the absolute knowledge you
24 had throughout the entire history of the many,
25 many hearings held on this and the early

1 setting of it for trial.

2 MS. FLYNN: We absolutely understood the
3 trial date and that a trial was going to
4 happen. What we didn't understand was how the
5 damages hearing was going to be held in
6 conjunction with that, especially when --

7 THE COURT: You elected to try -- that's
8 completely untrue. You understood that it was
9 going to be a trial to determine that because
10 you elected. You had the ability to have the
11 judge try it or the jury try it. The reason I
12 allowed it to be tried by the jury is because
13 you insisted on that. Did you not?

14 MS. FLYNN: I do not think we insisted on
15 either one. The election to try it before a
16 judge or a jury is the plaintiffs' election.
17 It's not my election.

18 THE COURT: Pardon me. I'm saying the
19 plaintiff elected -- and that wasn't an
20 election made at the last minute. The
21 plaintiff does get to elect it. The plaintiff
22 elected to have the damages tried, and that was
23 done months before the case was tried, and you
24 had notice of that.

25 MS. FLYNN: If that's the case, they

1 should have complied with the specific --

2 THE COURT: Well, I understand your
3 argument, but I think what was done fully
4 complied with the requirements.

5 MS. FLYNN: And I understand Your Honor's
6 position, ruling on that. Our position would
7 be that AII was held in default on a
8 technicality by not answering --

9 THE COURT: AII was held in default
10 because they did not answer and didn't even
11 engage you as a lawyer until well after that.
12 And only at that time did you try to get them
13 to undo the default, which they declined to do.

14 So I understand your arguments about it.
15 Please don't -- we are at about quarter of
16 5:00, so let's move on.

17 MS. FLYNN: Yes, Your Honor.

18 I'm trying not to repeat anything.

19 Some of these arguments, as you
20 understand, are repetitive, including our
21 motion to vacate default. I think all of the
22 arguments that we make to vacate default are
23 included --

24 THE COURT: I understand why you want to
25 make a record of it at this time, and I accept

1 that.

2 MS. FLYNN: So a lot of that is included.

3 We did include as part of our JNOV an
4 objection to the Court's charge number 4. I
5 think Mr. Brown touched on this a little bit
6 about what happened in connection with that. I
7 think there are multiple errors in connection
8 with that charge that the defendants, plural,
9 were told to the jury to have stipulated to the
10 total economic losses.

11 Then, in addition to that, it was added on
12 to that that AII had also stipulated to the
13 past actual medicals of \$510,000. And when
14 doing that, the Court told the jury that that
15 was another element of loss, when it was
16 talking about the extra \$510,000, and then
17 stated to the jury, when you saw those two
18 figures added together, 3 million and 329-some
19 thousand and then 510,000, that's what was
20 meant. So if you're going to award anything,
21 that is what to consider.

22 So that effectively amounts to maybe three
23 different problems with that charge. And we
24 think that the jury did follow that, and that
25 that's what they awarded when they looked at

1 it. Essentially -- it essentially doubled
2 the --

3 THE COURT: What you have ignored or
4 choose not to bring into this record at this
5 time is the reason I charged it, made that
6 charge, was because the jury requested some
7 information about that. So I supplied that
8 information by simply saying this piece of the
9 claim for damages is arrived at by putting
10 together these two numbers.

11 MS. FLYNN: Everything that I've just
12 talked about was during the original charge
13 read to the jury before any jury questions or
14 anything else. That was all -- this was all
15 part of the actual original charge are what
16 points we're making in this argument.

17 THE COURT: Well, okay.

18 MS. FLYNN: And I won't go on about that.
19 I just think -- you know, we think that it was
20 problematic that the jury was bound to follow
21 that charge and it doubled the actual amount.

22 THE COURT: I don't think I directed them
23 to make any particular finding, and I stay with
24 that.

25 MS. FLYNN: Your Honor, I really think

1 that most of our arguments and everything are
2 covered in our briefing and in our reply
3 briefing.

4 THE COURT: I agree with that.

5 MS. FLYNN: I don't know that there's
6 anything additional that we need to make over
7 and above what we've said in our written
8 briefing or what we've adopted from J&J's
9 arguments.

10 THE COURT: All right.

11 MS. FLYNN: Unless the Court has some
12 questions for me about what we've briefed, and
13 I'm happy to answer any questions that you
14 have, but otherwise I'm happy to sit down.

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

16 MS. MCVEY: Your Honor, I'm going to be
17 two minutes on this argument.

18 THE COURT: All right.

19 MS. MCVEY: Let me just say that we'll
20 fully incorporate all of our briefing to
21 respond to that.

22 THE COURT: All right.

23 MS. MCVEY: Just going briefly to charge
24 number 4, when you were talking about economic
25 stipulation. When Ms. Flynn talked about

1 defendants, plural, stipulating to
2 \$3.3 million, that was the J&J entities you
3 were talking about. It was plural in the
4 verdict form and everything else. It was clear
5 what you were explaining. You can read it one
6 way if you want to, which is how she's doing
7 it, but it was clear to me and everybody else
8 that you were giving what the different parties
9 had stipulated to in that charge, and that you
10 didn't even say to AII. That's why they called
11 the economist and all that kind of stuff, too.

12 The jury also had the written jury charge,
13 each one of them did, to look at those
14 stipulations. And it was clear as day what was
15 happening there; so I don't believe there was
16 any confusion.

17 Just briefly on this notice argument. It
18 has been clear, and I have had many
19 conversations with Ms. Flynn and her
20 co-counsel, Mr. Peck, how this trial would go
21 forward, meaning the liability portion would go
22 forward against any remaining defendants, and
23 AII would be around to contest any damages to
24 the extent they wanted to do that.

25 They certainly did that in this case. And

1 we know that they had notice because before
2 this trial ever started, you'll recall that
3 they filed a petition for writ of certiorari in
4 the Supreme Court talking about the trial and
5 the damages was going to start. On
6 June 29th -- that was on June 28th.

7 On June 29th of 2024, they moved to stay
8 this case in front of you, the trial and
9 damages. And at the pretrial hearing, AII
10 admitted and, of course, knew and did say they
11 were going to come and participate in this
12 trial.

13 The purpose of Rule 55 is so when you look
14 at a default against a defendant who never
15 appeared, and then I don't give you notice that
16 I'm going to have a damages hearing so you can
17 contest the damages, that's what that purpose
18 is. There is no question they had all the
19 notice on Planet Earth, because they moved to
20 get out of default about 17 times, and we've
21 heard it all the way through.

22 So I do want to just point out one last
23 thing about suggesting numbers in a verdict.
24 You and I disagreed about suggesting a number
25 for the punitive verdict. In fact, they cited

1 you Rule 8, which has only to do with
2 pleadings. It has nothing to do with whether
3 or not an attorney can suggest numbers to a
4 jury in a verdict. You recall that they
5 suggested zero. That's a number.

6 So this tit-for-tat stuff, Mr. Adams was
7 unkind in his closing, you'll recall that
8 Ms. Bueno also called Michael Perry a liar and
9 suggested that he magically found these bottles
10 of Johnson's Baby Powder. They were so old and
11 they happened to be somewhere else. It's
12 called argument. And I don't want to get into
13 the merits of all that, but the idea that they
14 could suggest a number and we can't suggest a
15 number, and somehow that's wrong, is a little
16 infuriating to me.

17 Now, Mr. Adams made it clear the jury
18 could do whatever they wanted to do with the
19 numbers. There's no question. And I kind of
20 admire how Mr. Brown went through and kind of
21 figured out how maybe the jury came to these
22 numbers, but that's total speculation.

23 He clearly asked for \$2 million a year for
24 each year of his life that he would lose, which
25 I think added up to, like, \$70 million, and

1 they gave him a fraction of that.

2 So, Your Honor, we believe these verdicts
3 are appropriate. They are not excessive. The
4 difference in these talc verdicts are that the
5 plaintiffs are so much younger. They're so
6 much younger. They have active economic loss.
7 Before we started the trial, there was \$3.2
8 million in stipulated economic loss, before we
9 even got to any of the noneconomic topics and
10 everything else that was going on.

11 And he was only 53 years old. And the
12 jury heard about not only that he was going to
13 die, but they were going to find out in
14 November, which is coming up, that his pleura
15 had already doubled, and it was going to be a
16 painful, horrific, agonizing death. His
17 husband was going to have to watch him do that.

18 This is not a much older person who has
19 lived a full life. This is something very
20 different from that. And we believe this
21 verdict is not excessive in any way, and we ask
22 that you not remit it.

23 I think that's the only other point that
24 hadn't really been addressed as to AII. I'm
25 happy to answer any other questions as to their

1 motion, but I know time is tight.

2 THE COURT: All right.

3 MS. MCVEY: Last thing, the setoff motion.

4 We have obviously given them the full credit

5 for the full amount of the total settlements.

6 We have not chosen to allocate leading to a

7 future wrongful death claim, even though Jolly

8 says that we can here. So they're getting a

9 dollar-for-dollar setoff.

10 So as we take that into account, I think

11 the total -- the total gross settlements were

12 \$11,255,000, Your Honor. And so if you --

13 THE COURT: So the total setoff is 11 --

14 MS. MCVEY: \$11,225,000. And I have sent

15 you an itemized listing.

16 THE COURT: Right.

17 MS. MCVEY: And then I've given you the

18 releases.

19 THE COURT: So the way that setoff would

20 work is it's allocated between AII and

21 Johnson & Johnson?

22 MS. MCVEY: No, ma'am. They both get the

23 full credit off the compensatory damages. So

24 the total compensatory verdict was

25 32 million -- I didn't write it down.

1 Let me tell you this way: When we take
2 the total verdict combined and you subtract the
3 \$11,255,000, the full amount of the setoff --

4 THE COURT: Right.

5 MS. MCVEY: -- Johnson & Johnson and AII
6 would be jointly and severally liable for
7 \$21,431,250. And the reason why they're --

8 THE COURT: And that's actual?

9 MS. MCVEY: That's actual damages. Then
10 Johnson & Johnson would be responsible for --

11 THE COURT: And that means none of it is
12 being applied to the loss of consortium?

13 MS. MCVEY: It is. I just combined it all
14 together because it's a straight
15 dollar-for-dollar setoff. It doesn't matter.

16 THE COURT: So, again, when you come up
17 with the 21,431,250, which is the net after
18 setoff, is that the net off of the combination
19 of the Michael Perry and Long verdicts?

20 MS. MCVEY: Yes.

21 THE COURT: Okay. I understand what
22 you've done.

23 MS. MCVEY: Yes. So I'm just giving a
24 flat-out dollar for dollar. We could allocate
25 50 percent and 50 percent, but it comes out to

1 the same number.

2 THE COURT: Right.

3 MS. MCVEY: So the actual damage award,
4 then judgment for Johnson & Johnson and AII,
5 because they're jointly and severally liable in
6 this case --

7 THE COURT: Right.

8 MS. MCVEY: -- because they were both
9 found to be reckless, is \$21,431,250. And then
10 Johnson & Johnson would be responsible for
11 \$30 million in punitive damages and AII would
12 be responsible for \$760,000 in punitive
13 damages.

14 THE COURT: Okay.

15 MR. BROWN: Your Honor, very briefly. I
16 know we are running out of time.

17 There was an allusion to an Avon claim in
18 bankruptcy. We don't know the significance of
19 that, but I know it's a claim. It's not money
20 they've received, but it could be a very
21 substantial number. We don't have any
22 information about what that number is. And
23 Avon also is involved in this.

24 MS. MCVEY: Avon is in bankruptcy, so
25 we're not getting paid any potential settlement

1 that we would have had.

2 THE COURT: Setoffs are set against the
3 amount that you are paid. I don't know if
4 they've reached -- they've reached some
5 settlement agreement with Avon, I feel sure,
6 but the number that they reached is not
7 something I think I could consider at all,
8 because all I can consider statutorily is the
9 amount they received.

10 MR. BROWN: I understand from a point of
11 time perspective what Your Honor is saying.
12 However, they're not entitled to a double
13 recovery under any scenario.

14 THE COURT: Well, that's something that
15 they would have to notify you about and you all
16 would have to talk about at some future time.

17 MR. BROWN: We'll work on that with them,
18 then.

19 MS. MCVEY: And I'll tell you that
20 eventually, if this goes to the appellate
21 process, or they want to settle it, and in the
22 meantime we've gotten paid by Avon, which I
23 don't think we're going to get, then I would
24 have to disclose that to you and you would get
25 the offset. But for purposes of now --

1 THE COURT: All I can do is deal with the
2 here and now.

3 MR. BROWN: Okay. So here's another. On
4 the punitive damages, Ms. Pepke and I were
5 mentioning we want to make sure that -- that,
6 in our opinion, was based on this third-party
7 harm concept where multiple times there were
8 allusions to babies and other people being
9 killed and all this. And that can't stand for
10 that reason, additional reason. That
11 \$30 million verdict cannot stand for that
12 reason.

13 THE COURT: I understand.

14 MR. BROWN: The last thing is Ms. McVey
15 mentioned allocating. She said she's not
16 allocating, but she's combining all of the
17 actual damages verdicts.

18 And then she said, well, you know, we can
19 allocate 50/50. That's the same thing. It's
20 really not, because Mr. Long did not get
21 50 percent of the verdict of Mr. Perry. It's
22 two different numbers.

23 MS. MCVEY: Here's my point in saying
24 that. So I can allocate it any way that's
25 reasonable, right? That's what Jolly tells us.

1 THE COURT: What she's talking about, an
2 allocation, is allocating between the various
3 claims as well as between the Long versus
4 Perry, as I understand it.

5 And, you know, I've certainly had people
6 gripe from time to time about, hey, she put it
7 all on wrongful death because all that went to
8 the jury was survival. I may have got that.
9 It doesn't make any difference. The Court has
10 upheld that the plaintiff can allocate it as
11 they see fit, and then the setoff is based on
12 what the verdict was.

13 MS. MCVEY: My point is, Mitch, even if
14 you allocate it 50 percent each way, which
15 would be reasonable, the number is still
16 \$21 million, and he gets it.

17 MR. BROWN: I understood your point. The
18 problem is the jury verdict didn't allocate --

19 THE COURT: They weren't asked to
20 allocate.

21 MR. BROWN: No, I know. But the most
22 recent Jolly decision requires this
23 retrospective look to see how reasonable in
24 accord with the evidence and the remedies that
25 the jury -- how reasonable is the allocation.

1 And so --

2 THE COURT: What are you talking about,
3 Mitch? I don't understand. We're using the
4 word "allocation" in two different -- entirely
5 different ways. What are you talking about?

6 MR. BROWN: Briefly, I'm talking about
7 post-verdict allocations, which the Jolly
8 court, the majority -- not Chief Justice
9 Kittredge, but the majority said was okay to
10 do, is still subject to --

11 THE COURT: That allocation was an
12 allocation between causes of action.

13 MS. MCVEY: We're giving you the full
14 benefit of the settlement --

15 THE COURT: What are you talking about?

16 MS. MCVEY: -- which I could to reduce
17 your setoff. So I'm giving Johnson & Johnson
18 and AII the full amount of setoff. I'm
19 actually doing more than I have to do to give
20 you the setoff.

21 THE COURT: That's correct. The
22 allocations are based on the claims submitted
23 to the jury. They are not based on anything
24 else I can think of.

25 MR. BROWN: If we had set off the whole

1 amount regardless of who's making the claim and
2 what claim it is, then we don't care.

3 MS. MCVEY: That's what I was trying to
4 say.

5 THE COURT: Well, okay. All right.

6 MR. BROWN: We didn't talk about
7 remittitur, but, Your Honor, our view is the
8 Jolly case says you have to first decide is it
9 grossly excessive. If you do, it's just a new
10 trial. If you don't, then you say, is it
11 unduly liberal, and then Your Honor can remit.
12 But we think it's grossly excessive because of
13 the reasons I said --

14 THE COURT: I understand all that.

15 MR. BROWN: -- based on violating the
16 structure.

17 MS. MCVEY: The last thing to say, and I
18 know you need to go.

19 First, the Johnson case, while we still
20 have two remaining defendants, we are going to
21 settle them. Union Carbide has resolved, and
22 so we do not need the hearing tomorrow.

23 THE COURT: Oh, man. So Union Carbide is
24 gone?

25 MS. PEPKE: Yes, ma'am. I'm here for

1 Union Carbide.

2 THE COURT: Wonderful. Thank you so much.

3 MS. MCVEY: There you go. I should have
4 told you. Sorry.

5 So my point of telling you that is we
6 don't need to be here tomorrow.

7 But I do want to talk about entering the
8 judgment in this case.

9 THE COURT: Well, here's what I'm going to
10 suggest be done.

11 MS. MCVEY: Okay.

12 THE COURT: I rule from the bench in these
13 matters. I realize we've got some out-of-town
14 people here that may or may not want to come
15 back tomorrow. But I want to make a full
16 ruling on the record from the bench about this
17 matter, and I would like to see if we can get
18 everybody back here tomorrow to do that.

19 What is the schedule? We don't have
20 anything tomorrow.

21 THE LAW CLERK: We don't have a September
22 block.

23 THE COURT: Well, I'm going to pose it
24 this way: Is there any way I can get all you
25 back together tomorrow morning at 9:30?

1 MS. BUENO: I was going to be here anyway
2 for Union Carbide.

3 MS. MCVEY: Even if the others have to go,
4 Ms. Pepke and I can probably handle it.

5 THE COURT: Ms. Bueno, I don't want to
6 disadvantage you. Can you --

7 MS. BUENO: I will be here, Your Honor.

8 THE COURT: Is that going to mess you up
9 with something else?

10 MS. BUENO: No, Your Honor. I'll make it
11 work. That's fine.

12 THE COURT: That's all I need to know, and
13 I thank you very much for it.

14 MS. MCVEY: Are we going to have any more
15 argument or are we just going to take your
16 order?

17 THE COURT: I am going to rule from the
18 bench, and that may occasion some further
19 discussion. And I think there's going to be
20 some discussion about setoff anyway.

21 But I've got to click through all of these
22 things, and I want to be able to do that. I
23 know how that goes. I know that sometimes that
24 agenda is --

25 MS. MCVEY: Thank you.

1 THE COURT: And I want to be sure that I
2 pay attention to something that maybe still
3 makes a difference even now with all the
4 briefing and everything else that's been done.
5 And that's why I want to get back together if
6 it's at all possible.

7 MS. MCVEY: Happy to be here.

8 THE COURT: Mitch?

9 MR. BROWN: I'm going to be on a plane,
10 but since you said you're going to deal with
11 setoff, that means -- that's not good. I think
12 you should just do the one-line thing I
13 suggested.

14 THE COURT: Well, I understand all that.

15 MR. BROWN: Anyway, I'll be on a plane,
16 but Ms. Pepke and Ms. Bueno can handle it.

17 THE COURT: And you all can be here?
18 Ms. Gross?

19 MS. GROSS: I'm changing my flight right
20 now. I'll make it work, Your Honor.

21 THE COURT: See you at 9:30 tomorrow
22 morning here.

23 Is 3B open tomorrow?

24 THE CLERK: Yes, it is.

25 THE COURT: Go to 3B tomorrow -- or 3A,

1 whichever --

2 MS. MCVEY: Where we normally are.

3 THE COURT: Which is the one I use?

4 THE CLERK: 3B.

5 THE COURT: 3B. Be at 3B tomorrow at
6 9:30.

7 MS. MCVEY: Okay. Perfect. And I'll just
8 make sure our court reporter is good for
9 tomorrow.

10 THE COURT REPORTER: Yes, I'll be here.

11 THE COURT: She was going to be here
12 anyway.

13 Thank you very much.

14 - - -

15 (Proceedings were adjourned at 5:04 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 24th day of September 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

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

3 - - -

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

10

11 HEARING BEFORE: THE HONORABLE JEAN H. TOAL
 VOLUME II

12

13

14 DATE TAKEN: Wednesday, September 25, 2024
 TIME BEGAN: 9:30 a.m.
 TIME ENDED: 10:37 a.m.
 LOCATION: Richland County Judicial Center
 1701 Main Street
 Courtroom 3B
 Columbia, South Carolina

19

20 REPORTED BY: Cynthia First, RPR, CRR
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P R O C E E D I N G S

THE BAILIFF: All rise.

THE COURT: Thank you. Please be seated.

All right, ladies and gentlemen. This is Michael L. Perry and Lonnie L. Long against American International Industries and Johnson & Johnson, defendants, 2023-CP-40-04072.

Welcome to the River Bluff students. Glad to have you with us this morning.

Ladies and gentlemen, what I propose to do is give you a very broad outline of what I'm thinking about.

On the successor liability issue, which is separate and apart from the verdict issue but an issue we agreed to defer and consider before we closed out the posttrial. I respect Mr. Brown as much as any lawyer that has practiced in front of me, and his scholarship was well done, but I simply can't make the leap on the basis of conventional motions of successor liability.

I think *Nationwide* does guide us about

1 what South Carolina would do, but some courts
2 have gone further and looked at the issue that
3 is worrying me the most about successor
4 liability in connection with Johnson & Johnson,
5 and a series of other entities created in the
6 wake of the massive increase in tort litigation
7 throughout the United States related to
8 allegations that Johnson & Johnson products,
9 particularly baby powder, contain asbestos and
10 that those products have caused its users in
11 certain rare instances to develop cancers, the
12 most common of which are mesothelioma, a
13 disease of the lining of the lungs, and ovarian
14 cancers of various sorts. In the wake of the
15 continuing litigation in this area,
16 Johnson & Johnson chose to restructure the
17 corporation.

18 The allegation of the plaintiffs is that
19 that restructuring was an attempt to avoid
20 liability in connection with the averments in
21 this case that Johnson & Johnson's baby powder
22 caused Mr. Perry to develop mesothelioma, now
23 diagnosed and predicted to end his life in just
24 a few years.

25 Certainly, it's almost uniformly true

1 throughout the state courts that successor
2 liability can be found when an entity
3 purposefully tried to divest itself of assets
4 in order to avoid known liability or claimed
5 liability that have resulted in litigation.

6 I note with interest that Oregon, when the
7 *Lee* case arose in state court, has some very
8 robust case law on this issue and does not
9 allow successor liability, but its case law is
10 much reflective of our own *Nationwide* case.

11 And I think what's important to note about
12 *Nationwide* is there's not a requirement of a
13 finding of fraud in its most pejorative sense;
14 but if there is a finding of deliberate
15 attempts to shield or escape liability for
16 already known claims of liability, then that's
17 enough to trigger the rule in *Nationwide* that
18 successor corporations will not be a means of
19 allowing the corporation first charged with
20 responsibility to evade that responsibility.

21 And that's how I look at successor
22 liability in the big picture. Much case law
23 has been argued, and I'll expect to have that
24 included in the proposed orders that are given
25 me on the topic. That is the way I rule on

1 that issue.

2 With respect to Johnson & Johnson's
3 motions for JNOV and AII's motions for JNOV,
4 they are almost entirely claims of errors of
5 trial with respect to decisions made about the
6 admission and nonadmissibility of evidence and
7 other activity by the Court, including
8 excluding certain testimony, limiting certain
9 testimony, and the Court's directions to the
10 jury during trial and charges thereafter.

11 All those undergird the motions -- the
12 motions for judgment non obstante veredicto. I
13 deny those motions.

14 New trial absolute in and of itself is, in
15 J&J's instance, not materially different from
16 the motion JNOV. It does include a greater
17 emphasis on some of the activities by the judge
18 in the trial of the case and the charges.

19 New trial absolute for AII is like its
20 motion of JNOV, primarily a tag onto the
21 arguments of J&J.

22 The arguments that AII makes particular to
23 it are, first, that I should have set aside the
24 default or that, even if I allowed the default,
25 they did not receive a fair trial on damages

1 because of violations by the plaintiffs of
2 certain civil procedure rules in that regard as
3 well as unfairness by the Court.

4 I deny the motions for a new trial
5 absolute. And in particular with regard to
6 AII, I believe that the very lengthy time
7 between the Court's orders with respect to
8 setting your case for trial, the Court's orders
9 with respect to how the case was to be tried in
10 the pretrial hearings, all of which were known
11 to AII and all of which the court proceedings
12 were participated in by AII, conform with any
13 requirements of the civil procedure rules with
14 respect to notice.

15 With respect to 13th juror, I'm very
16 familiar with this area. The *Folkens* case is
17 one I know well, and it sets forth some very
18 clear guidelines for 13th juror and does
19 emphasize, as Mr. Brown did in his arguments,
20 that the Court does not give a reason, because
21 what 13th juror literally means is that the
22 Court hangs the jury by weighing in and saying
23 the verdict is incorrect and should have been a
24 verdict for the defendant, for example, in this
25 case.

1 And that's all the Court has to say, is
2 I'm invoking my authority as the 13th juror to
3 weigh in against the verdict as it is rendered,
4 and therefore that results in a hung jury and
5 results in a new trial.

6 I decline to use the 13th juror doctrine
7 to interfere with the decision that the jury
8 made.

9 Then there is the motion by the defendant
10 J&J for a new trial nisi remittitur. I grant
11 that motion. And the question is what are the
12 parameters of that nisi remittitur?

13 And I'm going to say I still have not
14 gotten my calculator out and figured this out
15 for the next time, but I am very mindful, as I
16 decide how to remit this verdict, of the fact
17 that Johnson & Johnson and AII will receive the
18 benefit of a very substantial amount already in
19 the pipeline for the plaintiff as a result of
20 settlement agreements.

21 I have examined each. They are fair.
22 They are reasonable. And I find that the
23 overall accumulation of \$11 million in actual
24 damages is fair and reasonable. And that very
25 much influences my thought about what is fair

1 and reasonable as far as the \$63 million
2 verdict, of which the part remitted is an
3 actual damage verdict and a punitive damage
4 verdict.

5 The relationship between the two does not
6 violate the rules that we have with respect to
7 the percentage of punitive damages, which are
8 limited in South Carolina by statute to three
9 times the amount of actual damages. The
10 punitive damage award in this case does not
11 violate that statute.

12 And that also weighs heavily in my thought
13 about how to structure this thing.

14 I do not consider this verdict a runaway
15 verdict. And although I am mindful of the
16 contentions that were made about the argument
17 of Mr. Adams, the contention being that on that
18 basis alone, the verdict should be overturned
19 because the argument -- Mr. Adams' argument
20 appealed to the passion and prejudice of the
21 jury and I did not sufficiently honor the
22 objections that were made or direct Mr. Adams
23 in that regard sufficient to save the verdict
24 from the taint of being an appeal to passion
25 and prejudice. I don't find -- I was

1 dissatisfied with some of what Mr. Adams did.
2 I have reflected that at trial. I reflected
3 that yesterday as we argued these motions
4 originally. I do not think that that conduct
5 rises to the level of something that appeals to
6 passion and prejudice.

7 And I say that in light of everything that
8 happened in the trial, and I also say that in
9 light of the substantial sum that was projected
10 by the parties that did so, \$11 million, when
11 the primary claim was against Johnson &
12 Johnson, because that is the -- when all the
13 other exposures are discussed, and they were
14 discussed in the course of the trial of the
15 case, they pale in comparison to the heavy
16 exposure to Johnson & Johnson's product.

17 I think the jury -- as I've said
18 previously in reaction to the motion for a new
19 trial absolute and the motion of JNOV by
20 Johnson, I believe the jury was well within its
21 ability to look at the scientific and medical
22 information and corporate information that was
23 made available in the trial to conclude that
24 Johnson & Johnson's baby powder contained
25 asbestos, that the company knew about it for

1 years, that the company did not issue warnings,
2 did not sufficiently test, tested in a way that
3 guaranteed a result, all of this revealed in
4 the papers of the corporation and the testimony
5 of its former corporate representative and
6 high-level executive officer, Dr. John Hopkins.

7 And, in fact, that testimony was done by
8 video, and the parameters of that testimony
9 were agreed to by both parties, those parties
10 that did agree to endorse everything that
11 Dr. Hopkins said. And I don't mean to suggest
12 that, but the parties agreed to put that
13 testimony before the jury.

14 So its admissibility and the admissibility
15 of matters included in that testimony cannot
16 now be challenged. They were admitted by the
17 agreement of the parties.

18 And that testimony, first and foremost, is
19 the testimony that would have justified the
20 findings of responsibility that the jury made,
21 information out of Johnson & Johnson's records.

22 That testimony was supported by expert
23 testimony of experts whose qualifications were
24 examined in detail by me before this trial
25 started with strong contentions by the opposing

1 parties to the experts by the plaintiff and
2 defendants that they weren't qualified, that
3 they shouldn't be allowed to express an
4 opinion, that I should not qualify them.

5 I denied most of those motions. I limited
6 certain expert -- certain witnesses presented
7 by Johnson & Johnson in two ways.

8 Johnson & Johnson's corporate
9 representative was Dr. Kuffner. He is a
10 high-level medical officer, chief medical
11 officer of Johnson & Johnson. For years the
12 designated corporate representative was
13 Dr. John Hopkins. Dr. Kuffner has taken his
14 place.

15 They testified, each of them, not because
16 they were offered as experts nor qualified by
17 the Court, as they must be as experts; they
18 were offered as fact witnesses and as the
19 person who at Johnson in the trial of the case.

20 With Dr. Kuffner, at a certain point the
21 defense attempted to introduce through
22 Dr. Kuffner expert testimony of a geological
23 nature and of a medical nature and of a
24 scientific nature with respect to the causation
25 issue with regard to Johnson & Johnson, whether

1 its material contained asbestos and whether
2 what it contained could have caused the
3 mesothelioma that Mr. Perry contended was the
4 baseline of his tort claim against Johnson &
5 Johnson.

6 With respect to geological evidence, I
7 qualified the expert in geology. But with
8 regard to their medical experts and their
9 geology, I made one limitation, and that was
10 that they were not qualified to express a
11 medical opinion on the cause of Mr. Perry's
12 mesothelioma.

13 They intended to express the opinion that
14 his mesothelioma was spontaneous or idiopathic.
15 The word "idiopathic" simply means we don't
16 know. It's not a medical diagnosis. And I
17 noticed that that was, in past cases I've
18 tried, the original way this issue used to be
19 discussed.

20 But "spontaneous" is also a way of talking
21 about this. That's a "we don't know" thing as
22 well. It simply means it must have erupted on
23 its own because we know no medical or other
24 kind of reason that would explain how this lung
25 became damaged by mesothelioma.

1 They're not attributing it to asbestos;
2 they're not attributing it to anything. They
3 are saying that there's a spontaneity that
4 exists that caused it.

5 I find over time that that theory is not
6 well supported by scientific materials. And a
7 host of scientific material was put at issue in
8 this trial, much of it pretrial; much of it is
9 exhibits in the trial. I read every single
10 piece of it.

11 And the conclusion I reached, that I
12 reached pretrial, that "spontaneity" and
13 "idiopathic" are not medical diagnoses, was
14 made in the light of the materials submitted to
15 me upon which I was asked to judge the
16 competency of the expert witnesses to issue the
17 testimony they're going to issue.

18 So, again, with respect to the experts
19 that were offered in this area by Johnson &
20 Johnson, I certainly allowed all of them to
21 testify, but I limited the testimony of
22 Dr. Weill, Dr. Diette, and Mr. Sanchez in that
23 regard.

24 There was another expert that was
25 attempted to be -- that was going to be

1 proffered, and I indicated that I would admit
2 that expert testimony and denied motions by the
3 defendants to strike that witness or limit that
4 witness. I did not limit Dr. Barlow.

5 Dr. Barlow could have gotten up here and
6 testified in the sphere of her expert opinion.
7 Johnson & Johnson chose not to offer that
8 witness when its turn came to present its case.
9 So for all those reasons, the conclusions that
10 I reached are that a fair trial was had.

11 I think the best I can say about the
12 amount comes straight out of one of the finest
13 posttrial orders I have ever had the privilege
14 of reading and one that I recommend for your
15 attention as you each submit a proposed order
16 to me, and that is the order in Garvin against
17 AGCO Corporation and many others. The cite is
18 2012-CP-40-6675. It is an order issued by
19 Judge -- then trial Judge Gary Hill, who served
20 at my appointment when I was chief as the
21 leader of the asbestos docket.

22 D. Garrison Hill signed an order on
23 November 14th, 2014, in which he did
24 essentially what I'm going to do in this case.
25 He affirmed the -- he denied motions for

1 judgment notwithstanding the verdict and new
2 trial absolute, but he granted the defendant's
3 motion for a new trial nisi remittitur, and he
4 nisi'd the order.

5 And what he did -- he was looking at an
6 \$11 million award. He reduced that to
7 \$1.5 million; and a punitive damage award,
8 which he reduced from \$11 million to
9 \$3.5 million. And he let the loss of
10 consortium award stand as it was initially
11 decided.

12 So I give that as some outline of what
13 I've decided to do.

14 But how much should the nisi remittitur
15 be? I've had a hard time deciding that, I'll
16 be honest with you. I think it ought to
17 reflect a fair increase above what is set off.
18 And there are a lot of ways of figuring these
19 percentages, even using Judge Hill's
20 percentages.

21 Some things that differentiate the Perry
22 case from the *Garvin* case are, first of all,
23 the age of the plaintiff. That worked in --
24 that was one thing that Judge Hill considered
25 significant in reducing the verdict.

1 Also, the economic loss projected for
2 Mr. Garvin was substantially different from the
3 economic loss presented in this case.

4 And, of course, the life expectancy.
5 Mr. Garvin's life expectancy was about 10
6 years, as I recall it, while Mr. Perry's life
7 expectancy is something north of 27 years, as I
8 recall it. So there are a lot of differences
9 there.

10 And, quite honestly, if I applied the
11 literal differences between this award and
12 Judge Hill's award, the nisi would be pretty
13 slight, if any, in terms of fitting it into the
14 variables. But I do think that some reduction
15 should be made.

16 With respect to Michael Perry's other
17 damages -- with respect to Michael Perry's
18 actual damages, his actual damages are the
19 combination of 19,237,5 and 3.8, if I'm not
20 correct. And I would combine those together.

21 Now, and let me also say another thing,
22 that what I would do is look at the ratio
23 between the loss of consortium and Perry's
24 actual damages to make my reductions.

25 The loss of consortium, I think Mitch is

1 probably right about how they figured it. They
2 used a figure per year, and that's the figure
3 that was used in trial to make some account of
4 the competence testimony about the present
5 value of the right to receive money over a
6 period of time. I think that's the concept the
7 jury used. And I will try to use that same --
8 and I will try to use that same kind of logic
9 if I reduce the verdicts.

10 With respect to the punitive damage
11 verdict, the first thing is, of course, none of
12 the \$11 million setoff applies to the punitive
13 verdict. The punitive damage sits at
14 30 million freestanding.

15 I think punitive damages are appropriate
16 in this case because of the intentional
17 conduct. And I think the jury was well within
18 its rights to find that the conduct -- that the
19 predicate for the conduct, which is the finding
20 of willful, wanton conduct, allowed the finding
21 of actual damages.

22 And it is also significant that the jury
23 also found -- that the jury in Johnson &
24 Johnson's case did not find fraudulent
25 misrepresentation. In the case of AII, it

1 found fraudulent representation. Why? Because
2 that was alleged in the complaint and AII
3 defaulted.

4 And I depart here for a moment to say that
5 was the source of a constant exchange between
6 myself and the counsel for AII, and it's
7 continued up to our posttrial arguments.

8 And it's just a -- I respect Ms. Flynn.
9 Stephanie Flynn is one of the finest defense
10 lawyers we have. She's doing the bidding of
11 her client, and I don't criticize that. I've
12 sat in that chair many times during the course
13 of my trial practice and suffered some defeats
14 in that regard.

15 But "default" means what it says. And
16 they try somehow to say the damages claim has
17 to be set by the court and, therefore, this
18 fraudulent conduct doesn't count in some kind
19 of way.

20 They allege fraud as a part of their
21 deliberations. The jury found fraud with
22 respect to AII, as they must; and therefore,
23 AII had a firmer predicate for the finding of
24 the verdict of -- and that coupled with the
25 fact that they also found willful, wanton -- by

1 clear and convincing evidence found willful,
2 wanton, and reckless conduct on the part of J&J
3 goes a long way in my mind to the feeling -- to
4 the ruling that in the case of AII on the front
5 end, I will not grant a new trial nisi
6 remittitur. I will let the verdict stand as
7 the jury wrote it, which was a punitive damage
8 verdict of \$760,000 for AII, along with a --
9 and then AII, of course, is jointly and
10 severally liable with Johnson & Johnson for the
11 actual damages. There's no separation there.
12 That's part of the situation that the
13 contributions under the Joint Tortfeasors Act
14 puts us in with respect to actual damages for
15 any defendants who go to trial.

16 So that's the situation for joint AII. I
17 want to make that clear on the front end before
18 we then proceed to look at the punitive damage
19 situation with respect to Perry.

20 I have not got a calculator to do this my
21 way, but I am going to say my preliminary
22 thought is to remit \$3 million of the actual
23 damage loss of consortium verdict so that the
24 loss of consortium would be reduced by that
25 amount.

1 And with respect to the actual damage
2 verdict, my current inclination is to reduce
3 the actual damage verdict by \$6 million for
4 Mr. Perry.

5 Now, what I would like for you all to
6 do -- that's not my final ruling because I'm
7 still going to read some of the things that
8 have very newly been submitted to me as rulings
9 by other courts that bear on this matter.
10 That's my initial reaction to what to do about
11 this.

12 I would like posttrial orders to be like
13 this:

14 Ms. McVey, I would like for you to submit
15 a posttrial order in two weeks.

16 MS. MCVEY: Your Honor, can I submit it
17 quicker than that?

18 THE COURT: Yes, you can.

19 MS. MCVEY: Okay. I think we can get you
20 a posttrial order by Monday.

21 THE COURT: Okay. If you submit it by
22 Monday, I will give defendants until -- let me
23 look at my calendar. The plaintiffs will --
24 plaintiff will submit its proposed order which
25 covers all the topics I've raised.

1 And with respect to the remittitur, can
2 frame it as I have framed it but offer
3 alternatives. I will close that out.

4 MS. MCVEY: Okay.

5 THE COURT: And that will be done by
6 September the 30th -- close of business
7 September the 30th.

8 MS. MCVEY: Yes, ma'am.

9 THE COURT: With respect to defendants,
10 I'm going to turn it to you, Mr. Bogan. You
11 got any suggestions to make time-wise for your
12 reply?

13 MR. BOGAN: Today is Wednesday; so --

14 THE COURT: Yes.

15 MR. BOGAN: She's doing it in five days.
16 I mean, you want ours by the following Monday,
17 whatever that is, the 8th -- or the 7th?

18 THE COURT: How do you feel about that?
19 Can you do it by that time, or do you need
20 till --

21 MS. MCVEY: Ideally, we will get it done.
22 I don't want to rush Mr. Bogan, but I am
23 concerned about the timing of not entering --

24 THE COURT: Well, that's the only thing.
25 The volatility of this situation -- we're going

1 to talk about that in a minute.

2 Mr. Bogan, why don't we just go on and say
3 the Monday following her Monday.

4 MR. BOGAN: October 7th?

5 THE COURT: That's correct, October 7th.

6 MR. BOGAN: Judge, I know she's going to
7 draft the orders as you've outlined, but one
8 thing -- not to back up, but I heard you rule
9 on punitives for AII, but did you give your --

10 THE COURT: I uphold punitives for each
11 party. But with respect to AII, I choose not
12 to remit any amount of the punitive damage
13 verdict, 750 or 780, whatever it was.

14 With regard to actual damages, of course,
15 AII is in it like y'all are. It's the
16 contribution on joint tortfeasors.

17 MR. BOGAN: And I just missed, Your Honor,
18 you saying you were upholding for both parties
19 on punitives. I just didn't hear that part.

20 THE COURT: I uphold both parties
21 punitive -- well, I uphold the award of
22 punitive damages, but I nisi remit the amount.
23 So, in essence, I grant a new trial on nisi
24 remittitur. If the plaintiff accepts the
25 amount of the nisi, then that's what happens,

1 correct?

2 MR. BOGAN: Oh, yes, ma'am. I wasn't
3 contending. I just didn't know if you were
4 reducing punitives in any way for J&J. That's
5 the question I was asking.

6 THE COURT: Yes. That's what I just got
7 done saying, I think.

8 MS. MCVEY: You reduced the actual damages
9 award to what I understand to be \$15 million --
10 no. I'm sorry. You reduced the loss of
11 consortium award by \$3 million, the actual
12 damages --

13 THE COURT: Oh, okay. I didn't give you a
14 number on the --

15 MR. BOGAN: That's all I was asking.

16 THE COURT: I'm going to reduce the amount
17 of the punitive damage verdict. Okay?

18 MR. BOGAN: Thank you. So I wasn't
19 meaning to be persnickety.

20 THE COURT: Yes.

21 MS. MCVEY: And, Your Honor, just as we --
22 when we talk about ratio --

23 THE COURT: Yes.

24 MS. MCVEY: -- even if you reduce his
25 actual damages amount the way that you have --

1 THE COURT: Yes.

2 MS. MCVEY: -- you're still well within
3 any kind of acceptable ratio.

4 THE COURT: You were to begin with. You
5 would be if I didn't take a dime off of the
6 punitives as awarded.

7 MS. MCVEY: That's right. And the only
8 reason I say that is you went through a lot of
9 what the Garvin order said. And the biggest
10 thing for Judge Hill -- Justice Hill now; Judge
11 Hill then -- because I was in that case, is
12 that Mr. Garvin, as you mentioned, was older,
13 but he also had testicular mesothelioma.

14 THE COURT: That's correct.

15 MS. MCVEY: Which at the time was cured.

16 THE COURT: Right.

17 MS. MCVEY: That was very different than
18 what Mr. Perry has.

19 THE COURT: No question about it.

20 MS. MCVEY: So I just wanted to make
21 sure -- I don't think that was ever in the
22 record; so I wanted to make sure that's --

23 THE COURT: No, that was in the record and
24 in his order. That is specifically recited in
25 his order. And, yes, that bears on what you

1 may say as you respond to what my preliminary
2 reduction would be.

