

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2017-002611
Case No. 2016-CP-42-1592

Beverly Dale Jolly and Brenda Rice Jolly, ... Respondents,

v.

General Electric Company, et al., ... Defendants,

Of whom Fisher Controls International LLC and Crosby
Valve, LLC are the Appellants.

RECORD ON APPEAL
VOLUME I

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**RECORD ON APPEAL
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Certificate of Counsel

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016- CP-42-1592

Beverly Dale Jolly

Crosby Valve, LLC, et al.

Brenda Rice Jolly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), 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: DEFENDANTS' MOTION TO QUASH PLAINTIFFS' TRIAL SUBPOENAS IS DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : *See attached order*

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.

[Signature]
Circuit Court Judge

2758
Judge Code

9-21-17
Date

SCRCP Form 4C (02/2017)

Page 1 of 4

For Clerk of Court Office Use Only

This judgment was entered on the 25 day of Sept., 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of Sept., 2017 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley
CLERK OF COURT
M. Hope Blackley

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-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

2017 SEP 25 AM 9:17
M. HOPE BLACKLEY
SECRETARY

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
BEVERLY DALE JOLLY and BRENDA RICE JOLLY,	)	
Plaintiffs,	)	
v.	)	C/A No. 2016-CP-42-1592
CROSBY VALVE, LLC, et al.	)	
Defendants.	)	ORDER

**ORDER ON DEFENDANTS' FISHER CONTROLS INTERNATIONAL, LLC AND
CROSBY VALVE, LLC'S MOTIONS TO QUASH PLAINTIFFS' TRIAL SUBPOENAS**

Before the Court are Defendants Fisher Controls International, LLC ("Fisher") and Crosby Valve, LLC's ("Crosby" or collectively "Defendants") motions to quash Plaintiffs' trial subpoenas. For the reasons set forth below, the Defendants' Motions to Quash should be and therefore are denied.

BACKGROUND

Plaintiffs served Defendant Fisher and Defendant Crosby with trial subpoenas on July 12, 2017 for trial beginning July 24, 2017. The trial subpoenas were served via hand delivery by Federal-Express to the law firm of Bouch Leath & Seekings at 92 Broad St., Charleston, SC 29401, and were signed for by *McLeod* (misspelled McCloud by carrier). Counsel for Fisher and Crosby, Yancey McLeod concedes that he was the recipient of the hand-delivered subpoenas.

On July 20, 2017, Defendants filed motions to quash the trial subpoenas of both Defendant Fisher and Defendant Crosby.

LAW AND ANALYSIS

Defendants claim Plaintiffs' trial subpoenas are not valid "in that Fisher (and Crosby) is not a resident of South Carolina and was not served pursuant to the rule." Defs' Mot. to Quash at 1. Defendants' argument fails to recognize that Defendants Fisher and Crosby are parties to this action who have submitted to the jurisdiction of this Court. They are not merely non-party witnesses.

Rule 45, SCRPC, only allows *non-parties* to quash a trial subpoena. The rule states in pertinent part, as follows:

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance; or
(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provision of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
(iii) requires disclosure of privileged or otherwise protected matter, and no exception or waiver applies; or
(iv) subjects a person to undue burden.

Rule 45(c)(3)(A), SCRPC (emphasis added). Rule 45 thus provides that only a non-party may quash a subpoena for geographic or travel reasons, and even then a non-party may be subpoenaed to attend trial from anywhere in the state.

The rule does provide a mechanism for quashing a trial subpoena, but again only for non-parties:

(B) If a subpoena . . .

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

Rule 45(c)(3)(B), SCRCP (emphasis added). There is simply no provision for a party to quash a trial subpoena because the party resides outside the county or even the state.

In contending that they cannot be compelled to attend trial because they are corporations, Fisher and Crosby ignore the key fact that they are parties to this case. Their status as nonresident corporations does not change the fact that they have submitted to the jurisdiction of this Court by making a general appearance and litigating this case to trial. A general appearance constitutes a voluntary submission to the jurisdiction of the court. See, e.g., *Stickland v. Consol. Energy Prod.*

#3
JST
Co., 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980);
Brays Island Plantation, Inc. v. Harper, 245 S.C. 399, 405, 140 S.E.2d 781, 784 (1965).

The Court should reject Defendants' arguments that the only mechanism to secure trial testimony from Fisher and Crosby's corporate representatives is through a Rule 30(b)(6) deposition. There is no authority for the proposition that Plaintiffs cannot obtain live testimony from a party to this case. Rule 32 references the use of depositions of "witnesses" that reside more than 100 miles from the courthouse, not parties.

Defendants contend that Plaintiffs can present the testimony of the Defendants from depositions taken in other cases from other states. Defendants overlook the fact that, in addition to the reality that these Defendants are parties to the instant actions, that these other depositions are piecemeal, from other cases in other jurisdictions, and generally must be read in from paper

transcripts.¹ It is only fair that Plaintiffs be allowed to question Defendants, through their representatives, through live testimony at trial. In-person testimony will certainly aid the jury's understanding of the relatively complex issues presented in this case regarding Defendants' wrongful conduct in manufacturing and marketing asbestos products without a warning and their knowledge of the danger.

Finally, there is also no merit to Fisher and Crosby's contention that Plaintiffs' method of service was deficient. The Editor's Notes to the 2002 Amendments to Rule 45 confirm that a subpoena may be served on a corporation and that such service may be made on the corporation's attorney:

The first 2002 amendment amends Rule 45(b)(1) to permit service of subpoenas by the same method as used to serve a summons and complaint.

First, in addition to in hand service of the subpoena, service on an individual could be made by leaving the subpoena at the person's home or usual place of abode with a person of suitable age and discretion then residing there provided in Rule 4(d)(1). Second, *a subpoena could be served on an individual, a corporation, or a partnership by registered or certified mail, return receipt requested and delivery restricted to the addressee under Rule 4(d)(8). In addition, the person or the person's attorney may accept service under Rule 4(j).*

Notes to 2002 Amendments, Rule 45, SCRPC (emphasis added).

Further, subsection (j) of Rule 4 defines acceptance of service and provides that "[n]o other proof of service shall be required *when acceptance of service is acknowledged in writing and signed by the person served or his attorney*, and delivered to the person making service. The

¹ Defendants also, in contending that Plaintiffs must rely only on Rule 30(b)(6), appear to be of the position that Plaintiffs must conduct discovery and preserve trial testimony in the same deposition and in the same sitting. This fundamentally undermines the purpose and value of discovery in a civil case.

acknowledgement shall state the place and date service is accepted." Rule 4(j), SCRCPP (emphasis added).

In addition, Rule 5(b), SCRCPP applies to all service requirements listed in any South Carolina Rule of Civil Procedure. Subsection (b)(1) of Rule 5 provides that unless the Court orders that service on the party must be made personally, then whenever "service is required to be made upon a party represented by an attorney the service shall be made upon the attorney." *Id.* Rule 5 even defines delivery as meaning "handing it to the attorney or the party or leaving it at his office with his clerk or other person in charge thereof." *Id.*

Here, the Court never ordered that either Defendant Fisher or Defendant Crosby were to be served personally in circumvention of Rule 5(b)(1), therefore Defendant Fisher and Defendant Crosby "shall" be served by their attorney of record in the pending case pursuant to Rule 5(b)(1).

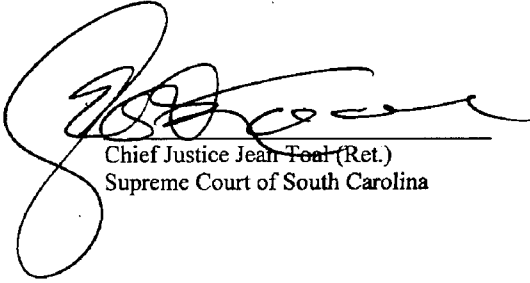
Secondly, Plaintiffs have provided the Court with Defendants' acknowledgment of acceptance of service in writing and signed by the person served or his attorney. Finally, Plaintiffs served timely valid subpoenas for attendance at trial, issued pursuant to Rule 45, served on Defendants pursuant to rule Rule 5(b)(1) and acknowledged by Defendant through signature of acceptance of service pursuant to Rule 4(j). Rules 4, 5 and 45, SCRCPP.

CONCLUSION

Therefore, Plaintiffs are entitled to an Order denying Defendants' motions to quash Plaintiffs' trial subpoenas and for an order compelling Defendant Fisher and Defendant Crosby to comply with Plaintiffs' trial subpoenas and appear at trial to give live testimony in Plaintiffs' case-in-chief.

For the reasons set forth above, Defendants Motion to Quash is DENIED and Defendants Crosby and Fisher are ORDERED to appear and present a corporate representative for examination at trial.

SO ORDERED.



Chief Justice Jean Toal (Ret.)
Supreme Court of South Carolina

#6

CLERK
SPARTANBURG DISTRICT
2017 SEP 25 AM 9:17
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-42-1592

Beverly Dale Jolly and

General Electric Company, et al.

Brenda Rice Jolly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Theile B. McVey

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), 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

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

SCRCP Form 4C (02/2017)

2758
Judge Code

12-15-17
Date

Page 1 of 4

ROA_00009

ELECTRONICALLY FILED - 2017 Dec 15 10:10 AM - SPARTANBURG - COMMON PLEAS - CASE#2016CP4201592

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

Defendants' post-trial Motions are **DENIED**.

Plaintiffs' post-trial Motions are **GRANTED**.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
BEVERLY DALE JOLLY and	)	FOR THE SEVENTH JUDICIAL
BRENDA RICE JOLLY,	)	CIRCUIT
	)	
Plaintiffs,	)	C/A No. 2016-CP-42-1592
	)	
v.	)	ORDER DENYING DEFENDANTS'
	)	POST-TRIAL MOTIONS AND
GENERAL ELECTRIC COMPANY, et al.	)	GRANTING PLAINTIFFS' MOTION
	)	FOR NEW TRIAL <i>NISI ADDITUR</i>
Defendants.	)	
	)	
	)	
	)	


 In this asbestos case, each of the parties has sought relief from the jury's August 3, 2017 verdict. For the reasons set forth below, Plaintiffs Dale and Brenda Jolly's motion for new trial *nisi additur* is GRANTED, the joint motions of Defendants Fisher Controls International LLC ("Fisher") and Defendant Crosby Valve, LLC ("Crosby") for judgment notwithstanding the verdict, election of remedies, and discovery of settlements are DENIED, and Defendants' joint motion for set-off under S.C. Code § 15-38-50 is GRANTED in part.

I. The Evidence at Trial

Dale Jolly was diagnosed with mesothelioma at the age of 71. (TT 7/25 at 58-59; TT 7/26 at 100). Mr. Jolly and his wife, Brenda, brought this action against companies that made asbestos products Mr. Jolly worked with during his career working at Duke Power as a mechanical inspector. Evidence at trial indicated that between 1980 and 1984, Mr. Jolly was exposed to asbestos gaskets and packing while inspecting pumps and valves, including valves manufactured by Fisher and Crosby. (TT 7/25 at 61-63, 72-76, 84-94).

Mr. Jolly worked at three of Duke's nuclear power plants: Oconee, McGuire, and Catawba. (TT 7/25 at 66-67). His job put him alongside mechanics that were changing asbestos gaskets

and/or asbestos packing on valves, particularly during outages at the plant, and he recalled that the use of grinders and brushes created dust. (TT 7/25 at 74-76, 84-94). He recalled that there were a lot of Fisher and Crosby valves present at those plants. (TT 7/25 at 72-73, 90-91). At times, engineers from Fisher or Crosby were present to assist with the maintenance of the valves. (TT 7/25 at 107).

Exposure testimony was also provided by Mr. Jolly's co-worker, David Taylor, who worked at the same Duke nuclear plants where Mr. Jolly was stationed, particularly Oconee. (TT 7/25 at 198-201). As a pipefitter, it was Mr. Taylor's job to connect and disconnect valves and pumps to and from pipe systems. (TT 7/25 at 201). He explained that he bolted valves to pipe flanges, and that there was a gasket between the pipe and the valve to seal the connection. (TT 7/25 at 201). He had to remove valve gaskets about once a week. (TT 7/25 at 204). He removed asbestos gaskets from valve flanges with a scraper or wire brush, which created a lot of dust. (TT 7/25 at 202, 204-05). Mr. Jolly was nearby when Mr. Taylor and other workers removed asbestos flange gaskets. (TT 7/25 at 207-09, 220).

Fisher and Crosby sold valves to Duke that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 7/25 at 74; TT 7/27 at 187-89; 7/31 at 122-23, 125, 164-65). Those flanged connections utilized asbestos gaskets. (TT 7/25 at 210). Fisher and Crosby valves also had internal asbestos gaskets and packing. (TT 7/25 at 210-13).

The original and replacement asbestos valve gaskets came from Fisher and Crosby. (TT 7/25 at 214-15; TT 7/26 at 214-15; TT 7/27 at 104-05). Most of the valve flange gaskets sold by Fisher and Crosby were asbestos gaskets. (TT 7/26 at 202, 210-13; Pl's Ex. 1012.6). Asbestos gaskets contain up to 90% asbestos. (TT 7/26 at 51-52).

The evidence at trial also established that at least some of the gaskets and packing sold by Defendants contained crocidolite, or Blue African asbestos. (Pl's Ex. 1008.10670; Pl's Ex. 1008.10665). Fisher also had a specification for crocidolite packing. (TT 7/27 at 201-02, 206; Pl's Ex. 2006.037). Defense expert Dr. Oury testified that gaskets and packing were known to contain crocidolite. (TT 8/2 at 188-89; Crosby Ex. 533). Crocidolite is known to be by far the most potent type of commercial asbestos fiber. (TT 8/1 at 114; TT 8/2 at 179).

There was testimony that Mr. Jolly's exposures to asbestos from Fisher and Crosby valves were many orders of magnitude above background levels. (TT 7/26 at 76-77). Dr. Frank testified that Mr. Jolly's exposures were extensive and repetitive. (TT 7/26 at 71).

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Both of Plaintiffs' medical experts, Dr. Arthur Frank and Dr. John Maddox, testified that Mr. Jolly's exposure to asbestos from Fisher and Crosby valves was a substantial factor in the development of his mesothelioma. (TT 7/26 at 72-73; TT 7/31 at 180-82). They testified that mesothelioma can be caused by brief or low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). Even Defense expert Dr. Crapo admitted that a "very low" level of exposure to crocidolite can cause mesothelioma. (TT 8/1 at 114).

Experts on both sides agreed that Mr. Jolly's mesothelioma would most likely be fatal. (TT 7/26 at 99; TT 8/2 at 190). Dr. Frank testified that Mr. Jolly would likely die in a year or less. (TT 7/26, at 99-100). Mesothelioma was described as an unusually painful disease. (TT 7/26 at 98; TT 8/1 at 150-53). Dr. Frank and defense expert Dr. Crapo indicated that Mr. Jolly will continue to require medical care until his death. (TT 7/26 at 101-02; TT 8/1 at 153).

A jury trial was held against Fisher and Crosby in July and August 2017. The jury considered Plaintiffs' claims of negligence, strict products liability, and breach of implied warranty. They returned a verdict for Plaintiffs on the negligence and breach of implied warranty

claims, and awarded \$200,000 in compensatory damages to Mr. Jolly and \$100,000 in compensatory damages to Mrs. Jolly.

II. Ruling on Motion for New Trial *Nisi Additur*.

A. Standard of Review

A new trial *nisi additur* may be granted when the trial court finds the amount of the verdict to be "merely inadequate" in light of the evidence presented at trial. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (2003); *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996). When granting a motion for *additur*, the court must offer compelling reasons. *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). "Great deference is given to the trial judge . . . [because] the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate courts]." *Waring v. Johnson*, 31 S.C. 248, 257, 533 S.E.2d 906, 911 (2000).

"A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." *Waring*, 31 S.C. at 257, 533 S.E.2d at 911. The trial court has the authority grant a new trial to the plaintiff unless the defendant agrees to the payment of an additional amount. *Id.* at 258, 533 S.E.2d at 911.

B. Additur

A new trial *nisi additur* is warranted when a jury has awarded medical damages for injuries caused by the defendant but has failed to consider the plaintiff's pain and suffering associated with those injuries. *See Waring v. Johnson*, 31 S.C. 248, 260, 533 S.E.2d 906, 912 (2000). In *Waring*, the jury only awarded the exact amount of the plaintiff's medical expenses, \$23,237.28, associated with her injuries from a car wreck. The Supreme Court found that it was proper to grant a *nisi*

additur of \$40,000 given the evidence that the plaintiff's pain was caused by her injury and that she was unable to continue her previously active lifestyle. *Id.* at 260, 533 S.E.2d at 912; *see also id.* at 258-59, 533 S.E.2d at 911-12 (collecting South Carolina cases upholding trial court orders granting new trial *nisi additur* under the abuse of discretion standard).

In *Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015), the Supreme Court held that the trial court had not abused its discretion in granting a *nisi additur* in the amount of \$600,000. This was a product liability case against Ford brought by the estate of a man who was killed when his door latch failed in a car accident. *Id.* at 189, 777 S.E.2d at 826-27. The uncontradicted evidence was that the family had \$228,000 in economic damages, plus a number of witnesses testified about the significant noneconomic damages suffered by his family. *Id.* at 193, 777 S.E.2d at 829. The trial court found the jury's verdict of \$300,000 to be inadequate, granted a *nisi additur* of \$600,000, and entered judgement for \$900,000. *Id.* at 189, 777 S.E.2d at 827.

In upholding the grant of a new trial *nisi additur*, the Supreme Court clarified that a *nisi additur* may be appropriate even when the jury has awarded some amount for noneconomic damages. *Id.* at 194, 777 S.E.2d at 829-30. The trial court had articulated compelling reasons for granting the *nisi additur*, including "a thorough recitation of the 'uncontested, and emotionally compelling' evidence, including testimony and supporting exhibits that demonstrated both the pecuniary losses suffered by the Riley family and also the noneconomic compensable elements of loss that are recoverable in a wrongful death action." *Id.*; *see also Graham v. Whitaker*, 282 S.C. 393, 405, 321 S.E.2d 40, 45 (1984) (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from \$10,000 to \$67,500).

When considering a new trial *nisi*, it is proper to compare the jury's verdict to damages awards in comparable cases. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976); *see also Kapuschinsky v. U.S.*, 259 F. Supp. 1, 8 (D.S.C. 1966) ("Admittedly not controlling, but worthy of note are treatments of verdicts from all over this country").

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 Damages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million. *See, e.g., Keene v. CNA Holdings, LLC*, No. 2013-CP-42-03915 (S.C. Ct. Comm. Pleas Jan. 8, 2016) (upholding award of \$2 million in survival damages, \$5 million in loss of consortium damages, and \$5 million in wrongful death damages); *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas Nov. 14, 2014) (remitting the jury verdict to award \$1.5 million for the plaintiff's pain and suffering and upholding the loss of consortium award of \$1 million); *see also Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017) (affirming in relevant part the district court's award of \$3 million in pain and suffering damages for woman with asbestos-related mesothelioma); *Romano v. Metropolitan Life Ins. Co.*, --So.3d --, 2017 WL2265424 (La. Ct. App. 2017) (increasing pain and suffering award from \$500,000 to \$1.5 million in mesothelioma case where plaintiff had endured invasive surgery and was expected to die from his disease); *John Crane, Inc. v. Linkus*, 190 Md. App. 217, 988 A.2d 511 (Md. Ct. App. 2010) (upholding \$15,335,274 verdict for living shipyard worker diagnosed with mesothelioma at the age of 70, of which \$335,000 was medical expenses and \$15 million was noneconomic loss); *In re New York City Asbestos Litigation (Re D'Ulisse)*, 16 Misc.3d 945, 842 N.Y.S.2d 333 (N.Y. Sup. Ct. 2007) (denying motion to reduce award of \$20 million in past and future pain and suffering to mesothelioma victim and \$5 million to his wife of 51 years); *Williams v. CSX Transp., Inc.*, 176 N.C.App. 330, 626 S.E.2d 716 (N.C. Ct. App. 2006) (affirming verdict in which railroad worker with mesothelioma was awarded \$7.5 million in pain and suffering

damages); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 17, 27-28 (Mo. Ct. App. 2004) (upholding award of \$2 million for pre-death pain, suffering and emotional distress where 43-year-old had survived one year with mesothelioma).

The South Carolina Supreme Court has held that the goal of compensatory damages is “to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.” *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000).

Under this case law, it is clear that the Jollys’ verdict is inadequate and should be increased to more accurately reflect the extent of their losses. The jury only awarded Mr. Jolly medical expenses in the amount of \$142,000, plus \$58,000 for pain and suffering.

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The jury was instructed that, “[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the accident or incident occurred. Actual damages would be the actual losses and expenses the Plaintiffs have incurred.” (TT 8/3 at 139). The jury was instructed on four categories of actual damages – medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. (TT 8/3 at 139-40). The jury was also instructed that future damages should be awarded for the duration of Mr. Jolly’s life expectancy, which is a little more than eleven (11) years given his age of 73. (TT 8/3 at 141-42).

The evidence supported damages in all of these categories, and for future damages. The jury’s award of only \$200,000 was not sufficient to make Mr. Jolly whole for the magnitude of his losses resulting from his mesothelioma diagnosis, treatment, and expected death.

Testimony bearing on damages was offered by Plaintiffs Dale and Brenda Jolly, their daughter, Tracy Pavlish, Plaintiffs’ expert Dr. Arthur Frank, and defense expert Dr. James Crapo.

As noted, Dr. Frank testified that all of the medical treatment received by Mr. Jolly was medically necessary. (TT 7/26 at 100). Dr. Frank testified, *without dispute*, that the total cost of Mr. Jolly's past and future medical care, from the time of his diagnosis to the time of his death, would reasonably be \$1,000,000. (TT 7/26 at 101, 179). This undisputed testimony took into account some of Mr. Jolly's past medical bills of \$142,000, plus the cost of his surgery that was hundreds of thousands of dollars. (TT 7/26 at 101, 193).

The jury heard evidence that Mr. Jolly is currently undergoing an experimental therapy that requires him to go for treatments and doctor visits several times a week. (TT 7/25 at 145, 162-63, 172; TT 7/26 at 100). Experts on both sides agreed that Mr. Jolly's would likely die from mesothelioma and that his medical needs would increase as he got sicker and closer to death. (TT 7/26 at 101-02; TT 8/1 at 153).

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Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, the Court will increase the medical expenses award to \$1,000,000.

The Court also finds that the jury's award of \$58,000 for Mr. Jolly's pain and suffering is inadequate. There was evidence that after his diagnosis Mr. Jolly suffered greatly through three rounds of chemotherapy, and endured surgery that involved removing his rib and scraping out the tumor. (TT 7/25 at 145, 159-60, 175; TT 7/26 at 96-97, 102). He lost 45 pounds. (TT 7/25 at 60). His recovery from the surgery required months of rehabilitation to help him regain his ability to walk and to breathe without oxygen. (TT 7/25 at 161-62). At the time of trial, he was on an experimental treatment that he said "brings you to your knees." (TT 7/25 at 145). Dr. Frank and defense expert Dr. Crapo both confirmed that the pain associated with mesothelioma is quite bad. (TT 7/26 at 98; TT 8/1 at 150-53).

This is not to mention Mr. Jolly's expected death, which Dr. Crapo described at length as "in no way . . . a comfortable death [because it is] a very bad tumor," "not a very good death," and "a bad death." (TT 8/1 at 151, 152, 153). Mr. Jolly will continue to waste away and by the end of his life will likely require feeding by a feeding tube or intravenously, and will be on hospice care. (TT 7/26 at 102).

There was also substantial evidence of Mr. Jolly's loss of enjoyment of life. The evidence is that he was a very healthy, active person prior to his diagnosis and that because of his mesothelioma he can no longer do any of the things that bring him joy. (TT 7/25 at 157). The testimony was that his life "came to a halt" after his diagnosis. (TT 7/25 at 156-57). He was still working at Duke at the time of his diagnosis, at the age of 71, because he "loved" his work. (TT 7/25 at 64). He had to stop because of his illness. (TT 7/25 at 59). He used to keep a vegetable garden and spend a lot of time gardening and mowing the grass, which he can no longer do. (TT 7/25 at 165). He cannot go to church or have friends over for dinner. (TT 7/25 at 173). They used to go to the beach for a vacation every year and they can no longer do that. (TT 7/25 at 173).

Mr. Jolly has also suffered mental anguish. His daughter testified that he was "heartbroken" by the diagnosis, (TT 7/25 at 157), and became "depressed" after going through chemotherapy. (TT 7/25 at 159, 175). She explained that he was "devastated" by the recent news that his cancer had come back. (TT 7/25 at 162). Mr. Jolly's mental anguish was evident for the jury to witness, as he became overwhelmed with emotion. (TT 7/25 at 107-08).

The Court will increase Mr. Jolly's noneconomic damages award by a factor of ten, and award \$580,000.

The Court will also increase Mrs. Jolly's loss of consortium damages. The evidence established that Mr. and Mrs. Jolly have been married for 51 years. (TT 7/25 at 170). Mrs. Jolly

has turned into Mr. Jolly's caregiver and has witnessed him in a lot of pain. (TT 7/25 at 167, 173). Her own health has been neglected to the point that she had a heart attack a few weeks before trial. (TT 7/25 at 163-64). Her daughter described her as "really scared" by the return of the cancer. (TT 7/25 at 162).

Given everything that the Jollys have endured, and that her time with Mr. Jolly will be cut short by at least ten years, the jury's award of \$100,000 in loss of consortium damages is inadequate to compensate Mrs. Jolly for her losses. The evidence supports a loss of consortium award of \$290,000.

The Court therefore grants a new trial *nisi additur* and orders an added verdict of \$1,580,000 to Mr. Jolly and \$290,000 to Mrs. Jolly.

III. Ruling on Defendants' Joint Motion for Judgment Notwithstanding the Verdict

Fisher and Crosby have raised nine separate points of error in support of their motion for judgment notwithstanding the verdict. The Court denies Defendants' motion on all grounds.

A. Standard of Review

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In ruling on a JNOV motion, the Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in

its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

B. Open and Obvious Danger.

Fisher and Crosby first contend that they had no duty to warn Jolly because the danger was open and obvious. This is contradicted by the fact that Fisher and Crosby took the position at trial that asbestos gaskets and packing are not dangerous. (TT 7/27 at 145-46). The jury could have concluded that neither Duke, nor Mr. Jolly, knew that the asbestos gaskets and packing used in Fisher and Crosby valves were dangerous because Fisher and Crosby completely denied that.

“A seller is not required to warn of dangers or potential dangers that are generally known and recognized.” *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41-42, 674 S.E.2d 500, 504 (Ct. App. 2009) (quoting *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (Ct. App. 1996). The jury was instructed to this effect in this case. It was told that there is no duty to warn of a danger that is “obvious” or that is “generally known and recognized.” (TT 8/3 at 124).

In arguing that Mr. Jolly was aware of the danger, Defendants rely entirely on his testimony regarding warnings that Duke provided about asbestos insulation. (TT 7/25 at 119-20, 124-25, 130, 135). There was evidence that Duke did not know that asbestos gaskets were hazardous, and thus was not warning its employees. (Pl's Ex. 136). A Duke document from September 1984 instructing employees how to protect themselves from asbestos insulation, states that asbestos used in gasket material is “bonded, which means it produces virtually no dust.” (Pl's Ex. 136 at Script, p. 3). Mr. Jolly explained that he was only warned by Duke about asbestos hazards that Duke knew about. (TT 7/25 at 142). Mr. Jolly's co-worker, David Taylor, testified that when Duke gave its employees information about asbestos hazards, Duke made a distinction between insulation and gaskets. (TT 7/27 at 126). Employees did not know there was a danger from asbestos gaskets until several years

after Duke started warning that precautions needed to be taken around asbestos insulation. (TT 7/27 at 127).

Fisher's representative, Ronald Duimstra, contended at trial that, with regard to asbestos components sold with Fisher valves and as replacement parts "there's no health risk and therefore there would be no reason to warn." (TT 7/27 at 146; *see also id.* at 148). Duimstra testified that there was no action for Duke to take with respect to warning about asbestos gaskets and packing. (TT 7/27 at 148-49, *emphasis added*). Crosby's representative, Robert Martin (TT 7/31 at 2, 4), similarly testified that "[w]e saw no danger from the gasket and the way we use them." (TT 7/31 at 33).

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Not only do Fisher and Crosby contend there was no health hazard from working with asbestos gaskets and packing, they did not always inform Duke that these materials contained asbestos. Some of Fisher's asbestos-containing packing specifications did not describe the material as containing asbestos, and instead referred to it as metallic or plastic. (TT 7/27 at 208-09). Mr. Duimstra agreed that a reference to a metal packing ring would not alert people that the product contained asbestos. (TT 7/27 at 210). Duke purchase orders to Fisher stated the Fisher part number and a brief description, but oftentimes in order to determine if the part contained asbestos one would have to reference Fisher's own material specification for that part number. (TT 7/27 at 215-16, 221-22, 225; Pl's Ex. 1012.5). Jolly's co-worker, David Taylor, testified that the only way to know if a gasket had asbestos was whether it was marked as asbestos-containing on the gasket packaging. (TT 7/27 at 115).

The Court finds that it is not possible to conclude, as a matter of law, that asbestos gaskets and packing were obviously dangerous to Mr. Jolly when Fisher and Crosby completely deny that they were dangerous at all and did not consistently notify Duke and its employees that valve

gaskets and packing were asbestos-containing. The question of whether Mr. Jolly knew about the danger of working around asbestos gaskets and packing was for the jury, which it decided in Plaintiffs' favor.

C. Sophisticated Intermediary Defense

The South Carolina Supreme Court has observed that the sophisticated intermediary defense has not been adopted in South Carolina. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015), *reh'g denied* (Feb. 12, 2016). The Court nevertheless determined that the jury should be instructed on this defense under the facts of this case. This is an affirmative defense for which Defendants had the burden of proof. *See Webb v. Special Elec. Co.*, 63 Cal. 4th 167, 187, 370 P.3d 1022, 1034 (2016).

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The jury decided this issue in Plaintiffs' favor. The Court finds that their verdict is supported by the evidence and that Fisher and Crosby are not entitled to judgment as a matter of law on this defense. Fisher and Crosby did not show that they warned Duke; the evidence was that Fisher and Crosby provided no warnings to Duke. (TT 7/27 at 144; TT 7/31 at 64-65). Fisher and Crosby also failed to show that they knew Duke was aware or should have been aware of the danger from asbestos gaskets. The evidence was that Duke distinguished asbestos gaskets as non-hazardous because it was thought they did not release asbestos fibers when disturbed. (Pl's Ex. 136 at Script, p. 3; TT 7/27 at 126). There was no evidence that Fisher and Crosby were relying on Duke to inform its employees of those hazards. The record thus supports the jury's rejection of this defense.

D. Product in Same Condition.

Fisher and Crosby contend that they are not liable for Mr. Jolly's exposure to asbestos flange gaskets because the flange gaskets "were placed between piping and the Defendants' valves

after they were sold and sent to Duke.” JNOV Motion at 10. Because the flange gaskets were applied to the flange during the installation of the valve at the power plant, Fisher and Crosby argue that the valve was not in the same condition as when they sold it.

The Court does not agree that connecting flanged valves to a pipeline in the field is an alteration of the valve. Fisher and Crosby sold valves that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 7/27 at 187-89; 7/31 at 18-19, 122-23, 125). The evidence was that Fisher and Crosby intended that flange gaskets would be used to connect their valves to the pipe line. (TT 7/27 at 188-89). Mr. Martin agreed that “the design was a flange that would have to have a gasket.” (TT 7/31 at 123).

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Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). Defendants’ engineers determined what materials the flange gaskets were made of to create the right seal under different conditions. (TT 7/27 at 189). Mr. Taylor recalled that the Fisher and Crosby valves present at Duke had flange connections that utilized asbestos flange gaskets. (TT 7/26 at 210-13).

Fisher and Crosby did not simply sell valves, they both also sold replacement asbestos flange gaskets to Duke. Mr. Taylor testified that all of the valve flange gaskets were supplied by the valve manufacturers. (TT 7/26 at 214-15; TT 7/27 at 104-05). Most of those valve flange gaskets were asbestos gaskets. (TT 7/26 at 202, 210-13). Duke purchase orders corroborate his recollection, as they show asbestos flange gaskets being sold by Fisher. (PI’s Ex. 1012.6). The evidence supports a jury finding that Mr. Jolly was exposed to asbestos flange gaskets sold directly by Defendants.

To the extent that the use of a flange gasket on a flanged valve could be considered an “alteration” of the valve, it was an entirely foreseeable and expected modification. “Liability may

be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller.” *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997). Only “if it can be shown that the product was (1) materially altered before it reached the injured user and (2) such alteration could not have been expected by the manufacturer or seller, then the manufacturer or seller is not liable.” *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592–93 (1994).

Fisher and Crosby did not show that the “alteration” of their valves by placing a flange gasket in the valve flange was unexpected. The valves could not be placed in service without use of a flange gasket, and, as noted, Fisher and Crosby sold asbestos flange gaskets to Duke. The jury declined to find an unexpected alteration to the valves simply from application of a flange gasket in the field that was called for by Defendants’ flanged valve design. Their determination is supported by the record.

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E. Proximate Causation

Fisher and Crosby next contend that Plaintiffs did not show that Defendants’ failure to warn about the dangers of asbestos exposure from their valves was a proximate cause of Jolly’s mesothelioma. They contend that there is no evidence that Jolly would have heeded such a warning if it had been given. The Court disagrees.

Defendants rely on *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998), which does state the basic rule that the failure to warn must be the proximate cause of the plaintiff’s injuries. *Allen* makes clear, however, that the issues of proximate cause, and the adequacy of the defendant’s warning, are for the jury to decide. *Id.* at 432–33, 505 S.E.2d at 360. In *Allen*, the product manufacturer did warn and the plaintiff did not follow the warning. But

because there was evidence that the warning was inadequate, that created a fact issue as to whether a different warning would have caused the plaintiff to behave differently. *Id.*

Here, there was a fact issue for the jury. There was evidence that Mr. Jolly followed every asbestos warning he was given. He testified that when he saw asbestos warnings at Duke, he heeded them and avoided touching asbestos insulation. (TT 7/25 at 120). He did not go into areas that were cordoned off for asbestos abatement. (TT 7/25 at 125). When he was in a zone that required a respirator, he wore a respirator. (TT 7/25 at 121, 127). There was also evidence that Jolly checked for any applicable warnings on Fisher and Crosby products. (TT 7/25 at 142).

There was evidence that Fisher and Crosby did not warn about the hazards of asbestos on the asbestos-containing products they sold to Duke. (TT 7/25 at 209-10, 218-19; TT 7/27 at 143-44, 232; TT 7/31 at 64-65). Plaintiffs' expert, Dr. Frank, testified that product warning labels were required by OSHA as of 1972 and that Fisher and Crosby's products should have contained asbestos warnings. (TT 7/26 at 110-11, 189).

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JTS
The record therefore supports the jury's conclusion that Mr. Jolly would have followed an adequate warning if one had been present on Fisher and Crosby products. Under *Allen*, the mere fact that an adequate warning was missing from the products was sufficient to create a jury question regarding whether an adequate warning would have changed Jolly's behavior. 332 S.C. at 432-33, 505 S.E.2d at 360. The evidence supports the jury's determination that Fisher and Crosby's failure to warn was a proximate cause of Jolly's mesothelioma.

F. Design Defect

Fisher and Crosby contend that Plaintiffs failed to prove their design defect claims because, they argue, there was no evidence of a reasonable alternative design. While a reasonable alternative design must be shown, this is part of the risk-utility test for design defect that is a matter for the

jury to decide. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 219, 701 S.E.2d 5, 13 (2010). The jury weighs the availability of a feasible alternative design, as well as the associated costs, safety, and functionality. *Id.* at 225, 701 S.E.2d at 16.

Evidence at trial showed that Fisher and Crosby had alternative feasible designs available to them at the time they were selling asbestos gaskets and packing with their valves and as replacement parts. Mr. Duimstra agreed that non-asbestos gasket and packing materials were always available. (TT 7/28 at 141). Mr. Martin also agreed that "one of the standards at that time would be asbestos but there are other materials they could have used." (TT 7/31 at 122-23).

Mr. Duimstra and Mr. Martin both testified that there were a variety of non-asbestos gasket materials available, including graphite, metal, and Teflon. (TT 7/28 at 100; TT 7/31 at 125). Defendants both sold some valves to Duke that did not contain asbestos materials. (TT 7/31 at 139, 163).

With regard to packing, Mr. Duimstra testified that Teflon had been available since the 1950s, and could have been sold instead of asbestos packing. (TT 7/28 at 100-01, 140-41). He acknowledged that there was no reason for Mr. Jolly to be exposed to asbestos gaskets and packing because of the availability of alternative materials. (TT 7/28 at 145-46).

The record showed that there were multiple non-asbestos materials that were available to Fisher and Crosby and that they have could have sold gaskets and packing to Duke that were made exclusively out of graphite, metal, or Teflon. Defendants did, in fact, sell gaskets and packing to Duke that were made out of these alternative materials. The evidence created a fact-issue for the jury on reasonable alternative design, and supports their finding in Plaintiffs' favor on this issue.

G. Standard of Care

The Court does not agree with Fisher and Crosby's contention that there was a lack of evidence as to the standard of care and their deviation from that standard. A product manufacturer is held to the skill of an expert in its business and to an expert's knowledge of the materials and processes in its industry. *Carolina Home Builders, Inc.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972); *see also Humphries v. Mack Trucks, Inc.*, 198 F.3d 236 (4th Cir. 1999); § 32-20 Products Liability - Standard of Care - Manufacturer, Anderson, S.C. Requests to Charge - Civil, 32-20. The manufacturer is therefore required to keep abreast and aware of current standards and scientific knowledge in his industry. *Id.* Because the manufacturer is held to the knowledge and skill of an expert, "[t]his is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product." *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089-90 (5th Cir. 1973). Industry knowledge may be established through expert testimony. *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir. 1982).

Manufacturers have a duty to test and inspect their products. *Nelson v. Coleman Co.*, 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967). "A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009). In addition, "[s]afety standards promulgated by government or industry organizations [] are relevant to the standard of care for negligence." *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477-78, 534 S.E.2d 289, 290-91 (Ct. App. 2000), *aff'd*, 352 S.C. 179, 573 S.E.2d 789 (2002) (collecting cases).

The evidence supports the jury's finding that Fisher and Crosby failed to meet the standard of care. There was evidence that they did not keep aware of the health hazards caused by the asbestos products they were selling, they failed to test their products to determine whether they were exempt from OSHA labeling regulations, they failed to comply with OSHA labeling requirements, and did not warn about asbestos hazards.

Plaintiff's expert Dr. Frank established that the dangers of asbestos exposure became known in industry around the turn of the century. (TT 7/26 at 86-89). In the early twentieth century, there were a number of publicly available publications about the dangers of asbestos exposure. (TT 7/26 at 88-89). In 1930, researchers Meriwether and Price published a paper that not only described the risk of lung diseases from asbestos exposure, but set forth the precautions that could be taken to reduce exposures and reduce the risk. (TT 7/26 at 86). Crosby received such information in the 1930s through its membership in the National Safety Council. (TT 7/31 at 91-92; Pl's Ex. 102).

By 1955, it was established that occupational asbestos exposure could cause lung cancer. (TT 7/26 at 89-90). By 1960, it was known that asbestos exposure could cause mesothelioma. (TT 7/26 at 91-93).

In the 1950s, the U.S. Department of Labor established workplace safety regulations for government contractors, called the Walsh-Healey Act, that required employers to take steps to control asbestos exposure levels below a certain threshold. (TT 7/26 at 83-85; Pl's Ex. 149.) As government contractors, Fisher and Crosby were required to comply with the Walsh-Healey Act. (TT 7/26 at 83-84; 7/31 at 85-86).

Although Fisher maintained a library at its manufacturing facility and corporate offices, it contained no publications regarding the hazards of asbestos. (TT 7/27 at 149). Crosby did not even

maintain a library of health and safety materials. (TT 7/31 at 71, 99). Nor did it have an industrial hygiene or a medical department. (TT 7/31 at 71). Mr. Martin admitted that he did not know of anything that Crosby had done to keep up with the dangers of the asbestos products it was selling. (TT 7/31 at 99).

Plaintiffs presented evidence that by 1980, when Mr. Jolly began working around asbestos gaskets and packing associated with Fisher and Crosby valves, Defendants should have known that the only safe level of asbestos exposure is zero. (TT 7/26 at 109). In Dr. Frank's opinion, Fisher and Crosby should have been warning users about the dangers of asbestos exposure from their valves. (TT 7/26 at 108-09, objections omitted).

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JST
In 1972, OSHA promulgated asbestos regulations, some of which applied to product manufacturers. (TT 7/26 at 81, 110-11; PI's Ex. 155). As of that time, product manufacturers were required to place warning labels on any asbestos-containing products. (TT 7/26 at 81-82, 110-11). The OSHA asbestos regulations applied to Fisher and Crosby as sellers of asbestos-containing products. (TT 7/26 at 83).

The only exemption from OSHA's warning label requirement was if the manufacturer could demonstrate that the asbestos in the product was encapsulated and would not be released during the normal use of the product. (TT 7/26 at 111). In order to determine if a product releases asbestos dust during normal use, the manufacturer was required to conduct tests under normal working conditions to measure any fiber release from the product. (TT 7/26 at 112).

Fisher and Crosby claim that asbestos gaskets and packing were not friable. Dr. Frank testified, however, that asbestos fibers did not remain encapsulated during the ordinary wear and tear on the gaskets. (TT 7/26 at 109-10). There was also evidence that Fisher and Crosby did not measure the fiber release levels from the removal of asbestos gaskets and packing. (TT 7/27 at

146-47; TT 7/31 at 13, 33-34, 40-41, 90). In the absence of fiber release testing, the jury could have reasonably concluded that Defendants did not have a rational basis to say that their products did not release asbestos fibers. (TT 7/26 at 112).

There was evidence that replacement asbestos gaskets sold by Fisher and Crosby should have included an OSHA-approved asbestos warning label. (TT 7/26 at 189). In addition to a warning label, Fisher and Crosby could have provided material safety data sheets ("MSD sheet") with information about the product composition, hazards, and recommended precautions. (TT 7/26 at 188-89). Dr. Frank testified that this was not an OSHA requirement until 1986, but would have been a good prudent business practice. (TT 7/26 at 194). If Fisher and Crosby had provided MSD sheets to Duke, that would have corrected Duke's misconception, as stated in its asbestos policy, that gaskets do not release asbestos fibers. (TT 7/26 at 191-92).

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Even though Fisher was supposed to behave with the knowledge of an expert, Fisher did not discontinue its sales of asbestos-containing gaskets and packing until its customers demanded it. (Pl.'s Ex. 1008.01).

Defendants also argue that Mr. Jolly's exposure to asbestos from their valves did not exceed OSHA permissible exposure limits (PEL). Plaintiffs' evidence contradicted this, as Dr. Frank testified that "if you see dust from an asbestos product you're dealing with levels that are generally quite high." (TT 7/26 at 113). He further testified that Mr. Jolly's exposures to asbestos from gaskets were many orders of magnitude above background levels. (TT 7/26 at 76-77).

Plaintiffs' evidence therefore establishes the standard of care, and it was reasonable for the jury to conclude that Fisher and Crosby failed to meet this standard. Even though they were charged with the knowledge of experts, and were supposed to keep up with scientific developments with regard to the products they were selling, there was evidence that they made no effort to do

so. Even though they were required under OSHA to determine whether their products released asbestos fibers, there was evidence that they made no effort to do so. Even though they were required by OSHA to include a warning label on their asbestos products, the evidence showed that they failed to do so. Plaintiffs presented evidence that if Fisher and Crosby had tested their products, they would have learned that the gaskets and packing they were selling were friable, released high levels of asbestos, and should have included a caution label. The evidence was thus sufficient for the jury to conclude that Fisher and Crosby violated the standard of care.

H. Bare Metal Defense

1. Direct Sales to Duke

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JH
Fisher and Crosby contend that they are entitled to summary judgment because they did not manufacture or provide the asbestos materials to which Mr. Jolly was exposed. This assertion is contradicted by the evidence that they were selling asbestos gaskets and packing to Duke with some of their valves, and that they also supplied replacement internal gaskets, flange gaskets, and packing. Under South Carolina law, “[a] manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part.” *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). In fact, “[a] manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.” *Duncan*, 385 S.C. at 133, 682 S.E.2d at 884. “The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product.” *Baughman*, 780 F.2d at 1132.

There was evidence that Crosby valves have incorporated asbestos components since the 1930s. (TT 7/31 at 26). Internal asbestos gaskets were installed by Crosby at the factory. (TT 7/31 at 22). Some Crosby valves contained asbestos components until 1991, but thereafter asbestos replacement parts may still have been available. (TT 7/31 at 39). Crosby provided asbestos replacement gaskets. (TT 7/31 at 41).

Plaintiff presented evidence that Crosby sold a lot of valves to the Duke plants where Jolly worked—66 to Oconee, 72 to McGuire, and 18 to Catawba. (TT 7/31 at 143-150; PI's Ex. 6395). Some Crosby valves sold to Duke contained asbestos gaskets. (TT 7/31 at 157). Crosby sold asbestos-containing replacement gaskets and packing to Duke. (TT 7/31 at 151, 155; PI's Ex. 6364.04). The material specification for the gasket part card relevant to Duke sales showed that an asbestos gasket made by Garlock was supplied by Crosby. (TT 7/31 at 74-77; PI's Ex. 6395, p. 39). This asbestos gasket was used in valve number 67261 at Duke. (TT 7/31 at 78). This gasket specification was for an asbestos-containing gasket until 1989. (TT 7/31 at 79). Other records show that asbestos gaskets were specified by Crosby until 1989. (TT 7/31 at 167).

Depending on Fisher's design, its valves came with a number of internal gaskets, including bonnet gaskets, cage gaskets, and seat ring gaskets, as well as packing. (TT 7/27 189-91). The gasket and packing material was selected according to Fisher specifications and installed at its manufacturing facility in Iowa. (TT 7/27 at 190, 208). Fisher sold valves to Duke that contained asbestos gaskets and packing. (TT 7/27 at 158). Fisher material specification 17A2 was for asbestos gasket material composed of 80 to 85% asbestos fiber. (TT 7/27 at 166-67). Fisher used a material specification number for its asbestos gaskets so that its customers could order replacement gaskets that were the exact same asbestos gaskets that had been supplied with the valve. (TT 7/27 at 167, 169). Every time the 17A2 specification was used in invoices and purchase

orders through 1988, the gaskets would have contained 85% asbestos. (TT 7/27 at 168). Fisher also had a specification number its customers could use to order asbestos packing from Fisher. (TT 7/27 at 177, 179, 192; Pl's Ex. 1008.1964; Pl's Ex. 948 at 27-28).

David Taylor testified that the replacement asbestos flange gaskets came from the valve manufacturers. (TT 7/26 at 214-15; TT 7/27 at 104-05). Purchase orders confirm the presence of Fisher valves at Duke and the sale of replacement asbestos gaskets, including asbestos flange gaskets, to Duke. (Pl's Ex. 1012; Pl's Ex. 1012.6; TT 7/26 at 215-16). Duke purchase orders indicate that Fisher was selling replacement asbestos gaskets, specification 17A2, to Duke facilities. (TT 7/27 at 168-69; Pl's Ex. 1008.1964). In 1982, Fisher sold replacement asbestos gaskets, specification 17A2, to the Oconee nuclear station. (TT 7/27 at 169; Pl's Ex. 1012.5). In 1982, Fisher sold several different asbestos gaskets to Oconee, including bonnet gaskets, gage gaskets, adaptor gaskets, and seat ring gaskets for Fisher valves. (Pl's Ex. 1012.5). Fisher sold more asbestos gaskets to Oconee in 1985. (Pl's Ex. 1012.7).

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Given the evidence of sales of asbestos gaskets and packing from both Crosby and Fisher to Duke, the jury could have reasonably inferred that Mr. Jolly was exposed to asbestos materials supplied directly by Defendants. The record supports the conclusion that Mr. Jolly was exposed to asbestos gaskets supplied by Fisher and Crosby with their valves and as replacement parts.

2. Liability for Foreseeable Harm

Fisher and Crosby raise the so-called "bare metal" defense, contending that they do not bear liability for replacement asbestos gaskets and packing. The Court has already rejected this argument.

A manufacturer's duty to warn extends to foreseeable dangers resulting from the anticipated and intended use of its products. *See* Ralph King Anderson, Jr., South Carolina

Requests to Charge - Civil § 32-27 (2d ed. 2009); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 84 (4th Cir. 1962); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 359-60, 191 S.E.2d 774, 870 (S.C. 1972); *Mickle v. Blackmon*, 252 S.C. 202, 233, 166 S.E.2d 173, 187 (S.C. 1969). A manufacturer is “expected to anticipate the environment which is normal for the use of his product and . . . must anticipate the reasonably foreseeable risks of the use of his product in such environment.” *Mickle*, 252 S.C. at 233 (quoting *Spruill*, 308 F.2d at 83-84). “Liability may be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller.” *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997).

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In *Garvin*, Judge D. Garrison Hill ruled that when a “manufacturer recommends specifies, or requires that asbestos gaskets and packing be replaced with like materials,” liability may be imposed for replacement gaskets and packing because the product remains in essentially the same condition as when it was sold. *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, at 18 (S.C. Ct. Comm. Pleas Nov. 14, 2014). Judge Hill reasoned that, “Crane’s liability arises because its own valves caused injury as manufactured, supplied, and designed by Crane with asbestos gaskets and packing. When the asbestos gaskets and packing were replaced with the same materials that came with the valve, it was not a ‘substantial change’ in the condition of the product.” *Id.* at 16-17.

The Court rejected the “bare metal defense” on the basis that Crane Co. valves were not sold as mere bare metal, but with asbestos materials that needed to be replaced. When asbestos replacement parts are recommended, specified, or required, the manufacturer cannot reasonably claim that its product somehow ceases to be harmful when such replacements are used. The Court reasoned that, “[t]o say Crane was no longer part of the ‘chain of distribution’ when the original

gaskets and packing wore out on its still-functioning product would be artificial, if not silly.” *Id.* at 13-14. The evidence showed that the asbestos gaskets and packing used as replacements were no different than that originally supplied by Crane Co., that Crane Co. knew those parts would have to be replaced, and knew that exposure to asbestos was hazardous. *Id.* at 13. The Court determined that Crane Co. “occupied the best position in the chain of distribution to warn consumers of those risks.” *Id.* This conclusion is supported by the comments to the Restatement of Torts (Second) § 402A, incorporated by reference by S.C. Code Ann. § 15-73-30, which espouses the policy that “the consumer of such products is entitled to the maximum of protection . . . and the proper persons to afford it are those who market the products.” *See id.* at 14 (quoting Comment c to the Restatement of Torts (Second) § 402A).

Other courts have taken a similar approach and recognized an equipment manufacturer’s liability when the manufacturer could foresee and anticipate that asbestos replacement parts would be used and could cause injury. *See, e.g., Osterhout v. Crane Co.*, No. 514CV208MADDEP, 2016 WL 6310765, at *3 (N.D.N.Y. Oct. 27, 2016); *Stevens v. Foster Wheeler, LLC*, No. CV 14-157S, 2016 WL 8577465, at *3 (D.R.I. Oct. 14, 2016), *report and recommendation adopted sub nom. Stevens v. Air & Liquid Sys. Corp.*, No. CV 14-157 S, 2017 WL 1025797 (D.R.I. Mar. 16, 2017); *Spychalla v. Boeing Aero. Operations Inc.*, 2015 U.S. Dist. LEXIS 71682, at *8-11, 2015 WL 3504927 (E.D. Wis. June 3, 2015); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 762, 769-70 (N.D. Ill. 2014); *Chicano v. Gen. Elec. Co.*, 03-5126, 2004 WL 2250990 at *6 (E.D. Pa. Oct. 5, 2004); *In re New York City Asbestos Litig. (Dummit and Suttner)*, 27 N.Y.3d 765, 794, 59 N.E.3d 458 (N.Y. App. 2016); *McKenzie v. A. W. Chesterson Co.*, 373 P.3d 150, 159-60 (Or. App. 2016); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 1000 (Md. 2015).

Most recently, the U.S. Third Circuit Court of Appeal reversed summary judgment for asbestos equipment manufacturers and held that under federal maritime law “a manufacturer of a bare-metal product may be held liable for a plaintiff’s injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff’s injuries were a reasonably foreseeable result of the manufacturer’s failure to provide a reasonable and adequate warning” *In re Asbestos Prods. Liab. Litig. (Devries)*, 2017 WL 4366866, at *6 (3d Cir. Oct. 3, 2017). Such foreseeability is shown with evidence that the manufacturer knew asbestos was hazardous and knew asbestos-containing parts would be used with its equipment because the product was originally equipped with asbestos-containing parts, the manufacturer specified asbestos-containing parts, or the product required asbestos-containing parts to function properly. *Id.* at *6-7.

Here, Plaintiffs presented evidence that Fisher and Crosby sold their valves with asbestos components, knew that the gaskets and packing would have to be changed according to the valve design, and intended that asbestos replacements be used. There was evidence that Fisher engineers selected the components and built the valves for the particular application requested. (TT 7/27 at 197). Similarly, the internal components of Crosby valves were installed by Crosby pursuant to the valve design of Crosby engineers. (TT 7/31 at 22).

Both Fisher and Crosby had material specifications that called for asbestos gaskets and/or packing to be used. (TT 7/27 at 166-69; Pl’s Ex. 1008.1964; TT 7/28 at 84-86; TT 7/31 at 74-79, 167; Pl’s Ex. 6395, p. 39). Mr. Jolly recalled that the manuals for Fisher and Crosby valves specified the type of gaskets that must be used. (TT 7/25 at 78). Crosby, in fact, recommended that asbestos gaskets be used as replacement parts. (TT 7/31 at 30-31).

There was evidence that Fisher decided whether or not to utilize asbestos-containing materials for the parts it supplied with its valves and as replacement parts. (TT 7/27 at 225). In

1986, for example, it changed the material composition of its packing to substitute non-asbestos materials. (TT 7/27 at 226-27). After that substitution, Duke would order the same Fisher part number and receive a part with a different material. (TT 7/27 at 227-28).

In addition to specifying asbestos gaskets, Plaintiffs' evidence showed that Fisher recommended that the gasket should be replaced whenever the valve was opened. (TT 7/28 at 38-39). Crosby was similarly aware that the internal gaskets in its valves would have to be removed and replaced during routine maintenance of its valves. (TT 7/31 at 41).

Defendants also designed their valves with flanged connections, as set forth above. (TT 7/27 at 187-89; 7/31 at 18, 122-23, 125). A lot of the valves Fisher and Crosby sold to Duke had flanged connections. (TT 7/31 at 164-65). Because of that design, flange gaskets had to be used to connect their flanged valves to the pipeline. (TT 7/27 at 187-89; *see also* TT 7/31 at 18-19, 123). Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). The Fisher and Crosby valves at Duke did, in fact, require asbestos flange gaskets. (TT 7/26 at 210-13).

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The evidence that Fisher and Crosby could anticipate that asbestos components would be used in their valves, and that asbestos flange gaskets would be used with their flanged valves, raised questions of fact for the jury regarding Defendants' breach of their duty to warn of the foreseeable dangers resulting from the design of Defendants' valves. When Mr. Jolly or his co-workers used replacement asbestos gaskets and packing in Fisher and Crosby valves, the valves remained unchanged from Defendants' original design. The evidence was therefore sufficient for the jury to conclude that Fisher and Crosby were negligent in failing to warn Mr. Jolly of the asbestos hazards associated with their valves.

I. Expert Causation Testimony

1. Standard of Review.

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” S.C. R. Evid. 702.

Courts evaluating the admissibility of scientific expert evidence “must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

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“[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert’s methodology, it is for the jury to determine the soundness of the facts underlying the expert’s opinion and the correctness of the expert’s conclusions. *See id.* 22.

2. Testimony of Dr. Frank and Dr. Maddox

Dr. Frank and Dr. Maddox testified that mesothelioma can be caused by brief or low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). These experts were entitled to rely on this basic medical fact in reaching their opinion in this case. That does not mean that they concluded that “each and every exposure” that Mr. Jolly had was a substantial factor in causing his disease. This distinction was recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank’s causation opinions. *See Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The court found his testimony to be entirely compatible with the substantial factor causation standard. *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016).

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The Eleventh Circuit has recently held the same. In *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that “there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma,” and that “all ‘significant’ exposures to asbestos ‘contribute to cause mesothelioma,’” is not the same thing as saying that each and every exposure is causative. *Id.* The expert’s causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Judge Robreno of the federal asbestos MDL has similarly found that a “cumulative exposure” opinion is not the same as the “each and every exposure” opinion. The court agreed with the plaintiff that the “cumulative exposure” opinion is different “in substance and by definition” from the “any exposure” opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The court therefore rejected the defendant’s argument that the experts’ opinions were inadmissible on grounds that they are the same as the “any exposure” opinion. *Id.*

As recognized by these other distinguished courts, which have all admitted the causation testimony of Dr. Frank and/or Dr. Maddox, it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. In reaching their opinions, Dr. Frank and Dr. Maddox both relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by Jolly and Taylor, and the facts surrounding Jolly's exposure to visible dust from Defendants' valves. (TT 7/26 at 19-95; 7/31 at 169-77, 179-80, 184-85).

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The specific causation opinions of Drs. Frank and Maddox were firmly grounded in the exposure evidence presented at trial. Dr. Frank testified that he had reviewed Jolly's medical records, the deposition transcripts of Jolly and his co-workers and other case-specific materials. (TT 7/26 at 58-60). He also described that, based on Jolly's testimony, the exposures he had from working with Fisher and Crosby valves were quite high. (TT 7/26 at 51). Mr. Jolly's exposures were many orders of magnitude above background levels. (TT 7/26 at 76-77). In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury. (TT 7/26 at 72-73).

Dr. Maddox similarly based his specific causation opinions on a summary of the exposure facts in this case. (TT 7/31 at 180-82). Dr. Maddox also addressed the issue of very low exposures and explained that low exposures carry only a low risk of disease. (TT 7/31 at 194-95).

The trial testimony of Dr. Frank and Dr. Maddox demonstrates that their causation opinions are based on the record of Mr. Jolly's repeated exposures to asbestos from Fisher and Crosby

valves during four years at Duke, as well as the scientific literature. The methodology and approach of Dr. Frank and Dr. Maddox is exactly the same as that approved by Judge Hill in *Garvin v. Agco Corp.*. There, Judge Hill rejected a challenge to the admissibility of Dr. Maddox's causation testimony, and found it reliable and helpful to the trier of fact. No. 2012-CP-40-6675 (S.C. Ct. Comm. Pleas Nov. 14, 2014).

The Court finds that the causation testimony of Dr. Frank and Dr. Maddox is admissible. It is supported by the scientific literature as well as the facts of this case, and was relevant and helpful to the jury.

J. Henderson Causation Standard

A plaintiff in an asbestos case may defeat summary judgment with evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

The Court finds that the *Henderson* causation standard is satisfied by the evidence presented at trial. The evidence showed that when Mr. Jolly was a mechanical inspector at Duke from 1980 to 1984, he was repeatedly exposed to asbestos gaskets and packing from Fisher and Crosby valves. (TT 7/25 at 61-63, 72-76, 84-94). Asbestos gaskets and packing were removed in a manner that released dust, and Mr. Jolly was close enough to breathe that dust many times over the course of his time at Duke. (TT 7/25 at 198-201, 204-05, 220).

At trial, Crosby's corporate representative acknowledged that there is a health risk from the removal of asbestos gaskets and packing from its valves. (TT 7/31 at 65-66). Defendants' own expert, Dr. Crapo, testified that a "very low" level of exposure to crocidolite can cause mesothelioma. (TT 8/1 at 114).

The jury could thus have concluded not only that Mr. Jolly had frequent, regular, and proximate exposure to asbestos gaskets and packing from Fisher and Crosby valves, but that these exposures were to the most potent form of asbestos fiber. This evidence was sufficient to support the jury's determination that Mr. Jolly's mesothelioma was caused by his exposure to asbestos products sold by Defendants and for which they are responsible.

IV. Ruling on Defendants' Motion for Election of Remedies

Defendants argue that Plaintiffs should be required to "elect a remedy" between their negligence and breach of implied warranty claims. Defendants have confused election of remedies with election of causes of action. "Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996). "[I]n cases where the complaint stated different causes of action, but only one recovery was sought, and the causes of action were so stated because of an uncertainty as to which the evidence might establish or on which it might appear that plaintiff was entitled to recover, no election was required." *Harper v. Ethridge*, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (Ct. App. 1986).

At trial, three causes of action were submitted to the jury. Each, however, was for recovery of a single injury. Plaintiffs, individually, were awarded a single recovery on their claims. "[W]hile the complaint stated . . . different causes of action, only one recovery was sought and only one recovery was awarded." *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct.

App. 1998). Consequently, there are no inconsistent remedies for Plaintiffs to choose between, no danger of double recovery as the jury only made one award per plaintiff. Plaintiffs do not have to elect their remedies in this matter.

V. Ruling on Defendants' Motion for Production of Settlements

Defendants argue that they are entitled to disclosure of Plaintiffs' confidential settlement documents because they are "relevant" to set-off. The Court does not find a compelling reason to require disclosure of the confidential releases. The only matter of relevance is the amount of the settlements, and that information has been disclosed. The Court has reviewed the releases *in camera* and has verified that Plaintiffs' pre-trial settlements are in the amount of \$2,270,000. Defendants' motion for production of settlement releases is denied.

VI. Ruling on Defendants' Motion for Setoff

#34
JH
Defendants are entitled to a set-off in the amount of Plaintiffs' settlements with other defendants in this case. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater" S.C. Code Ann. § 15-38-50.

Defendants correctly assert that Plaintiffs have received settlement money from other defendants in this case. The Court has verified that Plaintiffs have received \$2,270,000 in pre-trial settlements. This is not the end of the matter, however. In determining set-off, the Court must take into account the allocation of these pre-trial settlements to the various claims that the Jollys have or may have had at the time the settlement releases were executed.

In *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999), the Court of Appeals held that “when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law.” *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no setoff as a matter of law. *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). When the settlement “is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between” the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

The claims tried to verdict in this matter were personal injury claims on Mr. Jolly’s behalf and loss of consortium on Mrs. Jolly’s behalf. The settlements received by Plaintiffs also include compensation for the release of the potential future wrongful death claim that the Jollys had at the time of their pre-trial settlements. As such, Defendants’ entitlement to a setoff does not arise as a matter of law.

Defendants are only entitled to “credit for the amount paid by another defendant who settles for the same cause of action.” *Rutland v. S.C. Dep’t of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). Plaintiffs’ personal injury and loss of consortium claims are separate and distinct from their potential wrongful death claim. Because the potential wrongful death claim is different, factually and legally, from the claims tried to verdict, the amount that Plaintiffs received as compensation for the release of future claims, such as wrongful death, should not be considered by this Court when determining the setoff amount. Instead, in accordance with *Rutland* and *Smith*,

only the amounts received by Plaintiffs in settlement for the personal injury and loss of consortium claims should be considered when determining the setoff amount.

In determining the allocation of Plaintiffs' settlements, the Court accepts Plaintiffs' representation that at the time the settlements were received by Plaintiffs, they were internally allocated as one-third to Mr. Jolly's personal injury claims, one-third to Mrs. Jolly's loss of consortium claims, and one-third to the release of future wrongful death claims. Additionally, the Court reviewed the releases of the settling defendants and confirmed that all future claims related to Mr. Jolly's mesothelioma, including wrongful death, were released by the Plaintiffs. Because the total pre-trial settlements were in the amount of \$2,270,000, one-third of the settlements is valued at \$756,666.67.

The Court finds that the internal allocation of the settlement funds received by Plaintiffs is reasonable as required by South Carolina precedent. The Supreme Court has noted that "[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify . . . reapportionment for the sole purpose of benefitting [non-settling defendants]." *Riley v. Ford Motor Co.*, 414 S.C. 185, 196-97, 777 S.E.2d 824, 830-31 (2015).

As set forth above, the total amount of the added verdict for Mr. Jolly's personal injury claims is \$1,580,000. Defendants are entitled to a setoff in the amount of Plaintiffs' pre-trial settlements allocated to the personal injury claim, which is \$756,666.67. Defendants owe the balance of \$823,333.33 for Mr. Jolly's personal injury claim.

As set forth above, the total amount of the added verdict for Mrs. Jolly's loss of consortium claim is \$290,000. This does not exceed the \$756,666.67 in settlement proceeds allocated to her loss of consortium claim.

VII. Conclusion

The Court GRANTS Plaintiffs' motion for new trial *nisi additur*, and raises the verdict to \$1,580,00 for Mr. Jolly's personal injury damages and \$290,000 for Mrs. Jolly's loss of consortium damages. The Court GRANTS in part Defendants' motion for set-off, and reduces Mr. Jolly's damages by one-third of Plaintiffs' pre-trial settlements, in the amount of \$756,666.67. Mrs. Jolly's damages are likewise reduced in the amount of \$756,666.67, which exceeds her added damages award. Judgment will therefore be entered against Defendants in the amount of \$823,333.33. Defendants may, of course, reject the additur, and a new trial will be scheduled. Defendants' remaining post-trial motions are DENIED.

IT IS SO ORDERED.



Chief Justice Jean Toal (Ret.)
Supreme Court of South Carolina

#37
December 15, 2017

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016- CP-42-1592

Beverly Dale Jolly and

General Electric Company , et al.

Brenda Rice Jolly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCPP; ☐ 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: Defendants filed a motion to reconsider this Court's decision not to quash certain subpoenas issued to the parties. After careful consideration, the motion is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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), SCRCp.

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 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
BEVERLY DALE JOLLY and	)	FOR THE SEVENTH JUDICIAL
BRENDA RICE JOLLY,	)	CIRCUIT
	)	
Plaintiffs,	)	C/A No. 2016-CP-42-1592
	)	
v.	)	
FISHER CONTROLS, CROSBY	)	
VALVES.	)	
	)	
Defendants.	)	

NEGLIGENCE

1. We the jury find that Defendant Fisher Controls International LLC was negligent and its negligence was a proximate cause of Plaintiff Dale Jolly's injury and damages:

☒ Yes

☐ No *ARM 106*

2. We the jury find that Crosby Valve, LLC was negligent and its negligence was a proximate cause of Plaintiff Dale Jolly's injury and damages.

☒ Yes

☐ No

3. We the jury find the Plaintiff Dale Jolly was negligent and his negligence was a proximate cause of his injuries and damages.

☐ Yes

☒ No

STRICT LIABILITY

4. We the Jury find the Defendant Fisher Controls International LLC is strictly liable for selling products that proximately caused injury to Plaintiff Dale Jolly.

 Yes
✓ No

5. We the Jury find the Defendant Crosby Valves, LLC is strictly liable for selling products that proximately caused injury to Plaintiff Dale Jolly.

 Yes
✓ No

IMPLIED WARRANTY

6. We the Jury find the Defendant Fisher Controls breached the Implied Warranty in selling its products and its breach was a proximate cause of Dale Jolly's injury and damages.

✓ Yes
 No *AKM 106*

7. We the Jury find the Defendant Crosby Valve, LLC breached the Implied Warranty in selling its products and its breach was a proximate cause of Dale Jolly's injury and damages.

✓ Yes
 No

8. If you answered YES to any of Questions 1, 2, 4, 5, 6 or 7, please state the amount of actual damages that have been proven by the greater weight of the evidence.

\$ 200,000 Dale Jolly's damages

\$ 100,000 Brenda Jolly's loss of consortium damages

9. If you answered NO to Question 3, skip Question 9. If you answered YES to Question 3, please state what percentage of fault, (if any) as compared to the Defendants (if any), did Plaintiff Dale Jolly have for his own injury:

_____ % of Plaintiff's Fault

_____ % of Fisher Controls International LLC's Fault

_____ % of Crosby Valve LLC's Fault

_____ Total(must add up to 100%)

10. If you answered YES to Question 1 and/or Question 2, please answer Question 10. We, the jury, by unanimous vote, find by clear and convincing evidence that the conduct of the following Defendant or Defendants were willful, wanton, or reckless:

a. Crosby Valve
_____ Yes _____ ☒ No

b. Fisher Controls International
_____ Yes _____ ☒ No


Foreperson

8-3-17
Date

Jury

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT
C/A No. _____

BEVERLY DALE JOLLY and
BRENDA RICE JOLLY,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY

UNION CARBIDE CORPORATION

PFIZER, INC.

3M COMPANY f/k/a MINNESOTA
MINING AND MANUFACTURING

AIR & LIQUID SYSTEMS
CORPORATION, individually and as
successor-in- interest to BUFFALO PUMPS

AMETEK, INC., successor to HAVEG
Industries and successor to HERCULES,
INC.

AURORA PUMP COMPANY

BINGHAM WILLAMETTE COMPANY
(SULZER PUMP COMPANY, SULZER
PUMPS SOLUTIONS INC.)

BROWN & MORRISON, LTD.

BW/IP INTERNATIONAL, INC., A
Subsidiary Of FLOWSERVE
CORPORATION

CARRIER CORPORATION

CARVER PUMP COMPANY

CBS CORPORATION, f/k/a VIACOM,

2016-CP-42-1592

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

Living Mesothelioma

SUMMONS

(Jury Trial Demanded)

2016 APR 25 AM 11:48
H. HOPE SLACINLEY

INC., successor by merger to cbs
corporation, a Pennsylvania Corporation,
f/k/a WESTINGHOUSE ELECTRIC
CORPORATION)
)
CHAMPLAIN CABLE CORP f/k/a)
HERCULES, INC. and as successor in)
interest to HAVEG INDUSTRIES, INC.)
)
CIRCOR INSTRUMENTATION)
TECHNOLOGIES d/b/a HOKE)
)
CRANE CO., individually and as successor)
in interest to COCHRANE and CHAPMAN)
VALVE CO.)
)
CRANE ENVIRONMENTAL, INC.)
successor in interest to COCHRANE)
CORPORATION)
)
CGR PRODUCTS, INC.)
)
CROSBY VALVE, INC. Merged to CVI)
HOLDINGS, INC.)
)
CYPRUS-AMAX MINERALS CO)
(acquired by Freeport-McMoRan Company),)
successor to SIERRA TALC CO &)
UNITED TALC COMPANY)
)
DANA COMPANIES LLC)
)
DANIEL INTERNATIONAL)
CORPORATION f/k/a DANIEL)
CONSTRUCTION COMPANY, INC.)
)
ELLIOTT TURBOMACHINERY)
COMPANY a/k/a ELLIOTT COMPANY)
)
FISHER CONTROLS INTERNATIONAL,)
LLC., subsidiary of EMERSON ELECTRIC)
COMPANY)
)
FLOWERVE CORPORATION,)
individually and as successor in interest to)
ANCHOR/DARLING VALVE COMPANY)

2016 APR 25 AM 11:48
M. HOFF BLADLEY

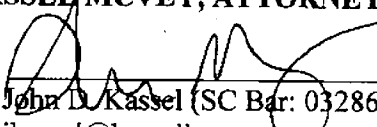
FLOWSERVE US INC., individually and as
 successor to BYRON JACKSON PUMP
 COMPANY)
)
)
 FLUOR CONSTRUCTORS)
 INTERNATIONAL, f/k/a FLUOR)
 CORPORATION)
)
 FLUOR CONSTRUCTORS)
 INTERNATIONAL, INC.)
)
)
 FLUOR DANIEL SERVICES)
 CORPORATION)
)
)
 FLUOR ENTERPRISES, INC.)
)
)
 FMC CORPORATION)
)
)
 FOSTER WHEELER ENERGY)
 CORPORATION)
)
)
 GARDNER-DENVER, INC.)
)
)
 GEORGIA-PACIFIC LLC f/k/a GEORGIA-)
 PACIFIC CORPORATION;)
)
)
 GETTY'S LUMBER COMPANY, INC.)
)
)
 GOULDS PUMPS, INC.)
)
)
 GRINNELL LLC, f/k/a GRINNELL CORP,)
 f/k/a ITT GRINNELL CORP., individually)
 and as successor to KENNEDY VALVE)
)
)
 HERCULES, INC.)
)
)
 IMO INDUSTRIES, INC. individually and)
 as successor in interest to IMO DELAVAL)
)
)
 INGERSOLL RAND COMPANY)
)
)
 ITT CORPORATION f/k/a ITT)
 INDUSTRIES, INC. individually and as)
 successor to ITT FLUID PRODUCTS)
 CORP., ITT HOFFMAN, ITT BELL &)
)

2016 APR 25 AM 11:48
 M. HOPE BLANCHLEY
 STATE OF MISSISSIPPI
 CLERK OF SUPREME COURT

INC., individually and as successor in)
 interest to ATWOOD & MORRILL CO.,)
 INC.)
)
 YUBA HEAT TRANSFER, LLC)
)
 ZURN INDUSTRIES, LLC., successor in)
 interest to ZURN INDUSTRIES, INC.)
 Defendants.)

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

KASSEL MCVEY, ATTORNEYS AT LAW

By: 

John D. Kassel (SC Bar: 03286)

jkassel@kassellaw.com

Theile B. McVey (SC Bar: 16682)

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1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202

803-256-4242

803-256-1952 (Facsimile)

Jonathan Holder (SC Bar: 77935)

Dean Omar Branham, LLP

3900 Elm Street

Dallas, Texas 75226

ATTORNEYS FOR PLAINTIFFS

M. HOPE BLAINEY

2016 APR 25 AM 11:48

SEAN H. BLAINEY

April 22, 2016

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT
C/A No. _____

2016-CP-42-1592

BEVERLY DALE JOLLY and
BRENDA RICE JOLLY,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY

UNION CARBIDE CORPORATION

PFIZER, INC.

3M COMPANY f/k/a MINNESOTA
MINING AND MANUFACTURING

AIR & LIQUID SYSTEMS
CORPORATION, individually and as
successor-in- interest to BUFFALO PUMPS

AMETEK, INC., successor to HAVEG
Industries and successor to HERCULES,
INC.

AURORA PUMP COMPANY

BINGHAM WILLAMETTE COMPANY
(SULZER PUMP COMPANY, SULZER
PUMPS SOLUTIONS INC.)

BROWN & MORRISON, LTD.

BW/IP INTERNATIONAL, INC., A
Subsidiary Of FLOWSERVE
CORPORATION

CARRIER CORPORATION

CARVER PUMP COMPANY

CBS CORPORATION, f/k/a VIACOM,

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

Living Mesothelioma

COMPLAINT

(Jury Trial Demanded)

H. HOPE BLACKLEY

2016 APR 25 AM 11:48

CLERK OF COURT

SC

FLOWERVE US INC., individually and as
successor to BYRON JACKSON PUMP
COMPANY

FLUOR CONSTRUCTORS
INTERNATIONAL, f/k/a FLUOR
CORPORATION

FLUOR CONSTRUCTORS
INTERNATIONAL, INC.

FLUOR DANIEL SERVICES
CORPORATION

FLUOR ENTERPRISES, INC.

FMC CORPORATION

FOSTER WHEELER ENERGY
CORPORATION

GARDNER-DENVER, INC.

GEORGIA-PACIFIC LLC f/k/a GEORGIA-
PACIFIC CORPORATION;

GETTY'S LUMBER COMPANY, INC.

GOULDS PUMPS, INC.

GRINNELL LLC, f/k/a GRINNELL CORP,
f/k/a ITT GRINNELL CORP., individually
and as successor to KENNEDY VALVE

HERCULES, INC.

IMO INDUSTRIES, INC. individually and
as successor in interest to IMO DELAVAL

INGERSOLL RAND COMPANY

ITT CORPORATION f/k/a ITT
INDUSTRIES, INC. individually and as
successor to ITT FLUID PRODUCTS
CORP., ITT HOFFMAN, ITT BELL &

2016 APR 25 AM 11:48
M. HOPE BLACKLEY

INC., individually and as successor in	)
interest to ATWOOD & MORRILL CO.,	)
INC.	)
	)
YUBA HEAT TRANSFER, LLC	)
	)
ZURN INDUSTRIES, LLC., successor in	)
interest to ZURN INDUSTRIES, INC.	)
Defendants.	)

GENERAL ALLEGATIONS

Plaintiffs BEVERLY DALE JOLLY and BRENDA RICE JOLLY, (hereinafter "Plaintiffs"), come before this court and complain and allege as follows:

1. Plaintiff Beverly Dale Jolly has been diagnosed with mesothelioma.
2. From 1979 to 2003, Plaintiff Beverly Dale Jolly was employed by Duke Power at various locations and held different occupational titles, beginning as a pipefitter and retiring as an ultrasonic quality control inspector. While employed by Duke Power, Plaintiff Beverly Dale Jolly worked at Catawba Nuclear Station; McGuire Nuclear Station; Oconee Nuclear Station; Belews Creek Power Station; Riverbend Steam Station; Marshall Steam Station; Buck Steam Station; Dan River Steam Station; and Cliffside Steam Station, among other Duke Power facilities in South Carolina and North Carolina.
3. During various times throughout his life, including during the 1960s and 1970s, Plaintiff Beverly Dale Jolly worked in both occupational and non-occupational capacities performing construction work involving asbestos-containing construction products including, but not limited to, joint compounds and wall textures.
4. During the course of Plaintiff's employment at the location(s) mentioned above, during both occupational and non-occupational work projects and in other ways, Plaintiff Beverly Dale Jolly was exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers emanating from certain products he was working around.

5. Plaintiff Dale Jolly's cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Plaintiff's mesothelioma and other related injuries and therefore under South Carolina law, is the legal cause of Plaintiff's injuries and damages.

6. Plaintiff was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

7. Each of the named Defendants is liable for damages stemming from its own tortious conduct or the tortious conduct of an "alternate entity" as hereinafter defined. Defendants are liable for the acts of their "alternate entity" and each of them, in that there has been a corporate name change, Defendant is the successor by merger, by successor in interest, or by other acquisition resulting in a virtual destruction of Plaintiffs' remedy against each such "alternate entity"; Defendants, each of them, have acquired the assets, product line, or a portion thereof, of each such "alternate entity"; such "alternate entities" have acquired the assets, product line, or a portion thereof of each such Defendant; Defendants, and each of them, caused the destruction of Plaintiff's remedy against each such "alternate entity"; each such Defendant has the ability to assume the risk-spreading role of each such "alternate entity;" and that each such defendant enjoys the goodwill originally attached to each "alternate entity."

DEFENDANT

ALTERNATE ENTITY

3M COMPANY	MINNESOTA MINING AND MANUFACTURING
AIR & LIQUID SYSTEMS CORPORATION	Successor in interest to BUFFALO PUMPS
AMETEK, INC.	Successor to HAVEG INDUSTRIES and successor to HERCULES, INC.
BINGHAM WILLAMETTE COMPANY	SULZER PUMP COMPANY, SULZER PUMPS SOLUTIONS INC.
BW/IP INTERNATIONAL, INC.	A Subsidiary Of Flowserve Corporation
CBS CORPORATION	f/k/a Viacom, Inc., successor by merger to CBS CORPORATION, a Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION

CHAMPLAIN CABLE CORP	f/k/a HERCULES, INC. and as sii to HAVEG INDUSTRIES, INC.
CIRCOR INSTRUMENTATION TECHNOLOGIES	d/b/a HOKE
CRANE CO.	Successor in interest to COCHRANE AND CHAPMAN VALVE CO.
CRANE ENVIRONMENTAL, INC.	Successor in interest to Cochrane Corporation
CROSBY VALVE, INC.	Merged to CVI HOLDINGS, INC.
CYPRUS-AMAX MINERALS CO	Acquired by Freeport-McMoRan Company, SUCCESSOR TO SIERRA TALC CO & UNITED TALC COMPANY
DANIEL INTERNATIONAL CORPORATION	DANIEL CONSTRUCTION COMPANY
ELLIOTT TURBOMACHINERY COMPANY	a/k/a ELLIOTT COMPANY
FISHER CONTROLS INTERNATIONAL, LLC.	Subsidiary of EMERSON ELECTRIC COMPANY
FLOWSERVE CORPORATION	Individually And As Successor In Interest To ANCHOR/DARLING VALVE COMPANY
FLOWSERVE US INC.	Individually and as successor to BYRON JACKSON PUMP COMPANY
FLUOR CONSTRUCTORS INTERNATIONAL	f/k/a FLUOR CORPORATION
GEORGIA-PACIFIC LLC	f/k/a GEORGIA-PACIFIC CORPORATION
GRINNELL LLC	f/k/a GRINNELL CORP, f/k/a ITT GRINNELL CORP., Individually and as successor to KENNEDY VALVE
IMO INDUSTRIES, INC.	Individually and as successor in interest to IMO DELAVAL
ITT CORPORATION	f/k/a ITT INDUSTRIES, INC. individually and as successor to ITT FLUID PRODUCTS CORP., ITT HOFFMAN, ITT BELL & GOSSETT COMPANY and ITT MARLOW
METROPOLITAN LIFE INSURANCE COMPANY	A wholly-owned subsidiary of MetLife Inc.
MILL POWER SUPPLY	f/k/a M.P. POWER SUPPLY, INC.
R.T. VANDERBILT HOLDING COMPANY, INC.	Individually and as successor in interest to R.T. VANDERBILT COMPANY, INC.
TRANE U.S. INC.	f/k/a AMERICAN STANDARD, INC.
UNIROYAL, INC.	f/k/a UNITED STATES RUBBER COMPANY, INC.
VIAD CORP	f/k/a THE DIAL CORPORATION
WEIR VALVES & CONTROLS USA, INC.	Individually and as successor in interest to ATWOOD & MORRILL CO., INC.
ZURN INDUSTRIES, LLC.	Successor in interest to ZURN INDUSTRIES, INC.

8. Plaintiffs are informed and believe, and thereon allege, that at all times herein mentioned, Defendants or their "alternate entities" were or are corporations, partnerships, unincorporated associations, sole proprietorships and/or other business entities organized and existing under and by virtue of the laws of the State of South Carolina, or the laws of some other state or foreign jurisdiction, and that said

Defendants were and/or are authorized to do business in the State of South Carolina, and that said Defendants have regularly conducted business in the County of Spartanburg, State of South Carolina.

9. Plaintiffs are informed and believe, and thereon allege, that progressive lung disease, mesothelioma and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

10. As a direct and proximate result of the conduct as alleged within, Plaintiff Dale Jolly suffers permanent injuries, including, but not limited to, mesothelioma and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

11. As a direct and proximate result of the conduct as hereinafter alleged, Plaintiff Dale Jolly incurred and is continuing to incur liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiffs at this time. Plaintiffs request leave to supplement this Court and all parties accordingly when the true and exact cost of Plaintiff's medical treatment is ascertained.

12. As a further direct and proximate result of the conduct as hereinafter alleged, Plaintiff Dale Jolly has incurred, and will incur, loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiff. Plaintiff prays leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

FOR A FIRST CAUSE OF ACTION
(Product Liability: Negligence)

Plaintiffs Complain of Defendants for a Cause of Action for Negligence Alleging as Follows:

13. Plaintiffs incorporate herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

14. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, and other products containing asbestos.

15. At all times herein mentioned, Defendants and/or their "alternate entities" singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised, a certain product, namely asbestos, and other products containing asbestos, in that said products caused personal injuries to Plaintiff and others similarly situated, (hereinafter collectively called "exposed persons"), while being used for their intended purpose and in a manner that was reasonably foreseeable.

16. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos and asbestos-containing products from causing Plaintiff's mesothelioma, due to an inability of any asbestos-alternative to penetrate the pleural lining of Plaintiff's lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur to users of its products, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use by Plaintiff. Defendants and/or their "alternate entities" had a duty to exercise due care in the pursuance of the activities mentioned above and Defendants, each of them, breached said duty of due care.

17. Defendants and/or their "alternate entities" knew or should have known and intended that the aforementioned asbestos and asbestos-containing products would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out," and other manipulation, resulting in the release of airborne asbestos fibers, and that through

such foreseeable use and/or handling by exposed persons, including Plaintiff, would use or be in proximity to and exposed to said asbestos fibers.

18. At all times relevant, Defendants and/or their "alternate entities" were aware of their asbestos and asbestos-containing products' defect but failed to adequately warn Plaintiffs, Plaintiffs' family members or others in their vicinity, as well as failed to adequately warn others of the known hazards associated with their products and/or failed to recall or retrofit their products. A reasonable manufacturer, distributor, or seller of Defendants' products would have, under the same or similar circumstances, adequately warned of the hazards associated with their products.

19. Plaintiffs, Plaintiffs' family members and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Plaintiff's exposure to asbestos and asbestos-containing products occurred at various locations as set forth in this Complaint.

20. Plaintiff suffers from mesothelioma, a cancer related to exposure to asbestos and asbestos-containing products. Plaintiff was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury or disease.

21. Defendants' conduct and defective products as described in this cause of action were a direct cause of Plaintiff's injuries, and all damages thereby sustained by Plaintiffs. Plaintiffs therefore seek all compensatory damages in order to make them whole, according to proof.

22. Furthermore, the conduct of Defendants and/or their "alternate entities" in continuing to market and sell products which they knew were dangerous to Plaintiff and the public without adequate warnings or proper use instructions was done in a conscious disregard and indifference to the safety and health of Plaintiff and others similarly situated.

23. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, failing to recall or retrofit, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products, Defendants and/or their "alternate entities" did so with conscious disregard for the safety of "exposed persons" who came in contact with asbestos and asbestos-containing products, in that Defendants and/or their "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products, including, but not limited to, asbestosis, mesothelioma, lung cancer, and other lung damages. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their "alternate entities."

24. Defendants and their "alternate entities" were aware that members of the general public and other "exposed persons," who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos or asbestos-containing products could cause injury, and Defendants and their "alternate entities," each of them, knew that members of the general public and other "exposed persons," who came in contact with asbestos and asbestos-containing products, would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact said exposure was extremely hazardous to health and human life.

25. The above-referenced conduct of Defendants and their "alternate entities," was motivated by the financial interest of Defendants, their "alternate entities," and each of them, in the continuing, uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase,

offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos and asbestos-containing products. Defendants, their "alternate entities," and each of them consciously disregarded the safety of "exposed persons" in pursuit of profit. Defendants were consciously willing and intended to permit asbestos and asbestos-containing products to cause injury to "exposed persons" without warning them of the potential hazards and further induced persons to work with and be exposed thereto, including Plaintiff.

26. Plaintiff and other exposed persons did not know of the substantial danger of using Defendants' asbestos and asbestos containing-products. The dangers inherent in the use of these products were not readily recognizable by Plaintiff or other exposed persons. Defendants and/or their "alternate entities" further failed to adequately warn of the risks to which Plaintiff and others similarly situated were exposed.

27. Defendants and/or their "alternate entities" are liable for the fraudulent, oppressive, and malicious acts of their "alternate entities," and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of their "alternate entities" as set forth herein.

28. The herein-described conduct of Defendants and their "alternate entities," was and is willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof.

FOR A SECOND CAUSE OF ACTION

(Product Liability: Strict Liability- S.C. Code Ann. sec. 15-73-10, et seq.)

As a Second and Distinct Cause of Action for Strict Liability, Plaintiffs Complain of Defendants, and Allege as Follows:

29. Plaintiffs incorporate herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

30. Plaintiff suffers from mesothelioma, a cancer related to exposure to asbestos and asbestos-containing products. Plaintiff was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

31. Defendants' conduct and defective products as described above were a direct cause of Plaintiff's injuries, and the injuries and damages thereby sustained by Plaintiffs.

32. Furthermore, the Defendants' conduct and that of their "alternate entities" in continuing to market and sell products which they knew were dangerous to Plaintiff and the public without adequate warnings or proper use instructions, was done in a conscious disregard and indifference to the safety and health of Plaintiff and others similarly situated.

33. Defendants and/or their "alternate entities" knew or should have known, and intended that the aforementioned asbestos and products containing asbestos would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out," and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling, "exposed persons," including Plaintiff, would use or be in proximity to and exposed to said asbestos fibers.

34. Plaintiff, Plaintiff's family members, and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Plaintiff's exposure to

asbestos and asbestos-containing products occurred at various locations as set forth in this Complaint.

35. Defendants and/or their "alternate entities" knew and intended that the above-referenced asbestos and asbestos-containing products would be used by the purchaser or user without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

36. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos and asbestos-containing products from causing Plaintiff's mesothelioma, due to an inability of any asbestos-alternative to penetrate the pleural lining of Plaintiff's lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use.

37. The defect existed in the said products at the time they left the possession of defendants, their "alternate entities," and each of them. Said products were intended to reach the ultimate consumer in the same condition as it left defendants. Said products did, in fact, cause personal injuries, including mesothelioma, asbestosis, other lung

damage, and cancer to "exposed persons," including Plaintiff herein, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe and dangerous for use.

38. Plaintiff and other exposed persons did not know of the substantial danger of using Defendants' asbestos and asbestos-containing products. The dangers inherent in the use of these products were not readily recognizable by Plaintiff or other exposed persons. Said Defendants and/or their "alternate entities" further failed to adequately warn of the risks to which Plaintiff and others similarly situated were exposed.

39. Defendants' defective products as described above were a direct cause of Plaintiff's injuries, and the damages thereby sustained.

40. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products, Defendants, their "alternate entities," and each of them, did so with conscious disregard for the safety of Plaintiff and other exposed persons who came in contact with the asbestos and asbestos-containing products, in that Defendants and/or their "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products, including, but not limited to, mesothelioma, asbestosis, other lung damages and cancers. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their "alternate entities."

41. Defendants and/or their "alternate entities" were aware that members of the general public and other exposed persons, who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating

that asbestos or asbestos-containing products could cause injury. Defendants and/or their "alternate entities" further knew that members of the general public and other exposed persons, who came in contact with asbestos and asbestos-containing products would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact exposure was extremely hazardous to health and human life.

42. The above-referenced conduct of Defendants and/or their "alternate entities" motivated by the financial interest of Defendants, their "alternate entities," and each of them, in the continuing and uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos and asbestos-containing products. Defendants and/or their "alternate entities" consciously disregarded the safety of "exposed persons" in their pursuit of profit and in fact consciously intended to cause injury to Plaintiff and other exposed persons and induced persons to work with, be exposed to, and thereby injured by asbestos and asbestos-containing products.

43. Defendants are liable for the fraudulent, oppressive, and malicious acts of their "alternate entities," and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and knew, or should have known of, the acts of each of their "alternate entities" as set forth herein.

44. The conduct of said defendants, their "alternate entities," and each of them as set forth in this Complaint, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of exposed persons. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof.

45. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, and other products containing asbestos.

FOR A THIRD CAUSE OF ACTION

(Vicarious Liability of Defendants Based upon Respondeat Superior)

As a Third Distinct Cause of Action Against Defendants, Plaintiffs Bring this Third Cause of Action for Vicarious Liability of Defendants Based upon Respondeat Superior and Allege as Follows:

46. Plaintiffs incorporate by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

47. Prior to and during all relevant times Defendants employed workers (hereinafter "employees") in areas where defendants owned, maintained, controlled, managed and/or conducted business activities where Plaintiff worked and/or spent time as alleged above.

48. At all times herein mentioned, Defendants' employees frequently encountered asbestos-containing products, materials, and debris during the course and scope of their employment, and during their regular work activities negligently disturbed asbestos-containing materials to which Plaintiff was exposed.

49. Employees handling and disturbing asbestos-containing products in Plaintiff's vicinity were the agents and employees of defendants and at all times

relevant were subject to the control of Defendants with respect to their acts, labor, and work involving (a) the removal, transport, installation, cleaning, handling, and maintenance of asbestos-containing products, materials, and debris, and (b) the implementation of safety policies and procedures. Defendants controlled both the means and manner of performance of the work of their employees as described herein.

50. Employees handling and disturbing asbestos-containing products in Plaintiff's, Plaintiff's family members and others' vicinity received monetary compensation from Defendants in exchange for the work performed and these employees performed the work in the transaction and furtherance of Defendants' businesses.

51. Harmful asbestos fibers were released during Defendants' employees' use, handling, breaking, or other manipulation of asbestos-containing products and materials.

52. Once released, the asbestos fibers contaminated the clothes, shoes, skin, hair, and body parts of those exposed, including Plaintiff, who also inhaled those fibers, and on the surfaces of work areas, where further activity caused the fibers to once again be released into the air and inhaled by Plaintiff.

53. The asbestos and asbestos-containing materials were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air onto surrounding surfaces, and onto persons in the area. The inhalation of asbestos fibers can cause serious disease and death.

54. Defendants' employees' use, handling and manipulation of asbestos-containing materials, as required by their employment and occurring during the course and scope of their employment, did in fact, cause personal injuries, including mesothelioma and other lung damage, to exposed persons including Plaintiff.

55. Defendants' employees were negligent in their use, handling and manipulation of said products in that they failed to isolate their work with asbestos and/or to suppress asbestos fibers from being released into the air and surrounding areas. They also failed to take appropriate steps to learn how to prevent exposure to asbestos, failed to warn and/or adequately warn Plaintiff that he was being exposed to asbestos, failed to adequately warn Plaintiff of the harm associated with his exposure to asbestos, and provide him with protection to prevent his inhalation of asbestos.

56. Defendants' employees knew or should have known that failure to take such steps would result in exposure to bystanders including Plaintiff.

57. Defendants' employees owed Plaintiff a duty to exercise due care and diligence in their activities while he was lawfully on the premises so as not to cause him harm.

58. Defendants' employees breached this duty of care as described above.

59. At all times mentioned, Plaintiff was unaware of the dangerous condition and unreasonable risk of personal injury created by Defendants' employees' use of and work with asbestos-containing products and materials.

60. As a direct result of the Defendants' employees conduct, Plaintiff's exposure to asbestos and asbestos-containing materials, each individually and together, caused severe and permanent injury to Plaintiff and the damages and injuries as complained of herein by Plaintiff.

61. The risks herein alleged and the resultant damages suffered by the Plaintiff were typical of or broadly incidental to Defendants' business enterprises. As a practical matter, the losses caused by the torts of Defendants' employees as alleged were sure to occur in the conduct of Defendants' business enterprises. Nonetheless, Defendants engaged in, and sought to profit by, their business enterprises without exercising due

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CLERK
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

care as described in this Complaint, which, on the basis of past experience, involved harm to others as shown through the torts of employees.

62. Based on the foregoing, Defendants as the employers of said employees are vicariously liable under the doctrine of *respondeat superior* for all negligent acts and omissions committed by their employees in the course and scope of their work that caused harm to Plaintiff.

FOR A FOURTH CAUSE OF ACTION
(Premises Liability: Negligence as to Premise Owner/Contractor)

As a Fourth Distinct Cause of Action for General Negligence, Plaintiffs Complain of Defendants, and Allege as Follows:

63. Plaintiffs incorporate herein by reference, as though fully set forth, each and every paragraph of the General Allegations above.

64. Prior to and during all relevant times, Defendants employed workers in areas where Defendants owned, maintained, controlled, managed and/or conducted business activities where Plaintiff worked and/or spent time.

65. At all times herein mentioned, Defendants selected, supplied, and distributed asbestos-containing materials to their employees for use during their regular work activities, and said employees disturbed those asbestos-containing materials.

66. Defendants were negligent in selecting, supplying, distributing and disturbing the asbestos-containing products in that said products were unsafe. Said products were unsafe because they released asbestos fibers and dust into air, where used which would be inhaled by Plaintiff and settled onto Plaintiff's clothes, shoes, hands, face, hair, skin, and other body parts thus creating a situation whereby workers and bystanders including Plaintiff would be exposed to dangerous asbestos dust beyond the present.

67. The asbestos and asbestos-containing materials described herein were unsafe in that handling and disturbing products containing asbestos causes the release

68. At all times herein mentioned, Defendants knew or should have known that its employees and bystanders thereto, including Plaintiff, frequently encountered asbestos-containing products and materials during the course and scope of their work activities.

70. At all times herein mentioned, Defendants, in the exercise of reasonable diligence, should have known that absent adequate training and supervision, their employees and bystanders thereto including Plaintiff were neither qualified nor able to identify asbestos-containing products nor to identify the hazardous nature of their work activities involving asbestos-containing products.

of reasonable
supervision, their
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72. At all time herein mentioned, Defendants, in the exercise of reasonable diligence, should have known that workers and bystanders thereto, would bring dangerous dust home from the workplace and contaminate their family cars and homes, continuously exposing and potentially causing injury to others off the premises.

73. At all times herein mentioned, Defendants had a duty to use due care in the selection, supply, distribution and disturbance of asbestos-containing products and materials to its employees, to adequately instruct, train, and supervise their employees and to implement adequate safety policies and procedures to protect workers and persons encountering those workers, including Plaintiff, from suffering injury or death as a result of the asbestos hazards encountered and created by the work of Defendants' employees.

74. Defendants' duties as alleged herein exist and existed independently of Defendants' duties to maintain their premises in reasonably safe condition, free from concealed hazards.

75. Defendants negligently selected, supplied, and distributed the asbestos-containing materials and failed to adequately train or supervise their employees to identify asbestos-containing products and materials; to ensure the safe handling of asbestos-containing products and materials encountered during the course of their work activities; and to guard against inhalation of asbestos fibers and against the inhalation of asbestos fibers by those who would come into close contact with them after they had used, disturbed, or handled, said asbestos-containing products and materials during the course and scope of their employment by defendants.

76. Defendants failed to warn its employees and bystanders thereto, including Plaintiff, of the known hazards associated with asbestos and the asbestos-containing materials they were using and/or disturbing.

77. As a direct and proximate result of the conduct of Defendants in selecting, supplying, distributing and disturbing asbestos-containing materials and failing to adequately train and supervise their employees and failing to adopt and implement adequate safety policies and procedures as alleged herein, Plaintiff became exposed to and inhaled asbestos fibers, which was a substantial factor in causing Plaintiff to develop asbestos-related mesothelioma, and to suffer all damages attendant thereto.

FOR A FIFTH CAUSE OF ACTION

(Product Liability: Breach of Implied Warranties- S.C. Code Ann. 36-2-314)

As a Fifth Distinct Cause Of Action for Breach of Implied Warranties, Plaintiffs Complain of Defendants and Alleges as Follows:

78. Plaintiffs repeat the general allegations, as well as allegations of the First and Second, of Action where relevant.

79. Each of the Defendants impliedly warranted that their asbestos materials or asbestos-containing products were of good and merchantable quality and fit for their intended use.

80. The implied warranty made by the Defendants that the asbestos and asbestos-containing products were of good and merchantable quality and fit for the particular intended use, was breached. As a result of that breach, asbestos was given off into the atmosphere where Plaintiff Dale Jolly carried out his duties and was inhaled by Plaintiff.

81. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality and fitness for the particular intended use, Plaintiff Dale Jolly was exposed to Defendants' asbestos and/or asbestos-containing products and consequently developed mesothelioma, causing Plaintiffs to suffer all damages attendant thereto.

FOR A SIXTH CAUSE OF ACTION

(Fraudulent Misrepresentation)

**For a Sixth Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiffs
Complain of Defendants, and Allege as Follows:**

82. Plaintiffs repeat and re-allege the portions of the above paragraphs where relevant.

83. That during, before and after Plaintiff Dale Jolly's exposure to asbestos products manufactured by Defendants, the Defendants falsely represented facts, including the dangers of asbestos exposure to Plaintiff in the particulars alleged in the paragraphs above, while Defendants each had actual knowledge of said dangers of asbestos exposure to persons such as Plaintiff Dale Jolly. At the same time of these misrepresentations, Defendants each knew of the falsity of their representations and/or made the representations in reckless disregard of their truth or falsity.

84. The foregoing representations were material conditions precedent to Plaintiff Dale Jolly's continued exposure to asbestos-containing products. Defendants each intended that Plaintiff act upon the representations by continuing his work around, and thereby exposure to, the asbestos products. Plaintiff was ignorant of the falsity of Defendants' representations and rightfully relied upon the representations.

85. As a direct and proximate result of Plaintiff Dale Jolly's reliance on Defendants' false representations, Plaintiff has suffered injury and damages as described herein.

FOR A SEVENTH CAUSE OF ACTION
(Loss of Consortium)

For a Seventh Distinct Cause of Action For Loss of Consortium, Plaintiff Brenda Jolly Complain of Defendants, and Alleges As Follows:

86. Plaintiffs incorporate by reference as though fully set forth herein, each and every paragraph of the General Allegations and the First through Fifth Causes of Action.

87. Plaintiffs Dale Jolly and Brenda Jolly were married on August 19, 1966, and

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M. J. DEERLACKLEY
CLERK OF COURT
COURT OF APPEALS
DISTRICT OF COLUMBIA

at all times relevant to their action were husband and wife.

88. Prior to his injuries as alleged, Plaintiff Dale Jolly was able and did perform his spousal duties. As a proximate result thereof, subsequent to the injuries, Plaintiff Dale Jolly has been unable to perform his spousal duties and the work and service usually performed in the care, maintenance and management of the family home. As a proximate result thereof, Plaintiff Brenda Jolly was deprived of the consortium of her spouse, including the performance of duties, all to Plaintiffs' damages, in an amount presently unknown to Plaintiffs but which will be proven at time of trial.

89. As a direct and proximate result of the acts of Defendants and/or their "alternate entities" and the severe injuries caused to Plaintiff Dale Jolly as set forth herein, Plaintiff's spouse and co-Plaintiff Brenda Jolly suffered loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love and affection of her spouse, and has suffered severe mental and emotional distress and general nervousness.

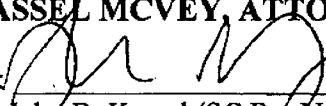
WHEREFORE, Plaintiffs pray judgment, joint and several, against Defendants and/or their "alternate entities" in an amount to be proved at trial, as follows:

1. For Plaintiffs' actual damages according to proof, including Plaintiff's pain & suffering, as well as medical bills;
2. For loss of earnings according to proof;
3. For loss of care, comfort and society;
5. For punitive damages according to proof;
6. For plaintiffs' cost of suit herein;
7. For damages for fraudulent misrepresentation according to proof; and
8. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided by South Carolina law.

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H. H. DE SLACKLEY
SEAL OF THE COURT

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

April 11, 2016

Spartanburg, South Carolina.

FILED
CLERK OF COURT
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KASSEL MCVEY

EXHIBIT A

GENERAL ELECTRIC COMPANY

UNION CARBIDE CORPORATION

PFIZER, INC.

3M COMPANY f/k/a MINNESOTA MINING AND MANUFACTURING

AIR & LIQUID SYSTEMS CORPORATION, individually and as successor-in- interest
to BUFFALO PUMPS

AMETEK, INC., successor to HAVEG INDUSTRIES and successor to HERCULES,
INC.

AURORA PUMP COMPANY

BINGHAM WILLAMETTE COMPANY (SULZER PUMP COMPANY, SULZER
PUMPS SOLUTIONS INC.)

BROWN & MORRISON, LTD.

BW/IP INTERNATIONAL, INC., a subsidiary of FLOWSERVE CORPORATION

CARRIER CORPORATION

CARVER PUMP COMPANY

CBS CORPORATION, f/k/a VIACOM, INC., successor by merger to cbs corporation, a
Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION

CHAMPLAIN CABLE CORP f/k/a HERCULES, INC. and as successor in interest to
HAVEG INDUSTRIES, INC.

CIRCOR INSTRUMENTATION TECHNOLOGIES d/b/a HOKE

CRANE CO., individually and as successor in interest to COCHRANE and CHAPMAN
VALVE CO.

CRANE ENVIRONMENTAL, INC. successor in interest to COCHRANE
CORPORATION

CGR PRODUCTS, INC.

CROSBY VALVE, INC., Merged to CVI HOLDINGS, INC.

CYPRUS-AMAX MINERALS CO., acquired by Freeport-McMoRan Company,
successor to SIERRA TALC CO & UNITED TALC COMPANY

DANA COMPANIES LLC

ELLIOTT TURBOMACHINERY COMPANY a/k/a ELLIOTT COMPANY

FISHER CONTROLS INTERNATIONAL, LLC., subsidiary of EMERSON ELECTRIC
COMPANY

FLOWERVE CORPORATION, individually and as successor in interest to
ANCHOR/DARLING VALVE COMPANY

FLOWERVE US INC., individually and as successor to BYRON JACKSON PUMP
COMPANY

FMC CORPORATION

FOSTER WHEELER ENERGY CORPORATION

GARDNER-DENVER, INC.

GEORGIA-PACIFIC LLC f/k/a GEORGIA-PACIFIC CORPORATION

GOULDS PUMPS, INC.

GRINNELL LLC, f/k/a GRINNELL CORP, f/k/a ITT GRINNELL CORP., individually
and as successor to KENNEDY VALVE

HERCULES, INC.

IMO INDUSTRIES, INC. individually and as successor in interest to IMO DELAWARE

INGERSOLL RAND COMPANY

ITT CORPORATION f/k/a ITT INDUSTRIES, INC. individually and as successor
ITT FLUID PRODUCTS CORP., ITT HOFFMAN, ITT BELL & GOSSETT
COMPANY and ITT MARLOW

JOHN CRANE, INC.

KAISER GYPSUM COMPANY

KELLY MOORE PAINT COMPANY

2016 APR 25 AM 11:48
M. HOFFMAN
SCANNED BY
M. HOFFMAN

METROPOLITAN LIFE INSURANCE COMPANY, a wholly-owned subsidiary of
METLIFE INC.

R.T. VANDERBILT HOLDING COMPANY, INC. individually and as successor in
interest to R.T. VANDERBILT COMPANY, INC.

SPIRAX SARCO, INC.

THE GOODYEAR TIRE & RUBBER COMPANY

THE GORMAN-RUPP INTERNATIONAL COMPANY

TRANE U.S. INC., f/k/a AMERICAN STANDARD, INC.

UNIROYAL, INC., f/k/a UNITED STATES RUBBER COMPANY, INC.

UNITED CONVEYOR CORP.

VANDERBILT MINERALS, LLC
VELAN VALVE CORPORATION

VIAD CORP f/k/a THE DIAL CORPORATION

VIKING PUMP, INC.

WEIR VALVES & CONTROLS USA, INC., individually and as successor in interest to
ATWOOD & MORRILL CO., INC.

YUBA HEAT TRANSFER, LLC

ZURN INDUSTRIES, LLC., successor in interest to ZURN INDUSTRIES, INC.

CLERK OF COURT
SPRINGFIELD COUNTY
2016 APR 25 AM 11:48
H. HOFF ACQUITY

EXHIBIT B

CBS CORPORATION, f/k/a VIACOM, INC., successor by merger to cbs corporation, a
Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION

CYPRUS-AMAX MINERALS CO., acquired by Freeport-McMoRan Company,
successor to SIERRA TALC CO & UNITED TALC COMPANY

DANIEL INTERNATIONAL
CORPORATION f/k/a DANIEL CONSTRUCTION COMPANY, INC.

FLUOR CONSTRUCTORS
INTERNATIONAL, f/k/a FLUOR CORPORATION

FLUOR CONSTRUCTORS INTERNATIONAL, INC.

FLUOR DANIEL SERVICES CORPORATION

FLUOR ENTERPRISES, INC.

GETTY'S LUMBER COMPANY, INC.

GOULDS PUMPS, INC.

METROPOLITAN LIFE INSURANCE COMPANY, a wholly-owned subsidiary of
METLIFE INC.

MILL POWER SUPPLY f/k/a M.P. POWER SUPPLY, INC.

R.T. VANDERBILT HOLDING COMPANY, INC. individually and as successor in
interest to R.T. VANDERBILT COMPANY, INC.

EXHIBIT C

DANIEL INTERNATIONAL
CORPORATION f/k/a DANIEL CONSTRUCTION COMPANY, INC.

FLUOR CONSTRUCTORS
INTERNATIONAL, f/k/a FLUOR CORPORATION

FLUOR CONSTRUCTORS INTERNATIONAL, INC.

FLUOR DANIEL SERVICES CORPORATION

FLUOR ENTERPRISES, INC.

2016 APR 25 AM 11:48
M. HOPE DLAORLEY
SPAINHOLDING COMPANY



DREXEL UNIVERSITY
School of
Public Health

Department of Environmental and Occupational Health

March 11, 2016

William M. Graham, Esq.
Wallace and Graham, P.A.
525 North Main Street
Salisbury, NC 28144

Re: Beverly D. Jolly

Dear Mr. Graham:

I am in receipt of records in the case of Mr. Jolly and have been asked by you to review them and render my judgment regarding any evidence of an asbestos-related disease.

I am currently employed as Professor of Public Health at the Drexel University School of Public Health in Philadelphia. I received my medical degree from the Mount Sinai School of Medicine in 1972. During this time and thereafter, I worked with Dr. Irving Selikoff regarding health concerns associated with exposure to asbestos. From 1973 to 1975, I served two years at the Lung Cancer Branch at the National Cancer Institute at the National Institutes of Health in Bethesda, Maryland as a Commissioned Officer in the United State Public Health Service. I then returned to Mount Sinai and completed two residencies: one in internal medicine and the other in occupational medicine. I became board-certified in internal medicine in 1978 and in occupational medicine in 1979. I also have a Ph.D. degree in biomedical sciences. From 1977 to 1983, I served on the faculty at Mt. Sinai.

In 1983, I accepted the position of Chairman and Professor of Preventive Medicine and Environmental Health at the University of Kentucky, College of Medicine and remained in that position until 1994, when I became Vice President for Medical Education at the University of Texas Health Science Center at Tyler. In 2002, I became the Chairman and Professor for the Department of Environmental and Occupational Health at the Drexel School of Public Health in Philadelphia, Pennsylvania. I held the Chair position until 2014, but am still a professor. I am also Professor of Medicine in the Division of Pulmonary Medicine at Drexel.

I have held a number of positions with the United States government. I was on the Board of Scientific Counselors and Chair of the Grant Review Panel for the National Institute for Occupational Safety and Health (NIOSH). I do consulting work for federal agencies including NIOSH, OSHA and the EPA on issues involving general occupational and environmental exposures. In addition, I was appointed to the Air Pollution Control Board in the City of Philadelphia.

In addition to the United States government, I have been a consultant to the governments of China, Thailand, India, Brazil, and Israel, among others, regarding asbestos-related issues. In the 1980s, I was elected to the Collegium Ramazzini, which is an international organization of health care professionals. Admission in this group is by election only and limited to 180 members. I have been part of this organization for more than 25 years and held a position on the executive board. Currently, my time is

March 11, 2016
Re: Beverly Jolly
Page 2

divided between research, teaching, and service. My department research activities focus on occupational toxins. I also teach introductory courses in environmental and occupational health, occupational cancers, and occupational toxicology.

The medical records provided to me in the case of Mr. Jolly note that he worked at Duke Energy where he had been exposed to asbestos. In December 2015, he presented with shortness of breath and when X-rays were taken he was found to have a right-sided pleural effusion. In January 2016, he had tissue taken from his chest and was then diagnosed with a malignant pleural mesothelioma. He had a talc pleurodesis done at that time.

It is my opinion and diagnosis, to a reasonable degree of medical certainty, that Beverly Jolly, based at least in part upon his work history at Duke Power and the information supplied to me has been exposed to asbestos and has an asbestos-related mesothelioma. It is further my opinion, to a reasonable degree of medical certainty, that Mr. Jolly's exposures to asbestos were approximate cause of the diagnosed mesothelioma and that Mr. Jolly's illness is not more probable the result of other causes. This is clearly shown by his employment at Duke Power where he had exposures to asbestos. The cumulative exposures he had to asbestos, from any and all products, during his work, containing any and all fiber types, would have contributed to his developing his mesothelioma.

The hazards of asbestos have been known for more than a century, and is reflected in medical articles and studies and industry materials.

My fuller views can be found in my affidavit of December 10, 2013, which I include as if written out here in full.

Should you have any questions about this matter please feel free to contact me.

Sincerely yours,

Arthur L. Frank

Arthur L. Frank, MD, PhD

ALF/kmw

2016 APR 25 AM 11:48
M. HOPKINS BLACKLEY
S. H. HOPKINS
S. H. HOPKINS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Beverly Dale Jolly and Brenda Rice Jolly,	)	Civil Action No. 2016-CP-42-01592
	)	
Plaintiffs,	)	
	)	ANSWER OF DEFENDANT FISHER
v.	)	CONTROLS INTERNATIONAL LLC TO
	)	PLAINTIFFS' COMPLAINT
General Electric Company, <i>et al.</i> ,	)	(Jury Trial Demanded)
	)	
Defendants.	)	
	)	
	)	

Defendant Fisher Controls International LLC (hereinafter referred to as "Defendant"), answering the Plaintiffs' Complaint, alleges and says as follows:

ANSWERING GENERAL ALLEGATIONS

1. Defendant is without sufficient information to form a belief as to the allegations contained in paragraphs 1, 2, 3, and 4 and therefore denies them.

2. Defendant denies the allegations contained in Paragraph 5 of the Plaintiffs' Complaint pertaining to it, and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

3. Defendant is without sufficient information to form a belief as to the allegations contained in paragraph 6 and therefore denies them and asserts that its products did not present any risk of injury and/or disease.

4. Defendant denies the allegations contained in Paragraph 7 of the Plaintiffs' Complaint pertaining to it, and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 JUN -6 AM 10:11
J. HOPE BLACKLEY

5. Answering the allegations contained in Paragraph 8, Defendant admits only that it is incorporated under the laws of a state other than South Carolina. Defendant denies the remaining allegations contained in Paragraph 8 of Plaintiffs' Complaint.

6. Paragraph 9 contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraphs 9 of Plaintiffs' Complaint.

7. Defendant denies the allegations contained in Paragraphs 10, 11, and 12 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE FIRST CAUSE OF ACTION
(Product Liability: Negligence)

8. In response to Paragraph 13 of the Plaintiffs' Complaint, Defendant, repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 12 of the Plaintiffs' Complaint.

9. Defendant denies the allegations contained in Paragraphs 14, 15, 16, 17, 18, and 19 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

10. Paragraph 20 of contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraph 20 of the Plaintiffs' Complaint.

11. Defendant denies the allegations contained in Paragraphs 21, 22, 23, 24, 25, 26, 27, and 28 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

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CLERK OF COURT
SOUTH CAROLINA
HOFER BLANCHLEY

ANSWERING THE SECOND CAUSE OF ACTION
(Product Liability: Strict Liability – S.C. Code Ann. Sec. 15-73-10, et seq.)

12. In response to Paragraph 29, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 28 of the Plaintiffs' Complaint.

13. Paragraph 30 of the Plaintiffs' Complaint contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraph 30 of the Plaintiffs' Complaint.

14. Defendant denies the allegations contained in Paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE THIRD CAUSE OF ACTION
(Vicarious Liability of Defendants Based Upon Respondent Superior)

15. In response to Paragraph 46, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 45 of the Plaintiffs' Complaint.

16. Defendant denies the allegations contained in Paragraphs 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 and 62 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE FOURTH CAUSE OF ACTION
(Premises Liability: Negligence as to Premise Owner/Contractor)

17. In response to Paragraph 63, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 62 of the Plaintiffs' Complaint.

18. Defendant denies the allegations contained in Paragraphs 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 77 of the Plaintiffs' Complaint pertaining to it. Specifically, Defendant

denies that it was a "premises owner" of any job site where the Plaintiff allegedly worked and denies that Plaintiff was employed by Defendant. Defendant is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE FIFTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties – S.C. Code Ann. 36-2-314)

19. In response to Paragraph 78, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 77 of the Plaintiffs' Complaint.

20. Defendant denies the allegations of Paragraphs 78, 79, 80 and 81 of the Plaintiffs' Complaint pertaining to it and specifically denies that any implied warranty was made, breached or that any alleged breach of implied warranty resulted in any damage to the Plaintiffs. Defendant is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE SIXTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

21. In response to Paragraph 82, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 81 of the Plaintiffs' Complaint.

22. Defendant denies the allegations contained in Paragraphs 83, 84 and 85 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE SEVENTH CAUSE OF ACTION
(Loss of Consortium)

23. In response to Paragraph 86, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 85 of the Plaintiffs' Complaint.

CLEAN OF COURT
SPRINGFIELD, MO
2016 JUN - 17 10:14
M. HOPE LACKEY

24. Paragraph 87 of the Plaintiffs' Complaint contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraph 87 of the Plaintiffs' Complaint.

25. Defendant denies the allegations contained in Paragraphs 88 and 89 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

26. Defendant denies the Prayer for Relief of Plaintiffs' Complaint.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

27. The Court lacks jurisdiction over this Defendant as a result of improper, and/or lack of, service of process; lack of subject matter jurisdiction; and/or lack of personal jurisdiction. Under the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), Defendant is not subject to general personal jurisdiction in South Carolina. *Daimler* holds that, absent "exceptional" circumstances, a corporation is subject to general jurisdiction only in its place of incorporation and principal place of business. Because South Carolina is not Defendant's place of incorporation or principal place of business—and because there are no "exceptional" circumstances that would warrant a departure from the governing rule—general jurisdiction is unavailable. Specific jurisdiction exists only where a defendant's suit-related conduct is alleged to have occurred in the forum. Plaintiff's Complaint lacks any allegation that Plaintiff was injured in South Carolina or that Defendant did or failed to do anything in South Carolina giving rise to Plaintiffs' damages, if any.

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CLERK OF COURT
SOUTH CAROLINA
2016 JUN -6 AM 10:14
M. HOPE BLANCHET

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

28. The Plaintiffs' Complaint and each cause of action therein fail to state a claim against this Defendant.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

29. The Complaint should be dismissed due to the Plaintiffs' lack of capacity.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

30. There is a lack of joinder of one or more parties who should or must be joined; without the joinder of these proper parties, complete relief cannot be accorded among those already made parties to this action.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

31. The claims set forth in the Complaint are barred by the applicable statutes of limitations and/or repose in this state or other states as may be applicable.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

32. Plaintiffs' claims are barred by the contributory or comparative negligence of the Plaintiff; in the alternative, Plaintiffs' claims are barred in part by the comparative negligence of the Plaintiff and any award to the Plaintiff should be reduced accordingly.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

33. The claims set forth in the Plaintiffs' Complaint are barred to the extent that there is another action pending between the same parties for the same claim.

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SEATTLE, WASH.
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B. HOPE BLACKLEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

34. Plaintiffs do not have capacity to bring this claim pursuant to Section 15-5-150 of the South Carolina Code of Laws, also referred to the South Carolina's Door Closing Statute.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

35. Plaintiffs' Complaint should be dismissed and/or is not subject to trial for its failure to comply with the requirements of Section 44-135-10 *et seq.*, of the South Carolina Code of Laws, also known as the "Asbestos and Silica Claims Procedure Act of 2006."

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

36. Plaintiffs' claims are barred or reduced by the doctrines of res judicata, waiver, release, laches, and/or conditions precedent or subsequent.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

37. Plaintiffs' claims are barred or reduced by the applicable provisions of the Worker's Compensation Act, whether of this state or another.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

38. By virtue of the doctrine of judicial estoppel, the Plaintiffs are precluded from taking a position inconsistent with one taken with respect to the same facts in earlier litigation, if any, and are, therefore, precluded from alleging the material facts necessary to state a cause of action against this Defendant.

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CLERK OF COURT
SPRINGER, DONALD
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M. HOPE BLACKBURN

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

39. Venue is improper in this action. This Defendant reserves its right to move for dismissal and/or transfer of the action based on improper and/or inconvenient venue and further reserves its right to seek application of the law of the appropriate venue on all issues.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

40. This Defendant would show that, among other things, Plaintiffs' claim for punitive damages is barred, reduced, bifurcated, capped or otherwise impacted by the South Carolina Fairness in Civil Justice Act of 2011 and/or similar and/or related state statutes and limitations.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

41. The alleged injuries to the Plaintiff are barred by Section 15-73-10 *et seq.*, of the South Carolina Code of Laws; therefore, the Plaintiff is prohibited by law from asserting a cause of action based on strict liability for either actual or punitive damages.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

42. There has been no concert of action between this Defendant and any of the other named Defendants. The Defendants are not joint tortfeasors and, therefore, this Defendant may therefore not be held jointly and severally liable with the other named Defendants.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

43. This Defendant should not be held jointly and severally liable pursuant to the provisions of Section 15-38-15 of the South Carolina Code of Laws and/or other similar statutes.

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CLERK OF DISTRICT COURT
SOUTH CAROLINA
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M. H. E. FACILEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

44. To the extent that the Plaintiffs have received payment in satisfaction of any of the alleged injuries and/or claims against this Defendant, the Plaintiffs' Complaint in each and every count and cause of action alleged therein is barred or reduced by the defenses of payment and accord and satisfaction.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

45. There are no allegations against this Defendant stated with sufficient particularity to constitute a cause of action for fraud, fraudulent concealment, concert of action, conspiracy, or the like meeting the requirement of Rule 9(b) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

46. This Defendant had no duty to warn Plaintiffs of or protect Plaintiffs from the risks and dangers, if any, associated with asbestos or asbestos-related products.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

47. Plaintiff was employed by a knowledgeable and sophisticated user/employer and any duty this Defendant may have had to warn Plaintiffs of any potential dangers incident to use of this Defendant's products, which duty is denied, was discharged by the employer's intervening duty to give Plaintiff warning.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

48. Plaintiffs' claims are barred to the extent this Defendant's products were sold to a "learned intermediary" and/or "sophisticated user" or other similar purchaser and/or Defendant was a "bulk supplier."

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SOUTH CAROLINA
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HOFER BLACKLEY

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

49. The Plaintiffs were not in privity with this Defendant and Plaintiffs may not rely upon any warranties which may have been implied or imposed by law upon this Defendant; this Defendant affirmatively states that it breached no warranty.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

50. Any oral warranties upon which Plaintiffs allege to have relied are inadmissible and unavailable because of the provisions of the applicable Statute of Frauds.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

51. This Defendant affirmatively states that it has appropriately disclaimed all applicable warranties.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

52. This Defendant alleges that the Plaintiff had actual knowledge of and voluntarily assumed the risk incident to Plaintiff's use and exposure to asbestos or the products and processes involving the use of asbestos or asbestos-containing materials which were known to him to be dangerous.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

53. This Defendant alleges that the Plaintiff failed to properly use the product or products in question, abused the product or products, and/or subjected them to abnormal use at the time or times and places alleged in the Complaint.

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STANTON COUNTY
2018 JUN -6 AM 10:43
MEHOPE BLACKLEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

54. This Defendant alleges that if the Plaintiff used the product or products of this Defendant, the same was used for a purpose not intended by this Defendant and contrary to any instructions or normal method of using the same.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

55. This Defendant alleges that if the Plaintiff sustained any injuries or damages as set forth in the Complaint, which is denied, the same were due to and caused by the negligence, recklessness, willfulness, and wantonness of others and not this Defendant.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

56. This Defendant would show that even if Plaintiff has suffered injuries as described by Plaintiffs, and the same are admitted for the purposes of this defense only, then said injuries were caused by the acts or omissions of third parties, including but not limited to the actions of unions, employers, other manufacturers, distributors, and others, and that these acts or omissions of third parties acted as a direct and proximate cause of the Plaintiff's injuries in such a way as to constitute a supervening or intervening cause ending all liability on the part of this Defendant.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

57. If Plaintiff sustained the injuries and/or damages alleged, which is specifically denied, then such injuries and/or damages were proximately caused by the acts and/or omissions of the Plaintiff's employers with respect to the maintenance of healthy and safe work sites and environments, which were under the exclusive control and possession of the employer(s).

CLERK OF COURT
SEATTLE
2008 JUL -6 11:10:04
MEHOE-BLACKEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

58. This Defendant alleges that if the Plaintiff sustained injuries as a result of exposure to asbestos or asbestos-containing products, which is denied, then such injuries were or may have been due to exposures to products of manufacturers not named as Defendants in this action, including but not limited to product manufacturers which have taken advantage of the protections of the bankruptcy provisions of the United States Code.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

59. This Defendant denies that it mined, manufactured, processed, imported and/or sold any asbestos or asbestos-containing material which allegedly caused or contributed to the alleged injuries or damages of the Plaintiff. This Defendant further denies that, for those periods of time alleged by the Plaintiff, any product or action or inaction on its part caused damage to the Plaintiff.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

Plaintiffs did not notify this Defendant within a reasonable period of time after he discovered or should have discovered the alleged defect in its products and, therefore, is barred from recovery.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

60. If the Plaintiff was exposed to any of Defendant's products, said products at the time were manufactured in conformity with applicable federal and state regulations, standards, specifications and laws; consequently, recovery by the Plaintiff herein is barred.