3 MS. MCVEY: Okay.

4 THE COURT: I look at Garvin as a
5 touchstone for me. And so, as you contemplate
6 what you're going to write back -- there are a
7 lot of things that will be written that have to
8 do with the rulings made at trial and so forth
9 and so on; but as you contemplate how you want
10 to respond, I look at this as a guideline.

11 Now, I will say about the Garvin verdict,
12 the landscape has changed radically since that
13 case was tried. First and foremost, the
14 average verdicts are much higher now all across
15 the country with respect to -- particularly
16 with respect to cosmetic talc-type cases.

17 With respect to industrial mesothelioma
18 cases, they are also higher. And there are
19 several interesting articles that are in the
20 literature about that. But with respect to
21 talc and cosmetic product verdicts, the
22 verdicts are very, very different than they
23 were when Garvin was decided, no question.

24 MS. MCVEY: Yes, ma'am.

25 THE COURT: They're very, very different

1 from when I tried the first three J&J cases I
2 cited, and the verdicts were for the defendant
3 or a hung jury in each one of them.

4 MS. MCVEY: That's right.

5 THE COURT: So there is a difference.

6 But the other thing about the landscape
7 that is very different that we're going to talk
8 about here in a minute is what
9 Johnson & Johnson has done to reformulate
10 itself by the use of bankruptcies.

11 And that concerns me deeply about what
12 happens with this case and where it stands in
13 line if that activity persists.

14 MS. MCVEY: Thank you, Your Honor.

15 THE COURT: Okay. So with respect to the
16 punitive damage verdict, what I'm saying is
17 this: I am going to remit that verdict, but I
18 have not decided what the amount is. And I
19 will take suggestions about that.

20 If the defendant chooses to make
21 suggestions, they will be done in complete
22 preservation of its contention that the trial
23 was not fair to them and that the verdict
24 amounts were not fair to them and greatly
25 exceeded what was justified by the evidence

1 offered. And that's fine.

2 Now, there is, of course, this whole
3 matter of how the parties should be structured.
4 And let's talk about that for a minute.

5 Just in the course of since the case has
6 ended, as the verdict was announced,
7 Johnson & Johnson made another significant
8 shift in its corporate status. And, Ms. McVey,
9 recite for the record what that was.

10 MS. MCVEY: Your Honor, the day that the
11 verdict came in after Johnson & Johnson
12 multiple times told this Court and us that LTL
13 was the proper party -- I'm sorry. I'm getting
14 them confused. It was LTL, but this was LLT
15 was the proper party and would be able to
16 satisfy any judgment. The day this verdict
17 came in, LLT had been dissolved. And so
18 there's --

19 THE COURT: And what happened to its
20 liabilities, if you know?

21 MS. MCVEY: It went to, I believe,
22 Pecos -- to Pecos, P-E-C-O-S, River.

23 THE COURT: Right. Then I received a
24 motion from the defendants posttrial to
25 substitute Pecos for LLT. Correct?

1 MS. MCVEY: Yes, ma'am. And my suggestion
2 had been -- because they gave us a declaration,
3 but it's totally one-sided. And they may be
4 totally right.

5 But instead of substituting out, why
6 wouldn't we just add Pecos in if that's what
7 they're saying is the proper entity?

8 THE COURT: All right. That's what you
9 request?

10 MS. MCVEY: Yes, ma'am.

11 THE COURT: All right.

12 MS. MCVEY: That way, it makes us not have
13 to go dig into all this stuff right now that's
14 not necessary. What we want to do is have the
15 right people who are responsible for the
16 judgment, and they may be right. And if LLT
17 doesn't exist, then it will be Pecos River.
18 But at least we'll have Pecos River in without
19 taking out LLT to the extent they're not right.
20 That's just what I understand.

21 THE COURT: All right. I want to turn
22 after this -- and after I ask some questions of
23 the defense about this particular piece of it,
24 I want to turn to the broader question of how
25 any judgment would be secured, because I'll

1 tell you on the front end, I'm not entitled to
2 pause or stay the judgment -- or I'm going to
3 issue a judgment order in this matter. So what
4 could be the possible security of that is
5 something I want to talk about.

6 But I'm going to turn to you now, lawyers
7 for Johnson & Johnson, and ask you first: Do
8 you have the ability to make a representation
9 now that Pecos could be added rather than
10 substituted? Do you have the authority to do
11 that?

12 MS. PEPKE: We don't have the authority,
13 although I have sent offer requests to the
14 client to consider the suggestion.

15 THE COURT: All right. So I think what's
16 happened here is that I don't -- I am not
17 inclined -- I am inclined to protect this
18 verdict by adding Pecos rather than
19 substituting, but I am not going to do that
20 because I don't think the -- I think the
21 defense ought to be given a fair shot at
22 consulting with the corporate party, the
23 representation of the companies involved,
24 before they indicate anything about that. And
25 that, I'm sure, can be done during the time

1 period we have before the orders -- proposed
2 orders come.

3 MS. MCVEY: And I think that makes sense.
4 So what we'll likely do in our proposed order
5 is add Pecos in.

6 THE COURT: Right. And understanding that
7 I haven't made a decision one way or another
8 about that, but then I'm going to await what
9 they have to say about it.

10 MS. MCVEY: I think that's fair, and I'm
11 happy to give that to them. And I think
12 ultimately you can order it even if their
13 client can't be --

14 THE COURT: I probably could, but I prefer
15 to let them have the ability to check with
16 their client about that.

17 Then there's the broader question of how
18 this judgment, as it's finally issued by me,
19 can be secured. And I'm going to turn first to
20 the defense to talk about it, because they've
21 done some thinking about that, I think.

22 All right. So, Mr. Bogan, would you speak
23 to that for me.

24 MR. BOGAN: Yes, ma'am.

25 I think the suggestion Mr. Brown made

1 yesterday that I could reiterate again here
2 today would be a bonding mechanism of securing,
3 if Your Honor would be so inclined to permit
4 that. I think it's in your discretion, if you
5 allow that, to bond the judgment off.

6 And in particular -- I mean, it's Rule 62,
7 Your Honor, as you know. But also I would cite
8 to 18-9-130(A)(1)(a) is the bonding statute
9 that talks about sufficient security there. So
10 that would be our suggestion.

11 I mean, other alternatives would be paying
12 them into court. I don't have the authority to
13 offer that, but that's another alternative to
14 securing it. Because I know they're -- you've
15 mentioned priority of bankruptcy and other
16 things. But Johnson & Johnson is not in
17 bankruptcy; so a bond would be my suggestion,
18 Your Honor, if you'll permit that.

19 THE COURT: And what I will do is this:
20 I'm inclined to do a bond, but now I want to
21 know how it's securitized and what bearing
22 18-9-130(A)(1)(a) has. I'm familiar with this
23 section. It's changed over time since I was in
24 practice and used to represent companies that
25 issued these kinds of bonds. So --

1 MR. BOGAN: And, Your Honor, I would say
2 this: Obviously, once Your Honor makes a
3 decision about the total amount of reduction,
4 including punitives -- and I'm speaking to
5 ordinary practice, like you're talking about in
6 your experience, would be to go to a bonding
7 entity. AIG, for example, often bonds
8 judgments.

9 It would be who you use to bond it off,
10 depending on the amount, which bonding agent or
11 insuring agent you would go to. So we would,
12 of course, engage in all that depending on --

13 THE COURT: Sure, sure.

14 MR. BOGAN: I don't know that it's changed
15 much from what you remember, Your Honor. The
16 statute has changed but what happens hasn't.

17 THE COURT: Well, I was much engaged in
18 doing the work on an individual, large amount
19 of bonds type -- well, it was large for us in
20 those days, but nothing like what you see
21 now -- as well as draft a surety agreement. So
22 I have never delved into it in recent years to
23 see how much has changed since I used to draw
24 these instruments.

25 But what we'll do is just have you make

1 the specific proposal in the order proposal
2 that you make, if your client allows that. And
3 Mitch indicated there was some interest in
4 doing that.

5 MR. BOGAN: Yeah. And we would still
6 stand by that suggestion that we bond it. The
7 question would be to Your Honor specific is I
8 don't know yet who it would be. It would
9 depend on the amount that we need bonded, to
10 which --

11 THE COURT: Sure.

12 MR. BOGAN: -- entity you'd go to. That's
13 all I mean.

14 THE COURT: I understand. I understand.

15 MS. MCVEY: And just from our
16 perspective -- and we'll put it in our
17 potential draft -- they had wanted to bond only
18 25 million, and we would want the bond to be
19 the full amount of whatever the judgment is.

20 THE COURT: Yes, the bond needs to be in
21 the amount of whatever I remit to, or if I
22 don't, then they could -- y'all can come back
23 at another time, and they could say what they
24 want to secure and how, and you can reach some
25 kind of accommodation.

1 But I would vote -- and I just throw this
2 into the middle -- that, like the *Weist* case,
3 this might provoke some discussion amongst the
4 parties as to how to resolve this case.

5 This case is not in the same category at
6 all as the ones that are attempting to be
7 resolved by these various bankruptcies. The
8 mesothelioma cases are being treated very
9 differently, as I understand it.

10 We've talked informally amongst us about
11 some of that activity. But for the record, the
12 most recent activities involving various
13 corporate reconfigurations and restructuring by
14 Johnson & Johnson and its entities has been
15 aimed primarily at creating prepackaged
16 settlements, or prepackages, they're called, in
17 connection with ovarian cancer cases.

18 Mesothelioma cases are in a different
19 category and -- but they're going to be
20 affected, just like this case will be affected,
21 by all the so-called restructurings.

22 And that is why I am determined to have
23 orders that protect the collectibility of this
24 verdict at whatever amount it is or becomes or
25 is agreed to from all this other activity that

1 is going on.

2 And the defense lawyers -- these defense
3 lawyers -- Ms. Bueno, Ms. Pepke, and
4 Mr. Bogan -- are not the people that make these
5 decisions at all, and I'm keenly aware of that.
6 And I'm not going to bind them and ask them to
7 put something on the record today about that.
8 It just wouldn't be fair.

9 So that will be wrapped up in whatever is
10 submitted to me otherwise.

11 MR. BOGAN: Yes, ma'am. And all I would
12 say, Your Honor, is, in terms of the statute
13 which you're going to go look at that I cited
14 and the amount of the bond, I mean, as we stand
15 here, it's going to be -- the amount of the
16 bond is going to be whatever the new loss of
17 consortium number is, whatever the new actual
18 damages number is, whatever the new punitive
19 damages number is, minus the setoff --

20 THE COURT: Right.

21 MR. BOGAN: -- and I don't know if that
22 number is above 25 million or not because we
23 don't know the math yet.

24 THE COURT: I don't either.

25 MR. BOGAN: And so my point only is you

1 can read the statute and interpret it for what
2 it says. You don't need my argument on it
3 today. We're going to present plenty of stuff
4 to you. But we don't know the amount yet; so I
5 think we're a little bit ahead of ourselves on
6 deciding what it's going to be, whether it's
7 the full amount or 25 million under the
8 statute. And that will be to Your Honor to
9 decide.

10 THE COURT: All right. I understand that.
11 And nobody's giving away anything in that
12 regard.

13 Now, with regard to proposed orders,
14 Ms. Flynn, you have the same time period that
15 Johnson & Johnson has, which is October 7th, to
16 file your reaction to what they file.

17 MS. FLYNN: Yes, Your Honor. Thank you.

18 MS. MCVEY: Your Honor, we're going to
19 submit two separate orders, I think, one on
20 Johnson & Johnson and one on AII for the ease
21 of the two separate parties.

22 THE COURT: Certainly. I think that makes
23 plenty of sense.

24 Now, anything else that I need to cogitate
25 about?

1 MS. MCVEY: I don't think so, Your Honor.

2 THE COURT: All right. I just would again
3 reiterate that I am pretty firm in my decision
4 to remit this verdict, but the amounts are
5 subject to a lot of discussion, thoughtful
6 discussion by both sides. And I know you'll
7 give that. I would hope that it would be
8 thoughtful enough to resolve the matter,
9 because I'm always optimistic about such
10 things.

11 But at least I want to have both sides --
12 or all sides of the equation get enough
13 permission from their client to discuss
14 remission in their proposals.

15 MS. MCVEY: Okay.

16 THE COURT: Anything further?

17 All right. Thank you so much. And it's
18 been my honor to be the trial judge in this
19 very complex matter.

20 With all of the heartburn you go through
21 in the intensity of a trial, I again say that I
22 express my great admiration for all of you
23 attorneys. And tell Mr. Adams and the other
24 attorneys involved, Cowan and the others that
25 are not present today, that extends to them as

1 well.

2 Thank you so much.

3 MS. MCVEY: Thank you.

4 THE COURT: Court will be in recess.

5 - - -

6 (Proceedings were concluded at 10:37 a.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 25th day of September 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	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2023-CP-40-04072
	)	
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	<u>JOHNSON & JOHNSON DEFENDANTS'</u>
	)	<u>WITNESS LIST</u>
vs.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

Defendants Johnson & Johnson, Inc. ("J&J"); LLT Management, LLC ("LLT"); Johnson & Johnson Holdco (NA), Inc. ("Holdco"); and Kenvue, Inc. (collectively, "Defendants"), by and through the undersigned counsel hereby submits its final Witness List per the Court's Scheduling Order and the South Carolina Rules of Civil Procedure:

EXPERT WITNESSES

1. Dominik D. Alexander, PhD, MSPH
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2. Christy A. Barlow, PhD
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3. Gregory B. Diette, MD, MHS
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1830 East Monument Street, 5th Floor
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4. Stanley J. Geyer, MD
Geyer Pathology Services LLC
3 Willow Farms Lane
Pittsburgh PA 15328
5. Victor L. Roggli, MD
Duke University Medical Center

Department of Pathology
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200 Trent Drive
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6. Matthew S. Sanchez, PhD
RJ Lee Group
350 Hochberg Road
Monroeville, PA 15146
7. David Weill, MD
Weill Consulting Group
533 Audubon Street
New Orleans, LA 70118

CORPORATE WITNESSES

Defendants may call some or all of the following corporate witnesses at the trial of this action:

8. Edwin Kuffner, M.D.
c/o Kim Bueno
Butler Snow LLP
1400 Lavaca Street, Suite 1000
Austin, TX 78701
9. John Hopkins, PhD
c/o Kim Bueno
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FACT WITNESSES

Defendant may call some or all of the following fact witnesses at the trial of this action:

10. Michael L. Perry
c/o Rachel A. Gross
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302 N. Market Street, Suite 302
Dallas, TX 75202
11. Lonnie L. Long
c/o Rachel A. Gross
Dean Omar Branham Shirley, LLP
302 N. Market Street, Suite 302
Dallas, TX 75202

12. Alice M. Blount, PhD

13. Barry Gibney, MD
MUSC Health at Tidelands
4040 Highway 17 Bypass
Suite 306
Murrells Inlet, SC 29576

14. Timothy McCarthy, PhD
c/o Kim Bueno
Butler Snow LLP
1400 Lavaca Street, Suite 1000
Austin, TX 78701

RESERVATIONS – ADDITIONAL WITNESSES

In addition, Defendants reserve the right to call all witnesses named by any other party in this action, even if the party naming that witness is no longer a party to this lawsuit at the time of trial.

Defendants reserve the right to withdraw any witness identified herein.

Defendants reserve the right to use any affidavit, deposition, answers to interrogatories, and/or answers to requests for admissions made by any party to this action.

Defendants reserve the right to call as witnesses any individuals necessary to authenticate documents, including corporate documents, social security records, tax records, military records, union records, personnel records, or medical records, including depositions of records custodians.

Defendants further reserve the right to call the following additional witnesses:

1. All witnesses previously identified by Plaintiffs in this case whether or not listed by Plaintiffs in their disclosures and/or called by Plaintiffs at trial.
2. All representatives of medical facilities and physicians at said medical facilities who have treated Plaintiff Michael Perry during his lifetime.
3. All witnesses necessary to provide rebuttal or impeachment evidence.
4. Defendants reserve their rights to call live or by deposition or other transcript any of the witnesses listed above.
5. Employees of Johnson & Johnson-- Those with knowledge relevant to this litigation, including the presence or absence of asbestos minerals in talc deposits, the various testing

methods that have been used and are being used to test talc for asbestos contamination, witnesses with personal knowledge as to events described or mentioned in any relevant documents produced in this litigation.

6. Third Party Witnesses-- Those from testing facilities or laboratories with knowledge relevant to this litigation, including the presence or absence of asbestos minerals in talc deposits, the various testing methods that have been used and are being used to test talc for asbestos contamination, witnesses with personal knowledge as to events described or mentioned in any relevant documents produced in this litigation.

Discovery in this case is ongoing. Accordingly, Defendants reserve their rights to call live or by deposition or other transcript any other witnesses subsequently identified or deposed.

Respectfully submitted,

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Attorneys for Defendants Johnson & Johnson, Inc.; LLT Management, LLC, formerly known as LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.

Columbia, South Carolina

July 20, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2023-CP-40-04072
	)	
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>J&J DEFENDANTS' PROPOSED JURY</u>
	)	<u>CHARGES AND VERDICT FORM</u>
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	
	)	

The J&J Defendants hereby submit that the attached jury charges and verdict form listed as “COMPREHENSIVE JURY CHARGES” and “PHASE 1.VERDICT FORM REQUESTED BY J&J DEFENDANTS” are consistent with the law of South Carolina and should be thus be used during Phase 1, and hereby object to any charges, instructions, or verdict forms used that are inconsistent herewith, and which are inconsistent with the J&J Defendants’ filings, also being filed contemporaneously herewith, on: (1) the proper application of *Smith v. Tiffany*; (2) the proper application of the legal requirements for specific causation in a toxic tort case in South Carolina under *Edwards v. Scapa*; (3) the proper application of the law regarding negligence *per se* in South Carolina and its interaction with South Carolina’s strict liability statute; and (4) successor liability.

As the Court has made clear, it intends to charge the jury and use a verdict form consistent with the law it charged in the *Plant* case, and thus, the J&J Defendants are submitting a modified version of a separate set of charges entitled “JURY CHARGES MODIFIED FROM *PLANT* CASE FROM J&J DEFENDANTS,” to be used during Phase 1, while reserving all objections, requests, and rights, and waiving no positions.

On the submitted verdict form, only “Johnson and Johnson” is listed for the jury’s consideration. The J&J Defendants have maintained throughout that Plaintiffs’ successor liability claims are equitable and for the court, and not for the jury, and that it is error to inject successor liability issues into the products liability claims of Mr. Perry before the jury. Further, there is no evidence that LLT, Holdco, or Kenvue have sold, distributed or made talc that Mr. Perry could possibly have used.¹ The Court thus should instruct the jury that on its verdict form, while different J&J related entities have been sued, it should consider a verdict only as to Johnson and Johnson, and should not concern itself with the other entities.

Additionally, the J&J Defendants understand that the Court disagrees with their interpretation of *Smith v. Tiffany* and *Machin v. Carus*. Without waiving any positions and reserving all rights, the J&J Defendants submit that apportionment should be required with respect to all party defendants sued, whether settled or not, and failing that, for all party Defendants sued, whether settled or not, for whom there was evidence presented as to causation of Plaintiffs’ injuries/ damages. The Court has indicated that only parties still in the case who have not settled or been dismissed as of this time should be on the verdict form for apportionment. The J&J Defendants disagree with this interpretation of the law, but understanding this, and without waiving and fully reserving all objections, rights and positions, the J&J Defendants request at minimum apportionment for all party defendants currently in the case. That would include Atlas Turner and Himmel Media, which are in default but have not been dismissed. The J&J Defendants

¹ Further, in opening statements, Plaintiffs’ counsel stated that “there’s a myriad of Johnson and Johnson companies, but for this trial, the only ones you need to worry about are Johnson and Johnson and Kenvue.” To include LTL and Holdco a verdict form would create confusion and undue prejudice for the jury. There is no evidence sufficient to include Kenvue on the jury verdict form.

also reserve all rights afforded to it by statute, including but not limited to the causation in fact “empty chair” defense.

Additionally, the J&J Defendants hereby submit that the attached jury charges and verdict form listed as “PHASE 2 JURY CHARGES” and “PHASE 2.VERDICT FORM REQUESTED BY J&J DEFENDANTS” are consistent with the law of South Carolina and should be thus be used during Phase 2, and hereby object to any charges, instructions, or verdict forms used that are inconsistent herewith, and which are inconsistent with the J&J Defendants’ filings, also being filed contemporaneously herewith

(Signature Page Follows)

Respectfully submitted,

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Columbia, South Carolina

August 11, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION J&J DEFENDANTS'
		PROPOSED CHARGE NO. 2023-CP-40-
		04072
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	JURY CHARGES AND VERDICT FORM
	)	MODIFIED FROM <i>PLANT</i> CASE FROM
AMERICAN INTERNATIONAL	)	J&J DEFENDANTS
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

Defendants Johnson & Johnson, Inc. (“J&J”); LLT Management, LLC (“LLT”); Johnson & Johnson Holdco (NA), Inc. (“Holdco”); and Kenvue, Inc. (collectively, “Johnson & Johnson Defendants” or “J&J Defendants”) hereby submit their Requests to Charge based on the Court’s instruction that the parties should work from the charges previously given in *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl). Proposed additions to the charges given in *Plant* are reflected in bold.

Defendants reserve the right to modify, delete, and submit additional Requests to Charge as appropriate. In addition, Defendants will be requesting a special interrogatory verdict form. Therefore, Defendants reserve the right to submit additional charges regarding special interrogatories and, if necessary, the verdict form and jury charges to be used pursuant to S.C. Code Ann. § 15-38-15. The J&J Defendants reserve all rights and do not waive any positions or objections or motions by submitting these requests.

CHARGE #1 PRELIMINARY – ROLE OF JURY

Ladies and gentlemen, I'm going to charge you on the law that applies to the case and the law that applies to the facts in this case. And it is your duty to find the facts from the evidence. And to those facts, you must apply the law as I give it to you, and you must decide this case based on the evidence and the law. You should not be concerned with what the law should be, but with what it is. And you must not be influenced in this case by any personal likes or dislikes or any undue sympathy or prejudice. And that means you must decide this case solely on the evidence before you according to the law. You will remember that you took an oath to do just that when we began this trial.

So, follow my instructions. You must follow all of them and not single out some and ignore others because they are all equally important. Please don't read into these instructions or into anything I may have said or done during the trial as any indication as to what I think the facts are, or what I think your verdict should be. Because under our system of justice, you, the jury, are the sole and exclusive judge of the facts. I'm not going to intrude on your constitutionally guaranteed right to determine the facts. Just as I know you're not going to intrude on my responsibility under the constitution to charge you with what the law is.

Now, ladies and gentlemen, how do you decide what the facts are? You do that by evaluating or weighing the evidence you've heard during this trial. There is no way for you to weigh evidence in the literal sense. I'm not going to give you a set of scales to go back and conduct experiments, that's not what I'm talking about. You weigh and evaluate evidence simply by using your good common sense, your sense of logic and reason, and your life experiences. And you bring those things to bear on the evidence you've heard during this case. And once you do that, you will be able to determine the true facts of the case. And once you've done that, you'll be able to take the law that I'm about to give you and apply the law to those facts, and you will be able to reach a decision and a verdict in this case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

You must not consider as evidence any statement of counsel made during the trial. Statements of counsel do not constitute evidence; rather, counsel is articulating the position and contention of his or her client. This rule applies to the opening statement of counsel and the closing argument.

Attorneys are officers of the court. Attorneys have the absolute right and duty to bring matters to the attention of the court by way of objection. Do not become upset or disturbed by counsel because of an objection. Our trial procedure includes the objection process as a means of controlling evidence; that is, letting in proper evidence and keeping out improper evidence. Counsel, by objecting, are simply performing their role in the trial of the case.

Once the court makes a ruling on an objection, the jury is bound by that ruling. If the objection is sustained, the question is improper. If the objection is overruled, the question is proper. In that regard, the jury must not, under any circumstances, derive any inference from any ruling made by the court on objections as to any opinion the court may have on the case. The judge does not have an opinion on the evidence and is not entitled to an opinion under the law. The judge is performing her role in the trial of the case.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.¹

¹ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl)

CHARGE #2 BURDEN OF PROOF

I told you at the beginning that the plaintiffs have the burden of proving their case. And the burden of proof in a civil case is by the greater weight, or preponderance, of the evidence. And that means that the plaintiffs, in order to obtain a verdict, must produce evidence, which, considered in the light of all the facts, leads you to believe that what they are claiming is more likely true than not true. The better way to visualize it, perhaps, is to envision a set of scales. If you were to put the plaintiffs' and the defendants' evidence on opposite sides of a set of scales, in order to receive a verdict, the plaintiffs would have to have the scales tipped in their favor. If those scales tip in the plaintiffs' favor even slightly, even by the most minute portion, then the plaintiffs would be entitled to a verdict because then the greater weight would be on their side. However, if after your review of the evidence, the scales remain evenly balanced and there's not a greater weight on either side, or the scales are tipped in the defendant's favor, then the defendant would be entitled to a verdict because the plaintiffs would not have proved her case by the greater weight or preponderance of the evidence.

In connection with my charge on burden of proof, I charge you that a party's allegations, that is, the stated case or defense, may be proved by any evidence, regardless of whether that evidence is brought out or introduced by the opposing party, or the opposing party's witnesses. That is to say, a party, in proving the claim or defense, is not limited solely to the testimony given by that party's own witnesses, but may rely upon any evidence presented and introduced by the opposing party and upon any testimony elicited from the opposing party's witnesses on direct or cross-examination.²

Now, some of you may be familiar with the burden of proof in a criminal case. In a criminal case, before the state can convict someone of a crime, they must prove each element of that crime beyond a reasonable doubt. This is not a criminal case, obviously, so that phrase "beyond a reasonable doubt," which is one of the highest standards of proof the law knows, has no place in this civil case. The standard of proof that you must use and the yardstick you must apply is the

² Anderson's S.C. Requests to Charge – Civil, § 1-3 General Instructions - Burden of Proof.

burden of the greater weight of the evidence. That is the sole standard of proof in this case as to the plaintiffs' claims for actual damages.³

³ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (proposed modification in bold)

CHARGE #3 EVIDENCE

You must decide what the facts are from the evidence, **and it cannot be influenced by passion, prejudice, or considerations not found in evidence**⁴. And the evidence consists of sworn witness testimony and exhibits. We've also had something called stipulations in this case. And a stipulation is simply an agreement by the parties that a certain fact exists without the necessity of any further proof. And you must take the stipulation as conclusive evidence of a fact. So, the only things you can use in determining what the facts are, are witness testimony, exhibits, and stipulations. Nothing else is evidence. We have had excellent lawyers in this case. And they have zealously advocated for their clients' positions, but they are not the witnesses, so what they say is not evidence. **A question is not evidence and may be considered only as it supplies meaning to the answer. You must never speculate to be true any insinuation suggested by a question asked a witness.**⁵ If you remember something differently than the way the lawyers remember it, your memory controls. What they have said and argued in this case is very important for you to listen to, because, as I said at the outset, they're trying to help you understand the evidence. But do keep in mind that what they say is not in itself evidence.⁶

⁴ *S.C. Public Service Authority v. Spearwant Liquidating Co.*, 196 S.C. 481, 13 S.E.2d 605 (1941).

⁵ Anderson's S.C. Requests to Charge – Civil, § 1-12 General Instructions – Questions.

⁶ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #4 STIPULATIONS

MEDICAL STIPULATION

The parties stipulate that Michael Perry's reasonable and necessary past medical bills as a result of her mesothelioma diagnosis and treatment are **\$[TO BE INSERTED]**.⁷

⁷ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold). Additional revisions will be needed based if/when stipulations are finalized.

CHARGE #5 DIRECT AND CIRCUMSTANTIAL EVIDENCE

In any type of case, there are different types of evidence. And what I'm discussing now is direct and circumstantial evidence. Direct evidence is the testimony of a witness who claims to have actual and direct knowledge of the facts, such as an eyewitness. **It is evidence based on actual knowledge and proves a fact without inference or presumption.**⁸ It is evidence that, if believed, immediately establishes a fact.

Another type of evidence is circumstantial evidence. And I'm sure you've heard that term. Circumstantial evidence is indirect evidence. To put it another way, circumstantial evidence is proof of a chain of facts and circumstances from which you could find that another fact exists, even though it has not been proven to you directly. In modern parlance, we call this connecting the dots. **It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn. In other words, you may infer that a particular event occurred based on proof of circumstances warranting such an inference.**⁹ The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. You may consider both kinds of evidence in this case.

By way of example, if a witness testified that the witness saw it was raining outside, that would be direct evidence that it was raining. But if a witness testified that the witness saw someone enter a room wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

Where circumstantial evidence is relied upon, it is incumbent upon the party presenting the evidence to show the existence of such circumstances as would justify the inference that a particular event actually occurred, and to not leave the questions to speculation or conjecture. If the circumstances are proved to your satisfaction, you may infer a fact from those circumstances,

⁸ Anderson's S.C. Requests to Charge – Civil, § 1-4 – Direct and Circumstantial Evidence.

⁹ Anderson's S.C. Requests to Charge – Civil, § 1-4 – Direct and Circumstantial Evidence.

but the circumstances must lead to the conclusion with reasonable certainty. If the circumstances are not proven to your satisfaction, then you should not infer such facts.¹⁰

¹⁰ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #6 EVIDENCE – EVALUATING WITNESS TESTIMONY

You must consider all of the evidence in deciding what the facts are. If there has been evidence that has been stricken from the record, or if I've told you to disregard it, that material is no longer part of the record or the evidence in this case, and you can't consider it in your deliberations. But you must, as the judges of the facts, determine the credibility of all of the evidence. And so as I told you at the beginning, for every witness who testifies and every exhibit that's admitted, you will have to determine whether those things are worthy of belief. How do you do that? In the case of a witness who testifies, I can give you some general guidelines.

First of all, you may consider whether the witness has some interest in the outcome of this case, whether they have some bias or prejudice towards someone or some issue in the case, whether they have something to gain by their testimony. Second, you may consider what opportunity the witness had to observe the things they were here to tell you about. Third, you may consider how the witness' evidence or testimony stacks up against the other evidence in the case. Is it consistent or inconsistent? Fourth, you may consider their demeanor on the stand. Was the witness hesitant or forthright in their testimony? Fifth you may, certainly, use what you use in your day-to-day life to determine whether someone is telling you the truth because you did not surrender your common sense when you walked into this courthouse last week.

I will also tell you this, you may believe everything a witness says or you may believe nothing a witness says. You may believe parts of a witness's testimony and disbelieve other parts. You may believe one witness over several or several over one. But you certainly don't decide this matter of credibility simply by counting up the witnesses on one side or the other. Because your sole objective, ladies and gentlemen, is to determine the truth in this case, and it does not matter to you whether that truth comes from a witness for the plaintiffs or for the defendants.

CHARGE #7 EXPERT TESTIMONY

Now, you have heard testimony from people who have been described and qualified as experts. They were qualified as experts because they, by reason of their education, training, or experience, achieved some expertise in their given fields. And they can, therefore, state their opinions on matters in their field. **In determining the weight to be given the expert's opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion.**¹¹ ~~And they may state their reasons for their opinions.~~ But expert testimony, as I told you when we had the first expert qualified, must be judged by you just as any other testimony in this important respect, and this is that you, the jury, are the sole judges of the credibility. You may believe a witness's testimony and accept it, or you may reject it. You may give it whatever weight you think it deserves.

The testimony of experts on a subject which is little known to the general public is entitled to consideration. Such testimony, however, must be submitted to your judgment and consideration, to be weighed by you as a part of the evidence in connection with all the other facts in this case. The testimony of experts is to aid and assist you as jurors, not to dominate or control you in the decision of questions of facts. Their opinions and deductions from the evidence before you, and their judgments and opinions, do not preclude yours. You are required to decide disputed questions after comparison and consideration of all the evidence in this case.^{12 13}

~~In connection with the last expert we hear from, dr. Feingold, I made rulings about the scope of his testimony before he took the stand. Dr. Feingold cannot express any direct opinion about the cause of sarah plant's mesothelioma but he, of course, can testify as he did in his area of expertise about the matters he presented.~~

¹¹ Anderson's S.C. Requests to Charge – Civil, § 1-6 – Expert Witness Testimony – General Charge.

¹² Anderson's S.C. Requests to Charge – Civil, § 1-6 – Expert Witness Testimony – General Charge.

¹³ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #8 EXPERT WITNESSES AND CAUSATION

Now, when someone relies on expert testimony to show a causal connection between an injury and a subsequent condition, the testimony must meet the “most probably” rule. It is not sufficient that the condition in question possibly or could have or might have resulted from the injury. The expert must go further and testify that, taking into consideration all of the facts, it is his or her professional opinion that the result in question “most probably” came from the cause alleged.¹⁴

¹⁴ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl).

CHARGE #9 DEPOSITION TESTIMONY

You also heard testimony presented through depositions. I just want to remind you that deposition testimony is entitled to the same weight and consideration as if the witness had been present and had testified from the stand.¹⁵

¹⁵ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl).

CHARGE #10 TAKING NOTES

Now, some of you have taken notes during the trial. I gave you an instruction on that, but I want to just remind you that the notes are for your own personal use. And notes, certainly, don't overcome another's independent recollection of the testimony, and they're not to be used in place of your memory.¹⁶

¹⁶ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl).

CHARGE #11 MULTIPLE DEFENDANTS

The plaintiffs in this case are Michael Perry and his husband, Lonnie Long. ~~There are~~ defendants in this trial **are: American International Industries, Inc., Atlas Turner, Inc., Himmel Media, LLC and the J & J Defendants.** You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of its defenses.¹⁷

¹⁷ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (modifications as to party names in bold).

J&J DEFENDANTS' PROPOSED CHARGE**DEFAULTED DEFENDANTS**

The Court has entered a default against three of the defendants in this matter: American International Industries, Inc., Atlas Turner, Inc., and Himmel Media, LLC. American International Industries, Inc. manufactured the Clubman line of products. Atlas Turner manufactured asbestos friction, drywall, fireproofing, and insulation products. Himmel Media manufactured the Gold Bond talc products. As a result of that default, multiple questions on the verdict form have been pre-marked based on the Court's determination. As to those defendants, you will only be asked to determine the amount of damages owed to Plaintiffs. Those determinations relate only to these three defendants and do not relate to the Johnson & Johnson defendants. These determinations will have no impact on your deliberations or decisions about the Johnson & Johnson defendants.¹⁸

¹⁸ *Crowley v. Chait*, No. CV 85-2441 (HAA), 2005 WL 8165117, at *1 (D.N.J. July 27, 2005); *Lanzo v. Cyprus Amax Mins. Co.*, 467 N.J. Super. 476, 530, 254 A.3d 691, 722 (App. Div. 2021) (vacating jury verdict where adverse inference instruction against one defendant undermined co-defendant's defense and trial court refused motion to sever: "The adverse inference instruction [against co-defendant Imerys] allowed the jury to infer the talc that Imerys supplied was contaminated with asbestos. If that were the case, the jury could conclude that JJCI's talc products were similarly contaminated.")

CHARGE #12 SUMMARY OF PLAINTIFFS' CLAIMS

This is a claim for damages stemming from a personal injury that has been alleged. And I want to go over with you the various claims that are being made in this case. The plaintiffs, Michael Perry and Lonnie Long, are seeking to recover damages for personal injury arising out of the alleged exposure of Michael Perry to asbestos from the defendants' products.

Plaintiffs' claims in this case are based on **four** theories: **strict product liability, negligent product liability, and fraudulent misrepresentation.**

Generally, there can be no liability for injury owing to a product unless that product is defective, but where a product is in a defective condition, there may be liability for harm resulting from the defect.¹⁹ There are three different ways a company can be strictly liable under the law of this state: design defect, manufacturing defect, and warning defect. The plaintiffs must ~~only~~ prove one of these defects to establish a defendants' liability under **their product liability claims** ~~strict liability~~. **The existence of a defect is crucial, because a manufacturer is not an insurer against all risks of injury associated with its product.**²⁰

Regardless of plaintiffs' theory, because this is "a product liability case, the plaintiff is required to prove:

(1) he was injured by the product;

¹⁹ Anderson's S.C. Requests to Charge – Civil, § 32-4 Defendants propose this addition because it applies to all of Plaintiffs' product liability claims. *See also Branham v. Ford Motor Co.*, 390 S.C. 203, 226 (2010) ("In order for a plaintiff to prove his case in a product liability action, he must show that the "product was in a defective condition at the time that it left the hands of the particular seller ... and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained." (quoting *Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 131–32 (1982) (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g. (1965) adopted as legislative intent via S.C.Code Ann. § 15–73–30 (2005)).

²⁰Anderson's S.C. Requests to Charge – Civil, § 32-4. Defendants propose this addition because it applies to all of Plaintiffs' product liability claims. *See generally Branham*, 390 S.C. at . The *Plant* jury charge includes this instruction only for strict liability.

(2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and

(3) that the product at the time of the injury was in essentially the same condition as when it left the hands of the defendant.

To prove a defective condition due to negligence, the plaintiff bears the additional burden of demonstrating the defendant [seller] [manufacturer] failed to exercise due care in some respect. The focus is on the conduct of the [[[seller] [manufacturer], and liability is determined according to fault. The mere fact a product malfunctions does not demonstrate the defendant's negligence nor tend to establish the product was defective.²¹

The plaintiffs are not required to prove all of these theories to recover. Proof of a claim under any one of these theories would enable you to find the plaintiffs are entitled to a verdict. But the plaintiffs must meet their burden of proof as to, at least, one of these theories against at least one of the defendants in order to recover. If you find they have not, then the defendant would be entitled to a verdict. ²²

²¹ Anderson's S.C. Requests to Charge – Civil, § 32-14; *Glenn v. 3M Co.*, 440 S.C. 34 (Ct. App. 2023), *reh'g denied* (Aug 10, 2023) (Holding that it is necessary to show “the product defect was the proximate cause of the injury sustained” whether the products liability theory of liability sounds in negligence, strict liability, or breach of warranty); *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 215 (Ct. App. 2005) (Under any products liability theory, a plaintiff must prove the product defect was the proximate cause of the injury sustained.); *Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 131-32 (1982) (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g. (1965) adopted as legislative intent via S.C.Code Ann. § 15-73-30 (2005)) (In order for a plaintiff to prove his case in a product liability action, he must show that the “product was in a defective condition at the time that it left the hands of the particular seller ... and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.”). Defendant Objects to any instruction that implies that these elements are unique to a strict liability claim.

²² *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

#15 STRICT LIABILITY – ELEMENTS

I will now explain the legal requirements for each of Plaintiffs' claims.

The **first**²³ theory I want to go over with you is strict liability.

Plaintiffs' claims are that defendants, should be held strictly liable for the plaintiffs' injuries. To recover under strict liability, the plaintiffs must prove three things by the greater weight of the evidence. First, that the product was in a defective condition, unreasonably dangerous to the plaintiff. Second, that at the time of the injury, the product was essentially in the same condition as it was when it left the defendant's hands. Third, that the plaintiffs were injured by the product.

Strict liability means liability without fault. Under the theory of strict liability, **liability is imposed, without regard to the exercise of reasonable care, on one who sells a product in a defective condition unreasonably dangerous to the user or consumer, for physical harm caused to the ultimate user or consumer, or to his property, if the seller is engaged in the business of selling such product, and the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.**²⁴

In other words, it does not matter whether the defendant was negligent or not negligent. ~~If the products were defective and unreasonably dangerous when they left the defendant's hands, the defendant is liable even if all reasonable care was used in making and selling the product and even if the plaintiff did not buy the product from any of the defendants or enter into any contract with the defendant. Because the plaintiffs do not have to show negligence under the theory of~~

²³ Strict liability must be instructed first, and be the first claim addressed on the verdict form. *Glenn v. 3M Co.*, 440 S.C. 34, 53, 890 S.E.2d 569, 579 (Ct. App. 2023), reh'g denied (Aug. 10, 2023) (all three [strict liability] elements are also required for a negligence claim. . . . When an element common to multiple claims is not established, all related claims must fail.) (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010)). In *Branham*, the circuit court concluded that as a matter of law, the product at issue was not in a defective condition and, therefore, declined to send the plaintiff's strict liability claim to the jury. *Id.* at 210, 701 S.E.2d at 8. The supreme court held that the circuit court should have also dismissed the plaintiff's negligence claim because that claim also included the product's defective condition as an element. *Id.* at 212, 701 S.E.2d at 9.

²⁴ Anderson's S.C. Requests to Charge - Civil, §32-41; *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 238, 754 S.E.2d 714, 720–21 (Ct. App. 2014); S.C. Code Ann. § 15-73-30; Restatement (Second) of Torts § 402A cmt. i (1965) (discussion of "unreasonably dangerous").

~~strict liability, the plaintiffs must only prove the product was defective and unreasonably dangerous when placed in the stream of commerce.~~²⁵ Your focus should be on the product itself and not on the conduct of the defendant. The defect must exist at the time it leaves the defendant's control.

The existence of a defect is crucial because a manufacturer is not an insurer against all risks of injury associated with a product. In a products liability case against a manufacturer, the plaintiffs have the burden of proving that the product in question was defective at the time when the defendant had possession or control of it or when the product was delivered or purchased. There is no duty on a manufacturer to furnish a product that will not wear out. A party who sells a product in a defective condition, unreasonably dangerous, is subject to liability for physical harm caused to the user if the manufacturer is engaged in the business of producing or selling a product and it is expected to reach and reaches the consumer without a substantial change in its condition.

If you find it was probable that a user would be injured by the product and the injury was not reasonably perceivable to the user, the product is defective. You cannot find the product defective if it were only possible that such an injury would occur. ~~In deciding whether a product is unreasonably dangerous and defective, you should consider the dangers that would be reasonably anticipated by a typical user of a product of this kind. Then you should decide whether the particular product involved in this case had a tendency for causing dangers beyond those that an ordinary user with common knowledge of the product's characteristics would anticipate.~~²⁶ You should also consider whether the dangers associated with use of the product

²⁵ Redundant and an incomplete statement of the law. The claims still requires that the defect proximately cause the injury.

²⁶ Defendants object. The consumer expectation test has been rejected in product liability cases. *Branham v. Ford Motor Co.*, 390 S.C. 203, 222, 701 S.E.2d 5, 15 (2010) (adopting risk-utility test, "we find the consumer expectations test and its focus on the consumer ill-suited to determine whether a product's design is unreasonably dangerous"). The test for "unreasonably dangerous" is different for each defect theory and should be instructed in those sections.

~~outweigh the usefulness of the product, the costs involved for adding the safety, the likelihood and the seriousness of the injury and the obviousness of the danger.~~²⁷

Many products cannot be made completely safe for their use. If products are useful and desirable and properly prepared and manufactured, packaged, and accompanied with adequate warnings and instructions, they cannot be said to be defective. The fact that a product can be made safer alone does not make the product unreasonably dangerous. ~~In order for the defendant to be held responsible, the product must have been in a condition not contemplated by the ultimate user, which would be unreasonably dangerous to the user when the product was used in a foreseeable manner, including any intended use of the product at the time it left the defendant's hands.~~²⁸

There are three types of product defects: design defect, manufacturing defect, and warning defect. Plaintiffs allege that defendants' products have all three types of defects. ~~You need only find one type of defect, however, to find a defendant strictly liable.~~²⁹ I will give instructions on each type of defect.³⁰

²⁷ The test for "unreasonably dangerous" is different for each defect theory and should be instructed in those sections. The "risk-utility" test applies to design defect claims, and should be instructed in that section on the instructions.

²⁸ Defendants object. The consumer expectation test has been rejected in product liability cases. *Branham v. Ford Motor Co.*, 390 S.C. 203, 222, 701 S.E.2d 5, 15 (2010) (adopting risk-utility test, "we find the consumer expectations test and its focus on the consumer ill-suited to determine whether a product's design is unreasonably dangerous").

²⁹ Defendants object. This could confuse the jury in *Perry* given the differences in the verdict as compared to *Plant*.

³⁰ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE # 16 STRICT LIABILITY – DESIGN DEFECT

To prove defective condition, the plaintiffs must first prove that the defendant sold the product, and, at the time of the sale, it was unreasonably dangerous to the user. A defect does not have to be a manufacturing error. With a design defect, there's nothing wrong with the manufacturing process and the product is made according to its design. However, there is a flaw in the product's design. The plaintiffs must prove that the product as designed was in a defective condition, unreasonably dangerous. The test is not whether the product could be made safer but whether its design was unreasonably dangerous.

You must balance the utility of the risk inherent in the design of the product with the magnitude of the risk to determine the reasonableness of the manufacturer's action in designing the product. A product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product. Numerous factors must be considered when determining whether a product is unreasonably dangerous, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger.

The plaintiff must also prove the existence of a reasonable alternative design. If the plaintiff does not show that the defendant could have designed the product in an alternative manner that would have eliminated the defect, the plaintiff cannot recover under the claim of design defect, **whether in strict liability or negligence.**³¹

³¹ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #17 STRICT LIABILITY – MANUFACTURING DEFECT

Plaintiffs also contend that defendants' products were defectively manufactured.

A manufacturing defect exists when a product does not conform to the manufacturer's design standards and specifications and the flaw makes the product more dangerous and therefore unfit for its intended or foreseeable uses. This type of defect is not a defective design but defective execution of the design. When a manufacturing defect is claimed, the test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product.³²

³² *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl). Defendants submit these instructions and verdict form without waiting their position that Plaintiffs have not submitted evidence of, nor properly pled, a manufacturing defect claim.

CHARGE #18 STRICT LIABILITY – WARNING DEFECT

The product may also be defective if the defendant failed to warn or failed to provide adequate instructions to the user. A product is not defective for failure to warn of the obvious. A seller is not required to warn with respect to products when a danger or potential danger is generally known and recognized. A product cannot be deemed either defective or unreasonably dangerous if the danger associated with the product is one that the product's users generally recognize.

A product may be, by reason of its nature and use, unreasonably dangerous unless proper instructions and warnings are supplied for its intended use. In those cases, a seller or manufacturer must give an appropriate warning of any dangerous conditions likely to be encountered. The warning must be one that would cause a reasonable person to use caution proportionate to the potential danger.

There is a particular need for sufficient warning when there is a representation that the product in question is not dangerous. A product may be found defective if the product is unreasonably dangerous in the hands of the user without a suitable warning. A manufacturer or seller is not required to warn about the defects in a product unless the manufacturer knew or should have known about the defects when the products were sold.

The Plaintiff has the burden of showing that a warning would have made a difference in the conduct of the person warned.^{33 34}

³³ *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 432, 505 S.E.2d 354, 359 (Ct. App. 1998).

³⁴ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #13 PRODUCTS LIABILITY - NEGLIGENCE

The **second** theory of the plaintiffs is one of negligent **product liability**.³⁵ **In an action based on negligence, the plaintiff must prove the product, as designed, was in a defective condition unreasonably dangerous to the user when it left the control of the defendant and the defect caused his injuries.**³⁶ **“To prove a defective condition due to negligence by the manufacturer defendant, the plaintiff bears the additional burden of demonstrating the defendant failed to exercise due care in some respect.”**³⁷ The focus under negligence is on the conduct of each of the defendants. In order to prevail under this claim, the plaintiffs must prove by the greater weight of the evidence that the defendant failed to exercise due care in some respect. If you are having a hard time with the phrase “negligence,” you can substitute the word “careless” because it means essentially the same thing. It means the failure to act as a reasonably prudent person would under the same or similar circumstances, or doing something that a reasonable person would not do under the same or similar circumstances. **When I use the word person here, obviously, that also encompasses the word “corporation.”**³⁸

³⁵ Plaintiffs did not assert a simple negligence claim, but rather a negligent product liability claim, and a negligence per se claim. Defendant proposed the modifications in bold to align the instruction with negligent product liability law. Further, Defendants have not proposed a negligence per se instruction because Plaintiff’s negligence per se claim is not distinct from, and is subsumed by, Plaintiff’s negligent product liability claim. The key element of any traditional negligence per se action is that the jury no longer has to consider whether the defendant’s actions were reasonable or not. *See* Anderson’s S.C. Requests to Charge – Civil, § 20-6 (“Negligence per se simply means you, the jury, need not decide if the defendant acted as would a reasonable man in the circumstances. . . . If he did, his failure to take due care is established as a matter of law.”) And the defendant’s actions are assumed to be unreasonable if the conduct violates the applicable rule, regulation, or statute. *Id.* The underlying statute for a negligence per se claim is typically a specific safety statute. Yet, here, the underlying statute that Plaintiff is relying upon is the same product liability statute that governs Plaintiff’s negligent product liability claim. Thus, instructing the jury on both negligence per se and negligent product liability would impermissibly invite a finding of liability without a finding of negligent conduct and risk inconsistent verdicts.

³⁶ Anderson’s S.C. Requests to Charge – Civil, § 32-19

³⁷ Anderson’s S.C. Requests to Charge – Civil, § 32-14; *Branham*, 390 S.C. at 210 (“A negligence theory imposes the additional burden on a plaintiff ‘of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and unlike strict liability, the focus is on the conduct of the seller or manufacturer and liability is determined according to fault.’”) (quoting *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531 (Ct. App. 1995).

³⁸ Anderson’s S.C. Requests to Charge – Civil, § 32-14.

There are three essential elements of the plaintiff's negligence cause of action. The plaintiff has the burden of proof throughout this process. He must prove all of these elements by the preponderance of the evidence.

(1) The plaintiff must show that the defendant designed or manufactured or marketed the product in a negligent manner;

(2) The plaintiff must show that he suffered injury to his person [and property];

(3) The plaintiff must prove the defendant's negligence or carelessness in one or more of those specifications alleged in the complaint, was the proximate cause of the plaintiff's injuries [and property loss].³⁹

The word “negligence” is an integral part of this matter. Negligence is defined as the absence of due care, the want of due care or ordinary care.⁴⁰ So you must first determine if the defendant owed the plaintiffs a duty of care. ~~A defendant will owe a plaintiff a duty of care when the defendant knows of the risks of harm posed by its products.~~⁴¹

The duty of care is that standard of conduct the law requires of a corporation in order to protect others against the risk of harm from its actions. The law does not make a corporation an insurer against all possible harm it may cause. A corporation is not required to guard against harm which is not reasonably to be anticipated, or which is so unlikely to occur that the risk, although recognizable, would commonly be disregarded. A duty of care arises only with respect to a danger which is apparent to one in the position of the actor before the harm occurs. It is not enough that the danger can be perceived by ‘looking back at the mishap with the wisdom borne of the event’.⁴²

³⁹ Anderson’s S.C. Requests to Charge – Civil, § 32-14.

⁴⁰ Anderson’s S.C. Requests to Charge – Civil, § 32-14.

⁴¹ Defendants object. This is an incomplete and misleading statement defining a manufacturer’s duty of care.

⁴² *Carter v. R. L. Jordan Oil Company, Inc.*, 294 S.C. 435, 365 S.E.2d 324 (S.C. Ct. App. 1989), *reversed on other grounds*, 299 S.C. 439, 385 S.E.2d 820 (1989).

Liability for negligence requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design.⁴³ This may be met by showing the defendant was aware of the danger and failed to take reasonable steps to correct it. ~~Where a product is actually designed and manufactured by another company, the seller assumes the duty of the manufacturer and labels and sells the product as its own.~~⁴⁴ **A manufacturer of a product made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the product or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.**⁴⁵

A manufacturer is held to the skill of the expert in the field as to products it sells and is charged with an expert's knowledge of materials and processes used in the industry. A manufacturer has a duty to stay aware of current standards and scientific knowledge in the industry and, therefore, since the seller assumes the duties of the manufacturer, a seller is held to the skill of an expert in the field as well and has the duty to stay aware of the current standards and scientific knowledge in its industry.

Industry standards, in the form of codes or manuals issued by voluntary associations, even though lacking the force of law, are proper matters for your consideration and may be evaluated by you as relevant to the defendant's duty of care.⁴⁶ Although evidence of industry standards may be considered as evidence of the standard of care, an industry cannot set its own unreasonable standards. An entire industry may lag behind in the adoption of new and available products or safety features. And the failure to use due care, even if no one in the industry uses due care, does not excuse negligence. It is for you to decide whether the standard of care was proper considering what a reasonable person would have done in similar circumstances.

⁴³ Anderson's S.C. Requests to Charge – Civil, § 32-19.

⁴⁴ Inapplicable to the facts of this case.

⁴⁵ Anderson's S.C. Requests to Charge – Civil, § 32-19

⁴⁶ Anderson's S.C. Requests to Charge – Civil, § 32-21, defining "industry standards". The jury should be instructed as to what that term may include.

If you find a defendant owed the plaintiffs a duty of care, the next thing plaintiffs must prove, by the greater weight, or preponderance, of the evidence, is that the defendant breached that duty of care by a negligent act or omission. In deciding whether the defendant breached the duty of care, you should consider whether the defendant has followed the normal and customary practices and procedures in the industry in light of defendant's expertise and ability to see and appreciate the problem and its cause. If the defendant failed to exercise reasonable care fulfilling any of its duties, the defendant would be responsible for the injuries to any person the defendant should expect to use its product, assuming the injuries have been proven to have been proximately caused by that breach. This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it. **If you find the industry had established customs or practices relating to talcum powder, and that the talcum powder in this case conformed to such customs or practices, then that is a factor for you to weigh in considering whether the plaintiff has carried his burden of establishing by the preponderance or greater weight of the evidence the defectiveness of the product.**⁴⁷

In an action based on negligence, the plaintiffs must also prove the product was in a defective condition unreasonably dangerous to the user when it left the control of the defendant and the defect caused the plaintiff's injuries.⁴⁸

⁴⁷ Anderson's S.C. Requests to Charge – Civil, § 32-21. The jury must be instructed both as to the implication of operating below industry standards, as well as complying with industry standards. *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 39 (Ct. App. 2010) (finding that the circuit court did not err in considering conformity with industry custom as one factor in its analysis); *Bragg v. Hii-Ranger, Inc.*, 319 S.C. 531, 544, 462 S.E.2d 321, 329 (Ct. App. 1995) (“While conformity with industry practice is not conclusive of the product's safety, the cases where a member of industry will be held liable for failing to do what no one in his position has ever done before will be infrequent.”).

⁴⁸ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #14 DUTY OF PRODUCT MANUFACTURERS AND SELLERS

A manufacturer owes a duty of care in the manufacture of its product proportionate to the dangers involved in the product's use. A manufacturer of a product may, under a plan or design that makes it dangerous for the use for which it is made, owe a duty to use reasonable care in the adoption of a safe plan or design to those users you would expect to use the product. A seller owes the duty to conduct adequate tests and inspections of its product to discover latent defects or defects that are not visible or apparent on a reasonable inspection.

If the seller had reason to know the product was likely to be dangerous or defective, a seller owes a duty to exercise and use reasonable care inspecting and testing the product before selling it if a reasonable inspection or test would have disclosed a defect. ~~A manufacturer who incorporates a defective component part into its finished product and places the finished product in the stream of commerce is liable for injuries caused by defects in the component part.~~⁴⁹

A defendant cannot, however, be liable for an allegedly defective product it did not design, recommend, specify, require, manufacture, sell or place in the stream of commerce. In deciding whether the defendant had a duty to test the product, you should consider the defendant's ability to conduct tests at the time the product was sold.

A seller of a defective product has a duty to warn users of the product and any dangers created by its product with which the manufacturer is or should be aware at the time the products are sold. ~~The supplier of a product who knew or should have known that the product is or might be dangerous during its perceivable use and had a reason to believe that the ultimate user would not appreciate the dangers has a duty to clearly and understandably warn the ultimate user of the danger.~~ **The manufacturer's duty is to exercise reasonable care. A manufacturer of a product is liable for failing to warn if:**

⁴⁹ Not applicable to the facts of this case.

- (1) the manufacturer knows or has reason to know the product is, or is likely to be, dangerous for its intended use;**
- (2) the manufacturer has no reason to believe that the user will realize the potential danger; and**
- (3) the manufacturer fails to exercise reasonable care to inform the user of the product's dangerous condition or of facts which make it likely to be dangerous.**

A manufacturer has a duty to warn consumers of any foreseeable hazards attendant with the use of its product.⁵⁰—A seller is required only to warn about dangers that are unreasonable or which are dangerous beyond the expectation and general knowledge of the ordinary person who uses the product with the ordinary common knowledge about the product’s characteristics. ~~In other words, there’s a duty to warn not when scientific certainty is established, but when a reasonable person would want to be informed of the risks.~~⁵¹ ~~In deciding whether the directions or instructions or warranties are adequate, you should consider their location, language and size.~~^{52, 53}

⁵⁰ Anderson’s S.C. Requests to Charge – Civil, § 32-5. Clearly setting forth the elements of the claim tracks the pattern instructions, is clearer for the jury to follow, and aligns more closely to controlling caselaw. Furthermore foreseeability is a requirement that is currently omitted from the proposed instructions. *See Livingston v. Noland Corp.*, 293 S.C. 521, 525 (1987) (“A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use. . . .”); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 462 (1978) (“ . . . the touchstone of proximate cause in South Carolina is foreseeability.”).

⁵¹ Defendants object to this instruction because it is not consistent with the law. The instruction as written appears to reflect a consumer expectations point of view, which has been rejected in product liability law. The standard is that of a reasonable manufacturer.

⁵² Location, language, and size are not in issue.

⁵³ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

J&J DEFENDANTS' PROPOSED CHARGE**FRAUD**

Fraud has been defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Fraud is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

Actual fraud consists of deceit, artifice, trick, design, some direct and active operation of the mind. It includes cases of the intentional and successful employment of any cunning, deception or artifice used to circumvent or cheat another. It is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception.

Fraud occurs where one person or party intentionally deceives another by word or conduct for the purpose of inducing that other party to part with some property or surrender some legal right and the party thereby accomplishes his purpose. It involves the elements of dishonesty and deceit. Fraud involves deceitful practices in depriving or endeavoring to deprive another of his known rights by means of some artful device or plan contrary to the plain rules of common honesty.

Fraud, in its general sense, comprises anything calculated to deceive, including all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed and resulting in damage to another.⁵⁴

⁵⁴ Anderson's S.C. Requests to Charge – Civil, § 18-1.

J&J DEFENDANTS' PROPOSED CHARGE**FRAUD**

To establish fraud, the plaintiff must prove the following nine elements by clear and convincing evidence: (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity; (5) the speaker's intent that the representation be acted upon by the person hearing the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Each and every one of these elements must be proven by clear, cogent, and convincing evidence. The failure to prove any element of fraud is fatal to recovery. Fraud is never presumed in the law.

Were the representations made which the plaintiff claims? The defendants say they were not. If you find that no statements or representations were made to the plaintiff, you need not consider the case further. There would be no basis for fraud.

To establish actionable fraud, there must first be a false representation. The representation must be a statement or a set of actions which concerns an existing or pre-existing fact. The false representation must be one of fact as distinguished from the mere expression of an opinion. The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion, an expression of intention, or an expression of confidence that a bargain will be satisfactory. The distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made. Statements of opinion, predictions of future events, mere puffing, sales

talk, and broken promises normally do not amount to fraud. As a general rule, fraud cannot be predicated on a statement that constitutes an expression of an intention. An exception to the general rule is recognized for unfulfilled promises which were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party.

An actionable representation cannot consist of a mere broken promise, even if a party acts in reliance on the promise. An action in fraud, however, can be based on an unfulfilled promise to perform in the future made with a present undisclosed intention not to perform, which is made for the purpose of inducing one to sign a paper or do some other act.

The representation must be false. A fraudulent act is characterized by dishonesty in fact, unfair dealing, or unlawful appropriation of another's property by design. Bad faith is the test of fraud. Nondisclosure, or silence, becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other. The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date.

The representation must be material. If an objective, reasonable person using the misrepresentation would have viewed the representation as sufficiently important and significant that it would have played a role in the decision to enter into a contractual relationship, the representation may be deemed material. The matter is material if:

- (1) a reasonable person would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
- (2) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

The knowledge of falsity extends to statements made in reckless disregard of the truth. Reckless disregard exists where one makes a statement and knows he lacks the knowledge necessary to be confident that the statement is true.

A defendant may be held liable for misrepresentations made to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the fraudulent misrepresentation.

To recover for fraud, the plaintiff must have relied on the misrepresentation. If the plaintiff knew the misrepresentation was false, there is no cause of action because there could not have been any reliance on the truth of the statement. A victim of fraud has a right to rely on a misrepresentation so long as his reliance is not reckless or grossly negligent. The legitimacy of the plaintiff's reliance on the misrepresentation is an issue to be decided by you, the jury.

There is no cause of action for a fraudulent statement unless the plaintiff is injured.⁵⁵

⁵⁵ Anderson's S.C. Requests to Charge – Civil, § 18-2; *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 496 n.5, 719 S.E.2d 656, 658 n.5 (2011) (noting that the plaintiff must prove the elements of fraud by “clear and convincing evidence”); *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (“Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence.”)

J&J DEFENDANTS' PROPOSED CHARGE

FRAUD - BURDEN OF PROOF

In order to recover in an action for fraud, the plaintiff must prove the elements of fraud by clear, cogent and convincing evidence.⁵⁶

⁵⁶ Anderson's S.C. Requests to Charge – Civil, § 18-8

CHARGE #20 STATE OF THE ART

Something you must consider in assessing the defendant's product and conduct is the state of the art at the time the products left the defendant's hands. The issue of due care ~~as well as the breach of any warranty~~ must be assessed in light of the circumstances existing at the time of the sale. In order for the plaintiffs to prove their case in a products liability action, they must show the products were in a defective condition at the time it left the hands of the particular seller. The product must be measured against the standards existing at the time of the sale. State of the art includes all of the reasonably available scientific knowledge on the subject at the given time. This includes scientific, medical, engineering and other knowledge that may be available. State of the art includes the element of time, what is known, and when this knowledge was available. ~~If a product was non-defective under standards existing at the time of manufacture, the manufacturer does not have a post-sale duty to warn.~~⁵⁷ You should return a verdict in favor of the plaintiffs only if considering the state of the art existing at the time the defendant's products were sold in a defective condition. **Hindsight opinions by experts suggesting that more should have been done are insufficient to discredit the conclusion that the manufacturer met the standard of care.**⁵⁸

Even if you find that there was an unreasonable danger, if you find that the defendant did not know and had no reason to know when it sold the products that the danger existed in its product because of the state of the art at the time that the product was manufactured and sold, then you should not find the defendant breached a duty to warn or that a product was unreasonably dangerous.^{59 60}

⁵⁷ Defendants object to the language as written as potentially confusing to the jury.

⁵⁸ *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 548-49, 462 S.E.2d 321, 331 (Ct.App.1995) (recognizing that the "product must be `measured against a standard existing at the time of sale'" and that "'hindsight opinions by [...] experts suggesting that more should have been done ... are insufficient to discredit the conclusion that the manufacturer met the standard of care'" (quoting *Sexton ex rel. Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir.1991)).

⁵⁹ *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982).

⁶⁰ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

J&J DEFENDANTS' PROPOSED CHARGE
POST-DISTRIBUTION EVIDENCE

Post-distribution evidence is evidence of facts neither known nor available at the time of distribution. When assessing a product liability claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or reasonably attainable at the time of manufacture. The use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper.⁶¹

⁶¹ *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010).

CHARGE #21 CAUSATION

Under any products liability theory of recovery—**negligent products liability, strict product liability, or fraudulent misrepresentation**—the plaintiff must establish that the product defect was a proximate cause of the injury sustained.

Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant’s acts. Legal cause is proved by establishing foreseeability. If there is not sufficient evidence to conclude that, but for a defendant’s conduct the injury would not have occurred, then you must find in favor of the defendant.⁶²

To do that, the plaintiffs must prove that the plaintiff’s exposure to ~~the defendant’s~~⁶³ asbestos in the defendants’ product was of such frequency, regularity and duration that it was a substantial factor in bringing about the disease or injury. This evidence must show more than casual or minimal contact to asbestos from the defendant’s product. Presence of the plaintiff in the vicinity of the defendant’s talc product that has no asbestos contained within the container, does not constitute actionable exposure. Regular, frequent, and proximate use of defendant’s talc product is not sufficient, rather the plaintiff must show regular, frequent, and proximate exposure to asbestos in talc at an actionable level of exposure.⁶⁴

Establishing causation “requires the plaintiff do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. He must prove similarities between himself and the individuals in the studies, which includes proof that (1) he was exposed to the same toxin, (2) the exposure or dose level was comparable to those in the

⁶² Anderson’s S.C. Requests to Charge – Civil, § 32-15 (Proximate Cause); *Small v. Pioneer Machinery, Inc.*, 239 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997).

⁶³ Defendants objection to the use of the term “asbestos product”, because none of the named defendants make an “asbestos product.”

⁶⁴ *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986).

study, (3) the exposure to the toxin occurred before the onset of the injury, and (4) the latency period of the injury is consistent with the individuals in the study.”⁶⁵

The mere fact that the injury or accident occurred standing alone does not permit you to draw a conclusion that an injury or accident was caused by anyone’s negligence ~~or breach of warranty~~ or strict liability.

In a negligence claim, the plaintiffs must prove by the greater weight, or preponderance, of the evidence that defendant’s negligence proximately caused injury to the plaintiffs and that the damages suffered were proximately caused by the defendant’s breach of its duty of due care. Proximate cause is conduct that produces a natural chain of events and in the end brings about the injury. It is a direct cause of the injury.

To prove a defendant’s negligence proximately caused the plaintiffs’ injury, the plaintiffs must first prove something called “causation in fact.” And that is proven by showing the defendant’s negligence was a substantial factor in causing the injury. The plaintiffs must also prove something called “legal cause.” And that is proven by showing the injury was foreseeable. And that means the injury occurred as a natural and probable consequence of the defendant’s negligence. The plaintiffs must prove that some injury from the defendant’s negligence was foreseeable, but they do not have to prove that the particular injury that occurred was foreseeable. However, a defendant cannot be held responsible for something that could not be expected to happen.

As proximate cause is the direct cause, without which the injury would not have occurred, if you find that Mr. Perry would have contracted mesothelioma even if he had never been exposed to the defendant’s product, then you must find in favor of that defendant because his exposure was not the cause without which the injury would not have occurred.”^{66 67}

⁶⁵ *Edwards v. Scape Waycross, Inc.*, 437 S.C. 396, 412 (Ct. App. 2022), *affirmed* 442 S.C. 387 (2024).

⁶⁶ Anderson, South Carolina Requests to Charge – Civil, §32-15.

⁶⁷ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #22 THERE CAN BE MORE THAN ONE CAUSE

Proximate cause does not mean the only cause. The defendant's actions can be a proximate cause of the plaintiff's injury if defendant's conduct was at least one of the direct causes of the injury. Where two or more causes combine to produce injury, a defendant is not relieved from liability for negligence because it is responsible for only one of the causes. It is sufficient that its negligence or fault is a substantial factor in causing the injury. Consequently, if a defendant's negligence is a proximate cause of an injury to another, the fact that the negligence of a third party occurred with its own negligence to produce the harm does not relieve it of liability. In such cases, each wrongdoer is in breach of the duty of care over the plaintiffs, and because the negligence of each concurred to produce the injury, they can all be liable.

If you find more than one defendant liable, you will also be given the opportunity to apportion fault. Apportionment will be explained later.⁶⁸

Under South Carolina law, a defendant is entitled to assert that other persons or entities, contributed to the alleged injury or damages **and are liable for any or all of the damages**⁶⁹. The matter of the others' alleged fault in causing the plaintiffs' injuries has been raised by the defendants, and it is proper for you to consider the actions of others, but only in so far as plaintiffs have met their burden proof. **You must apportion, or assign, percentages of fault to parties determined to be at fault by the Court based on default. Only if you decide that the Johnson & Johnson Defendants contributed to the alleged injuries, should you include Johnson & Johnson in that determination.**^{70 71}

⁶⁸ Anderson's S.C. Requests to Charge – Civil, § 32-15 (modifications in bold).

⁶⁹ S.C. Code Ann. §15-38-15(D).

⁷⁰ S.C. Code Ann. §15-38-15.

⁷¹ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

J&J DEFENDANTS' PROPOSED CHARGE**APPORTIONMENT OF FAULT**

As I stated, you the jury may apportion fault among the defendants and other persons or entities. If more than one of the defendants and other persons or entities was at fault for the same indivisible injury or death, then you must specify in a verdict the percentage of liability that proximately caused the indivisible injury or death that is attributable to each of the defendants and other persons or entities.

Of course, if any defendant was not negligent, or did not sell a defective product, or the alleged negligence or defective product was not the proximate cause of the injury, then the plaintiff is not entitled to recover from that defendant or defendants. However, if you find that the injury was proximately caused by the negligence or defective product of one or more of the defendants, then the plaintiff is entitled to full recovery; and any apportionment of percentages will not reduce the recovery by the plaintiff.

When you are asked to determine percentages of fault among the defendants and other persons or entities, you must compare the percentages of fault among the various defendants and other entities or parties. You will express your determination of fault in the forms of percentages. The percentages allocated among the defendants and other persons or entities must total 100%. This does not mean that all of the defendants and other persons or entities must have some percentage of fault allocated to them. If a defendant or other person or entity was not at fault, in your opinion, then its percentage of fault would be zero, and the 100% would be allocated or apportioned among the remaining defendants and other persons or entities based on the greater weight of the evidence.⁷²

⁷² S.C. Code Ann. §15-38-15.

J&J DEFENDANTS' PROPOSED CHARGE**NO DUTY TO RECALL**

A manufacturer has no duty to notify previous purchasers of its products about later developed safety issues or concerns regarding said products if the products were non-defective under standards existing at the time of the manufacture or sale. A product must be measured against a standard existing at the time of sale or against reasonable customer expectations held at the time of the sale.⁷³

⁷³ Anderson's S.C. Requests to Charge – Civil, § 32-9; *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

CHARGE #23– CLEAR AND CONVINCING EVIDENCE

As I have explained to you, in evaluating whether the defendants were negligent, **or** strictly liable, ~~or breached an implied warranty~~, the burden of proof is simply the greater weight or the preponderance of the evidence.

However, I have told you that Plaintiffs must prove their fraud claim by clear and convincing evidence.

There is one **other** question on the verdict form that asks whether the defendants' conduct was willful, wanton, or reckless. To find that a defendant's conduct was willful, wanton, or reckless, the plaintiff must prove that by clear and convincing evidence.⁷⁴

⁷⁴ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

J&J DEFENDANTS' PROPOSED CHARGE**DEFINITION OF CLEAR AND CONVINCING EVIDENCE**

Clear and convincing evidence is an elevated standard of proof, which lies between the lesser standard of "preponderance of the evidence," used in most civil cases, and the higher standard of "beyond a reasonable doubt," which is required in criminal cases. Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of fact a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

When the law places upon a party a burden of proof by clear and convincing evidence, the law means that the evidence is not ambiguous, doubtful, equivocal, or contradictory, but the evidence is pointed to the issue and satisfactory in the sense that the source from which it comes is one in which you as jurors can place credence.⁷⁵

⁷⁵ Anderson, South Carolina Requests to Charge – Civil, § 1-3.

J&J DEFENDANTS' PROPOSED CHARGE**HARM TO OTHERS**

You may not punish Defendants for any harms suffered by persons other than Mr. Perry.⁷⁶

⁷⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003) (as a matter of constitutional law, “[a] defendant should be punished for the conduct that harmed the plaintiff”); *id.* at 423 (“Due process does not permit courts . . . to adjudicate the merits of other parties’ hypothetical [punitive damage] claims against a defendant”); *id.* at 423 (“Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of reprehensibility analysis.”); *id.* at 424 (“The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.”); *id.* at 422 (“A Defendants’ dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”); *id.* at 422–23 (even conduct admitted to prove reprehensibility “must have a nexus to the specific harm suffered by the plaintiff,” and courts must “ensure the conduct in question”—conduct that did not harm the plaintiff but that is being admitted to show reprehensibility—“replicates the prior transgressions”); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (holding that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties”); *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (“In assessing 45 reprehensibility . . . it is crucial that a court focus on the conduct related to the plaintiff’s claim rather than the conduct of the defendant in general.”).

CHARGE #24 ACTUAL DAMAGES--PERSONAL INJURY

If you find the plaintiffs have met their burden of proving at least one of **two** theories—**negligence or strict liability**—by the greater weight of the evidence, **or their fraud claim by clear and convincing evidence**, and that their damages were proximately caused by the defendant's conduct or product, then you would move on to assess any damages. That is how much money the defendant should be required to pay. Actual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the incident or accident occurred. Actual damages include the actual losses and expenses the plaintiffs have suffered because of the defendants' wrongs. Actual damages include several areas recognized by the law.

In personal injury actions, the plaintiffs may recover for the necessary and reasonable expenses caused by the injury, such as amounts necessarily incurred for medical treatment. A person who suffers personal injuries because of the misconduct of another is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of the injuries to the time of trial as well as those reasonably certain to be incurred in the future. Accordingly, a plaintiff may recover amounts incurred for past and future medical care, including hospital, physician and nursing care costs, medicine and other out-of-pocket and anticipated expenses such as vocational, physical or other rehabilitation efforts.

Pain and suffering is also recognized as an element of damages properly considered under the law. Pain and suffering compensates plaintiff for physical discomfort and emotional response to the sensation of pain caused by the injury. There's no definite standard I can give you to determine the amount of damages. You, the jury, will have to use your calm and reasonable judgment to determine them in light of your own experiences and in light of the testimony and the evidence presented in this case.

Another form of damages is loss of enjoyment of life. This compensates a plaintiff for limitations on the ability to participate in and derive pleasure from normal activities of daily life. Another category is mental suffering. And that is compensation for shock, fright, anxiety, emotion upset.

Actual damages for plaintiff who has been physically injured include pain and suffering, both **may also include** past and future, as well as mental anguish. Mental anguish is more than mere disappointment or anger or worry or embarrassment or resentment. **Mental anguish is intense mental suffering**⁷⁷ Although it may include all of these, it also includes mental sensation of pain resulting from painful emotion such as grief and wounded pride, shame, disparage, and humiliation. It may be composed of fright, nervousness, ~~grief~~, anxiety, and worry for an ordeal.

But the existence, causation, or amount of damages cannot be left to conjecture, guesswork or speculation. However, proof of amount of loss with absolute or mathematical certainty is not required. Damages must be proved with a reasonable degree of certainty. The evidence presented by the plaintiff must enable you, the jury, to determine what amount is fair, just and reasonable.^{78 79}

⁷⁷ Johnson v. W. Union Tel. Co., 81 S.C. 235, 62 S.E. 244, 245 (1908).

⁷⁸ Anderson's S.C. Requests To Charge - Civil § 13-6.

⁷⁹ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, No. 2022-CP-01265 (S.C. Com. Pl) (proposed modifications in bold).

CHARGE #25 ACTUAL DAMAGES – LOSS OF CONSORTIUM

Plaintiff **Lonnie Long** also claims loss of consortium damages due to injuries received by his **husband, Michael Perry**. The companionship for society of a spouse are not articles of commerce that can be weighed or measured or bought or sold. No expert is competent to testify as to their value. There's no way we can go to determine their market price, of course, and the consideration on which their based is not monetary, but **Lonnie Long** is entitled to compensation and money for his loss. Loss of consortium includes afforded services provides by the other spouse, love, companionship, affection, society, sexual relations, comfort, solace, and guidance. Plaintiff **Lonnie Long may be** is entitled to recover the value of those services of **Michael Perry** which have been lost, including the loss of her society and companionship in her home.

In order to prevail in an action for loss of consortium, the plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury.⁸⁰

⁸⁰ Anderson's S.C. Requests to Charge - Civil § 13-6. Over Defendants' objection, this court excluded evidence from Plaintiff Perry's medical records that reflected on the nature of Mr. Perry and Mr. Long's relationship. But for this court's exclusion, and in accordance with Anderson's S.C. Requests to Charge - Civil § 13-6, Defendants would have requested that the jury be instructed to consider "the nature and extent of the [Mr. Perry's] services and society prior to the incident, including her disposition, temperament, character and attainments" and his "acts of affection, love and sexual intercourse performed and the extent to which the injuries she sustained in the incident incapacitated her from performing such services and providing such society after the incident."

CHARGE #26 - DAMAGES – FUTURE DAMAGES⁸¹

Now, in determining the amount of compensation for someone personally injured by another's misconduct, it is proper to consider past, present, and future aspects of the injury. The injured party may recover those future damages that are reasonably certain to result. The principle underlying compensation is that only one action can be brought and therefore, only one recovery had. So it may be, depending on your view of the evidence, proper to include the estimate of future damages, future medical expenses, and pain and suffering that will with reasonable certainty result.

The plaintiff is never entitled to recover speculative damages. That is damages that you arrive at by guess work. The plaintiff has the burden of proving the existence and the causation and the amount of damages, which she does not have to prove them to a mathematical certainty. Instead, the plaintiff must present you evidence that is sufficient to allow you to make a reasonable approximation of the damages. That is, plaintiff must prove their damages to a reasonable degree of certainty. Any future damages you award must be reasonably calculated to a result of the alleged injury or damage sustained and they must be reduced to their present cash value. I will charge that in this case, Michael Perry is a 54-year-old male with a life expectancy according to the South Carolina code of 25.64 years. This is a factor you may consider along with any other facts and circumstances that may bear on his health and longevity, including his occupation, habits, and health.

⁸¹ Defendants object because this is redundant of the instruction not to consider future damages in *Plant* Charge 24 – Actual Damages.

J&J DEFENDANTS' PROPOSED CHARGE
NO PUNITIVE DAMAGES

In this stage of the trial, you must not include in your award any damages to punish or make an example of any defendant. Such damages would be punitive damages, and they cannot be part of your compensatory damages verdict. At this time, as to any defendants you find liable, you must award only the damages that fairly compensate plaintiffs for their actual loss.⁸² If you find that the Johnson & Johnson Defendants were reckless, willful, or wanton in their conduct, you will hear additional evidence related to punitive damages in a second phase of the trial.⁸³

⁸² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003) (“Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct... .By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.”) (citation omitted); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

⁸³ See S.C. Code Ann. §15-32-520(A).

J&J DEFENDANTS' PROPOSED CHARGE**RECKLESSNESS DEFINED**

Punitive damages can only be awarded where the Plaintiff proves by clear and convincing evidence that the Defendant's conduct was willful, wanton, or in reckless disregard of the Plaintiff's rights.

The words recklessness, willfulness and wantonness are synonymous. The terms are used to describe a conscious failure to exercise and observe reasonable or due care. Recklessness implies the doing of a negligent act knowingly. When a person acts negligently and he realizes that he is acting negligently, the law says he is reckless, willful, and/or wanton, whichever term you prefer, they all mean the same thing, that is, the conscious failure to exercise due care.

Recklessness is distinguished from negligence and gross negligence. Negligence is the failure to use due care. Negligence is failure by omission or commission to exercise due care as a person of ordinary reason and prudence would exercise in the same circumstances.

Recklessness is a higher degree of culpability and responsibility. Recklessness signifies a conscious failure to exercise due care. Recklessness is a conscious indifference to the rights of the plaintiff, or a reckless disregard of the rights of the plaintiff. Recklessness is an awareness of wrongful conduct and a continuation to act regardless of consequences.

In other words, while a negligent person is one who acts carelessly, a person whose behavior is reckless, willful and/or wanton is not only careless in his actions, but is also aware that he is careless. The test for determining whether a tort may be deemed reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the injured party.⁸⁴

⁸⁴ Anderson's S.C. Requests To Charge - Civil § 22-1; Carter V. R.L. Jordan Oil Co., Inc., 390 S.E.2d 367, 301 S.C. 84 (S.C. App. 1990).

J&J DEFENDANTS' PROPOSED CHARGE
PUNITIVE DAMAGES

In determining whether punitive damages may be warranted, you should also take into consideration any mitigating evidence. Mitigating evidence is evidence which may demonstrate that there is no need to impose punitive damages against Defendants.⁸⁵

⁸⁵ *TXO v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (ruling that mitigating circumstances should be considered in determining whether to award punitive damages).

J&J DEFENDANTS' PROPOSED CHARGE
PUNITIVE DAMAGES

Punitive damages may be warranted against a Defendant only for its conduct that caused Mr. Perry's mesothelioma, and not based on any conclusion that the Defendant is an unsavory business.⁸⁶

⁸⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”).

CHARGE #27 JURY DELIBERATIONS

Now, I am through with my instruction on the law. I just want to give you some final instructions on your deliberations. Before we do that, I want to remind you that you were chosen in this case not to be partisans or advocates for either the plants or for defendants. You were chosen because all of them believe you could be fair and reasonable and you could be a juror who can decide this case without any kind of bias or prejudice or partisanship. So you are judges, judges of the facts. Your sole interest is to determine the true facts from the evidence in this case and take the law I just gave you and apply it to those facts and you will, ultimately, be able to reach a verdict.

You should know that the record is now closed. There are not going to be anymore witnesses. There are not going to be anymore exhibits. So, if something was referred to during this trial, such as a particular document, and you don't have it back there with you as an exhibit, I can't give it to you. So, keep in mind that the record is closed, and you have to make your decision based on the exhibits you have and your memory of the evidence. A jury: if you look up the word in a dictionary, would be defined as a company of people sworn to render a true verdict. And that's what you've been called upon to do, to determine the true facts of this case. And, ladies and gentlemen, you each have a vote in this case. And your vote is exactly that: it's your vote and no one else's. Don't be afraid to change your mind if the discussion that you're going to have persuades you that you should because that's what deliberations are all about. But don't surrender an honestly and conscientiously held belief simply to get this case over with or reach a unanimous verdict because these parties have waited a long time, and this is their day in court. I know you recognize the importance of it to them. And we appreciate the seriousness and respect you've given everyone involved in the case and your patience with us.⁸⁷

⁸⁷ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl).

CHARGE #28 VERDICT FORM

This is the verdict form, so I'm going to go over it with you briefly. Under the constitution of this state, the jury verdict must be unanimous. Unanimity is mandated. Every single juror must agree on the jury verdict. There cannot be any split or divided vote in any form or fashion, such as eleven-to-one, ten-to-two, or nine-to-three. Every single juror must agree on the jury verdict. When the foreperson writes the verdict and signs the name as the foreperson, that assures the court that the jury verdict is unanimous.⁸⁸

⁸⁸ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl).

CHARGE #29 RETIRE TO JURY ROOM

I thank you all for your attention to me and your patience with me. Don't start deliberating about the case until you receive the exhibits. That will be your signal that you can start talking about the case. Right now, believe it or not, for as long as I've been talking, I may have left something out and if I have, they'll be quick to remind me. So just go back to the jury room and when you get the exhibits, that will be your signal you can start deliberating.⁸⁹

⁸⁹ *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION J&J DEFENDANTS'
		PROPOSED CHARGE NO. 2023-CP-40-
		04072
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>J&J DEFENDANTS REQUESTS TO</u>
	)	<u>CHARGE FOR PHASE II</u>
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

Defendants Johnson & Johnson, Inc. (“J&J”); LLT Management, LLC (“LLT”); Johnson & Johnson Holdco (NA), Inc. (“Holdco”); and Kenvue, Inc. (collectively, “Johnson & Johnson Defendants” or “J&J Defendants”) hereby submit their Requests to Charge for Phase II pursuant to S.C. Code Ann. § 15-38-15 and S.C. Code Ann. § 15-32-520.

These charges should only be given if there is a second phase of trial because the jury has found that Plaintiffs are entitled to seek punitive damages from Johnson & Johnson.

Only Johnson & Johnson – not LLT, Holdco, or Kenvue – should be subject to punitive damages. Pursuant to S.C. Code Ann. § 15-32-520(D), “punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm is the result of the defendant’s willful, wanton or reckless conduct.” Neither LLT, Holdco, nor Kenvue are subject to liability under any theory other than successor liability. As a result, under the clear language of § 15-32-520, they do not face liability for punitive damages.