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SPRINGFIELD, ILLINOIS
2016 JUN -6 AM 10:44
M. HOPE BLACKLEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

61. If it should be proven that the Plaintiff, while working for or otherwise associated with the United States Government, worked with or around asbestos-containing products manufactured by this Defendant or a predecessor corporation, such materials, on information and belief, were made in compliance with military specifications and contract requirements for a specific intended use by the United States Government.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

62. If any products manufactured and sold by this Defendant which give rise to Plaintiffs' claims herein were designed and manufactured pursuant to and in accordance with the standards of, or specifications mandated by, the United States Government and its agencies, the knowledge of the United States Government and its agencies of any possible health hazards from use of such products was equal or superior to that of this Defendant, and by reason thereof this Defendant is entitled to assume any immunity from liability which exists in favor of the United States Government or its agencies and/or to assert the government contractor defense.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

63. In the event it is determined that any product developed, manufactured, distributed, sold or otherwise utilized by this Defendant was dangerous, which danger is specifically denied, this Defendant was unaware of such danger as it would apply in any conceivable use of its products by the Plaintiff; furthermore, the discovery of such danger was beyond the state of the art at the time such product or products were manufactured, distributed, sold or used. Further, such products were manufactured, distributed, sold and used in conformity with the state of the art and/or prevailing industry standards at the time.

CLERK OF DISTRICT COURT
STATIONER
2016 JUN 6 AM 10:44
M. HOPKINS
M. HOPKINS

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

64. On information and belief, Plaintiffs have received payments from and granted releases to other parties, including but not limited to other parties to this action and other non-parties against whom Plaintiffs have claimed liability in tort for the same injury for which Plaintiffs claim this Defendant has liability. This Defendant is entitled to set off of the greater of the amount stipulated to in such release or the amount of consideration paid for such a release.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

65. Upon information and belief, Plaintiffs have failed to mitigate or otherwise act to lessen or reduce the injuries and disabilities alleged in the Complaint.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

66. Plaintiffs' Complaint fails to set forth a claim for punitive damages upon which relief may be granted.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

67. To the extent Plaintiffs' Complaint asserts a demand for punitive damages, this Defendant specifically incorporates by reference any and all standards of limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1966); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

CLERK OF COURT
SPARTANBURG COUNTY
2016 JUN -6 AM 10:14
M. HOPE BLACKLEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

68. To the extent that Plaintiffs' Complaint seeks punitive damages, this Defendant affirmatively pleads the following in regard to punitive damages:

- (a) An award of punitive damages in this civil action would amount to a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the applicable state Constitution;
- (b) An award of punitive damages in this civil action would violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the applicable state Constitution;
- (c) The criteria used for determining whether and in what amount punitive damages may be awarded are impermissible, vague, imprecise and inconsistent and, therefore, violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the applicable state Constitution;
- (d) An award of punitive damages in this civil action would amount to an excessive fine in violation of the due process provisions of the Eighth Amendment to the United States Constitution and the corresponding provisions of the applicable state Constitution; and
- (e) Plaintiffs' claim for punitive damages is barred by the "double jeopardy" clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

FILED
CLERK OF COURT
SPARTANBURG, SC
2016 JUN 16
M. HOPKINS
BLAKEY

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

69. This Defendant reserves the right to allege additional facts and circumstances in support of its defenses as these facts become available.

FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE

70. This Defendant incorporates by reference herein, as if fully set forth, all defenses, both affirmative and otherwise, raised, pleaded or asserted by all other answering defendants.

ANSWER TO CROSS-CLAIMS

This Defendant, answering any and all Cross-Claims which may already have been asserted or which may be asserted in the future against this Defendant by any Co-Defendants and/or Third-Party Defendants, says:

1. In defense of any and all cross-claims, this Defendant incorporates herein as if restated fully all responses and defenses which it has asserted above or may assert in response to the allegations contained in the Plaintiffs' Complaint.
2. The allegations against this Defendant in any and all cross-claims are denied.
3. This Defendant denies liability with respect to any and all cross-claims.
4. This Defendant denies that it has any indemnity or contribution liability to any other defendant or Third-Party Defendant.

RESERVATION OF CROSS-CLAIMS

All cross-claims for contribution and for indemnity by this Defendant against all Defendants and Third-Party Defendants are hereby reserved and implied.

JURY DEMAND

This Defendant requests trial by jury on all issues so triable.

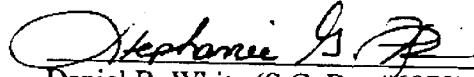
CLEAN UP COURT
SPRINGFIELD COUNTY
2008 JUL -6 AM 10:13
M. HOPE BLANCHLEY

WHEREFORE, this Defendant prays the Court for the following relief:

1. That Plaintiffs' Complaint be dismissed with prejudice as to this Defendant;
2. That any and all Cross-Claims against this Defendant be dismissed with prejudice;
3. That the Plaintiffs and other Defendants and/or Third-Party Defendants have and recover nothing from this Defendant;
4. That the costs of this action be taxed against the Plaintiffs and/or other Defendants and/or Third-Party Defendants;
5. That any judgment against this Defendant be reduced by any amount that any employer of the Plaintiff, their successors or assigns, would be entitled to receive there from by way of subrogation;
6. That there be a trial by jury on all issues of fact; and
7. For such other and further relief as the Court deems just and proper.

Respectfully submitted this, the 2nd day of June, 2016.

GALLIVAN, WHITE & BOYD, P.A.



Daniel B. White (S.C. Bar #6070)
Stephanie G. Flynn (S.C. Bar #16653)
GALLIVAN, WHITE & BOYD, P.A.
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P. O. Box 10589
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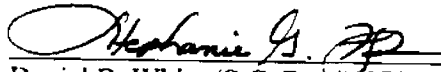
Attorneys for Defendant
Fisher Controls International LLC

OF COUNSEL:

JOHN G. GOLLER
von BRIESEN & ROPER, S.C.
411 East Wisconsin Ave.
Suite 1000
Milwaukee, WI 53202
jgoller@vonbriesen.com
(414) 287-1242

FILED
CLERK OF COURT
SPARTANBURG DISTRICT COURT
2016 JUN -6 AM 10:49
M. HOPE BLACKLEY

Defendant Fisher Controls International LLC demands a trial by jury


for Daniel B. White (S.C. Bar #6070)

FILED
CLERK OF COURT
SPARTANBURG DISTRICT
2016 JUN -6 11:10 AM
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C/A NO. 2016-CP-42-01592
BEVERLY DALE JOLLY AND BRENDA	)	
RICE JOLLY,	)	
	)	ANSWER
PLAINTIFFS,	)	
	)	
V.	)	
	)	
GENERAL ELECTRIC COMPANY, Et Al.,	)	
	)	
DEFENDANTS.	)	

Comes now, Crosby Valve, Inc., ("Crosby" or "Defendant"), by and through its undersigned counsel, and presents the following Answer and Defenses to Plaintiff's Complaint. Any allegation in the Complaint not specifically admitted herein is denied. More specifically, Crosby States:

ANSWERING GENERAL ALLEGATIONS

1. Defendant is without sufficient information to form a belief as to the allegations contained in paragraphs 1, 2, 3, and 4 and therefore denies them.

2. Defendant denies the allegations contained in Paragraph 5 of the Plaintiffs' Complaint pertaining to it, and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

3. Defendant is without sufficient information to form a belief as to the allegations contained in paragraph 6 and therefore denies them and asserts that its products did not present any risk of injury and/or disease.

4. Defendant denies the allegations contained in Paragraph 7 of the Plaintiffs' Complaint pertaining to it, and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

5. Answering the allegations contained in Paragraph 8, Defendant admits only that it is incorporated under the laws of a state other than South Carolina. Defendant denies the remaining allegations contained in Paragraph 8 of Plaintiffs' Complaint.

6. Paragraph 9 contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraphs 9 of Plaintiffs' Complaint.

7. Defendant denies the allegations contained in Paragraphs 10, 11, and 12 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE FIRST CAUSE OF ACTION
(Product Liability: Negligence)

8. In response to Paragraph 13 of the Plaintiffs' Complaint, Defendant, repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 12 of the Plaintiffs' Complaint.

9. Defendant denies the allegations contained in Paragraphs 14, 15, 16, 17, 18, and 19 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

10. Paragraph 20 of contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraph 20 of the Plaintiffs' Complaint.

11. Defendant denies the allegations contained in Paragraphs 21, 22, 23, 24, 25, 26, 27, and 28 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE SECOND CAUSE OF ACTION
(Product Liability: Strict Liability – S.C. Code Ann. Sec. 15-73-10, et seq.)

12. In response to Paragraph 29, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 28 of the Plaintiffs' Complaint.

13. Paragraph 30 of the Plaintiffs' Complaint contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraph 30 of the Plaintiffs' Complaint.

Defendant denies the allegations contained in Paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE THIRD CAUSE OF ACTION
(Vicarious Liability of Defendants Based Upon Respondent Superior)

14. In response to Paragraph 46, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 45 of the Plaintiffs' Complaint.

Defendant denies the allegations contained in Paragraphs 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 and 62 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE FOURTH CAUSE OF ACTION
(Premises Liability: Negligence as to Premise Owner/Contractor)

15. In response to Paragraph 63, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 62 of the Plaintiffs' Complaint.

16. Defendant denies the allegations contained in Paragraphs 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 77 of the Plaintiffs' Complaint pertaining to it. Specifically, Defendant

denies that it was a “premises owner” of any job site where the Plaintiff allegedly worked and denies that Plaintiff was employed by Defendant. Defendant is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE FIFTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties – S.C. Code Ann. 36-2-314)

17. In response to Paragraph 78, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 77 of the Plaintiffs’ Complaint.

18. Defendant denies the allegations of Paragraphs 78, 79, 80 and 81 of the Plaintiffs’ Complaint pertaining to it and specifically denies that any implied warranty was made, breached or that any alleged breach of implied warranty resulted in any damage to the Plaintiffs. Defendant is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE SIXTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

19. In response to Paragraph 82, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 81 of the Plaintiffs’ Complaint.

20. Defendant denies the allegations contained in Paragraphs 83, 84 and 85 of the Plaintiffs’ Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

ANSWERING THE SEVENTH CAUSE OF ACTION
(Loss of Consortium)

21. In response to Paragraph 86, Defendant repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 85 of the Plaintiffs’ Complaint.

22. Paragraph 87 of the Plaintiffs' Complaint contains no allegations against Defendant to which a response from Defendant is required. To the extent a response from Defendant is deemed necessary, Defendant denies Paragraph 87 of the Plaintiffs' Complaint.

23. Defendant denies the allegations contained in Paragraphs 88 and 89 of the Plaintiffs' Complaint pertaining to it and is without sufficient information to form a belief as to the allegations pertaining to co-defendants and therefore denies them.

24. Defendant denies the Prayer for Relief of Plaintiffs' Complaint.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

The Court lacks jurisdiction over this Defendant as a result of improper, and/or lack of, service of process; lack of subject matter jurisdiction; and/or lack of personal jurisdiction. Under the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), Defendant is not subject to general personal jurisdiction in South Carolina. *Daimler* holds that, absent "exceptional" circumstances, a corporation is subject to general jurisdiction only in its place of incorporation and principal place of business. Because South Carolina is not Defendant's place of incorporation or principal place of business—and because there are no "exceptional" circumstances that would warrant a departure from the governing rule—general jurisdiction is unavailable. Specific jurisdiction exists only where a defendant's suit-related conduct is alleged to have occurred in the forum. Plaintiff's Complaint lacks any allegation that Plaintiff was injured in South Carolina or that Defendant did or failed to do anything in South Carolina giving rise to Plaintiffs' damages, if any.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

25. The Plaintiffs' Complaint and each cause of action therein fail to state a claim against this Defendant.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

The Complaint should be dismissed due to the Plaintiffs' lack of capacity.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

26. There is a lack of joinder of one or more parties who should or must be joined; without the joinder of these proper parties, complete relief cannot be accorded among those already made parties to this action.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

The claims set forth in the Complaint are barred by the applicable statutes of limitations and/or repose in this state or other states as may be applicable.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred by the contributory or comparative negligence of the Plaintiff; in the alternative, Plaintiffs' claims are barred in part by the comparative negligence of the Plaintiff and any award to the Plaintiff should be reduced accordingly.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

The claims set forth in the Plaintiffs' Complaint are barred to the extent there is another action pending between the same parties for the same claim.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs do not have capacity to bring this claim pursuant to Section 15-5-150 of the South Carolina Code of Laws, also referred to the South Carolina's Door Closing Statute.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs' Complaint should be dismissed and/or is not subject to trial for its failure to comply with the requirements of Section 44-135-10 *et seq.*, of the South Carolina Code of Laws, also known as the "Asbestos and Silica Claims Procedure Act of 2006."

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or reduced by the doctrines of res judicata, waiver, release, laches, and/or conditions precedent or subsequent.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or reduced by the applicable provisions of the Worker's Compensation Act, whether of this state or another.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

By virtue of the doctrine of judicial estoppel, the Plaintiffs are precluded from taking a position inconsistent with one taken with respect to the same facts in earlier litigation, if any, and are, therefore, precluded from alleging the material facts necessary to state a cause of action against this Defendant.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Venue is improper in this action. This Defendant reserves its right to move for dismissal and/or transfer of the action based on improper and/or inconvenient venue and further reserves its right to seek application of the law of the appropriate venue on all issues.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant would show that, among other things, Plaintiffs' claim for punitive damages is barred, reduced, bifurcated, capped or otherwise impacted by the South Carolina Fairness in Civil Justice Act of 2011 and/or similar and/or related state statutes and limitations.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

The alleged injuries to the Plaintiff are barred by Section 15-73-10 *et seq.*, of the South Carolina Code of Laws; therefore, the Plaintiff is prohibited by law from asserting a cause of action based on strict liability for either actual or punitive damages.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

There has been no concert of action between this Defendant and any of the other named Defendants. The Defendants are not joint tortfeasors and, therefore, this Defendant may therefore not be held jointly and severally liable with the other named Defendants.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant should not be held jointly and severally liable pursuant to the provisions of Section 15-38-15 of the South Carolina Code of Laws and/or other similar statutes.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

To the extent that the Plaintiffs have received payment in satisfaction of any of the alleged injuries and/or claims against this Defendant, the Plaintiffs' Complaint in each and every count and cause of action alleged therein is barred or reduced by the defenses of payment and accord and satisfaction.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

There are no allegations against this Defendant stated with sufficient particularity to constitute a cause of action for fraud, fraudulent concealment, concert of action, conspiracy, or the like meeting the requirement of Rule 9(b) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant had no duty to warn Plaintiffs of or protect Plaintiffs from the risks and dangers, if any, associated with asbestos or asbestos-related products.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiff was employed by a knowledgeable and sophisticated user/employer and any duty this Defendant may have had to warn Plaintiffs of any potential dangers incident to use of this Defendant's products, which duty is denied, was discharged by the employer's intervening duty to give Plaintiff warning.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred to the extent this Defendant's products were sold to a "learned intermediary" and/or "sophisticated user" or other similar purchaser and/or Defendant was a "bulk supplier."

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

The Plaintiffs were not in privity with this Defendant and Plaintiffs may not rely upon any warranties which may have been implied or imposed by law upon this Defendant; this Defendant affirmatively states that it breached no warranty.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Any oral warranties upon which Plaintiffs allege to have relied are inadmissible and unavailable because of the provisions of the applicable Statute of Frauds.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

This Defendant affirmatively states that it has appropriately disclaimed all applicable warranties.

**FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE**

This Defendant alleges that the Plaintiff had actual knowledge of and voluntarily assumed the risk incident to Plaintiff's use and exposure to asbestos or the products and processes involving the use of asbestos or asbestos-containing materials which were known to him to be dangerous.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant alleges that the Plaintiff failed to properly use the product or products in question, abused the product or products, and/or subjected them to abnormal use at the time or times and places alleged in the Complaint.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant alleges that if the Plaintiff used the product or products of this Defendant, the same was used for a purpose not intended by this Defendant and contrary to any instructions or normal method of using the same.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant alleges that if the Plaintiff sustained any injuries or damages as set forth in the Complaint, which is denied, the same were due to and caused by the negligence, recklessness, willfulness, and wantonness of others and not this Defendant.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant would show that even if Plaintiff has suffered injuries as described by Plaintiffs, and the same are admitted for the purposes of this defense only, then said injuries were caused by the acts or omissions of third parties, including but not limited to the actions of unions, employers, other manufacturers, distributors, and others, and that these acts or omissions of third parties acted as a direct and proximate cause of the Plaintiff's injuries in such a way as to constitute a supervening or intervening cause ending all liability on the part of this Defendant.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

If Plaintiff sustained the injuries and/or damages alleged, which is specifically denied, then such injuries and/or damages were proximately caused by the acts and/or omissions of the Plaintiff's employers with respect to the maintenance of healthy and safe work sites and environments, which were under the exclusive control and possession of the employer(s).

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant alleges that if the Plaintiff sustained injuries as a result of exposure to asbestos or asbestos-containing products, which is denied, then such injuries were or may have been due to exposures to products of manufacturers not named as Defendants in this action, including but not limited to product manufacturers which have taken advantage of the protections of the bankruptcy provisions of the United States Code.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant denies that it mined, manufactured, processed, imported and/or sold any asbestos or asbestos-containing material which allegedly caused or contributed to the alleged injuries or damages of the Plaintiff. This Defendant further denies that, for those periods of time alleged by the Plaintiff, any product or action or inaction on its part caused damage to the Plaintiff.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs did not notify this Defendant within a reasonable period of time after he discovered or should have discovered the alleged defect in its products and, therefore, is barred from recovery.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

If the Plaintiff was exposed to any of Defendant's products, said products at the time were manufactured in conformity with applicable federal and state regulations, standards, specifications and laws; consequently, recovery by the Plaintiff herein is barred.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

If it should be proven that the Plaintiff, while working for or otherwise associated with the United States Government, worked with or around asbestos-containing products manufactured by this Defendant or a predecessor corporation, such materials, on information and belief, were made in compliance with military specifications and contract requirements for a specific intended use by the United States Government.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

If any products manufactured and sold by this Defendant which give rise to Plaintiffs' claims herein were designed and manufactured pursuant to and in accordance with the standards of, or specifications mandated by, the United States Government and its agencies, the knowledge of the United States Government and its agencies of any possible health hazards from use of such products was equal or superior to that of this Defendant, and by reason thereof this Defendant is entitled to assume any immunity from liability which exists in favor of the United States Government or its agencies and/or to assert the government contractor defense.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

In the event it is determined that any product developed, manufactured, distributed, sold or otherwise utilized by this Defendant was dangerous, which danger is specifically denied, this Defendant was unaware of such danger as it would apply in any conceivable use of its products by the Plaintiff; furthermore, the discovery of such danger was beyond the state of the art at the time such product or products were manufactured, distributed, sold or used. Further, such products were manufactured, distributed, sold and used in conformity with the state of the art and/or prevailing industry standards at the time.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

On information and belief, Plaintiffs have received payments from and granted releases to other parties, including but not limited to other parties to this action and other non-parties against whom Plaintiffs have claimed liability in tort for the same injury for which Plaintiffs claim this Defendant has liability. This Defendant is entitled to set off of the greater of the amount stipulated to in such release or the amount of consideration paid for such a release.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Upon information and belief, Plaintiffs have failed to mitigate or otherwise act to lessen or reduce the injuries and disabilities alleged in the Complaint.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

Plaintiffs' Complaint fails to set forth a claim for punitive damages upon which relief may be granted.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

To the extent Plaintiffs' Complaint asserts a demand for punitive damages, this Defendant specifically incorporates by reference any and all standards of limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

To the extent that Plaintiffs' Complaint seeks punitive damages, this Defendant affirmatively pleads the following in regard to punitive damages:

- (a) An award of punitive damages in this civil action would amount to a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the applicable state Constitution;
- (b) An award of punitive damages in this civil action would violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the applicable state Constitution;
- (c) The criteria used for determining whether and in what amount punitive damages may be awarded are impermissible, vague, imprecise and inconsistent and, therefore, violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the applicable state Constitution;
- (d) An award of punitive damages in this civil action would amount to an excessive fine in violation of the due process provisions of the Eighth Amendment to the United States Constitution and the corresponding provisions of the applicable state Constitution; and
- (e) Plaintiffs' claim for punitive damages is barred by the "double jeopardy" clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant reserves the right to allege additional facts and circumstances in support of its defenses as these facts become available.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE**

This Defendant incorporates by reference herein, as if fully set forth, all defenses, both affirmative and otherwise, raised, pleaded or asserted by all other answering defendants.

ANSWER TO CROSS-CLAIMS

This Defendant, answering any and all Cross-Claims which may already have been asserted or which may be asserted in the future against this Defendant by any Co-Defendants and/or Third-Party Defendants, says:

1. In defense of any and all cross-claims, this Defendant incorporates herein as if restated fully all responses and defenses which it has asserted above or may assert in response to the allegations contained in the Plaintiffs' Complaint.
2. The allegations against this Defendant in any and all cross-claims are denied.
3. This Defendant denies liability with respect to any and all cross-claims.
4. This Defendant denies that it has any indemnity or contribution liability to any other defendant or Third-Party Defendant.

RESERVATION OF CROSS-CLAIMS

All cross-claims for contribution and for indemnity by this Defendant against all Co-Defendants and Third-Party Defendants are hereby reserved and implied.

JURY DEMAND

This Defendant requests trial by jury on all issues so triable.

WHEREFORE, this Defendant prays the Court for the following relief:

1. That Plaintiffs' Complaint be dismissed with prejudice as to this Defendant;
2. That any and all Cross-Claims against this Defendant be dismissed with prejudice;
3. That the Plaintiffs and other Defendants and/or Third-Party Defendants have and recover nothing from this Defendant;
4. That the costs of this action be taxed against the Plaintiffs and/or other Defendants and/or Third-Party Defendants;
5. That any judgment against this Defendant be reduced by any amount that any employer of the Plaintiff, their successors or assigns, would be entitled to receive there from by way of subrogation;
6. That there be a trial by jury on all issues of fact; and
7. For such other and further relief as the Court deems just and proper.

Respectfully submitted this, the 16 day of June, 2017.

LEATH, BOUCH & SEEKINGS, LLP

By: /s/Yancey A. McLeod, III
Timothy W. Bouch
Yancey A. McLeod, III
Amy Melvin McLeod
92 Broad Street
Charleston, South Carolina 29401
(843) 937-8811

Counsel for Crosby Valve, Inc.

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF SPARTANBURG) OF THE SEVENTH
4) JUDICIAL CIRCUIT
5)
6 BEVERLY DALE JOLLY AND)
7 BRENDA RICE JOLLY,)
8)
9 Plaintiffs,) TRANSCRIPT OF RECORD
10 vs.) 2016-CP-42-01592
11)
12 GENERAL ELECTRIC COMPANY,)
13 ET AL.,)
14 Defendants.)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

July 18, 2017
Spartanburg, South Carolina

B E F O R E:

HONORABLE JEAN H. TOAL, Judge.

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

1 A P P E A R A N C E S:

2 THEILE B. MCVEY, ESQUIRE
3 For Plaintiffs

4 JONATHAN M. HOLDER, ESQUIRE
5 For Plaintiffs

6 SIMONA FARRISE, ESQUIRE
7 For Plaintiffs

8 TIMOTHY W. BOUCH, ESQUIRE
9 For Defendants Crosby and Fisher

10 PHILLIP C. REID, ESQUIRE
11 For Defendants Crosby and Fisher

12 YANCEY A. MCLEOD, III, ESQUIRE
13 For Defendants Crosby and Fisher

14 CHRISTOPHER MASSENBURG, ESQUIRE
15 For Defendant Georgia-Pacific

16 JASE GLENN, ESQUIRE
17 For Defendant Georgia-Pacific

18 Also present:

19 Keith D. Munson, Esquire
20 M. Todd Rainsford, Esquire
21 Alexander M. Bullock, Esquire
22 William P. Early, Esquire
23 Allyson Twilley, Esquire
24 Thomas M. Kennaday, Esquire
25 Louis P. Hearn, Esquire
Moffitt G. McDonald, Esquire
Brady A. Yntema, Esquire
Chip Collins, Esquire
Mark Curren, Esquire
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EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

1 BEVERLY D. JOLLY, ET AL V. GENERAL ELECTRIC CO., ET. AL

2 THE COURT: While we're kind of getting set up,
3 logistically let me have your attention for a minute.
4 As I understand it, with this enormous bale of motions
5 that Ms. Long has produced for us, we have three
6 defendants left in Jolly against General Electric. And
7 those defendants are, as I understand it, Fisher
8 Controls, Crosby Valve and Georgia-Pacific. Am I right
9 about that?

10 MS. MCVEY: Yes, ma'am.

11 THE COURT: All right. What I want you all to do
12 to begin with, and everybody here is pretty familiar
13 with my motorcycle remedy. Right now I want you to
14 stand and identify yourself and your client, beginning
15 with plaintiff, and then coming over here to the defense
16 side. And every time you speak I want you to stand and
17 identify yourself and your client. It's just hard for
18 her to keep up otherwise.

19 I see many interested parties in the gallery and
20 I know that from time to time you all may want to weigh
21 in on things. And similarly, if you do, please stand
22 and identify yourself so that our court reporter can be
23 sure she's got everybody attached to the right
24 interested party in these proceedings.

25 I have received various communications from Ms.

1 McVey and from Mr. Meriwether's office, for which I am
2 very grateful to try to figure out what still is up and
3 what is not. And what I have been doing was, when I was
4 prepping over the weekend and yesterday, was to utilize
5 Ms. McVey's e-mail to me of Friday in which she goes
6 through and highlights the things that are still active
7 as motions. And how to marry that up with this big list
8 here from Marsha is something that I want to do so that
9 Ms. Long will have correctly listed what is active and
10 what rulings are made and what motions they're attached
11 to. So I want you all to be mindful of helping me with
12 that.

13 So let's begin by having the plaintiff identify
14 all members of the plaintiff's team and then we'll go to
15 the defense. Ms. McVey, why don't you start.

16 MS. MCVEY: Good morning, Chief Justice Toal.
17 Theile McVey for the plaintiffs, Mr. and Mrs. Jolly.
18 Before we get started, this is Simona Farrise.

19 MS. FARRISE: Good morning, ma'am.

20 MS. MCVEY: And I have an order. We filed her
21 pro hoc, but the order has not been filed.

22 THE COURT: And I realize that you all are still
23 pulling your hair out because of orders. I will at our
24 next break get all of you up here to be sure that all of
25 your pro hac orders are signed and dealt with. Today is

1 the 18th. All right.

2 MS. MCVEY: And Jonathan Holder, Your Honor.

3 MR. HOLDER: Jonathan Holder for the plaintiffs.

4 THE COURT: Okay.

5 MS. FARRISE: Good morning, ma'am. For the
6 record Simona Farrise for the plaintiff as well.

7 THE COURT: And spell that last name, Ms.
8 Farisse.

9 MS. FARRISE: Sure. F, like Frank, A-R-R-I-S-E.

10 THE COURT: And are you with Kassel and McVey or
11 are you with Mr. Holder's firm or are you ---

12 MS. FARRISE: With Mr. Holder's firm.

13 THE COURT: Very good. Okay. We've got it. All
14 right. And now I turn to the defense side, Mr. Bouch.

15 MR. BOUCH: Good morning, Your Honor. Tim Bouch
16 for Fisher and Crosby. I have with me Mr. Phil Reid,
17 whose order is pending.

18 THE COURT: Mr. Reid, consider it done. We'll
19 get all the paperwork taken care of on the next break,
20 but welcome. Glad to have you here.

21 MR. REID: Thank you very much, Your Honor.

22 MR. BOUCH: Mr. Reid is a member of the Wisconsin
23 bar, Your Honor.

24 THE COURT: Great. And hello Mr. McLeod. Good
25 to see you again, sir.

1 MR. MCLEOD: Hello, Justice Toal, how are you
2 this morning?

3 THE COURT: I'm great. And Yancey is a part of
4 your team. Now how about for Georgia-Pacific?

5 MR. GLENN: Your Honor, Jase Glenn on behalf of
6 Georgia-Pacific LLC. I have with me my colleague,
7 Christopher Massenburg.^o He too has a pro hoc order
8 pending with Your Honor.

9 THE COURT: Good. We'll get all that straight
10 and you're admitted, all is well.

11 And then for the record, this is not a normal
12 gallery. These are all interested parties. Lawyers
13 representing various parties on the Court's broader
14 asbestos docket. And so for the record I would like to
15 have you begin. Mr. Phillips, why don't you begin and
16 each of you identify yourself for the record in case we
17 end up needing that information at some point.

18 MR. PHILLIPS: I understand, Your Honor, and
19 delighted to do it. Mark Phillips from Nelson Mullins
20 Riley and Scarborough for a number of interested
21 defendants.

22 MR. EARLY: I'll introduce Susan Collings is here
23 with Nelson Mullins as well, Your Honor.

24 MR. PHILLIPS: Oh, she's my paralegal.

25 THE COURT: Ms. Collings is the most important

1 person in this room.

2 MR. PHILLIPS: She is indeed, Your Honor. She is
3 indeed. Susan Collings also Nelson Mullins Riley and
4 Scarborough.

5 THE COURT: All right. Mr. Early.

6 MR. EARLY: Will Early here on behalf of multiple
7 defendants from Charleston. Pierce, Hems, Sloan &
8 Wilson.

9 THE COURT: Very good.

10 MR. RAINSFORD: Todd Rainsford, Your Honor, also
11 from Pierce, Hems, Sloan & Wilson for several
12 defendants.

13 MR. BULLOCK: Good morning, Your Honor. Alex
14 Bullock from Kilpatrick Townsend and Stockton.

15 THE COURT: All right.

16 MR. McDONALD: Moffitt McDonald. I'm here from
17 Haynesworth Sinkler Boyd on behalf of a couple
18 defendants.

19 MR. TRAYLOR: David Traylor with Nelson Mullins
20 on behalf of several defendants.

21 MR. HERNS: Good morning, Your Honor, Louis Hems
22 with Pierce, Hems, Sloan & Wilson, here on behalf of
23 several defendants.

24 MS. TWILLEY: Allyson Twilley from Gallivan,
25 White & Boyd. I'm here for several defendants.

1 MR. KENNADAY: Tom Kennaday from Turner Padget.

2 MR. YNTEMA: Good morning, Your Honor, Brady
3 Yntema. Last name is spelled Y-N-T-E-M-A, with Goldberg
4 Segalla.

5 MR. COLLINS: Good morning, Your Honor, Chip
6 Collins from Dougall and Collins.

7 MR. MUNSON: Good morning, Justice Toal. Keith
8 Munson from Womble Carlyle for a number of defendants.

9 MR. COLLIER: Good morning, Your Honor. Chris
10 Collier from Hawkins, Cornell, Thackston and Young for a
11 number of defendants.

12 MR. CURRESS: Mark Curress (phonetic) also here
13 for a number of defendants.

14 THE COURT: Very good. Thank you so much. And,
15 Ms. Collings, again the Court thanks you so much for all
16 of your work in trying to keep the master list of cases
17 pending up to date. And Ms. Collings has, as you all
18 may have seen, sent out a more recent e-mail than her
19 last master list indicating that she needs your
20 assistance in updating that list.

21 So I just want to again say she's doing that on
22 my behalf as well. So, please, if you know of changes
23 that need to be made, substitution of counsel,
24 withdrawals, additions, et cetera, please let Ms.
25 Collings know that. Thank you.

1 All right. Ms. McVey, the way I see -- well, let
2 me ask -- let me start with this.

3 Mr. Bouch, I have seen several communications
4 from you present with the lack of notice and so forth
5 and so on and I get all that. Of course, you're kind of
6 coming into this thing as substitute counsel for a
7 withdrawn counsel. And so some things have taken place
8 before you came to the party.

9 But my -- this case is scheduled for trial on the
10 24th. I think you protected yourself in terms of any
11 disadvantage that you may be suffering, but I don't want
12 to run over you, but it would be my intention to move
13 forward with all of these motions.

14 MR. BOUCH: Your Honor, I have no, no problem
15 with notice of any of these motions. I'll bring two
16 matters up to the Court that you may wish to consider.
17 We do have an issue with Dr. Oury's deposition.

18 THE COURT: Yes, we're gonna get to that
19 definitely.

20 MR. BOUCH: I'll be glad to go into that in some
21 detail at the Court's invitation. Number two, the only
22 notice that we have is apparently the Court notified
23 plaintiff's counsel and maybe Mr. Meriwether about three
24 weeks ago that you wish to change the standing
25 scheduling order and provide for motions in limine to be

1 filed a week earlier with the responses a week earlier.

2 The notice to the defendants did not include
3 about half the defendants. And at 4 o'clock on Friday,
4 the day the new motions were due, we found out about it
5 purely by accident.

6 THE COURT: Well, I'm sorry for that. I will say
7 that I looked over my e-mails and there was an e-mail
8 that did include everybody that was remaining in the
9 case.

10 MR. BOUCH: No, Your Honor, that was incorrect.
11 Neither did Mr. ---

12 THE COURT: Well, I've got it here. All right,
13 but it did not include you because I didn't know that
14 you had been substituted for Gallivan and White.

15 MR. BOUCH: They were not included either, Your
16 Honor.

17 THE COURT: Well, I understand your position,
18 but...

19 MR. BOUCH: Well, but we scrambled, Your Honor,
20 and we filed our motions as quickly as we could because
21 there's no great surprise. As Your Honor has probably
22 observed, these motions in limine do not come divinely
23 inspired.

24 THE COURT: No, they are of a pattern and Judge
25 Hill ruled on all of them many times and I've ruled on

1 them a couple times.

2 MR. BOUCH: Well, more importantly, Your Honor,
3 each one of them, both sides, has been a subject of a
4 mistrial.

5 THE COURT: Oh, no question about it. Right.
6 So...

7 MR. BOUCH: Again that's why.

8 THE COURT: All right. Having stated your
9 dissatisfaction, all right, it sounds like you're not
10 disadvantaged so we're going to go forward.

11 MR. BOUCH: As I said when I stood up, Your
12 Honor, I have no objection to any of the notices other
13 than I brought that to the Court's attention that we
14 were concerned about being left off.

15 THE COURT: All right. Okay. And with that, Ms.
16 McVey I need a little direction from you as to how we're
17 gonna proceed. These motions are numbered 1 through 52
18 on Ms. Long's list.

19 MR. BOUCH: Excuse me, Your Honor. One more
20 thing that might ease the course. Crosby and Fisher
21 still have outstanding motions for summary judgment that
22 might clarify some of the later filed motions in limine.
23 We'll take that up, of course, at the Court's
24 convenience, but I bring that out. It's not on Ms.
25 McVey's list.

1 THE COURT: Yeah. And we certainly got all the
2 motions for summary judgment still pending.

3 MS. MCVEY: It is -- I'm sorry, Your Honor. It
4 is on my list. That's, in fact, the first thing on my
5 e-mail to everybody what was pending is the summary
6 judgment motions for Fisher & Crosby.

7 THE COURT: Yeah.

8 MS. MCVEY: That's the first thing listed on that
9 list. And then we have some discovery motions and then
10 we have -- and, actually, only one discovery motion.
11 And then we have all the motions in limine. So however
12 you want to take them up.

13 THE COURT: Okay. Well, let me see what list
14 you're looking at.

15 MS. MCVEY: Yes, ma'am. May I approach?

16 THE COURT: Sure.

17 MS. MCVEY: This is the one that's been around
18 that had the agreements I think that everybody got.

19 THE COURT: Yeah, that's the 15th. Let's see. I
20 just had the 14th in this notebook.

21 MS. MCVEY: And, I'm sorry, this is an internal
22 e-mail, Your Honor, that has some things on it from our
23 team, so that's probably why it's ---

24 THE COURT: Yes, yes, I understand. Well, why
25 don't we do this. Before we get to any of the motions

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1 in limine, let's begin with the motions for summary
2 judgment by Fisher & Crosby. Those are the two that are
3 outstanding, as I understand it. So let's move forward
4 with those two.

5 Mr. Bouch, you're the moving party, so you may
6 proceed.

7 MR. REID: Your Honor, Phillip Reid for Crosby.
8 I'll start with Crosby's motion, Your Honor. The point
9 of ---

10 THE COURT: Tell me one more time your last name.

11 MR. REID: Reid, R-E-I-D. Your Honor, the upshot
12 of Crosby's motion for summary judgment is that there's
13 no evidence in this record that Mr. Jolly was exposed to
14 asbestos on account of a Crosby valve. As the Court
15 knows from reading the briefs submitted on Crosby's
16 motion for summary judgment, there are legal issues
17 presented, such as whether the defendants in this case
18 have a duty to warn about insulation.

19 But in a sense those are moot because we don't
20 get past the facts. There's simply no evidence of
21 exposure to any Crosby product by Mr. Jolly. Mr.
22 Jolly's deposition is in the record. He never mentioned
23 Crosby.

24 There are three co-worker or four co-worker
25 depositions in the record. Mr. Freeman is one of those.

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1 He never mentioned Crosby in his deposition. He does
2 not know Mr. Jolly.

3 Mr. Simpson is another co-worker. Likewise, he
4 didn't know Mr. Jolly. He did not recall doing any
5 internal work on Crosby valves. He couldn't remember
6 ever encountering a flanged Crosby valve. He didn't say
7 Crosby valves were insulated.

8 Mr. Taylor is the last co-worker that the
9 plaintiff's rely on. He acknowledged that he did not
10 know of Mr. Jolly ever doing any valve work and could
11 not recall, could not identify any brand of valve that
12 Jolly ever worked around.

13 So what the plaintiff's case amounts to against
14 Crosby is that Mr. Jolly worked at the Oconee, McGuire,
15 Catawba plants, as well as about 15 other fossil fuel
16 plants that Duke owns; that Crosby valves were at the
17 three nuclear plants. And they've submitted some 1982
18 purchase orders directed to Crosby where Duke was
19 ordering asbestos containing gaskets.

20 What they have not shown is any evidence of work
21 on a Crosby valve by or near Mr. Jolly or that any such
22 work would have involved asbestos or that if any such
23 work had occurred it occurred with regularity, proximity
24 or frequency required by the Lohrmann case. Lohrmann,
25 in fact, characterized the very same circumstances that

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1 could be used to characterize this case.

2 Your Honor, if the Court will indulge me,
3 Lohrmann, 782 F2d 1158 at Page 1162, the court said:
4 "The mere proof that the plaintiff and a certain
5 asbestos product are at the shipyard at the same time
6 without more, does not prove exposure to that product."

7 And that's a perfect description for this case.
8 They have Crosby valves at these plants. They say
9 Mr. Jolly worked there. They have nothing more.

10 Your Honor, really the pitch in the brief I wrote
11 here was to tell the Court don't take my word for it,
12 but to use as a measure of whether summary judgment is
13 appropriate or not a number of other cases. One of
14 those is case -- in fact, all the cases I'm about to
15 mention to the Court were circumstances where the
16 plaintiff had a relatively stronger case than Mr. Jolly
17 does here.

18 In Pace, for instance, the plaintiff worked on
19 pumps and valves. He submitted an affidavit stating
20 that he regularly worked in the vicinity of asbestos
21 containing materials that when worked on created dust
22 which he breathed. He worked on the defendant's
23 products, but there was no witness that tied his work to
24 work on asbestos containing products. And the Fourth
25 Circuit granted summary judgment in that case.

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1 We've cited a case called *Logan*, 214 U.S. Lexis
2 157958. Very similar circumstances. There was
3 co-worker testimony that established that the decedent
4 had worked at a facility for 30 years, that he
5 frequently worked on gaskets containing asbestos. That
6 asbestos dust was hard to avoid. That he was right
7 there during valve work and the gaskets. And that the
8 defendant who brought the motion for summary judgment
9 made 10 percent of the valves at the site.

10 But there was no one who saw the decedent work on
11 or near the moving defendant Powell's valves. And the
12 Court concluded that a jury could only speculate that
13 the plaintiff was exposed to asbestos from Powell Valves
14 and granted summary judgment.

15 We cited the Stewart case, which is from the
16 federal asbestos MDL in Pennsylvania, much to the same
17 effect.

18 We've cited the Mullis case, Your Honor. In that
19 case there was evidence that the decedent was in a shop
20 thousands of times in proximity to the defendant's
21 engine products. That the majority of gaskets in those
22 engines had asbestos. But just as in this case, there
23 was no evidence of actual exposure and the court granted
24 summary judgment.

25 Your Honor, I want to mention one other case,

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1 which we didn't cite in our briefs, but I think is, is
2 pertinent. This is a decision called *Ryan versus Eli*
3 *Lilly and Company*, 514 F.2d 1004, where Judge Chapman
4 wrote something that I think applies to our case.

5 Quoting at page 1018: "The unequivocal law of
6 South Carolina is the plaintiff in a negligence case has
7 not only the burden of proving negligence but also the
8 burden of proving that the injury or damage was caused
9 by the actual conduct of the particular defendant."

10 And it goes on to cite another case saying that:
11 "A judgment for the plaintiff was reversed because where
12 the cause of plaintiff's injury, they be as reasonably
13 attributed to an act for which defendant is not liable
14 as to one for which he is liable. The plaintiff has
15 failed to carry the burden of establishing that his
16 injuries were the approximate result of defendant's
17 negligence."

18 The Supreme Court of South Carolina has not
19 carved out any exceptions to this traditional rule. I
20 think what the ---

21 THE COURT: Well, in that case they were not able
22 to identify who manufactured the DES tablet sheet that
23 the mother took. Here you've got, for example, in Mr.
24 Taylor's deposition -- I mean these are all people that
25 worked -- a bunch of these plaintiffs are people that

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1 work at McGuire, Oconee and various plants.

2 Taylor says ten different brands of valves were
3 used at Duke, including Crosby. And he describes the
4 ruling asbestos plant gasket from Crosby valves and
5 testifies that that's what the guys who worked on these
6 valves did. Jolly is one of these people who testifies
7 that -- he and his wife both testify about what he
8 worked on.

9 He doesn't use the name Crosby, but he talks
10 about the same kind of activity that Mr. Taylor engaged
11 in, removing flange gaskets, removing packing from
12 Crosby valves, from valves. And Crosby definitely is
13 one of the ones that supplied valves.

14 That's a little different situation from the
15 Ryan and some of the other cases you have mentioned, Mr.
16 Reid where there is no identification of the work that
17 was done with the particular valves. Here there is some
18 testimony from co-workers in that regard, is there not?

19 MR. REID: My point, Your Honor, is that there's
20 no such testimony -- there's no testimony that Mr. Jolly
21 was present during work on a Crosby valve. Simply no
22 testimony of that nature. In fact, if ---

23 THE COURT: Well, you have to piece it together
24 from several pieces of testimony, but we are here
25 looking at this thing in the light most favorable to the

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1 nonmoving party, as we must at this stage. And there is
2 testimony in this record from depositions of co-workers
3 that describes Crosby valves as one of the valves and
4 Crosby flanges as some of the flanges that were on --
5 that had to be removed and replaced and that asbestos
6 flew into the air. It was a very dusty environment.
7 Wire brushes and cores were used.

8 This is the very same thing that -- and the very
9 same defense that Judge Miller has dealt with several
10 times in previous orders that addressed the same Duke
11 environment. Why is that gonna be different in this
12 case? Won't the same evidence gonna be introduced?

13 MR. REID: Well, Your Honor, I disagree with that
14 conclusion because in this case what we have is just
15 general testimony that valves were worked on. Nobody
16 has ---

17 THE COURT: No, we don't have general testimony
18 in all cases. We've got some general testimony and that
19 includes Mr. Jolly's testimony. But we've also got
20 specific testimony from some of these co-workers about
21 Crosby valves being one of the ten brands of valves that
22 was extensively used in Duke over a long period of time.

23 If you put that together with what is testified
24 about what these pipefitters did, that establishes at
25 least circumstantial evidence that Crosby valves were

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1 among the valves that Mr. Jolly worked upon, does it
2 not? I mean, circumstantial evidence, you know, is good
3 evidence. In fact, I quoted saying it should be treated
4 just like any other evidence.

5 MR. REID: What this case illustrates, Your
6 Honor, is the difference between circumstantial evidence
7 and speculation. And I think that's the point of the
8 cases I've cited to the Court where there is no one who
9 says it was this defendant's product that the plaintiff
10 was near. The courts have reached the conclusion that
11 that would require a jury to engage in speculation.

12 And here we have, as Your Honor has just noted, a
13 number of valves, Veling, Kennedy, Crane, Anchor,
14 Kerotest, Warren, Grinnell, Flowserve, Chapman, Edward,
15 NEWCO. The only two that Mr. Jolly identified were
16 Warren and Crane. I could look at it this way, Your
17 Honor. One of the issues in this case is insulation,
18 but nobody has testified that a Crosby valve was
19 insulated. To the contrary, Mr. Rogers said that the
20 kind of valves we make, safety and relief valves, would
21 not be insulated.

22 We have put in the record the affidavit of Bob
23 Martin of Crosby, who says he wouldn't insulate our
24 valves because that could compromise their ability to
25 function. We've got -- you know there's no one in the

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1 record who has testified to doing any work on the flange
2 of a Crosby valve.

3 The only person who was identified or was asked
4 any question about doing internal work, and I, pardon
5 me, bu don't remember if it was Mr. Simpson or
6 Mr. Freeman, but one of those fellows was asked that
7 question and said I don't remember ever doing any
8 internal work. So I think this record is the devoid of
9 any evidence that would allow a jury to do anything
10 other than engage in just pure conjecture in trying to
11 reach a verdict against Crosby.

12 THE COURT: All right. All right, Ms. McVey.

13 MS. MCVEY: Your Honor, Ms. Farrise is going to
14 argue this motion.

15 THE COURT: All right.

16 MS. FARRISE: And, Your Honor, it sounds like
17 we're on the same page, so...

18 THE COURT: Don't assume anything.

19 MS. FARRISE: Okay.

20 THE COURT: I'm the biggest devils advocate there
21 is. All right. He's raising some --

22 MS. FARRISE: First ---

23 THE COURT: -- important points about the record.
24 He's focussed most on the depositions that were taken in
25 connection with this case. And your submission really

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1 concentrates a lot on depositions taken in other cases
2 like Taylor and on the order issued by Judge Miller in
3 the Garvin case. And what he's saying is that may be
4 all well and good for those cases, but what have you
5 shown that relates to this case?

6 MS. FARRISE: Thank you, Your Honor. And with
7 the Court's indulgence therefor. First of all, as a
8 matter of law, it seems like under South Carolina law,
9 like many states, there are really two components before
10 a defendant can pass summary judgment. And there was
11 not a lot, even though there was a lot of papers, there
12 was not a lot of time spent in the papers about whether
13 or not Crosby valves ever met its initial burden of
14 proof to demonstrate that there was actually an axis of
15 evidence.

16 And I raise that because really from the
17 plaintiff's perspective -- and I will address all of the
18 abundance of testimony about how Mr. Jolly was exposed
19 to Crosby's products, but we would like the Court to
20 consider specifically ruling on whether or not the
21 defendant, who has the initial burden of proof, to bring
22 forth and show the Court that there is actually a
23 complete lack of evidence, an absence of evidence, has
24 met that burden.

25 For instance, the motion of Crosby sets forth

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1 excerpts of testimony and, therefore, if you just look
2 at that alone, the Court would be left not being able to
3 tell one way or another whether the vast amount of
4 missing pages, let's take Mr. Taylor's 600-page
5 deposition, where there's about 50 pages submitted,
6 whether or not in those other 550 pages there in fact is
7 any evidence of exposure.

8 There is, as I understand it, under South
9 Carolina law standing discovery that plaintiff answered.
10 If the defendant were to meet its burden and show that
11 there is in fact an absence of evidence about Crosby, it
12 would have to bring to the Court the evidence and say
13 see, here's what it is.

14 And nowhere in the totality of the evidence is
15 there anything about Crosby. And neither of the
16 defendants have done that. What they have done is
17 cherry pick some excerpts of the depositions and say
18 these portions, and we're gonna exclude other portions
19 of the overall testimony, do not show, in fact, that
20 there was exposure.

21 So, first of all, we would submit ---

22 THE COURT: Well, I understand your access failed
23 argument.

24 MS. FARRISE: Okay.

25 THE COURT: Let's get specifically to what there

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1 is in this record that identifies Crosby as the supplier
2 of products that Mr. Jolly's mesothelioma resulted from.

3 MS. FARRISE: Your Honor, in our response we
4 pulled out testimony that focussed on the Oconee plant
5 because all of these men had a presence and worked at
6 this one plant, the Oconee plant, including Mr. Jolly.
7 But the Oconee plant is representative, really, of what
8 happened at many of the Duke plants.

9 So in order to sort of fully understand that
10 Mr. Jolly had a significant exposure to asbestos that is
11 associated with Crosby valves, in some ways you have to
12 step back and say what is the environment that these men
13 are working in and that these products exist in. So the
14 Oconee plant and the other Duke Power plants, which are
15 mentioned, are nothing more than a series of piping
16 systems.

17 And one of the things that we agree on is that
18 exposure occurs when asbestos is in the air. And I
19 point that out because there is no question from the men
20 who were there, including Mr. Jolly, that they were all
21 breathing the exact same air. Mr. Jolly's job was
22 during the relevant time, '79 to '85, if we just take
23 that time period, to be a quality assurance guy and also
24 to be an inspector.

25 Mr. Jolly's testimony, which is not in any way

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1 conflicted by the other men, is that the asbestos from
2 the portions of the Crosby valve, which is the gaskets
3 which are in the flange in the packing, which may go in
4 the stem or in the packing box and the external
5 insulation is disturbed and asbestos is liberated into
6 the air when it's -- these -- when there's work done on
7 the valve.

8 And what Mr. Jolly testified about, and the
9 others corroborated, was that there's these things
10 called outages and shutdowns. And it's very much akin
11 to in the modern world like the IT departments and they
12 have some e-mails saying we're going to shut down the
13 entire computer system this weekend because we need to
14 do some major repairs and we can't have people working
15 on it, so we have to take the entirety of the operation
16 offline.

17 And Mr. Jolly, and I'm happy to give page sites
18 because I do have them, says that my work as an
19 inspector and as a quality assurance guy where people
20 were disturbing asbestos and removing gaskets and all of
21 these things happened in the context of taking the plant
22 offline and making -- and doing major repairs. And so
23 he would have to, in terms of quality assurance, make
24 sure that the valves by Crosby and others were not
25 leaking. And he didn't do that. There's no testimony

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1 that he did that from afar.

2 On this proximity question, Mr. Jolly's testimony
3 is that I was standing shoulder, you know, to shoulder
4 right next to these men. And that makes sense because
5 his job was to look there and make sure that the valve
6 was functioning properly and that it was being prepared
7 -- repaired properly.

8 In terms of the point that Crosby seeks to make
9 there somehow is a few valves, in the context of a power
10 plant, which is really a system of piping and valves and
11 pumps are an integral part because valves, number one,
12 control the flow.

13 THE COURT: Ms. Farrise, I think the record is
14 very complete on the environment in which these folks
15 worked, including Mr. Jolly. They've got one little
16 narrow slice that they're taking of this thing, which is
17 they don't disagree at all with your description of the
18 environment which had asbestos being released into the
19 air in which these folks work. They insist that in
20 order for you to go forward you must identify Crosby
21 with the environment in which Mr. Jolly is exposed.

22 No one can -- I don't think there's any
23 disagreement that he was exposed. He developed
24 mesothelioma. It can come only from asbestos. What
25 they are saying is it's not our asbestos unless you can

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1 tie Crosby directly to it. So what is it in the record
2 that's gonna do that?

3 MS. FARRISE: Well, Your Honor, it's the
4 testimony of the men who were there. There were three
5 men in addition to Mr. Jolly. There was Mr. Simpson.
6 And his testimony is in our response at Exhibit
7 Number 2.

8 THE COURT: Right.

9 MS. FARRISE: Mr. Simpson's job was to work
10 directly as hands on doing repair of the valve. His job
11 was a pipefitter. The same is true of Mr. Taylor. And
12 what Mr. Simpson -- Mr. Simpson was also a maintenance
13 supervisor, meaning it was his job to know what the work
14 was.

15 Mr. Simpson identified at Exhibit 2 in a number
16 of places, but a great example of that would be Page 49,
17 that there were Crosby valves at the Oconee plant. That
18 the valves in terms of a complete piece of equipment had
19 a flange end. I think the Court said there was a --
20 seemed to suggest that Crosby made valves and flanges,
21 but to clarify they made a valve. They made several
22 valves that had flange enges -- ends, which means it was
23 designed to be attached to a piping system.

24 Mr. Simpson pointed out that there were hundreds
25 of Crosby valves, and that's at Page 50. Let's see.

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1 Because he talked about this environment having, really
2 by the time you take his testimony together, thousands
3 of valves to move liquid, et.cetera. And for each of
4 the manufactures which he identified at Ocone
5 specifically was Crosby. There were hundreds of valves
6 for them. And he ---

7 THE COURT: And you also have other records or
8 Duke documents that show that Crosby was selling
9 asbestos, selling gaskets that had asbestos in them
10 during the timeframe when Mr. Jolly worked for Duke at,
11 for example, Ocone, right?

12 MS. FARRISE: Specifically, yes, Your Honor.

13 THE COURT: All right.

14 MS. FARRISE: And that there's also testimony
15 from Mr. Martin that we submitted where Mr. Martin is
16 the corporate representative and spokesman for Crosby
17 admits that in fact these valves were designed for
18 specific applications. So, for instance, this
19 discussion about whether or not the valves had to be
20 insulated, there are invoices that show repair work to
21 the, quote, main steam valve of the number three and the
22 number two unit, which is two separate units with three
23 component parts, I won't bore you with that, that make
24 electricity.

25 And so the main steam valve is a huge valve.

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1 It's a, I think Mr. Freeman's testimony was some of
2 these valves are as large in terms of diameter and in
3 terms of the flange face that you can stand up in them
4 and you can actually walk through them.

5 And so the testimony is that Crosby was
6 definitely there in the context of -- and there were
7 hundreds of those valves. In the context of the
8 allergist and the shutdowns, which is what brought
9 Mr. Jolly primarily to that site to do his inspection
10 work and his quality assurance work, that he saw people
11 removing from the valves flange end, the necessary
12 gasket, which these pipefitters, Mr. Simpson and
13 Mr. Taylor, could identify based on their specific
14 training and their work over decades as being asbestos
15 containing.

16 There's a bunch of testimony that the men have of
17 course we can distinguish cork from rubber from asbestos
18 gaskets. They talked about the tools that were used to
19 act upon the asbestos gaskets. For instance, the wire
20 brushes, the scrapers, the grinders. There is testimony
21 that when the flanges were removed using those tools
22 there was visible dust in the air, that they breathe
23 that dust.

24 There's testimony from Mr. Simpson that anyone
25 who worked in the area when this work was done with

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1 these tools on these asbestos containing gaskets would
2 have been exposed to asbestos because, of course, they
3 are breathing the same air.

4 Mr. Taylor's testimony when he was asked about
5 whether Mr. Jolly would have been exposed to asbestos
6 from the removal of flange, asbestos containing flange
7 gaskets, was that his exposures would have been the same
8 as mine to asbestos.

9 So we have Mr. Simpson and Mr. Taylor who
10 identified Crosby at the Oconee site. We have
11 Mr. Simpson and Mr. Taylor who speak specifically about
12 the tools and the work practices that liberated the
13 asbestos from those valves.

14 And then we have Mr. Taylor -- Mr. Simpson had --
15 didn't know Mr. Jolly in particular because in the
16 context of an outage and an industrial setting like this
17 there are many workers, but Mr. Taylor did know
18 Mr. Jolly and he did recall that his work would be
19 consistent with what Mr. Jolly testified to, to stand
20 there while people were removing these gaskets and his
21 exposure was exactly the same.

22 So to stand here and compare Crosby's valves in
23 this context, in the context of significant overhaul of
24 the plant where valves are being opened, gaskets are
25 being removed, insulation is being knocked off the

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1 valves with a hammer, with a saw, to those cases where
2 there's no evidence of either ID or disturbance or
3 exposure is not appropriate --

4 THE COURT: Right.

5 MS. FARRISE: -- because that's not our product.

6 THE COURT: I think I get that part of it now.

7 All right. Mr. Reid, you have not covered the rest of
8 the issues raised in the motion that deal with the
9 concept that these replacement components and packing
10 were manufactured by someone else and therefore you
11 can't be responsible for them. Are you wanting to have
12 that considered as well?

13 MS. FARRISE: Yes, Your Honor. The product --

14 THE COURT: Well, hold it. I'm asking Mr. Reid
15 first.

16 MS. FARRISE: Oh.

17 THE COURT: He didn't really propound that
18 argument, so let's hear from him for a minute about
19 that.

20 MR. REID: Your Honor, I can comment on that, but
21 would you give me an opportunity to respond first?

22 THE COURT: Yes, sir.

23 MR. REID: I frankly think some liberties have
24 been taken with the record. First of all, there's a
25 comment that I think infers that Mr. Jolly said he

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1 worked with components on Crosby valves. You can do a
2 word search on his transcripts and ---

3 THE COURT: I'll agree with that. They're not
4 making that argument. She's making the argument that
5 Mr. Simpson and Mr. Taylor identified Crosby valves,
6 that Mr. Taylor identified Jolly as one of the guys at
7 work when they were working on these valves, and that's
8 the way they lay that out.

9 MR. REID: Okay.

10 THE COURT: So the fact that Mr. Jolly doesn't
11 mention Crosby valves, she argues, is not significant
12 because of what co-workers say.

13 MR. REID: Mr. Taylor did not implicate Crosby.
14 At Page 147 of his deposition he said he did not know of
15 Mr. Jolly doing any valve work himself. At Page 281 of
16 his deposition he said he could not identify any brand
17 of valve that Mr. Jolly ever worked around, so there's
18 no connection in his testimony. He mentions Crosby, he
19 mentions Jolly, but he never makes the connection and
20 affirmatively could not make the connection between
21 Mr. Jolly and Mr. -- and Crosby.

22 Your Honor, you commented before about something
23 that I think is at the forefront of your mind, which is
24 is circumstantial evidence enough. I found a quote in
25 Lohrmann, as counsel was addressing the Court, which I

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1 think addresses your question and your thought.
2 Lohrmann says: "To support a reasonable inference of
3 substantial causation from circumstantial evidence,
4 there must be evidence of exposure to a specific
5 product." And I think that word specific is in there
6 advisedly by the court. "Exposure to a specific product
7 on a regular basis over some extended period of time in
8 proximity to where the plaintiff actually worked."

9 In these cases in a sense it's impossible to
10 prove causation because nobody can ever identify the
11 fiber or fibers which cause meso. The *Lohrmann* test is
12 a device by which the courts permit plaintiffs to prove
13 a case. It requires regularity, frequency, proximity to
14 demonstrate that there is a substantial cause.

15 In every one of the cases I cited I honestly
16 believe it's not distinguishable from our case. Every
17 one of those cases involved either a plaintiff himself
18 or co-workers, like we have in this case, saying this
19 plaintiff was in this room, there were asbestos products
20 in that room. He worked with a defendant's product.
21 But each of them, like this case, missed -- there simply
22 was nothing that connected the specific defendant's
23 product containing asbestos being worked on while the
24 plaintiff was present. We don't have that here either.

25 Counsel commented on the Martin affidavit. And

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1 there are some records in this case of work that Crosby
2 did. So I think it's important for me to identify what
3 Crosby valves are. Crosby valves are safety and relief
4 valves which operate when there's an overpressurization.
5 So if there's a boiler that's about to explode, our
6 valve will pop open and relieve pressure. So they're
7 not on the main line and there's no evidence here
8 anywhere, either in Mr. Martin's deposition or elsewhere
9 that there's any insulation on our valves. As I
10 mentioned before, the only person who addressed it
11 besides Mr. Martin himself was Mr. Rogers, who said he
12 wouldn't insulate one of those valves.

13 And then, finally, just to address Mr. Simpson,
14 because again nobody -- I mentioned Mr. Taylor did not
15 make a connection, that he simply identified Crosby as
16 one of the many valves and the fact that Mr. Jolly did
17 work, but never connected the two. The same is true for
18 other, the other co-workers. In fact, they rely on
19 Mr. Simpson.

20 Page 297 of his deposition he was asked: "Do you
21 remember ever actually working on a Crosby valve or just
22 seeing them?" He said: "I, I can't remember. I can
23 remember installing them. As far as me doing the work
24 on the internals, I don't remember doing any work on the
25 internals of them. When you install them" -- well, in

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1 short he continues at 297 and 298 to be asked if he
2 could recall if what he saw were flanged or welded
3 Crosby valves and he couldn't remember which one he'd
4 seen. So there's really no ability on his part to make
5 a connection either.

6 So that's, that's it on my rebuttal. I think the
7 Court's question was about the duty. I want to
8 distinguish between two things. In terms of insulation,
9 of course I don't think we get there because of the lack
10 of proof of any insulation on Crosby valves, but there's
11 got to be some guiding principle in the law for one
12 manufacturer's responsibility for another manufacturer's
13 product.

14 And I submit that its -- well, my understanding
15 is South Carolina products liability law is based on the
16 restatement second. But I do think the restatement
17 third is persuasive. And it fundamentally says a
18 defendant is responsible if it either has sold the
19 product in question, in this case it would be a Crosby
20 valve, or has substantially participated in the design
21 of the system into which that implement is going to be
22 incorporated.

23 So our valve is a component of Duke's overall
24 facility, but there's no evidence that we participated
25 in the design of their system. They ---

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1 THE COURT: And that's not what's being argued
2 here frankly. You know, I'm not gonna spend all day now
3 on just these motions for summary judgment that have
4 been dealt with so many times in the past, but the
5 Garvin order is a very good order by Judge Miller that
6 talks about exactly this. And, you know, when a
7 manufacturer designs a particular piece of machinery in
8 such a way that its reasonably foreseeable that certain
9 types of gaskets and certain type of packing will have
10 to be used in that valve. And when the manufacturer
11 recommends, specifies or requires by its design of its
12 particular piece of bare metal that these type gaskets
13 and packing products have to be used to make it operate
14 properly, then it just assumes responsibility for those
15 components. And I don't know of anything that's changed
16 since 2014 when Judge Miller made those rulings that
17 would cause me to want to revisit that, Mr. Reid.

18 MR. REID: Your Honor, first and foremost, my
19 apologies for getting a bit long winded. I don't mean
20 to prolong things. But Garvin is a different case. In
21 Garvin, Crane was the defendant at issue. The evidence
22 was that all Crane valves at the site had asbestos.
23 That Crane specified that they have asbestos replacement
24 parts and that the plaintiff worked on all the Crane
25 valves at the worksite. That's not the case here.

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1 In fact, Mr. Martin's affidavit, we submitted
2 that in response to their submission of this 1973, 1974
3 invoice where Crosby personnel went to repair and test a
4 Crosby valve. And what Mr. Martin's affidavit said is
5 that the -- there were no gaskets and no packing in
6 those valves. That's the nature of the safety and
7 relief valve.

8 THE COURT: Well, that's the whole bare metal
9 defense, is what that is, Mr. Reid.

10 MR. REID: Well ---

11 THE COURT: For these pieces of machinery to work
12 when they are installed there has to be a gasket and
13 there has to be packing.

14 MR. REID: Not in our valves, Your Honor.

15 THE COURT: Well, that is not the information
16 that is replete in the Taylor record and in the
17 testimony that these gentlemen put forward about working
18 on all these gaskets and working on all these valves of
19 which Crosby valves were definitely one of the valves.

20 Their testimony is that there were gaskets in
21 there, they had to be removed when they stood the plant
22 down, and that they were replaced with other gaskets
23 after taking wire brushes and vibrating machinery and
24 pulling them off or taking packing pullers and reaching
25 down into the valve to pull out this packing. And

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1 that's, that's not changed from the many other cases in
2 which Crosby has been involved, Mr. Reid.

3 MR. REID: Your Honor, you reminded me of one
4 thing I wanted to respond to. Counsel suggested that
5 Mr. Simpson had said that anyone there would be exposed
6 to asbestos. In fact, I'd like to read the questions
7 and answers to the Court. Again, I apologize for
8 prolonging things.

9 But Mr. Simpson was asked: "Do you know, are you
10 familiar with a man named Dale Jolly?" This is at
11 Page 94 and 95. Answer: "No, I'm not."

12 Question: "All right. Let me ask you this then.
13 Sir, based on your experience and your memory, would
14 anyone working at the plants we've talked about be
15 exposed to the same valves that you mentioned?" In
16 other words, the word asbestos is not in there.

17 THE COURT: I get what your opinion is about
18 this, Mr. Reid, and it's because he doesn't mention
19 Jolly. You've got to put together several of these
20 pieces of testimony, but you've got some people who
21 mention Jolly as somebody who worked in the environment
22 in which he stood right there with the responsibility he
23 had in working in the environment in which these valves
24 were disassembled, these pipes were disassembled, and
25 gaskets and packing were removed and dust went into the

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1 air from the removal of those things.

2 And that is put together by the combination of
3 what environment they worked in and by at least one of
4 them who, Taylor, who has identified Jolly as someone
5 who did work in that same environment in which he
6 worked. He disassembly and Jolly being the QA or
7 inspector. So, I mean, that's what I understand the
8 evidence to be.

9 And, quite frankly, at this stage in the game I'm
10 not free to dismiss a claim simply because of the
11 evidence is scam. I can -- if there's -- I have to
12 consider this constellation of evidence in the light
13 most favorable to the nonmoving party. And on the basis
14 of that standard, although you -- and Mr. McLeod is over
15 there shaking his head back and forth, you all disagree
16 with my description of the -- of how property valves
17 work, I've read enough of this material and enough of
18 this testimony that this description is in this evidence
19 many different times.

20 And whether that's gonna be enough when we take a
21 more qualitative or quantitative look at the evidence
22 that I can take now, you may have a very good point.
23 But at this point in the proceedings I don't think I've
24 got any choice but to deny your motion for summary
25 judgment.

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1 MR. REID: Thank you, Your Honor.

2 THE COURT: All right. Now, who else has got a
3 motion for summary judgment?

4 MR. REID: Fisher, Your Honor.

5 THE COURT: The same argument?

6 MR. REID: Essentially. I'll spend 30 seconds on
7 it. The evidence is only slightly different in that
8 this case, it's Mr. Simpson who never mentioned Fisher,
9 whereas Mr. Freeman never mentioned Crosby. Mr. Freeman
10 simply said that Fisher valves were present, but again,
11 neither Mr. Jolly never mentions Fisher, Simpson never
12 mentions Fisher. Neither Simpson or Freeman know Jolly.
13 And Mr. Taylor, again, didn't know of Jolly doing any
14 valve work and could not identify a brand of valve that
15 Jolly worked around.

16 THE COURT: All right. Ms. Farrise, with respect
17 to Fisher?

18 MS. FARRISE: Yes, Your Honor. So obviously I
19 would adopt the prior comments as being applicable here,
20 but the evidence that we have submitted with
21 Mr. Freeman's testimony, number one, about seeing -- let
22 me just get it. At Page 78 his testimony was submitted
23 as Exhibit 6. He testified that Fisher valves were at
24 the Oconee plant. That his job there was to do
25 calibration, which is something that comes up in the

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1 context of an outage, meaning when a valve is being
2 repaired it has to then be recalibrated to put back
3 online.

4 When asked how many Fisher valves there were, he
5 said a lot of them. Too many to count. So, again,
6 there's no question that they were there. And I didn't
7 see in Mr. Simpson's testimony -- and this, again, is
8 that access issue that Fisher actually said to
9 Mr. Simpson, hey, we represent Fisher valves. You said
10 there were a lot of brands there. Was Fisher one of
11 them, one way or another? And Mr. Simpson said, no,
12 Fisher was not there. He simply was never asked from
13 the testimony that was put forth. So they can't, number
14 one, demonstrate that Mr. Simpson, for instance,
15 couldn't identify Fisher when there's no evidence that
16 they ever asked him.

17 Secondly, I would point the Court to Exhibit
18 Number 16, which if Fisher is claiming what we just
19 heard Crosby claiming, that their equipment did not have
20 asbestos components, then their Exhibit Number 16, which
21 shows a purchase order from Duke Power to Fisher
22 Controls for items that specifically include gaskets,
23 quote, with asbestos, those two things don't add up.

24 These documents, the documentary evidence support
25 what the men who were there said. There were

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1 hundreds of -- plenty of Fisher valves there that the
2 work practices on Fisher and Crosby and the others in
3 this context. There were asbestos containing gaskets
4 that we removed them. And when we went to replace them
5 and we needed a replacement it was the exact replacement
6 of what had been the original equipment which came,
7 actually, with the valves in the case of internal
8 gaskets.

9 And so I see you looking at Exhibit 16. It's
10 about ---

11 THE COURT: Yeah. There are a lot of Fisher
12 control invoices.

13 MS. FARRISE: Yes.

14 THE COURT: I mean, excuse me, Duke Power Company
15 PO's in here that's specified and their addresses.
16 These PO's are addressed to Fisher Controls Company,
17 Robert E. Mason Company, P.O. Box so and so Charlotte.
18 And many times in here they indicate gasket, flange
19 fitting types by allowing material numbers with
20 asbestos. And that's all through these purchase orders,
21 no question about it.

22 MS. FARRISE: And specifically, Your Honor, for
23 the Oconee plant --

24 THE COURT: That's correct.

25 MS. FARRISE: -- during the timeframe that these

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1 men described the work being done on the valves which
2 released the -- disturbed the asbestos.

3 THE COURT: That's correct. I mean, I got one
4 right here Duke Power Company, AC Barren, Ocone nuclear
5 station Rochester Highway, Seneca, South Carolina.
6 Order date 2/28/91, for example. I mean, they go all
7 the way up to the year 2000, some of them.

8 MS. FARRISE: Right. And if you take
9 Mr. Duimstra's (phonetic), the corporate representative
10 of Fisher's, testimony he admits that as late as the
11 late '80's they had 1500 Fisher part numbers for
12 replacement parts of gaskets that were asbestos
13 contained.

14 So -- and then I would just add for Crosby, just
15 really as a supplement to the record, Exhibit 7 is
16 similar. Counsel for Crosby indicated that there's no
17 evidence that their valves had asbestos containing
18 components. But Exhibit Number 7, the plaintiff's
19 response, is a set of invoices where there are a
20 specific order to Crosby valves where the type of
21 gaskets that are being ordered to replace after repair
22 specifically say asbestos.

23 So the documentary evidence where asbestos
24 gaskets are being supplied and replacement by Crosby is
25 consistent with what the workers who were there said.

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1 And it is in conflict, and we dispute, that Crosby had
2 valves at this site but didn't have asbestos. Otherwise
3 it makes no sense why they would have invoices that
4 supply replacement asbestos gaskets or valves that they
5 claim never had asbestos in the first place.

6 THE COURT: Yeah. I mean, I'm seeing Crosby
7 valve and gauge, for example.

8 MS. FARRISE: There's items number seven, number
9 eight, number nine.

10 THE COURT: Yeah.

11 MS. FARRISE: Number ten.

12 THE COURT: And in several places --

13 MS. FARRISE: And on and on.

14 THE COURT: -- they do purchase orders for
15 Ocone. They specify asbestos gaskets. Okay. All
16 right. Does that complete your argument, Ms. Farrise?

17 MS. FARRISE: Yes, Your Honor, unless you need
18 more.

19 THE COURT: Mr. Reid, in reply?

20 MR. REID: Just to clear up on that Crosby issue,
21 Your Honor. What I mentioned was that Mr. Martin was
22 addressing Exhibit 8, not Exhibit 7. In Exhibit 8 he
23 said that those documents show that the Crosby valves
24 specified in those documents were -- have neither
25 gaskets nor packing.

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1 THE COURT: Well, Exhibit 7 --

2 MR. REID: So --

3 THE COURT: -- this is a purchase order.

4 MR. REID: Understood. That's the '82 purchase
5 order for McGlare.

6 THE COURT: Yeah.

7 MR. REID: And it obviously has the word asbestos
8 in it.

9 THE COURT: Uh-huh. Well ---

10 MR. REID: But both with represent to Crosby and
11 Fisher, my ultimate point, Your Honor, this is simply my
12 rebuttal on the Fisher argument, is as Lohrmann says,
13 your presence is not evidence and even if it was, which
14 I don't think it is here, it doesn't -- there's not
15 enough of it in this record to establish the frequency,
16 proximity and regularity required by order.

17 THE COURT: Thank you, Mr. Reid. And for the
18 same reasons that I've enunciated with Crosby with
19 Fisher, at this stage in the proceedings where I view
20 the evidence in the light most favorable to the
21 nonmoving party, I will deny Fisher's motion for summary
22 judgment.

23 Okay. That gets rid of the two summary judgment
24 motions. Are we now ready to go to the motions in
25 limine?

PLAINTIFF'S OMNIBUS MOTIONS IN LIMINE

1 MS. MCVEY: Yes, Your Honor.

2 THE COURT: All right. Are we going to begin
3 with the plaintiff's motions in limine?

4 MS. MCVEY: Happy to do it that way.

5 THE COURT: All right. And the first one I've
6 got is the omnibus. I'm gonna get my hand on that. Now
7 let's relate that in some way. We just dealt -- let's
8 go back for a second. I'm looking at Ms. Long's motion
9 sheet. All right.

10 Ms. Long, Item 1, this is Gardner-Denver is out
11 because they're out. Number two is Fisher Controls,
12 that was denied. We just argued that. Number three is
13 Crosby, denied.

14 And then we've got a series of -- and then we've
15 got Crane out because Crane is out. Union Carbide out,
16 that's number five. Number six is Georgia-Pacific's
17 motion in limine. That's how this thing reads.

18 THE CLERK: Yes, Your Honor.

19 THE COURT: My brain would work better if we
20 could stick one side's motion in limine and then go to
21 the other side's motion in limine. And I certainly
22 don't mind starting with defendant's motions in limine
23 since number six is the first of those. So the first
24 motion in limine is Georgia-Pacific's motion in limine.
25 Help me out Georgia-Pacific. You've got a series of

1 them. Six

2 MR. GLENN: Your Honor, um.

3 THE COURT: Seven.

4 MR. GLENN: I can't tell, and I'm guessing I've
5 got the same list as you do, which motion is which
6 from them.

7 THE COURT: Well, then ---

8 MR. GLENN: We can use Ms. McVey's list.

9 THE COURT: Is that okay to do?

10 MR. GLENN: Yes, Your Honor. It's okay with us.

11 THE COURT: Okay. If we're gonna do that, what
12 we'll do at some point, Ms. Long, for your benefit is
13 we'll relate these things so that you'll know how to
14 mark your docket.

15 THE CLERK: That's fine.

16 THE COURT: But right now we're just gonna hear
17 them. Are you fine with that, Mr. Bouch? Mr. Reid?
18 Mr. McLeod? Are you fine with that?

19 MR. BOUCH: Your Honor, that's fine. Just some
20 of us are perplexed on the Court's reference to Judge
21 Miller. I believe, respectfully, you're referring to
22 Judge Hill.

23 THE COURT: Yes, I am, thank you.

24 MR. BOUCH: Oh, okay. Just as a reference.

25 THE COURT: I mix those two guys up all the time

PLAINTIFF'S OMNIBUS MOTIONS IN LIMINE

1 and have most of my career in the judiciary, but, yes, I
2 am referring to Judge Gary Hill in the Garvin order.

3 MR. BOUCH: Just wanted to get the record
4 straight so the ---

5 THE COURT: Thank you very much. Appreciate
6 that. If that kind of slipup occurs, please interrupt
7 me. Thank you so much.

8 All right. Well, if we're going with Ms.
9 McVey's, then Ms. McVey, let's go to your omnibus.

10 MS. MCVEY: Yes, Your Honor. And what I'll do as
11 we go through, if you've got it in front of you.

12 THE COURT: I have.

13 MS. MCVEY: On our list, number one, collateral
14 source, everybody's agreed to that motion in limine.

15 THE COURT: All right.

16 MR. HOLDER: I was handling number two. This is
17 Jonathan Holder for the plaintiffs. Settlements with
18 other defendants. This was not agreed to by the
19 parties, but this is one that came up at the Taylor
20 hearing on MILs. And I think it's pretty clear that
21 plaintiffs move to exclude any mention of any
22 settlements that have occurred in this case, any
23 settlements of any defendants. And we don't believe
24 that any developments in South Carolina law have, have
25 provided that that go to the jury.

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1 THE COURT: Yeah. You all have cited 408.
2 You've cited the old cases, Powers, McCombs, but really
3 isn't *Smith versus Tiffany* the statement on this thing?

4 MR. HOLDER: I believe so, Your Honor.

5 THE COURT: All right. Well, then let's turn to
6 defense. Mr. Bouch, Mr. Reid, Mr. McLeod, who's gonna?

7 MR. BOUCH: Your Honor, I'll just quickly. We
8 have no intention of violating. We weren't in *Taylor*,
9 but we have no intention of violating the court's ruling
10 there that we're certainly not going to display to the
11 jury any indication of settlement. I will let the Court
12 and counsel know, I believe I have the absolute right to
13 disclose the plaintiff's admission that they made claims
14 against a lot of people.

15 THE COURT: Well, we're going to get into that.
16 They's a whole other kettle of fish.

17 MR. BOUCH: Okay.

18 THE COURT: But with respect to this particular
19 issue ---

20 MR. BOUCH: As far as settlements go we agree
21 with that.

22 THE COURT: Yeah. But I think what needs to
23 happen is you all need to remain mindful -- and I'm
24 gonna turn to *Georgia-Pacific* before we're through, so
25 don't worry that I'm gonna leave you out. *Smith versus*

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1 *Tiffany*. The ink is not dry good on that opinion. It
2 came out in April of this year. Justice Kittredge wrote
3 that opinion and wrote another one which is *Machin*
4 *against Caris Corporation*. And those two opinions are
5 the latest word on contributions among tortfeasors, the
6 mention of settling defendants and so forth and it
7 changes the landscape somewhat.

8 MR. BOUCH: It does, Your Honor.

9 THE COURT: And I will say that Judge Hill's
10 order in *Garvin* kind of prefigured that because what
11 Judge Hill said about distribution in *Garvin* is very
12 similar to what was expanded on greatly in *Smith versus*
13 *Tiffany*. So when we get to the other things we want to
14 argue about, I want you to be sure to let me know how it
15 coordinates with *Smith versus Tiffany* because I'm not
16 free to ignore that. That's the latest from the Supreme
17 Court.

18 MR. BOUCH: We understand that, Your Honor.

19 THE COURT: That's the latest opinion from the
20 Supreme Court.

21 MR. BOUCH: We understand that, Your Honor, and
22 we have no problem with that. And in referencing to
23 Judge Hill, if I'm permitted to give the same opening
24 statement I gave in *Garvin* as here I have no issue
25 because I did not mention it. I said there was a claim

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1 made against 49 defendants. These three say we want a
2 trial on it among our peers.

3 THE COURT: Right. And I don't know that you're
4 gonna get to do that this time because I think the
5 landscape has changed a lot since you made that argument
6 in Garvin.

7 MR. BOUCH: Well, Your Honor, respectfully, we --

8 THE COURT: But we'll talk about that when we get
9 there.

10 MR. BOUCH: Right. We think that Tiffany is
11 distinguishable. It involves the third-party defendants
12 and whatnot.

13 THE COURT: Well we'll get there.

14 MR. BOUCH: We'll get there.

15 THE COURT: Okay.

16 MR. GLENN: Your Honor, we didn't oppose that.

17 THE COURT: All right. Now again ---

18 MR. GLENN: Jase Glenn for Georgia-Pacific.

19 THE COURT: Very good.

20 MR. GLENN: My apologies to the Court.

21 THE COURT: So all right. Where we come up is
22 that the -- well, excluding any mention of any previous
23 settlement is granted, right?

24 MR. HOLDER: Yes, Your Honor.

25 THE COURT: Okay.

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1 MR. HOLDER: The next one that I had, which
2 sounds like another one but should be agreed to but we
3 weren't able to reach an agreement on our, what we call,
4 is the number three, American tort system and
5 plaintiff's attorneys generally, tort reform generally.
6 We don't see this as being a big issue, but it has
7 happened in the past that it has been brought up. So
8 the plaintiff would just ask for any reference to tort
9 reform or plaintiff's lawyer generally be excluded.

10 THE COURT: Mr. Bouch?

11 MR. BOUCH: I have no objection to that.

12 MR. GLENN: Jase Glenn for Georgia-Pacific. No
13 objection, Your Honor.

14 THE COURT: All right. It's granted.

15 All right. Effective insurance claims. That was
16 agreed to, right?

17 MS. MCVEY: Yes, ma'am.

18 THE COURT: All right. Now we're at asbestos
19 companies being in bankruptcy.

20 MS. MCVEY: Your Honor, this was again addressed
21 in Taylor. And Georgia-Pacific agreed with number five,
22 not mention that Fisher and Crosby, I think, wanted to
23 be able to use bankruptcy trust for Mr. Jolly. But in
24 this case, unlike Taylor, Mr. Jolly never filed any
25 bankruptcy claims. So this motion in limine just seeks

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1 to prevent the defendants from saying that John Manville
2 is in bankruptcy or, or whatever. But in this case
3 Mr. Jolly never filed a bankruptcy claim, so it's a moot
4 issue.

5 THE COURT: All right: Mr. McLeod?

6 MR. MCLEOD: That's find, Your Honor. We were
7 just seeking clarification on this point.

8 THE COURT: Good. All right. You're peaceful
9 with that, so that's granted. All right. Now we've
10 got ---

11 MR. HOLDER: Jonathan Holder.

12 THE COURT: Six, reference to rulings by other
13 courts as to scope/admissibility.

14 MR. HOLDER: Yes, Your Honor. Jonathan Holder
15 again for the plaintiffs. This again came up in Taylor
16 and we believe that just -- it should be excluded from
17 any evidence or mention any ruling as to any of the
18 expert witnesses and the, either the scope or the
19 admissibility of their testimony from other courts. We
20 understand qualification of experts, but we believe that
21 can occur without going into specific other courts'
22 rulings.

23 THE COURT: Mr. Bouch?

24 MR. BOUCH: Your Honor, generally goes to bias.
25 What we have in this case there are a series of experts

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1 who have changed their opinions as a result of court
2 opinions directly, and it's admitted, number one.
3 Number two, there's an expert in this case. It happened
4 about ten years ago where the predecessor firm with the
5 plaintiffs here today convinced a doctor to sign two
6 affidavits that were demonstrably false. Sometime later
7 this was discovered. The court held a hearing,
8 sanctioned the lawyers, struck the opinions. The doctor
9 is entitled to explain it. He has in the past as being
10 a typographical error.

11 THE COURT: Who is the doctor?

12 MR. BOUCH: Dr. Maddox. Dr. Maddox was
13 cross-examined on this very point in the Firth case, in
14 the *Lens* case, both before Judge Patterson. Depending
15 upon the qualifications of Dr. Maddox when he appears, I
16 believe I have the opportunity -- I should have the
17 opportunity to voir dire on those -- that specific issue
18 and generally his change of opinions specifically as a
19 result of the Texas decision in the Borg Warner case.

20 THE COURT: All right. I understand your
21 position. Mr. Glenn?

22 MR. GLENN: Your Honor, Jase Glenn for
23 Georgia-Pacific. As we said in our pleading, we don't
24 object to this in front of a jury. We will when Your
25 Honor is considering qualifications of certain opinions

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1 under *State v. Counsel* and *State v. Jones*, we may want
2 to point the Court to other opinions that have excluded
3 these same opinions from, in some cases, these same
4 experts.

5 THE COURT: So your position is that this would
6 be pertinent in a, what I would call for lack of a
7 better word, gatekeeper proceeding by the Court to
8 decide whether to admit this witness as an expert
9 witness?

10 MR. GLENN: Yes, Your Honor.

11 THE COURT: But, but in terms of what goes before
12 the jury, you don't have any objection to this motion by
13 plaintiff?

14 MR. GLENN: That's right, Your Honor. And really
15 it would just be the gatekeeping role to certain
16 opinions. I don't think we're gonna claim that any of
17 these experts should be completely excluded.

18 THE COURT: All right, very good. All right.
19 Mr. Holder, do you want to respond?

20 MR. HOLDER: My only response is plaintiff isn't
21 seeking to prevent cross-examination or impeachment or
22 anything like that, but I believe that plaintiffs and
23 Georgia-Pacific are at a mutual set of the minds on how
24 this would be used. I just -- I don't specifically
25 think that the Maddox example is reason to deny our

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1 motion.

2 THE COURT: Well, all right. Here's the approach
3 I would take to this. With respect to rulings by
4 another court going before a jury, I think that's a no
5 no, but in terms of considering the expertise in the
6 light of any sanctions, any admissibility issues or in a
7 gatekeeping type proceeding, and I hope that's gonna
8 take place today, because the Maddox motions are part of
9 this, I think that's completely pertinent. So I would
10 grant with respect to the trial in front of a jury, but
11 I would deny with respect to any proceedings before the
12 Court without the jury with regard to the qualification
13 of the expert.

14 MR. HOLDER: Thank you, Your Honor.

15 MR. MASSENBURG: May it please the Court, Your
16 Honor. Chris Massenburg on behalf of Georgia-Pacific.
17 Point of clarification.

18 THE COURT: Yes, sir.

19 MR. MASSENBURG: As I understand the plaintiff's
20 motion, it's regarding the experts that are coming to
21 testify before Your Honor and before this jury?

22 THE COURT: Right. Exactly right.

23 MR. MASSENBURG: And now I understand. Now there
24 are possibly studies, work practice simulations, which
25 are also part of some motions in limine that are experts

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1 that are not coming to trial that some of these experts.
2 might rely upon.

3 THE COURT: Yeah. And that's a different kettle
4 of fish.

5 MR. MASSENBURG: Thank you, Your Honor.

6 THE COURT: Got ya. I'm not intending to go
7 there at this moment. We've got some other motions in
8 limine that we'll deal with that.

9 MR. MASSENBURG: Thank you.

10 THE COURT: All right. Okay, number seven.

11 MR. BOUCH: Not to belabor it, Your Honor. I
12 just want to make sure I don't embarrass myself, which I
13 sometimes do.

14 THE COURT: If you do it in front of a jury
15 you're gonna embarrass yourself, if you don't do it in
16 front of a jury you're gonna be fined.

17 MR. BOUCH: This is what I want to ask, Your
18 Honor. If Dr. Maddox is on the stand and I ask him is
19 it true you falsified some affidavits before court ten
20 years ago and you got caught and it was very
21 embarrassing, am I allowed to ask him that?

22 THE COURT: No, sir, you are not.

23 MR. BOUCH: It doesn't have anything to do with
24 the court ruling. I'm not asking him were you
25 sanctioned, where did the court exclude you or anything

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1 else. I'm just saying you put in a false affidavit.

2 THE COURT: Mr. Bouch, my ruling is that you
3 cannot ask those questions. That is a backdoor way of
4 trying to get a determination into evidence that the
5 affidavits were false. That apparently was made by a
6 judge in connection with whatever happened in that
7 particular case. I've said I will allow the submission
8 of that evidence to me in any proceeding that discusses
9 whether or not Maddox should be allowed to testify as an
10 expert witness. But, no, I will not allow you to ask
11 that kind of question because it goes to a determination
12 made by another court about the truth or falsity or
13 propriety of his opinion.

14 MR. BOUCH: I realize Your Honor hasn't seen the
15 transcript.

16 THE COURT: I've ruled. Mr. Bouch I've ruled.

17 MR. BOUCH: Your Honor, I understand your ruling,
18 but Dr. Maddox admits this.

19 THE COURT: I have ruled, sir.

20 MR. BOUCH: Yes, ma'am.

21 THE COURT: Thank you. All right, now we go
22 to -- and you're still standing, sir.

23 MR. MASSENBURG: And I apologize, Your Honor.
24 Again, Chris Massenburg with Georgia-Pacific. I'm
25 familiar with the issue with Dr. Maddox. What I would

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1 ask, not to draw this out any further than is necessary,
2 but when that time comes if the Court could hear not the
3 court ruling or that he falsified affidavits, there was
4 a ruling or before the court. There's another issue
5 with the affidavits that goes to bias and relationships
6 with the attorneys, which I would like to present to the
7 Court at that time when Dr. Maddox is present, if we
8 could hold it until then. But I wanted to bring it up
9 now so that Your Honor knew there's a -- the affidavits
10 were put together by lawyers that some of the lawyers in
11 the courtroom used to work with and worked closely with
12 Dr. Maddox that he works a lot with.

13 THE COURT: And what do you want to do, talk
14 about that in front of a jury?

15 MR. MASSENBURG: I want to talk about the bias.
16 The fact that he makes a lot of money as a ---

17 THE COURT: Let me say this. I don't mind
18 showing that people are bias because they're paid by one
19 side and so forth and so on. That's classic. We all do
20 that. But I am very, very firm that I'm not gonna get
21 into accusing lawyers on one side of doing something or
22 their predecessors doing something and so forth. That's
23 not proper for the jury to consider and does not go to
24 anything other than trying to make the other side's
25 lawyers look bad. These lawyers are not on trial. The

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1 plaintiffs and the defendants are in a trial. So you
2 can bring up -- there are plenty of ways to --

3 MR. MASSENBURG: Sure.

4 THE COURT: -- bring out Dr. Maddox's bias
5 without involving sideways comment about the lawyers in
6 the case.

7 MR. MASSENBURG: I appreciate that.

8 THE COURT: That's what I'm saying.

9 MR. MASSENBURG: Yes, ma'am.

10 THE COURT: And there's plenty of way to bring
11 out his bias without using inflammatory
12 characterizations of the ruling of another court by
13 calling them falsifications and so forth and so on. I'm
14 just not gonna -- this case is not gonna try like that.

15 MR. MASSENBURG: Thank you, Your Honor.

16 THE COURT: There's a good way to try this case
17 and bring out bias that doesn't need to be that
18 inflammatory.

19 MR. MASSENBURG: I appreciate the Court's ruling.

20 THE COURT: Okay. Now we're to number seven.

21 MS. MCVEY: Yes, ma'am.

22 THE COURT: Asking the experts to define the
23 legal terms of causation. All right.

24 MS. MCVEY: And the only thing we're trying to do
25 here is to prevent an expert from defining what the

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1 Court will define in a jury instruction. In other
2 words, what for causation means, what proximate cause
3 means. I think they can talk about these exposures are
4 substantial contributing factors, but just a legal
5 definition is what we're seeking the experts to prevent
6 them from doing:

7 THE COURT: All right.

8 MR. BOUCH: I really don't know what their --
9 what the motion goes to, Your Honor. I really don't.

10 THE COURT: Well, you ---

11 MS. MCVEY: I'd be happy to explain it again, if
12 that's help. We're seeking to have prevent an expert
13 from defining what the Court will define in a jury
14 instruction. What South Carolina -- what South Carolina
15 law says is proximate cause but for causation. That's
16 all we're asking the Court to do.

17 THE COURT: All right. Mr. Glenn?

18 MR. GLENN: Yes, Your Honor. Jase Glenn for
19 Georgia-Pacific. I think in our briefs we mentioned
20 that the plaintiffs have the burden of proving
21 causation, as Ms. McVey said, but for causation and
22 proximate cause. And we've also cited the Court to the
23 *Pellstring* (phonetic) decision, which is a district of
24 South Carolina case, which made very clear and cites a
25 string of cases that talks about in a toxic tort case

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1 like this where the allegations are that exposure to a
2 substance caused a later developed disease they have to
3 prove general causation and specific causation. And I
4 think those are their burdens of proof. And as part of
5 our defense we are allowed to inquire on
6 cross-examination of the experts what their opinions are
7 as to whether or not our products could have caused the
8 disease.

9 THE COURT: No question about that. And I think
10 that plaintiff agrees with you completely about that.
11 What they don't want to have happen is for the expert to
12 then go further and say now my definition of causation
13 is that you've got to show XYZ. What they want to do is
14 have the court define causation.

15 But I can tell you, Ms. McVey, I'm not gonna be
16 controlling on that. The heart of the defense in this
17 case is causation and they're gonna get much flexibility
18 in terms of how they explore that. So I think the best
19 way for me to handle this is to deny number seven.

20 And if you've got specific heartburns that comes
21 up as particular witnesses examine, why you may bring
22 that to the attention of the Court or ask for some
23 further clarification from the Court. But counsel for
24 Georgia-Pacific has said just exactly what they want to
25 do, which is they want to be able to ask the expert

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1 whether the particular asbestos we're talking about
2 caused the mesothelioma that Mr. Jolly is inflicted
3 with.

4 MS. MCVEY: And I think that's absolutely
5 reasonable. What I'm seeking to prevent them from doing
6 is saying Mr. Expert how do you define substantial
7 causation or define substantial causation from a
8 legal -- because that's a legal term of ours. That's
9 what I'm worried about.

10 THE COURT: Well, but he's gonna be asked whether
11 in his expertise and what he bases that --

12 MS. MCVEY: Okay.

13 THE COURT: -- yes, it caused or, yes, it didn't
14 cause. What he bases that on is not just a legal
15 definition, it's his testimony about what his expertise
16 leads into.

17 MS. MCVEY: And I agree with that.

18 THE COURT: And I think we can handle that,
19 without having to confuse the issue by granting this
20 motion and making them feel they're in someway limited
21 in how they explore the expert's foundation for his
22 causation testimony.

23 MS. MCVEY: Fair enough.

24 MR. GLENN: Thank you, Your Honor.

25 THE COURT: All right. Number eight, reference

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1 that other defendants not present were sued by the
2 plaintiff. Okay, now we get into it. Ms. McVey?

3 MS. MCVEY: Your Honor, this is a motion that has
4 been filed essentially by Georgia-Pacific asking to
5 publish the pleadings, as well as by Fisher and Crosby.
6 And, Your Honor, you heard this in *Taylor*. The *Smith*
7 *versus Tiffany* case speaks directly to this. They are
8 allowed to obviously argue the empty chair defense. In
9 other words, Mr. Jolly was exposed to lots of other
10 products. Our concern is that they would come in here
11 and say Mr. Jolly sued or Mr. Jolly made claims against
12 42 different defendants and we're the only three left
13 here standing. That is impermissible under *Smith versus*
14 *Tiffany*.

15 And just to point out, in *Smith versus Tiffany*
16 they want to make the distinction that Mizzel was a
17 third party defendant. But just to go back and look at
18 the facts of that case. What happened, it's a car wreck
19 case, Mizzel pulled out in front of Smith and there's a
20 collision. They settle pre suit for policy limits, so
21 Smith did not sue Mizzel because they settled for policy
22 limits, but he was clearly an at-fault defendant.
23 Tiffany was a truck driver that Mizzel said was blocking
24 his view, so Smith sued Tiffany as a contributing tort
25 teaser. And Tiffany wanted to bring in Mizzel, the

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1 third party defendant and the Court said you can't do
2 that for all the reasons that we discussed. So, Your
3 Honor, we would ask that this motion be granted..

4 THE COURT: All right.

5 MR. BOUCH: I think it goes to an intervening
6 cause, Your Honor, which is not present here in the
7 pleadings or otherwise. Our request is very simple.
8 Plaintiff filed a complaint, it's an admission. He
9 named 42 defendants. I agree I should not go any
10 further than that. I'm not gonna say they settled. I'm
11 not gonna say ---

12 THE COURT: Wait a minute. What are you wanting
13 the jury to have that information for?

14 MR. BOUCH: Why are we here when the testimony
15 shows Warren valves, Gate valves, whatever -- Gate or --
16 why are we here instead of Dupont or Duke Power? Why
17 are we here instead of the insulation companies? Why
18 are we here instead of ---

19 THE COURT: Well, I understand your argument.

20 MR. BOUCH: And I'm not gonna go far on it.

21 THE COURT: Mr. Bouch, let me just say this. And
22 I want you all, if you don't have *Smith versus Tiffany*
23 at your table --

24 MR. BOUCH: I've do.

25 THE COURT: -- pull it up on your computer and

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1 look at it because it is a discussion of the difference
2 between an empty chair defense and what you are trying
3 to do which is introduce into the proceedings settling
4 or withdrawn defendants. And *Smith versus Tiffany* says
5 you cannot do that. It says that the empty chair
6 defense is the right to protect non-settling defendants
7 by letting them argue that another potential tortfeasor
8 contributed to the injury or damages. That's not the
9 same as why are we here when they sued all these
10 different people, that's not allowed anymore. And
11 Justice Kittredge makes that very clear in this opinion.
12 I'm not free to depart from it.

13 MR. BOUCH: All I want to do, Your Honor, is
14 comply with the state versus -- or with the Tiffany
15 case. And if it says I can say that there are others
16 that are contributing ---

17 THE COURT: It will not allow do you say that,
18 Mr. Bouch.

19 MR. BOUCH: I believe that's what you just read,
20 Your Honor. Maybe I'm not hearing it right.

21 THE COURT: The empty chair defense --

22 MR. BOUCH: Right.

23 THE COURT: -- is not the same thing as what you
24 are trying to do. The empty chair defense is a defense
25 to assert that another potential tortfeasor contributed

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1 to the injury or damages. You have to put in evidence
2 to do that.

3 MR. BOUCH: Right.

4 THE COURT: And then if you do, you can argue the
5 empty chair. What you want to do is to put into
6 evidence that the plaintiff sued other people and then
7 either settled with them or dismissed them. The very
8 same pen that wrote the words about empty chair also
9 says that because of what the contributions among the
10 Joint Tortfeasor Act says and because of what they have
11 ruled here that you cannot project to the jury any
12 information about the settling or withdrawing
13 defendants.

14 MR. BOUCH: Not gonna do that. Not even gonna
15 name them.

16 THE COURT: You're not gonna stand up in front of
17 a jury and say that they sued 42 other people and
18 they're not here. You cannot do that.

19 MR. BOUCH: Can I say they made claims --

20 THE COURT: No.

21 MR. BOUCH: -- against 42 people.

22 THE COURT: No, sir, you cannot.

23 MR. BOUCH: I understand, Your Honor. We, you
24 know, just need to preserve our record on it.

25 THE COURT: All right. Yes, sir.

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1 MR. GLENN: Your Honor, I'll be very brief
2 because I understand that the Court feels strongly. I
3 did read *Smith versus Tiffany* again this morning because
4 I had a feeling it may come up. I think to me, first of
5 all, we need to frame the issue with what we are
6 planning to do. We are planning merely to publish the
7 plaintiff's complaint.

8 THE COURT: And doing that for the reasons --

9 MR. GLENN: Yes, Your Honor. Yes.

10 THE COURT: -- you want to publish the names of
11 all the other defendants.

12 MR. GLENN: I agree, Your Honor. I agree with
13 that.

14 THE COURT: Right.

15 MR. GLENN: And I think we're allowed to do it
16 under Rule 43(j). And we cited the Court to two cases
17 in South Carolina that have both held that it's proper
18 to publish a party's pleadings as admission. Now those
19 cases talk about answers to requests for admission, but
20 they talk about them in terms of a party's pleadings.
21 That's number one. And that's why Judge Hill permitted
22 us to do this in the Millard Philmore Jackson case, the
23 Garvin case and the Muldoon case.

24 I agree that *Smith versus Tiffany* the ink is not
25 yet dry and that is something that the Court absolutely

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1 has to consider. In *Smith versus Tiffany*, though, the
2 issue, as Ms. McVey said, was whether or not they can
3 third party in the empty chair where that empty chair
4 had already settled. It didn't talk about publishing
5 the pleadings, number one.

6 Number two, and this is the most important part
7 of that case and the distinction that needs to be made
8 here, is the court largely based its holding on the
9 plaintiff chooses rule. And that rule is that the
10 plaintiffs get to decide which at-fault parties they
11 want to sue. If they want to take the shotgun approach
12 and sue 42 of them, they can do that. If they want to
13 sue two in South Carolina and sue the rest in Louisiana,
14 they can do that. And that goes back 200 years, I
15 believe Justice Kittredge pointed out.

16 In this instance the plaintiffs chose to sue 42
17 defendants and we are merely pointing that out. And I
18 think that's completely in line with *Smith versus*
19 *Tiffany*.

20 Justice Kittredge also talked about not letting
21 third parties -- not letting a defendant to third party
22 in another potential at-fault defendant on the basis
23 that the plaintiff's complaint includes no allegations
24 of any liability on the part of the unnamed parties.
25 That's completely different from what we are here, Your

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1 Honor, where their complaint does contain allegations
2 against these defendants who we're talking about.

3 It also talks about unnamed parties do not claim
4 any interest in the controversy. The parties we're
5 talking about appeared in this litigation and did have
6 an interest.

7 THE COURT: And then they got out of the
8 litigation. And what are we to make of the part of the
9 *Smith versus Tiffany* case that talks about settling
10 defendants? Because it clearly says that you cannot
11 bring severing defendants into the discussion.

12 MR. GLENN: I think it does in terms of the
13 verdict form, yes, Your Honor. But we're talking about
14 a verified complaint that is making these claims.
15 That's what I would say. I understand Your Honor's
16 position.

17 THE COURT: Okay. Very good. Well the motion is
18 granted. All right. Number nine is felonies and
19 convictions, agreed. Past alcohol or drug use, agreed.
20 And tobacco use or smoking. Ms. McVey?

21 MS. FARRISE: Simona Farrise. Good morning
22 again, Your Honor.

23 THE COURT: All right.

24 MS. FARRISE: The plaintiffs move to exclude any
25 reference to tobacco, and I point that out because

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1 Mr. Jolly was not a smoker, but there is some testimony
2 that he use chewing tobacco. And so there's no evidence
3 or not gonna be any that there's any causal link between
4 tobacco and mesothelioma; therefore, it really is
5 irrelevant.

6 To the extent the defendants would argue that
7 it's relevant to life expectancy, at this point we've
8 not seen any experts who can quantify a reduction of
9 life expectancy from the average statistical number for
10 a man his age based on his chewing tobacco because men
11 his age, who are included to come up with the average
12 chewing, tobacco chewers are already included.

13 THE COURT: Well, if all they want to do is
14 introduce it because they want to show that he ignored
15 the clear warning labels on chewing tobacco and
16 continued to chew it and yet he's fussing at Crosby for
17 not put warning labels on their valves? That's why they
18 want it and what's wrong with that?

19 MS. FARRISE: Well, first of all, there's no law
20 to support that because what they want do is engage --
21 invite the jury to engage in speculation. If Crosby or
22 anyone else had done what the law compels them to do as
23 a duty, warn about the dangers of their product, then
24 they may not be liable for failure to warn. But they
25 don't get to say here where they didn't warn at all if

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1 we had done what the law requires us to do it wouldn't
2 have mattered because he wouldn't have heeded that
3 warning.

4 If, and as I look at sort of the rule ---

5 THE COURT: And what's wrong with that?

6 MS. FARRISE: Well, what's wrong with that is
7 it's pure speculation. You don't -- there's no way to
8 know what any person would have done as it relates to
9 warnings on asbestos products if, in fact, they had been
10 presented with a choice. What they want to say is,
11 first of all number one, there were warnings on chewing
12 tobacco, and we actually dispute that, but to the extent
13 we're like off the path and talking about whether and if
14 there were warnings on chewing tobacco at all and what
15 they said to, you know, sort of flush that out, they've
16 present no evidence that there was actually a warning.
17 They just say it and we dispute it. We don't even
18 accept that during the relevant time. So it doesn't --
19 it's pure speculation to say if we had not failed our
20 duty under the law it wouldn't have mattered.

21 THE COURT: Okay. Well, I understand. You say
22 it's too speculative. All right.

23 MS. FARRISE: Well, and I think that the rule
24 which talks about you can use certain habits and customs
25 to show conformity with that habit or custom it has to

1 be in the same lane, if you will. You know, I have a
2 habit of custom of overeating even though I know I
3 shouldn't. That doesn't mean that if I'm presented, you
4 know, with a warning on a product that's dangerous and
5 could kill me because I, you know, know I shouldn't eat
6 that extra dessert, I'm therefore gonna ignore the
7 warning. But there's a complete disconnect of the
8 nexus.

9 So we dispute there was ever actually a
10 sufficient warning at all, but on the chewing tobacco
11 that would be the relate to this. So if they wanted to
12 try and use this rule, they would have to show here
13 Mr. Jolly was actually given the choice of warning on
14 asbestos products and he ignored it. Then we might be
15 having a different conversation.

16 THE COURT: Right. I understand.

17 MS. FARRISE: As such if we would have had
18 warnings he would have ignored ours too.

19 THE COURT: Right. I understand your argument.
20 Who's gonna take this one?

21 MR. GLENN: I am. Your Honor, at least for
22 Georgia-Pacific, I think Ms. Farrise said that we're
23 asking, you know, the jury to speculate about if we put
24 a warning. It's funny because actually they asked that
25 question at Mr. Jolly's deposition and to me that opens

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1 the door.

2 The question at Mr. Jolly's deposition was if
3 there had been a warning on those bags about breathing
4 and then it's cut off and talking about Georgia-Pacific
5 bags in this instance. And the question is, he said --
6 the answer was: "I would have saw it, yeah." And the
7 question is: "Okay. And would you have followed those
8 warnings?" And the answer is: "I believe I might
9 have." And then the next question is: "Do you think
10 you most likely would have?" And the answer is: "Yeah,
11 I would have, ma'am."

12 To me that has opened the door to the issue of
13 whether or not Mr. Jolly would have heeded warnings. I
14 don't believe that there's a heeding presumption in,
15 South Carolina, as far as I can tell. So he later
16 testifies about his chewing tobacco that he, quote,
17 always saw warnings. And so I think Your Honor hit the
18 nail on the head about why this issue is relevant to his
19 potential heeding of warnings.

20 Also, my colleague pointed out, I don't believe
21 there was actually any law in place for the time period
22 that we're talking about for us to warn. So I just
23 wanted to make that point of clarification.

24 THE COURT: All right. I'm not gonna go on
25 forever about these things, Ms. Farrise, but go ahead.

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1 MS. FARRISE: No problem. I just, the law that
2 they cite and the argument you just heard is that we
3 somehow, quote, opened the door. Obviously it's clear
4 we've not opened the door to anything. We've not
5 offered the testimony. Mr. Jolly is dying of a terminal
6 cancer. If in fact -- so this testimony was meant to
7 preserve this if, in fact, there is at an actual trial
8 some evidence that would be allowed over our objection,
9 we have some testimony which may relate to that in
10 response. But we've not offered any testimony. The
11 jury has not heard any testimony.

12 THE COURT: Well, I mean, that's true of all
13 these motions in limine.

14 MS. FARRISE: It actually didn't open the door to
15 anything.

16 THE COURT: I mean this is a preliminary thing
17 that depends on whether the testimony gets up. I'm
18 going to deny the motion.

19 Okay. Now we are at 11. I am going to let the
20 court reporter have a break. Julie, how long a break,
21 ten minutes?

22 COURT REPORTER: Yeah, that's fine.

23 THE COURT: Very good.

24 (Whereupon, a recess was had from 11:00 a.m. -
25 11:13 a.m.)

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1 THE COURT: All right. All in place. And the
2 next is number 12. Let me see. It's other non-life
3 threatening medical conditions. Plaintiffs want to
4 exclude any statement about Mr. Jolly's other medical
5 conditions. Mrs. McVey?

6 MS. MCVEY: Your Honor, this is pretty
7 straightforward. It's uncontested in this case that
8 Mr. Jolly has mesothelioma, which is terminal. And no
9 expert is going to testify to a reasonable degree of
10 medical certainty that any of his non-mesothelioma
11 health related conditions are life threatening. So we
12 would like for you to issue an order preventing
13 defendants from saying his high blood pressure is life
14 threatening, unless an expert is gonna come in here and
15 say that.

16 THE COURT: All right: Mr. McLeod?

17 MR. MCLEOD: I'll take this one, Your Honor.
18 Yancey McLeod on behalf of Fisher and Crosby. It's our
19 position that this goes directly to damages in the case.
20 And I would assume Mr. Jolly is still alive and his, you
21 know, health in life is directly an issue here. Whether
22 or not his high blood pressure will ultimately cause his
23 death is not -- it's important. I mean, his ---

24 THE COURT: I don't think she's arguing that, so
25 let's be sure we understand what's being asked here.

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1 All right. Certainly you are entitled to explore any
2 other medical conditions that might lead to the demise
3 of plaintiff. She is simply saying if you don't have
4 any evidence that any of the other medical conditions
5 that Mr. Jolly has are likely to cause his demise, then
6 she wants to preclude you from referring to it. But,
7 you know, if you've got evidence upon which to predicate
8 that question, then that's a different kettle of fish.
9 So have you got some evidence that his, for example,
10 high blood pressure may kill him?

11 MR. MCLEOD: We don't have -- our experts are not
12 going to testify to that fact, but the fact that he has
13 high blood pressure is a factor in as far as the life
14 expectancy tables and ---

15 THE COURT: I agree. I agree. But it's not --
16 so you're not saying that, that he is gonna die of heart
17 disease, you're gonna say his life will be shortened by
18 heart disease, just as -- and, of course, that's in a
19 different category from he is going to lose his life
20 because of mesothelioma, right?

21 MR. MCLEOD: Yes, Your Honor.

22 THE COURT: All right. Well, for whatever
23 benefit you're gonna get out of that, the benefits --
24 the burdens may outweigh the benefits, but I will deny
25 that Mrs. McVey.

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1 Now, asbestos generally is the cause of
2 Mr. Jolly's mesothelioma.

3 MR. HOLDER: Thank you, Your Honor. Jonathan
4 Holder for the plaintiff.

5 THE COURT: Yes, sir.

6 MR. HOLDER: In this case the plaintiffs are
7 moving that defendants be precluded from putting forth
8 any other potential cause of mesothelioma. We're not
9 saying specific to any product, but we just mean
10 generally that asbestos brought it. What specifically
11 about this case that makes a difference from say Taylor,
12 in Taylor Dr. Oury said that he could not determine
13 based on the evidence and the pathology that he reviewed
14 that it was an asbestos caused mesothelioma.

15 In this case Dr. Oury, the defense expert,
16 reviewed the pathology and found asbestos bodies within
17 the lymph material and concluded that it was asbestos
18 caused mesothelioma. There has not been expert opinions
19 as to any other cause of the mesothelioma, so the
20 plaintiffs would just move to preclude any other
21 reference or contention of another cause generally.

22 THE COURT: All right. Mr. McLeod?

23 MR. MCLEOD: Yes, Your Honor. This is pretty
24 simple. This is their burden of proof, first of all, is
25 what our position would be that his mesothelioma was

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1 caused by asbestos, more importantly caused by my
2 client's asbestos. And I understand that most of
3 mesothelioma is our -- is ultimately caused by asbestos.

4 There are other causes and our experts should be
5 allowed to testify regarding to that, that he's -- they
6 were correct that the asbestos body found in Mr. Jolly's
7 lymph nodes and is very important to the case and our
8 own expert based on that will testify as to what he
9 believes the causes of the mesothelioma was. However,
10 in science there are other causes that could or possibly
11 be explored with our experts. And the cause ---

12 THE COURT: Well, are they causes that he's ever
13 been exposed to?

14 MR. MCLEOD: We'll lay a foundation, of course,
15 Your Honor, but there's certainly situations where ---

16 THE COURT: Well, just for my benefit, have you
17 got some other causes that relate to mesothelioma that
18 this plaintiff has been exposed to?

19 MR. MCLEOD: Well, it's not necessarily exposure.
20 X-rays, I'm not sure if he's been exposed to.

21 THE COURT: X-rays cause mesothelioma?

22 MR. MCLEOD: There are also ---

23 MR. BOUCH: Radiation, Your Honor.

24 MR. MCLEOD: Radiation and idiopathic cases. We
25 just don't want to prevent it. We'll lay a foundation.

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1 THE COURT: Any evidence that he's got radiation
2 caused mesothelioma?

3 MR. BOUCH: Worked for 30 years in a nuclear
4 power plant.

5 THE COURT: Mr. Bouch, my friend.

6 MR. BOUCH: Yes, ma'am.

7 THE COURT: You know how to operate in the
8 courtroom. Mr. McLeod is making this argument. If
9 there's something else that needs to be added, I know
10 you'll do it, but he is perfectly capable.

11 MR. BOUCH: Yes, ma'am, I apologize.

12 THE COURT: Go ahead Mr. McLeod.

13 MR. MCLEOD: Your Honor, there are other causes
14 of mesothelioma other than asbestos exposure, and we
15 just simply do not want a situation where we're not
16 allowed to have our experts testify about those other
17 causes. And he was in a nuclear power plant for his
18 whole life. And we will, of course, lay the proper
19 foundation for anything. The bottom line is that they
20 have the burden of proof.

21 THE COURT: Well, they understand that and they
22 say that they've got at least some evidence that the
23 asbestos fibers in his lymph nodes. That's pretty
24 convincing sort of stuff.

25 MR. MCLEOD: It absolutely is, Your Honor.

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1 THE COURT: And, you know, you bear the risk of
2 trying to say it's radiation if you don't have anything
3 to support that. So I understand what you're saying.

4 MR. MCLEOD: Yes, ma'am.

5 THE COURT: Let me turn now to our guests from
6 out of town. Yes, sir.

7 MR. MASSENBURG: Thank you, Your Honor. May it
8 please the Court, Chris Massenburg from Georgia-Pacific.
9 I want to make maybe a slight clarification on our
10 position here. I think our expert, Dr. Allan Feingold,
11 who's gonna testify and depose this week, Thursday, I
12 believe, is gonna testify based on his examination that
13 it is an asbestos related mesothelioma and specifically
14 an amphibole asbestos related mesothelioma.

15 THE COURT: Yes. That's what I understood the
16 battleground was gonna be is what kind of asbestos it
17 was. And that's another typical thing we get into.
18 They've got some motions not wanting to let you get into
19 all that. Those will be in another time Mr. Holder.

20 MR. HOLDER: Yeah. And we're not asking for
21 judicial notice or anything like that.

22 THE COURT: Yeah, I understand. But I get what
23 you're saying there.

24 MR. MASSENBURG: And, and I ---

25 THE COURT: We're in a different category where,

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1 you know, radiation caused it, but you haven't got any
2 expert that says that, as I understand it.

3 MR. MASSENBURG: And on that point, Your Honor, I
4 think where we would be is that there are other causes
5 of mesothelioma generally --

6 THE COURT: Yes, sir.

7 MR. MASSENBURG: -- that our expert should be
8 able to talk about to put in context why so many occur
9 and what do you look at as far as environmental
10 exposure, but that's not gonna apply necessary to
11 Mr. Jolly.

12 THE COURT: I understand.

13 MR. MASSENBURG: Thank you, Your Honor.

14 THE COURT: Well, here's my position on this
15 thing. Watch what you ask for. I'm gonna deny this
16 motion and we'll just see how it goes. The jury may not
17 be in love with a suggestion of other causes if what
18 you're trying to do is say there are other causes that
19 relate to Mr. Jolly.

20 So you're gonna have to kind of navigate a little
21 bit of a tightrope about how you discuss it. But
22 certainly both sides are gonna be free to talk about
23 generally what is mesothelioma and what causes it and so
24 forth and so on. I don't see any harm.

25 MS. FARRISE: Yes, ma'am.

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1 THE COURT: I think that's something the jury is
2 gonna need to know and probably this old judge is gonna
3 need to know before it's all over, so I'll deny it.

4 MR. MCLEOD: Thank you, Your Honor.

5 THE COURT: All right. Now we've gotten off of
6 the, what I call the omnibus and we're now into the
7 numbered and the first is lack of knowledge. This is
8 plaintiff's motion to exclude evidence that the
9 defendant lacked knowledge that asbestos caused
10 mesothelioma. Ms. McVey.

11 MS. MCVEY: Your Honor, good morning. This is a
12 motion that you also heard in Taylor. And they filed a
13 motion to the counter of this. Essentially what we
14 filed our motion to say is just because they didn't know
15 that asbestos exposure would specifically cause
16 mesothelioma, they knew it would cause other lung
17 diseases, like asbestosis and lung cancer.

18 They filed a motion saying you can't talk about
19 anything other than mesothelioma. So really what we're
20 seeking to do is what's good for the goose is good for
21 the gander, meaning we can argue that because they knew
22 about asbestosis and lung cancer, they should have knew
23 or should have known that exposure to asbestos or their
24 products would cause lung disease.

25 THE COURT: All right.

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1 MR. MASSENBURG: May it please the Court, Your
2 Honor?

3 THE COURT: Yes, sir.

4 MR. MASSENBURG: Chris Massenburg for
5 Georgia-Pacific. That's an important point because what
6 this trial, if they're allowed to talk about asbestosis
7 and lung cancer in certain ways, the distinction is that
8 science is established without question that it takes a
9 certain amount of exposures that are much heavier to
10 cause asbestosis and lung cancer, generally speaking,
11 than it does to cause mesothelioma. And they're gonna
12 harp on that because they're gonna argue a low exposure
13 can cause this disease that Mr. Jolly has.

14 And so the way I read this motion, without
15 jumping ahead to our separate motion in limine, is to
16 say what they appear to be doing, the way I read it, is
17 to eliminate their burden of proof. I can't say that I
18 didn't know something about mesothelioma. I can't --
19 they have a burden of proof to prove that
20 Georgia-Pacific knew or should have known that its
21 products without a warning, et cetera, would lead to
22 disease. And specifically and this disease mesothelioma
23 is the disease at issue.

24 So I think they should have that burden of proof.
25 I don't know that they're arguing that, but that's the

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1 way I've read it, and I think that they should have to
2 fulfill their burden of proof..

3 THE COURT: Theirs is a counter to one that you
4 all spent a lot of time with in the Taylor's case. And
5 I can just tell you I'm not gonna limit either side and
6 I'm gonna deny your motion, just like I'm gonna deny
7 their motion.

8 MR. MASSENBURG: Should we wait until we get to
9 hours on that?

10 THE COURT: Well, you can if you want to.

11 MR. MASSENBURG: I'm just kidding, Your Honor.
12 Thank you, Judge.

13 THE COURT: All right. So that's denied. Number
14 six, precluding writings or action or knowledge of the
15 trade associations. All right.

16 MR. BOUCH: Well, did we miss 3, 4, 5?

17 MS. MCVEY: Oh, yeah.

18 THE COURT: Three -- two is agreed to, plaintiffs
19 lack of insurance. Three, the defendant's attorneys
20 it's agreed. Other cases involving counsel agreed. And
21 lack of corporate representation at trial is agreed.

22 MS. MCVEY: Your Honor, are we onto the omnibus
23 or the plaintiff's individual motions?

24 THE COURT: Oh, excuse me. I'm sorry, I am
25 jumping ahead. OSHA compliance. I'm sorry. Thank you

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1 very much Mr. Bouch. I got on the wrong line here.

2 Okay, OSHA compliance. Ms. McVey.

3 MS. MCVEY: Your Honor, this is again you've
4 heard this motion so I'll be very brief. The only thing
5 this is seeking to do is to prevent the defendants from
6 saying since we complied with OSHA we are absolved of
7 liability. In other words, you can't be negligent.

8 THE COURT: Right, I agree.

9 MR. BOUCH: All I want to say is it's a standard,
10 not the standard. I think that's, that's your ruling,
11 Your Honor.

12 THE COURT: Yeah. I mean, you're not gonna be
13 able to hide behind your compliance with government
14 standards and that's all she's saying, as an absolute
15 defense to being liable.

16 MR. BOUCH: Right. I think we're in agreement,
17 Your Honor.

18 THE COURT: Yeah.

19 MR. BOUCH: It's not a, it's not a directed
20 verdict issue, it's a, you know, we complied with this.
21 It's evidence of compliance, but it's not an end all be
22 all. We understand it.

23 THE COURT: So, all right. I would exclude any
24 evidence of their compliance with government standards,
25 Ms. McVey, but I certainly would say that that's not

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1 gonna be any absolute defense to liability.

2 MS. MCVEY: Right. I guess what we're trying to
3 say is OSHA doesn't create the legal standard.

4 THE COURT: That's correct.

5 MS. MCVEY: Right. It's an industry standard.

6 THE COURT: That's right.

7 MS. MCVEY: To some extent.

8 THE COURT: That's right. And if they want to
9 talk about it in the context of it being an industry
10 standard, that's fine, but it is not the -- you are not
11 absolved from product liability because you complied
12 with OSHA standards.

13 MR. BOUCH: I think we're all in agreement, Your
14 Honor. And you denied this the last time. My only
15 clarification was, you know, OSHA is not an industry
16 standard. OSHA is a governmental body, but it doesn't
17 preempt the field. It's not like I'm operating a
18 securities case and the securities law preempts the
19 whole liability issue. That's not here. I agree with
20 Your Honor. I agree with what you're saying.

21 THE COURT: Well, good, you agree, it's denied,
22 let's move on.

23 MR. BOUCH: Thank you.

24 MS. MCVEY: It's granted you mean.

25 THE COURT: Huh?

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1 MS. MCVEY: It's granted? It's my motion to
2 prevent them from saying ---

3 THE COURT: No. They cannot say --

4 MS. MCVEY: Right.

5 THE COURT: -- that they are absolved from
6 liability because they complied with the law, OSHA
7 standards. They can say the standards in the industry
8 at the time were these.

9 MS. MCVEY: Got it.

10 THE COURT: But the liability is separate and
11 distinct from whether the industry got with the program
12 and had the right standards in an OSHA regulation. Do
13 we understand each other?

14 MS. MCVEY: Yes, ma'am.

15 THE COURT: All right. Okay. Improper comments
16 about jury exposure, I think we agreed on that.

17 Other asbestos exposure, number five. Ms. McVey?

18 MS. MCVEY: Your Honor, this was, it's
19 essentially what you addressed earlier in terms of the
20 empty chair defense. They have to be able to show some
21 evidence of regular frequent and proximate exposure to a
22 product before they can throw out Spirit Sarco and some
23 other defendant who was dismissed from this case was a
24 proximate cause of the exposure. So we're just asking
25 to be held in the same, but they've got to show some

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1 evidence before they can blame it on the empty chair.

2 THE COURT: All right.

3 MR. BOUCH: I assure you, Your Honor, we're gonna
4 plan on presenting a lot of evidence of other exposures.
5 And I understand fully, believe me. You've tattooed it
6 on my head that I'm not allowed to talk about the 42
7 other people that were sued. I'm not gonna talk about
8 that, but the co-workers that they rely on, Mr. Jolly,
9 they mention all kinds of other exposures and products
10 and this and that and we believe that's relevant.

11 MS. MCVEY: I don't necessarily disagree with
12 that. That's what I'm saying is we just would expect
13 that there be some evidence presented before they can
14 make the argument.

15 THE COURT: And I think that's what Judge
16 Kittredge says in *Smith versus Tiffany*. All right. "
17 The general assembly has put into the statute the right
18 to argue the so called empty chair defense. The right
19 to offset the value of any settlement received prior to
20 verdict, a right which arises by operation of law is not
21 within the discretion of the courts. The critical
22 feature of the codification of the empty chair defense,
23 a defendant retains the right to assert that another
24 potential tortfeasor, whether a party or not,
25 contributed to the alleged injury or damages."

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1 So that's, that's what you get to do. You get to
2 talk about an empty chair if you've got something in the
3 record that indicates that the empty chair contributed
4 to the injuries suffered by this plaintiff.

5 MR. BOUCH: That's correct, Your Honor.

6 MR. GLENN: Your Honor, Jase Glenn for
7 Georgia-Pacific.

8 THE COURT: Yes, sir.

9 MR. GLENN: Just would like to clarify one thing
10 on that. That the defendants do not have to show who
11 the manufacturer was per se. In other words, there's
12 lots of testimony in the record about commercial
13 amphibole insulation that Mr. Jolly was exposed to while
14 at Duke Power. We don't necessarily know in some cases,
15 some cases we do, some cases we don't, whether the
16 manufacturer of that insulation was a Johns Manville or
17 Owens Corning Fiberglass.

18 THE COURT: What -- listen, that's not what this
19 says. This says another potential tortfeasor. You're
20 gonna have to -- the empty chair is not an empty chair
21 of everybody in the world that might have contributed.
22 It's gonna be a potential tortfeasor.

23 MR. GLENN: And that would include Duke Power, of
24 course.

25 THE COURT: Well, that's a different question.

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1 That's *Machin* against *Caris Corporation*. We'll get
2 there, but that's not what we're talking about right
3 now.

4 MR. GLENN: Okay. And, Your Honor, again I'm not
5 talking about the verdict form issue for *Machin*.

6 THE COURT: Well *Machin* covers a lot more than
7 verdict form.

8 MR. GLENN: Okay.

9 THE COURT: It has four certified questions that
10 deal with what you can do with an employer in a case
11 like this, and it's going to be followed religiously by
12 me.

13 Okay. I am going to grant this motion, which
14 simply says that you've got to make an offer of proof on
15 the factual record outside the presence of the jury
16 regarding other empty chair defendants. And if you do
17 that, then you're gonna be permitted to argue about
18 those empty chair defendants. So, all right, I will
19 grant that motion.

20 MR. MASSENBURG: Your Honor, I apologize. Chris
21 Massenburg from Georgia-Pacific. If we have evidence
22 and documents from the testimony of co-workers and the
23 documents from Duke that the parties have, to
24 cross-examine a witness, an expert about the content --

25 THE COURT: Yes.

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1 MR. MASSENBURG: -- that would be not outside the
2 presence of the jury but in the presence?