Additionally, Johnson & Johnson should only be subject to punitive damages based on Plaintiffs' claims for product liability negligence (only if Plaintiffs meet their burden as to the necessary level of conduct) and/or fraud. Plaintiffs' strict liability claim is not legally sufficient to support a claim for punitive damages. See S.C. Code Ann. § 36-1-106(1); S.C. Code Ann. § 36-2-714; S.C. Code Ann. § 36-2-715; *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 536-37, 393 S.E.2d 162, 163 (1989) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964)) (finding that damages for a strict liability claim are limited to actual damages, "which compensate 'for physical harm caused'").

Defendants reserve the right to modify, delete, and submit additional Requests to Charge as appropriate.

REQUEST TO CHARGE NO. 1 - INTRODUCTION

Because you have found that defendants are liable to pay damages to the plaintiff, you should now continue your deliberations to consider whether the conduct of defendants is of such a character as to make it subject to punitive damages, and, if so, in what amount. The instructions that follow are intended to assist you in that task by informing you of the purposes of punitive damages and identifying factors that you should and should not consider during your deliberations.

As in your earlier deliberations, it is your duty to follow the law as I shall state it to you and apply that law to the facts as you find them from the evidence in the case. Counsel has referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and the law as stated by the Court in these instructions, you are to follow the Court's instructions. Statements and arguments of counsel are not evidence in the case, nor is anything I say.

You are not permitted to change the law or apply your own ideas of what you think the law should be. You, as jurors are bound by the law as stated in these instructions.

You must perform your duties as jurors without bias, passion, or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All of the parties, as well as the Court, expect that you will consider all of the evidence carefully and impartially, follow the law as it is now being given to you, and reach a just verdict.

The verdict as to punitive damages must represent the considered judgment of each of you as jurors. In order to return a verdict, it is necessary that each juror agree. The verdict must be unanimous on each question on the verdict form.

REQUEST TO CHARGE NO. 2 - PURPOSES OF PUNITIVE DAMAGES

Compensatory and punitive damages serve different and distinct purposes.¹ The only purposes for which you may impose punitive damages are to punish a defendant for reckless, willful and wanton acts toward Mr. Perry² and to deter, or discourage, the defendant and others from acting in a similar way in the future.³ If you find that these purposes would not be advanced by imposing punitive damages, then you may not award punitive damages in this case. Additionally, you may not award punitive damages as a result of anger, passion, or prejudice.⁴

¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003) (“Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct... .By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.”) (citation omitted); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

² Punitive damage awards may only be based on conduct affecting the plaintiff in the given case. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003) (“A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of reprehensibility analysis...”).

³ *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003) (“Punitive damages are imposed for purposes of retribution and deterrence.”) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”).

⁴ *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003); *Plant v. Whittaker Clark & Daniels, Inc., et al.*, NO. 2022-CP-01265 (S.C. Com. Pl) (“Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion.”).

REQUEST TO CHARGE NO. 3 - PERMISSIBLE TO AWARD NO PUNITIVE DAMAGES

It is entirely within your discretion whether or not to impose punitive damages against the defendants. Even if you have found that a defendant has engaged in conduct that makes it subject to punitive damages, the plaintiff is not automatically entitled to punitive damages. You may award no punitive damages. You should impose punitive damages only if you conclude that they are necessary to accomplish the goals of punishment and deterrence.⁵

⁵ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003); *Smith v. Wade*, 461 U.S. 30,52 (1983) (“a key feature of punitive damages [is] that they are never awarded as of right, no matter how egregious the defendant’s conduct”).

REQUEST TO CHARGE NO. 4 - PRESUMPTION THAT COMPENSATORY DAMAGES ARE SUFFICIENT TO MAKE THE PLAINTIFF WHOLE

Because punitive damages and compensatory damages serve different purposes, you should presume that the plaintiff has been made whole for his injuries by the compensatory damages you have awarded. You should only award punitive damages if a particular defendant's conduct was so reprehensible that it warrants the imposition of additional punishment, beyond compensatory damages, to achieve punishment or deterrence.⁶

It is not the purpose of punitive damages to compensate Mr. Perry or anyone else. You may not award punitive damages for the purpose of providing additional compensation or a windfall to the plaintiff.⁷

⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519, 1521 (2003) (“[P]unitive damages serve a broader function; they are aimed at deterrence and retribution....It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”).

⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (“[Punitive damages] are not compensation for injury.”) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (“Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.”).

REQUEST TO CHARGE NO. 5 - BURDEN OF PROOF: CLEAR AND CONVINCING EVIDENCE

You may in your discretion impose punitive damages against a defendant only if you find by clear and convincing evidence that the particular defendant engaged in reckless, willful and wanton conduct toward the plaintiff in this case.

Clear and convincing is more than just a preponderance, or greater weight, of the evidence, which requires only proof which persuades you that a party's claim is more likely true than not true. ~~On the other hand, clear and convincing proof is not as high a standard as the burden of proof in criminal cases, which is proof beyond a reasonable doubt.~~ Clear and convincing proof leaves no substantial doubt in your mind. It means that the evidence is not ambiguous, doubtful, equivocal, or contradictory. It is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established."⁸ ~~Convincing means persuading by proof or argument, causing one to believe in the truth of what is asserted. Clear and convincing proof establishes in your mind, not only that the fact is probable, but that it is highly probable.~~⁹

⁸ S.C. Code Ann. § 15-33-135; *Collins Sec. Corp. v. Sec. & Exch. Comm'n.*, 562 F.2d 820, 824 (D.C. Cir. 1977) (defining clear and convincing evidence standard); *Fred C. Walker Agency, Inc. v. Lucas*, 211 S.E.2d 88, 92 (Va. 1975) (quoting *Cross v. Ledford*, 120 N.E.2d 118, 123 (Ohio 1954))

⁹ *Anonymous v. State Board of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17(1998); *Jimenez v. Diamler Chrysler Corp.*, 269 F.3d 439 (4th Cir. 2001); *Anonymous v. State Board of Med. Exam'rs*, 323 S.C. 260, 473 S.E.2d 870 (Ct. App. 1997), *overruled on other grounds*, 329 S.C. 371, 469 S.E.2d 17 (1998); *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282 (1996).

REQUEST TO CHARGE NO. 6 - MERE NEGLIGENCE INSUFFICIENT

Even though you may have found Johnson & Johnson liable for negligence, such a finding by itself is insufficient to support the imposition of punitive damages. Punitive damages may be imposed only for reckless, willful and wanton conduct toward the plaintiff that goes beyond mere negligence. An error in failing to make what hindsight demonstrates to have been the proper decision or course of action - even a gross error - is not enough to warrant punitive damages.¹⁰

¹⁰ *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991); *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000); *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); S.C. Code Ann. § 15-33-135.

REQUEST TO CHARGE NO. 7 - SETTING THE APPROPRIATE AMOUNT OF PUNITIVE DAMAGES

If you find, by clear and convincing evidence, that Johnson & Johnson engaged in reckless, willful and/or wanton conduct toward the plaintiff and if you determine that some amount of punitive damages should be awarded to Mr. Perry, then it will be your task to set an amount that is appropriate.

You may award only such an amount as you determine is necessary to punish the defendant for the particular conduct that injured this plaintiff and discourage the defendant and others from acting in a similar way in the future. Because punitive damages constitute a payment to the plaintiff that is greater than the actual damages the plaintiff suffered, they are not favored in the law. They should be imposed only where and to the extent necessary to achieve just punishment and adequate deterrence. In the event that you decide to award punitive damages, you should award the lowest amount necessary to accomplish these purposes.¹¹

¹¹ *State Farm Mut. Auto, Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1519, 1521 (2003) (“[P]unitive damages serve a broader function; they are aimed at deterrence and retribution....It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-85 (1996) (“The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multi-million-dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case.”); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1,22 (1991) (adopting standards that “provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter.”); *Kifle v. ZP Towing*, Civil Action No. 22-02056(RC), 2024 WL 1213208 (D.C. 2004) (“It is well-recognized that punitive damages are not favored in the law . . . [t]he most appropriate field for their application is the realm of tort actions generally . . . but even there, they are available only in cases which present circumstances of extreme aggravation.”) (quoting *Seve v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982); *Jannota v. Subway Sandwich Shops, Inc.*, 125 F.3d 503 (7th Cir. 1997) (“Because of their penal nature, punitive damages are not favored in the law . . .”) (quotation omitted); *Continental Tread Res.Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (stating that the amount of punitive damages should be “the least punishment that will change future behavior”).

REQUEST TO CHARGE NO. 8 - FACTORS TO BE CONSIDERED

You should only award punitive damages if the defendant was given fair notice of both the conduct that might subject it to punishment and the severity of the punishment that might be imposed.¹²

In determining the amount of any award of punitive damages against a particular defendant, you should consider:

1. The degree of reprehensibility of the defendant's misconduct that caused the plaintiffs harm;
2. The disparity between the amount of harm suffered by the plaintiff and the size of the punitive damages award, keeping in mind that any punitive damages award must bear a reasonable relationship to the damage actually suffered by the plaintiff as a result of the defendant's conduct; and
3. The difference between the punitive damages award and the civil penalties authorized or imposed for comparable conduct, keeping in mind that any punitive damages award must not be excessive compared to the civil penalties available for comparable conduct.¹³

¹² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (quoting *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 574 (1996)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

¹³ *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).

REQUEST TO CHARGE NO. 9 - REPREHENSIBILITY OF THE MISCONDUCT

I have instructed you that one of the factors that you should consider in setting punitive damages is the reprehensibility of the defendant's conduct that caused the plaintiffs injury. Reprehensibility is a matter of degree. Not all conduct that is subject to punishment is equally wrongful or deserving of the same punishment. You should consider how blameworthy each particular defendant's conduct was in deciding how much punishment that conduct deserves, if any.¹⁴

¹⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct... This principle reflects the accepted view that some wrongs are more blameworthy than others.").

REQUEST TO CHARGE NO. 10 - PROPER TO CONSIDER MITIGATING EVIDENCE

In determining whether punitive damages are necessary to punish and deter each defendant from committing misconduct in the future, and, if so, how much is necessary, you should consider all of the circumstances, including any mitigating circumstances that may negate the need for punitive damages or reduce the amount of punitive damages that should be awarded.¹⁵ ~~Such mitigating evidence that you should consider includes, but is not limited to, evidence concerning the liability of the defendants, evidence of changes in corporate policies, and evidence of punishment imposed.~~¹⁶

¹⁵ See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 463 n.29 (1993) (“In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including... any mitigating circumstances which may operate to reduce the amount of the damages.”) (quoting jury instruction under West Virginia law); *In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) (“Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.”)

¹⁶ See *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (noting that appropriate punitive damages amount should be determined with reference to other costs and expenses incurred by the defendant, including settlements with the government and private parties, fines, restitution, casualty losses, and net compensatory damages); *Liggett Group, Inc. v. Engle*, 2003 Fla. App. LEXIS, 7500, *84 (Fla. Dist. Ct. App. May 21, 2003) (“The defendants were entitled to have the jury consider the FSA and MSA as potential mitigating factors in determining the need for further punishment and deterrence, especially with regard to claims for the same alleged misconduct.”).

**REQUEST TO CHARGE NO. 11 - NO PUNISHMENT FOR HARMS TO PERSONS
OTHER THAN PLAINTIFF**

You may not impose punitive damages based on any argument, claim, belief, or possibility that a defendant's conduct caused harm to persons other than the plaintiff in this case.¹⁷

¹⁷ *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (holding that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003) (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of reprehensibility analysis.... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (describing the second *Gore* guidepost as “the relationship between the penalty and the harm *to the victim* caused by the defendant’s actions”) (emphasis added); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (looking to “the disparity between the harm or potential harm suffered *by Dr. Gore* and his punitive damages award” in describing the reasonable relationship requirement) (emphasis added); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

REQUEST TO CHARGE NO. 12 - NO PUNISHMENT FOR CONDUCT OUTSIDE THIS STATE

This State only has a legitimate concern in imposing punitive damages to punish a defendant for, or deter a defendant from, unlawful acts committed within this state; this State has no interest in conduct that may have occurred outside of its jurisdiction, in other states. For this reason, you may not impose punitive damages against any defendant for conduct that occurred outside this state or for the purpose of changing a defendant's conduct in another state.¹⁸

¹⁸ *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570 (2009) (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of reprehensibility analysis.... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”) quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,435 (2001) (describing the second *Gore* guidepost as “the relationship between the penalty and the harm to the victim caused by the defendant’s actions”) (emphasis added); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (looking to “the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award” in describing the reasonable relationship requirement) (emphasis added).

REQUEST TO CHARGE NO. 13 - REASONABLE RELATIONSHIP BETWEEN COMPENSATORY AND PUNITIVE DAMAGES

The amount of punitive damages awarded, if any, must bear a reasonable relationship or proportion to the harm to the plaintiff in this case caused by the particular defendant's punishable conduct. Since your award of compensatory damages in this case represents the harm to the plaintiff, punitive damages must bear a reasonable relationship or proportion to the compensatory damages you decided to award to the plaintiff against each defendant.

You need not award any punitive damages, and you may not award any if you conclude that the purposes of punishment and deterrence are already satisfied by your award of compensatory damages.¹⁹

While there need not be any particular ratio or relationship between the amount of compensatory damages and punitive damages, if any²⁰, the ratio or relationship between them must be reasonable.²¹

¹⁹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *id.* at 1525 ("Compensatory damages, however, already contain this punitive element.").

²⁰ *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.Ct. 570 (2009) ("Similarly, in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), the Court held that a punitive damages award that is based on evidence of harm to persons other than the plaintiff or plaintiffs will violate due process. The Court noted that harm to others may be considered to help show that the conduct that caused the plaintiff's harm also posed a risk to the public, but the jury may not go further and base a punitive damages award on that evidence. In these cases, the Supreme Court has continued to uphold *Haslip* and further delineate the contours of punitive damages awards that "run wild." *Haslip*, 499 U.S. at 19, 111 S.Ct. 1032. Nevertheless, the Court has consistently declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18, 111 S.Ct. 1032.").

²¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003) ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) ("This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.").

When, as here, compensatory damages are substantial, a punitive award equal to the compensatory award may well approach the maximum award allowed, in which case you may not award punitive damages in an amount greater than the amount of compensatory damages.²²

²² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1524 (2003) (“When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”) (finding a \$1 million compensatory award to be “substantial”). If the jury has already awarded compensatory damages, the Court should instruct the jury that such compensatory damages are “substantial” as a matter of law.

REQUEST TO CHARGE NO. 14 - WEALTH OF THE DEFENDANT

You should determine the appropriate amount of punitive damages, if any, solely by considering the factors about which I have already instructed you - the character of the defendant's punishable conduct and the degree of harm such conduct caused to the plaintiff in this case. You may not impose a larger punitive award than you otherwise would simply because the defendant is a large corporation with substantial wealth, income, revenues, or financial resources.²³ Even outrageous conduct by a defendant cannot support a grossly excessive or arbitrary award of punitive damages, regardless of the size or wealth of the defendant.²⁴

Punitive damages are intended to punish and deter, not to destroy.²⁵ You should only consider the defendant's financial condition in order to ensure that any award you impose does not exceed the defendant's current ability to pay. To determine this, you should evaluate each defendant's financial condition only at the time you render your verdict. Any punitive award must be such that the defendant could pay in one lump sum, without the burden financially destroying the defendant; you may not assume that a defendant would be allowed to pay overtime in an installment plan. Further, you may only consider that portion of each defendant's net worth

²³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519-20 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,433 (2001) ("The Due Process Clause of its own force also prohibits the States from imposing grossly excessive punishments on tortfeasors.") (quotation omitted); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.") (quotation omitted); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993).

²⁴ *Mitchell, Jr. v. Fortis Ins. Co.* 385 S.C. 570 (2009) ("We caution that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. *Campbell*, 538 U.S. at 427, 123 S.Ct. 1513. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth."), FN8.

²⁵ *Group, Inc. v. Engle*, 2003 Fla. App. LEXIS 7500, *47 (Fla. Dist. Ct. App. May 21, 2003) ("It is well established that punitive damages may not be assessed in an amount which will financially destroy or bankrupt a defendant.").

resulting from its business in this state, and not in other states or other countries.²⁶

²⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)); *id.* at 1525 (“The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (“Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences.”) *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (“the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident”).

REQUEST TO CHARGE NO. 15 - NO CONSIDERATION OF SIZE OR STATUS

You may not allow your decision regarding punitive damages to be influenced by the relative size or status of the parties, the fact that the defendants are large companies, or the fact that the defendants have principal offices outside of this state. The defendants' status as corporations make them persons in the eyes of the law and entitles them to the same fair and impartial consideration, by the same legal standards, as the plaintiff in this case, or as would be applied to any individual person who might appear in a courtroom. This case should be considered and decided by you as an action between persons of equal standing in the community. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this court of justice.²⁷

²⁷ REQUESTED FROM NELSON MULLINS.

REQUEST TO CHARGE NO. 16 - NO PUNISHMENT FOR CORPORATE LOCATION

You may not allow your decision regarding punitive damages to be affected by the fact that the defendants' principal offices are outside of this state.²⁸

²⁸ *State Farm Mut. Auto, Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (quoting *Honda Motor Co. v. Oberg* 512 U.S. 415, 432 (1994)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.”); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (“Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences.”); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (“the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident”).

REQUEST TO CHARGE NO. 17 – CLOSING INSTRUCTION

Members of the jury, you have now heard and received all of the evidence on the issue of punitive damages. Your verdict on the issues raised by the punitive damages claim of Plaintiff against Defendants must be based on the evidence that has been received during the trial of the first phase of this case and on the evidence that has been received in these proceedings and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given the verdict form.

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire and consider your verdict.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION J&J DEFENDANTS'
		PROPOSED CHARGE NO. 2023-CP-40-
		04072

MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	JURY CHARGES AND VERDICT
	)	FORM REQUESTED BY J&J
vs.	)	DEFENDANTS
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

J&J DEFENDANTS' REQUESTS TO CHARGE

Defendants Johnson & Johnson, Inc. ("J&J"); LLT Management, LLC ("LLT"); Johnson & Johnson Holdco (NA), Inc. ("Holdco"); and Kenvue, Inc. (collectively, "J&J Defendants") hereby submit their Requests to Charge. Defendants reserve the right to modify, delete, and submit additional Requests to Charge as appropriate. In addition, Defendants will be requesting a special interrogatory verdict form. Therefore, Defendants reserve the right to submit additional charges regarding special interrogatories and, if necessary, the verdict form and jury charges to be used pursuant to S.C. Code Ann. § 15-38-15. The J&J Defendants reserve all rights and do not waive any positions or objections or motions by submitting these requests.

NO. 1 – INTRODUCTION

Members of the Jury:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. The parties expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law and are to be dealt with as equals in a court of justice.

See Ervin, S.C. Requests to Charge - Civil §1-2 and §16-5.

NO. 2 – CREDIBILITY OF WITNESSES

Members of the jury, in determining what the facts are in this case, you, of necessity, must pass upon the credibility of the witnesses who have testified. Credibility in the law means believability. Can I believe this witness? Is this witness credible? The value and weight to be given to their testimony is in your sound discretion. You alone must decide the force and effect and the truth of the testimony. In making a determination as to the credibility of a witness, there are many factors that you may and should take into consideration, such as the appearance or manner of the witness as he or she gave testimony from the witness stand, known in the law as the demeanor of the witness. Did the witness have an interest in the outcome of the trial? Was the witness forthright or hesitant? Was the witness's testimony consistent or did it contain discrepancies? What was the ability of the witness to know about the facts concerning which he or she gave testimony? Did the witness have cause or reason to be biased or prejudiced in favor of the testimony that he or she gave? Was the testimony of the witness corroborated and made stronger by other testimony and evidence or was it made weaker and impeached by other testimony and evidence?

As jurors, you have the right to believe a small portion of a witness's testimony and disregard the larger portion. Or you may believe a larger portion of a witness's testimony and disregard the smaller portion. You may disregard a witness's testimony entirely if you have sound reason in the record for doing so. You may believe the testimony of a single witness against that of many witnesses or the many witnesses as against the one. Most certainly, you do not determine the matter of credibility or believability merely by counting the number of witnesses for either side. Throughout this entire process, you have but one single objective and that is to seek the truth, regardless of from what source that truth may come.

See Anderson, S.C. Requests to Charge - Civil §1-2

NO. 3 - OBJECTIONS

Attorneys are officers of the court. Attorneys have the absolute right and duty to bring matters to the attention of the court by way of objection. Do not inferentially, or otherwise, become upset or disturbed by counsel by virtue of an objection. Our trial procedure includes the objection process as a means of control of evidence, i.e., letting in proper evidence and keeping out improper evidence. Counsel, by objecting, are simply performing their role in the trial of the case.

Once the court makes a ruling on an objection, the jury is bound by that ruling. If the objection is sustained, the question is improper. If the objection is overruled, the question is proper. In that regard, the jury must not, under any circumstances, derive any inference from any ruling made by the court on objections as to any opinion the court may have on the case. The judge does not have an opinion on the evidence and is not entitled to an opinion under the law. The judge is performing his role in the trial of the case.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

Anderson, South Carolina Requests to Charge – Civil, § 1-10.

NO. 4 - BURDEN OF PROOF

Members of the jury, the plaintiff in this case, having initiated and brought the action, has the burden of proof. That is to say, the plaintiff has the burden of proving her case by what is known in the law as the greater weight or preponderance of the evidence. When we say that a party must prove a proposition by the greater weight or preponderance of the evidence, we mean that the evidence on that proposition must be more convincing on that party's side than on the other side.

In this case, there are a number of different defendants. You must judge each defendant separately. The plaintiff has the burden of proving her case as to each defendant by the preponderance or greater weight of the evidence.

Anderson, South Carolina Requests to Charge – Civil, § 1-3 General Instructions - Burden of Proof.

NO. 5 – EVIDENCE

Your verdict must be supported by the evidence, and it can not be influenced by passion, prejudice, or considerations not found in evidence.

S.C. Public Service Authority v. Spearwant Liquidating Co., 196 S.C. 481, 13 S.E.2d 605 (1941).

**NO. 6 - EVIDENCE
(Statements of Counsel)**

You must not consider as evidence any statement of counsel made during the trial. Statements of counsel do not constitute evidence, rather counsel is articulating the position and contention of his client. This rule applies to the opening statement of counsel and the closing argument. You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

Anderson, South Carolina Requests to Charge – Civil, § 1-8, 1-12

NO. 7 -EVIDENCE
(Rejected Or Stricken Evidence)

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court. Such matter is to be treated as though you had never known of it.

Anderson, South Carolina Requests to Charge – Civil, § 1-11.

NO. 8 - EVIDENCE
(Direct And Circumstantial Evidence)

Two kinds of evidence are recognized by the law: direct evidence and circumstantial evidence. These two kinds of evidence apply to the parties alike, the plaintiff and the defendant, and both are equally good in the law if they meet the test of the law. On a particular factual point, there may be direct evidence, circumstantial evidence or a combination of these kinds of evidence.

Facts in issue may be proved either by direct evidence or by indirect evidence, otherwise called circumstantial evidence. It is direct evidence if it proves a fact without an inference and which in itself, if true, conclusively establishes that fact. By direct evidence of a fact is meant the statements of persons who have perceived its existence by means of their senses, or the production of the thing itself before the court. "Direct evidence" is the testimony of a person who claims to have actual knowledge of a fact. It is evidence based on actual knowledge and proves a fact without inference or presumption. It is when a witness can be called to testify to the precise fact that is the subject of the issue on trial. Direct evidence immediately establishes the main fact to be proved. It is essentially evidence you could see, observe, or hear with your senses.

"Circumstantial evidence" does not tend to immediately prove a fact in issue; however, it does give rise to a legal inference that such a fact does exist. It means the proof of a chain of facts and circumstances indicating the existence of a fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn. In other words, you may infer that a particular event occurred based on proof of circumstances warranting such an inference. Circumstantial evidence immediately establishes secondary facts from which the main fact may be inferred, and is typically characterized by inference or presumption. It is not something that one observes; but from facts one can draw a conclusion.

Circumstantial evidence of fact means the proof of some other fact or facts from which, taken either singly or collectively, the existence of the particular fact in question may be inferred as a necessary or probable consequence. Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. I charge you that inferences drawn from physical facts may be as strong as direct evidence, such inferences amount to circumstantial evidence and, when established, are as competent to prove a fact. Where circumstantial evidence is relied upon, it is incumbent upon the party presenting it to show the existence of such circumstances as would justify the inference that a particular event occurred, and not leave the question to mere speculation or conjecture. Additionally, where circumstantial evidence is relied upon, the facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced from such evidence as common sense dictates. If the circumstances are proved to your satisfaction, you may infer a fact from those circumstances, but the circumstances must lead to the conclusion with reasonable certainty.

Circumstantial evidence is just as competent or capable of proving a fact in issue as is direct evidence. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. The proof as to circumstantial evidence is sufficient if shown by the preponderance of the evidence or the greater weight of the evidence. Both types of evidence are accepted as reasonable methods of proof and each is respected for such convincing force as it may carry.

In a civil case such as this, proof of circumstances warranting a given inference is sufficient because proof of a certainty is not required in a civil suit. In civil actions, every other reasonable conclusion need not be excluded. But the circumstances established, if any, in the minds of the

jury must have sufficient probative force to produce a reasonable and probable conclusion and not a mere conjecture. The conclusion reached must be in the minds of the jury the most probable and reasonable one. So, if there are several reasonable inferences that may be drawn from all the circumstances and evidence, it is for you, the jury, to say which is established by the greater weight of the evidence.

Anderson, South Carolina Requests to Charge – Civil, § 1-4.

NO. 9 - EVIDENCE
(Expert Witness Testimony)

Although lay witnesses are limited to testifying about facts within their knowledge and are not allowed to give opinions, certain witnesses, who, by training, education or experience are considered as experts in a particular field, may give opinions in that field based upon the facts of a matter. Their conclusions and opinions constitute evidence to be considered by you in connection with all of the other testimony and evidence in the case. That is to say, you may consider the expert's opinion just as you do all other evidence in the case and it is for you, the jury, to give it such weight as you, in your experience and discretion, may determine. By this, I mean that you must weigh such evidence and accept or reject it in the same manner that you treat all other evidence in the case. In determining the weight to be given the expert's opinion, you should consider the qualifications and credibility of the expert and the reasons given for his opinion.

The testimony of experts on a subject which is little known to the general public is entitled to consideration. Such testimony, however, must be submitted to your judgment and consideration, to be weighed by you as a part of the evidence in connection with all the other facts in this case. The testimony of experts is to aid and assist you as jurors, not to dominate or control you in the decision of questions of facts. Their opinions and deductions from the evidence before you, and their judgments and opinions, do not preclude yours. You are required to decide disputed questions after comparison and consideration of all the evidence in this case.

Anderson, South Carolina Requests to Charge – Civil, § 1-6.

NO. 10 - EVIDENCE
(Conflict In Testimony Of Expert Witnesses)

In this case, there has been a conflict in the testimony of expert witnesses. To that end, you must weigh one expert's opinion against that of the other, and you must consider the reasons given by one as compared with those of the other. You should consider the relative credibility and knowledge of the experts who have testified. Thereupon, you should find in favor of that expert testimony which, in your opinion, is entitled to the greater weight.

Anderson, South Carolina Requests to Charge – Civil, § 1-6.

NO. 11 - EVIDENCE
(Payment Of Expert Witness)

When an expert witness is called by either a plaintiff or a defendant, he expects to be paid and he should be paid. You should not take into consideration the fact that the witness is paid unless there is some evidence or circumstances appearing from the evidence which would fully and reasonably convince you that the testimony of the witness has been influenced because of the sum which he has been paid as a witness.

Anderson, South Carolina Requests to Charge – Civil, § 1-6.

NO. 12 – FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT

You have heard statements from witnesses and from Plaintiff’s counsel regarding actions by Johnson & Johnson in trying to advocate on its own behalf with the government. Under the United States Constitution, a Defendant has a First Amendment right to petition the government and advocate on its own behalf. There is nothing illegal or improper about exercising this Constitutional right. You should disregard and not factor into your deliberations any statement by any witness or counsel suggesting or stating that there is anything illegal or improper about a Defendant exercising this Constitutional right.

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (defendants are immune from liability for seeking government action, even if they use “improper means” to do so); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (jury should have been instructed that efforts to influence public officials are not illegal, “regardless of intent or purpose”); *E.R.R. Presidents Conf. v. Noerr Motors Freight, Inc.*, 365 U.S. 127, 145 (1961) (defendant could not be held liable for an “attempt to bring about the passage of laws that would help it or injure the other,” even if it “deliberatively deceived the public and public officials”).

NO. 13 – PROTECTED SPEECH – ADVERTISING

Defendants also have the right to advertise their products. Advertising is commercial speech that is protected by the First Amendment to the United States Constitution. Accordingly, you may not impose liability based on the mere fact that Defendants have advertised their products, or based on the amount of money spent by Defendants to advertise their products.

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001) (recognizing that, under the First Amendment, “the tobacco industry has a protected interest in communicating information about its products and adult consumers have an interest in receiving that information”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 & n.17 (1993) (“[E]ven speech that does no more than propose a commercial transaction is protected by the First Amendment.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (speech that merely proposes a commercial transaction nonetheless receives First Amendment protection). Any argument that such protection is lost because advertising is collaterally attractive to youth has been rejected, and thus cannot legitimately serve as the basis for Plaintiff’s claims. *See Lorillard Tobacco Co.*, 533 U.S. at 571.

NO. 14 – RIGHT TO DEFEND AGAINST CLAIMS

Actions taken to defend against litigation—no matter how vigorous—cannot, without more, form the basis of liability in this case. Similarly, requests for legal advice from an attorney cannot support a finding of liability against Defendants on any claim.

U.S. Const. amend. I; *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965); *Hise v. Philip Morris Inc.*, 46 F. Supp. 2d 1201, 1206 (N.D. Okla. 1999), *aff'd*, No. 99-5112, 2000 WL 192892 (10th Cir. Feb. 17, 2000); *Lemelson v. Bendix Corp.*, 104 F.R.D. 13, 18 (D. Del. 1984).

Defendants have a due process right to litigate, which includes the right “to present every available defense” against civil claims. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)); *see also United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

NO. 15 - EVIDENCE
(Expert Witness and Causation)

When one relies on expert testimony to show a causal connection between an injury and a subsequent condition, the testimony must meet the “most probably” rule. It is not sufficient that the condition in question “possibly” or “could have” or “might have” resulted from the injury. The expert must go further and testify that, taking into consideration all the facts, it is his professional opinion that the result in question to a reasonable degree of scientific or medical certainty most probably came from the cause alleged. Further, the expert must testify as to causation in accordance with the law I instruct.

Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969). See also, *Windham v. Florence*, 221 S.C. 350, 70 S.E.2d 553, 556 (1952); *Eubanks v. Piedmont Natural Gas Co.*, 198 F.Supp. 522, 526 (D.S.C. 1961).

Ervin, S.C. Requests to Charge – Civil § 30-8 (1994).

NO. 16 – VIDEO TESTIMONY

During the trial of this case, we have had testimony by way of deposition of witnesses taken outside of the courtroom and live by video conference. Those witnesses may or may not appear personally before you. Any such testimony was taken in the manner prescribed by law and you will consider the testimony from that deposition just as if the witness were here upon the stand testifying and consider it in the same manner.

See Rule 32, SCRCPP; *see also* *Visual Graphics Leasing Corp., Inc. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000)

NO. 17 – EVIDENCE

In some instances, testimony and exhibits have been admitted for limited purposes and not as proof of the truth of what was said in them. In each of those cases, you should consider that evidence only for the limited purpose for which it was admitted.

State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973); *State v. Smalls*, 260 S.C. 44, 194 S.E.2d 188 (1973).

NO. 18 - PRODUCTS LIABILITY

A products liability case may be brought under several theories, including negligence and strict liability. In a products liability action, regardless of the theory on which the plaintiff seeks recovery, The Plaintiff must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant.

Under any products liability theory, a plaintiff must prove the product defect was the proximate cause of the injury sustained.

See Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Small*, 329 S.C. at 462-63, 494 S.E.2d at 842; *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993); *Livingston v. Noland Corp.*, 293 S.C. 521, 362 S.E.2d 16 (1987); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978); S.C. Code Ann. § 36-2-715(2)(b) (2003).

NO. 19 - PRODUCTS LIABILITY
(Absence of a Fault from Mere Fact of Injury)

The mere fact that an injury or accident has happened, standing alone, does not permit you, the jury, to draw any inference that such an injury or accident has been caused by anyone's negligence or fault.

See Mack v. West, 275 S.C. 453, 272 S.E.2d 631 (1980); *Orr v. Saylor*, 253 S.C. 155, 169 S.E.2d 396 (1969); *Gilland v. Peter's Dry Cleaning Co.*, 195 S.C. 417, 11 S.E.2d 857 (1940); *Covington v. Atlantic Coast Line Ry.*, 158 S.C. 194, 155 S.E. 438 (1930); *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991)(no inference of negligence arises from the mere fact of injury).

NO. 20 - PRODUCTS LIABILITY
(Burden of Establishing Defect at Time Product Left Defendant's Control)

Generally, there can be no liability for injury owing to a product unless that product is defective, but where a product is in a defective condition, there may be liability for harm resulting from the defect. The defect must exist at the time it leaves the control of the manufacturer upon whom liability is sought to be imposed. The existence of a defect is crucial, because a manufacturer is not an insurer against all risks of injury associated with its product.

In a products liability case against the manufacturer, the plaintiff has the burden of proving, by a preponderance of the evidence, that the product in question was defective at the time when the defendant had possession or control of it, or when the product was delivered, or in the case of an action against a seller, when the product was purchased. There is no duty on a manufacturer to furnish a product that will not wear out.

See Sexton v. Bell Helmets, Inc., 926 F.2d 331 (4th Cir. 1991) (plaintiff must prove product was defective at time of sale); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982)(burden of proof that product was in defective condition at time it left hands of particular seller is upon injured plaintiff; unless evidence can be produced which will support conclusion that it was then defective, burden is not sustained); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993); 63 Am. Jur. 2d *Products Liability* §§ 4, 12 (1997); 72 C.J.S. Supp. *Products Liability* § 11 (1975)(this rule applies no matter what theory of liability is relied upon).

NO. 21 - PRODUCTS LIABILITY
(Manufacturer's Duty to Warn)

A product may be defective when there is a failure to provide warnings or instructions that are adequate to safeguard against mishaps or injuries.

When a manufacturer has reason to anticipate danger from a use of its product, it has a duty to warn consumers. The manufacturer's duty is to exercise reasonable care. A manufacturer of a product is liable for failing to warn if:

- (1) the manufacturer knows or has reason to know the product is, or is likely to be, dangerous for its intended use;
- (2) the manufacturer has no reason to believe that the user will realize the potential danger; and
- (3) the manufacturer fails to exercise reasonable care to inform the user of the product's dangerous condition or of facts which make it likely to be dangerous.

A manufacturer has a duty to warn consumers of any foreseeable hazards attendant with the use of its product. A manufacturer has a duty to conduct adequate research into and tests upon its products, such as will reveal latent dangers. There is no separate "failure to test claim" other than the duty to design a product that is not defective and unreasonably dangerous. It has a duty to give accurate and adequate instructions for the use of its product such as will avoid unintended consequences of which the manufacturer is or should, through the exercise of reasonable care, be aware.

A manufacturer is treated as an expert in its particular field and is under a continuing duty to keep abreast of the current state of knowledge with respect to its product as gained through research, reports and other available methods.

Many products cannot be made completely safe for use. If such products are useful and desirable, and they are properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions, they cannot be said to be defective. Just because a product can be made more safe, that factor alone does not render the product “unreasonably dangerous.”

In order to determine whether a product is unreasonably dangerous, you may consider among all the surrounding circumstances the following factors:

- (1) the usefulness and desirability of the product;
- (2) the cost involved for added safety;
- (3) the likelihood and potential seriousness of injury; and
- (4) the obviousness of danger.

See Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971); *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010); *Livingston v. Noland Corp.*, 293 S.C. 521, 362 S.E.2d 16 (1987); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 191 S.E.2d 774 (1972); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); 72 C.J.S. Supp. *Products Liability* § 25 (1975); 63A Am. Jur. 2d *Products Liability* §§ 1110-11, 1175 (1997); Restatement (Second) of Torts § 388 (1965).

NO. 22 - PRODUCTS LIABILITY
(Duty to Warn)

A manufacturer or seller is not required to warn of dangers or potential dangers that are generally known and recognized. Therefore, a product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that users of the product generally recognize.

Anderson, South Carolina Requests to Charge – Civil, § 32-6
Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996).

NO. 23 - PRODUCTS LIABILITY
(Design Defect)

In applying the rule of strict liability, a product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product. The state of the art and industry standards are relevant to show both the reasonableness of the design and that the product is dangerous beyond the expectations of the ordinary consumer.

The fact that a product could be made safer does not automatically mean the product is unreasonably dangerous. Strict liability is not equivalent either to absolute liability or to insurance of the safety of the product's user. Likewise, the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence nor does it establish that the product was defective. Rather, in the final analysis, we have another of the law's balancing acts and numerous factors must be considered, including:

- (1) the usefulness and desirability of the product;
- (2) the cost involved for added safety;
- (3) the likelihood and potential seriousness of injury; and
- (4) the obviousness of danger.

In this State, we balance the utility of the risk inherent in the design of the product with the magnitude of the risk to determine the reasonableness of the manufacturer's action in designing the product.

See Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982); *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344 (5th Cir.1983); *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735 (1983); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969); *Bray v. Marathon Corp.*, 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001), *aff'd in part, rev'd in part*, 356 S.C. 111, 588 S.E.2d 93 (2003); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

NO. 24 - PRODUCTS LIABILITY
(Feasible Alternative Design)

In order to show a product is in a defective condition unreasonably dangerous, the Plaintiffs must prove by a preponderance of the evidence that a feasible alternative design was available at the time the product was manufactured. In meeting this burden, the Plaintiff cannot rely upon mere conceptual design theories.

Branham v. Ford Motor Co, 390 S.C. 203 (2020), 701 S.E.2d 5 (2010)

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Cohen v. Winnebago Industries, Inc.*, No. 98-1925, 2000 App. LEXIS 4850 (4th Cir. 2000)(unpublished).

**NO. 25 - PRODUCTS LIABILITY
(Negligence)**

In a products liability case based on a negligence theory the plaintiff is required to prove:

- (1) he was injured by the product;
- (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and
- (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant.

To prove a defective condition due to negligence, the plaintiff bears the additional burden of demonstrating the defendant manufacturer failed to exercise due care in some respect. The focus is on the conduct of the manufacturer, and liability is determined according to fault. The mere fact a product malfunctions does not demonstrate the defendant's negligence nor tend to establish the product was defective.

The first cause of action in this case is based on negligence. There are three essential elements of the plaintiff's negligence cause of action. They are denied by the defendant's answer. The plaintiff has the burden of proof throughout this process. He must prove all of these elements by the preponderance of the evidence.

- (1) The plaintiff must show that the defendant designed or manufactured or marketed the product in a negligent or careless manner;
- (2) The plaintiff must show that he suffered injury to his person;
- (3) The plaintiff must prove the defendant's negligence or carelessness in one or more of those specifications alleged in the complaint, was the proximate cause of the plaintiff's injuries.

The word "negligence" is an integral part of this matter. Negligence is defined as the absence of due care, the want of due care or ordinary care. The word carelessness conveys the same idea as negligence. It is the failure by omission or commission to exercise such due care as

a person of ordinary reason and prudence would exercise in the same circumstances. In determining whether a particular act is negligent, the test you apply is what would a person of ordinary reason and prudence do under those circumstances. When I use the word person here, obviously, that also encompasses the word “corporation.”

Hart v. Doe, 261 S.C. 116, 198 S.E.2d 526 (1973)(negligence is failure to use that degree of care which person of ordinary prudence and reason would exercise under same or similar circumstances); *Campbell v. Robbins Tire and Rubber Co.*, 256 S.C. 230, 182 S.E.2d 73 (1971); *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993); *Sunvillas Homeowners Ass'n, Inc. v. Square D Co.*, 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990); 63 Am. Jur. 2d *Products Liability* §§ 204, 206 (1997).

**NO. 26 -PRODUCTS LIABILITY
(Negligence Design Defect)**

In an action based on negligence, the plaintiff must prove the product, as designed, was in a defective condition unreasonably dangerous to the user when it left the control of the defendant and the defect caused his injuries. In addition, liability for negligence requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it.

A manufacturer of a product made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the product or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

See City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987); *Marchant v. Lorain Div.*, 272 S.C. 243, 251 S.E.2d 189 (1979); *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985); Restatement (Second) of Torts § 398 (1965).

NO. 27 - PRODUCTS LIABILITY
(Standard of Care for a Manufacturer)

Where an action is brought against a manufacturer on the basis of negligence, the plaintiff must show the manufacturer has not adhered to the standard of care required by the law of negligence. In the case of a manufacturer, it is generally held that the standard applicable is one of reasonable care in the manufacturing process or, as sometimes expressed, due care or ordinary care. A manufacturer who fails to exercise such care in the manufacture of a product which, unless carefully made, he should recognize as involving an unreasonable risk of causing harm, is subject to liability for such harm.

Usually, the degree of care depends upon, and must be commensurate with, the risk of harm flowing from normal use of the product, or is proportionate to the seriousness of the consequences reasonably to be anticipated. While an extraordinary duty of care is not required of a manufacturer, the duty on the part of the manufacturer to exercise due care must be commensurate with the risk of danger involved.