3 THE COURT: Yes, of course.

4 MR. MASSENBURG: Okay, thank you.

5 THE COURT: Of course. All right. Number six,
6 unduly speculative information.

7 MS. FARRISE: Good morning, again, Your Honor.

8 THE COURT: Yes, Ms. Farrise.

9 MS. FARRISE: Simona Farrise. With the Court's
10 permission I'd just like to submit on our written
11 submission.

12 THE COURT: All right. Who's gonna take that
13 one?

14 MR. MASSENBURG: I guess me.

15 THE COURT: Mr. Massenburg.

16 MR. MASSENBURG: Please the Court, Your Honor. I
17 don't know where Your Honor is leaning, but what I wrote
18 down from the pleadings was arguments on fiber potency.
19 Some arguments on authors of studies Hodson and Darnton
20 and Burman and Crump. Arguments about whether there is
21 a, quote, safe level of exposure to asbestos and
22 arguments regarding dose estimations or dose
23 reconstructions. And I think there might have been
24 something about whether our experts could say what more
25 likely than not was the cause of Mr. Jolly's

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1 mesothelioma.

2 I will address them one by one, if it pleases the
3 Court, or if Your Honor is satisfied with the submission
4 of the brief and I don't need to waste the Court's time
5 with argument if the motion's gonna be denied so that
6 everything comes in, then I can sit down and save us all
7 time.

8 THE COURT: Well, there's a whole lot of stuff in
9 this. How about you go into it just a little bit.

10 MR. MASSENBURG: Certainly. So we'll first start
11 just on my own from my notes fiber potency. I had
12 that's a, you know, as you have pointed out earlier,
13 Your Honor, we've got chrysotile, which is the
14 serpentine. That's what Georgia-Pacific had in its
15 asbestos containing joint compound. And then you've got
16 amphiboles. You've got amosite, which is in the pipe
17 insulation at Duke, and you've got presibolite, which is
18 in some of the gaskets that were at Duke based on the
19 documents. It's important based on motions you're gonna
20 hear later regarding what fiber type most likely made up
21 the core of the ferruginous bodies that have been found
22 in Mr. Jolly's tissue, lymph node tissue.

23 I'll make this one easy. As far as fiber
24 potency, there's a lot of published and peer reviewed
25 literature on it, and all the experts are gonna talk

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1 about it. Dr. Frank is in an extreme position. It's
2 one of their medical experts. And he says that he
3 doesn't really believe there's much of a difference in
4 the potency.

5 Their other expert, Dr. Maddox, testifies the
6 opposite. He says, and said in this case, there's a 10
7 to 15 times greater potency for amosite, the stuff
8 that's in the pipes.

9 THE COURT: What you all are doing in one way or
10 another is trying to get your stuff in without the other
11 side's stuff in. What they want to do is to exclude
12 this opinion testimony that's listed here about dose
13 reconstruction, threshold levels of exposure. And what
14 you all want to do is prevent them from saying that each
15 and every exposure can lead to it.

16 So I'm gonna deny all of that. You all try your
17 case and they're gonna get each and every and you're
18 gonna get whatever opinions you have about the safe
19 levels of it and so forth and so on.

20 MR. MASSENBURG: Thank you, Your Honor.

21 THE COURT: Very good, so that's denied. All
22 right. Now we come to seven. This is Dr. Oury.

23 MS. FARRISE: Yes, Your Honor, Simona Farrise.
24 Plaintiff asks the Court to exclude Dr. Oury's specific
25 testimony which speculates that in Mr. Jolly's

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1 particular case that there was a certain type of
2 asbestos, which is contained within the asbestos bodies
3 that he noted in his lung. Mr. -- Dr. Oury seeks to do
4 that by essentially saying in a bunch of other people
5 who never worked at Duke Power, who never had exposures
6 like Mr. Jolly, we don't know what their exposures were.
7 Where we have actually studied and actually found
8 asbestos bodies and published the results, by the way,
9 because every asbestos body that's found in a patient
10 does not relate -- does not end up being published in
11 the medical literature, that the odds are in favor of it
12 being amphibole.

13 But I didn't do that study and I don't know what
14 the fiber type is precisely in Mr. Jolly because I
15 didn't have the right microscope or whatever and so I
16 honestly just don't know. But I'd like to speculate
17 based on the odds of what has happened with other people
18 in other settings around the world who were the small
19 few whose cases have been published in the medical
20 literature that in Mr. Jolly's particular case it's
21 probably in my opinion amphibole. And that's just pure
22 speculation, not based on any evidence whatsoever.

23 For instance, I could not say in a car accident
24 case most people wear their seatbelts, therefore my
25 client must have been wearing his seatbelt. That would

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1 be pure speculation about what happened in a specific
2 case, and the same is true here.

3 MR. MASSENBURG: Yeah, go ahead.

4 THE COURT: All right, Mr. Massenburg.

5 MR. BOUCH: Well, Your Honor, can I start,
6 please?

7 THE COURT: All right.

8 MR. BOUCH: Dr. Oury, and we have it specifically
9 what he said in his deposition.

10 THE COURT: Well, I guess that's the question of
11 whether he's gonna say anything since you all got so at
12 odds with each other about taking his deposition.

13 MR. BOUCH: And to quote Your Honor we'll get to
14 that.

15 THE COURT: Yeah.

16 MR. BOUCH: Okay. Right now Dr. Oury in the
17 predicate is this. Dr. Oury and Dr. Roggli had the
18 largest collection of mesothelioma studies, of people
19 with individual, individual mesothelioma in the United
20 States, if not the world. They've published extensively
21 on it.

22 THE COURT: Well, what's being said here is that,
23 in this particular case Oury has not identified this
24 asbestos in Mr. Jolly. And if he hasn't identified this
25 asbestos in Mr. Jolly, then they say he doesn't have the

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1 right to speculate based on what he's found in other
2 people.

3 MR. BOUCH: All right, Your Honor. And I will
4 say to a reasonable -- he has said to a reasonable
5 degree of scientific certainty it is a particular type
6 of fiber. What do you base that on? In studies of
7 thousands and thousands of people, 96 percent of them
8 were this way. It is to a scientific certainty. And
9 that is the appropriate standard. And that -- I don't
10 have -- I can't explain it anymore clear than that.
11 It's like Your Honor being asked to verify the validity
12 of a ---

13 THE COURT: Hear's what I'm cogitating about
14 right now. Maybe your brains can come up with this.
15 It's on the backside of my brain. I can't quite bring
16 it up. I wrote a decision for our court a couple years
17 ago on a sudden acceleration case in which an expert was
18 just as expert as you can ever have an expert, but he
19 wasn't an expert in the particular area that we were
20 talking about. He was an expert in heavy naval
21 machinery and he made a decision based on that as to a
22 magnetic field that would cause sudden acceleration of a
23 car, but he had never looked at this car. He never
24 looked at the speed control device.

25 So we made the decision as a court that he was

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1 wrongly qualified as an expert, but because he didn't
2 have a -- he was very expert, a fine gentleman, very
3 knowledgeable and so forth. He just didn't have the
4 platform upon which to express an expert opinion about
5 this particular thing.

6 Now, similarly here, what's bugging me a little
7 bit is Dr. Oury may be as experienced in many, many
8 different things, but he has not been able to identify
9 the fibers that were found in the lymph nodes of
10 Mr. Jolly as a particular kind of asbestos. But now
11 he's going to speculate based on other examinations of
12 other patients in this data base he's got that's very
13 broad. That gives me some heartburn. I'm worried about
14 that.

15 MR. BOUCH: Right. Well, Your Honor, number one,
16 contrary to that case where the naval expert did not go
17 into automobiles or anything else, these people that in
18 contrary to the representation, an awful lot of the
19 people in these data basis did work for Duke Power.
20 Looking, he is the expert on identifying these
21 particular fibers. And from a scientific basis when you
22 find them 96 percent of the time. And you can say the
23 same thing about DNA testing, fingerprints --

24 THE COURT: But he actually --

25 MR. BOUCH: -- or anything else.

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1 THE COURT: -- had access to the fibers that were
2 in Mr. Jolly and he was not able to identify them.
3 Isn't that right?

4 MR. BOUCH: No. No, Your Honor.

5 THE COURT: Well.

6 MR. BOUCH: No, Your Honor. His opinion on
7 looking at where they were and his exposures and his
8 history based upon his 30 years of research into what
9 kind of fibers show up in these cases, 96 percent of the
10 time it's X. And he said it's X. And he's identified
11 not only his textbook, but other peer reviewed medical
12 literature. And if it's a question of qualifying the
13 doctor, we have no hesitation in doing that.

14 THE COURT: Well, here's what he said. He found
15 two clearcut asbestos bodies that he could see clear
16 fibers in both of them, but he did not identify the type
17 asbestos he found in Mr. Jolly's lymph node because you
18 can't use fiber type analysis on light microscopy --
19 microp -- well --

20 MR. BOUCH: Microscopy.

21 THE COURT: Microscopy. You would need to do a
22 digestive study and then in addition an electron
23 microscopy that's equipped with an x-rated fraction
24 analysis of EDXA. He nevertheless opined Mr. Jolly has
25 an elevated amphibole asbestos in his lymph nodes, which

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1 would mean that prior exposure to amphibole asbestos
2 contributed to his mesothelioma. And he further said:
3 "Well I should say I did not determine exactly what they
4 were, but from prior studies looking at asbestos bodies,
5 I think over 99 percent or 98 percent in some very high
6 percentage area are known to be culicotic. When you
7 have an asbestos body and when you scan them over
8 95 percent for sure. So this is commercial amphibole in
9 my opinion until proven otherwise."

10 That's not saying he knows anything about what's
11 in this gentleman. He is -- he had the material but it
12 wasn't -- he didn't do the analysis or the analysis
13 wasn't available to show exactly what it was. So then
14 he wants to speculate based on the fact that 99 percent
15 of them are.

16 MR. BOUCH: Your Honor, that's the same standard
17 of which you admit fingerprints, you admit DNA parentage
18 tests, anything else.

19 THE COURT: No, sir. I disagree with that and
20 it's sure not consistent with what the Court said in the
21 expert witness case I cited to you. Let me hear from
22 Mr. Massenburg. Mr. Massenburg.

23 MR. MASSENBURG: May it please the Court, Your
24 Honor, Chris Massenburg for Georgia-Pacific. So I came
25 from New Orleans, Your Honor, and so I only had with all

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1 these motions so much room, so I only brought some of my
2 smaller books. But I brought the book from Dr. Roggli,
3 who was conflicted out of this case I think by the
4 plaintiff's counsel, who's a prominent pathologist in
5 asbestos disease in North Carolina. Dr. Oury's
6 published with him and their book is Pathology of
7 Asbestos Associated Diseases. It's the third edition of
8 that book.

9 And on Page 39 of that book this is what they say
10 consistent with what you read. "The predominance of
11 amphibole asbestos body cores is somewhat curious
12 considering that the bulk of asbestos used commercially
13 is chrysotile." Meaning in the thousands of people that
14 they examined, finding ferruginous bodies the cores were
15 at a high probability. We're not talking about more
16 likely than not, we're talking about 96 percent in their
17 examinations of thousands of people.

18 And they did acknowledge, though, they said:
19 "Chrysotile asbestos bodies do occur." And they give a
20 little picture down at the bottom which looks like
21 something out of Dr. Brody's syllabus. "And account for
22 0.5 percent of all asbestos bodies that have been
23 analyzed by that lab." Now that's Oury Rogers.

24 If I go back a little further, Dr. Arnold Brody,
25 who's one of the plaintiff's experts in this case and a

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1 very -- well, a very nice gentleman. And he published a
2 chapter in Dr. Roggli's book, the first edition of that
3 same book. And in Chapter 10 it's called *Experimental*
4 *Models of Asbestos Related Diseases* by Victor Roggli and
5 Arnold Brody.

6 Dr. Roggli and Dr. Brody concluded on Page 338 of
7 that book, it says: "In general a percentage of
8 noncommercial amphiboles and chrysotile fibers correlate
9 inversely to the total pulmonary fiber burden." And
10 that touches on what Your Honor was talking about. I'll
11 get to the heart of it, but he talked about a digestion
12 analysis, which Dr. Oury mentions.

13 Two separate studies, the analysis of slides,
14 which you rarely find ferruginous body, asbestos bodies
15 in slides. Usually if you have enough tissue you can
16 digest it using various types of methods and determine
17 how much asbestos was in the person's lungs. And by
18 using different microscopes you can determine the type
19 of asbestos that was in their lungs.

20 But here's what Dr. Brody wrote when he was
21 publishing with Dr. Rodly. He says: "Table 1116 shows
22 that the vast majority of coded fibers, which are
23 ferruginous bodies, have a commercial amphibole core
24 independent of disease category. Chrysotile asbestos
25 bodies do occur -- and this is the word, the two words

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1 they use, Your Honor, that I want to point out to the
2 Court -- but are distinctly uncommon." And that's their
3 own expert, Dr. Brody.

4 We deposed Dr. Arthur Frank, one of their other
5 doctors that they have in this case and we asked him
6 expressly in the case, and it's in our opposition to
7 their motion, or it's in our -- it's in the briefing.
8 You've seen the testimony of Dr. Oury.

9 He says more likely than not the -- and I would
10 say to a reasonable degree of scientific or medical
11 certainty -- that the asbestos bodies that he saw in his
12 analysis of the tissue are amphibole core and he said I
13 agree. He said it's their experts. It's two of their
14 experts, I agree.

15 The last thing I would show is, Your Honor,
16 another expert who was UCC's expert and is one of the
17 most well credentialed doctors in asbestos disease.
18 Dr. Allen Gibbs published a book with Dr. John Craighead
19 called *Asbestos and it's Diseases*. And in that chapter,
20 Page 300 of that book, they talk about lung digestions
21 and light microscope and examining of slides. And they
22 talk about the fact that the overwhelming majority --
23 and in their analysis, and this is over in Whales. This
24 is ---

25 THE COURT: Mr. Massenburg, I have no doubt that

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1 there are all kinds of opinions in here that say what
2 they would use and what they would not use. This is a
3 very simple straightforward thing, which is Mr. -- I
4 mean, Dr. Oury concedes that he could not identify what
5 kind of asbestos was in Mr. Jolly's lymph nodes. He
6 further said that it would take some other studies,
7 which had not been made on this, to accomplish that.

8 He didn't perform those other studies, nobody
9 did, and yet he is going to offer an opinion about what
10 kind of asbestos is in Mr. Jolly's lymph nodes based on
11 the projection he makes that 90 percent, 95, 90 to
12 95 percent of them are amphibole. That's what's got me
13 concerned.

14 MR. MASSENBURG: Well, where we --

15 THE COURT: You know, we have got a raft of
16 motions here to deal with and, you know, we can't have a
17 battle royal on every one of them and get through this
18 today and I'm gonna get through this today.

19 MR. MASSENBURG: I would only then say in
20 closure, Your Honor, that it is Dr. Brody, Dr. Frank,
21 their experts. It is Dr. Oury, and when he's deposed
22 this week and testifies, it'll be Dr. Feingold who
23 also -- Dr. Gibbs would have also said what they said.
24 So it'll be Dr. Feingold. And Feingold took photo
25 micrographs, and I only had a black and white printer at

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1 the hotel, so -- but that's a picture, Your Honor,
2 of ---

3 THE COURT: I've seen them in color.

4 MR. MASSENBURG: And so -- and what I'll say is
5 that he is gonna talk about the distinctive nature of
6 the ferruginous bodies and why we believes ---

7 THE COURT: Well, that's fine. If those experts
8 could testify to that, that's fine, well and good.
9 We're talking at Dr. Oury at the present time.

10 MR. MASSENBURG: Okay. We did it as a
11 precautionary measure. But I'll say this, Your Honor,
12 what we have right here is lawyers saying that they
13 don't want all the experts, including their own expert.
14 Dr. Frank says I agree that it's more likely than not
15 based on the published and peer reviewed literature and
16 the studies that exist as to looking at ferruginous
17 bodies that it is more likely than not to a high degree,
18 in the 90th percentile, that it is an amphibole fiber.
19 That's all.

20 That's based on sound science. It doesn't mean
21 it's hundred percent, but we don't have to. We have
22 circumstantial evidence too. And they can say well you
23 didn't look at it to prove hundred percent, but we can
24 say that the science says when you see ferruginous
25 bodies, 96 to 98 percent of the time they form more

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1 amphibole cores. That's all we can say.

2 THE COURT: That was based on some of the testing
3 that they did that was not done by Dr. Oury, that's all.
4 That's all. I mean, you've got plenty of other people
5 apparently that you're illicit this information from and
6 you're probably gonna cross-examine their witnesses
7 about that. That's perfectly okay, Mr. Massenburg.

8 MR. MASSENBURG: Did I get carried away, Your
9 Honor? I'm sorry.

10 THE COURT: Well, maybe I'm getting carried away
11 too, so...

12 And, Mr. Bouch, you don't need to crouch
13 like a panther every time you want to add something.
14 These other lawyers are very capable of arguing these
15 things too. They are very good lawyers.

16 MR. BOUCH: I have one sentence, that it goes to
17 the weight, not to the admissibility.

18 THE COURT: I get that, but what we are back here
19 with is an absence of information that these other
20 witnesses that Mr. Massenburg has pointed out have. And
21 they base their statements on some of the testing that
22 Dr. Oury did not have available to him when he looked at
23 these lymph nodes in Mr. Jolly. That's what I'm getting
24 at.

25 MR. MASSENBURG: Well, just to add to it, Your

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1 Honor. I think what Dr. Frank and Dr. Oury and
2 Dr. Brody and Dr. Feingold all would agree on is that
3 all of the studies that have been done by everybody
4 everywhere that's been published in asbestos disease
5 over the past four or five decades all come to the
6 conclusion that to the 95 to 98th percentile, when
7 you're looking at an asbestos body it is on amphibole
8 core. And so that would be the evidence that we
9 believe.

10 THE COURT: That's fine. That's fine. That's
11 gonna be admitted.

12 MR. MASSENBURG: Thank you.

13 THE COURT: But what's not gonna be -- what
14 Dr. Oury is not gonna be allowed to say is I couldn't
15 make any determination about the asbestos in Mr. Jolly's
16 lymph nodes, but I am going to jump to the conclusion --
17 and that is because I didn't have these particular tests
18 I did. But I am going to jump to the conclusion that
19 it's amphibole based on, strictly on these statistics.
20 It's that little gap that I'm concerned with.

21 And it may be if you all ever get around to
22 deposing Dr. Oury he'll change up and say something
23 different. But on the basis of what I've got right, now
24 I'm gonna grant the motion.

25 MS. FARRISE: Thank you, Your Honor. I'd just

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1 like to clarify Dr. Oury was deposed. Mr. Branham
2 was ---

3 THE COURT: You all got all kind of arguments
4 you're gonna make about that. Some say, yeah, it was
5 just a little television conversation, yakity yak, yak.
6 We're gonna get to that.

7 MS. FARRISE: Well that was about his trial
8 preservation, but he was deposed in this case and --

9 THE COURT: I agree with that.

10 MS. FARRISE: -- and we just wanted you know.

11 THE COURT: I agree with that. All right. It's
12 granted. All right. Number nine -- number eight.
13 Feingold internet use on the stand.

14 MS. FARRISE: Yes, Your Honor. So plaintiffs
15 experience with Dr. Feingold is when he testifies at
16 trial he purports to like to have his laptop computer
17 presumably because he has his, what is usually like a
18 150-page report in his laptop, but it has been the
19 concern and objection that in fact what he's doing is
20 having an open book testimony about whether it be the
21 reliance material or anything else.

22 THE COURT: Uh-huh.

23 MS. FARRISE: So in the case we would like a
24 specific order that Dr. Feingold testify, and to the
25 extent he needs to refer to matters, that he bring them

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1 with him in paper so that we don't have this concern
2 that he's doing this worldwide internet search in
3 realtime in trial about things that didn't come up in
4 deposition and we have no way to really respond to that
5 at the time.

6 THE COURT: I understand.

7 MR. MASSENBURG: May it please the Court?

8 THE COURT: Mr. Massenburg.

9 MR. MASSENBURG: Mr. Massenburg, Chris Massenburg
10 for Georgia-Pacific. I had Dr. Feingold on the stand
11 several times in trial. I've never seen this. I would
12 only say this one thing, I've had experts come in and
13 bring their boxes of all their literature. It's un --
14 unwieldy. You can't -- if you get a -- what I -- I've
15 even had Dr. Feingold on the stand with his laptop
16 looking up papers, but it would seem like an excellent
17 point for cross-examination.

18 If she's asking about a study, she might refer to
19 a study. If they have the study, they could show it to
20 him so that he could talk about it and he doesn't need
21 to go on the internet to do -- to look up the study.
22 But I have been in trial with experts where the lawyer
23 has said have you seen this study and they say, no, but
24 I have it can I pull it up on my computer and you can
25 ask me about it and I can look at it and they say okay.

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1 That I have seen. I've never seen ---

2 THE COURT: And I think that's not what they're
3 addressing. I think that would be fine. What they're
4 addressing is his doing independent research in realtime
5 and I'm gonna grant that. But, certainly, pulling up a
6 study that they're gonna be asking him about on his
7 computer, I don't think there's any problem about that
8 and I don't think they're addressing that.

9 MR. MASSENBURG: Thank you.

10 THE COURT: All right, granted. All right. Now
11 we come to the Crosby's omnibus. Use of the term
12 asbestos victim, number one. Mr. McLeod.

13 MR. MCLEOD: Thank you, Your Honor. Yancey
14 McLeod for Crosby and Fisher's motion, omnibus motion
15 number one, the use of the term asbestos victim. We
16 think that the use of saying victim indicates that
17 criminal activity took place. It's unduly prejudicial
18 to Crosby and Fisher.

19 THE COURT: Mr. -- yes, Mr. Glenn.

20 MR. GLENN: Well, Your Honor, I was gonna say
21 we've got the same motion so we can kill two birds with
22 one stone, if it's all right with Ms. McVey. I would
23 just add, I think Your Honor ruled in Taylor that they
24 couldn't discuss issues of killing the plaintiff or
25 murder or that sort of thing. This to me is kind of the

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1 backdoor way of doing the same thing. I really don't
2 understand how it would assist the trier of facts to use
3 the term like you said. Thank you.

4 THE COURT: Well, what I said in Taylor was
5 asbestos victim can be used, but what can't be used is
6 the more inflammatory terms like murder, kill, that kind
7 of thing. And I would stick with that. Mr. Holder.

8 MR. HOLDER: I submit, thank you.

9 THE COURT: And so -- and that's the -- so I
10 would deny the asbestos victim, but certainly anything
11 of an inflammatory or a majority nature about, you know,
12 some intentional activity that results in murder or
13 killing, no, that's not fair. Too inflammatory.

14 MR. HOLDER: I agree, Your Honor.

15 THE COURT: All right. Number six. Two, three,
16 four and five are okay. And number six, precluding
17 writings or actions or knowledge of the trade
18 associations. All right, sir. Who's arguing that one?
19 Well, yes, Mr. Reid.

20 MR. REID: Phillip Reid for Crosby and Fisher,
21 Your Honor. I can't find my paperwork on this one, but
22 I think our point is that that type of evidence should
23 not be admitted until such time as there's proof that we
24 are a member of the organization and have acted in
25 someway to endorse the information or there's a showing

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1 that the information that they want to publish is
2 generally available.

3 MR. MASSENBURG: Your Honor, the only other
4 thing -- Chris Massenburg for Georgia-Pacific. The only
5 other thing I would add is references. For
6 Georgia-Pacific our exposing period ends in early 1971
7 according to the evidence. I don't think it's disputed.
8 So trade association comments and things of that nature
9 after that towards us would serve several motions on
10 that we have separately. That might be an additional
11 issue that Crosby may or may not have. So I would add
12 that for the Court's consideration as irrelevant and
13 prejudicial.

14 THE COURT: Well, Mr. Holder.

15 MR. HOLDER: Just in opposition to the motion,
16 because I do believe GP has a separate motion on
17 postexposure evidence. We can address that at that
18 time. But I believe this issue came up in Taylor and
19 the Court was very clear. And I even cited the Court in
20 our response that this was a notice issue. The
21 present -- I mean, the current, at that time counsel for
22 Fisher actually wanted a clarification and asked if even
23 if they weren't a member, and Your Honor ruled that the
24 fact that there was an industry association or trade
25 association within the industry and that knowledge was

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1 being provided through that association, that makes it
2 known or knowable. And for that reason, even if they
3 weren't a member or an officer in the association that
4 that evidence was still admissible as to notice.

5 THE COURT: All right. Mr. Reid.

6 MR. REID: Perhaps we should just deal with it as
7 it comes up at trial because there are various
8 organizations. We're not a member of all of them.
9 Never have been. Many are unrelated to the valve
10 industry in particular. So I suggest, Your Honor, the
11 preferable way to be to deal with in specific context as
12 they seek to admit evidence at trial.

13 THE COURT: Well, Mr. Massenburg?

14 MR. MASSENBURG: I would concur. We could save
15 time.

16 THE COURT: All right. It's a notice thing, as
17 far as I'm concerned. And on the framework of who it's
18 noticed to, a lot of Georgia-Pacific arguments can be
19 dealt with. But I can tell you I'm not going to exclude
20 trade information from trade associations about this
21 subject. That's part of notice of industry notice about
22 disease we're talking about and the use of asbestos and
23 that's going to be permitted to be introduced.

24 MR. MASSENBURG: I respectfully -- we'll take up
25 some issues, I guess, during the course of trial, some

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1 other exhibits, Your Honor. I don't want to take up any
2 more time.

3 THE COURT: All right, so that's denied. Number
4 12, depositions at which defendants were not present.

5 MR. BOUCH: Your Honor, I just got their page in
6 line on the depositions that they wanted to admit this
7 morning and I haven't had a chance to see them and many
8 of them I've never heard before, but I think this came
9 up in the abstract in Taylor. We take the position that
10 if we didn't have notice, we weren't in the case, we
11 weren't present, it should not be used against us.

12 THE COURT: All right. Ms. McVey.

13 MS. MCVEY: Your Honor, we agree to a certain
14 extent with essentially two exceptions. The first is in
15 Taylor we discussed whether or not Monsanto documents,
16 depositions could be used against Fisher because
17 Monsanto is a parent company. And your ruling in that
18 case was you can't do it unless you can show some sort
19 of nexus between Fisher and Monsanto. We believe that
20 we found documents, after going to the Fisher documents,
21 that showed that nexus.

22 So to the extent that you allow us to do it, and
23 this may be deferred until later and we can show that
24 nexus, we would use the Monsanto depositions against
25 Fisher and Fisher, I guess, would not have been there.

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1 Although, we would argue they were there because
2 Monsanto was there. That's the first exception.

3 The second one is only for to the extent we don't
4 have agreement on authenticating documents. There are
5 some depositions that authenticate documents. We would
6 only use the pieces of depositions that authenticates
7 the documents, not any of the body of the deposition.
8 And ---

9 THE COURT: And these documents are what, like
10 purchase orders and things of that nature? I can say,
11 and I said this in Taylor, I'm not gonna get hung up
12 about that. These purchase orders and things like that
13 are not fabricated. They're gonna come in and the
14 parties ought to agree about them in my opinion. But if
15 the parties won't agree, yes, I'd allow depositions,
16 even if you weren't present to come in to authenticate
17 these. Frankly, when you look over most of these
18 exhibits that's pretty self authenticating.

19 MS. MCVEY: Right.

20 THE COURT: But so that, yes. But certainly the
21 same ruling that I made before about depositions when
22 the other side wasn't present didn't have any kind of
23 opportunity. You know, I'm gonna stay just the way I
24 was on that.

25 MS. MCVEY: Yes, ma'am. And the only exception

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1 to that is this Monsanto issue. And that kind of goes
2 to -- we'll have to show in nexus first, but if we were
3 able to show that in nexus --

4 THE COURT: If you're ever able to show a nexus
5 then you're gonna be permitted to get into it because
6 that's the ---

7 MS. MCVEY: Okay.

8 THE COURT: Within the control of the party.

9 MS. MCVEY: Yes, ma'am.

10 THE COURT: And, therefore, it's gonna come in.

11 MR. BOUCH: Your Honor, short circuit this. I
12 never give people a hard time on authentication and I'm
13 not going to now. Just for the Court's information,
14 Mr. Branham and I had a conversation a month ago. And
15 we're dealing with thousands of pages of Duke documents.
16 And I said, Trey, I've got a month to trial, do you want
17 me to go up to Charlotte and get Duke to do a deposition
18 or good good, you use Duke documents, I use Duke
19 documents, they're all good. He said they're all good,
20 so --

21 THE COURT: All right.

22 MR. BOUCH: -- that's kind of where we are on
23 that.

24 THE COURT: So it sound like we may even be in
25 agreement on the deposition issue.

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1 MS. MCVEY: Other than Monsanto, but yes.

2 THE COURT: But -- and with regard to Monsanto,
3 if they can show a nexus it's coming in and you agree
4 with that.

5 MR. BOUCH: I think that's a different issue,
6 Your Honor. They can show an alter ego test I agree,
7 but I think they have to show it.

8 THE COURT: All right. Okay, so I'm gonna mark
9 this one as granted for the limited issue of
10 nonattendance in unrelated cases in terms of admitting
11 the depositions. But for purposes of authenticating
12 documents and material that ought to be used in this
13 case, either because there's a nexus between the
14 companies or because somebody is being difficult about
15 stipulations I would deny it and those materials could
16 come in. Okay, we straight?

17 MS. MCVEY: Yes, ma'am.

18 THE COURT: All right. 13, opinions of counsel.

19 MR. BOUCH: Your Honor, I was kind of amazed this
20 was opposed. I'm surprised counsel wasn't as familiar
21 with Rule 3.4 South Carolina rules of professional
22 conduct. It basically says: "A lawyer shall not state
23 a personal opinion as to the justice of the cause, the
24 credibility of a witness, the culpability of a litigant,
25 the guilt or innocence of the accused." That's what the

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1 motion goes to, Your Honor.

2 MR. GLENN: We have the same motion, Your Honor.
3 Jase Glenn for Georgia-Pacific.

4 THE COURT: All right. What are you all
5 specifically talking about? I don't like it when the
6 argument is made that people are not paying attention to
7 the rules of professional conduct, to be honest with
8 you. I don't like that. They're paying attention, they
9 just got a different point of view. But what are we
10 really talking about here in terms of counsel
11 expression? Are we talking about -- I mean, what are
12 you talking about?

13 MR. BOUCH: I think if you go to the closing
14 argument of the plaintiff in the Garvin case, which is
15 subject to a motion for sanctions that's still pending
16 before Judge Hill, it's exactly what I'm talking about.

17 THE COURT: Okay. What are we talking about
18 here?

19 MS. MCVEY: I don't know. I mean, this is the
20 problem with this motion is that it's very vague. And
21 so I think all of us would agree not to make any
22 improper comments, but until I -- I don't know what
23 they're talking about, so it's hard for us to say we
24 promise to do this when it's unclear. We're gonna abide
25 by the rules of professional conduct.

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1 THE COURT: Absolutely. And I'm gonna enforce it,
2 so denied.

3 MR. BOUCH: Denied, Your Honor?

4 THE COURT: Yes.

5 MR. BOUCH: Denied that they have to comply with
6 the -- I think it's a semantic thing, it should be
7 admitted -- agreed to.

8 MS. FARRISE: There's nothing to agree to.

9 THE COURT: There's nothing here to agree to,
10 Mr. Bouch, because you haven't cited what it is you're
11 talking about that they would do. They've already said
12 that they recognize that lawyers are not supposed to
13 express opinions of their own, they are supposed to say
14 what they believe the evidence shows. And all of them
15 know that. I don't know what was argued in the Garvin
16 case, but that, if it comes up in this case, we'll see
17 what to do about it.

18 MR. BOUCH: Thank you.

19 THE COURT: But I'm not gonna make some
20 determination right now about an argument that, as far
21 as I know nobody is gonna make.

22 All right. References to the asbestos industry
23 or asbestos companies, 14.

24 MR. MCLEOD: Thank you, Your Honor. Yancey
25 McLeod for Fisher and Crosby. This is, again, pretty

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1 straightforward. We don't believe that the plaintiff
2 should be allowed to refer to Fisher or Crosby as being
3 part of the asbestos industry. Companies do not
4 manufacture asbestos products and we think it would be
5 unduly prejudicial for them to lock us into that
6 category.

7 THE COURT: All right. Who's gonna take this?

8 MS. FARRISE: I will, Your Honor.

9 THE COURT: All right.

10 MS. FARRISE: Simona Farrise. We oppose this
11 motion. As we discussed in the summary judgment
12 argument, it is our good faith belief that, in fact,
13 these companies were manufacturers of asbestos products.
14 They had a design that required them to include
15 asbestos. The testimony is that they were shipped with
16 asbestos products in them.

17 So there's no prejudice and they haven't
18 explained any prejudice to being referred to as a
19 company that made asbestos or part of the asbestos
20 industry, which is a group of companies that make the
21 choice to use asbestos, include asbestos, sell asbestos
22 and, therefore, have an obligation under law, as you
23 will tell them, to keep themselves abreast of whether or
24 not there's any health dangers with that. There's
25 absolutely no prejudice.

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1 And so this is really, in our view, simply
2 defendants, you know, sort of trying to wordsmith what
3 we can say. We could go through that for thousands of
4 words and thousands of phrases, but there's nothing
5 inherently prejudicial about calling a company that
6 manufactures valves with asbestos an asbestos product
7 maker.

8 And we believe it limits our ability to actually
9 even prove our case, which is what we do have to show
10 that they were a company that manufactured products with
11 asbestos to start wordsmithing phrases and words which
12 we cannot say which are not in and of themselves at all
13 prejudicial.

14 THE COURT: All right. All right, I'll deny it.
15 Improper or prejudicial comparison, number 15.

16 MR. MCLEOD: Thank you, Your Honor. Yancey
17 McLeod, again for Fisher and Crosby. This motion is
18 pretty simple. We just don't want the plaintiffs to be
19 able to compare my clients to other situations, Erin
20 Brockovich, Firestone Tires, other situations where
21 manufacturers have, you know, been implicated in doing,
22 you know, bad things. It would be totally irrelevant
23 and I'm somewhat surprised that they haven't agreed to
24 this one as well.

25 THE COURT: Ms. McVey.

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1 MS. MCVEY: Your Honor, again, this is just too
2 vague. I don't think I'm gonna call them Erin
3 Brockovich or refer to myself as Erin Brockovich, but I
4 don't -- it seems too vague. I don't want to walk into
5 a trap and it seems very broad and vague to me.

6 I don't think we'll say anything improper, but I
7 don't know how to agree to this when what comparisons
8 they're talking about are unclear. If they want us to
9 not compare them to pintos, I mean, we can agree to
10 that.

11 THE COURT: Well, I'm gonna grant -- I think it's
12 clear enough what they're talking about. They don't
13 want you to talk about other kinds of products,
14 liability cases other than the one we're talking about
15 here. And I think they're right about that.

16 MR. GLENN: Your Honor, Georgia-Pacific -- I'm
17 sorry.

18 MS. MCVEY: I'm sorry go ahead.

19 THE COURT: Are you gonna, are you gonna argue on
20 this?

21 MR. GLENN: No. No, ma'am, not at all. I was
22 just gonna state for the record Georgia-Pacific has the
23 same motion.

24 THE COURT: Yes, sir.

25 MS. MCVEY: Your Honor, the only thing I would

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1 say is they want to talk about warnings on chewing
2 tobacco.

3 THE COURT: I mean, that's true. That's true.
4 It's a little inconsistent. That's true. You bring up
5 a very good point. You bring up a very good point.
6 They want to talk about those warnings as an indication
7 of similar conduct and I'm just going to put tobacco out
8 here to the side. I'll look at that again.

9 I'm not inclined to deny their motion here. I'm
10 gonna grant their motion here, but that may cause me to
11 revisit the tobacco thing, so I'm just gonna put that
12 down there.

13 MS. MCVEY: Thank you.

14 THE COURT: Okay. All right. References to
15 media, number 18.

16 MR. REID: Your Honor, Phillip Reid for Fisher
17 and Crosby. This is a limited motion. We're simply
18 asking that there be no mention of any media coverage of
19 lawsuits or issues about asbestos related lawsuits.
20 That takes us down to collateral matters that's
21 irrelevant and a waste of time.

22 THE COURT: All right. Mr. Holder.

23 MR. HOLDER: I believe this came up in the Taylor
24 case as well. The plaintiff would only intend to use
25 any kind of media communications or media information to

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1 narrow the issues, and particularly in notice. One of
2 the exhibits that we like to use for the earlier
3 knowledge to a lot of these companies was advertisements
4 about them and articles about the dangers of asbestos
5 appearing in Newsweek or Time magazine or the New York
6 Times that was gratuitously available, but then also we
7 would need to prove that there's some connection that
8 they would have seen this in the media. But we don't
9 think that a blanket exclusion of all media would be
10 proper here.

11 THE COURT: All right. Mr. Reid.

12 MR. REID: We can deal with those kinds of things
13 on an exhibit-by-exhibit basis. There'll certainly be
14 issues about whether the information in those types of
15 articles is relevant to the issues we have here. And
16 obviously one issue we have is a distinction between
17 fiber doses. These media articles account for that sort
18 of thing, so I suggest that it be granted but that the
19 Court leave open the door to consider their exhibits on
20 an exhibit-by-exhibit basis.

21 THE COURT: Well, all right. What I'm gonna say
22 is this, granted except to the extent that the use --
23 that the purpose for which the media material is offered
24 is to prove notice. And if that is, we obviously will
25 look at it. That's another way of saying what I think

1 you're saying, Mr. Reid, but I'm gonna grant it but it's
2 not a blanket grant that excludes them from offering a
3 piece of journal information or media information if the
4 purpose of it is to establish notice. I obviously would
5 have to see that thing to decide whether it is a
6 legitimate foundation for notice. So granted, but it's
7 not so blanket that they can't attempt to show the
8 pertinence and reliability of notice information that
9 they want to present.

10 Okay. Inflammatory photographs.

11 MR. REID: This is our motion again. Phillip
12 Reid for Crosby and Fisher. And I think Georgia-Pacific
13 has one along the same lines. If I might just suggest a
14 practical solution. Every case I've ever tried, Your
15 Honor, photographs that the plaintiff wishes to use are
16 shown to the Court and counsel before so we can see
17 exactly what we have in store and determine whether we
18 object or not and the Court can -- often I find the
19 Courts permit publication of some but not all of those
20 kinds of photos.

21 We just got the exhibit list last night. I'm not
22 sure we've seen the photos, so I can't really comment on
23 what's in them. But if we at least have a ruling that
24 they can't publish it to the jury before we have a
25 chance to look at and consider objections, I think that

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1 would be appropriate.

2 THE COURT: Well, that's SOB. I mean, that's what
3 happens with any. I would deny the motion, but
4 certainly I'm gonna review exhibits that are intended to
5 be submitted before they submit it to the jury. I mean,
6 that's standard operating procedure.

7 MR. GLENN: And, Your Honor, that would would
8 apply to demonstratives as too, not just exhibits, would
9 that be true?

10 THE COURT: Yes. Yes, absolutely.

11 MR. GLENN: Thank you.

12 THE COURT: All right. Pain and suffering, 20.

13 MR. REID: Phillip Reid again, Your Honor. The
14 point of this motion is to limit testimony about pain
15 and suffering either to Mr. Jolly himself or his
16 physicians.

17 THE COURT: Now, what is it we're gonna limit?

18 MR. REID: This would be testimony about the pain
19 and suffering he experiences. We think it's ---

20 THE COURT: And on what basis would that be
21 excluded?

22 MR. REID: Well, we're just saying other
23 witnesses apart from Mr. Jolly and his physician should
24 not be able to address that. They're not the ones
25 experiencing it or ---

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1 THE COURT: Why? I never heard of such a thing.
2 Other witnesses testify about pain and suffering all the
3 time and the basis of their knowledge is explored. How
4 often they see them and so forth and so on, but I can't
5 see a blanket exclusion.

6 MR. REID: Well, we'll deal with it if it comes
7 up then. I understand your ruling.

8 THE COURT: All right.

9 MR. GLENN: Your Honor, I would just add, we had
10 a similar motion, and I know how Your Honor feels about
11 this. The final point I was going to put on it was
12 certainly a witness can testify to things that he or she
13 has observed that Mr. Jolly -- of Mr. Jolly's condition.
14 I would just say that to the extent that they are
15 parroting something that Mr. Jolly has said about his
16 pain and suffering, that would be hearsay and that would
17 not be permissible. That would have to come in through
18 either a treater or through Mr. Jolly himself.

19 THE COURT: Well, I don't know. I'll just have
20 to see that at the time. I believe they are going to be
21 able to offer that kind of testimony without violating
22 the hearsay rule, but Mr. Holder do you got anything to
23 add to that?

24 MR. HOLDER: I submit to that. We have the wife
25 and the daughter who are being deposed this week and

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1 we ---

2 THE COURT: And that's who you're gonna -- well,
3 the wife and daughter are gonna be able to testify about
4 that, it would seem to me. And it's gonna be based on
5 what they hear him saying and what they hear him doing
6 and so forth and so on. I can't see any, anything
7 problematic about that nor can I see anything of a
8 hearsay.

9 MR. GLENN: I understand your ruling.

10 THE COURT: Huh?

11 MR. GLENN: I understand your ruling.

12 THE COURT: Okay, that is denied.

13 MR. GLENN: Thank you.

14 THE COURT: Religious or political beliefs. What
15 are we talking about here?

16 MR. REID: I'll narrow it for Your Honor. We
17 just don't want expressions of religious or political
18 beliefs. I think they've agreed in their papers to not
19 talking politics. I don't know what the evidence is
20 here. I can't remember what Mr. Jolly said about
21 whether he goes to church or that kind of thing. I
22 don't have a problem with that.

23 What I've really got in mind is a closing
24 argument by one of their colleagues at an Oklahoma trial
25 saying my clients are good Christians, trying to draw

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1 distinction between the corporate defendants in that
2 case. I think that's improper use of religion.

3 If he wants to say I go to church and I go to
4 church picnics and that's part of my life, no problem.
5 It's one of the activities he doesn't like. That's fair
6 game. It's trying to drive distinctions between
7 someone's religion and the other parties in this.

8 THE COURT: I understand.

9 MS. MCVEY: Your Honor, we absolutely agree on
10 the political beliefs. And I don't believe this to be
11 anything overt, but Mr. Jolly's faith and his family's
12 faith is kind of part of who they are and how they've
13 managed this illness, his pain and suffering, that sort
14 of thing. I don't think it'll be anything dramatic, but
15 it certainly is a part of who they are.

16 THE COURT: Well, he's very right that you all
17 should not be able to argue to the jury anything about
18 his religious beliefs as foundation for any action they
19 take about this case and arguing that he is a good
20 religious person or a good Christian and, therefore,
21 that should be taken into account by them I think is off
22 limits.

23 I understand that plaintiffs express themselves
24 in terms of I'm coping with this by the friendship I
25 have with the people I go to church with, et cetera. I

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1 don't see anything wrong with that and I don't think
2 Mr. Reid does either, but I am going to grant this
3 motion. And I don't think it excludes the normal kinds
4 of things people say about what my activities include.

5 MS. MCVEY: And how he's coping with his disease.

6 THE COURT: Exactly. Exactly. All right. The
7 evidence of worker's comp complaints Machin against
8 Caris Corporation. Who's taking that one?

9 MR. BOUCH: Well, I guess I'll take the spear on
10 that one, Your Honor.

11 THE COURT: All right, sir.

12 MR. BOUCH: But it's much more narrow than that.
13 It's my understanding that neither -- our objection is
14 worker's compensation claims against other people other
15 than us being submitted as evidence against us. For
16 example ---

17 THE COURT: You're fearful that they would talk
18 about the existence of a comp claim against ---

19 MR. BOUCH: Duke. By one of the plaintiffs or
20 co-workers. It's not against us. If they've got a
21 compensation claim against us we'll take it up when they
22 do it. I didn't see it on the exhibits. I don't think
23 there is one.

24 THE COURT: Well, let me followup with them to
25 see what they have in mind.

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1 MS. MCVEY: No. What we're talking about is
2 using worker's comp claims that Crosby and Fisher had or
3 Georgia-Pacific had against them to show notice and
4 knowledge of dangers of asbestos to their own workers.

5 MR. BOUCH: As long as it's against us we can
6 argue, we can argue about that when they want -- on the
7 foundation they lay. What I'm concerned about is
8 foundation is workers' compensations claims against
9 other people that aren't in this trial.

10 MS. MCVEY: We're not gonna do that.

11 MR. BOUCH: Okay.

12 THE COURT: No. I think they're talking ---

13 MR. BOUCH: Okay, that's fine.

14 THE COURT: I mean, what leads you to believe
15 they would do that?

16 MR. BOUCH: Because they've tried it in dozens of
17 cases.

18 THE COURT: This is this case.

19 MR. BOUCH: Well, I understand that, Your Honor.
20 That's why I'm trying to flush out the evidence.. If
21 they say they're not gonna do it, we're fine, we're in
22 agreement.

23 THE COURT: They're not gonna do that. All
24 right.

25 MR. MASSENBURG: May it please the Court, Your

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1 Honor. Chris Massenburg on behalf of Georgia-Pacific.
2 We have motions, I think slightly different, but our
3 position is different. Again, the exposure for us ends
4 in early '71. We don't have any comp claims until years
5 later. In fact, after we stopped selling asbestos
6 materials. There's no notice issues for us and it's
7 just prejudice and relevance arguments for us.

8 He didn't work in a facility and wasn't exposed
9 to our joint compound that contained asbestos in a
10 manner in which people that worked in our facilities
11 might have that got disease later and had comp claims.
12 So there's no notice for us in this case under these
13 facts. And we have a different scenario, so the
14 relevance and prejudice is that our argument that if we
15 wanted to take it up now. I'm not sure if they oppose
16 that or not.

17 MS. FARRISE: Your Honor, Simona Farrise. We do
18 oppose not being able to present specific or workers'
19 compensation claims having to do with the very same
20 products which we claim Mr. Jolly was exposed to
21 because, number one, it goes to causation.
22 Georgia-Pacific is taking the position here that its
23 products and the asbestos in its products, specifically
24 they claim to be chrysotile, does not cause asbestos
25 disease.

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1 And the fact that this is a disease that has a
2 latency where exposures would have occurred in exactly
3 the same time period that Mr. Jolly was exposed to
4 exactly the same asbestos from Georgia-Pacific, we
5 believe that by presenting the defense that their
6 products do not cause disease at all in any one. The
7 fact that their own workers who had those exposures
8 showed up and said we have an asbestos disease from
9 being exposed to your products is highly relevant to
10 show and to respond to that defense. That they actually
11 have actual notice that that's not the case, their own
12 workers are making those claims.

13 And that to the extent, for instance, corporate
14 representatives come in here and say we don't believe
15 our products caused asbestos related diseases when see
16 what's shown up on workers' compensation claims about
17 these same products is highly relevant.

18 THE COURT: Here's what I've got a little bit of
19 heartburn about.

20 MS. FARRISE: Okay.

21 THE COURT: This is on proving causation, but
22 it's also a second cousin to notice.

23 MS. FARRISE: Yes.

24 THE COURT: And they don't have any notice based
25 on things that happened years after their last -- his

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1 last exposure to Georgia-Pacific products. That's
2 what's got me a little bit concerned about using --
3 yeah, it's got a period of latency and it doesn't,
4 therefore, the claims don't occur until much much later.

5 You say well, but we're wanting to do it on the
6 basis of causation, but really notice is the first thing
7 you've got to deal with. And it seems to me that there
8 are other ways to demonstrate the issues with respect to
9 causation. I'm a little worried about letting you use
10 something that occurs so much later than the exposure of
11 Mr. Jolly.

12 MS. FARRISE: Well, Your Honor, I guess some
13 parts maybe the dispute with the Court is I'm not sure
14 what issue comes first or less. All of these issues are
15 in play. And so, for instance, if a Georgia-Pacific
16 representative will take the stand today and say that we
17 have no information that our products caused asbestos
18 related disease when they have been presented with
19 asbestos work disease workers' compensation claims, that
20 goes to the credibility of Georgia-Pacific, as well as
21 this issue of, which I understand remains in play here,
22 punitive damages.

23 If your own workers show up and say we were
24 exposed to the same products that we sold in handling
25 them the same ways, warehousing them, shipping them, et

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1 cetera, and in response to having that notice you do
2 nothing, you can feel the fact from the public, you
3 don't recall, you do absolutely nothing but stand by and
4 hope that you don't get caught, then that goes to the
5 defendant's state of mind and whether or not they acted
6 with fraud and malice to conceal they had it.

7 THE COURT: Well, it seems the --

8 MS. FARRISE: There's a whole host ---

9 THE COURT: -- the dangerous thing is gonna be a
10 different kettle of fish, but ---

11 MS. FARRISE: Well, what I was going to say is
12 there's a whole host of issues. But what I will say is
13 I think they're trying to take it as a group and say
14 they should all be excluded is not appropriate. I would
15 be more than willing to, if and when we have a specific
16 workers' compensation claim, that we would offer,
17 including possibly even for impeachment, that we would
18 bring it to the counsel and the Court's attention and we
19 can have a specific claim taken up in that context
20 because given the time limitation that you've hashed out
21 for this case, I'm not quite sure we're gonna be able to
22 do all the things we might want to do anyway.

23 THE COURT: Yeah.

24 MS. FARRISE: So it may actually be a nonissue.

25 THE COURT: Well, what I'm gonna do is hold off

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1 on the comp ruling until we see what it is you actually
2 intend to offer. I'm concerned about Georgia-Pacific's
3 argument about the timeframe, but I'm not gonna grant
4 your motion now. I'm gonna hold off until we see
5 exactly what they intend to offer.

6 MR. MASSENBURG: With respect to the Court, if I
7 could, I'm gonna take, if I could take ten seconds and
8 just put this bug in your ear so that when we get there
9 you'll know why you should, you know, exclude the
10 evidence respectfully. Mr. Jolly did not work with
11 joint compound. He didn't fix it, he didn't make it.
12 He held it, put it in a bag and brought it out to work
13 sites. So what their theory would be is if you -- if my
14 worker did like Mr. Jolly for four quarters of over two
15 years and a couple times a week haul lumber, drywall and
16 joint compound sometimes to its work sites and drop that
17 stuff off, then they got disease.

18 There's no doubt there is no comp claim. And if
19 they can site it to me, I'll have to do it. There is no
20 comp claim during this time period.

21 THE COURT: Then what are you and I talking about
22 this for?

23 MR. MASSENBURG: Well because there's comp claims
24 later.

25 THE COURT: I get that and I'm gonna take a look

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1 at those at the time, but I'm not gonna make any
2 determine -- I'm not gonna jump over into this other
3 issue about whether the limited exposure they had to
4 your compound is used now but don't begin to describe as
5 something I ought to get into right now. I'm not going
6 to get into that.

7 MR. MASSENBURG: Okay. And it would -- okay.
8 We'll take it up, then, when they -- if they present
9 that evidence --

10 THE COURT: That's right. That's right.

11 MR. MASSENBURG: -- we'll take it up to the side.

12 THE COURT: That's right. That's right. Okay.
13 Material safety data sheets.

14 MR. REID: Your Honor, Phillip Reid for Fisher
15 and Crosby. This motion simply seeks to exclude them
16 from using MSDS's that relate to products that they
17 don't identify. We should know what we're talking about
18 if we're going down that path. And I note in their
19 response they talk about John Crane. I'm not sure if
20 that's a holdover from Taylor that didn't enter it out,
21 but I don't understand the response that the plaintiffs
22 have submitted to our motion.

23 THE COURT: Ms. Farrise.

24 MS. FARRISE: Thank you, Your Honor. First of
25 all, the motion should be denied because it doesn't

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1 actually identify any particular material safety data
2 sheets that they have any concern about that we could
3 examine and say it's not appropriate.

4 But in terms of now just this category of
5 material safety data sheets and including actually the
6 material safety data sheet of John Crane, as the Court,
7 I believe, knows from this case and other cases, John
8 Crane was a manufacturer of asbestos containing gaskets
9 that were included, chosen, purchased, if you will, by
10 valve makers, including Crosby and including Fisher.

11 So to the extent the manufacturers of the
12 asbestos products which they selected and incorporated
13 into their design are creating material safety data
14 sheets that say these products can cause diseases
15 including cancer, and by the way, if you don't want to
16 get exposed and be at risk for cancer, here are all the
17 protections you can take and those material safety data
18 sheets are available to those manufacturers and they
19 sell the valves with those products without passing on
20 the material safety data sheets, that's one period of
21 relevance.

22 Secondly, we talked earlier about the defendant's
23 desire to introduce evidence about OSHA regulations and
24 perhaps whether they comply. One of the specific
25 requirements of OSHA regulations from the very first

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1 standard is that if you are putting out into the world
2 and selling product with asbestos, which we claim the
3 valve manufacturers did by their design and also
4 specifically included it, you have a responsibility to
5 include a material safety data sheet.

6 So to the extent we've heard that they are going
7 to try to claim they complied with OSHA standards, the
8 fact of the lack of material safety data sheet, what it
9 is, what other -- you know/, what they received from
10 their suppliers, the fact that the information is so
11 prevalent by a certain point in time that other people
12 are able to create a material safety data sheet that
13 says cancer when they claim up until today that these
14 products don't claim cancer, go to a whole host of
15 issues. And this category of very highly relevant
16 information should not be excluded.

17 THE COURT: All right.

18 MR. REID: Judge, I don't know if Crane supplied
19 asbestos containing gaskets to Fisher or not. I'll have
20 to check that out between now and trial. It's not a
21 name I remember, but I suggest we take this on a ---

22 THE COURT: Well, I'm gonna deny this motion, as
23 I did in the Taylor's case. You know, obviously when
24 you offer a particular piece of evidence you may have
25 something to say, but I'm not gonna make a blanket

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1 determination that no material data sheets are gonna be
2 allowed to some of them, which would certainly be
3 pertinent if you can show that they are pertinent to
4 materials that were supplied by your client. So I'm not
5 gonna make a blanket determination.

6 Wealth, power, size, assets of corporate
7 defendants. We're certainly going to comply with Gamble
8 and its prejudice. What is this about? Jase?

9 MR. GLENN: Your Honor, it's not my motion.

10 THE COURT: Okay. Whose motion is this? Who's
11 gonna, who's gonna claim this orphan?

12 MR. MCLEOD: Your Honor.

13 THE COURT: Yes, sir.

14 MR. MCLEOD: I'll try and take this one up. We
15 think that at the appropriate time perhaps, you know,
16 that the amount of the defendant's corporate wealth may
17 come into play but not during the trial of the case.

18 THE COURT: Yeah, we generally reserve that for
19 the bifurcated part of the trial that deals with
20 punitive damages.

21 MR. MCLEOD: Yes, Your Honor.

22 THE COURT: And we'll file all of the appropriate
23 regulations and opinions of the Supreme Court of South
24 Carolina and of the United States about how that
25 information is adduced. I must say most people agree to

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1 that fact.

2 MS. MCVEY: As you look at me. We're not
3 disagreeing, with one small point. To the extent these
4 guys come in and say we're just this poor little Fisher
5 company and we couldn't -- didn't test our product
6 because we're not sophisticated, we're not wealthy
7 enough to do all that stuff, one of the issues we want
8 to get into is manufacturers have a duty to test their
9 product. And so if they go down that line I think we
10 can talk about the size of the corporation and that sort
11 of thing.

12 THE COURT: And I agree with that. So the
13 solution here is I'm gonna deny this motion. There
14 isn't any information that we're gonna do anything other
15 than go by what the rules say. All right. If you open
16 the door, Mr. McLeod, by the defense you present, then
17 it may become pertinent or relevant, but right now it's
18 not pertinent in the liability portion of the case at
19 all.

20 If something happens in the liability portion of
21 the case to say, you know, we was too little to really
22 do this, we'll face that when it comes, but we're not
23 gonna let it go wild with kind of unconnected arguments
24 that everybody that has got a corporate wealth of a
25 certain size ought to be punished. We're not gonna let

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1 that happen.

2 MR. MCLEOD: Thank you, Your Honor.

3 THE COURT: All right. Mention to the jury send
4 a message.

5 MR. MCLEOD: Simply put, Your Honor. We think
6 that's an inflammatory type of argument.

7 THE COURT: Yes. Ms. McVey, I know you're not
8 gonna make that argument, are you?

9 MS. FARRISE: Your Honor, we would not make --
10 Ms. Farrise, sorry. We would not make that argument.
11 It's a little, again, they don't actually say other
12 than, quote, send a message. I would point out that I
13 believe the law in South Carolina and other
14 jurisdictions when you get to punitive damages, if you
15 get to punitive damages, and the jury is vetting amount,
16 the purpose of that is to deter that comment.

17 THE COURT: Yes. And deterrent can certainly be
18 argued. That is completely appropriate, but that phrase
19 send a message is freighted with some other potential,
20 and so I know you all are not gonna do that but I know
21 you've got other ways of talking about what deterrence
22 means if you get there. All right.

23 MR. MCLEOD: Thank you, Your Honor.

24 THE COURT: Fish Crosby's other motions in
25 limine. Reptile, are you all still serious about that?

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1 Who's gonna take this one, the reptile theory?

2 MR. MCLEOD: I'll take it, Your Honor. And I was
3 present for your rulings in Taylor. And we wanted to
4 file a motion for the purposes of protecting our record.
5 I understand that it's the same arguments and we don't
6 want to spend too much time on it other than to say that
7 one of our concerns also is using reptile tactics in
8 jury voir dire.

9 THE COURT: Well, we're not gonna allow -- well,
10 jury voir dire is not conducted by the lawyers, it's
11 conducted by the judge and we're not gonna allow any
12 deviation from that. The second thing is we're not
13 gonna allow any golden rules.

14 We're not gonna allow any reptile arguments and
15 all those kind of things that seeks to pray on the fears
16 of the jury or ask the jury to get into the position of
17 the plaintiff and bear their burdens and walk in their
18 footsteps and all that kind of thing, and I don't
19 believe they're gonna do that. I think we had all that
20 pretty much hashed out in the last case.

21 Mr. Massenburg.

22 MR. MASSENBURG: Yes. May it please the Court,
23 Your Honor. I just had a trial with Ms. Dean in Tacoma,
24 Washington earlier this year and there are some specific
25 examples here. I've not tried a case as lead with the

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1 attorneys that are sitting at the table, so I don't know
2 that they would do this, but since they're in the same
3 firm I want to bring it up.

4 It's not necessarily just the golden rule
5 violations that you're very familiar with in the reptile
6 book and the reptile tactics, it's actually appealing to
7 a larger issue that the jury is it's a conscience of the
8 community. The jury is righting a large wrong in this
9 case. And I'll give you some examples from cases
10 that's ---

11 THE COURT: Well, you know, some of that is gonna
12 be allowed, Mr. Massenburg. I mean that's pretty
13 typical deterrence type argument. And so that's
14 probably gonna put -- some of that probably is gonna be
15 allowed, but we are certainly not going to go overboard
16 with trying to have them render a verdict on either the
17 liability or damages that is a reflection of their peers
18 or their need to right the wrongs for the burrow
19 community. That's had not right and that's not gonna be
20 allowed to happen. Poor Ms. Dean has been portrayed as
21 having the arms in the tail.

22 MS. MCVEY: And she's a lovely person for the
23 record. I mean, she's not even here.

24 THE COURT: You know, Judge Hill tells me that he
25 found her entirely appropriate, so I don't know what

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1 happened in these other cases, but in ---

2 MR. MASSENBURG: No, I didn't -- I'm not saying
3 its -- the court in that case, we brought this motion
4 and allowed those arguments to be made based on law in
5 Washington. I'm not --

6 THE COURT: Uh-huh. Well, we don't --

7 MR. MASSENBURG: Jessica Dean is very --

8 THE COURT: We're gonna handle it in South
9 Carolina where we don't allow juries to be stampeded by
10 their motions or we try not to.

11 MR. MASSENBURG: Jessica Dean is --

12 THE COURT: And we're gonna, we're gonna try to
13 follow that. And I believe these lawyers who are gonna
14 try this case are very familiar with how they should
15 operate in that regard.

16 MR. MASSENBURG: I'll just say for the record
17 Jessica Dean is a very talented trial lawyer.

18 THE COURT: Yes. She talks birds out of trees is
19 the way I heard it. All right. Okay. So this reptile
20 thing, what I'm simply gonna say is here is we will
21 enforce the normal rules of not appealing to the
22 emotions of the jury and not arguing the golden rule.

23 And if this reptile motion stands for that
24 proposition, fine, it's granted, but it does not exclude
25 talking about deterrence and the other things that would

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1 help address the wrong that allegedly has been done in
2 this case.

3 MS. FARRISE: But, Your Honor ---

4 THE COURT: So they're gonna be able to talk
5 about some things you wouldn't want them to talk about,
6 but they're not gonna be able do it on the basis of
7 trying to scare the jury because something might happen
8 to a jury person.

9 MR. MASSENBURG: Thank you. Thank you, Your
10 Honor. I just ---

11 MS. FARRISE: She's granted it. Do you want to
12 mess that up? What I would like to say, Your Honor, is
13 because your ruling if this reptile thing does things
14 that the law precludes, then, yes, we're gonna seclude
15 it. We don't have any common agreement on what this
16 reptile thing is. We can talk about that. So I
17 think ---

18 THE COURT: I agree. I think it's very
19 overblown. I think it's a form motion that they make in
20 every one of these cases. We're gonna file the normal
21 rules that govern the trial cases in South Carolina and
22 they do not include putting a juror at fear of their own
23 safety. And that is what this motion is about. We will
24 control that. We don't need to have ---

25 MS. FARRISE: I understand. The plaintiffs were

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1 urged, Your Honor, that because of the vague nature of
2 that, number one, you deny the motion because it's easy
3 to claim that you violated a court order when there's no
4 flesh on the bones of what the order is, that's number
5 one.

6 But number two, my larger concern is that let's
7 say someone says something that an appellate lawyer
8 later decides falls within a violation of this. It
9 basically gives them the task of not having to be
10 lawyers and object at the time, but rather to sort of
11 say everything you say we would now claim or preserve to
12 claim, if it comes to that on appeal as being a
13 violation of this very vague court order. So I think
14 that it should be denied. And lawyers here, we will
15 abide by the rules and they should, of course, be
16 lawyers.

17 THE COURT: Well ---

18 MS. FARRISE: And if they hear something --

19 THE COURT: Okay.

20 MS. FARRISE: -- that they think falls into that.

21 THE COURT: No. No. All right. Okay. My
22 ruling is that we are going to follow the normal rules,
23 as I just recited them. I guess that's a partial grant
24 and a partial denial, but we are going to -- we are not
25 going to make some kind of overall ruling right now

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1 about something that I don't think is gonna occur or
2 come up.

3 If there comes a time in the projection of
4 arguments or anything else to the jury that either side
5 feels that the other has gone beyond the pale of what is
6 legitimate and within the bounds of what a jury ought to
7 hear then they can object and I will rule on it. Okay?

8 MS. FARRISE: Yes, ma'am.

9 MR. MCLEOD: Thank you, Your Honor. I just
10 wanted to let the Court know that at some point one of
11 our concerns is the jury questionnaire voir dire.

12 THE COURT: Well, we're gonna talk about a jury
13 questionnaire. I'm not a big fan of all these nail the
14 jury down five different ways to Sunday. And I know
15 neither the plaintiff nor the defendant are completely
16 in love with that. We developed a jury questionnaire
17 for Taylor that I thought was a kind of a reasonable
18 compromise, but we'll talk about that in a minute.

19 MR. MCLEOD: Thank you, Your Honor.

20 THE COURT: Okay. Exclude publication of
21 evidence prior to admission. What does that mean?

22 MR. BOUCH: Your Honor, we've had this problem in
23 other trials where things go up on the screen without
24 being admitted into evidence, shown before the jury. It
25 was the subject of several mistrial motions in Garvin.

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1 It's the subject of the pending sanction motion. We
2 just want to make it clear that whatever goes up on
3 whatever type of electronic screen has been vetted by
4 the Court before it does.

5 THE COURT: All right. Well, that's fine. I'm
6 gonna deny this motion because I don't think anything
7 like that's gonna happen. Everybody knows that they
8 have to submit things to the Court before they put it in
9 front of a jury and that's what we're gonna do.

10 MR. BOUCH: If that -- I understand your ruling,
11 Your Honor. And I just want to bring it to the Court's
12 attention.

13 THE COURT: Very good.

14 MR. BOUCH: Thank you.

15 THE COURT: All right. Now, each and every.

16 MR. BOUCH: Well, the plaintiffs agree they're
17 not gonna elicit testimony, so we may not have to argue.
18 But in times past the experts for the plaintiff have
19 opined that each and every exposure to asbestos is a
20 substantial contributing cause of disease. It is
21 unsupported by any science. It's been excluded by most
22 courts that have looked at it and we don't think it's
23 proper.

24 Now, in response to the Texas Supreme Court's
25 decision in Borg Warner, they've shifted a little and

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1 they say, well, substantial exposure above background is
2 the new mantra. Well, we have problems with that and
3 we'll deal with it when they testify. That's not what
4 this motion goes to. So I think we're kind of in
5 agreement based on their return but I don't know.

6 THE COURT: All right.

7 MS. FARRISE: Two things. The plaintiffs are not
8 in agreement. We believe the motion should be denied
9 for the reasons that we said in the papers and I'd like
10 to submit on that basis.

11 THE COURT: All right.

12 MR. MASSENBURG: Your Honor, I know it's not our
13 motion, but...

14 THE COURT: Here's what I'm concerned about. I
15 think there are going to be a lot of testimony that will
16 say that this mesothelioma was caused by a lot of
17 different exposures to a lot of different kinds of
18 asbestos of which the products of these defendants are
19 some. And that the products of these defendants to the
20 extent there's been exposure in the industrial setting
21 that's described, whether for two years or five years or
22 one year or six months, is a contributing cause to the
23 mesothelioma that this gentleman is now experiencing.
24 And I'm gonna -- I think that's perfectly legitimate
25 testimony to be offered.

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1 And I don't want to make a ruling on this -- and
2 some experts say that is there's no safe level of
3 exposure to asbestos. Some experts say that. So I
4 don't want to step on a land mine here and start
5 granting something like this if it's gonna be viewed as
6 an exclusion of testimony about the incremental nature
7 of how this occurs.

8 This guy's got mesothelioma and the biggest
9 defense these defendants have is not mine, somebody
10 else's. And so I don't know what I'm precluding when I
11 grant something like this at this stage in the
12 proceedings, that's what's got me concerned. How about
13 somebody help me out with this. Mr. Massenburg.

14 MR. MASSENBURG: I will, Your Honor. Chris
15 Massenburg. I'm just standing up right now. We have a
16 similar motion, but you talked about the word safe.
17 Unless there's an instruction from the Court later that
18 talks about a standard that goes to the jury about
19 whether something was safe or not, then what we do by
20 inferring, this is a very brilliant maneuver by the
21 asbestos plan borrowed some years ago and start talking
22 about whether an exposure is safe.

23 The science talks about a threshold, whether
24 there's a level below which disease has not been shown
25 to occur. It's slightly different because when we get

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1 into a courtroom we're not talking about scientists
2 looking at published papers or examining patients.
3 We're talking to a jury about whether or not something
4 was a substantial contributing factor.

5 And so what the plaintiffs bar and asbestos has
6 been able to do by injecting the word safe into the
7 vernacular in the courtroom is to remove the substantial
8 factor requirement. There are hundreds of studies,
9 thousands of studies for their experts to rely on and
10 I've cross-examined them on all of them. And they're
11 epidemiological studies for them to rely on that have
12 very low exposures where disease has been shown to
13 cause -- to occur.

14 And if they rely on published and peer reviewed
15 studies, I cross-examine them on those studies, they
16 establish it and they say based on these studies the
17 exposure that he had at this level was a substantial
18 cause. But what they will say instead, and what we have
19 a concern about is, there's no safe level and,
20 therefore, every single exposure, no matter how small it
21 is, as long as it's greater than what he breathes in the
22 regular air, is a substantial cause.

23 And there is no published or peer review
24 literature that supports that. And we've cross-examined
25 every one of these experts on that and they agree. They

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1 can't test it. They can't repeat it. It's not
2 generally accepted in the medical and scientific
3 community. And more importantly, in this case we have
4 experts who are gonna testify that they, themselves,
5 would work for asbestos containing materials at an
6 elevated level without wearing a respirator at a
7 certain -- for a certain number of years.

8 Now, that's all cross-examination. I'm only
9 emphasizing one part. There's only one thing I really
10 want out is the word safe because there's no such thing
11 for anything in this world that is safe. We have things
12 that have levels of risk that have been associated with
13 it, but me standing up here talking for this long has
14 risk that may not be safe. When I walk outside on the
15 street I'm not safe. I might think I am. I might think
16 I have low risk.

17 So that's the issue, is that the problem with the
18 substantial contributing factor burden of proof when you
19 start putting safe in then nothing's -- everything is
20 substantial and it dilutes the purpose of the word and
21 the purpose of the law. So that's my only concern, Your
22 Honor, is the use of the word safe and whether or not
23 that becomes the standard by which an expert who is
24 otherwise very intelligent, very learned on all the
25 published literature and could cite the jury to low

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1 exposure studies that show disease occurring bypasses
2 all of that and just says there's no safe level, so
3 everything above general background is a cause. That's
4 not scientifically supported in anything.

5 THE COURT: All right. Ms. Farrise.

6 MS. FARRISE: In response to the Court's
7 question, you're not sure what you're excludeing. What
8 they're really asking you to do is limit plaintiff's
9 ability to meet his burden of proof. We will certainly
10 put forth that his, Mr. Jolly's mesothelioma is the
11 result of the accumulation, the total dose of asbestos
12 that he had in his life, which for him was sufficient.

13 So the moment that you make an order that says we
14 cannot say that every part of that accumulation was a
15 contributing part of the cause, then you are -- the land
16 mine is limiting our ability to prove our case and meet
17 our burden of proof. Here they're going to say, they've
18 already told you, that he had an enormous amphibole
19 exposure and, you know, even if -- unless he had a
20 normal chrysotile exposure it didn't count, so that's
21 kind of the reverse of it.

22 And so because we have the burden of proof, we
23 ought to have every opportunity to prove our case to
24 show that all of the exposures that Mr. Jolly had were
25 important and that without each and every one of them

CROSBY'S INDIVIDUAL MOTIONS IN LIMINE

1 his disease may have never occurred. And that is well
2 supported by science.

3 Now, as to this new point, which is really a moot
4 point.

5 THE COURT: Yeah, how about safe.

6 MS. FARRISE: Yeah, the new point, which is safe,
7 there is absolutely a body of scientific research and
8 studies by worldwide researchers who say there is no
9 recognized safe level and they say that because we have
10 tried to evaluate the lowest of the lowest of the lowest
11 exposure and we have still found mesothelioma in those
12 extraordinarily low, extraordinarily brief exposures.
13 And no matter how far down we go, we cannot find a level
14 for all human beings that we could say this would be
15 safe.

16 And then in Mr. Jolly's -- and they used the word
17 safe. And what counsel just described to you, as I
18 heard it, is that other courts have allowed experts to
19 testify as they have testified and he has been allowed
20 to ably cross-examine them on that and he has, in his
21 mind at least, gotten the jury to understand that they
22 shouldn't believe the expert. But that's a far
23 different matter than saying that the expert cannot
24 initially testify. So whatever he's saying goes to the
25 weight and not the admissibility.

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1 THE COURT: All right.

2 MR. MASSENBURG: Your Honor, I want to say that
3 if there's a study that says something about safe then
4 it's a published study, I can cross-examine on it.
5 I'm -- my point is a little finer. It is the attempt to
6 say that safe, there's no safe level, therefore, every
7 exposure above background is a significant cause. There
8 is no published study on that. There is no testability,
9 repeatability, general acceptance in the medical and
10 scientific community for that.

11 So, of course, if they have a published study
12 that talks about safe, I can talk about that with the
13 expert and cross-examine him on the lernatretis
14 (phonetic).

15 THE COURT: Okay. I think I understand. I'm
16 gonna deny the motion. All right. Now, we have got
17 three more motions in limine by Fisher Crosby. We've
18 had a lot of time back and forth with GP on some of
19 these things that have already been covered. It's
20 1 o'clock now. I'm gonna take a short recess for lunch.
21 I don't even know what's close. It's been so long since
22 I've been to Spartanburg. Can everybody be back by two?

23 MS. MCVEY: Yes, ma'am.

24 THE COURT: Good.

25 MR. MASSENBURG: Your Honor, are we okay to leave

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1 our stuff in the courtroom?

2 THE COURT: Absolutely. Marsha, they're okay if
3 they leave their stuff in the courtroom, aren't they?

4 THE CLERK: Yes, Your Honor.

5 THE DEPUTY: The doors will be locked, Judge.

6 THE COURT: Thank you so much.

7 (Whereupon, a lunch recess was had from 1:00 p.m.
8 - 1:56 p.m.)

9 THE COURT: All right. We'll reconvene this
10 motions hearing in Jolly against General Electric. And
11 where I am now is on GP's omnibus. Mr. Reid, you're
12 standing.

13 MR. REID: Oh, we just had one left on our list,
14 Your Honor.

15 THE COURT: Huh? Oh, what do we got left?

16 MR. REID: 1D.

17 THE COURT: Past impending -- oh, you got three.
18 Past impending lawsuits and replacement parts and
19 crocidolite.

20 MR. REID: To try to cut to the chase this
21 afternoon and move us along, on 1D, I think where we
22 left is they would like to use our discovery answers for
23 the past cases. We're fine with that as long as, you
24 know, subject to our relevancy objections.

25 THE COURT: Certainly.

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1 MR. REID: What we don't want are references to
2 other lawsuits, and so my suggestion would be that we
3 not show the jury the caption of whatever discovery they
4 want to use or mention the date unless there's some
5 compelling reason to do that. So they can use the
6 substance of the answers they want but there won't,
7 therefore, be the message communicated through jury and
8 otherwise.

9 THE COURT: I think that's reasonable. Ms.
10 McVey? Ms. ---

11 MS. FARRISE: Farrise, yes. Good afternoon, Your
12 Honor. We can work out something on the caption. We
13 don't have any fundamental disagreement with that, but
14 the issue about the date is important because what tends
15 to happen is the defendant changes the story over time,
16 so we are entitled to be able to say what the defendant
17 is saying is not believable because they've had this
18 version of the story ten years ago and now they changed
19 it and cleaned it up and it's changed three or four
20 times in the middle.

21 And that is one thing that happens very often
22 with discovery responses, especially ones they answered
23 20 years ago when they were more forthright, I would
24 say, about what maybe they made and what ---

25 THE COURT: Okay. And I understand your point.

GEORGIA PACIFIC'S OMNIBUS MOTIONS IN LIMINE

1 But how about the dates, Mr. Reid?

2 MR. REID: We can deal with that when it comes
3 up.

4 THE COURT: Yeah. I think you can work something
5 out on that, but certainly not -- I don't want any
6 revealing of the fact of another lawsuit. I think that
7 would be very unfair. So it's granted with the caveat
8 we talked about.

9 All right. Replacement parts.

10 MR. BOUCH: Your Honor, I think this one and the
11 next one we'll just take it up as it comes up in trial.

12 THE COURT: All right. So withdrawn. That's
13 Fisher for 1K and --

14 MR. BOUCH: 1L.

15 THE COURT: -- 1L. All right. And so now --
16 yes.

17 MS. MCVEY: Replacement parts and crocidolite, is
18 that ---

19 THE COURT: Yes, that's withdrawn as well. And
20 now we come to Georgia-Pacific's.

21 MR. GLENN: Yes, Your Honor. I think that we can
22 go very, very quickly through this omnibus because I
23 believe Your Honor has already ruled on a lot of these
24 issues.

25 THE COURT: All right.

GEORGIA PACIFIC'S INDIVIDUAL MOTIONS IN LIMINE

1 MR. REID: Yeah. Mass I, I think I've been ---

2 THE COURT: He might pinch you on the nose after
3 he gets out of here in a little bit.

4 MR. REID: Hey, no, I'm just not informed about
5 what citations he's got and I don't think it's relevant
6 myself, but I want that OSHA evidence that we want in.

7 MR. MASSENBURG: Yeah. And just so I'm clear,
8 obviously we would like the OSHA citations out and we'd
9 like the OSHA regulations --

10 THE COURT: I understand.

11 MR. MASSENBURG: -- in so we can discuss that.
12 Yeah. Just so I'm clear for the record.

13 MS. FARRISE: Can I just confirm. So it's all
14 coming in?

15 THE COURT: It's all coming in. I denied you, I
16 denied them. It's all coming in. All right. So we're
17 left with the CPSC bans coming in and the foreign bans
18 coming in. I just think it's all a picture of what's
19 happened in terms of regulating these things, so,
20 therefore, I'm denying both of those.

21 Okay. So that 's number 35 on our omni and
22 number four on the motions in limine. All right. I
23 think that that finishes us with all these things. What
24 I've got left on my list, and you all help me out here.
25 I've got the Dr. Oury deposition and what else?

MOTION TO ADMIT DUKE DOCUMENTS

1 MR. MERIWETHER: Are you guys, are you guys okay
2 with the Duke documents?

3 MR. BOUCH: Yeah, we've got that.

4 MS. MCVEY: Well, hold on a second. There were
5 requests to admit that were sent to us with 14 CDs of
6 Duke documents.

7 THE COURT: Yeah.

8 MS. MCVEY: I think they're Duke documents. I
9 had them yesterday. I haven't opened the CDs.

10 THE COURT: Is this pertinent to your motion to
11 compel?

12 MS. MCVEY: Partly. This is what Robert was just
13 talking about really quickly, so I want to make sure
14 that I understand. And they've asked us to admit the
15 authenticity of those documents. I think most of those
16 documents are authentic, but they're on 14 CDs. I don't
17 know what's on there, so my only concern is admitting
18 these documents where we don't know what they are or how
19 they got them.

20 We did send a bunch of documents to you all with
21 an affidavit, and those, I'm happy to admit. I just
22 haven't looked at all of the documents yet.

23 THE COURT: Well, look, I've got a big solution
24 to this. I have told you all that I'm gonna be very
25 liberal about authenticating documents and I'm not gonna

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1 make people jump through some artificial hoops in this
2 regard. You all have tried a bunch of cases involving
3 Duke and involving these defendants. And the documents
4 that are used are ones that you all are pretty familiar
5 with in my view.

6 MS. MCVEY: Yes, ma'am. And I, what I don't want
7 to have to do is answer a request to admit where I can't
8 even see the documents. I think the documents are
9 probably authentic. I'm not objecting to the
10 authenticity of them. What I'm concerned about is
11 having a request to admit that I've got to answer that I
12 can't -- I don't know how to admit them as a technical
13 term.

14 MR. MERIWEATHER: I can tell you what's on them.

15 MS. MCVEY: Because they're not documents.

16 THE COURT: Help me out Robert.

17 MR. MERIWETHER: I can tell you what' on them.
18 These are the CDs that Wallace and Graham produced to us
19 that ---

20 MS. MCVEY: In 2010, right?

21 MR. MERIWETHER: No, they're 2010 cases, but the
22 actual production was a couple years later because that
23 was in the MDL years. And for the sake of the court
24 reporter, this is Robert Meriwether from Nelson Mullins.

25 The -- these are the CDs of so-called Duke Power

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1 production CDs that I actually brought the originals
2 that still have the Wallace and Graham, you know,
3 labels.

4 THE COURT: Labels on them, yeah.

5 MR. MERIWEATHER: And basically all of these
6 documents are what plaintiffs have been drawing from for
7 years when ---

8 THE COURT: Exactly. I've got a master list of
9 documents that's probably got a bunch of them in there
10 that I was looking at this morning.

11 MR. MERIWETHER: When we -- when this came up in
12 the Taylor case where both -- I was already out,
13 obviously I wasn't involved, but Bill Graham called Duke
14 Power and got -- and asked if 200,000 of them could be
15 identified and got an affidavit from Bambi Lohr
16 (phonetic) to identify a subset of them. We just
17 figured why don't we just get them all authenticated on
18 and going forward with a basis we'll be fine.

19 So this is, this is the larger set of the 200,000
20 documents that they had -- they had authenticated for
21 Taylor. This is just the total package.

22 THE COURT: I got ya.

23 MR. MERIWETHER: That's it.

24 MS. MCVEY: And my only suggestion is this. I
25 obviously can't review \$200,000 (sic). I trust what Mr.

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1 Meriwether is saying where they came from. We weren't
2 in that, so before they come in I'd just like to look at
3 them without having to open every document on a CD.
4 That's all I'm asking. I just don't know that I could
5 admit them, the authenticity of them. We're not gonna
6 object.

7 THE COURT: Well, when can you do it because they
8 need to know that?

9 MS. MCVEY: Well, I need to know what documents
10 they seek to -- are they gonna put in all 200,000? Is
11 there a list?

12 MR. BOUCH: Your Honor, can I make this easy?

13 MS. MCVEY: That's all.

14 THE COURT: Huh?

15 MR. BOUCH: Can I make this easy?

16 THE COURT: Yeah.

17 MR. BOUCH: Okay. With all due respect to Mr.
18 Meriwether, he only has about 20 percent of the issue.
19 There have been a lot of Duke documents produced through
20 the years. I have two boxes that Jim Pressley sent me
21 25 years ago. Okay?

22 As Your Honor pointed out earlier, 99.9 percent
23 of them are self-authenticating. They've got a Duke --
24 they're over 25 years old. They got -- I didn't find
25 them in my garage, all right? They're probably

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1 self-authenticating.

2 This was, I mentioned earlier, generated my phone
3 call to Mr. Branham a month ago. I said we've got three
4 big batches of Duke documents. Ms. Tecklin (phonetic)
5 representing GE got a production years ago. Jim
6 Pressley got a production years ago. Wallace and Graham
7 did one or two productions years ago.

8 If we have an argument about any of them let me
9 know and I'll get ahold of Duke. He said no, good,
10 good. If they want to use anything with Duke or Crosby
11 or Coval Insulation that came but it was addressed to
12 Duke it's fine. If I want to use them that's fine too.
13 And that's where we left it. And I thought that's where
14 we left it this morning.

15 MS. MCVEY: I don't think we have a big argument
16 here.

17 THE COURT: I don't either.

18 MS. MCVEY: What I'm simply saying is I cannot
19 open 200,000 documents and admit those.

20 THE COURT: And you're not gonna do that before
21 you try the case.

22 MS. MCVEY: I can't do it.

23 THE COURT: Well, here's what I think you ought
24 to do. I mean, what are they asking you to do, please
25 admit that these are --

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1 MS. MCVEY: Authentic documents.

2 THE COURT: Well, I would -- you know, I'm almost
3 willing to take judicial notice myself and I haven't
4 seen them.

5 MS. MCVEY: Well, can we do this.

6 THE COURT: That they are all Duke documents.
7 All they're doing is passing along to you what they've
8 got from these various hands that had touched these
9 things. If there comes time in the course of the trial
10 they pull out some document that you don't think is
11 legit you can raise it, but I, I wouldn't hold up --
12 they need to know if they're gonna be able to use these
13 documents. And I can tell you they're gonna be able to
14 use them.

15 MS. MCVEY: And, Your Honor, I'm not saying that
16 they can't use them. What I am concerned about is
17 committing malpractice by admitting the authenticity of
18 documents I haven't seen. I don't think it's gonna be
19 an issue. I think they're self-authenticating as they
20 are. So I guess all I'm asking if they want to use them
21 in this trial they show them to me.

22 THE COURT: Well, you won't -- I can solve that
23 real easy. Each side is gonna show the other what
24 they're gonna use, so that's gonna take care of itself.

25 MR. BOUCH: Can I make it easy, Your Honor? They

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1 served it to her yesterday. Can I make a motion to
2 strike the request to admit because she's got at least
3 30 days and the trial will be over by then anyway.

4 MS. MCVEY: There's a statute --

5 MR. MERIWETHER: This is a statutory request to
6 admit that requires four days response, but --

7 MS. MCVEY: That's what I'm worried about.

8 MR. MERIWETHER: Which she introduced me to --

9 MS. MCVEY: I know.

10 MR. MERIWETHER: -- just recently. And I was so
11 delighted to learn about it.

12 MS. MCVEY: You took my trick. No, but -- and I
13 am not trying to hold them up in any way, and I'm sure
14 we're gonna work it out. I just don't have time in four
15 days to open 200,000 documents.

16 THE COURT: Well, I will not enforce any kind of
17 four-day limit --

18 MR. MERIWETHER: The only thing ---

19 THE COURT: -- or anything else like that. So
20 don't be internorum about that. The parties are gonna
21 show each other what you're gonna put in. And I think
22 it's all gonna be okay.

23 MS. MCVEY: I do too.

24 THE COURT: So don't worry about that.

25 MS. MCVEY: Thank you.

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1 THE COURT: That's not something I'm gonna
2 enforce.

3 MS. MCVEY: Thank you.

4 MR. MERIWETHER: Your Honor, we can withdraw the
5 request to admit.

6 MS. MCVEY: Thank you.

7 MR. MERIWETHER: The only reason we served them
8 that way was I called our old friend Josephine Hicks and
9 said Josephine can you get me a witness to authenticate
10 if they fuss and won't authenticate.

11 THE COURT: Well, I can assure you when this case
12 is tried we're not gonna spend any time authenticating
13 documents.

14 MR. MERIWETHER: Then we withdraw.

15 THE COURT: So that's solved the problem.

16 MS. MCVEY: Thank you.

17 THE COURT: There you go. Okay. Now we've got
18 -- so that's, that's taken care of. We've got the
19 Dr. Oury deposition. We're gonna hear that in a minute.
20 What else?

21 MS. MCVEY: One other housekeeping thing is
22 typically in these trials we have our court reporter who
23 does a fabulous job but typically doesn't have time to
24 do daily transcripts and so the parties in the past have
25 hired a private court reporter to come in, kind of sit

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1 in the corner and provide us daily transcripts from the
2 trial. Do you have any objection to that going forward?
3 I think everybody in the case would like that as well.
4 The state court reporter would maintain the official
5 transcript. This is just something for us to have at
6 night.

7 THE COURT: I never thought about that. Julie,
8 how do you feel about that?

9 COURT REPORTER: Um, I've never -- I don't know.

10 MR. BOUCH: To make her feel better, we still
11 will have to order the official transcript from her.

12 MS. MCVEY: Yes.

13 THE COURT: Exactly.

14 MR. BOUCH: So...

15 MS. MCVEY: Absolutely.

16 THE COURT: Okay. I don't have any heartburn
17 about that.

18 MS. MCVEY: Okay.

19 MR. BOUCH: Your Honor, one, one other
20 housekeeping thing.

21 THE COURT: Hold it. I was trying to make a
22 little list and I can see it always takes an a bunch of
23 conversation with you all rather than making a simple
24 list. It is past time for the court reporter to have a
25 little break.

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1 MR. BOUCH: Yeah.

2 THE COURT: We're gonna take a ten-minute break.

3 MS. MCVEY: Thank you.

4 THE COURT: And in the meantime, guys, with
5 respect to this Dr. Oury deposition, have I got
6 everything up here I'm gonna need to deal with it?

7 MS. MCVEY: Yes.

8 THE COURT: We need to be set about that?

9 MS. MCVEY: (Nods head up and down.)

10 THE COURT: Okay. All right.

11 (Whereupon, a recess was had at the hour of
12 3:41 p.m. - 3:50 p.m.)

13 THE COURT: Okay. Why don't we do Dr. Oury
14 first.

15 MR. BOUCH: I can give you the side view, Your
16 Honor.

17 THE COURT: What's that?

18 MR. BOUCH: I can give you the factual predicate
19 and ---

20 MR. HOLDER: We think it's our motion to quash.

21 MR. BOUCH: Huh?

22 MR. HOLDER: I think it's our motion to quash.

23 THE COURT: It's his motion to quash, yeah.

24 MR. HOLDER: Jonathan Holder for the plaintiff.

25 THE COURT: Jonathan.

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1 MR. HOLDER: Yes, Your Honor. Dr. Oury was
2 deposed in this case on a few weeks ago, and I noticed
3 that deposition for use at trial or for discovery or
4 both and we took his opinions. I even asked him at the
5 end are you available to come for trial and he said if
6 he was asked, yes. So a couple of weeks later, so I
7 guess last week, we got -- we hadn't really received
8 contact, we just received a notice of a trial
9 preservation deposition of Dr. Oury in Pittsburgh for
10 this Thursday.

11 We are -- well, one, there are several reasons
12 why plaintiffs move to quash it. One, he's already been
13 deposed in this case, this doctor. Per South Carolina
14 rules without leave of Court or this can't be deposed
15 twice.

16 Secondly, we have no availability to be ready for
17 a trial cross in Pittsburgh on Thursday. And third,
18 we're deposing other people. There are other -- GP's
19 expert is on Thursday. And we've also provided the
20 daughter, whose only available day was Thursday as well,
21 but we were only able to do that this week.

22 So while I don't want it to undercut our argument
23 to say that we can't really show an availability because
24 we've tendered the family member on the only available
25 day when she was available, I would just make a point

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1 that being able to cover a family member's deposition is
2 not nearly the same as going up to Pittsburgh and
3 performing a trial cross for trial preservation.

4 Based on, based on all these and him already
5 being deposed in this case, we would move to quash the
6 deposition set for this Thursday.

7 THE COURT: Well, how did the deposition take
8 place before? Was it an in-person deposition or a
9 telephone deposition or just what was it?

10 MR. HOLDER: It was a telephonic deposition, Your
11 Honor.

12 THE COURT: And was it anything at great length
13 or was it just some kind of minimal sort of discovery
14 deposition?

15 MR. HOLDER: It was an hour, but -- and I got all
16 of his opinions and then I asked if defense had any
17 questions and they didn't. I've asked specifically --
18 had been specifically noticed for all purposes and
19 defense lawyers invited to ask questions if they sought
20 to.

21 THE COURT: And what was your understanding why
22 Dr. Oury suddenly switched around and can't be available
23 for trial?

24 MR. HOLDER: That's what I'm still trying to
25 understand.

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1 THE COURT: Okay. All right. Anything else?

2 MR. HOLDER: No, Your Honor.

3 THE COURT: All right, Mr. Bouch.

4 MR. BOUCH: Your Honor, Dr. Oury's deposition was
5 taken about six weeks ago. It lasted less than an hour.
6 Not all of his opinions were listed when it was by
7 telephone. Dr. Oury testified he would be available for
8 trial and everybody, both sides, relied on that.

9 On Friday, July 7th, about 3:30 in the afternoon,
10 Mr. McDonald called me. I have no reason to doubt
11 Mr. McDonald's word, I'm married to his sister. He told
12 me that Dr. Oury had called and said that he could not
13 come to trial, that he had been called to clinic and he
14 couldn't get out of it. Within 30 minutes we know we
15 convinced Dr. Oury to sit for a de bene esse deposition
16 pursuant to Rule 30(i) on this Monday, yesterday, in
17 Pittsburgh, but giving them ten-day's notice.

18 I received a couple phone calls from Mr. Branham.
19 We finally hooked up on Tuesday the 11th, last Tuesday,
20 this last Tuesday. Mr. Branham said it is the day
21 before the summary judgment motions. I'm doing the
22 summary judgment motions. I can't go to Pittsburgh and
23 then to Spartanburg. I can do it any other day. I said
24 fine.

25 I go and I cash every favor I have with Dr. Oury.

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1 He agreed to make three hours available on Thursday
2 morning the 20th. I immediately noticed it again for
3 the 30th -- or the 20th, consistent with my conversation
4 with Mr. Branham. I might -- Mr. Holder was not in this
5 loop, Your Honor. Mr. Branham was the one who took
6 charge of it.

7 Number one, I believe that Rule 30(i) provides
8 for medical experts and others to be deposed separately.
9 In fact, they even waive the notice or distance
10 requirements for a doctor even if he's in the same town
11 within the subpoena power to be there.

12 Number two, Dr. Feingold's deposition is noticed,
13 and the only notice I got for Dr. Feingold's deposition
14 a couple weeks ago was that he would be available
15 tomorrow -- Thursday afternoon at 1:30 for an
16 hour-and-a-half only by telephone only.

17 This morning at 9:43 we got a notice of
18 deposition trial preparation deposition of the
19 plaintiff's family. And obviously if the plaintiffs
20 wanted to burn this particular bridge I have no
21 hesitation in burning it myself and I will object to
22 that. It's one thing I gave them at least 10, 12-day's
23 notice. I got 48 hours notice to take, take that.

24 And I don't want to play tit for tat, Your Honor,
25 but I might point out previously the shoe was on the

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1 other foot. Six months ago in the Paterniti case,
2 Dr. Holstein, their expert, announced he couldn't come
3 to trial. They immediately hired Dr. Stags from
4 Arkansas. Unlike most of these experts, we've never
5 heard of him. Some grumbling, we all head off to Little
6 Rock, Arkansas..

7 At the deposition, Dr. Stags says, oh, I can't
8 come to trial. And so without any notice to anybody
9 Mr. Holder immediately notices a videotaped second
10 deposition of Dr. Stags. And but for the fact that the
11 case resolved, we all were prepared to have to go out to
12 Little Rock again.

13 And I only point this out, Your Honor, is that
14 these cases aren't gonna work unless we cooperate in
15 this, in this effort. Everybody's busy. We've deposed
16 people at night during the middle of trial. In the
17 Garvin case, Mr. McLeod went to McVey's office in the
18 middle of the day during trial to depose witnesses.
19 This happens. This is not some devious trick. I
20 noticed it within 30 minutes.

21 I have no particular power over the University of
22 Pittsburgh Medical Center. I can't make Dr. Oury come.
23 He's the only pathologist we have. We are not -- we
24 haven't retained Dr. Feingold. Can't. And he's a vital
25 witness in this case, as you know from our earlier

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1 argument.

2 I would like to take a video deposition. I will
3 hook up, I'll hook up teleconferencing facilities for
4 them if they want to appear for that. My direct is
5 gonna be 25 minutes. I'm gonna have two exhibits. And,
6 you know, we're in a spot. Absent that and I, you know,
7 I don't want to upset too many apple carts, but I have
8 no, in order to protect myself, no other option than to
9 move to continue the trial.

10 THE COURT: That's not gonna happen.

11 MR. BOUCH: That's a complete surprise.

12 THE COURT: That's not gonna happen.

13 MR. BOUCH: Oh, I'm not, I'm not forecasting the
14 answer, Your Honor. I'm just saying that procedurally
15 the court says I have to at least exhaust all options.
16 And I'm in a corner this time, and I'll admit it. And
17 it's no particular fault of mine, but it's my expert.
18 But I've given them two bites and Mr. Branham, I guess,
19 had other plans today, but he said he couldn't take it
20 yesterday because he was gonna be here and that's why I
21 reset it for Thursday. Now they say they can't take it
22 because they've got to get on the phone with
23 Dr. Feingold three hours later.

24 I ask for the Court's discretion and indulgence
25 and let me take the deposition and I'll make every

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1 accommodation I can to them.

2 THE COURT: All right. Mr. Holder?

3 MR. HOLDER: Yes, Your Honor. I just have to
4 clarify the record on just a few things. When Mr.
5 Branham and Mr. Bouch were going back and forth on this,
6 Mr. Branham said we had no coverage of any of our
7 attorneys to be able to take a deposition in Pittsburgh
8 because of the hearing today. He didn't indicate that
9 he was taking a deposition and he would be arguing the
10 motions, so just that clarification.

11 Secondly, as he pointed out this is their only
12 pathologist, but he's lucky in this case because there's
13 been no contested pathological issue. Both pathologists
14 agree that it's a mesothelioma, a confirmed diagnosis.
15 Both pathologists agree that it was caused by asbestos.
16 Oury had a further opinion as to the type of asbestos
17 body, but you've already heard about that today.

18 It's not that we are not willing to work with
19 him; however -- and when I say him, I mean defendant
20 Fisher Crosby, it's that both dates were unilaterally
21 just thrown at us. And if we could just work together
22 and, you know, give us a day and give us a couple dates
23 and let's see which one we can work with, we're willing
24 to work with them because we understand that this
25 litigation is tough, especially with expert's schedules.

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1 THE COURT: Well, how does that translate into
2 whether we can work something out about this date?

3 MR. HOLDER: I just know that we can't do it
4 Thursday.

5 THE COURT: Well, can you do it some other day?

6 MR. HOLDER: Well, and I guess that's more my
7 question is, is he in clinic for the full two weeks or
8 we're willing to take him out of order, if that would
9 help at trial.

10 MR. BOUCH: Your Honor, he's not available during
11 the two weeks of trial, I've asked that.

12 THE COURT: Why?

13 MR. BOUCH: He has been called to clinic for
14 those two weeks, is the answer I get. Okay? I haven't
15 verified it with the administrator of the clinic, but
16 I'm told this. Dr. Oury is familiar to their firm. I
17 did not unilaterally pick Thursday, Your Honor.
18 Mr. Branham told me he could do it any other day.

19 MS. MCVEY: Your Honor, just to correct the
20 record. I mean, he, Mr. Branham copied you on an e-mail
21 to Mr. Bouch about that and he disputes Mr. Bouch's
22 assertion, just to make that clear.

23 THE COURT: Yes.

24 MS. MCVEY: He did not say that.

25 THE COURT: He very definitely said that. He

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1 said he was in a restaurant and he tried to answer it
2 the best he could but that he disputes what Mr. Bouch
3 has recited as the agreement that he made.

4 MS. MCVEY: Yes, ma'am.

5 MR. BOUCH: I assure you, Your Honor, I did not
6 pick it out at random.

7 THE COURT: Well, the problem is your experts
8 have let you down and now it's a question of whether
9 they can accommodate you. I mean, that's what it is,
10 that's the note of it. Your expert who said I can be
11 available and who has now said I can't be available.

12 MR. BOUCH: Well, I understand, Your Honor. I
13 mean...

14 THE COURT: Now what was this business about
15 Dr. Feingold? How does that work into the equation?

16 MR. BOUCH: The reason it was articulated to me
17 that they could not cover Thursday was Dr. Feingold's
18 deposition is to take place by telephone at 1:30. If
19 that has changed I have no notice of that.

20 THE COURT: And Feingold is whose --

21 MR. BOUCH: It's Georgia-Pacific's expert.
22 Dr. Feingold is a pulmonary physician.

23 THE COURT: How about it, GP, is that when that's
24 gonna take place?

25 MR. GLENN: Yes, Your Honor, set by agreement.

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1 THE COURT: Well, Theile, I'm asking you all one
2 more time. Jonathan, do you all got any time when you
3 can accommodate him?

4 MR. HOLDER: Right. I mean, if it's before
5 trial, I think the weekend might be our only option.

6 MS. MCVEY: It's just hard when we're getting
7 ready for trial, but I mean, if he can do it maybe over
8 the weekend.

9 THE COURT: Well, let me ask you this. Going
10 back to Thursday, he's saying he wants to do it Thursday
11 in the morning?

12 MR. BOUCH: 9 to 12, Your Honor.

13 THE COURT: Huh?

14 MR. BOUCH: 9 to 12, Your Honor.

15 THE COURT: And you've got the daughter of
16 Mr. Jolly at what time?

17 MS. MCVEY: It's at two. But I think the issue
18 for us with Dr. Oury is we want to do it or one of us,
19 somebody needs to be there in person because it's a
20 trial for us. That's the issue. It's not just a
21 discovery deposition you can easily do by phone. The
22 daughter is going -- Georgia-Pacific wanted to take the
23 daughter's deposition and we agreed to do it Tuesday. I
24 then crossed it for video after. I'm sorry Thursday.

25 MR. BOUCH: Well, I'm gonna move to quash it.

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1 MR. HOLDER: So we're looking at --

2 MS. MCVEY: What you gonna do?

3 MR. MASSENBURG: If helps, originally we're
4 talking about ---

5 THE COURT: Now, wait a minute. What was this
6 little bit of cross talk, Mr. Bouch?

7 MR. BOUCH: Well, Your Honor, you know ---

8 THE COURT: I'm not gonna have a tit for tat
9 going on.

10 MR. BOUCH: Okay, Your Honor.

11 THE COURT: I'm trying awfully hard to see if I
12 can resolve this, but I don't like that kind of thing.

13 MR. BOUCH: Okay, Your Honor.

14 THE COURT: That's not how we treat each other.

15 MR. BOUCH: I understand.

16 THE COURT: They may do it other places, but we
17 don't do that here.

18 MR. BOUCH: Yes, ma'am.

19 THE COURT: So let's be concentrating on what we
20 can do to solve this problem and not threaten some kind
21 of motion. You can threaten a motion all you want to,
22 but I'm not gonna play tit for tat.

23 MR. BOUCH: I apologize if that's the way it was
24 taken.

25 THE COURT: Well, that's the way it appeared to

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1 me. All right.

2 MR. MASSENBURG: May it please the Court, Your
3 Honor?

4 THE COURT: Yes.

5 MR. MASSENBURG: Chris Massenburg. It was
6 originally all for us to be able to take the family
7 members' depositions 48 hours before they testify.

8 THE COURT: Uh-huh.

9 MR. MASSENBURG: The concern was not knowing what
10 somebody would have to say, in part of case evaluation,
11 et cetera.

12 THE COURT: Yeah.

13 MR. MASSENBURG: And they accommodated us by
14 giving us a date this week. Given the circumstances, as
15 they've been stated today, if they would renew that
16 offer to allow us to depose the family members 48 hours
17 before they testify and, therefore, they can work out
18 some kind of compromise here and everybody could walk
19 away kind of happy, we would, we would do that.

20 THE COURT: It might be the better thing.

21 MS. MCVEY: And, Your Honor, just a minute. We
22 may - Ms. Farrise just told me that she sent an e-mail
23 cancelling what she had going on Thursday morning so she
24 can go in -- she's willing to go in person. Are you
25 sure?

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1 THE COURT: Ms. Farrise, you'd be willing to go
2 to Pittsburgh in person?

3 MS. FARRISE: Yes, Your Honor.

4 THE COURT: Well that solves the problem and
5 keeps the rest of it like it's said. I think that's a
6 very, very generous accommodation and I don't know if
7 you deserve it Mr. Bouch. We just got to have a little
8 more civil treatment of each other.

9 MR. BOUCH: I understand. I understand, Your
10 Honor.

11 THE COURT: I want you to pledge to me that
12 that's gonna happen.

13 MR. BOUCH: Of course it will.

14 THE COURT: I don't like when we're not treating
15 people with complete civility and respect.

16 MR. BOUCH: I understand, Your Honor. I
17 apologize.

18 THE COURT: We just can't do that. If that
19 happens again, you're not gonna be accommodated.

20 MR. BOUCH: I understand.

21 THE COURT: You understand that?

22 MR. BOUCH: Yes, ma'am.

23 THE COURT: All right. Well, then we solved this
24 problem. All right. Now -- all right. How about on
25 this daily transcript business, folks, listen up here,

1 I'm still -- Julie and I are trying to figure out what
2 position Court administration would take about that.
3 Have you all done that at any other trial?

4 MS. MCVEY: The court reporter?

5 THE COURT: Yes. I've been approached that you
6 want this daily transcript of kind of informal daily?

7 MS. MCVEY: Yes, ma'am, we've done it in every
8 other asbestos case.

9 THE COURT: Okay.

10 MS. MCVEY: And they just -- the official
11 transcript comes from the state court reporter.

12 THE COURT: Right. Well, you all are gonna order
13 it, that's for darn sure.

14 MS. MCVEY: No, absolutely. So it's just to take
15 a little bit of pressure off because it's helpful to the
16 parties to have daily transcripts.

17 THE COURT: Okay. And it's not gonna be used in
18 any kind of official way?

19 MS. MCVEY: No, ma'am.

20 THE COURT: Okay. All right. Well, then that --
21 I'm okay with that. Now, Dr. Maddox, wasn't there some
22 issue about Dr. Maddox?

23 MS. MCVEY: Oh, no. I think there was a motion
24 about duplicative testimony, but we were gonna defer
25 that.

MOTION ON DUPLICATE TESTIMONY

1 MR. MASSENBURG: Your Honor, Chris Massenburg for
2 Georgia-Pacific. We have Dr. Maddox, Dr. Brody, and
3 Dr. Frank, two of whom are medical doctors and while I
4 can see that you could definitely call all three and not
5 duplicate, not knowing how they're gonna use them in the
6 designations, go over each other a little bit.

7 I just wanted to bring it to the Court's
8 attention in case a motion came up during the course of
9 the trial. If we start hearing the same testimony again
10 from another doctor, they get two bites at the apple, we
11 might raise an objection.

12 THE COURT: And I don't want that. You know, I
13 had a discussion with Mr. Taylor about limiting the
14 number of witnesses, limiting the time of examination.
15 We got very deep into that before that case settled.
16 And, you know, I'm not a two-week girl, I'm a one-week
17 girl. I still don't understand why these cases should
18 take two weeks to try when you've got three defendants,
19 one of whom -- two of whom are represented by the same
20 firm.

21 So I'm not gonna impose anything hard and fast
22 here, but I can tell you I'm not gonna allow a bunch of
23 duplicate or punitive testimony. So you all have got to
24 figure that out.

25 Now, the other problems about Dr. Maddox and

MOTION ON DUPLICATE TESTIMONY

1 Dr. Brody and Dr. Frank it sounds to me we're just gonna
2 have to wait and see what happens when trial comes.

3 MR. MASSENBURG: I agree, judge.

4 THE COURT: You know, you may think their
5 opinions are off the wall and they're a bunch of wing
6 nuts, but you know, each side is gonna be allowed to put
7 up their experts and as long as they're sound and
8 reasonable, I'll certainly make some declarative
9 determination if I need to, but my general approach is
10 to let folks put up what they want to put up.

11 MR. MASSENBURG: Normally at this point, Your
12 Honor, what I would ask is if they could tell the Court
13 how -- we know what Brody is gonna say, and I'm told by
14 Mr. Branham some of the things he's not gonna say. If
15 they could, if they could tell us, I'm deferring, but if
16 they could tell us how they plan to use Dr. Frank and
17 how they plan to use Dr. Maddox.

18 In some cases, most cases, Dr. Frank is kind of a
19 state of the art, he talks about historical knowledge
20 and medical and scientific community and he also is an
21 occupational epidemiologist and occupational specialist,
22 so he can talk about some of those things. Maddox,
23 although he's a pathologist, fits a lot of the same
24 things if called to do so on a case-by-case basis. So
25 we can wait and cross that bridge, Judge, but I thought

MOTION ON DUPLICATE TESTIMONY

1 it was prudent to bring up given that the redacted time
2 period.

3 THE COURT: Well, you all are gonna engage in
4 some discussion about that and if you come to a
5 difficult point, why I can try to weigh in if I need to.

6 All right. The final thing is jury
7 questionnaires.

8 MS. FARRISE: Your Honor --

9 THE COURT: You know I'm not a fan of jury
10 questionnaires.

11 MS. FARRISE: And just before you move on, I'm a
12 firm believer that they have a way of working themselves
13 out. And, perhaps, after we take Dr. Oury, the
14 pathologist's, testimony that may give us a better
15 perspective on how we limit our case.

16 THE COURT: Well, that's correct.

17 MS. FARRISE: I would also ask, though, I think
18 Mr. Bouch mentioned there's two documents he plans to
19 use. Today is Tuesday, I'm gonna be flying up there on
20 Thursday, that I could at least have a disclosure.

21 THE COURT: Yes. You need to get to those just
22 as quick as --

23 MR. BOUCH: It's gonna be his CD, the micro
24 picture of the driver, and the covers of his book. That
25 will be it.

1 THE COURT: Good. Okay. Jury questionnaire.
2 Where are you all on that? Here's what would generally
3 happen here. There's a criminal case going on and
4 there's our civil case going on and the big voir dire
5 has been notice that would be -- and generally what I do
6 if I've got a civil and a criminal and I'm doing civil,
7 I'll let civil, the criminal judge qualify the jury
8 because they've got a few more wrinkles in what they
9 have to do than civil does. If that's so, Keith Kelly
10 would do that.

11 And then in terms of jury questionnaire, you
12 know, I don't want to have to take a whole day with this
13 and then send them home and all that kind of business.
14 What I'd like to do is either conduct an additional voir
15 dire myself after he is finished with the voir dire or
16 and dealing with something, let them bring it right back
17 in, give to you all and then it'll be a piece of
18 information for you when you're striking, but it won't
19 be something that they'd be cross-examined by.

20 Thiele, how do you feel about all this?

21 MS. MCVEY: You know, I think, I think it's an
22 impossibility to look at one piece of paper between all
23 of us in the morning.

24 THE COURT: Yes.

25 MS. MCVEY: So maybe the better thing to do is we

1 could provide you, maybe all decide what questions we
2 want you to ask them.

3 THE COURT: Okay.

4 MS. MCVEY: At the addition voir dire. And go
5 from there.

6 THE COURT: Okay. And I'll either ask them or
7 I'll get Keith Kelly to ask them.

8 MS. MCVEY: Yeah. And what -- I don't know how
9 you -- normally what I've seen is they pull our panel up
10 after the criminal trial pulls theirs.

11 THE COURT: That's correct.

12 MS. MCVEY: And we would have 60 or however many
13 potential people in this courtroom and you could ask
14 maybe just those 60.

15 THE COURT: Exactly.

16 MS. MCVEY: Okay.

17 THE COURT: That's kind of the way I would see it
18 working. I figure that would suit you all.

19 MR. BOUCH: Fine with us.

20 THE COURT: Okay.

21 MR. MASSENBURG: No objection but us, Your Honor.

22 THE COURT: Okay. All right, now, with all these
23 bails of papers and everything else I think I've got
24 most everything, so the first person to ask is Marsha.
25 Marsh, do you have everything you need?

1 THE CLERK: I do believe so, Your Honor.

2 THE COURT: Okay.

3 THE CLERK: I believe so.

4 THE COURT: All right. Parties, is there
5 anything else we need to cover? Yancey?

6 MR. MCLEOD: Just real quick, Your Honor. I
7 believe Tim had a conversation with somebody. I just
8 wanted to know, is this the courtroom that we're gonna
9 be in?

10 THE COURT: As far as I know. Marsha?

11 THE CLERK: Yes, Your Honor. This will be the
12 courtroom.

13 THE COURT: Okay.

14 MR. MCLEOD: And if so, is it my understanding,
15 my correct understanding that we're gonna need to bring
16 our own table because there's obviously not enough room
17 for all the defendants.

18 THE CLERK: Uh-huh. Yeah.

19 MR. MCLEOD: And I just wanted to --

20 THE CLERK: We don't provide tables, extra
21 tables.

22 THE COURT: Okay. So, yes, you need to do that.

23 MR. MCLEOD: Is it possible to move the -- I
24 mean, okay, sure, it should work. Yeah, we'll work it
25 out.

1 THE CLERK: You can't move these tables.

2 They're ---

3 MR. MCLEOD: They're permanent?

4 THE CLERK: Yeah, they're permanent, but you're
5 welcome to bring tables off the side. I tried to send
6 photographs. I forget who I sent the photographs to of
7 the courtroom to warn you that it's a small courtroom.
8 It's ---

9 MR. MCLEOD: Am I correct that this is the grand
10 jury --

11 THE CLERK: Your jury will be sitting over here.
12 Your screen's up there. We have an Elmo. We usually
13 sit it upright here, projector, so... (Indicating.)

14 MR. BOUCH: We'll make it work. We've done it in
15 courtrooms the size of that jury box.

16 THE CLERK: We do have one very, very small
17 table, but it's in another courtroom.

18 MR. MCLEOD: We'll make it work.

19 THE CLERK: And we may need it.

20 MR. BOUCH: Not, not an issue.

21 THE CLERK: It's as small as a student desk back
22 in high school.

23 MR. BOUCH: Sort of like that one.

24 THE CLERK: Yeah, it's really small.

25 MR. BOUCH: We'll, we'll be fine.

1 THE CLERK: It'll probably do you no good.

2 MR. BOUCH: We'll get the logistics.

3 THE COURT: Okay. Now, one final question. No,
4 sir who've been observing from afar, Will, Mike, all the
5 rest of you, anything else I need to be doing right now
6 for you all?

7 MR. EARLY: Nothing other than what I addressed
8 earlier, Your Honor, with regards to the November. I
9 told you a couple of lawyers are here in the Smith and
10 Howe case. I'm gonna send an e-mail out to Your Honor,
11 Mr. Graham, as well as everybody involved with Smith and
12 Howe to let them know what you told me about the
13 November date being off.

14 THE COURT: The November date is off for piya --
15 I mean, excuse me for the --

16 MR. EARLY: Rock Hill case.

17 THE COURT: -- Rock Hill case.

18 MR. EARLY: York County.

19 THE COURT: And the only reason I haven't got
20 some proposed dates for you for -- I've talked to Lynn
21 Straight. She is the member of the clerk's office in
22 York that I'm working with, but Court Administration,
23 Tiffany Raines' office has got to send out the terms of
24 court first and that hasn't been done yet. And so I'm
25 waiting to get that.

1 As soon as I get that I'm trying for some dates,
2 the last two weeks of January, so you can let people
3 know that that's what I'm trying for if I can get it.
4 The first of the year is generally heavy on general
5 sessions in York, so I'm trying to work around all that,
6 but I'll let you know the minute I know something. What
7 else?

8 MR. BOUCH: One thing, Your Honor. Opening
9 statements.

10 THE COURT: Yes.

11 MR. BOUCH: We've had this issue before and it's
12 gone both ways, so I want to know -- but I'd like to
13 know how Your Honor feels about it. I personally
14 believe nothing should be shown to the jury until
15 it's admitted into evidence, so evidence, perspective
16 evidence, should not be shown on opening statements.

17 Pictures, models, all that. Line item power
18 points, I don't -- it doesn't matter, but otherwise
19 evidence, demonstrative or otherwise, it's my view that
20 it shouldn't go to the jury until the foundation is
21 laid and submitted by the Court. I don't want any
22 misunderstandings when we get here on Monday and maybe I
23 inadvertently put something in a power point that is
24 objectionable. I'd like to know Your Honor's feelings
25 on that.

1 THE COURT: Well, I would have -- I would think
2 and I would hope that you all would reach objection --
3 reach agreement about the evidence to the greatest
4 extent possible and anything we've reached agreement on
5 is fair game in my view to be shown to the jury on
6 opening statement. But if it hasn't been agreed to or
7 if I've said you can't say it, then don't.

8 MR. BOUCH: Okay.

9 THE COURT: So that's kind of my approach to
10 things.

11 MR. BOUCH: Fair enough, Your Honor.

12 THE COURT: All right. Is anybody on the GP side
13 got to say anything about that?

14 MR. GLENN: Nothing on that, Your Honor, other
15 than I think it's actually -- that issue was discussed
16 in an order that Judge Hill signed in the in re asbestos
17 docket. I was just gonna ask is that order still good?

18 THE COURT: Yes, it's still good.

19 MR. GLENN: Okay. Because it sets time limits
20 for certain things --

21 THE COURT: That's correct.

22 MR. GLENN: -- including opening statements.

23 THE COURT: That's correct.

24 MR. GLENN: Okay.

25 THE COURT: And all those will be as per what

1 Gary Hill has already provided.

2 MR. GLENN: Understood. Thank you, Your Honor.

3 MR. MASSENBURG: One last issue, Your Honor.

4 MS. MCVEY: Just on that order, the only thing
5 I'd like you to consider and I asked Judge Hill to
6 consider it is he lays it out by party, time limits by
7 party. Thirty minutes for the plaintiff and then
8 thirty minutes for each defendant. So Mr. Bouch would
9 get an hour. Yeah, that's how he had it laid out. And
10 Georgia-Pacific would get 30 minutes on top, or whatever
11 it is, 45 minutes. I can't remember the time of it. I
12 think it should be by side.

13 THE COURT: I agree.

14 MS. MCVEY: Okay.

15 MR. BOUCH: Well, Your Honor, can we split that
16 then? I'm not gonna take -- I'm not gonna ask to take
17 30 minutes for Fisher and 30 minutes for Crosby, I'll
18 take 30 minutes total. But I -- because as, you know,
19 we've been here all day today and there's a good deal of
20 difference between the positions of the defendant and,
21 of course, for me to do 15 minutes for two defendants
22 and Georgia-Pacific 15 minutes, I think that's a little
23 much. And we'd ask for 30 minutes per law firm, let's
24 put it that way.

25 THE COURT: Well, then, she gets an hour.

1 MS. MCVEY: Thank you, Your Honor.

2 MR. BOUCH: She can have an hour.

3 THE COURT: I mean, she is so danger minded that
4 she wants to bore the jury for an hour. And you may not
5 want to take all your 30 minutes either, but anyway
6 that's how we're weeding that out.

7 MS. MCVEY: Thank you, Your Honor.

8 MR. BOUCH: I can assure you I won't take an
9 hour, but 30 minutes.

10 THE COURT: I'll be measuring that, making the
-11 over and under on that one.

12 MR. MASSENBURG: Your Honor, one other issue, if
13 I could, please. Again, Chris Massenburg. So just
14 because I've never selected a jury with Your Honor and
15 never tried a case here specifically, after voir dire,
16 assuming the Court's conducting, it might go a little
17 quicker, we have AV, some AV technology and stuff to get
18 set up, would we have any time for that or...

19 THE COURT: Yes. I'll accommodate anything you
20 need to do to set the courtroom up like you want it
21 before we bring the jury in for opening statements and
22 all of that kind of thing.

23 MR. MASSENBURG: We anticipate that would be
24 Monday immediately following voir dire or would it start
25 Tuesday?

1 THE COURT: Yeah, that would be my thought.

2 MS. MCVEY: Open on Monday?

3 THE COURT: Uh-huh. And realistically speaking
4 it would probably be Monday afternoon.

5 MS. MCVEY: Yeah.

6 MR. BOUCH: Yeah.

7 MR. MASSENBURG: Yeah.

8 THE COURT: So after we got --

9 MS. MCVEY: I think ---

10 THE COURT: -- them selected, we go on and let
11 them have lunch and then you all set up and then, you
12 know ---

13 MS. MCVEY: Wonderful.

14 THE COURT: And it's kind of dependent upon how
15 long it's gonna take to qualify them. Anything else?

16 MS. MCVEY: One last question. What do you
17 anticipate your day looking like? I mean, are you a 9
18 to 5-er or are you -- just in terms of planning
19 witnesses.

20 THE COURT: Well, yes, I usually am a 9 to 5-er,
21 if that suits you all.

22 MS. MCVEY: Yes.

23 THE COURT: The first day is gonna be about ten
24 because that is, of course, the jury's qualification,
25 but I'm a 9 to 5-er.

1 MS. MCVEY: Okay, great.

2 THE COURT: If you all got some other thoughts
3 about it let me know.

4 MS. MCVEY: That works with us.

5 THE CLERK: Can I ask a question, Your Honor?

6 THE COURT: Yes.

7 THE CLERK: How many alternates are you going to
8 do?

9 THE COURT: Yeah, let's talk about alternates.
10 Three?

11 MS. MCVEY: I think three.

12 MR. MASSENBURG: Three's best, Your Honor.

13 THE COURT: Okay, good.

14 THE CLERK: Thank you, Your Honor.

15 THE COURT: All right, anything else?

16 MS. MCVEY: No, ma'am.

17 THE COURT: Anybody?

18 MR. MASSENBURG: Your Honor, are those designated
19 alternates or do you mix them together at the end so
20 that you ---

21 THE COURT: It's a one, two, three.

22 MS. MCVEY: It's a designated.

23 THE COURT: It's designated. Uh-huh. All right,
24 good luck.

25 MS. MCVEY: Thank you, Judge. Appreciate it.

1 MR. BOUCH: Thank you.

2 THE COURT: See you Monday unless you settle it.
3 Certainly can always be hopeful.

4 (Whereupon, hearing concluded at 4:23 p.m.)

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7 --- THIS CONCLUDES REQUESTED TRANSCRIPT ---

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1 STATE OF SOUTH CAROLINA
2 COUNTY OF SPARTANBURG COURT OF COMMON PLEAS
3 BEVERLY DALE JOLLY AND
4 BRENDA RICE JOLLY,
5 Plaintiff,
6 vs. CASE NO. 2016-CP-42-01952
7 GENERAL ELECTRIC COMPANY, ET AL,
8 Defendants.
9 TELEPHONIC CONFERENCE
10 BEFORE: THE HONORABLE JEAN H. TOAL, JUDGE
11 (appearing telephonically)
12 DATE: July 21, 2017
13 TIME: 9:28 AM
14 LOCATION: A. William Roberts, Jr.
15 & Associates
16 234 Seven Farms Drive
17 Suite 200
18 Charleston, SC
19 REPORTED BY: Priscilla Nay,
20 Certified Shorthand Reporter
21 A. WILLIAM ROBERTS, JR., & ASSOCIATES
22 Fast, Accurate & Friendly
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Page 4 1 JUSTICE TOAL: Good morning. 2 MS. McVEY: Good morning. 3 JUSTICE TOAL: Tell me who all is 4 saying good morning. 5 MS. McVEY: Theile McVey. 6 MR. HOLDER: Your Honor. 7 JUSTICE TOAL: Good morning. Tell me 8 again, Jonathan. I was losing you. 9 MR. HOLDER: Jonathan Holder for the 10 Jollys. Thank you, Your Honor. 11 MS. FARRISE: Simona Farrise for the 12 Jollys. Good morning, Your Honor. 13 JUSTICE TOAL: Good morning. All 14 right. 15 MR. McLEOD: Good morning, Justice 16 Toal. Yancey, Tim, and Phil are on the line for 17 the Defendants? 18 THE COURT: Great. And do you have a 19 court reporter? 20 MR. McLEOD: Yes, we do. 21 JUSTICE TOAL: Excellent. Okay. 22 Well, let me just tell you what I perceive the 23 agenda to be. We've got an issue about the 24 corporate representatives for Fisher and for Crosby 25 Valve, the legitimacy of their subpoenas, and the	Page 5 1 order of their testimony. So that's one chunk of 2 stuff. Then we've got the motions with respect to 3 Dr. Oury's deposition and contentions that my order 4 of July the 18th regarding limitations on his 5 testimony was violated. All right. 6 Is that what we're hearing today? 7 MS. McVEY: Yes, ma'am. 8 JUSTICE TOAL: Very good. Counsel, I 9 know that you have got limitations and I wish that 10 I could be down there to go to Sha's funeral. It's 11 too sad for words, but I think we can get these 12 things disposed of rather quickly. To the extent 13 we can't we'll carry them over. Does that suit 14 you? 15 MR. BOUCH: Whatever pleases the Court, 16 Your Honor. 17 THE COURT: Let's keep the routine 18 followed for the benefit of our court reporter. 19 This is, of course, Jean Toal. I'm the presiding 20 judge for this asbestos trial in Jolly against 21 General Electric Company, Civil Action 22 2016-CP-41-01592. 23 Okay. We'll take up as our first 24 matter the corporate representatives for Fisher and 25 Crosby Valve. What I've got in front of me is



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1 motions to quash subpoenas that Yancy McLeod filed
2 on behalf of Fisher and Crosby Valve.
3 So let's start first with the
4 legitimacy of the subpoenas. Yancey, it's your
5 motion. So go forward.
6 MR. McLEOD: Thank you, Your Honor.
7 It's pretty straightforward. We don't believe that
8 Rule 45 provides for subpoena and out-of-state
9 parties in compelling them to attend trial. The
10 way -- we object and believe that these subpoenas
11 should be quashed because the Court does not have
12 the power to compel an out-of-state party to attend
13 trial. That's the basis of the motion.
14 I will note also that the corporate
15 representatives weren't named on the subpoena, just
16 the Defendants, and so I think there's an issue
17 there as well.
18 Finally, we believe that service was
19 improper being that I happened to be the person
20 downstairs when the FedEx package was delivered. I
21 think it's a distortion of Rule J that I accepted
22 service on behalf of my clients when I didn't even
23 know what was in these packages.
24 The main focus of our argument is
25 whether or not the Court can compel an out-of-state

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1 not these Defendants would comply with the
2 subpoenas. That e-mail was written on Wednesday.
3 Mr. Bouch responded that they were working on it
4 and that they would respond probably the following
5 day since he was traveling.
6 Mr. Bouch called Mr. Holder. No
7 agreement was reached. So these motions to quash
8 were filed Thursday, the 20th. Your Honor, trial
9 is supposed to start Monday the 24th and we have
10 been operating since we didn't hear otherwise that
11 they were bringing their corporate representative
12 to trial. So that's just the first thing.
13 The second thing is these subpoenas are
14 valid. Fisher and Crosby are parties to this case.
15 They have submitted to the jurisdiction of this
16 Court and they are not merely nonparties. When you
17 look at Rule 45 it only allows nonparties to quash
18 a trial subpoena.
19 I looked carefully at Rule 45 and it
20 does provide a mechanism to wash a subpoena for
21 travel purposes but it only addresses nonparties.
22 So from our perspective and what the rule provides
23 for is what once you submit to the jurisdiction of
24 this Court as a party then you are obligated to
25 come to trial if served with a subpoena.