In determining whether the legal standard of care has been satisfied, a manufacturer is held to the skill of an expert in its business and to an expert's knowledge of the materials and processes in its industry. Manufacturers have a duty to possess expert knowledge in the field of their products and to exercise reasonable care in placing the product in the market, which duty must be met by inspection and testing. A manufacturer owes a duty to conduct adequate tests and inspections of its product such as will reveal latent defects or defects that are not visible or apparent upon a reasonable inspection of the product. The failure to exercise reasonable care in fulfilling any of these duties constitutes negligence and, if accompanied by the requisite knowledge, may constitute recklessness.

The duty of care that binds a manufacturer is a duty of due, ordinary, and reasonable care to see that the product is free from any potentially dangerous defect; that is, to see that there is no unreasonable risk of personal injury or property damage to persons using the products for purposes that the manufacturer may reasonably expect they will be employed.

This does not mean that a manufacturer has a duty to make its product accident-proof or is an insurer of its safety or utility. Rather, the manufacturer is under a duty only to manufacture its product in such manner that it will be reasonably fit for the purpose or purposes for which it is intended to be used. The plaintiff must prove that in manufacturing the product, the defendant failed to exercise due care. The defendant is liable neither as an insurer nor as a guarantor, but rather only for failing to act as a reasonable person would have acted.

• *See Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 191 S.E.2d 774 (1972); *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 188 S.E.2d 841 (1972); 63 Am. Jur. 2d *Products Liability* §§ 83, 223, 225-26, 310 (1997); 72 C.J.S. Supp. *Products Liability* § 4 (1975)(a manufacturer is not an insurer of the safety of his product or an insurer against accidental injury arising out of the use of such product; manufacturer is not under obligation to make product accident-proof or foolproof); 72 C.J.S. Supp. *Products Liability* § 18 (1975).

NO. 28 - PRODUCTS LIABILITY
(Standard of Care for a Manufacturer)

Industry standards, customs, and practices, as well as safety standards promulgated by government or industry organizations are evidence of the standard of care.

Elledge v. Richland/Lexington Sch. Dist Five, 341 S.C. 473, 477 , 534 S.E.2d 289, 290 (Ct App. 200)

**NO. 29 -PRODUCTS LIABILITY
(Strict Liability)**

The plaintiff claims the defendant is strictly liable because it violated section 15-73-10 of the Defective Products Act.

South Carolina Code section 15-73-10 states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
 - (a) The seller is engaged in the business of selling such a product, and
 - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in subsection (1) shall apply although
 - (a) The seller has exercised all possible care in the preparation and sale of his product, and
 - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The plaintiff claims that the product was sold by the defendant in a defective condition unreasonably dangerous to the person who is expected to use or be affected by the use of the product.

Generally speaking, the doctrine of “strict liability” is a rule under which liability is imposed, without regard to the exercise of reasonable care, on one who sells a product in a defective condition unreasonably dangerous to the user or consumer, for physical harm caused to the ultimate user or consumer, or to his property, if the seller is engaged in the business of selling such product, and the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Under strict liability, recovery by a plaintiff may be had even though a seller has exercised all possible care in the preparation and sale of his product. The exercise of due care in the manufacture of a product will not relieve the manufacturer of liability. Rather, a plaintiff need only prove the product was defective and unreasonably dangerous when it was placed in the stream of commerce. Thus, the focus is upon the product itself, not the conduct of the manufacturer.

The law of South Carolina is that one who sells any product in a defective condition unreasonably dangerous to the user is subject to liability for physical harm caused to the user if the manufacturer is engaged in the business of producing or selling such a product, and it is expected to and does reach the user without substantial change in the condition in which it is sold. The rule that I have just explained to you shall apply even though the manufacturer has exercised all possible care in the preparation and sale of its product and the user has not bought the product from or entered into any contractual relationship with the manufacturer.

Not every defect subjects a seller to strict liability. The defect must cause the product to be unreasonably dangerous. Whether the defect causes the product to be “unreasonably dangerous” is measured by the “ordinary consumer” for whom the product is designed. To be unreasonably dangerous, the article sold must be dangerous to an extent beyond that which would be expected or contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Now, what I have just instructed you applies only where the product is, at the time it leaves the manufacturer's hands, in a condition not contemplated by the ultimate user or consumer and which would be unreasonably dangerous to the user when the product is used in a foreseeable manner, which includes an intended use of the product. A product is not in a defective condition

when it is safe for normal handling, and by normal it is meant what the ordinary manufacture] would reasonably expect to incur with reference to use.

This would include the environment which is normal to the use of the product, and the anticipation of the reasonably foreseeable risk of the use of the product in such an environment. A manufacturer is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is used, unless such mishandling or other causes were reasonably foreseeable and to be reasonably expected.

Under strict liability, the manufacturer is not held as an insurer against all losses caused by the product but rather is to be held responsible only for damages attributable to some failure of the product to perform with reasonable safety in its normal environment. A product is not defective merely because an accident occurred when someone was using it. A product need not be accident-proof. A seller is not an insurer of the absolute safety of its product. It is enough that it is reasonably safe or, to state it differently, if it is not in a defective condition and unreasonably dangerous to the user.

There are three essential elements of the plaintiff's strict liability claim. They are all denied by the defendant. Because the plaintiff has made these charges as the foundation of his claimed right to damages, the burden of proof is upon the plaintiff to establish all three elements by the preponderance or greater weight of the evidence:

- (1) the defendant manufactured the product in a defective condition unreasonably dangerous to the user;
- (2) the plaintiff suffered personal injuries;
- (3) the defective product, in one or more of the particulars alleged in the complaint, was the proximate cause of the plaintiff's injuries.

Strict liability is imposed for only those products that are defective and unreasonably dangerous.

Livingston v. Noland Corp., 293 S.C. 521, 362 S.E.2d 16 (1987)(common elements of actions for strict liability and breach of implied warranty is proof product was not reasonably fit or safe for its intended use; proof must be sufficient to show not only that product was defective but that defect was direct and efficient cause of plaintiff's injury); *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735 (1983); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969); *Bray v. Marathon Corp.*, 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001), *aff'd in part, rev'd in part*, 356 S.C. 111, 588 S.E.2d 93 (2003); *Anderson v. Green Bull*, 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Henderson v. Gould, Inc.*, 288 S.C. 261, 341 S.E.2d 806 (Ct. App. 1986)(though § 15-73-10 uses terms “ “ “sales” and “seller,” these terms are merely descriptive and doctrine of strict liability may be applied if requirements for its application are otherwise met, though no sale has occurred in literal sense); S.C. Code Ann. § 15-73-10 (1977); 63 Am. Jur. 2d *Products Liability* §§ 556-59, 561, 563, 565 (1997); 72 C.J.S. Supp. *Products Liability* §§ 4, 7, 8 (1975); Restatement (Second) of Torts § 402A cmts. g, h & i (1965); 2 Dan B. Dobbs, *The Law of Torts* § 354 (2001)(stating strict liability is imposed for only those products that are defective and unreasonably dangerous).

NO. 30 - PRODUCT LIABILITY
(Design Defect- Strict Liability)

In an action based on strict liability, where a design defect is alleged, the plaintiff must prove the product, as designed was in a defective condition unreasonably dangerous to the user when it left the control of the manufacturer and the defect caused his injuries. The focus is on the condition of the product, without regard to the action of the manufacturer.

Industry standards and the state of the art at the time of manufacture are relevant to show both the reasonableness of the product's design and that the product is dangerous beyond the expectations of the ordinary consumer.

See Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982); *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735 (1983); *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990); *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985).

Anderson, South Carolina Requests to Charge - Civil, §32-43.

NO. 31 - PRODUCTS LIABILITY
(Industry Standards and State of the Art)

Industry standards and the state of the art in science, technology and design at the time products are manufactured are relevant considerations in determining whether or not a product is reasonable in design or unreasonably dangerous.

Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982) (applying South Carolina law).

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct.App. 1995)

Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct.App. 1996)

NO. 32 - PRODUCTS LIABILITY
(Industry Standards and State of the Art)

Even if you find that there was an unreasonable danger, if you find that the defendant did not know and had no reason to know when it sold the products that the danger existed in its product because of the state of the art at the time that the product was manufactured and sold, then you should not find the defendant breached a duty to warn or that a product was unreasonably dangerous.

Claytor v. General Motors Corp., 277 S.C. 259, 286 S.E.2d 129 (1982).

NO. 33 - PRODUCTS LIABILITY
(Post-Distribution Evidence)

Post-distribution evidence is evidence of facts neither known nor available at the time of distribution. When assessing a product liability claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or reasonably attainable at the time of manufacture. The use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper.

Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010).

NO. 34 – FRAUD

Fraud has been defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Fraud is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Actual fraud consists of deceit, artifice, trick, design, some direct and active operation of the mind. It includes cases of the intentional and successful employment of any cunning, deception or artifice used to circumvent or cheat another. It is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception.

Fraud occurs where one person or party intentionally deceives another by word or conduct for the purpose of inducing that other party to part with some property or surrender some legal right and the party thereby accomplishes his purpose. It involves the elements of dishonesty and deceit. Fraud involves deceitful practices in depriving or endeavoring to deprive another of his known rights by means of some artful device or plan contrary to the plain rules of common honesty.

Fraud, in its general sense, comprises anything calculated to deceive, including all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed and resulting in damage to another.

Anderson, S.C. Requests to Charge - Civil, § 18-1

NO. 35 – FRAUD

To establish fraud [sometimes referred to as a cause of action for fraud and deceit], the plaintiff must prove the following nine elements: (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity; (5) the speaker's intent that the representation be acted upon by the person hearing the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury

Each and every one of these elements must be proven by clear, cogent, and convincing evidence. The failure to prove any element of fraud is fatal to recovery. Fraud is never presumed in the law.

Were the representations made which the plaintiff claims? The defendants say they were not. If you find that no statements or representations were made to the plaintiff, you need not consider the case further. There would be no basis for fraud.

To establish actionable fraud, there must first be a false representation. The representation must be a statement or a set of actions which concerns an existing or pre-existing fact. The false representation must be one of fact as distinguished from the mere expression of an opinion. The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion, an expression of intention, or an expression of confidence that a bargain will be satisfactory. The distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made. Statements of opinion, predictions of future events, mere puffing, sales talk, and broken promises normally do not amount to fraud. As a general rule, fraud cannot be predicated on a statement

that constitutes an expression of an intention. An exception to the general rule is recognized for unfulfilled promises which were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party.

An actionable representation cannot consist of a mere broken promise, even if a party acts in reliance on the promise. An action in fraud, however, can be based on an unfulfilled promise to perform in the future made with a present undisclosed intention not to perform, which is made for the purpose of inducing one to sign a paper or do some other act.

The representation must be false. A fraudulent act is characterized by dishonesty in fact, unfair dealing, or unlawful appropriation of another's property by design. Bad faith is the test of fraud. Nondisclosure, or silence, becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other. The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date.

The representation must be material. If an objective, reasonable person using the misrepresentation would have viewed the representation as sufficiently important and significant that it would have played a role in the decision to enter into a contractual relationship, the representation may be deemed material. The matter is material if:

- (1) a reasonable person would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
- (2) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

The knowledge of falsity extends to statements made in reckless disregard of the truth. Reckless disregard exists where one makes a statement and knows he lacks the knowledge necessary to be confident that the statement is true.

A defendant may be held liable for misrepresentations made to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the fraudulent misrepresentation.

To recover for fraud, the plaintiff must have relied on the misrepresentation. If the plaintiff knew the misrepresentation was false, there is no cause of action because there could not have been any reliance on the truth of the statement. A victim of fraud has a right to rely on a misrepresentation so long as his reliance is not reckless or grossly negligent. The legitimacy of the plaintiff's reliance on the misrepresentation is an issue to be decided by you, the jury.

There is no cause of action for a fraudulent statement unless the plaintiff is injured.

Anderson, S.C. Requests to Charge - Civil, § 18-2

NO. 36 - PROXIMATE CAUSE

Under any products liability theory, the plaintiff must prove the product defect was the proximate cause of the injuries sustained. To prove proximate cause, the plaintiff must establish proof of both causation in fact and legal cause. To establish causation in fact, the plaintiff must show his injury would not have occurred “but for” the defendant’s conduct. To establish legal cause, the plaintiff must establish that the plaintiff’s injury was a foreseeable consequence of the defendant’s conduct.

The J&J Defendants cannot be charged with that which is unpredictable or could not be expected to happen. Plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act.

Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)

Jolly v. General Electric Co., 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021)

Edwards v. Scapa Waycross, Inc., 2024 WL 826371 (February 28, 2024)

Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992)

Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978).

NO. 37 - PROXIMATE CAUSE

To establish proximate causation, the plaintiff must introduce evidence that it is more likely than not that defendant's product was a substantial factor in bringing about the result. The mere fact that the injury or accident occurred, standing alone, does not permit you to draw a conclusion that the injury or accident was caused by the anyone's negligence or strict liability. To prove actionable exposure, Plaintiffs must prove that the plaintiff's exposure to asbestos in the defendants' product was of such frequency, regularity and duration that it was a substantial factor in bringing about the disease or injury. This evidence must show more than casual or minimal contact to asbestos from the defendant's product. Presence of the plaintiff in the vicinity of the defendant's talc product that has no asbestos contained within the container, does not constitute actionable exposure. Regular, frequent, and proximate use of defendant's talc product is not sufficient, rather the plaintiff must show regular, frequent, and proximate exposure to asbestos in talc at an actionable level of exposure.

Establishing causation requires the plaintiff do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. He must prove similarities between himself and the individuals in the studies, which includes proof that (1) he was exposed to the same toxin, (2) the exposure or dose level was comparable to those in the study, (3) the exposure to the toxin occurred before the onset of the injury, and (4) the latency period of the injury is consistent with the individuals in the study.

Edwards v. Scapa Waycross, Inc., 437 S.C. 396, 412, 878 S.E.2d 696, 705 (Ct. App. 2022), *aff'd*, 442 S.C. 387, 899 S.E.2d 597 (2024)

Henderson v. Allied Signal, Inc., 373 S.C. 179, 644 S.E.2d 724 (2007); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)

Jolly v. General Electric Co., 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021)

Edwards v. Scapa Waycross, Inc., 2024 WL 826371 (February 28, 2024)

NO. 38 -PROXIMATE CAUSE

As proximate cause is the direct cause, without which the injury would not have occurred, if you find that Mr. Perry would have contracted mesothelioma even if he had never been exposed to the defendant's product, then you must find in favor of that defendant because his exposure was not the cause without which the injury would not have occurred.

Anderson, South Carolina Requests to Charge – Civil, §32-15

NO. 39 - PROXIMATE CAUSE

Causation based upon a possibility rather than a probability is not sufficient for a plaintiff to recover in a products liability case. Where the cause of a plaintiff's injuries may be as reasonably attributed to an act for which the defendant is not liable as to one for which it is liable, the plaintiff has not met his burden of proof in establishing the defendant's product proximately caused the plaintiff's injuries.

Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996).

**NO. 40 - PROXIMATE CAUSE
(Non- Parties)**

In South Carolina a defendant is entitled to assert that other persons or entities, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by Mr. Perry. The matter of the alleged fault of entities who are not parties in causing has been raised by the J&J Defendants. Therefore, it is proper for you to consider the actions of other entities who are not parties to this action in assessing whether Mr. Perry has met his burden of establishing the elements necessary to recover against the J&J Defendants.

S.C. Code Ann § 15-38-15(D)

Smith v. Tiffany, 419 S.C. 548, 557 799 S.E.2d 479, 484 (2017) 557

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NO. 41 - SPECULATIVE DAMAGES

The existence or amount of damages cannot be left to conjecture, guess or speculation. However, proof of amount of loss with absolute or mathematical certainty is not required. Damages must be susceptible of ascertainment with a reasonable degree of certainty.

Anderson, South Carolina Requests to Charge – Civil, § 13-10

NO. 42 – HARM TO OTHERS

You may not punish Defendants for any harms suffered by persons other than Mr. Perry.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422–23 (2003) (as a matter of constitutional law, “[a] defendant should be punished for the conduct that harmed the plaintiff”); *id.* at 423 (“Due process does not permit courts . . . to adjudicate the merits of other parties’ hypothetical [punitive damage] claims against a defendant”); *id.* at 423 (“Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of reprehensibility analysis.”); *id.* at 424 (“The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.”); *id.* at 422 (“A Defendants’ dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”); *id.* at 422–23 (even conduct admitted to prove reprehensibility “must have a nexus to the specific harm suffered by the plaintiff,” and courts must “ensure the conduct in question”—conduct that did not harm the plaintiff but that is being admitted to show reprehensibility—“replicates the prior transgressions”); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (holding that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties”); *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (“In assessing 45 reprehensibility . . . it is crucial that a court focus on the conduct related to the plaintiff’s claim rather than the conduct of the defendant in general.”).

NO. 43 - ACTUAL DAMAGES

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put her in the same position she was in prior to the damages received insofar as this is monetarily possible. In other words, actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant.

Actual damages, if any, may be assessed where a wrongful act has caused a loss or injury which can be assessed in money, the universal and cardinal principle being that the person injured shall receive compensation commensurate with her loss or injury, and no more. Actual damages are such as will compensate the party for injuries suffered or losses sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position she was in before the wrongful injury occurred.

The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. Actual damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant.

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Barnwell v. Barber-Coleman Co.*, 301 S.C. 534, 393 S.E.2d 162 (1989); *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (in order for damages to be recoverable, evidence should enable jury to determine amount thereof with reasonable certainty and cannot be left to conjecture, guess, and speculation); *Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (1968); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964); *Hutchinson v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903) (actual damages are when the wrongful act has caused loss or injury which can be assessed in money, universal and cardinal principle being that the person injured shall receive compensation commensurate with his loss or injury and no more); *Mellen v. Lane*, 377 S.C. 261,

NO. 44 - DAMAGES

The purpose of awarding compensatory damages is to fairly and adequately compensate a damaged party in proportion to the character and extent of the damages caused by one or more of the defendants. It is not to provide plaintiffs with a windfall at the expense of the defendants.

Baldowski v. United States, 111 F. Supp. 653 (D.S.C. 1953).

NO. 45 - DAMAGES

Plaintiffs have the burden of presenting such evidence so as to enable you to determine the amount of their damages, if any, with reasonable certainty and accuracy. While proof of the amount of loss with absolute or mathematical certainty is not required, the existence, causation, or amount of damages cannot be left to conjecture, guesswork or speculation. The evidence presented by the plaintiffs must enable you, the jury, to determine what amount is fair, just and reasonable. The plaintiffs bear the burden of proving by the preponderance of the evidence that they are entitled to compensatory damages.

Gray v. Southern Facilities, Inc., 183 S.E.2d 438 (S.C. 1971); *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 162 S.E. 705 (1968); *United Merchants & Mfrs., Inc. v. South Carolina Electric & Gas Co.*, 113 F.Supp. 257, (D.S.C. 1953) *aff'd*, 208 F.2d 685 (4th Cir. 1953); TOM J. ERVIN, SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL §24-26 (S.C. Continuing Legal Ed. Div. 1994); Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil § 13-2 (modified).

NO. 46 - DAMAGES

You may not include as compensatory or actual damages any amount for the purpose of punishing one or more of the defendants or making an example of one or more of the defendants or to deter similar conduct by others. Such damages would be punitive and they are not authorized during this phase of the lawsuit.

Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991).

NO. 47 – LOSS OF CONSORTIUM

The plaintiff is claiming a loss of consortium. This is a claim for loss of the services, society, and companionship of a spouse. South Carolina Code Section 15-75-20, titled “Loss of companionship of spouse,” provides: “Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse.”

Loss of consortium arises out of the special relationship between a husband and wife. Consortium refers to the conjugal fellowship of husband and wife and the right of each to the company, society, cooperation, affection, and aid of the other in every conjugal relation. Loss of consortium includes several elements:

- (1) support and services provided by the other spouse;
- (2) love;
- (3) companionship;
- (4) affection;
- (5) society;
- (6) sexual relations;
- (7) comfort;
- (8) solace;
- (9) guidance.

In order to prevail in an action for loss of consortium, the plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury.

A spouse's loss of consortium, of which he is deprived by a negligent injury to his spouse, is a right which entitles him to damages for such loss.

In determining the amount of damages for loss of consortium, you may consider:

- (1) the nature and extent of the husband's services and society prior to the incident, including his disposition, temperament, character and attainments;
- (2) the interest he manifested in his home, the social life of his family, and in the comfort, happiness, education and general welfare of the members of the family;
- (3) the services he rendered in superintending the household, training the children, assisting his spouse in the management of the business or affairs in which the spouse was engaged, if any;
- (4) his acts of affection, love and sexual intercourse performed and the extent to which the injuries he sustained in the incident incapacitated him from performing such services and providing such society after the incident.

If you find the defendant's conduct resulted in the plaintiff's loss of consortium, you are to determine the value of such loss from the evidence in the case and your own observations, experiences, and knowledge, conscientiously applied to the facts and circumstances of this case.

§ 13-6 Damages - Elements of Actual Damages - Loss of Consortium, Anderson, S.C. Requests to Charge - Civil, 13-6

NO. 48 - APPORTIONMENT OF FAULT

Under South Carolina law, a defendant is entitled to assert that other persons or entities, whether or not parties to the case, contributed to the alleged injury or damages and are liable for any or all of the damages.

S.C. Code §15-38-15 (D)

NO. 49 - APPORTIONMENT OF FAULT

If you decide that one or more defendants, or other persons or entities, contributed to the alleged injuries or death, you must apportion or assign percentages of fault to the defendants and other entities or persons.

S.C. Code §15-38-15 (D)

NO. 50 - APPORTIONMENT OF FAULT

As I stated, you the jury may apportion fault among the defendants and other persons or entities. If more than one of the defendants and other persons or entities was at fault for the same indivisible injury or death, then you must specify in a verdict the percentage of liability that proximately caused the indivisible injury or death that is attributable to each of the defendants and other persons or entities.

Of course, if any defendant was not negligent, or did not sell a defective product, or the alleged negligence or defective product was not the proximate cause of the injury, then the plaintiff is not entitled to recover from that defendant or defendants. However, if you find that the injury was proximately caused by the negligence or defective product of one or more of the defendants, then the plaintiff is entitled to full recovery; and any apportionment of percentages will not reduce the recovery by the plaintiff.

When you are asked to determine percentages of fault among the defendants and other persons or entities, you must compare the percentages of fault among the various defendants and other entities or parties. You will express your determination of fault in the forms of percentages. The percentages allocated among the defendants and other persons or entities must total 100%. This does not mean that all of the defendants and other persons or entities must have some percentage of fault allocated to them. If a defendant or other person or entity was not at fault, in your opinion, then its percentage of fault would be zero, and the 100% would be allocated or apportioned among the remaining defendants and other persons or entities based on the greater weight of the evidence.

S.C. Code Ann. §15-38-15

NO. 51 – DEFINITION OF CLEAR AND CONVINCING EVIDENCE

Clear and convincing evidence is an elevated standard of proof, which lies between the lesser standard of "preponderance of the evidence," used in most civil cases, and the higher standard of "beyond a reasonable doubt," which is required in criminal cases. Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of fact a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

When the law places upon a party a burden of proof by clear and convincing evidence, the law means that the evidence is not ambiguous, doubtful, equivocal, or contradictory, but the evidence is pointed to the issue and satisfactory in the sense that the source from which it comes is one in which you as jurors can place credence.

Anderson, South Carolina Requests to Charge – Civil, § 1-3.

NO. 52 - PUNITIVE DAMAGES

In this stage of the trial, you must not include in your award any damages to punish or make an example of any defendant. Such damages would be punitive damages, and they cannot be part of your compensatory damages verdict. At this time, as to any defendants you find liable, you must award only the damages that fairly compensate plaintiffs for their actual loss. If you find that the J&J Defendants were reckless, willful, or wanton in their conduct, you will hear additional evidence related to punitive damages in a second phase of the trial.

See Anderson's S.C. Requests To Charge - Civil § 13-21.

NO. 53 – RECKLESSNESS DEFINED

Punitive damages can only be awarded where the Plaintiff proves by clear and convincing evidence that the Defendant's conduct was willful, wanton, or in reckless disregard of the Plaintiff's rights.

The words recklessness, willfulness and wantonness are synonymous. The terms are used to describe a conscious failure to exercise and observe reasonable or due care. Recklessness implies the doing of a negligent act knowingly. When a person acts negligently and he realizes that he is acting negligently, the law says he is reckless, willful, and/or wanton, whichever term you prefer, they all mean the same thing, that is, the conscious failure to exercise due care.

Recklessness is distinguished from negligence and gross negligence. Negligence is the failure to use due care. Negligence is failure by omission or commission to exercise due care as a person of ordinary reason and prudence would exercise in the same circumstances.

Recklessness is a higher degree of culpability and responsibility. Recklessness signifies a conscious failure to exercise due care. Recklessness is a conscious indifference to the rights of the plaintiff, or a reckless disregard of the rights of the plaintiff. Recklessness is an awareness of wrongful conduct and a continuation to act regardless of consequences.

In other words, while a negligent person is one who acts carelessly, a person whose behavior is reckless, willful and/or wanton is not only careless in his actions, but is also aware that he is careless. The test for determining whether a tort may be deemed reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the injured party.

Anderson's S.C. Requests To Charge - Civil § 22-1; Carter V. R.L. Jordan Oil Co., Inc., 390 S.E.2d 367, 301 S.C. 84 (S.C. App. 1990).

NO. 54 – PUNITIVE DAMAGES

In determining whether punitive damages may be warranted, you should also take into consideration any mitigating evidence. Mitigating evidence is evidence which may demonstrate that there is no need to impose punitive damages against Defendants.

See Humana Health Ins. Co. of Fla., Inc. v. Chipps, 802 So. 2d 492, 496-97 (Fla. 4th DCA 2001) (“The jury should have been allowed to consider any evidence which would have had the effect of ‘reducing or softening the moral or social culpability attaching to [the defendant’s] act.’”); *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 246-47 (Fla. 1983) (“Other factors which the jury may consider include the nature, extent, and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances.”); *see also TXO v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (ruling that mitigating circumstances should be considered in determining whether to award punitive damages).

NO. 55 – PUNITIVE DAMAGES

Punitive damages may be warranted against a Defendant only for its conduct that caused Mr. Perry's mesothelioma, and not based on any conclusion that the Defendant is an unsavory business.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”).

NO. 56 - UNANIMITY OF VERDICT

Under the Constitution of this State, the jury verdict must be unanimous. Unanimity is mandated. Every single juror must agree on the jury verdict. There cannot be any split or divided vote in any form or fashion, such as eleven to one, ten to two, nine to three. Every single juror must agree on the jury verdict. When the foreperson writes the verdict and signs the name as the foreperson, that assures the court that the jury verdict is unanimous.

Anderson, South Carolina Requests to Charge – Civil, § 1-13.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Defendants Johnson & Johnson, Inc.; LLT Management, LLC, formerly known as LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.

Columbia, South Carolina

August 11, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	
	)	Case No.: 2023-CP-40-04072
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES; et al.,	)	
	)	
Defendants.	)	
	)	

JOHNSON & JOHNSON DEFENDANTS
PROPOSED VERDICT FORM

Defendants Johnson & Johnson; LLT Management, LLC f/k/a LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. ("J&J Defendants") hereby submit their Proposed Verdict Form. J&J Defendants reserve the right to submit additional requested changes, additions, modifications, and/or alterations to this Proposed Verdict Form as appropriate.

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LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson
Holdco (NA), Inc.*

Columbia, South Carolina

August 11, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	
	)	Case No.: 2023-CP-40-04072
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES; et al.,	)	
	)	
Defendants.	)	
	)	

VERDICT

AMERICAN INTERNATIONAL INDUSTRIES, INC.

1. Did Plaintiff prove by the preponderance of the evidence that Mr. Perry was exposed to asbestos in American International Industries, Inc.'s products (the Clubman line of products) with such frequency, regularity and duration that those products were a substantial factor in bringing about his mesothelioma?

Yes ✓ No _____

The court has pre-marked a finding of "yes" for multiple questions for American International Industries, Inc. due to default.

Product Liability: Strict Liability

2. Were the products manufactured by American International Industries, Inc. in a defective condition, unreasonably dangerous to the consumer, due to their design, manufacture or warning?

Yes ✓ No _____

Product Liability: Negligence

3. Was American International Industries, Inc. negligent in designing or manufacturing its products?

Yes ✓ No _____

4. Was American International Industries, Inc. negligent in failing to warn Mr. Perry about the risks associated with its products?

Yes ✓ No

Fraud

5. Did Mr. Perry justifiably rely on a false representation of material fact intentionally made by American International Industries, Inc. that misrepresented the safety of its products, and if so, did that reliance proximately cause his mesothelioma?

Yes ✓ No

ATLAS TURNER, INC.

6. Did Plaintiff prove by the preponderance of the evidence that Mr. Perry was exposed to asbestos in Atlas Turner, Inc.'s products (asbestos friction, drywall, fireproofing, and insulation products) with such frequency, regularity and duration that those products were a substantial factor in bringing about his mesothelioma?

Yes ✓ No

The court has pre-marked a finding of "yes" for multiple questions for Atlas Turner, Inc. due to default.

Product Liability: Strict Liability

7. Were the products manufactured by Atlas Turner, Inc. in a defective condition, unreasonably dangerous to the consumer, due to their design, manufacture or warning?

Yes ✓ No

Product Liability: Negligence

8. Was Atlas Turner, Inc. negligent in designing or manufacturing its products?

Yes ✓ No

9. Was Atlas Turner, Inc. negligent in failing to warn Mr. Perry about the risks associated with its products?

Yes ✓ No

Fraud

10. Did Mr. Perry justifiably rely on a false representation of material fact intentionally made by Atlas Turner, Inc. that misrepresented the safety of its products, and if so, did that reliance proximately cause his mesothelioma?

Yes ✓ No

HIMMEL MEDIA, LLC

11. Did Plaintiff prove by the preponderance of the evidence that Mr. Perry was exposed to asbestos in Himmel Media, LLC's products (Gold Bond talc products) with such frequency, regularity and duration that those products were a substantial factor in bringing about his mesothelioma?

Yes ✓ No

The court has pre-marked a finding of "yes" for multiple questions for Himmel Media, LLC due to default.

Product Liability: Strict Liability

12. Were the products manufactured by Himmel Media, LLC in a defective condition, unreasonably dangerous to the consumer, due to their design, manufacture or warning?

Yes ✓ No

Product Liability: Negligence

13. Was Himmel Media, LLC negligent in designing or manufacturing its products?

Yes ✓ No

14. Was Himmel Media, LLC negligent in failing to warn Mr. Perry about the risks associated with its products?

Yes ✓ No

Fraud

15. Did Mr. Perry justifiably rely on a false representation of material fact intentionally made by Himmel Media, LLC that misrepresented the safety of its products, and if so, did that reliance proximately cause his mesothelioma?

Yes ✓ No

JOHNSON & JOHNSON

16. Did Plaintiff prove by the preponderance of the evidence that Mr. Perry was exposed to asbestos in Johnson's Baby Powder with such frequency, regularity, and duration that it was a substantial factor in bringing about his mesothelioma?

Yes _____ No _____

If you answered "No" to Question 16, skip to Question 21 and enter a 0 for Johnson & Johnson, without answering Questions 17-20.

Product Liability: Strict Liability

17. Was Johnson's Baby Powder in a defective condition, unreasonably dangerous to the consumer, due to its design, manufacture or warning?

Yes _____ No _____

If you answered "No" to Question 17, skip to Question 21 and enter a 0 for Johnson & Johnson, without answering Questions 18-20.

Product Liability: Negligence

18. Was Johnson & Johnson negligent in designing or manufacturing Johnson's Baby Powder?

Yes _____ No _____

19. Was Johnson & Johnson negligent in failing to warn Mr. Perry about the risks associated with Johnson's Baby Powder?

Yes _____ No _____

Fraud

20. Did Mr. Perry justifiably rely on a false representation of material fact intentionally made by Johnson & Johnson that misrepresented the safety of Johnson's Baby Powder, and if so, did that reliance proximately cause his mesothelioma?

Yes _____ No _____

DAMAGES

21. What is the percentage of each of the following entities' fault in causing Mr. Perry's mesothelioma?

Only include Johnson & Johnson in your answer if you answered "yes" to Questions 16 and 17. If you answered "no" to either Question 16 or Question 17, you must enter 0 for Johnson & Johnson.

American International Industries, Inc. _____

Atlas Turner, Inc. _____

Himmel Media, LLC _____

Johnson & Johnson _____

Total must add up to 100%.

22. Please state the amount of actual damages that have been proven by the preponderance of the evidence:

_____ Michael Perry's economic loss and other damages

_____ Lonnie Long's loss of consortium damages

23. Has Plaintiff proven, by clear and convincing evidence, that any of the following Defendants' conduct rose to the level of recklessness, willfulness, or wantonness and that this reckless, willful, or wanton conduct was the proximate cause of Michael Perry's mesothelioma?

You should only answer this question for Johnson & Johnson if you answered "yes" to Question 18, Question 19 or Question 20. If you answered "no" to all of those questions or if you did not answer those questions, you should not answer Question 23 for Johnson & Johnson.

American International Industries, Inc.

Yes _____ No _____

Atlas Turner, Inc

Yes _____ No _____

Himmel Media, LLC

Yes _____ No _____

Johnson & Johnson

Yes _____ No _____

Please sign and date this verdict form and return to the courtroom.

Jury Foreperson

Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	
	)	Case No.: 2023-CP-40-04072
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES; et al.,	)	
	)	
Defendants.	)	
	)	

JOHNSON & JOHNSON DEFENDANTS
PROPOSED PHASE II VERDICT FORM

Defendants Johnson & Johnson; LLT Management, LLC f/k/a LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. ("J&J Defendants") hereby submit their Proposed Verdict Form for Phase II. J&J Defendants reserve the right to submit additional requested changes, additions, modifications, and/or alterations to this Proposed Verdict Form as appropriate.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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*Attorneys for Johnson & Johnson; LLT Management, LLC f/k/a
LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson
Holdco (NA), Inc.*

Columbia, South Carolina

August 11, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	
	)	Case No.: 2023-CP-40-04072
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES; et al.,	)	
	)	
Defendants.	)	
	)	

PHASE II VERDICT

1. What is the amount of punitive damages, if any, which you found by clear and convincing evidence, should be awarded against American International Industries, Inc.?

\$ _____

2. What is the amount of punitive damages, if any, which you found by clear and convincing evidence, should be awarded against Atlas Turner, Inc.?

\$ _____

3. What is the amount of punitive damages, if any, which you found by clear and convincing evidence, should be awarded against Himmel Media, LLC?

\$ _____

4. What is the amount of punitive damages, if any, which you found by clear and convincing evidence, should be awarded against the Johnson & Johnson Defendants?

\$ _____

Please sign and date this verdict form and return to the courtroom.

Jury Foreperson

Date

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Civil Action No. 2023-CP-40-04072

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

v.

American International Industries et al.

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

NOTICE OF APPEAL

Defendants Johnson & Johnson; LTL Management, LLC f/k/a LTL Management, LLC;
Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. (“J&J Defendants”) appeal: (1) the
Order filed December 11, 2024, ruling on successor liability issues and denying the J&J
Defendants’ post-trial motions; (2) the jury verdict and the judgment entered thereon; (3) the
evidentiary and other rulings adverse to the J&J Defendants before and during trial, including but
not limited to the Court’s oral denial of the J&J Defendants’ August 10, 2024 and August 15,
2024 motions for a mistrial; (4) the Order filed on August 9, 2024 on Plaintiffs’ Motion to
Compel and for Sanctions Against Defendants Kenvue, Inc. and Johnson & Johnson Holdco
(NA), Inc.; (5) the Form 4 Order filed July 2, 2024 on Plaintiffs’ Motion to Compel Kenvue, Inc.
and Johnson & Johnson Holdco (NA), Inc.; and (6) the Form 4 Order filed on July 2, 2024

denying the J&J Defendants' Motion to Dismiss. Copies of the orders and the Form 4 order/judgment/verdict form are attached hereto. The J&J Defendants' received written notice of the order denying the post-trial motions on December 11, 2024.

Respectfully submitted,

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Attorneys for Defendants Johnson & Johnson, Inc.; Pecos River Talc, LLC, formerly known as LLT Management, LLC, formerly known as LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.

January 10, 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Civil Action No. 2023-CP-40-04072

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

v.

American International Industries et al.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, certify that I have served all counsel in this action with a copy of the document(s) specified below a copy by electronic mail to each attorney listed below using their primary email address listed in the Attorney Information System.

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All Defense Counsel of Record
Via Electronic Mail Only



Eileen Hindman
Administrative Assistant

January 10, 2025

Eileen Hindman

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Sent: Friday, January 10, 2025 12:35 PM
To: Ben Adams; Elizabeth Moultrie; Jamie Rutkoski; Kathy Felix; Liberty Moultrie; Rachel Gross; Teresa Gilliland; Theile McVey
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Subject: Perry vs American International Industries - CA No. 2023CP4004072

Attachments: 2025.01.10 Perry - Notice of Appeal.pdf; 2025.01.10 Perry - Proof of Service.pdf; 2024.08.19 Jury Verdict - 4937-2624-7694 1.pdf; 2024.12.11 [ECF] Perry - Order on J&J Defs Post-Trial Motions - 4899-0046-1573 1.pdf; 2024.07.02 Order on Motion to Compel - 4924-1755-9310 1.pdf; 2024.07.02 Order on Motion to Dismiss - 4911-4255-6430 1.pdf; 2024.08.09 - Order on PL Motion to Compel for Sanctions agst Kenvue, Holdco - Signed - FILED - 4885-2147-5801 1.pdf

Good afternoon,

Attached for service upon you in the above matter, please find Defendants Johnson & Johnson; LLT Management, LLC f/k/a LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. Notice of Appeal with exhibits and Proof of Service.

Thank you.



EILEEN HINDMAN **SENIOR ADMINISTRATIVE ASSISTANT**
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2023CP4004072

Michael L Perry
Jamie Rae Rutkoski

Lonnie L Long

American International
Industries
Himmel Media Llc
Himmel Management Co Llc
Walgreen Co
Block Drug Company Inc

Bristol Myers Squibb
Company
Brenntag Specialties Llc
Brenntag North America
Inc
Hawthorne Pharmacy Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiffs Motion to Compel against Defendants Janssen Pharmaceuticals'(NA), Johnson & Johnson Holdco, Inc, and Kenvue, Inc is GRANTED. Defendants have refused to designate a 30(b)(6) witness and notified Plaintiff they would not appear or produce a witness. This matter is scheduled for pretrial July 30, 2024 and trial beginning August 5, 2024. The Defendants shall immediately designate it's 30(b)(6) witness, produce all documents requested, answer interrogatories and cooperate with scheduling a deposition.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2758
Judge Code

7/2/2024
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Theile Branham McVey Kassel Mcvey PO Box 1476
Columbia, SC 29202
John D. Kassel PO Box 1476 1330 Laurel Street Columbia,
SC 29202
Jamie Rae Rutkoski PO Box 1476 Columbia, SC
29202-1476
David Christopher Humen 4146 Mapleridge Dr Grapevine,
TX 76051
Charles William Branham III 302 North Market Street Suite
300 Dallas, TX 75202

Steven James Pugh 1900 Barnwell St. Columbia, SC 29201
Robert Wilder Harte 1900 Barnwell St. P.O. Drawer 7788
Columbia, SC 29201
James D. Gandy III PO Box 993 CHARLESTON, SC 29402
Cameron D Berthelsen 235 Magrath Darby Boulevard, Ste
100 Mt. Pleasant, SC 29464
James H. Elliott Jr. 235 Magrath Darby Blvd, Suite 100 Mt.
Pleasant, SC 29464
Randi Lynn Roberts 3700 Forest Drive, Suite 400 Columbia,
SC 29204
Mary Elizabeth O'Neill 301 South College Street Suite 3500
Charlotte, NC 28202
A. Victor Rawl Jr. 677 King Street Suite 450 Charleston, SC
29403
William Henry Kleindienst 677 King Street Suite 450
Charleston, SC 29403

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jeanette W. McBride - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCF.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2023CP4004072Michael L Perry
Jamie Rae Rutkoski

Lonnie L Long

American International
Industries
Himmel Media Llc
Himmel Management Co Llc
Walgreen Co
Block Drug Company IncBristol Myers Squibb
Company
Brenntag Specialties Llc
Brenntag North America
Inc
Hawthorne Pharmacy Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Defendants Janssen Pharmaceuticals'(NA), Johnson & Johnson Holdco, Inc, and Kenvue, Inc's Motion to Dismiss is DENIED. The Plaintiff's complaint includes specific allegations regarding the continuity between Old JJCI and these defendants of management, personnel, operating locations, business operations, shareholders and control. Plaintiff's have also submitted 25 exhibits of factual material and court orders which support the allegations of their complaint. Construing these materials in the light most favorable to non moving parties, which are the Plaintiffs, this court is required to deny Defendants Motion to Dismiss.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

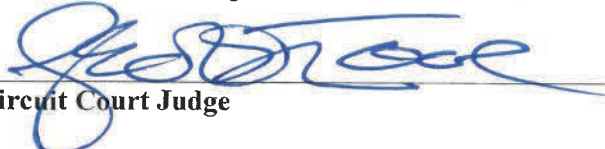
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

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Circuit Court Judge

2758
Judge Code

7/2/2024

Date

For Clerk of Court Office Use Only

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Court Reporter

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ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	ORDER ON PLAINTIFFS' MOTION TO
AMERICAN INTERNATIONAL	)	COMPEL AND MOTION FOR
INDUSTRIES, et al.	)	SANCTIONS AGAINST DEFENDANTS
	)	KENVUE, INC. AND JOHNSON &
Defendants.	)	JOHNSON HOLDCO (NA) INC.

Before the Court is Plaintiffs' Motion to Compel and Motion for Sanctions Against Defendants Kenvue, Inc. and Johnson & Johnson Holdco (NA) Inc. (hereinafter "Kenvue", "Holdco" or "Defendants"). The Court received briefs from Plaintiffs and from Defendants and heard argument from the parties on August 7, 2024. The motion is granted.