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1 party to attend trial. There's just no authority.
2 We are not aware of any authority, statutory or
3 otherwise, that gives the Court that power in
4 South Carolina.
5 JUSTICE TOAL: All right. Very good.
6 Who is going to argue this matter for the
7 Plaintiff?
8 MS. McVEY: Your Honor, Theile McVey.
9 I'll do the argument.
10 JUSTICE TOAL: Very well, Ms. McVey.
11 It's yours.
12 MS. McVEY: Your Honor, let me just
13 back up and give you some basic facts which I'm
14 sure you're aware of. These subpoenas were served
15 July 12th on Counsel. They were FedExed and signed
16 for by Mr. McLeod.
17 We did not hear anything from Counsel
18 regarding these subpoenas and we asked multiple
19 times what their position was. We had extensive
20 pretrial hearings on Tuesday as you'll recall all
21 day. No concerns were raised by these Defendants.
22 When we never heard anything from them
23 about when they were bringing their corporate
24 representative you will recall that we wrote the
25 Court asking about for guidance about whether or

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1 Their status as nonresident
2 corporations does not change the fact that they
3 have submitted to the jurisdiction of this Court.
4 They made a general appearance. They've been
5 litigating this case.
6 There is case law in South Carolina
7 which we cited in our brief that says: A general
8 appearance constitutes a voluntary submission of
9 the jurisdiction of this Court. That's the
10 Strickland versus Consolidated Energy Products case
11 and the Brays Island Plantation case. There is no
12 authority in the State of South Carolina.
13 The Plaintiffs cannot obtain live
14 testimony from a party to this case. Your Honor,
15 we're not trying to be difficult but the
16 practicalities of not having a live witness are
17 real. I mean, if we don't have a live witness
18 then what we could use are prior depositions of
19 corporate representatives and that makes it
20 piecemeal. They're from other cases in other
21 jurisdictions. Some have to be read. Some would
22 be video. It is time consuming.
23 It is much more effective and efficient
24 to have the live witness. Your Honor, service was
25 effective. Under Rule 45 it was effective. Under

Page 10 1 Rule 4(j) it was effective. Importantly, under 2 Rule 5(b) once a party has appeared then the 3 attorney -- we can serve the attorney for the party 4 and that is made clear, Your Honor. So these 5 subpoenas were valid and they're effective and they 6 should have to be complied with. 7 CHIEF JUSTICE TOAL: All right, but 8 Ms. McVey, how about respond to the contention that 9 the corporate representatives are not named and 10 that is a problem. 11 MS. McVEY: Your Honor, even when you 12 do 30(b)(6) depositions we don't name the corporate 13 representative. The Defendant is allowed to decide 14 who that's going to be. I mean, if we could name 15 Mr. Crosby or Mr. Fisher we would love to that. 16 In this case we named the Defendant and 17 then the Defendant chooses who's going to speak on 18 behalf of the corporation. 19 CHIEF JUSTICE TOAL: All right. Is 20 there in your mind any impact in the argument that 21 this should have been done by 30(b)(6)? 22 MS. McVEY: No. I don't think so. It 23 doesn't limit us. We don't have to do it by 24 30(b)(6) and that's not what the rules say and 25 that's not what any of the case law says.	Page 11 1 We can name a party and they can 2 bring them. Now, we can agree to use a 30(b)(6) 3 deposition, but I don't think it prohibits us from 4 doing it. 5 JUSTICE TOAL: All right. Mr. McLeod 6 in response. 7 MR. McLEOD: Yes, Your Honor. We 8 disagree completely. The reason why we didn't name 9 our individual corporate representative is because 10 they know they can't. They have to name the 11 Defendant, the corporation, and our position is 12 that the State cannot compel an out-of-state 13 corporation to attend trial. 14 Rule 5(b) is about pleadings after the 15 summons and complaint. Rule 45 specifically says 16 that you have to be served pursuant to Rule 4(b) in 17 summons and complaint and then refers to Rule 4(j), 18 acceptance of service. Well, this is not the kind 19 of acceptance of service that is, you know, 20 contemplated by Rule 4(j). 21 I didn't know I was accepting service. 22 The practice of South Carolina attorneys is if the 23 party knows that you're represented by Counsel then 24 you send them an acceptance of service piece of 25 paper saying, hey, will you accept service of the
Page 12 1 summons and complaint? I didn't do that. I didn't 2 know what was inside these documents. I just 3 happened to be the person downstairs when the FedEx 4 deliveries came that day. 5 I would point the Court to the case of 6 Langley v. Graham which is 322 S.C. 428. In 7 Footnote 5 -- this is a case contemplating service 8 by Rule 4(j) and in Footnote 5 the Court indicates 9 that Graham indicates in his affidavit that he was 10 not told what he was signing when he signed the 11 acknowledgment of service. 12 He further states that Langley's 13 counsel took advantage of him and that he failed to 14 fully explain the circumstances surrounding the 15 document he was signing and the contents of the 16 document that he was signing. 17 THE COURT: Mr. McLeod. 18 MR. McLEOD: Yes, ma'am. 19 THE COURT: All right. I am familiar 20 with that case. They're not arguing about 21 acceptance of service of the initial pleadings. 22 What they are talking about is the provision in 23 5(b) that deals with the service of papers after 24 the suit is commenced on the counsel for the 25 parties. That is the contention they make about	Page 13 1 the propriety of this service. That seems 2 routinely to be done. What is the difficulty 3 there? 4 Why would you have to know what's in 5 the papers when it's perfectly okay to serve papers 6 on an attorney for the parties after the suit has 7 commenced? 8 MR. McLEOD: Yes, Your Honor. Our 9 position is that, one, this is not a pleading. 10 Number 2, Rule 45 specifically states that service 11 must be done pursuant to Rule 4(b) or (j) and 12 acceptance of service under 4(j) did not happen as 13 required. 14 Our main argument, Your Honor, is that 15 the Court cannot compel an individual to come and 16 testify from out of state. There's just no 17 authority. The only mechanism is 30(b)(6) and they 18 have not done that. They have had the opportunity 19 to do that. 20 JUSTICE TOAL: All right. Parties, 21 here's what I'm going to do about that. My 22 longstanding understanding of Rule 45 is that 23 when you've got a party that submitted to the 24 jurisdiction of the Court that party may testify in 25 the case and here Fishers and Crosby both submitted

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1 to the jurisdiction of the Court and the
2 corporation can be compelled to submit testimony in
3 the case.
4 As I understand the subpoenas that were
5 issued, they were subpoenas to Crosby asking that
6 they require that they designate a corporate
7 representative to appear and I think they're
8 perfectly within the ambit of Rule 45. So I will
9 deny the motions to quash these subpoenas.
10 As I understand it the status then
11 would be Fisher has designated someone and this is
12 the named Mr. Duimstra if I'm pronouncing his name
13 right who's testified many times in these matters.
14 That's who they've designated.
15 With respect to Crosby Valve I looked
16 back over a lot of my materials for Crosby Valve.
17 Again, Crosby Valve has had a group of folks who
18 have testified many times in South Carolina in
19 other litigation. I believe perhaps the guy from
20 North Carolina is one such person, Mr. McLeod. Is
21 it Mr. Martin?
22 MR. McLEOD: Yes, Your Honor.
23 MR. HOLDER: That's one of them, Your
24 Honor.
25 JUSTICE TOAL: Of course, I'm not

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1 MR. BOUCH: Yes, Your Honor. For
2 our record we accept and we believe -- this is
3 Tim Bouch -- that Your Honor contravenes not only
4 the provisions of Rule 45 compelling attendance by
5 an individual without the state -- greater than 50
6 miles from courthouse and likewise contravenes
7 Rule 30(a)(2) but we understand your order.
8 JUSTICE TOAL: Very good. Thank you so
9 much, Tim. Just for complete clarification again
10 of the provisions with respect to -- out-of-state
11 nonparty witnesses do not apply in this particular
12 setting in which we are discussing the testimony of
13 corporate representatives.
14 All right. I think that interpretation
15 is further borne out -- I'm not looking at the
16 language of Rule 45 right now, but in the part
17 where it has the exception the fact that it accepts
18 from the nonparty rules about out-of-state
19 witnesses, agents, managing directors and other
20 representatives of the corporation is further
21 indication that corporate representatives of
22 parties are not affected by the out-of-state
23 limitations in the rule. Okay.
24 MR. BOUCH: We understand that's your
25 position, Your Honor.

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1 limiting who you designate, but you need to
2 designate someone. That needs to be done as soon
3 as this hearing is complete. That person needs to
4 be available next Thursday, I think is when we
5 talked about Fisher. So that individual needs to
6 be available next Thursday to testify.
7 With respect to the Court order of
8 presentation of testimony I'm not aware of anything
9 that would require the Defendant in the Plaintiff's
10 case be allowed to first prevent the witness or
11 that the Plaintiff could not call the corporate
12 witness until after the corporate witness testified
13 in the defense's case. So I'm going to direct that
14 the normal course be followed.
15 If the Plaintiff calls the witnesses,
16 the corporate representative, from Fisher and
17 Crosby Valve -- which it appears the Plaintiff
18 wishes to do on Thursday then -- but the witness
19 can be declared hostile and cross-examined then, of
20 course, the defense will have a chance to examine
21 the witness as well. So that is my disposition in
22 this matter of corporate representative witnesses.
23 Does everyone understand what I've
24 said?
25 MS. McVEY: Yes, ma'am.

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1 MR. McLEOD: Your Honor, depending on
2 who -- based on your ruling and depending on -- I'm
3 sorry.
4 MR. REID: This is Phil Reid. I'm
5 sorry.
6 MR. McLEOD: That's okay. I wanted
7 you --
8 JUSTICE TOAL: Wait a minute. Hold it.
9 Hold it. We can't all talk at once. Mr. Reid, why
10 don't you go forward.
11 MR. REID: Your Honor, I just wanted to
12 make sure because I'll be the person communicating
13 with our corporate reps immediately about your
14 directive here. Mr. Duimstra from Fisher I think
15 you said should be there Thursday?
16 JUSTICE TOAL: Yes. Isn't that,
17 Plaintiffs, when you have designated Duimstra?
18 MS. McVEY: Your Honor, I think that's
19 when Mr. Bouch said that he could be available.
20 JUSTICE TOAL: All right. Well, Tim
21 has said he can be available, Phil, on July the
22 27th in the afternoon. Is that correct?
23 MS. McVEY: That's --
24 MR. REID: Yes. His schedule is clear
25 then.

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1 JUSTICE TOAL: Right. That's great.
2 Mr. Duimstra would be there. Now, how about
3 Martin or whoever Crosby is going to designate?
4 Ms. McVey.
5 MR. REID: It will be Mr. Martin, Your
6 Honor, and I will communicate with him directly. I
7 know that he is available the week after next
8 because he told me that. I haven't checked with
9 him about --
10 JUSTICE TOAL: Yes. Week after next is
11 not going to be good enough. I can't imagine that
12 the Plaintiff's case is going to go on more than
13 one week. In fact, I'm kind of one of these people
14 that doesn't believe it's going to go on for the
15 whole of next week.
16 All right. Ask Mr. Martin to look at
17 his schedule for some time in this coming week. It
18 needs to be Thursday or before.
19 MR. REID: Understood, Your Honor. I
20 will do that. If there is any conflict with his
21 schedule I promise we will work with Mr. Holder and
22 Ms. McVey to, you know, make things right.
23 JUSTICE TOAL: I appreciate that so
24 much. It's all understood to be with the complete
25 reservation of rights of your opinions that the

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1 amphibole asbestos that he -- his opinion was that
2 Mr. Jolly's asbestos fibers were amphibole fibers.
3 My ruling was that he could not testify
4 to that because he had no basis for saying what
5 exactly was in Mr. Jolly's -- and he had excluded
6 his ability to say that. All right.
7 As I go back over the original
8 deposition of Dr. Oury he never uses such
9 terminology as a reasonable degree of medical
10 certainty or most probably in connection with the
11 opinion he renders about the asbestos in Mr.
12 Jolly's lymph nodes being amphibole. That would
13 be, of course, the standard.
14 Of course, it was the absence of that
15 kind of testimony that led me to grant in part the
16 motion to limit Dr. Oury's testimony. Now, I
17 understand his deposition was then taken in
18 Pittsburg yesterday and that he was asked and
19 testified as to identifying the lymph nodes slides
20 sent -- asbestos fibers from Mr. Jolly as
21 amphibole. That does not seem to comport with my
22 ruling.
23 The Plaintiffs have now asked that such
24 testimony be stricken and that a motion for
25 sanctions be granted. It is the Plaintiff's

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1 Court's ruling is not a correct one. So
2 understood.
3 MR. BOUCH: Your Honor, Tim Bouch.
4 Not to belabor this, but I just want to point out
5 that neither Mr. Duimstra nor Mr. Martin are
6 officers, directors, or managing agents as called
7 for in Rule 45. I understand your ruling. I just
8 want to put that on the record.
9 JUSTICE TOAL: All right, sir. Thank
10 you so much. Now we go to the issue of Dr. Oury.
11 I have looked back at the material in connection
12 with Number 7 asking to preclude trial testimony
13 from Dr. Oury, that there were amphibole asbestos
14 in Mr. Jolly's tissue.
15 We had a discussion about that at the
16 hearing on September 18th. As I recall it my
17 ruling was that Dr. Oury -- I did not exclude Dr.
18 Oury from testifying but Dr. Oury indicated that he
19 could not identify the fibers because of the lack
20 of availability of a certain test.
21 He had slides from the lymph nodes of
22 Mr. Jolly. He could not identify exactly what kind
23 of fiber it was but he then offered an opinion that
24 since 95 to 97 percent of the asbestos occurs in
25 these industrial settings in his view it's

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1 motion. So, Plaintiffs, I'll start with you.
2 MS. McVEY: Your Honor, Theile McVey
3 again for the Plaintiffs. You just went through
4 the history; so I won't go through it again.
5 Your ruling was clear about that opinion because
6 Dr. Oury did not do the required testing to
7 determine what the actual antibodies are -- I'm
8 sure what the asbestos bodies are in Mr. Jolly.
9 Because he didn't do the testing his
10 opinion was speculative. That was your ruling. It
11 was clear. That ruling was made on Tuesday, Your
12 Honor.
13 Just by way of background there was
14 also our motion to quash Dr. Oury's trial
15 deposition because we went up there. We did this
16 deposition and he was available. Ms. Farris in
17 order to accommodate Mr. Bouch and his expert
18 rearranged. She flew from South Carolina to
19 Pittsburg to do this deposition.
20 In the deposition Dr. Oury agrees with
21 our experts: One, that Mr. Jolly was exposed to
22 asbestos, that he had a pleural mesothelioma, and
23 that that meso was caused by his exposure to
24 asbestos. The only opinion that's different is the
25 one you prohibited the Defendants from asking and

1 State of South Carolina
2 County of Spartanburg
3

In the Court of Common Pleas

4 Beverly Dale Jolly and
5 Brenda Rice Jolly,

Plaintiffs,

-vs-

7 Crosby Valve, LLC and
8 Fisher Controls
9 International, LLC,

Defendants.

2016-CP-42-1593

July 24, 2017

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11
12
13 B E F O R E:

14 The Honorable Jean Hoefer Toal, Judge;
15 and a jury.

16 A P P E A R A N C E S:

17 Theile McVey, Esquire
18 Kassel McVey
19 Jonathan M. Holder, Esquire
20 Dean Omar Branham
21 Simona A. Farrise, Esquire
22 Farrise Law Firm
23 Attorneys for Plaintiffs

21 Timothy W. Bouch, Esquire
22 Yancey A. McLeod, Esquire
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24 Philip C. Reid, Esquire
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E x h i b i t s

For the Plaintiffs:

Marked	Description	I.D.	Admitted
	None offered.		

For the Defendants:

Marked	Description	I.D.	Admitted
	None offered.		

1 you come back in, and the foreperson of the jury will
2 sit in -- well, normally, I have them sit in this seat.
3 And I guess y'all are going to have to play musical
4 chairs with this small courtroom and the fact that you
5 have got three alternates, but y'all can find a way to
6 trade around who sits down out here in front of the
7 bench.

8 Thank you very much, and the jury is dismissed.

9 (WHEREUPON, the jury exited open court at
10 1:46 p.m.)

11 THE COURT: As soon as they have retired, then the
12 rest of you are dismissed as well. And thanks so very
13 much for putting up with this very lengthy process.

14 Justice is served in a way it isn't in any other
15 country on the planet by the system we have for
16 resolving disputes here, and it all depends on you.
17 You're the very center of it. So thank you so very
18 much.

19 All right. Ladies and gentlemen, you are now
20 dismissed, members of the venire.

21 And, lawyers, will you stay in place for a moment
22 and let's see what we have to take up.

23 (WHEREUPON, the remainder of the panel left the
24 courtroom.)

25 THE COURT: Lawyers, I have a question for you

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1 before y'all pitch to me whatever else I need to be
2 doing.

3 I am not one of these who minds if the jury takes
4 notes, but if y'all don't want for the jury to take
5 notes, that's fine too. I've tried them both ways.

6 So for plaintiff?

7 MS. McVEY: We're happy to have them. I think it
8 helps them to take notes.

9 MR. BOUCH: I object, Your Honor.

10 THE COURT: You object?

11 THE COURT: Of course, your objection doesn't
12 control the issue, as you know.

13 MR. BOUCH: I understand, Your Honor.

14 THE COURT: And the only reason I would consider
15 doing it is this is going to be a lengthy trial, and it
16 keeps their attention sometimes focused to take notes.
17 So I am going to allow note-taking. I don't know how
18 many are going to choose to do that, but I will allow
19 it if they want to.

20 I think that's all I've got about the jury.

21 All right. What else have we got going on?

22 We would be prepared, of course, at 3:00 to begin
23 our opening statements. I think we discussed the idea
24 of an hour a side. I pray that that doesn't turn out
25 to be the length of the opening statement, but

1 30 minutes apiece to the two defendants, and an hour if
2 the plaintiffs wish to take it. I would hope it might
3 be less than that, but we'll see.

4 Any issues before we begin the case? I know you
5 have got your lines and your testimony as discussed.

6 Do we have any activity we need to engage in in
7 connection with that testimony?

8 MR. HOLDER: Not at this time, we don't believe,
9 Your Honor.

10 THE COURT: How about it, Ms. McVey?

11 MS. McVEY: Just to project, it looks like, if we
12 start at 3:00, we'll get through openings today. And
13 that may be it.

14 THE COURT: That may be it.

15 MS. McVEY: Okay. If there were extra time, we
16 had some discovery we wanted to publish to the jury,
17 Your Honor, which we provided counsel for the other
18 side, some documents, that sort of thing. So I think
19 if there's time left, that would be the plan for today.

20 THE COURT: All right. Well, let's kind of see
21 how we go. If it's -- depending on how long it takes,
22 it might be well to get some things begun. But let's
23 just kind of see how we progress a little bit. They
24 have had a long day, and y'all have had a long day, and
25 I don't mind starting fresh tomorrow. Let's just see

1 how it goes, and we can talk about it after the opening
2 statements are made.

3 MS. McVEY: The only other thing, and I don't know
4 if you're ready to have you do it yet, is the Taylor
5 video deposition.

6 MR. HOLDER: I have just spoken to Yancey. I have
7 gone through and withdrawn a fair amount of testimony
8 just to try and meet and confer with the other side to
9 try to narrow the testimony. He's going to look at
10 that, I think, probably this evening now, and we're
11 going to touch back in case we need any objections
12 ruled upon by you.

13 THE COURT: All right. Let's talk about then how
14 we would begin tomorrow. I'm a fairly early bird, but
15 let's talk.

16 I would normally begin trial at 9:30. And if you
17 have preliminary matters that still need to be dealt
18 with, you know, I can be available any time you want
19 to. 8:00, 8:30, whatever you think. Or we can do some
20 of those things this evening if you're ready.

21 But it sounds, Mr. Holder, like if you have just
22 given the latest and the greatest to the defense,
23 they're going to want to have a little time to cogitate
24 about it.

25 Am I right?

1 MR. McLEOD: Yes, Your Honor.

2 THE COURT: Let's try to do that tomorrow morning
3 before we commence.

4 MS. McVEY: So maybe come in at 9:00?

5 THE COURT: Come in at 9:00 or 8:30, whatever you
6 want.

7 MS. McVEY: 8:30 is great.

8 THE COURT: Why don't we do that just to be sure
9 we have got enough time to be fully heard on these
10 things and come to some agreement, then we can move
11 along rather smoothly. We hope.

12 MR. BOUCH: Your Honor, two brief things, and I
13 don't want to belabor it. I renew my request to
14 publish the complaint to the jury. The additional
15 ground would be it's a public document, anybody can go
16 online and see it in addition to our previously argued
17 grounds, and it's an admission by the plaintiff.

18 THE COURT: Understood, your position. Motion, of
19 course, denied. Very good.

20 Anything else along those lines?

21 MR. BOUCH: Your Honor, I understand, from talking
22 to Mr. Holder, that the plaintiffs are not going to use
23 any slides or demonstrative pictures, exhibits,
24 posters, books in opening statement. That's fine with
25 me. I won't either.

1 THE COURT: Good. So that kind of obviates that
2 little bit of confusion about what exactly was good and
3 what wasn't. That's fine.

4 MR. BOUCH: If I'm incorrect.

5 MR. HOLDER: I wouldn't say no slides. There are
6 pictures of the family.

7 THE COURT: Well, the pictures of the family and
8 all that kind of stuff is something different. They
9 were talking about those slides that magnify certain
10 things.

11 MS. FARRISE: And aerial photographs of a few of
12 the Duke plants.

13 MR. BOUCH: Your Honor, these aren't in evidence
14 yet. And if they want to do that, I have to do it,
15 too. I mean --

16 THE COURT: I'm not going to forbid them on those
17 kind of things. Those other slides and so forth, I
18 think it's well that you work that out because it was
19 problematic. And I assume that workout is going to
20 remain.

21 MR. BOUCH: Well, my pictures are on slides.
22 That's the difference.

23 THE COURT: I think you know what I mean,
24 Mr. Bouch. A lot of difference between family members
25 and the Duke facilities and the other slides we were

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1 talking about that ya'll had more substantive --

2 MR. BOUCH: I'll work around it, Your Honor.

3 Thank you.

4 THE COURT: I appreciate that very much.

5 Anything else?

6 MS. McVEY: No.

7 THE COURT: All right. See you at three bells.

8 MS. McVEY: Thank you.

9 (WHEREUPON, lunch recess was taken from 1:55 p.m.
10 to 3:10 p.m.)

11 THE COURT: All right. Before I ask the jury in,
12 anything that we need to review, discuss? Or are you
13 ready for the jury?

14 MS. McVEY: Yes, Your Honor.

15 THE COURT: Very good. All right. Let's bring
16 the jury.

17 (WHEREUPON, the jury entered open court at
18 3:11 p.m.)

19 THE COURT: Please be seated, ladies and gentlemen
20 of the jury. Let me ask you, to begin with, have you
21 selected a foreperson of the jury?

22 JUROR: We have.

23 THE COURT: And who is that?

24 JUROR: Anna Kate.

25 THE COURT: Will you stand, and for the benefit of

1 the clerk, announce your name and number.

2 JURY FORELADY: My number is 106, and my name is
3 Anna McMakin.

4 THE COURT: All right. And, in the future, if you
5 will sit where your friend next to you is sitting.

6 JURY FORELADY: Here?

7 THE COURT: Yes. The foreperson should sit in
8 that chair only because if you have to pass up any
9 notes or anything from your colleagues, why you'll be
10 in position to easily do that. You can stay where you
11 are right now.

12 Everybody else, you can sit wherever you want to
13 as you please, but we have the foreperson there so they
14 can easily communicate your wishes to me.

15 Very good.

16 Ladies and gentlemen of the jury, you will find
17 that I stand sometimes, and it's only because I am so
18 short that it's very difficult for me to see over all
19 the time. But sometimes I even weary so I'll sit down
20 from time to time as well.

21 But for this stage of the proceedings, let me say
22 that we are about to start the trial, as you know, of
23 the case of Beverly Dale Jolly and Mrs. Brenda Rice
24 Jolly against Crosby Valves and Fisher Controls.

25 For this record, as I explained to you before, my

1 name is Jean Toal, and I'm acting circuit court judge.
2 I served for many, many years on the South Carolina
3 Supreme Court, and I'm in senior active status. I help
4 out sometimes, and it's my privilege to be with you
5 today and with these fine counsel and their clients to
6 try this important case for the parties concerned.

7 You know, this will probably be a little different
8 from what you could expect. Many of you may never have
9 seen a live jury trial. But, I guess, all of us have
10 seen television trials. And they're always full of a
11 lot of high drama, and they are compacted into a short
12 period of time, and everything is of equal
13 significance.

14 While there will be some very riveting moments in
15 this trial, it's not a form of entertainment. This is
16 the most fundamental value we have in the American
17 democracy. We're the only country that treats the jury
18 trial as the center of our rule of law. That doesn't
19 mean that every controversy is tried by a jury, but the
20 values that a trial by your peers embodies are basic
21 American trial values that the rest of the world stands
22 in awe of.

23 At the centerpiece of that jury trial is you, the
24 jurors, and you are a wonderfully diverse example of
25 this community. You come with your own backgrounds,

1 and your test, like my test as a judge, is to try to,
2 with all of your history and your background, look at
3 this matter objectively and fairly and listen to the
4 evidence as it comes from the witness box and the
5 exhibits and listen to the law as I'm required by the
6 rules under which I operate, and you operate, to give
7 you, and together we hope to place you in a position as
8 a jury to render a verdict which speaks the truth.
9 That's the English interpretation of the Latin word
10 "veredicto," to speak the truth in your verdict.

11 That's a slow and deliberate process at times.
12 Sometimes it's a little repetitive. But that's the
13 nature of things about the matter that you will hear.

14 This is a place of honor that respects and
15 preserves citizens' rights. Many call it the greatest
16 justice system ever devised. And by mortal hands, I
17 think that that's absolutely correct.

18 You are officers of the court, and you are sworn
19 to uphold the integrity and fairness of our judicial
20 system as you search for the truth. You should expect
21 the advocates for the parties to be professional and
22 competent and ethical. And I know them well and will
23 tell you they are professional and competent and
24 ethical.

25 You've taken an oath to reach a fair verdict to

1 the best of your ability, and you are also expected to
2 be professional, reasonable, and ethical. Sometimes I
3 find that jurors can model good behavior when lawyers
4 get a little excited sometimes, and maybe even judges.
5 But I'll try to be as professional and ethical and
6 balanced as I know you will be.

7 I thank you very much for your service. This is
8 important work, and you're much to be admired for the
9 service you're giving to your community and to the
10 nation by serving as a juror in our judicial system.

11 Now, how we will proceed, the first thing that
12 will occur is the attorneys for the plaintiff who have
13 brought this action will make an opening statement, and
14 that will be followed by a similar statement by one of
15 the attorneys for the defense.

16 These opening statements are not arguments. You
17 will hear arguments at the conclusion of the trial.
18 And they're not really evidence, as such. They're an
19 attempt to outline the claims and the evidence to
20 support the claims and the evidence to support the
21 defenses.

22 Evidence takes many different forms. It can be
23 testimony. It can be documents, models, photographs,
24 and you should pay close attention to all of it.
25 You're the sole finders of the facts, and you should

1 not interpret anything that I say or do as trying to
2 send a signal to you as to how you should interpret the
3 facts. That is your domain and your domain alone.
4 Nobody else but you can find the facts in this case.

5 Now, after all the evidence is presented, these
6 attorneys will make their closing arguments. And the
7 final remarks will be true arguments, where they really
8 advocate to you for their position. Each side will
9 emphasize certain portions of the evidence and try to
10 persuade you to agree with their version of the
11 evidence.

12 Keep in mind that opening statements as well as
13 closing arguments are not evidence in the case, but
14 give the attorneys your undivided attention. They have
15 worked mighty hard to try to focus this matter in a way
16 that makes sense and gets you right into the issues
17 that you will have to decide.

18 After the arguments are finished, then it's my
19 duty to explain the law to you. And I will do that in
20 a charge that's sometimes quite a lengthy process if
21 there are a lot of complicated issues, and it's
22 something I'm required to do by the court I used to sit
23 on and by legislative enactment and by the other kinds
24 of rules and laws that govern a controversy like the
25 one you're going to hear. And then you will return a

1 verdict.

2 During the course of the trial, the plaintiffs
3 have the burden of proving their claims. And they must
4 meet this burden by the greater weight or preponderance
5 of the evidence. And what we mean by the greater
6 weight or preponderance of the evidence: If you can
7 imagine a traditional set of scales, and when the case
8 begins, these scales are exactly even, and after all
9 the evidence has been presented, if these scales should
10 remain just like this, completely evenly balanced, or
11 even tipped slightly in favor of the defendant, then
12 the plaintiff would have failed to meet his and her
13 burden of proof, and your verdict would be for the
14 defendant.

15 On the other hand, if the scale tips even slightly
16 in favor of the plaintiff in your judgment, then they
17 will have met -- the plaintiffs will have met their
18 burden of proof, and your verdict would be for the
19 plaintiff.

20 Now, I'm the only person that can tell you what
21 the law is. And you're the only people who can
22 determine the facts. And I don't have the right to
23 indicate to you in any way at all how you should make
24 your evaluations.

25 Now, I want to tell you that from time to time the

1 lawyers are going to make objections. And they do that
2 to call my attention to possible violations of the
3 rules that I have to operate under as well as the
4 parties that put this case before you. And I have to
5 give attention to that as a judge and make rulings.

6 Don't hold the attorneys' objections against them.
7 They have to protect the record of this case, and so
8 they are required -- they're not trying to keep
9 something from you, but we have rules we operate under,
10 and that is why the objections are made.

11 Many times I try to make those rulings as
12 expeditiously as possible. There may be some times
13 when the issue is sufficiently complex that the
14 attorney may say, "Objection," and, "May I approach?"
15 And what they want to do is have a more extended
16 argument outside the presence of the jury. And if that
17 happens, I will send you to your jury room while we try
18 to resolve that.

19 Finally, I'd ask you pay close attention to all
20 the evidence. You will have to evaluate the
21 credibility, and that means the believability, of
22 witnesses. You are participating in a time-tested
23 system, and it's extremely important to listen to all
24 the evidence that is presented.

25 As you begin your deliberations, you cannot

1 discuss this case with anyone, including your fellow
2 jurors, your family, your friends, or anybody else
3 until the case is presented to you for decision. So
4 it's very tempting. And you will become very good
5 friends as you complete this process together. But you
6 can't talk about the case until we give you the case.
7 And that's because that tends to emphasize one piece of
8 evidence over another piece, and you need to see the
9 big picture, the complete picture, before you can
10 properly begin to deliberate the case.

11 Now, this includes not discussing face-to-face,
12 telephone, e-mail, text, blogs, or any other method of
13 communication. You may not use a computer, a cellular
14 phone, or any other kind of electronic device with
15 communications capabilities at any time in the
16 courtroom or during deliberations.

17 Now, during your breaks for meals or for
18 overnight, if it's necessary, of course, you may use
19 these devices but not while you're deliberating and not
20 in the courtroom, of course.

21 Now, one thing that's so important: You cannot,
22 as tempting as it sometimes is, use your ability to
23 research on your computers or your electronic devices
24 to try to get information about the case or send
25 information to someone else. And that includes

1 information about a party, a witness, an attorney, a
2 court officer, news accounts about the case, or any
3 other topics that you get curious about and would want
4 to use your electronic device.

5 In the old days when I first began the practice of
6 law, all the jury was told at this point in the
7 preliminary charge of the judge was not to read the
8 newspapers. But we've got -- that's an ancient way of
9 getting information. Now we have television, of
10 course, and we have so many different electronic
11 abilities to research. But this would be so unfair to
12 the parties. And you would do it quite innocently, and
13 yet, we'd have to mistry the case if we found that a
14 juror was accessing information like that. And that
15 would mean that all this effort to get us to this point
16 in time and all of the expense involved would be
17 wasted. So I know you will cooperate with me and be
18 sure that you don't try to do any independent research.

19 What you and I -- and I'm bound just as strongly
20 as you are. You and I both have got to try this case
21 and perform our different roles in that on the basis of
22 what is in this courtroom what comes out of the
23 courtroom. So don't listen or watch any news reports
24 about the case, anything in the newspapers, Internet,
25 radio, or television, or consider anything that you may

1 have read or heard outside the courtroom. After the
2 case is submitted to you, you must discuss it only in
3 the jury room with your fellow jurors.

4 The attorneys or parties involved, they are not to
5 talk to you at all. They know that very well. And if
6 you see anybody involved in this case and they don't
7 even say hello, you'll think, "Gosh, how unfriendly is
8 that," but it's because of these rules that you are not
9 to be tampered with or influenced inappropriately in
10 any way. So that's the reason we kind of keep our
11 distance from you, as the jury.

12 It's important you keep an open mind and not
13 decide this case until it's time for you to decide it.
14 Don't prematurely try to make up your mind about the
15 case. It's your solemn responsibility to determine
16 this case on the evidence presented.

17 Now, one further thing: I do allow note-taking to
18 take place. And don't be flummoxed, "Well, gosh, I
19 might want to take notes and I didn't bring my pencil
20 and paper with me." This afternoon is going to be
21 mostly taken up with the opening statements. So you're
22 not losing much steam by not having a notepad and paper
23 readily available to you. But remember this. Notes
24 are just to be taken for your own purposes. You can't
25 discuss those notes with anybody. You can't have those

1 notes keep you from listening to the parties and the
2 witnesses, and you can't use those notes to get back in
3 the jury room and say, "Well, my note said this."
4 These notes are purely for your own personal benefit,
5 and sometimes, if you're like me and you're in a
6 lengthy process like this and you feel like kind of
7 nodding off with people yakking at you all the time, I
8 find note-taking -- I use it as a way to pay attention
9 a lot of times. So that's really what we're allowing
10 you to do. And when I've got a trial that is going to
11 be of some length, I don't mind the jurors taking notes
12 because I know you'll do as I ask and not use them as a
13 device to deliberate but rather as a device to keep you
14 focused on what's going on.

15 Well, the trial begins now. So thank you very
16 much. If problems occur, the jurors have questions, I
17 will tell you that we're in a little different kind of
18 bailiwick here time-wise because the selection process.
19 But my normal course in the days to come will be to
20 take a break in the morning, and, of course, we'll have
21 lunch and then a break midafternoon. But if needs
22 develop that a break is indicated before that, all you
23 have to do is communicate with your jury forelady and
24 we'll be guided by that. I want the jury to be
25 comfortable and able to concentrate on the job at hand,

1 so you let me know if there's anything that we need to
2 pay attention to. Thank you.

3 Counsel, the floor is yours.

4 MS. FARRISE: Can everybody see that from wherever
5 you're sitting? Okay. Not Your Honor. Sorry, Your
6 Honor.

7 Good afternoon. My name is Simona Farrise, and
8 along with Ms. Theile McVey and Jonathan Holder, we
9 have the privilege of representing Beverly Dale Jolly
10 and his wife of 51 years, Brenda Jolly. We're going to
11 be referring to him as Dale. There is a long story
12 about how he got named Beverly, which is probably not
13 going to be important to what you're deciding.

14 But let me start by introducing you to Dale. He
15 will be here, we hope, tomorrow very briefly to testify
16 and mostly to tell you about his work and to tell you
17 about what has been happening to him.

18 So I think we have a photo. This is -- the bigger
19 one, not the little one -- Dale Jolly. And he has
20 lived and worked his whole life in this area.

21 Mr. Jolly, in terms of what this case is about
22 generally, is dying of mesothelioma. And he is dying
23 of mesothelioma which was diagnosed in January of 2016.
24 So if you think about it, we're all the way into the
25 summer of '17, and so he has been through it, and you

1 will hear a little bit about that.

2 But mostly you'll hear a lot about how it is that
3 he got mesothelioma. The short answer is he got
4 mesothelioma because he was exposed to asbestos fibers
5 as part of his work at various Duke Energy plants.
6 That's the basic case.

7 And so before we start this journey of evidence to
8 try and understand how that could occur, we need to
9 have a few sort of general concepts, if you will, under
10 our belt.

11 As the judge said, I'm not going to argue the case
12 to you right now. That will come later. Or not.
13 We'll see. What I want to do in opening statement is
14 essentially help you understand what we think the
15 evidence is going to show two weeks from now.

16 It's like a puzzle. You go to the store and you
17 see the box and the picture and what it's supposed to
18 look like, and then you take it and pour out all the
19 pieces and it doesn't look anything like the box.
20 Okay?

21 So this is in very general terms. There's going
22 to be a lot of detail. And as the judge said, notes
23 will be helpful. But in very general terms, here is
24 what the evidence is going to show and how we get to
25 meeting our burden of proving to you and showing to you

1 that, in fact, Dale Jolly was exposed to asbestos, it
2 caused his mesothelioma, and that these defendant
3 companies here, Crosby Valve and Fisher Controls and
4 Valves, played a role in that.

5 And I want to be clear. There were other
6 exposures to asbestos that Mr. Jolly had. They are not
7 the only ones, but they had a big role in what has
8 caused the cancer that is going to kill him. That's
9 not actually one of the things we are in dispute about.
10 I doubt that there's going to be much of a dispute
11 about his diagnosis, and there's not going to be much
12 of a dispute about whether or not asbestos was the
13 cause.

14 The dispute, if you will, is whose asbestos, where
15 did it come from, how did it happen, and under what
16 circumstances. Okay?

17 So you are going to hear that Dale Jolly in 1979
18 started at Duke Energy. And just a little bit about
19 Dale: Before he got to working at Duke, he went to
20 college. He got a degree, college degree, in
21 education. He taught middle school science and math.
22 He had three little kids. You'll hear a lot about the
23 kids and his seven grandchildren. You will hear
24 probably a little bit, especially tomorrow, about his
25 wife of 51 years, Brenda Jolly.

1 But in 1979, for pay, mostly, better pay, he took
2 this job. And this 1979 start date is going to be
3 something that's talked about over and over again
4 because at Duke Energy plants, by 1979, in the plants
5 that Dale mostly worked at, they were mostly
6 asbestos-free because there had been a lot of
7 regulation and rules, and the government got involved
8 starting in the '30s. And you will hear all about
9 that. And the state got involved, and you'll hear all
10 about that, to protect workers.

11 So the evidence will show that as to Duke Energy
12 and the main plants where Mr. Jolly was starting in
13 1979, they were proactive, Duke was, as it relates to
14 safety. And so these were brand-new plants -- and I'm
15 going to put a picture of a couple of them up in a
16 moment -- meaning newly constructed, for the most part.
17 They weren't these plants that had been built decades
18 ago.

19 And in about 1976, which is before Mr. Jolly
20 started, Duke said, "We will not use
21 asbestos-containing insulation." So where did the
22 asbestos come from? The evidence will show it came
23 from within, if you will, the literally hundreds, if
24 not thousands, of valves that Crosby made -- designed,
25 which it sold to Duke at these various plants. And I'm

1 going to talk a little bit about why a power plant
2 would need thousands of valves and what they do, try
3 and talk about it a little bit more generally.

4 So it's almost as though there is a thunderstorm,
5 and there is a lot of thunder, and there is a lot of
6 rain, and that's all annoying, but -- because you will
7 hear about a lot of dust, and I'll tell you about that,
8 but it wasn't the lot of dust because these plants were
9 mostly asbestos-free by the time Dale got there.

10 So it's like in the midst of that there is a
11 lightning strike. There is something that hurt him,
12 and the something that hurt him was the asbestos which
13 these companies, by their product design, selected by
14 their engineers, chose to include in the products that
15 they made.

16 And Dale Jolly's job at the various Duke Energy
17 plants was to work on what you're going to hear about
18 which is called outages, in large part, from 1979 until
19 the end of '84, or shutdowns. It is, in very simple
20 terms, the time when a specific unit at a power plant
21 is taken in for service, just like you take your car in
22 for service at regular intervals because there are
23 certain things you cannot do to your car when you are
24 operating your car. You can't change the oil. You
25 can't change a head gasket. You probably don't want to

1 change the tire while you're driving down the road.

2 And so, believe it or not, power plants and the
3 units in them, and I'll talk about that in a moment,
4 have to have regular service. And that happens about
5 every 18 months, you will hear from the witnesses who
6 were there. And during the 18 months is when they go
7 in and they start to take apart the piping that goes to
8 various pieces of equipment.

9 And for our purposes here, it is when they go in
10 and they check to see whether or not the valves that
11 were made by these companies, because they are mostly
12 safety valves, are functioning correctly, because if
13 those valves are not functioning correctly during
14 operation, then the entire power plant is at risk of
15 all sorts of things -- explosion, you name it. And so
16 you will hear not much about that, but the role of
17 these safety valves is critical to these plants.

18 The plants that I'm mostly going to be talking
19 about were nuclear plants that Dale Jolly worked at.
20 And that becomes an important issue here because
21 there's no shortchanging what you're going to do in
22 terms of maintenance on the outages.

23 And so that is how you are going to know that
24 there was a regular maintenance schedule, and on that
25 maintenance schedule, these valves were at times opened

1 up, they were at times taken offline, and Mr. Jolly's
2 job was to inspect the lines and to make sure that they
3 were in working order. So he and the other crews of
4 men would be in the area when the valves were worked
5 on.

6 You will hear as part of the evidence that valves
7 are mostly, in terms of size, metal; what valves do,
8 and we have valves in our home, we just don't think it,
9 they control the flow of something -- liquid, air. You
10 have your faucet in your kitchen is a valve. Depending
11 on what the nozzle looks like, it might be like a ball
12 valve if you have to turn it. It might be a different
13 kind of valve. But the purpose is it stops and it
14 starts the flow of liquid.

15 In a power plant, the valves that stop and start
16 the flow of liquid and air are huge. Obviously,
17 they're not like in our home.

18 Do we have our power plant picture?

19 What I'm showing you here is the first place that
20 Mr. Jolly worked, the first power plant when he started
21 with Duke in 1979. Let me move over here. And you'll
22 see that there's these two things that look alike.
23 Each one of them are units.

24 So a little bit about sort of Power Production
25 101, if you will. How is it that when we flick a

1 switch, electricity occurs and the lights come on? The
2 basics, as you will hear, is that the water -- there's
3 a nuclear reactor which is used to fire a boiler. And
4 even though it's a very large thing, a boiler for our
5 purposes is just like a tea kettle at home. You heat
6 up the water, and the hotter it gets, sooner or later
7 the whistle goes off.

8 In a power plant, the water is taken; the nuclear
9 reactor is lighted and heated to a superheated
10 temperature. The steam, superheated steam at
11 temperatures that will burn us, is then used to power a
12 turbine. The turbine spins at a very high rate, and
13 that is how electricity is created.

14 In this case you will hear about coal-fired plants
15 and maybe some oil-fired plants that Duke had, and
16 these nuclear plants. But the concept in how it works
17 is that water is boiled to a superheated temperature.
18 That superheated steam causes the power to cause the
19 turbine to run and electricity is created. It comes
20 from these plants, and it comes to everyone's home.

21 Now, this plant, the McGuire Nuclear Station,
22 where Mr. Jolly worked when he first started, when he
23 started, it was not even built. The first work that he
24 did was the finish work on the construction of Unit
25 Number 1. And then when that went online, which you

1 will hear was in 1981, then they had already started
2 building Unit Number 2. And then in the middle of
3 that, because we talked about this outage and
4 maintenance schedule, before Unit Number 2 was
5 finished, they did a full-on maintenance of Unit Number
6 1.

7 Now, because of the -- so how does all that work
8 inside? And this is going to be true of a Duke plant,
9 power plant, or ship power plants, or anything that has
10 power. It's a system of piping. The steam,
11 superheated steam, the chemicals, they go wherever they
12 need to go, all over the plants, through a system of
13 piping. And pipes, as you will see in some pictures,
14 they go this way and they go straight, and then they
15 have to turn, and then they go around, and they do all
16 kinds of things.

17 So in order to have this maze of pipes, because
18 that's really what it's going to look like, we're going
19 to be talking about something in this case called
20 flange connections. And it's really how you connect
21 one pipe to another, if that's what you're doing, or
22 for our purposes how you connect a pipe to a valve.

23 And so the asbestos, which is what hurts people,
24 is at the flange because there is an asbestos gasket
25 that has to go between it -- kind of like an Oreo

1 cookie, if you will -- to make sure that when the
2 liquid is coming through the pipe, it doesn't just fall
3 out at the connection. That makes sense, right? Or it
4 doesn't lose pressure. We're going to be talking a lot
5 about very high pressure.

6 The asbestos gaskets, and I'll put over here, a
7 flange, that you may have a valve. And they come in
8 all kinds of shapes and things just like faucets,
9 because they do different things. It's kind of like
10 pots on your stove. Pots come and they're made out of
11 different metals. They are made in different sizes,
12 and they do different things. But they're all pots.

13 And the same is true with valves. You're going to
14 hear about, well, they could have been made out of
15 carbon steel or stainless steel. For our purposes,
16 none of that is really important. What's important is
17 that when they are made of -- when they come from '
18 Crosby's factory and when they come from Fisher's
19 factory, they already come, per their design, with a
20 flange face.

21 And so if you can imagine taking this flange and
22 turning it this way, a flange face is a smooth surface
23 that will have sort of a hole for the pipe, if you
24 will, and then, like a spare tire, in some cases, there
25 will be holes already in the metal because you're going

1 to put a gasket around this part, connect another
2 flange which looks exactly like this -- same size, same
3 hole spots -- and put them together, screw them down.
4 That term is actually called torquing. And Mr. Jolly's
5 job as an inspector in part was to make sure that these
6 gaskets and these pipe connections were torqued
7 specifically to the right amount. Not too tight, not
8 too whatever. They have all kinds of detail about
9 that.

10 So the gasket goes in, and the plant goes back
11 online, and it starts operating, just like you drive
12 your car, eventually, just like the brakes on your car,
13 the gaskets wear out. And if they wear out, then they
14 starts to leak. And there may start to leak
15 superheated steam. There may start to leak air so that
16 the system loses pressure or compression, which means
17 that you have a power plant which is not working
18 optimally. The same is true of your car. If you have
19 a blown head gasket, it might still go down the road,
20 but without any compression, there won't be any power.

21 So after the gasket is put in service, is what we
22 call it, at some point it has to be removed. But
23 because of the very high temperatures -- and we are
24 talking 1,000, 1,500, 1,800 -- high, high temperatures,
25 like being in the oven, these asbestos-containing

1 gaskets, when they go to pull the flange apart, don't
2 come out easily because they are baked on and they are
3 caked on to the front of the flange surface.

4 It's really just like barbecue. You put the
5 barbecue on, and eventually the grill has a bunch of
6 stuff on it and you eat, and that's great, and then
7 somebody has to clean it up. And you can't just go and
8 wipe off the grill and that baked-on-from-the-heat
9 stuff comes right off. Well, gaskets are exactly the
10 same way.

11 So what you will hear is the men, who are
12 pipefitters -- they fit the pipe to whatever, another
13 pipe, a valve, what have you -- is that they would use
14 a tool, a steel wire brush just kind of like you use on
15 your barbecue, something that's going to get in there
16 and scrape it off, they would have a hand electric
17 powered one because these gaskets are so baked on that
18 they would have to grind off the gaskets to get back to
19 the clean metal surface, because you cannot just throw
20 another gasket atop of a surface that has old material
21 just like I'm hoping you don't want to throw new
22 barbecue on a grill that hasn't been cleaned from the
23 last barbecue. Same concept.

24 So the gaskets that are at the flange end, you
25 will hear, contain asbestos. A lot of asbestos. About

1 85 percent of the gasket is actually asbestos.

2 And for those who have never heard of asbestos,
3 asbestos is a mineral which comes from the rock, it's
4 mined out of the ground, and through some processes,
5 which I'm not going to take the time to explain, ends
6 up in a fibrous form just like cotton fiber. Except
7 unlike cotton fiber, asbestos fibers, once the fibers
8 are milled out, is virtually indestructible. It can
9 withstand high heat. It won't dissolve in chemicals.
10 And this is why asbestos fibers were used to make any
11 number of things.

12 So in the case of Fisher and Crosby valves, they
13 understood, number one -- because they are the experts
14 in valve-making, and you will hear about their history,
15 these are not new companies. They were born, if you
16 will, in the 1800s. They were part of what was the
17 Industrial Revolution of this country. And their
18 products, the market for them, if you will, the
19 customers for them are customers like Duke Power, power
20 plants, refineries, any industrial processes where you
21 have superheated steam, chemicals, these kind of
22 things.

23 So even though I've drawn this here, the evidence
24 will show that some of the valves, just like some of
25 the pots that we might have, are small. And some of

1 the valves, just like pots, are really big. You will
2 hear from the men who were there that the diameter,
3 which is basically how far is it from one side to
4 another if you were measuring straight, of the flange
5 faces for some of the valves that were at the power
6 plants where Mr. Jolly was, and they were -- would go
7 all the way up to 100 inches across.

8 So in a power plant, to create the power for a
9 neighborhood, you have small pipes, and you have pipes
10 that, as some of the witnesses will tell you, you can
11 walk through. Certainly, me and the judge can walk
12 through standing straight up.

13 And those pipes, like the small pipes, had to have
14 a connector, and the connector had a gasket to connect
15 it, and the valves that these companies made played a
16 critical role.

17 The evidence is also going to show that these
18 companies understood that their valves would not work
19 without asbestos gaskets, because they were in the
20 asbestos gasket business. They sold the asbestos
21 gaskets that were precisely machined to fit on the
22 precise end of the valve that they designed, and they
23 sold those along with the valve. And when they did the
24 outages and the shutdowns, they sold the replacement
25 gasket for the particular valve that was going to be,

1 you know, maintained, really.

2 And so you will see in this case documents where
3 Duke Power purchased hundreds of gaskets from these
4 companies. We know that those gaskets were
5 asbestos-containing because these companies putting
6 out -- being the experts in valves and, you know, if --
7 and understanding the environment -- like if you're
8 going to have superheated steam, you need to use
9 asbestos gaskets -- they had handbooks that told Duke
10 you need to use this particular part number on this
11 particular valve. They had engineering drawings,
12 material specifications that required asbestos. And if
13 you did not do it the way these companies said in terms
14 of the maintenance, use the valve with this gasket that
15 we sell and buy it from us, you void the warranty.

16 And there will be no question when we get to the
17 end of this journey two weeks from now that, yes, there
18 was hundreds of valves at a single -- on a single unit
19 at a single power plant, if you take like Ocone that
20 had three units, thousands of valves made by Fisher and
21 Crosby. There were some other valve makers, but these
22 companies were certainly -- had a huge presence.
23 Fisher -- Crosby, you will see invoices, sold safety
24 and relief valves.

25 So now getting back to the fact that if we're

1 talking about nuclear plants here, the purpose of a
2 pressure relief valve is that if the pressure, the
3 superheated pressure, builds up, that these valves --
4 and it builds up and it is kind of spring-loaded, and
5 you will see some diagrams -- that the valves pop off,
6 kind of like a big pop like we just heard a little
7 while ago, or they do other things to relieve the
8 pressure. Because just like if you're cooking
9 something on the stove and the pressure keeps building
10 up and building up and building up, maybe the stuff
11 will spill over, but in some cases, you know, it will
12 blow up, essentially.

13 Well, these valves that these companies made in
14 large part served the purpose. And there are a lot of
15 them to monitor the pressure, to relieve the pressure
16 in the system. So that's actually how come Mr. Jolly
17 will tell you every single outage, they had to break
18 the flange, which is what I showed you, and they had to
19 go in and scrape out the gasket so that they could
20 inspect the pressure relief valves -- and they have a
21 number of ways that they do that -- to make sure that
22 they were working properly. Kind of like when you take
23 your car in for service, they might do a whole bunch up
24 of things, but one thing they must do is check the
25 brakes. It would be great if we had new window washers

1 and all those things, but the critical safety things
2 get done every single time.

3 I was going to tell you a lot about a lot of
4 things. But that's why you're going to be here for two
5 weeks.

6 Oh, yes. Gaskets, and you will see pictures of
7 them -- let me back up. Asbestos that will hurt you is
8 microscopic. The fibers that can actually be inhaled
9 into the body, even though workers may describe seeing
10 dust, are invisible to the naked eye. The evidence
11 will show that there is no safe level to which folks
12 can be exposed to asbestos and not be at risk of
13 disease in a workplace setting.

14 You will hear about regulations and when that
15 started. In the case of companies like Crosby and
16 Fisher who started in the 1800s, these companies were
17 regulated by states and the federal government in the
18 1940s. You will hear about -- as it relates to
19 asbestos.

20 You'll hear about something called the
21 Walsh-Healey Act. That's where you have companies that
22 sold to the United States government, which both of
23 these companies did. The same kind of piping systems
24 that might make up a land-based power plant is the same
25 type of power system that you can put -- designed a

1 little differently -- on a Navy ship. So there's
2 piping and there's valves, they create their own power,
3 and that's how a Navy ship works.

4 Fisher and Crosby sold, designed valves with
5 asbestos for the U.S. government in a variety of
6 applications. But if you were a big contractor of the
7 United States government where you had contracts worth
8 more than \$10,000, which they did, by 1950, the
9 government said you have to protect the workers in your
10 plant from exposures to things that will hurt them.
11 Asbestos was one of them.

12 They said if you sell to the United States
13 government, you agree that your plants will monitor the
14 air to see what the levels are of asbestos and whether
15 or not your workers are being exposed. You will use
16 wet methods. You will isolate the hazards, this work,
17 from other workers, and a number of other things to
18 prevent exposures.

19 And the evidence in this case will be, just like
20 their products that they sold to customers like Duke,
21 in their own plants, they did nothing. That's why I
22 said Duke was proactive as it relates to the asbestos
23 that it knew about and before Mr. Jolly got there said,
24 "You can't use asbestos in insulation." But Duke was
25 never told by Crosby and Fisher the gaskets which are

1 valve specified are nearly 85-percent, 90-percent
2 asbestos, and every time people are removing them,
3 there's going to be large exposures to asbestos that
4 will put your own workers at risk.

5 You will hear about OSHA which came along in 1972.
6 And, basically, there was nothing new in terms of
7 knowledge that OSHA, the Occupational Safety and Health
8 Administration, and their rules about asbestos created.
9 The knowledge had been there, and you will see that,
10 since the beginning of 1900, and there were states that
11 regulated exposures to asbestos in the workplace in the
12 '30s and in the '40s. You heard about the federal
13 government's attempt to do it with Walsh-Healey in the
14 '40s and the '50s.

15 But what changed the OSHA was there was finally an
16 enforcement mechanism. It's as if you have speeding
17 rules on the books for decades but no police to enforce
18 them. And so the only thing that changed about the
19 early 1970s as it related to OSHA is that this new
20 government agency was created, and for the very first
21 time, there was an enforcement mechanism to police
22 whether or not action was being taken in the workplace
23 to protect workers from asbestos and other things. But
24 as to companies like Crosby and Fisher who had existed
25 for a hundred years before, they were already being

1 regulated, but there was no enforcement, no
2 consequences if you didn't follow the rules.

3 The evidence here will be that gaskets are not
4 what is called encapsulated. Like a capsule. So when
5 I think of encapsulated, I think of something that goes
6 to space; no air comes in; no air gets out. Gaskets
7 are not like that. They release asbestos fiber. The
8 asbestos fiber, because of the other things that kind
9 of hold it together, may be harder to release with hand
10 pressure. But once you have taken an electric grinder
11 to that gasket, it releases huge levels of dangerous
12 asbestos into the air.

13 And since Mr. Jolly worked at Duke during the
14 shutdowns when these removals occurred with the
15 electric tools and the other tools, that is what
16 released the asbestos into the air. He didn't work
17 with the tools. He was an inspector. And the evidence
18 will show that asbestos hurts people who are breathing.
19 It doesn't really matter. It gets into the air. If
20 you are breathing and you're breathing harmful air, it
21 doesn't really matter if you're the one that liberated
22 the asbestos. But if your job is to be an inspector
23 right there breathing the same air as the person who is
24 using the grinder or even three or four feet away,
25 because asbestos fibers float, then you, too, are

1 exposed at the same level or, as you will hear,
2 sometimes at higher levels.

3 There are multiple types of asbestos that were
4 sold commercially. I'm not going to go into it a lot
5 now. We'll go into it a lot during the trial. But the
6 evidence will show there is no safe asbestos. There is
7 no asbestos light. There is no asbestos that in many
8 ways is better than the others.

9 Every type of asbestos which was commercially sold
10 is what is called a carcinogen. It will cause cancer.
11 And there has never been a threshold below which
12 exposure was not known to cause cancer.

13 And so that is the other problem with asbestos,
14 which is why the government took various actions,
15 different agencies over different times, and you will
16 hear about some of that, to just remove it from the
17 workplace because it is that dangerous at very low
18 levels. And that is true for all varieties.

19 Bear with me. I'm turning pages. You see that.

20 To the extent we're going to be talking about what
21 occurred and exposures in the workplace, the evidence
22 is going to show that at Mr. Jolly's locations, when
23 work was being done, Duke Energy was his employer
24 subject to the OSHA rules. And there may be evidence
25 or a claim that somehow Duke didn't do enough. But the

1 evidence is going to show that there were really three
2 or more employers there as well.

3 Because what I forgot to tell you about the
4 outages is that when they would have an outage and take
5 it offline, the folks who were the experts as to their
6 particular equipment sent their service technicians and
7 their service engineers and their people to be on-site.
8 You know, it's like they plan it: We're going to do
9 this three months from now and those folks would come
10 to the site and oversee the work and make sure that it
11 was done correctly.

12 You're going to see some documents that when these
13 plants were initially built and a lot of these valves
14 were set, Crosby, for instance, sent a service engineer
15 to supervise the work that Duke was doing to make sure
16 that the valves and things were put in exactly
17 according to Crosby's specifications.

18 So even though the companies, Crosby and Fisher,
19 weren't physically at the site all of the time, they
20 directed and controlled every aspect of what occurred
21 with these valves, other than the operations, through
22 handbooks, technical manuals, replacement parts,
23 service technicians; you name it.

24 If you didn't do it their way, number one, it
25 created a safety hazard, but, number two, it voided the

1 warranty.

2 And you're going to see some documents that showed
3 their role, their continuing role, at the Duke plants.

4 I had a bunch of things I wanted to show you, by
5 the way. Okay.

6 So there's going to be a lot about valves, metal,
7 asbestos types, you name it, and that's what you're
8 going to be doing mostly for the next two weeks.

9 But I started my opening statement referring to
10 Mr. Jolly because it will be very easy to forget in
11 sort of the weeds of that that ultimately this case is
12 about a man. You're going to hear, once you hear all
13 of that, about what has happened to him.

14 The thumbnail is that around Christmastime in
15 2015, actually around Thanksgiving time, he started to
16 become short of breath. And he didn't really pay it
17 much attention. Like most folks, he thought it might
18 be a cold or something coming on, might go away. It
19 persisted. It did not go away.

20 On December 28, 2015, he finally went to the
21 doctor because he was trying to put it off, as most
22 people do, with the holidays. And as soon as they took
23 the first chest x-ray, they said, "There is something
24 terribly wrong in your chest."

25 That, of course, led, as these things do, to a CAT

1 scan, which led to a biopsy, and by January of 2016, he
2 and his wife and his family was given the news that,
3 "You have right pleural mesothelioma caused by exposure
4 to asbestos. There are some things we can try."

5 Chemotherapy. He's had that. Lots of it. He's
6 had a huge surgery where they try to go in and see if
7 they can take out the tumor. But mesothelioma is a
8 cancer of the lining of the lung and it is not lung
9 cancer, so they can't just cut it out. And it will
10 grow back.

11 So in Mr. Jolly's case, and you will hear from the
12 doctors and from him, in summer about a year ago, he
13 had this major surgery at Duke where they went into his
14 chest and they tried to cut out as much of the tumor as
15 they could. He will tell you what it was like to try
16 and recover from that, and we'll talk a lot about his
17 experiences.

18 His tumor seemed to, with the chemotherapy and the
19 surgery, sort of slow down, and he had some months
20 where he thought he was going to have more time. But
21 in the recent months, the cancer has come back. It is
22 progressing very rapidly.

23 This week and only this week he has off from some
24 treatment that he's having at Duke. His family has had
25 to basically move and find temporary housing at Duke

1 because they are trying an experimental treatment to
2 see if it will now help slow it.

3 So he's going to be here tomorrow. He will not be
4 here during the trial. I'm sure that you all
5 understand that and why and you won't hold that against
6 him. But that is sort of where we fall in this
7 journey.

8 And just like we don't disagree with the
9 defendants, or they don't disagree with us, he has
10 mesothelioma that was caused by asbestos, one of the
11 disputes we are not having is that it will take his
12 life. The only question is when. There's different
13 projections about that from different doctors, and it
14 depends on how he responds to the latest experimental
15 treatment.

16 So I want to thank you for your attention. Today
17 has been a long day. The trial is going to be, in some
18 ways, a long trial. But thank you for the opportunity
19 to tell you in brief what we hope or what we know the
20 evidence is going to show over the next two weeks.

21 Thank you.

22 THE COURT: Thank you, Counsel. And I know you're
23 going to want to take your easel with you so we're
24 going to give you a few minutes.

25 We'll give counsel a moment to take her materials

1 away.

2 Very good. And now we'll hear from Mr. Tim Bouch
3 for the defendants.

4 MR. BOUCH: Could I look just a second before I
5 start, Your Honor? I didn't want to interrupt
6 Ms. Farrise.

7 (WHEREUPON, Mr. Bouch reviewing the notepad on the
8 easel.)

9 MR. BOUCH: Afternoon. We met a little while ago.
10 My name is Tim Bouch. I'm from Charleston.

11 Mr. Jolly is 73. He's retired. He has cancer.
12 Asbestos caused his cancer. There's no dispute about
13 that. Cancer is an awful disease. You'll hear
14 testimony that one in three Americans will be touched
15 by cancer. There's not a person I know that has a
16 friend, a relative, a coworker, an acquaintance that
17 isn't touched by cancer. Whether they're patients at
18 Mary Black or Regional or St. Francis or Duke, we all
19 are sympathetic for that.

20 But this is not a case about sympathy. We do
21 grieve for Mr. Jolly and his circumstance. But I
22 think, as we go through this case, you will see,
23 despite what you've heard, all pancakes have two sides
24 to them, and this is my opportunity to outline what
25 this case is about.

1 Let me start out by saying one thing. Let me get
2 a pad of paper.

3 (WHEREUPON, counsel retrieved the easel.)

4 MR. BOUCH: This is called a deadly weapon in my
5 hands.

6 One thing you will hear, you've heard the term
7 "flange gasket," well, they come in two flavors.
8 There's a valve, and the water goes through here. And
9 you saw the little picture of that, and that's a
10 flange. And that's a flange gasket. We didn't sell
11 those. We didn't recommend them.

12 In fact, we told you, you could use anything on
13 that -- paper, vegetable, cork, rubber -- and many of
14 them were. Inside the valve, there's something called
15 a blind flange gasket. We did sell that. You have to
16 get all the way in from the top to find it.

17 It's one thing that I think you will see. We did
18 not recommend, specify, or sell those gaskets.

19 Mr. Jolly worked for Duke Power Company. I still
20 can't call it Duke Energy. I guess I'm old enough. I
21 remember it as the power company.