BACKGROUND

The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the organization, not the specific witness's knowledge. Regardless of whether the people whom the corporation designates have any personal knowledge of the matters in the deposition notice, the responding party must prepare its witnesses to provide non-evasive, complete and binding answers for the organization. The corporate representative for both Defendants failed to comply with this court's order.

APPLICABLE LAW

SCRCP Rule 30(b)(6) specifically requires a corporation to find requested information not just what is known to a company, but what is *knowable* to a company. In this case, this certainly applies to Defendants' predecessors, subsidiaries and parent companies including but not limited

to Johnson & Johnson. Kenvue and Holdco's refusal to provide a witness who took seriously the order of the court to inform himself of what is known at the company (from its own employees) or from information readily knowable. This is unreasonable conduct similar to what required an order compelling the depositions in the first place. That order was disregarded repeatedly.

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. *Temple v. Tec-Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App 2006). Here sanctions are appropriate. However, the amount of sanctions will be deferred to a later date. Neither defendant has been deposed before in litigation regarding talc. Neither Defendant cooperated with proper discovery requests, willfully ignoring a court order and did so when the timing was obviously extremely prejudicial to Plaintiffs.

CONCLUSION AND ORDER

Defendants abuse of discovery and failure to prepare both corporate representatives as ordered by this court warrant the imposition of sanctions. Defendants unilaterally and, in violation of the Order granting the Plaintiffs' Motion to Compel, failed to prepare the corporate representatives on numerous topics.

For these reasons, the Court **GRANTS** Plaintiffs' motion, and **IT IS HEREBY ORDERED** that:

1. Defendants are ordered to produce a fully prepared witness to be deposed this Saturday or Sunday, August 10th or August 11th based on availability of Plaintiffs' counsel. The deponent shall identify employees at Kenvue and Holdco with knowledge on the noticed subject and educate

himself on what is known by those employees in addition to doing an inquiry with entities that are reasonably available to Defendants such as J&J and JJCI-3.

2. The corporate designee shall appear for trial as the last witness to take the stand in the pre-punitive stage should the Plaintiffs wish to call the witness. Plaintiffs' case-in-chief will not be completed until this witness is heard.

3. The court will also consider evidentiary sanctions after the continued deposition is complete to extent the witness is not prepared or Plaintiff is prejudiced by the timing of the evidence.

AND IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Michael L Perry , plaintiff, et al vs American International Industries ,
defendant, et al
Case Number: 2023CP4004072
Type: Order/Compel

So Ordered

Jean H. Toal

Electronically signed on 2024-08-09 09:45:38 page 4 of 4

ELECTRONICALLY FILED - 2024 Aug 10 9:12:53 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4004072

(STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Michael L Perry and Lonnie L Long,

Plaintiffs,

V.

Johnson & Johnson and American International Industries et al,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 2023-CP-40-04072

VERDICT FORM

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2024 AUG 19 AM 9:05

RICHLAND COUNTY
FILED

VERDICT FORM

NEGLIGENCE

1. We, the jury, find that Defendant the Johnson & Johnson entities were negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

✓ Yes

No

2. We, the jury, find that Defendant American International Industries (AII), was negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

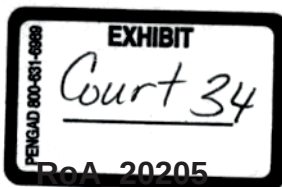
No

STRICT LIABILITY

3. We, the jury, find that Defendant the Johnson & Johnson entities are strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

✓ Yes

No



4. We, the jury, find that Defendant American International Industries (AII) is strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

☐ No

FRAUDULENT MISREPRESENTATION

5. We, the jury, find that Defendant the Johnson & Johnson entities engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

☐ Yes

☒ No

6. We, the jury, find that Defendant American International Industries (AII) engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

☐ No

DAMAGES

7. If you answered "Yes" to any of Questions 1-6, please state the amount of actual damages that have been proven by the greater weight of the evidence:

Michael Perry's economic loss (past & future) \$ 3,800,000

Michael Perry's other damages (past & future) \$ 19,237,500

Lonnie Long's loss of consortium damages (past & future) \$ 9,618,750

WILLFUL, WANTON OR RECKLESS CONDUCT

8. If you answered "Yes" to Questions 1, 2, 5, or 6, please answer this question as to any Defendant for which you answered "Yes." We, the jury, find by clear and convincing evidence that the conduct of the following Defendants was willful, wanton, or reckless:

Johnson & Johnson

☒ Yes

☐ No

American International Industries (AII)

☒ Yes

☐ No

Foreperson _____

August 15, 2024
Date

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Michael L Perry and Lonnie L Long,

Plaintiffs,

v.

American International Industries et al,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) C/A No. 2023-CP-40-04072

PLAINTIFFS' REQUESTED
JURY CHARGES

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2024 AUG 19 AM 9:05

RICHLAND COUNTY
FILED

PUNITIVE DAMAGES VERDICT FORM

1. As to Plaintiff Michael Perry's claims against Defendant Johnson & Johnson entities for punitive damages, we, the jury, by unanimous consent, find:

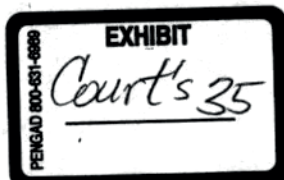
✓ for Michael Perry in the amount of \$ 30,000,000 punitive damages
(\$30 Million)

3. As to Plaintiff Michael Perry's claims against Defendant American International Industries for punitive damages, we, the jury, by unanimous consent, find:

✓ for Michael Perry in the amount of \$ 700,000 punitive damages

Foreperson

August 15, 2024
Date



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, et al.,	)	
	)	
Defendants.	)	

**ORDER ON DEFENDANTS JOHNSON & JOHNSON; LLT MANAGEMENT, LLC;
JOHNSON & JOHNSON HOLDCO (NA) INC.; AND KENVUE, INC.'S POST-TRIAL
MOTIONS**

Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc. (collectively “J&J”) move for relief from the jury’s August 15, 2024 verdict in favor of Plaintiffs Michael L. Perry and Lonnie L. Long. For the reasons set forth below, J&J’s motions for judgment notwithstanding the verdict, new trial absolute based on errors of law, new trial absolute based on the thirteenth juror doctrine is DENIED, and new trial *nisi remittitur* are GRANTED. Separately, J&J’s motion for setoff and production of settlement agreements is GRANTED as to setoff, but DENIED as to the production of settlement agreements. Finally, J&J’s motion for stay of execution on the judgment is GRANTED, in part.

I. EVIDENCE AT TRIAL

Viewing the record in the light most favorable to Plaintiffs, sufficient evidence supports the jury’s finding that Michael Perry’s malignant pleural mesothelioma was proximately caused by exposure to asbestos in Johnson’s Baby Powder (“JBP”). Mr. Perry and his husband, Lonnie Long, brought this action against multiple defendants, including but not limited to J&J. Evidence

at trial demonstrated that Mr. Perry was exposed to asbestos by using JBP on himself on a daily basis, multiple times a day, from 1974 through 2019. His mother also used JBP on him during diaper changes from the day of his birth on December 20, 1969. Three of Plaintiffs' causes of action were placed before the jury: negligence, strict liability, and fraudulent misrepresentation. J&J did not put on a case-in-chief.

A. Liability and Punitive Damages

1. Mr. Perry testified to his decades-long use of JBP on a daily basis.

Mr. Perry testified that his earliest memory of using talcum powder on himself was from 1974, when he was four or five years old, through 2019. He also testified that, after he was born in 1969, his mother used JBP on him during diaper changes when he was an infant and that his use of the baby powder "didn't just start at the age of five." This is all undisputed. He explained that he was using Johnson's Baby Powder two to four times per day. The jury further heard that Mr. Perry used a minimum of ten bottles of JBP per year. Use of JBP was part of Mr. Perry's daily hygiene routine because he was allergic to deodorant. The jury heard that this also was undisputed.

The jury was shown images of two bottles of JBP Mr. Perry found in his home. There was no warning of any kind on the first bottle. The second bottle had a small warning regarding keeping the bottle away from small children to avoid inhalation. Neither bottle found in his home had a warning that JBP could contain asbestos. Mr. Perry further testified to the jury about what was written on the bottles of JBP found in his home, including the phrases "purest protection", indicating that "pure" was synonymous with "safe," and "clinically proven mildness," indicating once more that "clinically proven" meant scientifically safe.

2. JBP contained asbestos.

It was undisputed that throughout Michael Perry's use of JBP, the specifications for the powder called for talc sourced from different mines including but not limited to mines in Val Chisone, Italy, Vermont, and China. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from each source that J&J used in its baby powder. His test results showed the presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. He confirmed that he found tremolite and other asbestos fibers, including winchite/richterite, over and over in JBP. Dr. Longo further testified that he found asbestos in JBP throughout each of the decades in which Mr. Perry used JBP – 1960s through the late 2000s. He confirmed that he found tremolite asbestos, anthophyllite, richterite, and actinolite in JBP. Battelle Memorial Labs also found tremolite asbestos in JBP 153 times as early as the 1950s. By the early 1970s, J&J had numerous reports showing the presence of tremolite in its Vermont and Italian talc ore. Additionally, even with “poor analytical sensitivity”, the FDA's contract lab found asbestos in the talc used in JBP in 2019. Despite J&J having this knowledge, J&J admitted through its former corporate representative, Dr. John Hopkins, that there has never been a warning about asbestos on JBP or any J&J talc product.

3. Michael Perry was exposed to asbestos from JBP.

The testimony established that Mr. Perry's use of JBP exposed him to visible asbestos-containing dust. Plaintiffs' expert Dr. Steven Haber testified that once talc is used in a powder form inside the home, often in enclosed spaces such as a bedroom or bathroom, it is impossible to get the asbestos from that talc powder out of the home. There was uncontradicted evidence regarding re-entrainment. Dr. Haber explained that once asbestos settles down to the ground or to a surface, anyone walking by it or brushing it can put the asbestos fibers back into the air inside

the home. He elaborated that even if one were to vacuum or sweep up the talc dust with asbestos in it that is all over the home, that process is simply blowing the asbestos back into the air. Once it's in the air, it can be breathed in. Dr. Haber cited an authoritative, peer-reviewed and published paper by Dr. Hillerdal that studied these very concepts.

Dr. Haber additionally testified that OSHA began regulating asbestos exposure in the workplace in the early 1970s and that while the permissible exposure limit eventually was set at .1 fiber per cubic centimeter of air (fiber/cc) time -weighted average, that level was not safe for mesothelioma and people exposed at this level would still develop the disease. Dr. Haber testified about his reliance on the Steffen study, which the jury heard showed that when individuals used JBP for 40 years, their exposure level to asbestos is between .38 to 5.18 fibers/cc years. This exposure level substantially increases the user's risk of developing mesothelioma. Dr. Haber opined, to a reasonable degree of medical certainty, that Mr. Perry's range of exposures from his use of JBP was between .1 to 4 fibers per cc. Epidemiological studies have established that these levels are sufficient to cause mesothelioma, including studies by Gardner, Ferrante, Jiang, LaCourt, Roland, Iwatsubo, and Rodelsperger.

The jury heard testimony from Dr. Madigan, who testified that he did a dose calculation immediately prior to this trial for someone who applied JBP twice a day for 30 years. He testified that "there is an estimate of the fibers per cc of asbestos that a person was exposed to by using talc for one minute. And it's 1.9 fibers per cc." He further testified that this was the equivalent to .35 fiber years. Mr. Perry used even more talc than the hypothetical person utilized in Dr. Madigan's calculation, and his calculation demonstrated an increased risk. Dr. Madigan's dose testimony was undisputed.

The jury also heard testimony from Dr. Haber, who testified that OSHA concluded that there is no safe level of exposure to asbestos and that mesothelioma requires the least amount of asbestos exposure to develop. Dr. Haber testified to the jury about the *Steffen, et al.* peer-reviewed published paper and explained the levels of exposure that occur when someone uses J&J's talc. He explained to the jury that the study showed that individuals who used J&J's talc for 40 years had an exposure level to asbestos between .38 to 5.18 fibers/cc years, which substantially increases the user's risk of developing mesothelioma. Dr. Haber testified that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers per cc. He clarified that 1 fiber per cc meant breathing "10,000 fibers every minute, millions or billions in a year."

4. Plaintiffs' experts considered Mr. Perry's frequent use of JBP.

The jury heard testimony from Dr. Haber that Mr. Perry was "an above-average user" of JBP and he was "not only using it two to four times a day, but he was putting it on his whole body, and . . . at times he was actually putting it on his . . . face." He also explained that Mr. Perry's use of JBP was "a repeated use" and, because Mr. Perry is "a big guy" that "the amount of talc that he uses . . . is going to be more than . . . a smaller-framed individual." The testimony established that Mr. Perry's exposures to asbestos from JBP were a "substantial contributing factor to" the "development of [his] mesothelioma." The jury also heard evidence that J&J used talc in JBP from Italy before 1966/1967, talc "mostly" from Vermont from 1966 to 2003, talc from Italy for seven months in 1979, and talc from China from 2003 to 2020 – and each of these mines have tested positive for asbestos. The uncontradicted evidence was that Mr. Perry inhaled talc from JBP from each of these mine sources.

5. Mr. Perry's lung tissue contained amphibole asbestos fibers found in JBP.

Plaintiffs' material scientist expert Dr. Longo performed a tissue digestion on Mr. Perry's tissue. The tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc particles in Mr. Perry's lungs. The jury heard from Dr. Longo that the tremolite in Mr. Perry's lungs was consistent with what he has previously and repeatedly found in his testing of JBP, and it is also consistent with "Johnson & Johnson's own internal documents from decades ago that said when you find tremolite in talc in people's lungs with mesothelioma, it's a fingerprint for exposure to asbestos." Dr. Longo further explained to the jury that J&J's own experts have found winchite in JBP, that winchite has been found in the talc sourced from the Italian mine used by J&J, that he has found richterite in JBP and that J&J's own expert refers to "richterite" as "winchite" as finding the same thing because the chemistry is so close. The jury then heard, uncontradicted, that Dr. Longo has never found tremolite or winchite in any of his testing of brakes.

B. Successor Liability

Prior to the trial of this matter, the parties agreed that the issue of successor liability would not be tried to the jury. Therefore, no evidence was put forth to the jury throughout trial as to the successor liability of any J&J entities, even though J&J continued to make objections on the record regarding certain evidence. Plaintiffs and J&J jointly stipulated that the verdict form submitted to the jury would read "J&J Entities" so that this Court could rule on the successor liability post-trial. As such, the parties have since submitted extensive briefing regarding the successor liability issue to this Court and reserved that issue for the Court's ruling.

C. Jury Trial

A jury trial was held against J&J and a co-defendant, American International Industries, in August, 2024. The jury found that (1) J&J was negligent and that its negligence proximately caused

Mr. Perry's mesothelioma; (2) J&J was strictly liable for selling defective products that were a proximate cause of Mr. Perry's mesothelioma; and (3) J&J was willful, wanton, and reckless in its conduct. The jury returned a verdict of \$23,037,500 for Mr. Perry's past and future loss and of \$9,618,750 for Lonnie Long on his loss of consortium claim. After a bifurcated trial on punitive damages, the jury found that J&J had acted willfully, wantonly, and recklessly and awarded \$30,000,000 in punitive damages against J&J.

J&J now seeks judgment notwithstanding the verdict, a new trial absolute, and a new trial *nisi remittitur*. J&J contends that there was no evidence to support any part of the jury's verdict, and challenges the amounts of the compensatory and punitive damages awards.

II. RULING ON SUCCESSOR LIABILITY

A. Standard of Review

In South Carolina, successor liability arises when: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451 (2018); *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise

satisfied. *Nationwide Mutual*, 424 S.C. at 269-70, 818 S.E.2d at 454-55. South Carolina recognizes this exception when a predecessor's assets are specifically transferred or moved to place the predecessor's assets out of the reach of creditors and/or third parties. *Nationwide Mutual*, 424 S.C. at 256.

B. Creation of the Successor Defendants

Johnson & Johnson alone made and sold JBP from the 1890s to 1978. From 1979 to 2021, subsidiaries under Johnson & Johnson's direction sold JBP (collectively "Old JJCI").

In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities. Defendants admitted they did it to (a) "allocate the talc liabilities," (b) "stop litigation completely" and (c) prevent an "outflow of revenue." On October 12, 2021, through a series of intercompany transactions (called the "Texas Two Step"), Old JJCI ceased to exist, and two new companies were created (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson), no productive assets and no ongoing business and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets.

Two days after its creation, LTL declared Chapter 11 bankruptcy. LTL requested a bankruptcy stay of litigation to apply not only to LTL, but to Johnson & Johnson, New JJCI and various other parties. In November 2021, the request was granted. In early 2023, the Third Circuit reversed the Bankruptcy Court, holding LTL's bankruptcy was filed in bad faith. On April 4, 2023, the Bankruptcy Court formally dismissed the case. LTL re-filed a second bankruptcy a few hours later on April 4, 2023. Ultimately, the Bankruptcy Court held that LTL filed the second bankruptcy in bad faith. On August 11, 2023, the second bankruptcy attempt was formally dismissed, ending all litigation stays. There is no dispute that Old JJCI is not a viable entity as it ceased to exist in October 2021.

After its creation in October of 2021, New JJCI continued to operate Johnson & Johnson's Consumer Health business in the U.S. without interruption. The manufacturing, marketing and distribution assets that Old JJCI used to make baby powder went to New JJCI. New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply, vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP. New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc. ("New JJCI/Holdco") in December 2022.

In early 2023, Johnson & Johnson spun off its consumer business segment to defendant Kenvue, Inc. ("Kenvue"):

- New JJCI/Holdco formed a subsidiary, Johnson & Johnson Consumer, Inc. ("JJCI 3.") in June 2022
- New JJCI/Holdco transferred New JJCI 3 to Janssen Pharmaceuticals in Feb. 2023.
- Janssen transferred "JJCI 3" to a holding company, JNTL Holdings 2, Inc.
- JNTL Holdings 2, Inc. (parent of JJCI 3), along with other entities, were ultimately transferred to Johnson & Johnson by early April 2023.
- Johnson & Johnson spun off these entities to Kenvue in April 2023.

According to testimony from Kenvue's corporate representatives, Kenvue held itself out as essentially the same company that was operating the Consumer Health Division inside of Johnson & Johnson. Kenvue's SEC filings present itself as the same company that sold JBP for decades. Kenvue maintained the (a) same business contracts, permits, licensing, etc. as Old JJCI and New JJCI/Holdco, (b) same ownership (both before and after an August 2023 "stock swap"), (c) same management, (d) same employees, (e) same operating locations, (f) same business operations and (g) same products, including JBP.

C. Other issues impacting successor liability.

J&J's business used to consist of three segments: Consumer, Pharmaceutical and Medical Devices. The consumer segment was composed of numerous legal entities, Old JJCI being only one. While over 10,000 employees worked in the consumer segment, allegedly Old JJCI employed about 3,000. Executives testified that they conducted business by segment, sharing employees and resources without regard for the legal entities:

- *Mr. Mongon (President of the consumer segment and then Kenvue):* They operated business segment, not “through the lens of legal entities;”
- *Mr. Ruh (CFO of the consumer segment and then Kenvue):* He did not know “what legal entities were under my purview” because it operated by segment;
- *Dr. Kuffner (Medical Officer of the consumer segment):* They oversaw and monitored products sold across all legal subsidiary entities of the segment;
- *Ms. Goodridge (President of Old JJCI and New JJCI):* She worked for the consumer segment consisting of multiple legal entities.

The officers and directors of Old JJCI and New JJCI were all employees of Johnson & Johnson. Ms. Goodridge simultaneously held positions as president of (a) a unit of Johnson & Johnson's consumer segment and (b) Old JJCI. She never participated in any board meetings for Old JJCI. Ms. Goodridge explained that the president of Old JJCI was not an “operational role,” but instead a “corporate officer role” consisting of signing legal transactions. The consumer health segment of J&J was spun off to the Kenvue enterprise.

Johnson & Johnson dictated the October 2021 “Texas Two Step.” The president of the Consumer segment (and then Kenvue) testified that the Legal Department of Johnson & Johnson handled the decisions of “Project Plato” in October 2021. Ms. Goodridge, president of Old JJCI, confirmed that Johnson & Johnson (the parent) controlled the creation of LTL and New JJCI. Ms. Goodridge testified that (a) Johnson & Johnson made her president of the other newly created entities in the transactions and instructed her to sign the instruments, (b) Johnson & Johnson

established the entities, (c) she only spoke with Johnson & Johnson attorneys (and no businessperson) and (d) she cannot identify any business purpose for the transactions.

Similarly, Johnson & Johnson dictated the April 2023 Kenvue spinoff. Both Kenvue's CEO and CFO confirmed that Johnson & Johnson made all decisions; the Kenvue Board had no say. The entire transaction was under the control and direction of Johnson & Johnson.

In the instant case, Plaintiffs deposed Kenvue Inc. first through its corporate representative James Mittenthal. Mr. Mittenthal testified the Vice President of Global Risk Management for Kenvue once worked for Johnson & Johnson. Additionally, according to Kenvue, Teddy Reed, Kenvue's vice president and corporate secretary, also worked for Johnson & Johnson before coming to Kenvue. Further, Mr. Mittenthal, as corporate representative for Kenvue, has no knowledge of the logic behind the "restructuring" transactions and cannot testify that anything substantive occurred in Texas.

Kenvue later designated John Kim as its corporate representative in this case after this Court found the preparation of Kenvue lacking. He was also designated as the corporate representative for Johnson & Johnson Holdco (NA) Inc. Mr. Kim has never worked for Kenvue or Holdco. He was, however, head of product liability litigation at Johnson & Johnson. Mr. Kim confirmed that the 2021 transaction created two entities from Old JJCI—LTL and New JJCI. New JJCI later became Holdco.

Mr. Kim testified that he was personally involved in Project Plato, along with Chris Andrew, who is currently at Kenvue. According to Mr. Kim, there are documents associated with Project Plato which refer to the J&J family or the "J&J enterprise" and he noted that the term is used to denote a company that shares some common ownership with, at the top—basically—generally, they're owned by Johnson & Johnson shareholders, ultimately.

In 2023, Johnson & Johnson initiated “Project Diamond” which concerned the spinoff of the Consumer Health business segment from Johnson & Johnson to the Kenvue enterprise. Kenvue’s CEO admitted that (a) Kenvue has held itself out to investors as essentially the same company that was operating the Consumer Health Division inside Johnson & Johnson and (b) Kenvue has held itself out as the former Johnson & Johnson consumer business. Despite forming in February 2022, Kenvue publicly referred to its portfolio of iconic and modern brands that has been built over 135 years, including JBP. In other words, Kenvue held itself out as the same company that made JBP for generations.

Similarly, corporate representatives for the companies admitted that all of the employees were transferred from Johnson & Johnson’s consumer segment to Kenvue, unless they were designated as shared employed. The executive officers for Kenvue had previously held the same or substantially similar positions for the Johnson & Johnson consumer segment. The manufacturing facilities remained the same and all of the manufacturing assets were transferred to Kenvue. According to Kenvue’s corporate representatives, everything under the consumer health sector was transferred over to Kenvue, including assets, trademarks, people, manufacturing facilities, and brands. Nothing related to the manufacture of JBP was left with Johnson & Johnson’s prior consumer health division. Through mid-August 2023, Johnson & Johnson still owned close to 90% of Kenvue. After mid-August 2023, Kenvue continued to have the same ownership because Johnson & Johnson shareholders became Kenvue shareholders through a stock swap. Johnson & Johnson shares were converted to Kenvue shares.

As to the commonality of directors, employees, officers, and/or managers, Kenvue testified during its deposition that currently two members of Kenvue’s current Board of Directors previously held positions at Johnson & Johnson. Kenvue made no effort to confirm which of its

current board members held positions with Johnson & Johnson. During Kenvue's deposition in this case, Kenvue confirmed the connections of each current member of Kenvue's executive team to prior Johnson & Johnson and/or Old JJCI:

Name	Kenvue Position	JJCI or J&J Position
Thibaut Mongon	CEO	Executive VP and Worldwide Chairman of Consumer Health
Paul Ruh	CFO	CFO
Luani Alvarado	Chief People Officer	Global Leader of Human Resources
Carlton Lawson	Group President, Europe, Middle East and Africa & Latin America	Group Chairman for Europe, Middle East, and Africa
Charmaine England	Chief Growth Officer	Global Head of Strategy, Consumer Health
Matthew Orlando	General Counsel	General Counsel
Meri Stevens	Chief Operations Officer	Worldwide Vice President, Consumer Health Chain and Delivery
Bernardo Tavaras	Chief Technology & Data Officer	Chief Information Officer
Ellie Bing Xie	Group President, Asia Pacific	Company Group Chairman, Asia Pacific

After their creation, Holdco and Kenvue continued the baby powder line. Talcum-based baby powder was sold internationally after the spinoff of Johnson & Johnson's consumer segment from Holdco to Kenvue.

III. CHOICE OF LAW

As a threshold matter, this Court must decide which state's substantive law will apply to the issue of successor liability. The Successor Defendants contend that Texas substantive law should apply to the issue because the restructuring of companies occurred under Texas law.

Plaintiffs disagree and argue that either South Carolina or New Jersey substantive law should apply to this issue. The Court agrees with Plaintiffs.

Under South Carolina's choice-of-law rules, the analysis necessarily begins with the question of whether a cause of action - in this instance successor liability - sounds in contract or tort. *Lister v. NationsBank of Delaware, N.A.* 329 S.C. 133, 141, 494 S.E.2d 449, 454 (S.C. App. 1997) ("Before determining choice of law, this Court must first decide if the cause of action . . . is an action in contract or in tort.").

If successor liability is properly characterized as a contract-based theory, South Carolina law provides that "contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935); *see also Albermarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (observing that the law gives effect to the parties' choice of law as set forth in the contract if reasonable); S.C. Code Ann. § 36-1-105 (1) (providing that when a transaction bears a reasonable relation to this state and to another state or nation, the parties may agree on the law that governs their rights and duties). On the other hand, if successor liability is properly characterized as a tort-based theory, South Carolina choice-of-law rules look to the law of the state in which the injury occurred. *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994).

Contrary to argument from J&J, South Carolina courts have not clarified whether successor liability claims should be evaluated using the choice-of-law rules governing tort or corporate/contract law and the Successor Defendants' reliance on the Supreme Court of South Carolina's statements in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 (2018) is inapposite. *Pertuis* was an action for stockholder oppression. 423 S.C. at 628. This case, unlike *Pertuis*, is

focused on determining which of the many entities organized underneath the Johnson & Johnson Enterprise can or should be held liable for the injuries suffered by Plaintiffs. Plaintiffs' issue regarding successor liability does not seek to "regulate the organization or [the] internal affairs of a foreign corporation[.]" *Pertuis*, at 423 S.C. at 650.

The Successor Defendants presume the Court must abide by their preferences for which entity (and only one entity) bears responsibility for the harm they caused. However, they overlook two distinctions. The import of a choice-of-law provision differs in disputes between (a) parties to the contract or transaction and (b) non-parties to the contract or transaction who are alleging injury in tort (*e.g.*, Plaintiffs here). *See, e.g., Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 465 (3d Cir. 2006) (applying an "interest-based analysis" to conclude that contractual choice-of-law provisions do not apply to choice of law in "de facto merger" analyses). Likewise, choice-of-law law analysis differs when analyzing disputes about the standard of care for (a) internal affairs of a corporation and (b) injuries caused by those corporations. While Johnson & Johnson can choose to apply Texas law in disputes between and amongst its own internal subsidiaries, Plaintiffs here are not bound by that choice.

Plaintiffs do not contend that Kenvue or Holdco expressly assumed liability. Similarly, Plaintiffs do not contend that Kenvue or Holdco are successors in interest to LTL/LLT/Pecos River (or any new entity with no ongoing business concerns that expressly assumes liabilities for talc). Rather, Plaintiffs contend Kenvue and Holdco are successors in interest to Johnson & Johnson Consumer Inc. and Johnson & Johnson.

I find that the successor-liability issue in this case is tort-based, as the question to be resolved is not one of contract interpretation or contract validity. Instead, the focus is on which entity in a chain of entities is and/or can be held liable for the injuries suffered by Plaintiffs.

Because this issue is tort-based, the laws of the state where Plaintiffs' injuries occurred—South Carolina—will apply.

IV. SUCCESSOR LIABILITY UNDER SOUTH CAROLINA LAW

In South Carolina, in the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451; *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

Importantly, a plaintiff may maintain a product liability claim under a successor liability theory against a defendant when there are one or more other viable product liability defendants. *Simmons*, 622 S.E.2d at 97. The status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action. Here, the predecessor entity—Old JJCI—no longer exists and is not a viable defendant. Rather than focus on viability of others a plaintiff must fall within one of the four exceptions set forth in *Brown*. See, *Nationwide*, supra, 424 S.C. at 264, 818 S.E.2d at 451.

A. An agreement to assume the debts

As to the Successor Defendants, Plaintiffs do not contend that the first exception applies. It is undisputed that LLT (now Pecos River Talc) was sued because of an agreement to assume the

debts of Old JJCI. This exception does not apply to the inquiry of whether **Holdco and Kenvue** may be held as successors in interest to Old JJCI.

B. Mere Continuation

A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. The mere continuation test is a strict one, but not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, South Carolina courts have stressed that control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability. Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability. However, South Carolina’s successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor’s liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269-70, 818 S.E.2d 447, 454-55 (S.C. 2018).

The Court finds that the mere continuation theory, as addressed in *Nationwide*, is satisfied. The business of Old JJCI continued without interruption in New JJCI via Holdco and Kenvue. The shareholders of Old JJCI became the shareholders of Holdco/Kenvue. The companies shared

employees, including members of their leadership teams and boards of directors. The majority of the individuals on Kenvue's current Board of Directors got their start at Johnson & Johnson or Old JJCI. Kenvue has even admitted in official documents that it is the same company as Old JJCI.

This Court finds continuity of enterprise management. Kenvue's representative created a chart of the overlap of leaders as of July 2024. However, each person currently in a leadership position at Kenvue held the same or a similar leadership position at Johnson & Johnson or JJCI prior to Kenvue's creation. Some changes occurred such as changing the title from "human resources" to "People Officer," but Defendants could not identify any substantive changes.

The Court further finds that the creation of these various corporate entities by J&J was done to escape its predecessor's liabilities and obligations with the intent to defeat creditors, such as Mr. Perry, and evade liability.

C. Holdco and Kenvue are liable as successors under the fraudulent transfer and blurred corporate identifies exceptions to non-liability.

Holdco and Kenvue are also liable as successors based on fraud and the use of the corporate form to escape liability. Here, the entity who had the liability for JBP for decades ceased to exist and assets were transferred to other entities. Additionally, Johnson & Johnson, Holdco, and Kenvue, along with other entities, have intermingled and blurred corporate interests, entities, and activities such that there is no legal distinction between the corporations involved in the consumer products business. *Mid-South Mgt. Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 604-605 (Ct. App. 2007); see also *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (finding a sibling company liable for the obligation of another sibling company due to the evidence revealing an "amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities' where the companies shared officers, shareholders, and location).

In *Schmoll v. AcandS, Inc.*, Raymark Industries transferred its assets to Raytech—a company owned by Raymark Industries’ shareholders—through asset transfers and corporate restructurings. 703 F. Supp. 868, 872-73 (D. Or. 1988). As a result of the transfers and corporate restructurings, Raymark Industries was left with “staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount.” *Id.* at 873. Meanwhile, Raytech received Raymark Industries valuable assets. *Id.* This left present and future asbestos tort claimants with little chance of compensation. *Id.* Based on this context and statements made by those involved, the court concluded, “the elaborate transfer of assets was designed to escape liability[.]” and held Raytech liable as a successor of Raymark Industries. *Id.*

Like *Schmoll*, Johnson & Johnson, Kenvue, and Holdco have engaged in an elaborate corporate fiction to avoid liabilities associated with and from asbestos-containing Johnson’s Baby Powder. Johnson & Johnson has been “transparent” about using the bankruptcy process as a vehicle “to address the company’s growing talc-related liability exposures and costs in defending the tens of thousands of pending ovarian cancer claims and hundreds of mesothelioma cases, as well as future claims.” *In re LTL Management, LLC*, 637 B.R. 396, 407 (Bankr. D.N.J. 2022), *rev’d and remanded*, 58 F.4th 738, *rev’d and remanded*, 64 F.4th 84 (3d Cir. 2023). The corporate restructure was “designed to allow ‘New JJCI to continue to operate Johnson & Johnson’s Consumer Health business in the United States without interruption[.]’” *Id.* Despite being amply solvent, Johnson & Johnson sought to use the bankruptcy system to limit and redefine the rights of the people its products harmed. While it sought refuge in the bankruptcy system for talc-based liabilities, Kenvue and Holdco continued to make, sell, and profit from Johnson & Johnson’s talc-based product line for some time and in some locations. Here, even more so than the defendants

in *Schmoll*, Johnson & Johnson's, Kenvue's, and Holdco's conduct, both before the Texas Two Step and after, shows that these entities were created to avoid and eliminate liability.

Additionally, like the companies in *Kincaid v. Landing Development Corporation*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) here too, J&J and these defendants have common shareholders, common officers and directors, and a blurred corporate distinction amongst the entities involved in the consumer products business.¹

D. Amalgamation

J&J argues that the Plaintiffs did not plead an amalgamation theory in their complaint. The Court agrees that the amalgamation theory was not plead in the complaint, and therefore, the Court does not address this issue.

V. SUCCESSOR LIABILITY AND PUNITIVE DAMAGES

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read "J&J Entities". Because of this, the jury's finding of punitive damages was against J&J Entities. Because the Successor Defendants are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor.

Successor liability does not allow the successor to pick and choose which of its predecessor's obligations follow it. Successor Defendants argue that South Carolina courts have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017)

¹ Because the Court has concluded that South Carolina law will apply to the successor-liability issue, the Court declines to address Plaintiffs' alternatively contention that the issue be resolved pursuant to New Jersey law.

(defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

The Successor Defendants cite a litany of cases from other jurisdictions that have found that punitive damages are not recoverable against a corporate successor. *See e.g., In re Related Asbestos Cases*, 566 F. Supp. 818 (N.D. Cal. 1983) (reasoning that, because the successor was doing nothing to perpetuate the alleged malicious conduct of the predecessor, no award of punitive was warranted); *Catasauqua Area School District v. Raymark Industries*, 662 F. Supp. 64 (E.D. Penn. 1987) (holding that punitive damages were not allowed against successor entities where the plaintiff failed to present evidence that asbestos products manufactured by a successor entity were actually used); *Drayton v. Jiffie Chemical Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975), *modified*, 591 F.2d 352 (6th Cir. 1978) (refusing to award exemplary damages when the successor company improved the injury-causing product).

The Court finds the cases cited by the Successor Defendants inapposite because, based on the evidence presented. Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products once manufactured and/or distributed by Old JJCI. Kenvue and Holdco continued these sales with the

same knowledge that its' JBP contained asbestos as Old JJCI. Thus, Holdco, Kenvue, and Old JJCI were "effectively one and the same entity" in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, Successor Defendants' request that punitive damages not be assessed against them is DENIED.

VI. RULING ON JUDGMENT NON OBSTANTE VEREDICTO (NOT WITHSTANDING THE VERDICT) ("JNOV")

A. Standard of Review

In ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, "[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." *Brinkley v. South Carolina Dep't. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). "The jury's determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict

only if the amount is so grossly inadequate or excessive so as to shock the conscious of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives.” *Id.*

“The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case.” *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). “Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed.” *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993); *see also Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under “thirteenth juror doctrine,” the trial court may grant a new trial if she believes the verdict is unsupported by evidence or if the verdict is inconsistent and reflects jury’s confusion).

A new trial *nisi remittitur* may be granted “when the verdict indicates the jury was unduly liberal in determining damages.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). “A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Id.*

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health & Env’tl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Id.*

B. J&J is not entitled to JNOV as to Plaintiffs' design defect claims.

The record supports the jury's finding that JBP was designed to contain talc, which J&J knew contained asbestos. As the Court of Appeals of South Carolina has recently acknowledged:

"A product can be defective because of a flaw in its design." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). "Liability for a design defect may be based on negligence, strict tort, or warranty." *Id.* "In an action based on strict tort or warranty, **plaintiff's case is complete when he has proved the product, as designed, was in a defective condition *unreasonably dangerous* to the user when it left the control of the defendant, and the defect caused his injuries.**" *Id.* at 579–80, 328 S.E.2d at 112 (emphasis added). "Liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Id.* at 580, 328 S.E.2d at 112. "This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it." *Id.*

Jolly v. General Electric Company, 435 S.C. 607, 648-49, 869 S.E.2d 819, 841-42 (Ct. App. 2021).

In 2010, the South Carolina Supreme Court held that the exclusive test in a products liability design case is the risk-utility test. *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (S.C. 2010). According to the Restatement (Third) of Torts: Products Liability §2(b), adopted by the Supreme Court in *Branham*:

A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Branham, 390 S.C. at 223-24, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Products Liability §2 (b) (1998).

The evidence presented at trial demonstrated that throughout the time period of Mr. Perry's use of JBP, from 1969 through 2019, the specifications for JBP called for talc sourced from mines in Italy, Vermont, and China. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from all of the sources that J&J used in its baby powder and that his test results showed the

presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. Dr. Longo testified to the jury that he found tremolite and other asbestos fibers repeatedly in JBP throughout each decade in which Mr. Perry used JBP.

The jury also heard at trial that other scientists found asbestos in the talc used to manufacture JBP. Battelle Memorial Labs found tremolite asbestos in Johnson's Baby Powder 153 times as early as the 1950s. Even with "poor analytical sensitivity" the FDA's contract lab found asbestos in the talc used in JBP in 2019. The jury heard Dr. Hopkins' testimony that there was never a warning about asbestos on any Johnson & Johnson product, despite knowing that by the early 1970s there were numerous reports of tremolite in J&J's Vermont and Italian talc ore. Dr. Hopkins further testified to the jury about several positive tests for asbestos in JBP throughout the decades that the talc powder was for sale.

The jury had this evidence and more in front of them when considering Plaintiffs' strict liability—design defect claim. Contrary to argument from J&J, Plaintiffs were not required to demonstrate that J&J intentionally added asbestos to their product. J&J's specifications for JBP—which called for the use of talc from mines which contained asbestos—created an unreasonable risk of harm to Mr. Perry.

J&J's motion for JNOV on Plaintiffs' design defect claim is DENIED.

C. J&J is not entitled to JNOV as to Plaintiffs' failure to warn claim.

"A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe the user will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous. *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987). Plaintiffs presented

evidence that J&J, after multiple tests of the talc used in JBP, knew that the talc contained asbestos. J&J presented no evidence to the jury that there was reason to believe that any of its JBP users, including Mr. Perry, would know that the product likely contained asbestos and still failed to warn of the hazards associated with the foreseeable use of the product.

In 1958, J&J knew its talc contained tremolite asbestos. By the early 1970s, J&J had received numerous additional reports that tremolite asbestos was found in the talc used in JBP. Despite this knowledge, the jury heard that bottles of JBP never displayed a warning about asbestos.

The jury also saw photos of two different bottles of JBP Mr. Perry found in his home. One of Mr. Perry's bottles had no warning on it about anything. The second of Mr. Perry's bottles had a small warning about infant's inhaling JBP generally. It was undisputed that neither of Mr. Perry's bottles of JBP had a warning about asbestos, and it is undisputed that one of Mr. Perry's JBP bottles had no warning at all.

J&J's motion as to this issue is DENIED.

D. J&J is not entitled to JNOV as to proximate cause.

J&J contends that Plaintiffs failed to establish that JBP was a proximate cause of Mr. Perry's mesothelioma. The evidence presented at trial, however, was sufficient for the jury to conclude that Mr. Perry's exposure to JBP was a substantial factor in the development of his mesothelioma.

As the South Carolina Court of Appeals affirmed in *Jolly v. General Electric Company*, 435 S.C. 607, 869 S.E.2d 819 (2021)², "when there are multiple possible sources of the plaintiff's

² The South Carolina Supreme Court granted certiorari only on the issue of additur and set off. It affirmed the trial court and the Ct. of App on additur and set off. Thus, the Court of Appeal's analysis on all other issues stands as though it was reviewed by the Supreme Court. *Jolly v. General Electric Co.*, __S.C.__, 905 S.E.2d 380 (2024).

exposure to a toxin . . . the plaintiff must also show that his exposure to a particular defendants' product was a 'substantial factor' in the development of the plaintiff's disease." *Id.* at 435 S.C. at 625, 869 S.E.2d at 829 (citing David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 52 (2008)). South Carolina adopted the "substantial factor test" in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), where the Supreme Court held that a plaintiff in an asbestos case need only present evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to . . . the plaintiff[.]" *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Plaintiffs' extensive causation evidence includes testimony from Mr. Perry regarding his lifelong daily use of JBP; testing of JBP establishing that the talc ore and finished product contained asbestos during the years Mr. Perry used JBP; Dr. Haber's testimony regarding talc exposure studies indicating that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers/cc, resulting in cumulative exposures over 40 years of .38 to 5.18 fiber-cc years; Dr. Madigan's similar testimony that Mr. Perry's dose of asbestos from JBP was .35 fiber years; Dr. Madigan's testimony that this exposure level is within the range found to cause mesothelioma in numerous epidemiological studies; and Dr. Haber's opinion that Mr. Perry's exposure to JBP was a substantial factor in causing his disease.

The record supports the jury's finding that Mr. Perry had frequent, regular, and proximate exposure to asbestos from JBP that contained asbestos over the course of many years. Evidence at trial demonstrated more than just a casual or minimum contact with JBP from which the jury could conclude that Mr. Perry's exposure to JBP was a substantial factor in the development of his mesothelioma.

J&J's request for JNOV on this issue is DENIED.

E. J&J is not entitled to JNOV on Lonnie Long's loss of consortium claim.

J&J's request for JNOV as to Lonnie Long's loss of consortium claim is based on, and derivative of, the jury's liability and causation findings for Mr. Perry's mesothelioma, which the Court has denied.

Therefore, this request is DENIED.

F. J&J is not entitled to JNOV as to punitive damages.

The jury in this matter assessed punitive damages against J&J in the amount of \$30 million. J&J argues that this amount was grossly excessive and that there was no evidence of J&J's reprehensible conduct in the record. The Court disagrees. The record supports the jury's finding that J&J's conduct was willful, wanton, or in reckless disregard of Mr. Perry's rights in connection with Plaintiffs' negligence claim.

Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a "reckless, willful, or wanton" manner. S.C. Code Ann. § 15-32-520(D); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); *see also Berberich v. Jack*, 392 S.C. 278, 288, 709 S.E.2d 607, 612 (2011). The South Carolina Court of Appeals recently wrote that "[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others

from engaging in similar reckless, willful, wanton, or malicious conduct in the future.” *Portrait Homes-South Carolina, LLC v. Pennsylvania National Mutual Casualty Insurance Company, et al.*, 442 S.C. 515, 587, 900 S.E.2d 245, 284 (Ct. App. 2023) (quoting *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000)). Additionally, punitive damages “serve to vindicate a private right of the injured party[.]” *Id.* “A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff’s rights. A conscious failure to exercise due care constitutes willfulness.” *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46 (citations omitted); *see also Berberich*, 392 S.C. at 288, 709 S.E.2d at 612. When evidence exists that suggest a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (citing *McGee v. Bruce Hosp., Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The jury has considerable discretion to determine the amount of damages. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages).

The evidence at trial showed that J&J knew asbestos, including asbestos in talc, could cause fatal disease. The jury heard that since the 1800s geology texts have reported asbestos in talc. Since the early 1930s, it has been known that asbestos causes deadly diseases. J&J’s own documents as well as J&J’s corporate representative, Dr. Hopkins’ testimony to the jury revealed that J&J has known that asbestos causes cancer since the 1930s. It was even further established by the 1960s that mesothelioma was caused by asbestos exposure.

The evidence at trial showed that J&J knew its talc contained asbestos and took no corrective action. By the 1940s, it was known that asbestos was a common impurity in cosmetic talc. By 1958, J&J knew they had fibrous tremolite asbestos in their talc. The jury heard from Dr. Hopkins about all of the testings done on J&J's talc throughout the 1970s that were positive for asbestos done by multiple scientists. The jury also heard about the 2019 FDA finding in which asbestos was, once again, found in JBP.

The evidence at trial showed that J&J had actual knowledge of asbestos in its talc before, and during, the time Mr. Perry was exposed to JBP. The jury saw an internal document from J&J in 1997 in which J&J was analyzing the tissue of women who had mesothelioma and finding tremolite and talc fibers. The jury saw that J&J wrote that both tremolite and anthophyllite are known contaminants of talc, and that the cases of mesothelioma among women with no other identifiable exposures to asbestos could be related to cosmetic talc exposure. The jury also saw an internal document from 1973 in which J&J notes that its "clean mine approach to asbestos is over."

The evidence at trial showed that J&J knew infants inhale talc during JBP application. By 1969, J&J knew the "needle shape of tremolite" made it especially respirable and capable of entering "pulmonary alveoli."

The evidence at trial showed that J&J failed to adequately test by transmission electron microscopy ("TEM"), which it knew was the most sensitive method for identifying asbestos in talc. The jury heard testimony and saw evidence that J&J chose not to adopt heavy liquid density separation techniques for asbestos detection because the method was too sensitive. The jury also heard about, and saw documents about, J&J's TM7024 testing method, which J&J intentionally designed in such a manner that 16 various kinds of asbestos fibers could be found in a small sample from a bottle of JBP and still be reported as non-detect.

The jury also heard from Dr. Hopkins that J&J knew there would be negative consequences for its business if people found out there was asbestos in JBP. Evidence at trial showed J&J's tactics aimed at defending the safety image of JBP, including (1) monitoring and defending against adverse scientific, consumerist, and regulatory trends; (2) quelling questions and data about asbestos in talc; (3) promoting less sensitive FDA regulations by advocating for less sensitive test methods and (4) withholding positive asbestos test results. The jury saw J&J documents in which J&J touted the safety of asbestos in talc, such as the 1974 document in which J&J told the FDA that a substantial amount of asbestos could be safely allowed in baby powder. The jury then saw evidence that, despite this, J&J continued to advertise JBP throughout the decades by seeking to capitalize on the mother-infant bond and promote JBP as a safe product that mothers should use on their babies to show love.

The evidence at trial further showed that J&J knew cornstarch was an available substitute for talc since the late 1800s. J&J was evaluating an alternative to talc throughout the 1960s, 1970s, and 1980s.

The evidence at trial supported the jury's finding that J&J was willful, wanton, or reckless. J&J knew there were multiple tests showing that the talc used to make JBP contained asbestos, and was present even in the final product sold to the American public. Dr. Hopkins then testified that J&J never put any warning about asbestos on JBP despite this knowledge. Regardless of this information, J&J continued to sell asbestos-containing JBP until 2020 in the United States.

Therefore, J&J's request for JNOV on Plaintiffs' punitive damages award is DENIED.

G. J&J is not entitled to a JNOV on punitive damages as to successor entities because punitive damages are recoverable against successor entities.

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read J&J Entities. The determination of successor liability was reserved for determination by the Court

post-trial. Because of this, the jury's finding of punitive damages was against J&J Entities. Because Kenvue and Holdco are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor. The J&J Defendants have requested that newly-formed Pecos River Talc, LLC ("Pecos River") be substituted as a party defendant for LLT. Plaintiffs have objected to this substitution. The Court DENIES J&J's request for substitution, but will permit Pecos River to be added as an additional party defendant.

Successor liability does not allow the successor to pick and choose which of its predecessor's obligations follow it. J&J argues that South Carolina court have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017) (defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

This Court finds that Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products which in turn gave Mr. Perry cancer. Thus, Holdco, Kenvue, and Old JJCI were “effectively one and the same entity” in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, J&J’s request that it have, in effect, a JNOV as to the award of punitive damages against its successor entities is DENIED.

VII. RULING ON MOTION FOR NEW TRIAL

J&J contends that a new trial is warranted because the jury instructions given to the jury were improper and that the Court improperly limited J&J’s evidence such that J&J had an unfair trial due to prejudicial error. The Court disagrees.

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, “[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate.” *Brinkley v. South Carolina Dep’t. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). “The jury’s determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives.” *Id.* The decision to grant a new trial rests within the discretion of the court. *Id.* The Court of Appeals has stated when reviewing whether the trial court committed error in exercising that discretion, “we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.” *Id.*; see

also, *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

A. The jury instructions given in this case were proper.

1. The jury instructions on punitive damages correctly stated the law.

J&J contends the Court improperly charged the jury as to punitive damages because the Court permitted the jury to award punitive damages based on third-party harm. A jury charge is correct if, when read as a whole, it contains correct definitions and adequately covers the law.

Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 514 S.E.2d 570 (1999).

As to punitive damages, the jury was charged, in part, as follows:

So we will begin with these instructions. As I have told you, if you award actual damages against the defendant, you may also consider and award punitive damages. You've already crossed the first hurdle, which is you have found that the conduct was willful, reckless, and wanton. Punitive damages are intended to punish a defendant for willful, reckless, and wanton misconduct and to prevent the defendant and others from committing similar acts in the future. Punitive damages can only be awarded when the conduct of the defendant has been something more than mere negligence. The evidence must clearly and convincingly establish that the defendant was reckless or willful or wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard for the safety of others.

The Court also read pertinent portions of S.C. Code Ann. § 15-32-520 to the jury. The trial court may charge the jury regarding the factors which would justify a punitive damages award in the case. A punitive damages award survives constitutional scrutiny if: (1) the trial court's jury instruction explains the nature, purpose and basis for the award; (2) post-trial procedures enable the court to scrutinize the award; and (3) an appellate review process ensures that the award is reasonable and rational. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

J&J argues that Plaintiffs' punitive award was the result of Plaintiffs being able to introduce evidence of third-party harm related to ovarian cancer. The Court disagrees. It was made clear repeatedly throughout trial that Mr. Perry suffers from mesothelioma and not any other asbestos-related disease. Additionally, there is no evidence that the jury was encouraged to award punitive damages against J&J for harm done to others. Plaintiffs' told the jury that the punitive phase was for what J&J had done to Mr Perry, emphasizing that punitive damages are for "[w]hat Michael Perry is going through."

The punitive damages instruction explained the nature, purpose, and basis for the punitive damages award. The instruction was the same as the instruction given to the jury when it was to determine whether J&J's conduct was reckless, willful, and wanton. The record shows that the jury understood that punitive damages are paid to Mr. Perry.

2. There was no error regarding the effect of "Question 8" on the jury form.

At the end of the liability phase of trial, the Court instructed the jury, in part, as follows:

In addition, if you find that the defendant's conduct was willful, wanton, or reckless, the plaintiff must also prove that by clear and convincing evidence, that is, that the evidence must clearly and convincingly establish that the defendant was actually reckless or willful and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard of the rights and safety of others.

* * *

Willful and wanton and reckless conduct. There's one question on the jury form that asks about willful, wanton, or reckless conduct. A defendant's conduct is reckless or willful or wanton if there was a conscious failure to exercise due care or conscious indifference to the rights and safety of others or reckless disregard to the rights and safety of others. This must be established by clear and convincing evidence, which is something more than simple greater weight of the evidence and something less than beyond a reasonable doubt. Clear and convincing proof is proof that leaves you firmly convinced. Clear and convincing proof establishes in your mind not only that a fact is probable but that it is highly probable.

Prior to charging the jury, the Court and counsel for the parties discussed the verdict form and the propriety of telling the jury the purpose of Question 8. J&J agreed to include Question 8 on the verdict form.

The record shows that a punitive damages phase would not be necessary if the jury returned a “no” verdict as to negligence. The verdict form was not defective, it did not prejudice J&J, and the Court gave clear instructions to the jury regarding completing the form. J&J has failed to demonstrate how the failure to tell the jury that a “yes” as to Question 8 would trigger a punitive damages phase trial resulted in prejudice. Quite to the contrary, the South Carolina General Assembly, by statute³, now mandates a bifurcated trial for punitive damages in cases of this kind. The jury must make the predicate finding that the Defendant’s conduct was willful, wanton and reckless. This does not dictate that a jury must find punitive damages. The Court’s decision not to discuss punitive damages until after the jury made its decision as to the character of the conduct is completely consistent with the provisions of the statute governing this matter. Finally, the Court’s preliminary instructions in the punitive phase made it clear that it was up to the jury whether to award any amount of punitive damages after a finding of willful, wanton and reckless conduct.

J&J’s motion for a new trial on this issue is DENIED.

3. There was no error in declining to charge J&J’s requested “But-For” Causation instruction.

J&J contends it was prejudicial for the Court to refuse to instruct the jury using its suggested causation charge, wherein it stated as follows:

Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant’s acts. Legal cause is proved by establishing foreseeability. If there is not

³ See S.C. Code Ann §15-32-520

sufficient evidence to conclude that, but for a defendant's conduct the injury would not have occurred, then you must find in favor of the defendant.

"[A] trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). "[T]he substance of the law is what must be instructed to the jury, not any particular verbiage." *Marin*, 415 S.C. at 482, 783 S.E.2d at 812.

J&J's instruction sought to have the jury determine causation in this case using a strict but-for causation standard. That is not the proper standard in asbestos cases in South Carolina. This Court, instead, charged the jury as to causation according to *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007). In *Henderson*, the Supreme Court of South Carolina held that in asbestos cases:

In determining whether exposure is actionable, we adopt the "frequency, regularity, and proximity test" set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[-63] (4th Cir. 1986): "To support a reasonable inference of *substantial causation* from circumstantial evidence, there must be evidence of exposure to a *specific product* on a *regular* basis over some *extended* period of time in *proximity* to where the plaintiff actually worked."

373 S.C. at 185, 644 S.E.2d at 727 (emphases added). The Supreme Court reaffirmed this standard in *Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 899 S.E.2d 597 (2024). Notably, in *Edwards*, the Supreme Court explained that "the *Lohrmann* substantial factor test relaxes the 'but-for' requirement that applies in traditional tort cases [but] still requires the plaintiff to show "more than a casual or minimum contact with the product.'" 442, S.C. at 391, 899 S.E.2d at 599 (quoting *Lohrmann*, 782 F.2d at 1162)).

J&J's proposed instruction was an incorrect statement of law. There can be no prejudice from the Court's proper decision not to misinform the jury about the controlling law.

J&J's motion for a new trial on this issue is DENIED.

4. There was no error in declining to give J&J's requested instruction on specific causation.

J&J contends this Court failed to properly instruct the jury as to “specific causation” and argued that this Court should have accepted its instruction on specific causation. J&J also contends that Plaintiffs failed to present sufficient evidence of specific causation to the jury. The Court disagrees.

“Specific causation is whether a substance caused particular individual’s injury.” *Jolly*, 435 S.C. at 625, 869 S.E.2d at 828 (quoting *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010)).

The Court instructed the jury as to causation, in part, as follows:

Plaintiff must prove that the defendant -- that the plaintiffs' exposure to asbestos in the defendant's product was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury. The mere fact that an injury or accident occurred standing alone does not permit you to draw the conclusion that the injury or accident was caused by anyone's negligence or breach of warranty of strict liability.

The Court finds that the instructions given to the jury as to causation were proper statements of the law. J&J has not and cannot demonstrate any prejudice to it resulting from the Court’s properly worded instruction. *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

The evidence satisfied the *Henderson* causation standard. A plaintiff in an asbestos case need only present evidence of “actionable exposure” to a defendant’s asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. at 185, 644 S.E.2d at 727. To determine whether exposure is actionable, South Carolina courts apply the “frequency, regularity and proximity” factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must

be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Plaintiffs’ presented sufficient evidence to support the jury’s causation finding. The evidence in this case was that Mr. Perry was exposed to visible dust while applying JBP on a daily basis for 50 years. Plaintiffs’ experts presented circumstantial evidence from which the jury could have concluded that the JBP that Michael Perry used for 50 years contained asbestos. The jury also heard testimony about the range of exposure to asbestos that Mr. Perry had while using JBP, and was further told that Mr. Perry’s asbestos exposure level was many orders above background levels.

The jury could thus have easily concluded that Mr. Perry had frequent, regular, and proximate exposure to asbestos from his use of JBP over the course of many decades. This evidence is more than sufficient to support the jury’s determination that Mr. Perry’s mesothelioma was caused by his exposure to asbestos from Johnson’s Baby Powder.

J&J’s motion on this issue is DENIED.

5. The Court properly instructed the jury on substantial factor causation.

As noted in *Edwards*, the “substantial factor” test requires demonstration of frequency, regularity, and proximity. 442 S.C. at 391, 899 S.E.2d at 599. The Court instructed the jury as to substantial factor. The Court instructed the jury, in part, as follows:

Plaintiff must prove that the defendant -- that the **plaintiffs' exposure to asbestos in the defendant's product was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury.** The mere fact that an injury or accident occurred standing alone does not permit you to draw the conclusion that the injury or accident was caused by anyone's negligence or breach of warranty of strict liability.

In this instruction, the Court told the jury that substantial factor meant “frequency, regularity, and duration.” This was a correct statement of law.

J&J's request for a new trial on this issue is DENIED.

6. The jury instruction as to “component parts” was proper.

It was not error for the Court to instruct the jury as to component parts. As to component parts, the Court instructed the jury that:

If a reasonable inspection or test would have disclosed a defect, a manufacturer who incorporates a defective component into its finished product and places the finished product into the stream of commerce is liable for the injuries caused by defect in that component part.

But defendant can, however, be liable for an alleged defective product it did not design, recommend, specify, require, manufacture, sell, or place in the stream of commerce. In deciding whether the defendant had a duty to test the product, you should consider the defendant's ability to conduct tests at the time the product was sold.

This instruction was given in order to address J&J's argument at trial that it did not intend for asbestos to be in its talc. This instruction informed the jury that J&J could still be found liable for Mr. Perry's mesothelioma even though it did not intentionally add asbestos to its product. The instruction also noted that once J&J was on notice that its product contained a defective component (asbestos) and still placed the product into the stream of commerce, J&J could be held liable for injuries caused by exposure to that defective component.

J&J's request for a new trial on this issue is DENIED.

7. The “eggshell plaintiff” instruction was proper.

J&J contends that the Court committed error when it instructed the jury on the “eggshell plaintiff.” The Court disagrees. This instruction was necessary because of J&J's suggestion that Mr. Perry's individual susceptibility would have been the reason he developed mesothelioma. J&J put on evidence at trial about Mr. Perry's family history of cancer. The jury heard from J&J that Mr. Perry's mother had ovarian/uterine cancer. J&J cross-examined Mr. Perry's treating thoracic

surgeon expert, Dr. Barry Gibney, at length on Mr. Perry's genetic makeup and what kinds of genetic testing were either done, or not done, on Mr. Perry.

South Carolina has adopted the "eggshell plaintiff" rule which states a "defendant takes the plaintiff as [she] is found." *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). "As a general rule, liability for the consequences of one's tortious act is not lessened by reason of the fact that the injuries were aggravated by plaintiff's unhealthy conditions . . ." *Id.*, citing 22 Am.Jur.2d Damages §282 (1988).

J&J's request for a new trial on this issue is DENIED.

8. The jury was not given a "blended" products liability charge.

J&J contends that the Court committed error by providing a "blended" products liability charge to the jury. This Court disagrees.

Plaintiffs alleged both a design defect and manufacturing defect claim against J&J and was given the proper test for each. In *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010), the Supreme Court clearly stated that "the consumer expectations test fits well in manufacturing defect cases" but is "ill-suited in design defect cases."

The instruction was not blended. The jury was instructed as to "manufacturing defect," in part, as follows:

When a manufacturing defect is claimed, the test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend the use of the product.

The jury was charged separately as to design defect. When instructing the jury as to design defect, the Court included language reflecting the risk-utility test, which is the proper test for design defect claims. *Branham*, 390 S.C. at 220, 701 S.E.2d at 14.

J&J's request for a new trial on this issue is DENIED.

9. There was no error in declining to charge the jury as to “hindsight opinions,” that more could have been done, or “post distribution” evidence.

J&J contends that the Court committed error by failing to charge the jury as to “hindsight opinions.” The Court disagrees. J&J has cited no authority which would require this Court to instruct the jury as to “hindsight opinions,” or that the jury should have considered that “more could have been done.”

The admission of post-distribution evidence in this case was not prejudicial. Mr. Perry used JBP until shortly before J&J removed the product from the shelves. South Carolina’s Supreme Court defined “post-distribution” evidence as “evidence of facts neither known nor available at the time of distribution.” See *Branham*, 390 S.C. at 227, 701 S.E.2d at 17. In a footnote, the Court clarified that:

If information on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture. The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.

Id. at n. 17. The evidence supports a finding that J&J knew of the presence of asbestos not only in the talc that it put into its powder but also the presence of asbestos in its finished product. The information regarding the presence of asbestos in JBP was available to J&J prior to Mr. Perry’s initial exposure.

J&J’s request for a new trial on this issue is DENIED.

B. None of the alleged structural, evidentiary, or expert witness errors identified by J&J warrant post-trial relief.

1. J&J was not entitled to severance.

J&J contends that the Court committed error by denying its request to sever trial from co-defendant American International Industries (“AII”). The Court disagrees. Trial judges, in their

discretion, are responsible for determining whether trial issues are distinct enough to warrant severability. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). In this case, the claims against J&J and AII were largely identical. The issues to be determined by the jury in this matter as to both of these defendants were not so distinct as to warrant severability.

By the time of trial, the Court had resolved Plaintiffs' liability claims against AII as a matter of law as a result of AII being in default. Before opening statements, the Court informed the jury as follows:

It has been determined as a matter of law that American International Industries, AII, which is a company responsible for Clubman talc products, is liable to Mr. Michael Perry on each of the causes of action pled against them in this case, specifically negligence, strict liability, fraud, conspiracy and implied warranty of merchantability. It has been determined as a matter of law that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma. It has been determined as a matter of law that American International Industries' conduct was willful, wanton, and reckless, meaning American International Industries acted with conscious indifference to the rights and safety of others.

You are instructed that American International Industries is liable to the plaintiffs in this case. Your only task as to American International Industries are to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

It was clear from this instruction that the jury understood that all of Plaintiffs' claims against J&J were to be decided by the jury. Nothing about the Court's instruction to the jury indicated that it should also find J&J liable for Plaintiffs' injuries because of AII. The jury was instructed that these two defendants were to be considered separately.

J&J's request for a new trial on this issue is DENIED.

2. Defendants' experts did not have a proper scientific foundation for their opinions that Mr. Perry's mesothelioma was idiopathic or spontaneous.

In accordance with its "gatekeeping" function, the Court prevented J&J's experts from opining that Mr. Perry's mesothelioma was idiopathic and/or spontaneous. J&J's experts were

permitted, however, to testify at trial about spontaneous mesotheliomas generally.

The trial court must act as a gatekeeper over scientific evidence and make three preliminary findings before expert testimony may be admitted. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The Court must find “that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable.” *Id.* at 446-47, 699 S.E.2d at 175. “In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert’s method is reliable (i.e., valid), but also (2) whether the substance of the expert’s testimony is reliable.” *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff’d in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). “A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Id.* (quoting *Joiner*, 522 U.S. at 146).

Dr. Weill is a pulmonologist who J&J intended to have testify that Mr. Perry’s mesothelioma was spontaneous because he saw no exposure to asbestos that Mr. Perry would have had, including any exposure to talc. While Dr. Weill reviewed the reports of the parties’ experts, he did not review any internal testing documents from J&J. He didn’t review any J&J documents at all. The Court finds that Dr. Weill’s opinion regarding spontaneous mesothelioma is unsupported in any recognized scientific community, and that his conclusions regarding the “cause” of Mr. Perry’s mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. Additionally, Dr. Weill’s anticipated testimony that Mr. Perry had no exposure to asbestos

throughout his life is unreliable given that he has not reviewed any J&J documents, including J&J's internal testing documents – some of which found asbestos in J&J's talc that Mr. Perry used.

Dr. Diette's opinions also lack an adequate foundation to opine that that Mr. Perry's mesothelioma was either spontaneous or "naturally occurring." The Court finds that Dr. Diette's opinion regarding spontaneous mesothelioma is unsupported in any recognized scientific community, and that his conclusions regarding the "cause" of Mr. Perry's mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. Additionally, Dr. Diette's anticipated testimony that Mr. Perry had no exposure to asbestos throughout his life is unreliable given that he has not reviewed any J&J documents, including J&J's internal testing documents – some of which found asbestos in J&J's talc that Mr. Perry used. In fact, Dr. Diette has previously opined that there is no scientific literature to support the conclusion that a mesothelioma can occur spontaneously when there is a history of asbestos exposure.

Drs. Diette and Weill were not excluded completely from testifying. Their only limitation was that they could not use a diagnosis of exclusion and testify that Mr. Perry's mesothelioma was spontaneous. J&J has not provided any explanation as to how it was prejudiced by these rulings. J&J chose not to call Dr. Weill and Dr. Diette as witnesses in its case-in-chief.

South Carolina precedent makes clear that "it is not sufficient for the doctors to say simply that the ailment in question 'possibly' or 'might have' resulted from the accident, but the medical experts must go further and testify at least that in their professional opinions the result in question 'most probably' came from the alleged cause." *Windham v. City of Florence*, 221 S.C. 350, 358, 70 S.E.2d 553, 556 (1952). The Court finds that any opinions from J&J's experts that Mr. Perry's

mesothelioma was “spontaneous” were scientifically unsupported, lacking in factual foundation, and unreliable.

J&J’s request for a new trial on this issue is DENIED.

3. Testimony from Plaintiffs’ experts complied with the South Carolina causation standard.

J&J contends that the causation testimony of Plaintiffs’ medical experts Dr. Arnold Brody and Dr. Steven Haber is unreliable and insufficient to establish substantial factor causation. The Court disagrees. Plaintiffs’ experts do not hold the opinion that “any exposure” or “every exposure” or “every asbestos fiber” causes mesothelioma generally or caused Mr. Perry’s mesothelioma. They testified that Mr. Perry’s mesothelioma was caused by his cumulative asbestos exposure, and that given the specific facts of his exposure to visible asbestos dust from JBP regularly over the course of several decades, these exposures were a substantial factor in causing Mr. Perry’s disease.

a. Standard of Review

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE.

Courts evaluating the admissibility of scientific expert evidence “must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the

quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

“[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. See *Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert’s methodology, it is for the jury to determine the soundness of the facts underlying the expert’s opinion and the correctness of the expert’s conclusions. See *id.* 22.

b. JNOV is an improper vehicle for the court to reconsider a *motion in limine*.

J&J offers no authority for the proposition that a JNOV motion is the appropriate vehicle for requesting a Court reconsider its evidentiary rulings. To the contrary, South Carolina Courts have found that a JNOV motion is not the appropriate vehicle to address errors in the admission of evidence. *Johnson v. Hoechst Celanese Corp.* 317 S.C. 415, 420 (1995) (“a motion for judgment notwithstanding the verdict was not the appropriate vehicle to address the alleged error,” in submitting a color-coded map to the jury which the moving parties contended showed their properties in the wrong color classification.).

In ruling on a JNOV, the Court is required to review *all* the evidence and consider it in the light most favorable to the nonmoving party. *Welch*, 342 S.C. at 299. South Carolina law does not contemplate revisiting evidentiary rulings when deciding a JNOV motion.

For this initial reasons, J&J's request that this Court belatedly exclude Plaintiffs' experts' testimony is DENIED.

c. Plaintiffs' experts had a reliable scientific basis for their opinions.

Plaintiffs' experts provided identical and/or similar causation opinions to the jury as at the trial of *Jolly v. General Electric Co.*, 435 S.C. 607, 869 S.E.2d 819 (S.C. Ct. App 2021), aff'd *Jolly v. General Electric Co.*, ___ S.C. ___, 905 S.E.2d 380 (2024). In *Jolly*, this Court allowed expert testimony that mesothelioma can be caused by brief or low-level cumulative exposures, finding that the plaintiffs' "experts were entitled to rely on this basic medical fact in reaching their opinion in this case." *Id.* at 30. The Court recognized that testimony about this basic medical fact is not the same thing as testimony that "each and every exposure" is a substantial factor in causing disease. *Id.* Dr. Brody's testimony was similarly allowed in the *Howe* trial 2015-CP-46-03456 in March 2018, the *Crawford* trial 2017-CP-42-04429 in July 2018, the *Glenn* 440 S.C. 34, 890 S.E.2d 560 (Ct. App 2023), trial in January 2019, and the *Plant* trial 2022-CP-40-01265 in 2023.

In *Jolly*, the Court found that the plaintiffs' experts had utilized a reliable methodology in that they "relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by [the plaintiff and his co-worker], and the facts surrounding [the plaintiff's] exposure to visible dust from Defendants' valves." *Id.* at 31. The Court ruled that because the experts' causation opinions were supported by the scientific literature as well as relevant exposure facts, their testimony was admissible, relevant, and helpful to the jury. *Id.* at 32.

The Court of Appeals affirmed this Court’s *Jolly* Order. Considering the same arguments raised by Defendants in this matter, it ruled, “[t]o the extent Appellants challenge the admissibility of Respondents’ experts’ testimony on the ground that it was unreliable, *they have failed to show any significant part of the testimony that could be reasonably characterized as espousing the ‘each and every exposure’ theory.*” *Jolly v. General Electric*, 435 S.C. 607, 639; 869 S.E.2d 819, 836 (Ct. App. 2021) (emphasis added).⁴

The Court of Appeals agreed with Mrs. Jolly that her “experts relied on the cumulative dose theory and that their reliance on basic science in reaching their opinions is not the equivalent of testifying that ‘each and every exposure’ was a substantial factor in causing Dale’s mesothelioma.” *Id.* at 634, 869 S.E.2d at 833-34.

The Court of Appeals also noted its disagreement with Defendants’ contention that “the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard.” *Id.* at 635, 869 S.E.2d at 834. “Stating that a certain exposure *contributes* to an individual’s cumulative dose does not espouse the view that ‘each and every breath’ of asbestos is ‘substantially’ causative of mesothelioma or imply that one exposure meets the legal requirement for causation.” *Id.* at 635-36, 869 S.E.2d at 834. “We view the testimony concerning cumulative dose as background information essential for the jury’s understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test.” *Id.* at 636, 869 S.E.2d at 834-35.

The Court of Appeals ultimately concluded, “the cumulative dose theory on which Respondents’ experts relied *easily meets* the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).” *Id.* at 639, 869 S.E.2d at 836 (emphasis added).

⁴ The Supreme Court granted review on other grounds and affirmed. *Jolly v. General Electric*, ___ S.C. ___, 905 S.E.2d 380 (2024).

“Respondents’ experts were guided by the facts specific to Dale’s exposure to Appellants’ products in forming their opinions concerning causation.” *Id.* at 637, 869 S.E.2d at 835. Finally, the Court recognized Plaintiff’s experts relied on “numerous peer-reviewed, published epidemiological studies, case series, and case reports,” as well as other scientific criteria impacting causation of disease, and follows the weight-of-the-evidence methodology used by national and international public health organizations for evaluating the health effects of asbestos.” *Id.* at 640-41, 869 S.E.2d at 837.

South Carolina’s Court of Appeals again rejected Defendants’ attempts to conflate “cumulative dose” testimony with the “each and every exposure” theory in *Edwards v. Scapa Waycross, Inc.*:

[Defendant] Scapa argues the trial court erred in failing to grant its motion for JNOV because Stewart employed the “each and every exposure” theory of causation at trial. Scapa states that Dr. Frank explained the cumulative dose or “cumulative exposure” theory to the jury and utilized that theory in reaching his opinion as to whether Scapa’s dryer felts were a substantial factor in causing Stewart’s mesothelioma. Scapa conflates these two theories and claims they are inconsistent with the specific causation standard set forth in *Henderson*. We disagree.

“The ‘each and every exposure’ theory espouses the view that ‘each and every breath’ of asbestos is substantially causative of mesothelioma.” *Jolly*, 435 S.C. at 633, 869 S.E.2d at 833 (quoting *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (2016)); see also *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) (“Also referred to as ‘any exposure’ theory, or ‘single fiber’ theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury.”). This court has recently refused to conflate the cumulative dose theory with the each and every exposure theory, concluding that an expert’s opinion which states “that a certain exposure contributes to an individual’s cumulative dose does not espouse the view that ‘each and every breath’ of asbestos is ‘substantially’ causative of mesothelioma or imply that one exposure meets the legal requirement for causation.” *Jolly*, 435 S.C. at 635–36, 869 S.E.2d at 834. Rather, this court viewed testimony regarding a plaintiff’s cumulative dose as “background information essential for the jury’s understanding of medical causation, which must be based on science.” *Id.* at 636, 869 S.E.2d at 834–35.

437 S.C. 396, 416-17, 878 S.E.2d 696, 707 (Ct. App. Aug. 3, 2022), *aff'd*, 442 S.C. 387, 899 S.E.2d 5976 (2024); see also, *Glenn v. 3M Company*, 440 S.C. 34, 64-68, 890 S.E.2d 569, 585-587 (Ct. App. 2023).

Consistent with years of South Carolina law, Plaintiffs' experts' opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts that have long been established by a significant body of peer-reviewed medical and scientific literature. In addition, Dr. Haber and Dr. Brody relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including animal studies, epidemiology, and other scientific literature, the dose-response relationship, and the science regarding the low levels of exposure that can cause mesothelioma. As in *Jolly*, *Edwards*, and *Glenn*, the opinions of Plaintiffs' experts are reliable and admissible expert opinion testimony.

J&J's request that this Court find Plaintiffs' experts' unreliable and inadmissible is DENIED.

d. Dr. Haber's specific causation opinion was based on the exposure evidence in this case.

Dr. Haber's specific causation opinion is firmly grounded in the exposure evidence presented at trial. Dr. Haber was offered and qualified as an expert in internal medicine and pulmonology. J&J objected to anything outside of internal medicine and pulmonology. This objection was partially overruled because Dr. Haber had read and relied on those materials in forming his specific causation opinion about what caused Mr. Perry's mesothelioma.

Dr. Haber testified that Mr. Perry was suffering from mesothelioma caused by asbestos. Dr. Haber testified to the jury that the JBP that Mr. Perry used for five decades played a role in the development of his mesothelioma. In reaching his conclusions, Dr. Haber reviewed Mr. Perry's

medical records, including X-rays and scans of his chest, conducted a personal interview with Mr. Perry, reviewed reports of other experts designated in this matter, reviewed the deposition testimony in this case, and “other materials.” Dr. Haber also reviewed and evaluated Mr. Perry’s clinical course of care and treatment post-diagnosis.

Dr. Haber explained that mesothelioma is a “signal tumor” for asbestos exposure. The average life expectancy for epithelioid mesothelioma is 18 months. Dr. Haber told the jury that Mr. Perry’s cancer was extensive and invasive and that it had spread into the soft tissues of the chest wall, including into his lymph node and lung. Dr. Haber also testified that Mr. Perry’s pleura had doubled in size as of April, which likely meant a recurrence of his mesothelioma. Dr. Haber then discussed asbestos and how the different asbestos types were used commercially and noncommercially. He testified that all fiber types cause mesothelioma.

Dr. Haber also testified to the jury that he reviewed J&J’s internal records finding tremolite asbestos in its talc and he reviewed published medical and scientific literature on the definition of asbestos. He also noted that J&J’s own internal documents confirm that exposure to fibrous tremolite is a cause of mesothelioma because it is asbestos. He explained that for asbestos to attack the body the asbestos fibers had to be in respirable form and, if there is asbestos in talc powder the asbestos is by its nature already in a respirable form.

Dr. Haber explained what he refers to as the “onion properties” when explaining whether asbestos harms a person as soon as it’s breathed in. He also testified that there is no safe level of exposure to asbestos even at the 0.1 fibers-per-cc- level established by OSHA. Dr. Haber also explained that multiple studies and multiple health organizations have concluded that there is no threshold level below which there is no risk of developing an asbestos-related disease.

Dr. Haber also reviewed and testified about case reports which look at people who had mesothelioma. He told the jury that there are case reports based on certain occupations that work with talc which indicate concerns about the development of mesothelioma and case reports of individuals exposed to cosmetic talc who develop mesothelioma. During autopsies of people who died of mesothelioma, Dr. Haber testified that talc, anthophyllite, and tremolite have been repeatedly found. Dr. Haber later noted that background asbestos is mostly composed of small amounts of chrysotile and that anthophyllite and tremolite are not found in background levels.

Dr. Haber also considered whether Mr. Perry had exposures to asbestos from sources other than talc. He concluded that Mr. Perry had some exposure to chrysotile asbestos from brake work and that this contributed to cause his disease.

In Dr. Haber's opinion, JBP was Mr. Perry's first and primary exposure to asbestos. As to frequency and quantity, Dr. Haber testified that Mr. Perry was "an above-average user" of JBP, using it "two to four times a day", "putting it on his whole body" and occasionally "actually putting it on his . . . face." Dr. Haber concluded that Mr. Perry's exposure to asbestos from JBP was a substantial contributing factor to the development of his mesothelioma.

Dr. Haber's causation opinion was expressed the jury to a reasonable degree of scientific and medical certainty. His causation opinions are based on the record of Mr. Perry's repeated exposures to asbestos from JBP, as well as the scientific literature and other evidence presented to the jury. Dr. Haber's methodology therefore is identical to the methodology affirmed in *Jolly*, *Edwards*, and *Glenn*.

J&J's request for a new trial on this issue is DENIED.

4. The Court did not commit error by admitting Plaintiffs' tissue digestion.

On July 10, 2024, this Court ordered the division of Mr. Perry's lung tissue for digestion. At the pre-trial hearing on July 30, 2024, J&J moved to exclude the tissue digestion. J&J argued that its expert, Dr. Victor Roggli, could not perform the digestion prior to trial. J&J then claimed to have found a second expert, Dr. Stanley Geyer, who could perform the digestion prior to trial.

After this Court signed the order permitting the tissue split to occur, it took several days for Medical University of South Carolina ("MUSC") to divide the tissue as instructed by the Court's order. On the day before the pre-trial hearing, the tissue was divided and MUSC sent the tissue to the experts designated by the parties in this Court's order. Each tissue division arrived at each of the parties' respective experts on the same day at the same time – the morning of the pre-trial hearing in this case. J&J argued that the tissue digestion should not be allowed because the parties were out of time to perform the testing. This Court overruled J&J's objection, and ordered that the tissue digestion could proceed.

On the first morning of trial, J&J informed the Court that its expert could not perform the tissue digestion. Plaintiffs' informed the court that its expert who was performing the tissue digestion, Dr. Longo, was in the process of concluding the tissue digestion and offered to make Dr. Longo available for a deposition on his findings before he testified so that there was no surprise.

Dr. Longo's report on his tissue digestion findings was produced to J&J on August 5, 2024. Plaintiffs tendered Dr. Longo for deposition on August 6, 2024, at 4:00 pm by phone as he was traveling to testify in trial that evening. Dr. Longo's deposition was conducted via zoom at 10:00 pm on August 6, 2024, at J&J's request.

Dr. Longo testified to the jury that he tested Mr. Perry's lung tissue. He told the jury that he and his lab had analyzed over 400,000 different individual asbestos samples, including testing human lung tissue referred to as a "lung burden" to see what, if anything, is in the lung. Dr. Longo testified that the tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc in Mr. Perry's lungs. The evidence supported Dr. Longo's testimony that the presence of tremolite asbestos in Mr. Perry's lungs was consistent with what had repeatedly found in Dr. Longo's historical testing of JBP. J&J cross-examined Dr. Longo regarding his findings of the presence of asbestos in Mr. Perry's lungs.

The Court prohibited J&J from asking questions regarding when Dr. Longo received the lung tissue for testing. J&J had two experts at its disposal that could have performed the tissue digestion yet did not make the time. J&J had every opportunity to cross-examine Dr. Longo on his methodology of performing the tissue digestion. They chose not to and this Court does not find compelling reasons to allow J&J to challenge Dr. Longo's findings in a post-trial motion.

The Court prohibited J&J, through its corporate representative Dr. Edwin Kuffner, from discussing the results of the tissue digestion. Dr. Kuffner was not designated as an expert witness in this case. J&J contends that the Court improperly prohibited Dr. Kuffner from testifying about Dr. Longo's winchite finding in Mr. Perry's lungs to the jury, and that this prohibition was error. The Court disagrees.

Dr. Kuffner was designated as the corporate representative and was a fact witness. J&J did not list him as an expert nor did it seek to qualify him as an expert. As he was not designated or qualified as an expert, this Court ruled that Dr. Kuffner could not testify about topics of which he had no special knowledge, skill, or training to discuss with the jury. The Court did allow Dr. Kuffner to testify about what he had seen in J&J documents regarding winchite asbestos in JBP,

but the Court ruled that J&J could not use Dr. Kuffner to testify about geological concepts to the jury, as J&J sought to have Dr. Kuffner testify to the jury what Dr. Longo's finding of winchite meant.

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). As a fact witness, Dr. Kuffner's testimony was properly limited by South Carolina Rule of Evidence 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Dr. Kuffner's was not an expert in microscopy or geology and was not tendered as an expert. Dr. Kuffner had already been permitted to explain to the jury that the minerals found in Mr. Perry's lungs did not come from JBP based upon his review of J&J documents. If J&J intended to have Dr. Kuffner testify as to the geology, mineralogy, and findings of winchite asbestos, he should have been offered and qualified as an expert witness with the training, skill, and education to do so. Alternatively, J&J could have called its geologist expert, Dr. Sanchez, to testify at trial. J&J chose not to do either.

J&J further argues that Plaintiffs' counsel statement in closing argument regarding J&J's failure to call an expert witness to rebut Dr. Longo's in Mr. Perry's lungs was an improper invocation of the missing witness rule. The jury was instructed that a comment on the failure to call an expert is permitted, but that Plaintiffs' assertion that J&J could not find an expert was

stricken. This instruction cured any potential prejudice to J&J. As such, the Court finds that J&J has failed to demonstrate any prejudice from admitting Plaintiffs' tissue digestion.

J&J's request for a new trial on this issue is DENIED.

5. Dr. Haber did not testify outside of his qualifications.

Dr. Haber was qualified as an expert by reason of his training, education, and experience, as an expert in the areas of internal medicine and pulmonology. He was also permitted to testify about the information that he relied on in forming his conclusions. Dr. Haber repeatedly testified that he had evaluated and reviewed thousands of J&J's internal documents on various topics. "Expert testimony may be based partially on information received from other sources if such facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Lucas v. Sara Lee Corp.*, 307 S.C. 495, 501, 415 S.E.2d 837, 841 (Ct. App. 1992).

J&J's request for a new trial on this issue is DENIED.

6. The Court's exclusion of the 1986 Citizens Petition and J&J 2019 Health Hazard Evaluation was proper.

J&J contends that this Court improperly excluded the 1986 Citizens Petition and the 2019 Health Hazard Evaluation ("HHE") and that these exclusions were error warranting a new trial. The Court disagrees.

J&J sought to present to the jury that the FDA's position was that there is "no risk" from asbestos in talc by admitting the 1986 document into evidence. The Court found the 1986 Citizens Petition contains inaccurate and unreliable expert opinion information which made its probative value substantially outweighed by the risk of confusion to the jury, and therefore unfair prejudicial under South Carolina Rule of Evidence 403.

The Court finds that the statements in the 1986 document are based on false information that J&J provided to the FDA. For example, in one of the documents Donald Kennedy, the then-Commissioner of the FDA, attempts to justify the 0.1% level by relying in part on J&J's "extensive testing for asbestiform particles in cosmetic-grade talc; all results to date have been negative." But all results of J&J's talc had not been negative. The evidence showed that by 1979, J&J was aware that asbestos minerals had been found in its talc over 400 times.

J&J offered this document as the FDA's official position and use it support its argument that any and all use of cosmetic talcum powder – no matter how long, how heavy, or how consistent – is without risk and cannot increase a person's risk of mesothelioma at all. The document was not admitted because it contained false and unreliable expert opinion information which the risk of confusion to the jury substantially outweighed by any probative value. J&J had other avenues to present their position regarding the FDA's position on asbestos in their talc, including through Dr. Barlow, J&J's toxicologist.

Despite this Court striking the 1986 document, J&J still was able to present evidence to the jury regarding its theory as to the FDA's position on the safety of talc. Dr. Kuffner testified that it was untrue that J&J hid information from the FDA. He also testified that J&J's testing method was created with consultation from the FDA, so J&J's testing method was the industry standard. Additionally, Dr. Kuffner testified that the FDA conducted studies of JBP in the 1970s and found no asbestos. Dr. Kuffner also testified that as of 1994, the FDA had concluded that "talc has proved to be among the safest of consumer products."

This Court finds no prejudice from the exclusion of the 1986 Citizens Petition.

With regard to the 2019 HHE, the Court's ruling was limited to Dr. Kuffner, a lay witness. Laypersons can provide opinion or inferences only if they (a) are rationally based on the

perception of the witness; (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE. Any opinions or conclusions about the HHE would require special knowledge, skill, experience, or training.

Dr. Kuffner testified that he was involved in preparing and writing the HHE, but as a lay witness he could not give toxicology testimony based upon this document as J&J sought to do. J&J could not use Dr. Kuffner to provide toxicology expert testimony to the jury. J&J could have called a properly qualified expert, including its toxicologist Dr. Barlow, but chose not to do so.

J&J has not shown that exclusion of the 1986 Citizens Petition and the 2019 HHE were so prejudicial that a new trial is warranted. J&J's request for a new trial on this issue is DENIED.

7. Plaintiffs' counsel's closing argument was not prejudicial such that J&J is entitled to a new trial.

"It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge 'who is on the scene and in much better position than an appellate court to judge as to what is improper argument under the circumstances.'" *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 599, 344 S.E.2d 157, 164 (Ct. App. 1986) (quoting *Lesley v. Am. Sec. Ins. Co.*, 261 S.C. 178, 185, 199 S.E.2d 82, 86 (1973)). "[C]onsiderable latitude is allowed counsel in drawing inferences and deductions from the evidence and in arguing the same to the jury." *Lesley*, 261 S.C. at 185, 199 S.E.2d at 85. "When [an] objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks." *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

J&J contends that several statements from Plaintiffs' counsel during his closing argument were prejudicial. To the extent that J&J did not object during Plaintiffs' closing argument when

certain terms were used, J&J has waived its argument as to these statements. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (rejecting argument regarding improper closing argument: “Since there was no contemporaneous objection, this issue is not preserved for appellate review.”); *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) (“[T]he record indicates no objection to counsel's argument to the jury regarding consent and this issue is not preserved for review”); *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) (“Failure to object to comments made during [closing] argument precludes appellate review of the issue.”).

“[G]reat latitude is accorded counsel in presenting closing arguments to a jury.” *United States v. Johnson*, 587 F.3d 625, 632 (4th Cir. 2009) (citation omitted); *see also id.* at 633 (“[T]o parse through a prosecutor's closing statement for minor infelicities loses sight of the function of our adversary system, which is to engage opposing views in a vigorous manner.”). “Thus, while courts should not hesitate to condemn those prosecutorial comments that truly offend constitutional norms, neither shall we attach constitutional significance to every verbal fillip, lest we unduly censor the clash of viewpoints that is essential to adversarial proceedings.” *United States v. Runyon*, 707 F.3d 475, 507 (4th Cir. 2013).

J&J has failed to demonstrate that Plaintiffs’ closing argument was designed to inflame the jury or encourage the jury to rule in Plaintiffs’ favor on an improper basis. This Court gave proper curative instructions when it found they were warranted.

J&J’s request for a new trial on this issue is DENIED.

8. There was no error in the verdict form submitted to the jury.

J&J contends that it is entitled to a new trial because, while Plaintiffs' claims against J&J included design defect and manufacturing defect theories, the verdict form did not include separate questions on those issues. The Court disagrees.

J&J did not object to the questions on the verdict form, after being given an opportunity to object, prior to its submission to the jury. Because its post-trial motion is the first time that J&J objected to questions on the final verdict form, its objection is waived. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997) (finding appellant waived claim of lack of notice of cause of action by failing to object to having his name included on the verdict form); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form).

The Court finds that neither the verdict form nor the instructions to the jury created confusion about the jury's role in this case. The jury was instructed regarding Plaintiffs' claims that J&J sold a product that was defective in multiple ways: the product had a manufacturing defect, had a design defect, and/or a warning defect. The instructions specifically stated:

Plaintiffs' claims in this case are based on several theories: negligence, strict liability, and fraudulent misrepresentation.

The instructions went on to explain the different ways J&J could be found strictly liable in South Carolina.

A trial judge has discretion to determine how a case is submitted to the jury and error, if any, in the refusal of using J&J's proposed verdict form would only constitute grounds for a new trial if prejudice resulted from that failure. *See Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 386, 778 S.E.2d 902, 914 (2015); *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 280 (Ct.

App. 1997) (quoting 5A C.J.S. *Appeal & Error* § 1762(b), at 1136 (1958)). The Court finds that J&J has not demonstrated any prejudice that it suffered as a result of this Court not separating the question on the verdict form regarding strict liability into multiple questions.

J&J's request for a new trial on this issue is DENIED.

VIII. RULING ON NEW TRIAL BASED ON CUMULATIVE ERROR

Where there has been no error, there cannot be cumulative error. "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.* The Court finds J&J has not shown that it did not receive a fair trial or that cumulative errors affected the outcome.

J&J's request for a new trial on this issue is DENIED.

IX. RULING ON NEW TRIAL PURSUANT TO THE THIRTEENTH JUROR DOCTRINE

In South Carolina, the thirteenth juror doctrine is a long-standing means by which a trial court may grant a new trial absolute. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (S.C. 1990). "Under the "thirteenth juror doctrine," a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts." *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (S.C. Ct. App. 2000) (quoting *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (S.C. Ct. App. 1996)). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S.C. 585, 243

S.E.2d 460 (S.C. 1978); see also *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722 (“Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge’s finding that justice has not prevailed.”). “[T]he trial Judge is the thirteenth juror, possessing the veto power to the nth degree....” *Worrell v. S.C. Power Co.*, 186 S.C. 306, 195 SE. 638 (S.C. 1938).

“Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party.” *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 SE.2d 746 (S.C. Ct. App. 2003); see also *Parker v. Evening Post Publ’g Co.*, 317 S.C. 236, 452 SE.2d 640 (S.C. Ct. App. 1994) (stating the trial court may take its own view of the evidence). Furthermore, the decision of whether to grant a new trial upon the facts is one addressed to the sound discretion of the trial judge. *S.C. State Highway Dep’t v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (S.C. 1976).

“South Carolina’s thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (S.C. 2002) (quoting *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267). By sitting “[a]s the ‘thirteenth juror,’ the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict.” *Id.* at 478, 567 S.E.2d at 854. As stated by the South Carolina Supreme Court in *Folkens*,

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

300 S.C. at 254, 387 S.E.2d at 267.

The jury returned a verdict finding that J&J was negligent, and that J&J was strictly liable for Mr. Perry's mesothelioma. The Court finds that the evidence at trial supported the jury's verdict. The Court declines to use the thirteenth juror to interfere with the decision made by the jury.

J&J's request for a new trial on this issue is DENIED.

X. RULING ON MOTION FOR SETOFF

J&J contends that it is entitled to a full set-off for Plaintiffs' entire settlement amount and Plaintiffs do not object. J&J further contends that Plaintiffs should have to produce their settlement agreements with various co-defendants, with which the Court disagrees. Plaintiffs' settlement releases are not discoverable. Rule 408, SCRE. The Court has reviewed Plaintiffs' settlement agreements in camera and finds they are fair and reasonable. *See Glenn v. 3M Co.*, 440 S.C. 34, 86, 890 S.E.2d 569, 596 (Ct. App. 2023). The Court therefore rules that the amount of \$11,255,000 in Plaintiffs' pre-trial settlements will be set-off from Plaintiffs' compensatory damages award.

XI. RULING ON STAY OF EXECUTION OF JUDGMENT AND BOND

J&J requests a stay of judgment pursuant to Rule 62, SCRCR. The Court agrees that J&J is entitled to a ten-day automatic stay of judgment pursuant to Rule 62(a).

There is no automatic stay of execution of a money judgment during the pendency of appeal. S.C. Code § 18-9-130(A)(1); *see also* Rule 241(b)(1), SCACR (providing that money judgments are an exception to the general rule that service of a notice of appeal automatically stays matters decided in the judgment). Rather, a stay of execution is within the trial court's discretion: "A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay

of execution.” S.C. Code § 18-9-130(A)(1). Rule 62(d) provides that a stay of execution of judgment is predicated on posting a supersedeas bond.

The Court exercises its discretion to deny J&J’s request for a stay order without the requirement of an appeal bond. In the event of an appeal, the Court orders that J&J post a supersedeas bond in the full amount of the judgment, pursuant to SCRCP 62(d).

XII. RULING ON A NEW TRIAL BASED ON VERDICT SIZE

A. Actual Damages

“When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.” *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). Likewise, the circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice. *See e.g., Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 592-96, 686 S.E.2d 176, 187-190 (2009) (finding a \$15 million punitive damages award to be “grossly excessive” such that it rose to the level of a due process violation but finding “no credible evidence anywhere in the record” to support the defendant’s contention that the compensatory or punitive damages award resulted from passion, caprice, or prejudice).

Further, the amount of unliquidated damages that “a jury might properly award ... is largely a matter of judgment based upon the facts and circumstances of each case.” *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). “In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[] whe[n] the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive.” *Id.* Moreover, “the jury’s determination of damages is entitled to substantial

deference[,]” and the circuit court's decision on whether to grant a new trial based on the amount of the verdict “will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000).

Here, as to the award of compensatory damages, the jury was informed that Plaintiffs and J&J stipulated to \$3,329,973.05 in economic loss, which including Mr. Perry’s economic loss and costs of his medical treatment. After this stipulation, Plaintiffs requested \$2 million for every year of his life that Mr. Perry will lose pursuant to the South Carolina life expectancy tables, which this Court finds to be slightly less than 27 years and reasonable. The jury returned a verdict lower than Plaintiffs’ request.

The jury heard testimony about Mr. Perry’s pain and suffering extensively. The jury heard from Mr. Perry’s treating thoracic surgeon, Dr. Gibney, who testified that published scientific data indicates that it is an average of 50% of mesothelioma patients that will survive between 12 to 18 months, and then confirmed that this survival period applies to Mr. Perry. Dr. Gibney testified that people with mesothelioma suffer from extreme chest pain, restrictive air disease that leads to heart problems and extreme shortness of breath that makes the patient feel as though they are drowning. Dr. Gibney testified that mesothelioma almost always recurs and is aggressive. The jury then heard about the 6-8 surgeries Dr. Gibney performed on Mr. Perry in great detail, testifying that: (1) he had to cut Michael open from behind his shoulder blade all the way around to the front of his body to access the chest wall; (2) cut his large back muscle in half to access his chest where the cancer was; and (3) removed one of his ribs. Indeed, Dr. Gibney testified that he had to use his hands to “peel the pleura off the chest wall and then off the lungs. I liken it most to removing the peel off of an orange.” Dr. Gibney further testified that he had to remove Mr. Perry’s entire diaphragm and

rebuild it with mesh. Dr. Gibney told the jury about Mr. Perry's post-surgical recovery, describing it as significantly painful due to the removal of the pleura where the mesothelioma is. He also testified that Mr. Perry would die from his mesothelioma and that he would experience shortness of breath and chest pain until he died.

Evidence was also presented to the jury showing Mr. Perry's loss of life expectancy by over two decades, the anxiety and mental anguish he will suffer before he dies, and the fact that his mesothelioma will cause his death. Evidence demonstrated that J&J knew that asbestos caused cancer and despite knowing that the talc it used in JBP had repeatedly tested positive for asbestos, J&J continued to use that talc in JBP. Mr. Perry used JBP for 50 years and his use of that powder has significantly shortened his life. Thus, the Court finds that the jury's award was not the result of passion or prejudice.

The jury also heard testimony from Lonnie Long relevant to his loss of consortium claim. Mr. Long testified that he and Mr. Perry met over 20 years ago and talked about the life they had together prior to Mr. Perry's mesothelioma diagnosis. Mr. Long told the jury about sharing the holidays with Mr. Perry, and how Mr. Perry would decorate and do things with the neighborhood kids for the holidays. He talked about their honeymoon in Hawaii and how much they enjoyed traveling together. Lonnie described Mr. Perry as his "savior" because when they met Mr. Long was suffering with low self-esteem and depression and Mr. Perry showed him the strength to keep going. The jury heard that their conversations since Mr. Perry got mesothelioma have turned to "how we're going to fight this and how we're going to get through it." Mr. Perry then testified that Mr. Long takes him to all of his doctors' appointments and that he has never missed a single appointment. He noted that his husband did not stay in the courtroom for his testimony because he was "very protective."

The jury then considered the relationship that Mr. Perry and Mr. Long had experienced for over 20 years, what they lost as a result of Mr. Perry's mesothelioma, and what they would lose when Mr. Perry inevitably died. The jury's loss of consortium award reflects the jury's deliberation on that life, the loss of that life, and the loss that Mr. Long has suffered, and will suffer, as a result of Mr. Perry's inevitable death. The jury's award of loss of consortium damages was not the result of passion or prejudice.

B. The jury's award of punitive damages satisfies Constitutional standards.

J&J contends that the size of the jury's punitive damages award is grossly excessive and violated J&J's constitutional right to procedural and substantive due process. The Court disagrees.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future" as well as "to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). "At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights." *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). "The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others." *Id.*

To receive a punitive damages award, "the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). "A tort is characterized as reckless, willful[,] or wanton if it was committed in such a manner or

under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "A conscious failure to exercise due care constitutes willfulness." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995).

"In South Carolina, 'punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'" *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). The amount of the punitive damages award is largely within the discretion of the jury, and, like the compensatory award, is entitled to substantial deference. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309-10, 457 S.E.2d 603, 608 (1995).

Punitive damages awards should be reviewed for compliance with the Due Process Clause. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). See *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Reprehensibility is the most important consideration. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. A number of factors are relevant to reprehensibility, including whether: “(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.” *Id.*

The evidence supports the jury’s finding that J&J’s conduct was reprehensible. Evidence showed to the jury showed that Mr. Perry is expected to die a very premature and painful death despite having a life expectancy—in the absence of mesothelioma—of about 26 years. Thus, the harm caused to Mr. Perry was physical as opposed to solely economic.

J&J has been selling baby powder since 1894. The serious health risks of inhaling asbestos dust from talc were well-published in the scientific literature, and actually known by J&J decades before Mr. Perry was ever born, let alone exposed to asbestos from JBP. The jury saw advertisement by J&J in which it advocated that JBP was safe and pure, and used both language and images to capitalize on the mother-baby bond in order to make J&J money off the reputation of JBP. Mr. Perry was first exposed to JBP through his mother’s use and then continued using JBP repeatedly and on a daily basis for almost 50 years. Throughout the time that he used JBP, J&J never warned Mr. Perry, nor any other customer, of the potential asbestos exposure from the foreseeable use of JBP. The jury also saw documents and heard testimony that J&J misled the FDA as to the asbestos content of JBP, including telling the FDA that a substantial amount of asbestos can be allowed safely in a baby powder.

The jury found J&J negligent, and that it engaged in conduct that was willful, wanton, and reckless related to its negligence finding. This Court finds that the jury’s assessment is appropriate

considering the devastating physical and emotional losses that Mr. Perry and Mr. Long have suffered and will continue to suffer due to J&J's willful, wanton, and reckless conduct.

As to ratio, due process requires consideration of the ratio between the compensatory damages award and the punitive damages award. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. A single-digit ratio is generally thought to comport with due process. *Id.* The South Carolina Supreme Court has upheld verdicts with a 6.82 to 1 ratio, 3.75 to 1 ratio, 2.54 to 1 ratio, 9.96 to 1 ratio, and a 28 to 1 ratio. *Id.* at 593, 686 S.E.2d at 188 (collecting cases). In *Mitchell*, the Court remitted a punitive damages award from \$15 million to \$10 million so that it would be a 9.2 to 1 ratio. *Id.* at 594, 686 S.E.2d at 188.

The Court finds the ratio between the jury's compensatory and punitive award is well within the acceptable ratio as defined by South Carolina law. The Court also finds that the jury's award of punitive damages is well within the legislative cap of three times the compensatory award pursuant to S.C. Code Ann. §15-32-530.

The final *Gamble* factor is an evaluation of like awards in similar cases. The Court may properly consider the similarity between the punitive damages awarded by the jury in the case under review as compared to punitive damages awards in other cases. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. Relevant points of comparison are "the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Id.* at 588-89, 686 S.E.2d at 186.

Mr. Perry's award is comparable to awards in other talc cases with young plaintiffs.

In the Theresa Garcia case tried earlier this year in Chicago, the jury awarded \$45 million in compensatory damages to her estate (\$33 million for noneconomic damages) and to her children

(\$12 million). Ms. Garcia had a very similar profile to Mr. Perry – she was only 52 years old and her primary exposure was to JBP.

In another reported decision from 2021, a California jury awarded \$29,490,000 in compensatory damages to Teresa Leavitt and her husband in their case against J&J, again pre-bankruptcy. *Leavitt v. Johnson & Johnson*, No. A157572, 2021 WL 3418410, at *2 (Cal. Ct. App. Aug. 5, 2021). Mrs. Leavitt was exposed to Johnson’s Baby Powder as an infant and adult and was diagnosed with mesothelioma at only 51 years old. *Id.*

There are not a large number of verdicts against J&J because its multiple bankruptcies stayed litigation for almost two years. Talc verdicts against other companies have been substantially similar to the verdict reached in this case. In 2021, Nedelka Vanklive was awarded \$75 million in noneconomic damages in a talc case in Alameda County California. The case was started against both J&J and Whitaker, Clark & Daniels but J&J declared bankruptcy in the middle of trial. The verdict is against Whitaker, Clark & Daniels but the jury assigned 60% liability to J&J. Ms. Vanklive was exposed to JBP as an infant and child and developed mesothelioma at 48 years old.

In a talc trial in California in 2022, the jury awarded \$32 million in noneconomic damages to Rita-Ann Chapman, and \$8 million to her husband, and a total of \$11.3 million in punitive damages in a case involving exposure to body powders made by Avon and J&J. Mrs. Chapman used both J&J and Avon body powders as a child and adult and was 75 years old at the time of her mesothelioma diagnosis.

In the *Plant* case tried before this Court in 2023, the jury awarded \$20 million in noneconomic damages to Sarah Plant, \$3.5 million in future medical expenses, and \$5 million to

her husband, in a trial against talc supplier Whitaker, Clark & Daniels. Mrs. Plant was only in her thirties when she developed mesothelioma from her use of asbestos-containing talc powders.

These recent talc verdicts against J&J and others establish that the award to Mr. Perry is consistent with verdicts in other talc cases across the country.

Finally, J&J contends that the jury's punitive damages award in this case is either unsupported or unconstitutional because it no longer sells the talc-based version of JBP. The Court disagrees as this argument fails to account for one of the purposes of punitive damages pursuant to South Carolina law—to deter the wrongdoer **and others** from engaging in similar reckless, wanton, willful, or malicious conduct in the future. *See Portrait Homes—South Carolina, LLC v. Pennsylvania National Mutual Insurance Company*, 442 S.C. 215, 900 S.E.2d 245 (Ct. App. 2023).

The evidence was that J&J sold talc-based JBP for over 100 years, with no warning of potential asbestos exposure, despite actual knowledge that both its talc ore and its finished JBP product had asbestos in it. Additionally, according to J&J, the decision to stop selling JBP was not based on safety reasons. The Court finds that the jury's punitive damages award was proper and does not violate any Constitutional bounds.

J&J's request to eliminate the jury's verdict as to punitive damages is DENIED. However, the Court will reduce the amount of the punitive damages award from \$30,000,000 to \$25,000,000.

XIII. J&J IS NOT ENTITLED TO A NEW TRIAL BASED ON *STATE V. WRIGHT*.

J&J contends that this Court prevented it from being able to present a defense at trial and thus is entitled to a new trial pursuant to *State v. Wright*, 271 S.C. 534, 248 S.E.2d 490 (1978). The Court disagrees.

J&J was not prevented from presenting a defense, nor did the Court make comments that affected the outcome of the case or the effectiveness of counsel's presentation. Unlike counsel in *Wright*, J&J chose to not put on its case and instead try this case solely through Plaintiffs' case-in-chief. J&J's defense was that JBP does not have enough asbestos in it to have been a substantial contributing factor in the development of Mr. Perry's mesothelioma. J&J's additional defense was that JBP does not have asbestos in it. This Court did not strike any of J&J's experts and they were all free to testify at trial. The only limitation was that Dr. Weill and Dr. Diette could not testify that Mr. Perry's mesothelioma was spontaneous. J&J chose not to call any of its experts.

J&J further argues that it could not try its case because of the potential for a spoliation order and the Court's exchanges with Dr. Kuffner. The Court disagrees on both counts.

A. The *Hood-McBrayer* Spoliation Order

The *Hood-McBrayer* Spoliation Order was entered on November 5, 2021, in another case involving decades of use of JBP. While there was discussion during the pre-trial hearing of this Order, it was never entered. No such order was ever signed in this trial, and no adverse instructions were given in this trial. The Court's potential consideration of entering the *Hood-McBrayer* Order did not change the outcome of Mr. Perry's trial or J&J's defense. J&J has failed to identify any witness that could not be called to testify as a result of the *Hood-McBrayer* Order. Critically, the potential for this order did not stop J&J from discussing negative test results with the jury in Mr. Perry's trial. J&J questioned Dr. Haber about tests, from the FDA and others, which did not detect asbestos in either the talc used in JBP or the finished product. The record also shows that Dr. Hopkins testified to the jury, through videotaped deposition, about J&J's negative testing results that it now argues the potential for this Order kept it from doing.

The Court made clear multiple times throughout this trial that J&J could call whatever witnesses it chose. J&J contends that it could not call *any* witnesses because it could not discuss negative testing. This is incorrect. The Court afforded J&J the opportunity to call expert witnesses with no notice to Plaintiffs' counsel, which J&J chose not to do. J&J was given every opportunity by this Court to put on its case with expert witnesses.

B. The Court's exchanges with Dr. Kuffner.

Dr. Kuffner was not an expert witness in this case. Because of this, the Court did not allow Dr. Kuffner to give opinions that would have been based on his skill, knowledge, training, and education because that testimony is not the testimony of a fact witness. J&J, during its questioning of Dr. Kuffner, made clear that his role of corporate representative was separate from his role as chief medical officer. He was permitted to testify as to what J&J documents say about the presence of asbestos in its talc and in the finished talc products. He also testified as to what documents were produced in litigation and not destroyed or concealed.

Beyond being able to testify as an expert on issues outside of his role as a fact witness or corporate representative, J&J does not identify any other topic on which the trial court prevented Dr. Kuffner from testifying to justify its request for a new trial.

C. Different standard as to J&J

J&J contends the Court treated J&J so differently from Plaintiffs, and applied a different standard of law, that it affected the verdict in Mr. Perry's case and J&J is entitled to a new trial. The Court disagrees.

First, the Court's comments regarding the years that LTL spent in bankruptcy neither reflect a different standard for J&J nor did the comments infect the trial such that J&J is entitled to a new trial. The record reflects the uncontradicted fact that any such discussion did not happen

in the presence of the jury at any point in time. There is no precedent preventing this Court from disagreeing with the steps taken by a defendant to avoid talc liabilities, and J&J has provided none.

Second, the Court's comments regarding the opinions that J&J intended to have its experts offer, including Dr. Sanchez's definition of asbestos, were not improper or prejudicial. The Court does not agree that the comments prevented J&J from presenting a defense to Plaintiffs' claims at trial and they were not made in the presence of the jury. This Court's discussion of Dr. Sanchez's anticipated testimony was made as part of this Court's gatekeeping function. the Court, in minding the Rule 702 gate, must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (quoting *Joiner*, 522 U.S. at 146).

J&J knew that this Court did not prohibit any of its experts testifying to the jury because as of Saturday, August 3, 2024, J&J intended to call at least 5 witnesses, including Dr. Sanchez, Dr. Diette, and/or Dr. Weill, during its case-in-chief.

For more than 50 years, it has been well settled that a Court is entitled to ask a witness questions to get to the truth. In *Williams v. South Carolina Farm Bureau Mut. Ins. Co.*, 251 S.C. 464 (1968), our Supreme Court held:

The trial judge, of course, has the right, in [her] discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth. This discretion will not be controlled except where it appears that the manner in which the judge exercised the right tended to unduly impress the jury with the importance of the

testimony elicited, or would be likely to lead the jury to suppose that the judge was of the opinion that one party rather than the other was correct upon a particular issue of fact.

If a trial judge in the exercise of his discretion feels called upon, in the interest of justice, to question witnesses to elicit the truth, he should be cautious to see that such questions are propounded in a fair and impartial manner, and should not express or indicate to the jury the judge's opinion as to the facts of the case or the weight or sufficiency of the evidence.

The Court questioned Dr. Kuffner during both direct and cross. When the Court believed the jury needed clarity on a position taken by Plaintiffs during the questioning of Dr. Kuffner, the record shows that the Court asked counsel for clarity and then instructed the jury.

None of the discussions that J&J takes issue with occurred in front of the jury. J&J's counsel even stated during its closing argument that J&J did not need to present any witnesses because it had proven its case through Plaintiffs' own witnesses. J&J chose not to call its expert witnesses.

D. Exchanges between attorneys for Plaintiffs and J&J

This Court finds that there is no authority or compelling evidence to grant a new trial based on a single exchange between counsel outside of the presence of the Court and outside of the presence of the jury. On Friday, August 9, 2024, Plaintiffs played the videotaped portion of the testimony of J&J's corporate representative, John Hopkins. This portion of the videotaped deposition had been edited and cut by J&J. During the re-direct, plaintiff's counsel at the deposition questioned Dr. Hopkins about the 1972 Report from Dr. Hutchinson, finding asbestos in J&J's talc repeatedly. Dr. Hutchinson took pictures of the actual asbestos fibers he found in J&J's talc. During the re-direct, plaintiff's counsel on the video not only discussed the results from Dr. Hutchinson's testing, but also displayed the pictures of the asbestos fibers Dr. Hutchinson found on the video. The video that was cut and played by counsel for J&J, however, omitted the

photographs of the asbestos found in J&J's talc by Dr. Hutchinson to the jury. During the break, Plaintiffs' counsel and counsel for J&J spoke about Plaintiffs' concerns regarding the way in which J&J presented evidence to the jury. The entire exchange with J&J's counsel lasted less than a minute.

The Court does not find that this single incident with Plaintiffs' counsel resulted in such intimidation that J&J's counsel could not effectively represent their clients. J&J has provided no such evidence justifying its request for a new trial based on *State v. Wright*. Unlike the circumstances in *State v. Wright*, this Court does not find that a single incident outside the presence of the jury, for which counsel was reprimanded, rises to any level sufficient to justify a new trial.

The Court has treated all parties and their counsel fairly. Throughout this trial, the Court disagreed with all parties on various issues. The Court was evenhanded when it came to ruling on objections. The Court reprimanded counsel on both sides when necessary. J&J has therefore failed to identify any incident which negatively affected its counsel's effectiveness as discussed in *State v. Wright*.

J&J's request for a new trial pursuant to *State v. Wright* is DENIED.

XIV. RULING ON NEW TRIAL *NISI REMITTITUR*

A new trial nisi remittitur may be granted "when the verdict indicates the jury was unduly liberal in determining damages." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). "A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice." *Id.*

When reviewing a request for new trial nisi remittitur, substantial deference must be given to the jury's determination of damages. *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d

373, 381 (Ct. App. 2020). The consideration of a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). “Compelling reasons must be given to justify invading the jury’s province by granting a new trial nisi remittitur.” *Id.*

The jury award against J&J, along with AII, was for \$23,037,500 in actual damages to Mr. Perry, \$9,618,750 to Mr. Long in loss of consortium damages, and \$30,000,000 in punitive damages against J&J. This Court also recognizes Plaintiffs’ settlement setoff in the amount of \$11,255,000 to be fair and reasonable.

As reasons to remit this jury award of actual damages to Mr. Perry and Mr. Long, J&J argued the following:

For example, the evidence simply does not support the massive loss of consortium award to Mr. Long. Nothing unusual about his loss of services of explained to in detail to justify a \$9M loss. Again, there is no attempt here to deny that he has suffered loss. But the jury’s award is grossly excessive or, failing that, overly liberal. The award to Mr. Perry is also shockingly excessive and, failing that, overly liberal. Mr. Perry’s disease has, fortunately, been treated at least temporarily by his treating doctors and he appeared for most of the two-week trial in court in Richland County. While without question he suffers from a terrible disease, he is ambulatory and self-sufficient, and was physically well-composed and able to testify during the trial, demonstrating his current state of health.

A. Analysis of other cases.

- *Firth v. Garlock Sealing Technologies, LLC*, Civil Action No. 2008-CP-23-09186 (Greenville Cty. 2009), involved a 72-year-old deceased mesothelioma. The jury awarded \$300,000 for survival and \$400,000 for wrongful death, for a total of \$700,000 in compensatory damages. The jury declined to award damages for loss of consortium.
- *Garvin v. AGCO Corporation, et al.*, Civil Action No. 2012-CP-40-06675 (Richland Cty. 2013), involved a 74-year-old living mesothelioma who worked on pumps and valves as a millwright for thirty years. The jury awarded \$10 million for pain and suffering and \$1 million for loss of consortium, for a total of \$11 million in compensatory damages. The jury also awarded an aggregate of \$27 million in

punitive damages against three defendant parties. After a trial defendant challenged the verdict, and the trial court granted a new trial *nisi remittitur* reducing the compensatory damages award from \$11 million to \$1.5 million (a remittitur of slightly more than 85%) and reducing the punitive damages award against the challenging defendant from \$11 million to \$3.5 million, commensurate with the statutory cap on punitive damages.

- *Keene v. CNA Holdings, LLC*, Civil Action No. 2013-CP-42-03915 (Spartanburg Cty. 2015), involved a 70-year-old deceased mesothelioma who worked as a millwright for Daniel Construction at the Celanese Spartanburg facility from 1969 to 1978. The jury awarded \$2 million for pain and suffering, \$5 million for wrongful death, and \$5 million for loss of consortium, for a total of \$12 million in compensatory damages. The jury also awarded \$2 million in punitive damages.
- *Jolly v. General Electric Co., et al.*, Civil Action No. 2016-CP-42-01592 (Spartanburg Cty. 2017), involved a 73-year-old living mesothelioma who worked for Duke Power as a mechanical inspector around other trades engaged in tearing-out asbestos insulation and gaskets from 1980 to 1984. The jury awarded \$200,000 for pain and suffering and \$100,000 for loss of consortium, for a total of \$300,000 in compensatory damages. This Court granted a new trial *nisi additur*, increasing the compensatory damages award to a total of \$1,870,000.
- *Edwards v. Scapa Waycross, Inc.*, Civil Action No. 2013-CP-46-00368 (York Cty. 2018), involved a 60-year-old deceased mesothelioma who worked at Bowater Paper Mill on a paper machine from 1963 to 2002. The jury awarded \$600,000 in survival and \$100,000 in wrongful death damages. This Court granted a new trial *nisi additur*, increasing the survival award by \$400,000 to \$1 million and sustaining the damages awarded for wrongful death. After additur, the compensatory damages totaled \$1,100,000.
- *Glenn v. 3M Co., et al.*, Civil Action No. 2015-CP-04-01607 (Anderson Cty. 2019), involved a 69-year-old deceased mesothelioma who worked for Duke Power as an instrumentation worker around trades tearing-out asbestos insulation and gaskets from 1970 through 1996. The jury awarded \$1 million for pain and suffering, \$1 million for wrongful death, and \$1 million for loss of consortium, for a total of \$3 million in compensatory damages. The jury also awarded \$2,125,000 in punitive damages.
- *Weist v. Kraft Heinz Company, et al.*, Civil Action No. 2020-CP-40-01597 (Richland Cty. 2021), involved the death of Kathy Weist. The jury awarded \$11 million for Kathy Weist's survival damages, \$10 million for the wrongful death damages and \$1 million for the loss of consortium damages. The jury also awarded \$10 million in punitive damages.

- *Plant v. Whittaker Clarke & Daniel et al*, Civil Action No. 2022-CP-40-01265 (Richland Cty. 2023), involved a 35 year old living mesothelioma who was exposed to talcum powder and cosmetic products. The jury awarded \$871,356 in past medical expenses, \$3,368,336 in future medical expenses, \$20 million in other damages, and \$5 million in loss of consortium.

B. *Garvin v. Crane Co.*

This Court points to now-Justice Hill's prior order in the *Garvin v. Crane Co.* case. *Order Denying in Part and Granting in Part Defendant Crane Co.'s Motion for Post-Trial Relief, Garvin v. AGCO Corporation*, No. 2012-CP-40-6675, Richland County Court of Common Pleas of South Carolina (Nov. 10, 2014)). After Mr. Garvin's trial, Justice Hill remitted the jury finding from \$10,000,000 in compensatory damages to \$1,500,000. The reasons for this remittitur were that Mr. Garvin was 74 years old, had testicular mesothelioma, and had several other serious medical conditions unrelated to his testicular mesothelioma. Additionally, Mr. Garvin was cancer-free and only had economic damages in the amount of \$149,000. Justice Hill noted that based on Mr. Garvin's pecuniary damages, the nature of his injury (testicular mesothelioma), his treatments, his age, and his life expectancy, there were compelling reasons to remit Mr. Garvin's verdict.

C. *Seay v. CNA Holdings, LLC*

Justice Hill also evaluated a request for new trial nisi remittitur in the *Seay v. CNA Holdings, LLC* case. *Order Denying Defendant CNA Holding, LLC's Motion for Post-Trial Relief, Angie Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay v. CNA Holdings, LLC*, No. 2013-CP-42-03915, Richland County Court of Common Pleas of South Carolina (Jan. 8, 2016)). Celanese requested that Justice Hill remit the jury's compensatory verdict from \$2,000,000 to \$1,500,000, which Justice Hill declined to do. *Id.* at *31. In support of his ruling, Justice Hill noted that Mr. Seay had pleural mesothelioma and suffered with chest and lung pain before his diagnosis. He noted all of Mr. Seay's pain and

suffering, including all of his medical treatments and surgeries to try and prolong his life. He noted that before his pleural mesothelioma diagnosis, Mr. Seay was “strong and in very good physical shape,” Justice Hill noted that Mr. Seay suffered from excruciating pain and mental distress, and that he found no compelling reason to reduce the compensatory verdict. Justice Hill further noted that the compensatory verdict was similar to other jury awards for someone with pleural mesothelioma.

Justice Hill further elaborated in his *Seay* post-trial order that:

As Celanese points out, in *Garvin*, this Court did remit the pain and suffering awarded to Mr. Garvin from \$10 million to \$1.5 million. But the cases are very different. Mr. Garvin was alive and cancer free at the time of his trial, whereas Mr. Seay suffered unrelenting pain until his mesothelioma killed him. Mr. Garvin was four years older at the time of trial than Mr. Seay was at his death, and Mr. Garvin’s life expectancy was a number of years shorter. Mr. Garvin suffered from a testicular form of mesothelioma, while Mr. Seay suffered from pleural mesothelioma that caused his death by suffocation.

Id. at *35.

Justice Hill also affirmed the jury’s award of \$5,000,000 for loss of consortium damages to Mr. Seay’s widow because she “suffered extreme hardship and loss” because of her husband’s mesothelioma. *Id.* at *36. Justice Hill noted how much time Mr. and Mrs. Seay spent together and the fact that Mrs. Seay took care of her husband when he was sick because he “always wanted her right beside him.” *Id.* at *36. Justice Hill noted that the loss of consortium award was supported by the trial evidence and was not unduly liberal. *Id.* at *37. Justice Hill acknowledged that, same as in *Garvin*, there was no compelling reason to disturb the loss of consortium verdict.

Justice Hill also affirmed the award of \$5,000,000 to the wrongful death claim noting that Mr. Seay would have had a life expectancy of 13 years had he not developed mesothelioma.

Finally, Justice Hill declined to remit the jury’s punitive verdict, finding of \$2,000,000 in total, or in the alternative to \$50,000. *Id.* at *43. Justice Hill walked through all of the evidence

that had been presented to the jury about how long Celanese had known about asbestos causing disease, how long Celanese had known that the asbestos on its premise exposed people to high enough levels of asbestos to cause disease, and that Celanese had knowingly and consciously disregarded the rights and safety of Mr. Seay and other workers on its premise and never warned anyone of asbestos hazards. Justice Hill wrote that:

...evidence included Celanese's decision to continue using asbestos products when there were available alternatives, and deliberately concealing the nature of the danger from contract workers like Mr. Seay. This was not isolated conduct, but continued for almost a decade...

Id. at *45.

D. Mr. Perry

The evidence shows that Mr. Perry's injuries are very different from Mr. Garvin's. Mr. Perry was 53 years old at the time of his diagnosis in 2023, more than 20 years younger than Mr. Garvin at the time of his trial. Mr. Perry has pleural mesothelioma and, as the jury heard from Dr. Haber, is facing a resurgence of his disease. He has no other severe medical conditions aside from his pleural mesothelioma and was in good physical health before his cancer diagnosis.

Mr. Perry is more similar to Mr. Seay. Mr. Perry, like Mr. Seay, has pleural mesothelioma. He has suffered extreme chest and lung pain. He has had extensive medical treatments, including but not limited to chemotherapy, radiation, and a six-to-eight surgery during which his back muscle was cut in half, his cancer-ridden lung lining was peeled off like an orange rind, his rib was removed, and his diaphragm was removed and reconstructed with mesh. The jury heard from Dr. Gibney that Mr. Perry's mesothelioma will recur, will be aggressive, and that when that happens, Mr. Perry will suffocate to death with a sensation of "drowning."

Relevant to both *Garvin* and *Seay* prior orders, Mr. Perry's loss of life expectancy was approximately 26 years. Mr. Perry had \$510,620.05 in medical bills, an amount that was stipulated

to as fair and reasonable by J&J. The record also shows that Mr. Perry had an economic loss of \$2,819,353, an amount also stipulated to by J&J as fair and reasonable. Therefore, Mr. Perry had a total economic loss of \$3,329,973.05, an amount that J&J stipulated to which was then presented to the jury. This is contrasted with Mr. Garvin's economic loss of \$149,000.

Evidence supports the fact that Mr. Long has felt the loss of his husband, and will continue to feel it long after Mr. Perry dies. The jury heard evidence that his husband gives him strength, and his entire life revolves around his relationship with Mr. Perry. The jury heard that Mr. Long takes Mr. Perry to every single doctor's appointment without fail, and loves his husband so much he could not even watch him testify at trial because it would be too painful to watch Mr. Perry be cross-examined.

Similar to the *Seay* order, the jury heard evidence that J&J continued to sell JBP knowing that it had asbestos in it and knowing that there was an alternative available in cornstarch the entire time JBP was sold. The jury also heard evidence that J&J deliberately misled the FDA as to the asbestos in its talc and deliberately designed, and advocated for the use of, underpowered testing methods so that the asbestos in its talc either would not be found or could be designated as "non-detect." The jury also heard evidence that J&J hid the fact that it had asbestos in its talc powder from the American public, including Mr. Perry. Finally, the jury heard evidence that J&J persisted in this conduct for decades – long after it first learned in the 1950s that its talc had tremolite asbestos in it.

As Justice Hill noted in his prior post-trial order in *Garvin*, "While the jury did decide on a large award, the Court has no reason to conclude it was the result of any improper motive or outside consideration. Placing a value on pain and suffering is inherently subjective." *Order*

Denying in Part and Granting in Part Defendant Crane Co. 's Motion for Post-Trial Relief, Garvin v. AGCO Corporation, at *32 (Nov. 10, 2014)).

However, the Court does find the verdict should be reduced because it is “merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). The verdict to Mr. Perry of \$23,037,500 shall be reduced by \$4,000,000 thereby leaving a verdict of \$19,037,500.

The Court finds the loss of consortium award shall be reduced because it is “merely excessive although not motivated by considerations such as passion, caprice or prejudice.” *Id.* The verdict to Mr. Long of \$9,618,750 shall be reduced by \$3,000,000 thereby leaving a verdict of \$6,618,750.

Finally, the Court finds that the jury’s punitive damages award is reasonable given the evidence at trial and that it is within the 3:1 ratio pursuant to S.C. Code Ann. §15-32-530. However, the Court finds that the punitive verdict against the Defendant shall be reduced by \$5,000,000, thereby leaving a punitive damage verdict of \$25,000,000. Against J&J.

Plaintiffs’ verdict of \$19,037,500 for Mr. Perry’s past and future total loss, \$6,618,750 for Mr. Long’s loss of consortium shall be set off by the fair and reasonable setoff of \$11,255,000, resulting in a compensatory judgment of \$14,401,250. The total punitive judgment, after reduction is \$25,000,000. Therefore, the total judgment to be entered against the J & J entities is \$39,401,250.

J&J’s request for nisi remittitur as to Plaintiffs’ compensatory awards and the punitive damages award is GRANTED.

[JUDGE’S SIGNATURE PAGE TO FOLLOW]



Richland Common Pleas

Case Caption: Michael L Perry , plaintiff, et al vs American International Industries ,
defendant, et al
Case Number: 2023CP4004072
Type: Order/Other

So Ordered

Jean H. Toal

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