22 About a year ago his lawyers had him sit for
23 what's called a deposition. Anybody who sees
24 television probably knows what a deposition is, but
25 somebody sits down and they answer questions. And

1 there are just lawyers there and a court reporter. And
2 it's just like an oath. You take an oath just like
3 from the witness stand.

4 And Mr. Jolly sat for a couple of days at his
5 lawyers' request, and they filmed it. And you may see
6 some of that film even though Mr. Jolly is coming live.
7 But we asked him, "Mr. Jolly, tell us about your work.
8 Tell us about what you did." And this is what he said:
9 He never worked with a valve his whole career. Never
10 worked with one.

11 And while he mentioned certain pieces of equipment
12 and valves and pumps and whatnot, he never mentioned
13 Fisher and Crosby. And while, yes, he worked at Oconee
14 and McGuire nuclear plants, he also worked in Allen and
15 Buck and Lee and Riverbend and Dan River and Cliffside
16 and Belews Creek and Catawba. These plants were built
17 in the '20s, '30s, '40s and '50s. They're not all
18 spanking brand-new. And they had a lot of asbestos in
19 them.

20 We had the opportunity to speak with some of his
21 coworkers that his lawyer said would help us
22 understand, when we got this case, what Mr. Jolly did.
23 And we asked them about Mr. Jolly and his work. There
24 were four of them. Three of them never knew Mr. Jolly.
25 Never met him.

1 One, Mr. Rogers, said, "I remember the name, but I
2 can't place him." Mr. Simpson, Mr. Freeman never heard
3 of him. Mr. Taylor met him in the middle '80s. But he
4 could not put Mr. Jolly near a Fisher or a Crosby
5 valve. So none of his friends could put him anywhere
6 near a Fisher or a Crosby valve.

7 Let me give you a couple of dates that might prove
8 important. You've heard one of them. Let me give you
9 a couple others. In 1964, Johns Manville, the
10 country's largest asbestos producer, put warnings on
11 its asbestos products. Johns Manville, you will hear
12 testimony, supplied Duke Power with its asbestos
13 insulation. Neither Mr. Jolly nor Mr. Taylor,
14 Mr. Rogers, Mr. Freeman, and Mr. Simpson ever got those
15 warnings. Then or later.

16 In 1967, Owens Corning put warnings on its
17 asbestos product. Their product was called Kaylo. You
18 will see documents that they used Kaylo to insulate
19 Ocone and McGuire. Mr. Jolly, Mr. Rogers,
20 Mr. Freeman, Mr. Simpson never got those warnings from
21 Duke. Then or later.

22 In 1972, you have heard about OSHA. A couple
23 things about OSHA. OSHA was Occupational Safety and
24 Health Administration. Many people are familiar with
25 it. It was designed to protect the health and safety

1 of the workplace. They come in and inspect.

2 And one of the first things OSHA did, you will
3 hear, and you will hear it from all kinds of experts,
4 was put controls on working around asbestos. And when
5 we asked Mr. Jolly and Mr. Freeman and Mr. Rogers and
6 Mr. Simpson, "Were you ever informed by Duke about
7 those OSHA rules?" "No, we were not."

8 In 1973, the Duke bidding documents stated that
9 Duke wanted to minimize asbestos purchases, but they
10 continued to purchase them. And in 1976, the OSHA
11 rules were strengthened. Insulation containing
12 asbestos was banned. You didn't have to take up the
13 old stuff, but you couldn't get new stuff. Respirators
14 were required. You had to wet it down. And the
15 employers were who OSHA told you have to do this: Duke
16 Power.

17 And Mr. Jolly told us that, "Well, Duke never did
18 that. They never required that until much, much
19 later." Mr. Taylor, Mr. Rogers, Mr. Freeman,
20 Mr. Simpson said the same thing, "Duke never told us
21 about that."

22 In 1977, Duke sent a memo to all its plant
23 managers instructing them on safety rules in working
24 with asbestos. No, Mr. Jolly, Mr. Rogers, Mr. Freeman,
25 Mr. Taylor, Mr. Simpson, they were never informed when

1 they were at Duke about the safe work practice manuals
2 that Duke had published.

3 In 1981 Duke sent around to all its power plants
4 revised safety procedures in working with asbestos. A
5 little manual. No, once again, neither Mr. Jolly,
6 Mr. Rogers, Mr. Freeman, Mr. Simpson ever received
7 these revised working manuals.

8 And in 1984, 1985, and 198- -- well, you know what
9 I mean -- '86 they sent around updated manuals. Then
10 Mr. Jolly said, "I never saw that." Mr. Taylor said,
11 "I never saw that." Mr. Freeman said, "I never saw
12 that." Mr. Rogers, Mr. Simpson never received it
13 either.

14 And you might ask, what could Fisher and Crosby
15 have told Duke that Duke did not already know. Duke
16 never stopped ordering asbestos even when companies
17 would not sell it to them. Duke said it wanted to
18 minimize asbestos, but it continued to order it.

19 And despite OSHA laws requiring Duke to segregate
20 the work; to wet it down, issue respirators, put up
21 warning signs, Mr. Jolly, Mr. Taylor, Mr. Freeman,
22 Mr. Simpson say they did not receive these warnings.
23 They didn't receive these respirators. Despite all the
24 Duke instructions, the Duke employees say it never
25 happened.

1 So in 1979, when Mr. Jolly went to Duke, you would
2 have thought this was a problem long ago solved. Duke
3 was still dealing with it. And you will see, despite
4 the written instructions, the Duke employees say those
5 safety precautions were never served.

6 Let's talk about asbestos. It's a mineral. It's
7 found in nature. It's all over the country. In the
8 1800s there was an asbestos mine near Winnsboro in
9 Fairfield County. Franklin County, North Carolina had
10 an asbestos mine well into the 1900s. Vermont,
11 Virginia, all over the place. There's a background
12 level of asbestos. It's all over. And you'll hear
13 this from experts. Everybody has got asbestos. It's
14 used for centuries.

15 Well, you might ask, why would anybody with a lick
16 of sense, based on what we know today, use asbestos?
17 And that's a pretty good question in 2017. But go back
18 80, 90 years. In the 1930s there were a lot of ships,
19 passenger ships, that had fires and hundreds of people
20 died. And congress got in the act. They say, what can
21 we do to prevent fire on ships? Asbestos. It's light.
22 It's strong. It's fireproof. It doesn't burn. We put
23 asbestos on the ships, they won't burn.

24 And the same thinking went in World War II. It's
25 light, strong, doesn't burn, and, hey, we can put more

1 bullets on our ships that will go to war. And in
2 Charleston where I live, there was a major shipyard
3 there up until, well, 20 years ago that built those
4 ships to go in harm's way. And in Charleston there was
5 an asbestos textile factory that made asbestos cloth to
6 be supplied not only to those ships but the power
7 plants -- it would wrap the pipes -- all over the
8 country. And it's not a strange product that you have
9 to be in a factory to find.

10 Simpsonville had the Mount Vernon mill. They
11 made -- you will hear testimony they made ironing board
12 covers. Those silver ironing board covers you could
13 buy at Sears in the '50s and '60s, those are asbestos.
14 They were made by Mount Vernon in Simpsonville. The
15 Slater mill made fireman suits out of asbestos cloth.
16 So it wasn't always the terrible product we hear about
17 on television. It was used for many years and
18 everybody thought it was good.

19 You hear a lot about insulation. We didn't make
20 it. We didn't sell it. We know nothing about it.
21 Through the years, and it's like anything else, you
22 will hear testimony there may have been a newspaper
23 article back when and maybe somebody observed
24 something, but in the '50s and '60s, medical doctors
25 started to research this: What's going on here?

1 And here is how it came down. In the textile
2 mills and in the asbestos textile mill down where I
3 live, they did a study in the '30s. And they say
4 people who work in that mill -- and it was a dusty mill
5 back then -- said you may get a disease called
6 asbestosis. Mr. Jolly doesn't have asbestosis. But
7 what it was, was a disease with scarring of the lung.
8 They call it white lung. And maybe up here we had
9 brown lung, byssinosis, in the cotton mill. But it was
10 white lung. And what they said is if you keep the dust
11 level down to five million particles per cubic foot of
12 air you shouldn't get any more asbestosis.

13 All the doctors, leading doctors, said that was
14 it. And in the '50s they said, well, some of these
15 people with asbestosis are getting lung cancer, said,
16 well, if you keep the dust down, you won't get
17 asbestosis, because the belief was you couldn't get
18 lung cancer unless you had that, and, therefore, you
19 won't get lung cancer.

20 And then in the mid '60s a disease that didn't
21 even have a name before then called mesothelioma came
22 up. And they said, you know, maybe this five million
23 particles is a little high. And in fact, the first
24 thing OSHA did was they dropped this five to two. And
25 they have changed it to per cubic foot -- to

1 centimeters and gone to a metric system. And then in.
2 '76 it went down to one, and then it went to .5, and
3 then it went to .2, and now it's .1. And that is the
4 OSHA standard, that over an eight-hour average, you
5 can't be exposed to more than that. And if you are,
6 you have to wear a respirator.

7 Gaskets and packing don't cause that kind of
8 exposures. They just don't.

9 You heard a little bit about there are three
10 different types of -- there is about 80 different types
11 of asbestos, but only three of them have been used
12 commercially. And, basically, there are three flavors
13 in two categories. I'll complicate it. There's one
14 that's called chrysotile. This is what packing and
15 gaskets are made out of. And it's a white asbestos.
16 Most of it's from Canada, though they used to mine it
17 in Fairfield County in North Carolina and Virginia and
18 Vermont and California. It's kind of like a cotton
19 thread.

20 And there's two other types in the same family
21 called amosite and crocidolite. These are mainly from
22 South Africa. And these aren't threads. These are
23 needles. And you'll hear our expert testimony that the
24 potency of these different asbestos is very different.
25 You will hear the term "biopersistence." That's how

1 long it lasts in your lung.

2 And the chrysotile, the white asbestos, lasts a
3 few days, maybe a week, the others last decades, which
4 is why most doctors will say they're different in
5 potency, and they have a different causation of
6 disease, because these last two, amosite and
7 crocidolite, have iron in them and chrysotile does not.

8 Now, how did they do this research? It's not --
9 you know, it's not something where they had scientists
10 in a laboratory. They do it two ways. You will see a
11 case report. A doctor might see something interesting,
12 "Gee, I've never seen this before," and he'll write up
13 a little case report. And that's useful, but it's not
14 as good because it doesn't compare what he saw to
15 others and he can only guess about the causes. So they
16 do an epidemiological study, which is a big word that
17 says you compare the disease in exposed people versus
18 the disease in nonexposed people, and you try to
19 measure the difference and see if there is more
20 likelihood that somebody will get sick. Or they
21 compare the amount of exposure with and without
22 disease. And that is what we have here. You won't see
23 an epidemiological study on only packing and gaskets
24 that shows an increase in disease.

25 Now, let me disabuse you of something. You will

1 still hear this. Asbestos gaskets and packing are
2 still made and sold in the United States. Perfectly
3 legal to do so. Perfectly legal to do so. Both Crosby
4 and Fisher ended it in the 1970s. Were there Crosby
5 and Fisher valves at Duke Power plants? Sure. You'll
6 see invoices, and they have asked us for thousands of
7 documents.

8 On the plants that Mr. Jolly worked at, 10 or 15
9 of them are from Fisher, three or four for Crosby. Do
10 they have asbestos gaskets? Some of them do. Internal
11 gaskets, not the outside. Duke ordered 20 or 30 from
12 Fisher, half a dozen or so from Crosby.

13 But even if they could show Mr. Jolly was in the
14 vicinity of these valves, these Crosby and Fisher
15 valves, for which there is no testimony, and show that
16 Mr. Jolly was near when these valves, these 10 to 20
17 valves, were being worked on, for which there is no
18 testimony I would submit, and that these ten or so
19 gaskets were being changed while he was there, for
20 which there is no testimony, this is not a regular,
21 frequent and in close proximity use that I believe you
22 will be charged which is the standard of whether we are
23 substantially responsible for Mr. Jolly's illness.

24 It's not enough to cause disease. And you might
25 say, "Well, wait a minute. Let's give this guy -- he's

1 sick. And asbestos caused it. Why should we believe
2 that your valves are different?"

3 MS. FARRISE: Your Honor, I'm just going to object
4 this is improper opening statement, not what the
5 evidence is going to show.

6 THE COURT: Just one moment. Just one moment.

7 Ms. Farrise, I did not hear exactly what you had
8 to say.

9 MS. FARRISE: I'm sorry, Your Honor. I just
10 objected to that statement that it was improper opening
11 statement. It wasn't what the evidence was going to
12 show. It was argument.

13 THE COURT: Overruled.

14 MR. BOUCH: Thank you, Your Honor.

15 The evidence will show that our valves are a
16 little bit different. They're not the valves on your
17 garden hose. They're not the valves on your kitchen
18 sink. You cannot go into a True Value hardware store
19 and buy the Crosby valve. It's a pressure relief
20 valve. It's intended to protect the power plant from
21 blowing up.

22 It is never, ever insulated. Why? If you
23 insulate it, you will change the settings on which it
24 will go, and then you really will blow it up. It's
25 never -- they're usually put almost always on top of

1 the reactor, way out of the way. This is not something
2 you can just walk by and pat it on the head as you go.
3 These are on top. They're never insulated, and they're
4 not easily reached.

5 Special qualifications to work on these valves are
6 necessary, and I don't believe that any of the people
7 that will testify have those qualifications. There are
8 internal gaskets in some of them. Not many. Most of
9 them have metal gaskets. There's not a flange gasket.
10 And you don't change; you don't -- you don't go into
11 these gaskets a lot. You might say, "Well, why? You
12 go into the other ones." And that's because the steam
13 and the water and whatever do not continue to flow
14 through these valves. They just sit up there until the
15 pressure gets to it. So it's much like a mill steam
16 whistle used to call everybody to lunch. You cycle it
17 once or twice a year, and that's that.

18 How about Fisher? Well, you can't buy those at
19 True Value either because it's not like your kitchen
20 sink or your hose. These are valves that are operated
21 remotely. So you not only have a valve body, you have
22 an actuator and regulator that are much bigger than the
23 valve itself. And one interesting thing you will hear:
24 These are never insulated for the similar reason
25 Crosby's are not. If you insulate this, you change the

1 settings, and the people in the control room can't tell
2 accurately how much steam is going through, how much
3 water is going through.

4 And if you want to repair them -- and most of
5 these valves are very large and very heavy -- you don't
6 take this out of the line and take it back to the shop
7 like you would something with your garden hose. You
8 take this part off and you go in it from there.

9 The interesting thing about Fisher valves and
10 Crosby, too, each one is different. They are custom.
11 They don't have a warehouse with all these valves
12 sitting, waiting for somebody to come and buy them.
13 The customer comes and says, "This is what I want you
14 to build." They specify each part, what kind of metal,
15 what kind of pressure, how big, how heavy, what parts
16 to use and what the parts are made of.

17 And, yes, they could buy an asbestos gasket if
18 they wanted. They could also buy cork, rubber,
19 vegetable fiber, or paper, and each one of them
20 performed just as well. But who made that decision?
21 Duke Power made that decision.

22 Now, I believe you'll hear testimony that the
23 Crosby and Fisher factories were entirely compliant
24 with the Walsh-Healey Act or any other statute because
25 it provides for a certain level, the five million.

1 particles that I mentioned earlier, and our factories
2 never had anything over that. They never had a
3 workers' comp claim. They never had an OSHA violation.

4 Duke was in the power plant business. Crosby and
5 Fisher were not. They knew their system. They didn't
6 tell us what it was. Duke knew what the valve was to
7 be used for. And other than generically, they never
8 told us. Duke knew where these valves were going to be
9 placed. We didn't.

10 The important fact is you'll hear a lot of
11 testimony about things were everywhere. But you will
12 also hear -- not hear testimony, at least based on the
13 sworn testimony we've been able to get so far --
14 Mr. Jolly never worked with any of these. No witness
15 places Mr. Jolly anywhere near a Fisher or a Crosby
16 valve.

17 What did he do? He went to work in 1979. He
18 spent six months learning how to weld pipe with no
19 asbestos other than maybe an asbestos glove. He spent
20 four or five years as a pipe inspector at all the Duke
21 plants.

22 From 1984 to 1994 he was a classroom inspector.
23 And after that, he did nondestructive testing of pipes.
24 He worked with pipes that were insulated. He worked in
25 pipes that were insulated years ago with asbestos. He

1 worked -- that's what he worked with.

2 So where were we? Mr. Jolly, I contend the
3 evidence will show, was not regularly, frequently or in
4 close proximity to any Fisher or Crosby product. He
5 was not told by Duke anything about asbestos safety
6 rules, regulations until it was much too late.

7 Neither Crosby nor Fisher specified, required, or
8 recommended any asbestos. If a customer wanted it,
9 sure, we sold it to them. We didn't tell them to buy
10 it because they knew their system and we didn't know.
11 We did not.

12 How did he get it? I think the evidence will show
13 the insulation that he was exposed to, particularly the
14 older insulation at the Buck plant, the Lee plant, the
15 Allen plant, the Cliffside plant, the Riverside plant,
16 the Dan River plant, that was probably the most likely
17 cause. And Duke never told him about those hazards.

18 Thank you for your attention. God, it's been a
19 long day. And hopefully we'll move this along. I
20 don't want you to think that we're trying to drag this
21 out. We know your time is valuable, and we will
22 respect that.

23 Thank you very much.

24 THE COURT: Thank you, Mr. Bouch.

25 THE COURT: All right. Members of the jury, yes,

1 it has been a long day. I will ask the jury be allowed
2 to retire to their jury room for about 15 minutes, let
3 me talk with counsel about how to proceed, and then
4 we'll bring you back in.

5 (WHEREUPON, the jury exited open court at
6 4:41 p.m.)

7 THE COURT: All right. Please, keep your seats.

8 I think the hour is kind of late, and my thinking
9 is to allow the jury to retire at this time, but I did
10 not want to pull the trigger on that until I saw where
11 y'all would like to be and how y'all would like to be.

12 It would even be possible to start a little
13 earlier tomorrow, 9:30, if I let them go now, but it
14 just depends on what y'all would like to do.

15 I'm going to turn first to the plaintiff.

16 MS. McVEY: Your Honor, we have a few things we
17 can put in if that's helpful, or we can agree it's been
18 a long day. We can go home and come back tomorrow.

19 THE COURT: Let me ask you this. If I were to
20 bring them back in about ten minutes or so, I mean, by
21 the time I get them in and seated, it's probably going
22 to be five to 5:00.

23 What are we talking about in terms of material to
24 put in? Testimony, photographs, documents?

25 MS. McVEY: There's some documentary evidence,

1 Your Honor, some invoices, purchase orders, that sort
2 of thing. We have given counsel interrogatories, I
3 believe the Fisher interrogatories -- no, Crosby
4 interrogatories from a prior case that we want to put
5 in and some things like that.

6 Either way you want to do it, it is getting late
7 in the day. I don't want to wear everybody out.

8 THE COURT: All right. What's your time estimate
9 if we were to at least allow you to put in some of the
10 purchase order-type documents?

11 MS. McVEY: Are there objections to that?

12 MR. BOUCH: Your Honor, and I don't want to
13 surprise the court on this, the only -- I don't know
14 what invoices they're talking about.

15 THE COURT: I think they have been marked and
16 shown, have they not?

17 MR. BOUCH: Well, there's thousands of them, Your
18 Honor. I haven't seen exactly --

19 THE COURT: Well, y'all produced them for them.

20 MR. BOUCH: Oh, of course. It's not an
21 authenticity issue. There may be a foundation issue.
22 But the only thing they did hand us were some redacted
23 answers to interrogatories from a California case, and
24 we do have some objections on that.

25 Your Honor's earlier thing that we show up at 8:30

1 and iron out all that might make it smoother than
2 20 minutes of, "Here's a document, here's a document,
3 here's a document, here's a document," whether they get
4 in or not. And my suggestion is, I think, if you bring
5 them in, let them go, we show up at 8:30, we'll know
6 exactly what we're arguing about. You will have plenty
7 of time to look at it and rule, and at 9:30 --

8 THE COURT: I'm inclined to do that, Ms. McVey, if
9 that suits.

10 MS. McVEY: That suits me fine. I think we want
11 to get some of the documents and information in before
12 Mr. Jolly testifies, and he's coming in in the morning.
13 I think 9:30 -- 8:30 will give us plenty of time to do
14 that.

15 THE COURT: I know that you will cooperate with
16 each other in the meantime to be sure we go along
17 smoothly in that regard.

18 I know people are probably using the facilities,
19 so forth and so on. Can you be peaceful for five
20 minutes? I'd like to call them in and dismiss them.

21 Y'all relax and take a break if you need it.

22 MS. McVEY: Thank you, Your Honor.

23 MR. McLEOD: Thank you, Your Honor.

24 (WHEREUPON, a recess was taken from 4:45 p.m. to
25 4:51 p.m.)

1 (WHEREUPON, the jury entered open court at
2 4:51 p.m.)

3 THE COURT: Thank you, ladies and gentlemen of the
4 jury. You may be seated.

5 I'm going to have mercy on you and let you go at
6 this time. We'll commence the trial again at 9:30
7 tomorrow morning, so please be in your jury assembly
8 room.

9 How much before then, Madam Clerk?

10 THE CLERK: Ma'am?

11 THE COURT: How much before the commencement of
12 trial do y'all like to have them in the jury assembly
13 room?

14 THE CLERK: Usually around maybe ten, 15 minutes
15 before.

16 THE COURT: So, you know, sometime by about 9:15
17 we would hope that everyone would be gathered so we can
18 begin promptly at 9:30.

19 We'll certainly again try to respect your time.
20 People have family obligations and other things. I've
21 got to take a trip down the road to Columbia with some
22 lightning that's about to come in, so we all want to be
23 safe.

24 So have a good evening. Please remember my
25 instructions to avoid newspaper accounts, radio

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1 accounts, television accounts, if there would be of
2 this matter, and independent research on your
3 electronic devices, and, otherwise, have a wonderful
4 evening. See you tomorrow morning.

5 (WHEREUPON, the jury exited open court at
6 4:52 p.m.)

7 THE COURT: All right. That will be it for us
8 unless there's anything else y'all need to bring to my
9 attention or put upon the record before we --

10 MR. BOUCH: I've got --

11 THE COURT: I know you have things, but my guess
12 is that you're going to try to consolidate things and
13 put them together and then we'll place them upon the
14 record.

15 MR. BOUCH: Just bullets tomorrow, not a shotgun.

16 THE COURT: Very good beginning. Such a
17 respectful beginning by both of you. Very
18 well-delivered opening statements. Thank you so much
19 for being so professional. I know the jury appreciates
20 it too.

21 Court will be in recess.

22 MS. McVEY: Your Honor, I'm sorry. Just briefly
23 before we go, if you guys can provide any objections
24 you have to the documents we e-mailed and provided to
25 you, we might be able to address them tonight.

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1 THE COURT: That would be lovely. I would like
2 that very much.

3 (WHEREUPON, proceedings adjourned at 4:53 p.m.)
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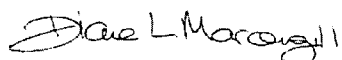
1 Certificate of Reporter

2
3 I, Diane L. Marcengill, Official Court Reporter
4 for the Tenth Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of a
7 portion of the proceedings had and evidence introduced
8 in the trial of the captioned case, relative to appeal,
9 in the Circuit Court for Spartanburg County, South
10 Carolina, on the 24th day of July 2017.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

13 I do further certify that I am neither of kin, counsel,
14 nor interest to any party hereto.

15 November 4, 2017

16 

17 _____
18 Diane L. Marcengill, RPR, CRR
19 Circuit Court Reporter
20
21
22
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1 State of South Carolina
2 County of Spartanburg

In the Court of Common Pleas

3
4 Beverly Dale Jolly and
5 Brenda Rice Jolly,

6 Plaintiffs,

7 -vs-

8 Crosby Valve, LLC and
9 Fisher Controls
International, LLC,

10 Defendants.

2016-CP-42-1593

July 25, 2017

Volume 2 of 9
Pages 187 - 436

Transcript of Record

11

12

13 B E F O R E:

14 The Honorable Jean Hoefer Toal, Judge;
15 and a jury.

16 A P P E A R A N C E S:

17 Theile McVey, Esquire
Kassel McVey
18 Jonathan M. Holder, Esquire
Dean Omar Branham
19 Simona A. Farrise, Esquire
Farrise Law Firm
20 Attorneys for Plaintiffs

21 Timothy W. Bouch, Esquire
Yancey A. McLeod, Esquire
22 Leath, Bouch & Seekings
Philip C. Reid, Esquire
23 Von Briesen & Roper
24 Attorneys for Defendants

25

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

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E x h i b i t s

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Marked	Description	I.D.	Admitted
1.1	Affidavit of Bambi M. Lohr	205	
947	Fisher Control Valve Handbook, 1965		427
948	Fisher Control Valve Handbook, Second Edition		429
1012-02	Duke P0 dated 9/3/92		248
1012-03	Duke P0 dated 3/24/93		248
1012-04	Duke P0 dated 5/19/93		249
1012-05	Mill-Power Supply P0 dated 5/24/82		250
1012-07	Mill-Power Supply P0 dated 9/10/85		250
1012-6	Fisher Controls P0 dated 3/6/91		244
6359	Schematics (Crosby-Duke 00001-00039) Crosby Installation Book		245
6364-04	Mill-Power Supply P0 dated 8/16/82		246
6364.01	Invoice 26348 dated 6/22/73		243

1 For the Defendants:

2 Marked	Description	I.D.	Admitted
3 Crosby 134	Memo dated 6/14/77 from Paul Barton to 4 All Station Managers		336
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1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 8:29 a.m.)

4 MS. McVEY: Your Honor, I'm not sure exactly what
5 objections there are. We have the Duke documents that
6 we want to put into evidence. The purchase orders, the
7 invoices, a lot of those are attached to the summary
8 judgment motions you have seen. And I believe there is
9 objection to us doing that, and I'm happy to have that
10 argument.

11 THE COURT: All right. Let's see. Is there any
12 way to narrow it down, or are y'all objecting to all
13 the Duke documents?

14 MR. McLEOD: Your Honor, I'm not exactly sure how
15 they're planning on having them admitted. It sounds
16 like they're trying to admit them without a witness.

17 THE COURT: Yes. That's exactly what they're
18 trying to do. We talked about that before, and I told
19 y'all, things that come from Duke that we all know come
20 from Duke, unless there's some reason to expect that
21 they have tampered with them or this kind of thing,
22 these asbestos trials have been admitting those things.
23 I've gone back and looked at Gary Hill's notes, and
24 there's never been any real dilemma about that.

25 So y'all explain to me why we should depart from

1 that.

2 MR. McLEOD: Well, I don't believe from Judge Hill
3 there were ever any documents admitted without a
4 witness to lay a foundation for the exhibits.

5 THE COURT: If this is authentication only,
6 Yancey, and by -- I mean, what are you saying, these
7 are not true exhibits? These are not true Duke
8 documents? You produced them to them and on your honor
9 as lawyers made the representation to the other side
10 and to the court that these were your client's
11 documents.

12 And so the reason there's no disputation in Hill
13 is they did not offer Duke witnesses to authenticate
14 those documents. They agreed about them. And they
15 agreed about them because they were not something that
16 they got in some other way, through third parties.
17 They were documents that the attorneys disclosed to
18 them in response to discovery.

19 MR. McLEOD: Your Honor, we're not -- first of
20 all, I'm not certain that it's accurate that we
21 produced them, these documents. We're not arguing the
22 authenticity of them. We're simply saying there hasn't
23 been a proper foundation laid to admit them into
24 evidence.

25 THE COURT: What kind of foundation are you

1 talking about? If they're authentic Duke documents and
2 they are in the time frame for purchase orders during
3 the time frame in which we're talking about in this
4 lawsuit, then what kind of foundation are you looking
5 to be laid?

6 MR. McLEOD: Well, Your Honor, it's hearsay. And,
7 I mean, they could be admitted -- we're not arguing to
8 the authenticity. We're arguing to the foundation. If
9 they're hearsay documents, even the business exception
10 rule requires somebody to lay a proper foundation.

11 THE COURT: Right. They're not hearsay under the
12 business exception rule if the business authenticates
13 them, and they are authenticated because you have
14 produced them pursuant to the discovery.

15 I wonder why we should have this kind of argument.
16 You know, these documents have been in every asbestos
17 case I've looked at. They are documents that are
18 produced by the defendants or their surrogates, and,
19 you know, I don't understand what we're talking about
20 here.

21 MR. McLEOD: Your Honor, we simply object to
22 having the documents admitted without a witness on the
23 stand. They can try and get the documents in --

24 THE COURT: And what is the witness on the stand
25 going to be required to testify to, that they are real

1 Duke documents? That they're the real business
2 records?

3 MR. McLEOD: Those go to authenticity of the
4 documents.

5 THE COURT: All right. Then what are you
6 expecting them to testify to?

7 MR. McLEOD: That either they had seen them
8 before, or there is evidence that the witness has
9 knowledge about the documents. We don't think that
10 it's proper just to admit a document.

11 THE COURT: That they have seen them before. And
12 what's the witness going to say if the witness has seen
13 them before? Is the witness going to testify about the
14 content of the documents?

15 MR. McLEOD: The jury doesn't know what they are,
16 where they came from. There's zero foundation if they
17 just admit the documents.

18 THE COURT: All right.

19 Ms. McVey.

20 MR. McLEOD: Your Honor, just to make the record
21 clear, we did not produce these documents. These were
22 documents that were produced in the course of many
23 years. Duke produced them.

24 MS. McVEY: Your Honor --

25 THE COURT: Ms. McVey, what I detect going on here

1 is a very valiant effort to create a record on appeal
2 because of an issue like this. I think that's silly
3 because these documents are documents that have been in
4 many of these asbestos cases.

5 MS. McVEY: Right.

6 THE COURT: But if we're going to have to prolong
7 this thing, then you're going to need to protect your
8 record.

9 MS. McVEY: And I think I can protect the record
10 and address the issues.

11 THE COURT: We're not going to all talk at once,
12 and we're not going to talk to our advisors.

13 MR. BOUCH: I'm sorry. I thought I was whispering
14 in Mr. McLeod's ear. I apologize.

15 THE COURT: How about confine that for a moment.
16 I don't blame you for consulting with your good
17 advisors, just let me hear from Ms. McVey before that
18 takes place. It's distracting.

19 Ms. McVey.

20 MS. McVEY: Your Honor, good morning.

21 Two things. The first thing is that at our
22 hearing, motion in limine hearing, remember Mr. Bouch
23 stood up and said, "I talked to them. These are Duke
24 documents. They're fine. We don't need to get a
25 witness here." I mean he said that in their arguments.

1 THE COURT: Many times.

2 MS. McVEY: But the other issue is in the Taylor
3 case, which applies to these documents, we had an
4 affidavit from Bambi Lohr, and she authenticates the
5 documents, and she lays the foundation that they're
6 business records, Your Honor. And she cites almost
7 word for word the rule, the business records rule,
8 which is, "I believe these documents to be genuine,
9 authentic copies of what each document purports to be.
10 I'm informed and believe these documents are records of
11 acts, events, or conditions made at or near the time of
12 the acts, events or conditions. I am informed and
13 believe these documents were made by a person or
14 persons who had knowledge of the facts reported."

15 And those are the documents, and they were
16 Bates-numbered Duke Taylor 1 through Duke Taylor
17 193479. That's the first thing. So they're business
18 records.

19 In addition, Your Honor, this is a sponsoring
20 witness. I don't think South Carolina requires that,
21 but to the extent it does, this affidavit is our
22 sponsoring witness. If we had a Duke witness come
23 here, this is what they would testify to.

24 Second, so under 803-6, it's a record of regularly
25 conducted activity. Two, under 803-16, these are

1 ancient documents in that they're more than 20 years
2 old. Three, they have the Fisher or Crosby or Duke
3 logos on top. These are not some manufactured
4 documents, Your Honor, so -- and they're also, to a
5 large extent, admissions by a party opponent.

6 Your Honor, these documents are authentic, the
7 foundation has been laid via affidavit, and they're
8 relevant; therefore, they are admissible documents.

9 THE COURT: All right. The first thing I want to
10 consider as you respond, Mr. McLeod, is the effect of
11 the statements made by your senior counsel at our last
12 hearing that we're not going to battle over
13 authenticity, "You are going to get your documents;
14 we're going to get our documents," and so forth and so
15 on.

16 I did not understand that to be a hair-splitting
17 that now under advice of appellate counsel you're
18 making between admission as authentic documents and
19 some other kind of concept about hearsay vis-à-vis the
20 business records.

21 I understood that we had resolved that so that we
22 could move forward in an orderly way. You explain to
23 me what's going on here.

24 MR. McLEOD: Sure. Sure.. Your Honor, we are not
25 contesting the authenticity of the documents. We're

1 simply saying that they need a witness to lay a
2 foundation before the jury before they're admitted into
3 evidence. We --

4 THE COURT: And the foundation is in this
5 affidavit, correct? The affidavit that we're talking
6 about lays that foundation, does it not?

7 MR. McLEOD: Your Honor, we would -- we disagree
8 and think that they need to have a witness. We are not
9 suggesting that --

10 THE COURT: You're saying not even if that witness
11 from Duke that signed the affidavit came to the
12 courtroom and testified as that affidavit reads, you're
13 saying that would not be sufficient to admit the
14 documents into evidence as a business record?

15 MR. McLEOD: Your Honor, this affidavit is an --
16 it's authenticating the documents.

17 THE COURT: It says they're business records.
18 They're admitted when they're business records.
19 Nothing else needs to be said about them. If they're
20 kept in the ordinary course of business, they're
21 admitted as business records and no other discussion
22 about the content. If you want to discuss the content
23 further, of course, that's another thing. But we're
24 talking about whether they come into evidence.

25 What the jury thinks about them is much governed

1 by what else might be said about them by either party,
2 but we're talking about whether they are admitted into
3 evidence as business records kept in the ordinary
4 course of business. It seems to me that affidavit is
5 fully sufficient, but you're saying not even the
6 affidavit would satisfy what you're talking about.

7 I really do not understand what you're talking
8 about.

9 MR. McLEOD: Okay, Your Honor. I would just --

10 THE COURT: What exactly is it that you expect the
11 Duke witnesses to say beyond what's in that affidavit?

12 MR. McLEOD: We're not suggesting that they have
13 to bring somebody from Duke. They can have an expert
14 testify. That's how it's always been done in the past.
15 Judge Hill never allowed them -- anybody to admit
16 evidence, exhibits into the record without a testifying
17 witness.

18 I'll cite, you know, *Ex Parte Morris*, 367 S.C. 56.
19 We're not trying to prevent them from using these
20 documents in this case. What they are trying to do is
21 submit evidence without a witness, and they're trying
22 to submit these documents into evidence without a
23 witness so that Mr. Jolly can testify to them, even
24 though they know that Mr. Jolly can't lay a proper
25 foundation.

1 We're not suggesting that they can't use these
2 documents in the trial. They need to do it through an
3 expert, one of their experts, and that's how Judge
4 Hill --

5 THE COURT: You mean an expert who's not a Duke
6 person is going to lay the foundation for business
7 records?

8 MR. McLEOD: Absolutely, Your Honor.

9 THE COURT: These are purchase order business
10 records. What they mean is something else again. But
11 these are simply purchase orders from the normally kept
12 business records of Duke, his employer, which have been
13 produced in the Taylor matter. And y'all have told me
14 when we've talked that those Taylor exhibits were going
15 to be very freely admitted. And I don't understand
16 what's going on now by way of what you're talking about
17 with foundation.

18 Mr. Bogan has obviously come up with some theory
19 in addition to the normal admissibility of business
20 records, but you're not explaining it to me.

21 MR. McLEOD: Your Honor, I mean, I could read the
22 quote from you. I went through and researched all the
23 law, and I couldn't find a single case where records
24 were introduced into evidence without a witness.

25 We are simply saying that the jury needs to see --

1 you know, lay a foundation for the exhibits. And we
2 don't think it's proper to use an affidavit to get
3 these documents into evidence without a witness. It's
4 always been done. Their experts can rely on these
5 documents. They probably have. And so --

6 THE COURT: It's always been done by an affidavit
7 just like the one that has been presented. I don't
8 know of anything else that needs to be said. No expert
9 then needs to come behind and say, "Well, yeah, these
10 are business records, and I think they mean so and so."
11 That's not how they're introduced. They're introduced
12 into evidence as business records by the business that
13 kept them. What they mean is not a foundational
14 examination. It is an examination of their
15 significance in the case.

16 And that's what you're really talking about, isn't
17 it, is someone who will discuss, as an expert, what
18 these documents mean? Is that what you're talking
19 about?

20 MR. McLEOD: Your Honor, absolutely. And how they
21 relied on them. We would suggest that the affidavit
22 can be used, of course, to authenticate the documents
23 but not lay the proper foundation without a witness on
24 the stand in front of the jury explaining that he or
25 she has seen the document before, what the document is,

1 and that they relied on it in coming up with their
2 opinions, or, vice versa, if the witness was familiar
3 with the documents and had seen it before and he can
4 say what it is and where it came from.

5 We're not suggesting that they're not authentic.
6 We're only -- which we -- which was our agreement.
7 However, we don't think that just because we agreed to
8 the authenticity of the documents, we never intended to
9 waive the rules of evidence to allow -- I mean --

10 THE COURT: Well, I think that's exactly what you
11 did in the conversations we had. This is not a subject
12 that was discussed by Mr. Bouch at all or anybody else
13 that argued this. This was very routinely thought to
14 be something that would be handled so that we could
15 move in an expeditious way with this trial.

16 What you don't like is the idea of Jolly
17 testifying before the experts testify and talking about
18 these documents. It's simply an order of how the case
19 is tried, as I perceive it.

20 MR. McLEOD: Mr. Jolly doesn't know anything about
21 these documents, or at least he hasn't testified to it
22 before. And so we think that in order to lay the
23 proper foundation, which we don't think that he can.

24 THE COURT: Ms. McVey.

25 MS. McVEY: Your Honor, I don't know that I need

1 to respond other than this. We have shown that the
2 documents are authentic. We have laid the foundation
3 for the documents. We have given exception to the
4 hearsay rule about why these documents are admissible.

5 Your Honor, we planned our trial based on the
6 representations made by counsel. If we needed to have
7 an expert come in in order to admit these documents, we
8 would have changed our plans.

9 The experts will testify about these documents,
10 but it's a different issue. It's about what they mean
11 and why they go to the weight of the testimony.

12 THE COURT: That's what he wants you to lay a
13 foundation for now. That's exactly what he wants you
14 to do is change the order of your witnesses and have
15 your experts talk about what they mean as a foundation
16 for their admission. That's -- at least he said yes to
17 that when I asked him before.

18 MS. McVEY: And the rules don't require me to do
19 that, as we've laid out. I have laid the foundation
20 through a Duke witness. I have provided -- in some
21 cases they're admissions by a party opponent.

22 THE COURT: Well, it's not admission by a party
23 opponent because Duke is not a party opponent in this
24 matter.

25 MS. McVEY: To the extent that they are actual

1 Crosby documents or Fisher documents, that's not
2 related to the Duke documents. It may be some other
3 documents. But there are -- they're ancient documents.
4 There are all sorts of reasons why. And this affidavit
5 outlines why they are business records and falls into
6 that exception.

7 THE COURT: I'm going to cogitate for a minute
8 with my clerk about this, but I'm very disappointed
9 because if we have got to do this, you have needlessly
10 delayed this trial on a point that is really not of any
11 magnitude whatsoever. If they have to jump through
12 these hoops, all I can say is what's sauce for the
13 goose is sauce for the gander. But I'm very
14 disappointed. Y'all knew exactly how this trial was
15 going to go, and I think it's very wrong what you're
16 doing.

17 This trial is going to be long enough as it is,
18 and to alter this on something that has really no
19 significance whatsoever other than to make us delay,
20 let this jury have to wait while some other approach is
21 taken to this thing, I am very disappointed with you.

22 MR. BOUCH: May I be heard?

23 THE COURT: Yes.

24 MR. BOUCH: Your Honor, I have been trying these
25 cases since 1977. I object to your comment that I

1 meant to waive admissibility. I was speaking only to
2 authentication to which we have no objection, and I've
3 never had an objection to that. I object to the
4 court's comment that this is merely a question of delay
5 tactics.

6 I have never tried an asbestos case, including
7 with Judge Hill, Judge Patterson, Judge Hayes, Judge
8 Chapman anywhere in the country that I have not had to
9 have a witness in which to lay a foundation and put
10 these into context for the jury.

11 I understand Your Honor's ruling, but we further
12 object to your comment --

13 THE COURT: I haven't ruled yet, Mr. Bouch, so
14 let's not go that way.

15 MR. BOUCH: Well, and I further object to your
16 comment that we're doing this solely to delay the trial
17 and to build an appellate record. I think that is
18 improper, Your Honor, and I object to it.

19 THE COURT: All right. Well, your objection is
20 noted, but I think that's exactly what's going on.

21 MS. McVEY: Your Honor, may I hand you this
22 affidavit so that you have it when you are --

23 THE COURT: Yes.

24 MS. McVEY: And I'm going to mark it as, I guess,
25 Plaintiff's 1.

1 (WHEREUPON, Plaintiffs' Exhibit Number 1.1 was
2 marked for identification.)

3 THE COURT: All right.

4 MS. McVEY: Your Honor, we believe this affidavit
5 properly lays the foundation for the admissibility of
6 these records.

7 THE COURT: How about the transcript of the
8 proceedings in which we discussed this?

9 MS. McVEY: I think I have it, but I need to find
10 it in e-mail. Let me look.

11 THE COURT: All right. How are you going to get
12 it to me?

13 MS. McVEY: I can e-mail.

14 MR. HOLDER: Our guys are ready with a printer as
15 soon as we give them the word so I can get it printed
16 for you.

17 THE COURT: How about get it for me, and meanwhile
18 I'm going take a look at this with my clerk.

19 MS. McVEY: Okay.

20 (Pause in proceedings.)

21 THE COURT: As I look at the transcript, remember,
22 this was a hearing that partially involved a motion to
23 compel. And in the meantime the Duke documents
24 appeared. And Mr. Bouch then had a phone call with
25 Mr. Brown, and there was some discussion, and Mr. Bouch

1 left with the understanding after that conversation
2 that all was in agreement that these documents would be
3 able to be admitted into evidence no problem.

4 Then Ms. McVey is the one who raised some
5 questions about, "I haven't had a chance to look at all
6 these documents," and so forth and so on. And then
7 Mr. Bouch says, "If we have an argument about any of
8 them, let me know and I'll get ahold of Duke."

9 He said, "No. Good. Good. If they want to use
10 anything with Duke or Crosby or Coble Insulation that
11 came but it was addressed to Duke, that's fine. If I
12 want to use them, that's fine too."

13 That's where we left it. This was Mr. Bouch
14 reciting his conversation with Mr. Brown. And that's
15 where I thought we left it this morning.

16 "MS. MCVEY: I don't think we have a big
17 argument."

18 "THE COURT: I don't either."

19 "MS. MCVEY: What I'm simply saying is I cannot
20 open 200,000 documents and admit those."

21 This is the production that apparently was made to
22 her.

23 And I then said, "You're not going to do that
24 before you try the case?"

25 "I can't do that."

1 "THE COURT: Well, here is what I think you ought
2 to do. I mean, what they are asking for, please admit
3 that these are authentic documents."

4 Ms. McVey says, "Well, I'm almost willing to take
5 judicial notice myself. I haven't seen them. Well, we
6 can do this."

7 "THE COURT: They're all Duke documents. All
8 they're doing is passing along to you what they got
9 from the various hands that have touched these things.

10 "Both Mr. Bouch and Mr. Meriweather had recited
11 deep contacts with Mr. Graham, and that's all spoken of
12 by Ms. Lohr in her affidavit.

13 "And if there comes a time in the course of the
14 trial they pull out some document that you don't think
15 is legit, you can raise it, but I would hold up they
16 need to know if they're going to be able to use these
17 documents. And I can tell you they're going to be able
18 to use them."

19 "MS. MCVEY: And, Your Honor, I'm not saying they
20 can't use them. What I am concerned about is
21 committing malpractice by admitting to authenticity of
22 documents I haven't seen. I don't think it's going to
23 be an issue. I think they're self-authenticating as
24 they are. So I guess what I'm asking, if they want to
25 use them in this trial, that they show them to me."

1 "THE COURT: Well, if you want, I can solve that
2 real easy. Each side is going to show the other side
3 what they're going to use, and that's going to take
4 care of itself."

5 "MR. BOUCH: Can I make this easy, Your Honor?
6 They served it to her today. Can I make a motion to
7 strike the request to admit because she's got at least
8 30 days and the trial will be over by then?"

9 "MS. MCVEY: There is a statute."

10 "MR. MERIWEATHER: This is a statutory request to
11 admit that requires a four-day response."

12 "MS. MCVEY: And that's what I'm worried about."

13 "MR. MERIWEATHER: Well, she introduced me to --"

14 "MS. MCVEY: I know."

15 "MR. MERIWEATHER: -- just recently, and I was so
16 delighted to learn about it."

17 "MS. MCVEY: You took my trip. No, but I'm not
18 trying to hold them up in any way, and I'm not sure
19 we're going to work it out. I don't have time in four
20 days to open 200,000 documents."

21 "THE COURT: Well, I'm not enforcing any kind of
22 four-day limit --"

23 "MR. MERIWEATHER: The only thing --"

24 "THE COURT: -- or anything else like that so
25 don't be" -- I don't know what "internornorum" is about

1 that. "The parties are going to show each other what
2 you're going to put in, and I think it's going to be
3 all okay."

4 "MS. MCVEY: I do too."

5 "THE COURT: So don't worry about that."

6 "MS. MCVEY: Thank you."

7 "THE COURT: That's not something I'm going to
8 enforce."

9 "MS. MCVEY: Thank you."

10 "MR. MERIWEATHER: Your Honor, we can withdraw the
11 request to admit."

12 "MS. MCVEY: Thank you."

13 "MR. MERIWEATHER: The only reason we served them
14 that way is I called our old friend, Josephine Hicks,
15 and Josephine said, 'If you can get me a witness to
16 authenticate if they fuss and won't authenticate.'"

17 "THE COURT: I can assure you when this case is
18 tried, we're not going to spend any time authenticating
19 documents."

20 "MR. MERIWEATHER: Then we're going to withdraw."

21 "THE COURT: So that solves the problem."

22 "MS. MCVEY: Thank you."

23 "THE COURT: There you go. Okay. We got that so
24 it's taken care of. Now we've got the Dr. Oury
25 deposition," and we go along into that.

1 I have looked at a recent court of appeals case --
2 Josh, being with the court of appeals -- that talks
3 about business records. These are ancient records
4 because they're over 20 years old, so they fit that
5 exception.

6 The court of appeals talks about the
7 self-authenticating nature of it. In one case it
8 involved the Pritchard Law Firm. They admitted all the
9 law firm's documents even though the law firm didn't
10 testify because they were self-authenticating.

11 The nature of a self-authenticating business
12 record is that if it is properly authenticated, which
13 y'all say you don't even fuss about, if it's properly
14 authenticated, it comes in. And you don't have to have
15 a witness to put it in. It comes in.

16 I know Mr. Bogan is back there shaking his head,
17 but that is what I read these cases to say.

18 Furthermore, that is what I understood the
19 attorneys to agree to in the hearing that we had on
20 September the 18th.

21 So for two reasons, first of all, because to me a
22 self-authenticated business record comes in, and,
23 number two, because the parties had heretofore agreed
24 to have these things be admitted into evidence as
25 business records, then I'm going to rule that they are

1 admitted. And if I'm wrong, which I often am, I will
2 not resent at all you asking my betters to check me out
3 and correct me if I'm not ruling correctly.

4 So that's what I'm going to rule, is that they
5 come in.

6 MS. McVEY: Thank you, Your Honor.

7 THE COURT: And I think y'all have a perfectly
8 adequate record on what your position is, Mr. McLeod
9 and Mr. Bouch, and when they come in, you will not have
10 to renew anything. You have objected. Your objection
11 is preserved and we can move forward.

12 MR. BOUCH: Your Honor, thank you for that, for
13 the ruling, and I think we're clear. I'd point out
14 even Your Honor said we're talking about
15 authentication, not admissibility, but I understand
16 your ruling.

17 THE COURT: The two are wrapped up together. Then
18 let me make clear what I'm ruling so if I'm wrong,
19 again, I can be corrected.

20 Self-authenticating records are admissible into
21 evidence and may be admitted into evidence on their
22 own. And that is the nature of what I pick up from
23 Johnson against Pritchard, 302 S.C. 437, a court of
24 appeals case from about 1990.

25 I'm sure if I had time, I could plow into some of

1 the other opinions of the supreme court about the
2 matter, but that's what I'm relying on. I just want
3 you to be clear about that.

4 MR. BOUCH: I understand, Your Honor.

5 THE COURT: And self-authenticating documents to
6 me are very much like documents of which judicial
7 notice is taken. They come in. Now, what they mean is
8 something different.

9 Judicial notice documents establish the fact
10 absolutely. These documents simply come in as the
11 business records of the company. Certainly they're
12 going to be conflicting interpretations of what they
13 mean, and I think you are fully free to explore that
14 and give up nothing, when these documents are admitted,
15 about what they mean.

16 MR. BOUCH: Your Honor, we understand your ruling.
17 I just want to make it very clear our only objection is
18 they're not in with a sponsoring witness. I understand
19 your ruling. We don't need to argue about it.

20 Your Honor observed, and thank you, that our
21 record is protected and we don't have to make a
22 contemporaneous objection. However, there are many
23 cases from your former court and the court of appeals
24 saying despite the good faith of a trial judge and
25 counsel, that isn't good enough. I still have to make

1 the objection contemporaneously.

2 THE COURT: Well, those are cases that involve
3 pretrial motions or motions in limine. And there are a
4 series of cases that talk about pretrial and what that
5 means. But we are now in trial. The jury is sworn,
6 and we are in trial, and that is why I suggest that
7 your objection is preserved.

8 MR. BOUCH: I don't want to delay things. I don't
9 want to incur the court's ire on that unnecessarily. I
10 just make the point that I've been tripped up by that
11 on records before, and I really don't want to take the
12 gamble. It may be a two-second, "Your Honor, we've
13 talked about this --"

14 THE COURT: I'm not critical of that at all. You
15 try your case like you think best.

16 MR. BOUCH: Right.

17 THE COURT: I'm just saying from my point of view,
18 I believe your objections are thoroughly preserved
19 because we're in trial now and we're at the point of
20 admitting these documents, and that is the context of
21 which this discussion is had.

22 MR. BOUCH: I don't want to end up the next
23 defendant.

24 THE COURT: I understand.

25 MS. McVEY: And, Your Honor, if it --

1 THE COURT: And -- one moment, Ms. McVey.
2 The other thing that I would reference as
3 foundation for the ruling I have made is Plaintiffs'
4 Exhibit 1, which is the affidavit of Bambi M. Lohr,
5 senior paralegal for Duke Energy Carolinas, submitted
6 in the case of Taylor against 3M, as all of these
7 exhibits were, she is the sponsoring witness who
8 identifies these as business records of Duke, and also,
9 in her ultimate Paragraph Number 6, lays the foundation
10 for the admissibility of these documents by saying, "I
11 have reviewed these documents. They were submitted by
12 William Graham, counsel for the plaintiffs, for
13 authentication in the above-captioned case. I believe
14 these documents to be genuine, authentic copies of what
15 each document purports to be. I am informed and
16 believe these documents are records of acts, events, or
17 conditions made at or near the time of the acts,
18 events, or conditions. I am informed and believe that
19 these documents were made by a person or persons who
20 has knowledge of the facts recorded. These records
21 were kept in regularly conducted business activity, and
22 it was the regular practice of that business activity
23 to make the record. I recognize these documents as
24 example documents that were produced pursuant to the
25 subpoenas for an earlier case."

1 And my point being, this kind of affidavit has
2 similarly been submitted with respect to these
3 documents as they have been used in many other asbestos
4 cases. So that is the ruling.

5 MS. McVEY: Your Honor, just if it makes anybody's
6 life easier, we're happy to agree that plaintiffs, that
7 Mr. Bouch doesn't need to make contemporaneous
8 objections to these documents just to protect the
9 record. We would waive that.

10 THE COURT: What else have we got?

11 MR. HOLDER: The only other thing that I think
12 there were objections to was reading former responses
13 to interrogatories to the jury.

14 And the objections go to -- I guess y'all should
15 enunciate your objections better, but I think it was
16 foundation, relevance, completeness.

17 But for the purposes of this motion, may I
18 approach and give you a copy of the discovery responses
19 we're referring to?

20 THE COURT: All right, sir.

21 MR. McLEOD: Unredacted?

22 MR. HOLDER: I'm going to give her both.

23 MR. McLEOD: Okay. Great.

24 MR. HOLDER: I'm handing you both a full version
25 and a redacted version. This is the full version; this

1 is the redacted version.

2 THE COURT: This is a huge document. What do you
3 want me to do with this right now?

4 MR. HOLDER: As we refer to it during our
5 arguments, I just want you to have it so you can see
6 it.

7 THE COURT: As the -- oh, that is very good. So
8 as the objections occur, we can deal with them.

9 MR. McLEOD: Well, I can put the objections.
10 They're pretty simple, Your Honor.

11 THE COURT: All right, sir.

12 MR. McLEOD: We can probably take care of it right
13 now pretrial --

14 THE COURT: Let's do it.

15 MR. McLEOD: -- so we're prepared to move forward.

16 So the plaintiffs are offering to publish these
17 previous interrogatories on behalf of Crosby.
18 Actually, they're not even on behalf of Crosby.
19 They're from defendant FMC.

20 So we would make the objection, one, that these
21 aren't Crosby. It's FMC. But, more importantly, the
22 interrogatories that they are proposing to submit are
23 redacted and not complete.

24 But first, several -- Number 15, 16, and 17 --
25 answers to interrogatories there on that first page,

1 response to Interrogatory Number 15 lists a whole
2 series of products that have anything to do with this
3 case. So our objection is to relevance. We think it's
4 extremely prejudicial. There is absolutely zero
5 evidence that many if not most of these products are at
6 Duke. And so that would be the first objection. And
7 that would include objections to 15, 16, 17.

8 THE COURT: Interrogatories 15, 16, 17?

9 MR. McLEOD: Yes, ma'am.

10 THE COURT: The first one I'm looking at is Number
11 14 -- okay. 15. 15, 16 and 17.

12 MR. McLEOD: These products are listed in 15, 16
13 and 17. Many are not -- there's no evidence -- they
14 have nothing to do with this case so they're entirely
15 irrelevant. Many of them weren't even made after the
16 '50s. And so this is entirely irrelevant, and we
17 object to them reading them in.

18 In addition, they're cumulative. To the extent
19 that they have evidence of our products at Duke, we're
20 not suggesting that they can't use that. But to use
21 these interrogatories to suggest that these products
22 listed in Interrogatory 15 were at Duke is entirely
23 impermissible. They're totally irrelevant to this
24 case. And I'll move on to --

25 THE COURT: Let me address this to begin with.

1 MR. McLEOD: Yes, ma'am.

2 THE COURT: First thing is I note that this is a
3 statement under oath by Mr. Robert Martin, the products
4 manager for Crosby Valve who was authorized by FMC on
5 behalf of its former subsidiary, Crosby Valve, to
6 verify the discovery responses in the above-entitled
7 and numbered cause.

8 So it would appear to me from looking at this
9 document that it is a management employee of Crosby
10 Valve who verified the authenticity. And I noticed
11 internally that it is Crosby Valve and its products
12 that are being discussed in this document.

13 Now, with regard to the list of products, is it
14 your position that the only products that can be
15 discussed in this lawsuit of your clients are products
16 that were used at Duke?

17 MR. McLEOD: (Nodding.)

18 THE COURT: Is that the foundation?

19 MR. McLEOD: Yes, Your Honor.

20 THE COURT: All right. Let me go back to
21 Ms. McVey on that.

22 Ms. McVey, Ms. Farrise is going to do this one?

23 MS. McVEY: Yes, ma'am.

24 THE COURT: Very good.

25 Ms. Farrise, the contention is that -- it's

1 evident I'm going to take the position that these are
2 admissions of a party opponent because they are
3 under-oath admissions of Crosby Valve, but they take
4 the position that 15 discusses a whole lot of products
5 that were not present at Duke and that it is irrelevant
6 and highly prejudicial. What do you say?

7 MS. FARRISE: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MS. FARRISE: I apologize for not being here right
10 at 8:30.

11 We contend that these valves which they admit in
12 this document were asbestos-containing, which goes to
13 the heart of the jury's question, in fact, were present
14 at Duke. There are a number of documents, and we will
15 start to admit them today, which refer, for instance,
16 to Crosby valves, and the only way that we would be
17 able to prove that in Crosby's own documents, for
18 instance, when it refers to a JA-6 series valve, one of
19 those listed or any of these others, that in those
20 documents at the very plants where Mr. Jolly worked,
21 that that is one way in addition to what the coworkers
22 have said that we can prove to this jury that these
23 valves, in fact, did have asbestos-containing
24 components.

25 THE COURT: Well, there's no question what this

1 document says, that it's a response to, "Have you at
2 any time engaged in the process of marketing and sale
3 of products containing asbestos fibers?"

4 And the answer is, "Yes. Crosby manufactured some
5 valves that incorporated component parts manufactured
6 by its suppliers that contained encapsulated chrysotile
7 asbestos for a period of years."

8 And then, "If your answer is affirmative, state
9 trade, brand name of each product, dates, description
10 of physical appearance, detailed description," et
11 cetera, et cetera.

12 Now, they take the position that your witnesses
13 simply say, "Yeah, there were a lot of Crosby valves
14 around," but that they don't identify which Crosby
15 valves they are, and they think it's highly
16 prejudicial. It's not relevant to talk about the ones
17 that are not in Duke, and it's prejudicial to have this
18 huge, long string of valves.

19 MS. FARRISE: Well, Your Honor, the defense is
20 essentially is one of catch me if you can. And the way
21 that we are choosing to catch them, if you will, is not
22 just with witness testimony; it's the connection, if
23 you will, of Crosby's own documents and Duke's
24 documents which have particular references to
25 particular types of Crosby valves described in the same

1 terms that they answer this interrogatory.

2 THE COURT: Right. And I think what they're
3 simply saying is you need to pick out those valves that
4 actually were supplied to Duke and not list all these
5 other valves. I'm not saying I agree with it. I'm
6 saying address yourself to that.

7 MS. FARRISE: But the other valves, one of the
8 things that they take the position is there was only a
9 couple of valves. We dispute that. We will be able to
10 show through the witness testimony, along with
11 documents that, for instance, there were hundreds of
12 Crosby valves documented and that those valves are
13 described in --

14 THE COURT: Ms. Farrise, let me see if I can
15 communicate what's in my head. There are a bunch of
16 valves here.

17 MS. FARRISE: Yes.

18 THE COURT: And there is a good deal of descriptor
19 about how each one of them works and what kind of
20 asbestos they have in them and so forth and so on, as
21 I'm just quickly scanning this thing. That's what I
22 get out of it.

23 MS. FARRISE: Right.

24 THE COURT: They're not saying that you can't put
25 into evidence these answers with respect to the valves

1 that were used at Duke. But that's where they're
2 taking the position unless you can show which valves
3 were actually used at Duke, all right, you can't show
4 it.

5 Now, you take a broader view, and I'm just asking
6 for a legal foundation for the broader view.

7 MS. FARRISE: I don't actually take a broader
8 view. My view is we can show that this long list of
9 valves and the categories of these valves were used at
10 Duke.

11 THE COURT: Okay.

12 MS. FARRISE: Through the documents. They are
13 identified in the Duke documents.

14 THE COURT: Every one of them?

15 MS. FARRISE: I can't tell you if every single one
16 of them, but the vast majority of them are. That is
17 how come, for instance, they only list here, A, 15 --
18 17 different categories of valves. And then they ask a
19 bunch of questions about those 17 categories.

20 And so the way -- so, yes, we contend that the
21 vast majority -- I don't know if I can tell you, you
22 know, 17 of 17, but let's say ten of 17 at least, or
23 more, when you go through the documents of what were
24 the Crosby valves at the Duke plants where Mr. Jolly
25 worked, they are described in Crosby's own documents in

1 these terms. And so we want to then put the documents
2 up, and we want to be able to say, for instance, there
3 were Sage 600 Series Crosby valves at Oconee. And how
4 do we know that? Because we have invoices where they
5 are ordering replacement parts for those.

6 THE COURT: I think I understand the approach.

7 Any reply, Mr. McLeod?

8 MR. McLEOD: Your Honor, let me just -- we are not
9 suggesting that the documents that they have from Duke
10 that specify which Crosby products were there cannot be
11 used. This document is being used for the simple
12 purpose of inserting prejudice against us with entirely
13 irrelevant stuff.

14 Your Honor, I would turn to -- point you to Page 9
15 of this document, under XI, Crosby, the valve we're
16 talking about was made one time in 1933 for use on
17 ships. Most of these valves have absolutely no
18 connection whatsoever to Duke, and I believe
19 Ms. Farrise just admitted that she can't show that they
20 do.

21 We're not suggesting that she can't submit
22 documents about the Crosby valves that they have
23 evidence of were at Duke. But in publishing something
24 like this to the jury without a witness to talk about
25 it, and we can cross-examine on these valves, is highly

1 prejudicial and irrelevant to this case.

2 THE COURT: Now, let me ask you this: There were
3 certain things said in opening statement about the use
4 of asbestos that certainly may not line up completely
5 with what's going to come into evidence about the use
6 of asbestos. And I'm wondering whether it is pertinent
7 and I'm asking whether it's pertinent for the jury to
8 know if they have a long history of using asbestos in
9 their valves, both the ones at Duke and the ones that
10 they manufactured long ago, and that that history
11 demonstrates both long-standing use of asbestos as well
12 as their knowledge of asbestos and its uses in their
13 valves, et cetera, and that it wasn't simply some
14 design person off somewhere or some supplier that did
15 something they didn't know about, that they knew about
16 it, and they used that kind of material for many, many
17 years.

18 Is any of that pertinent to this inquiry at this
19 trial in your view?

20 MR. McLEOD: No, Your Honor. They had the same
21 evidence on the products that are at Duke. They can do
22 that with the evidence they have of the products that
23 were at Duke. If she wants to submit evidence,
24 obviously, the court's already forced us to bring our
25 corporate witnesses here. She can ask our corporate

1 witnesses about this. But to introduce a document from
2 California about valves that were manufactured --

3 THE COURT: Well, the California part is really
4 not material. These are statements under oath by
5 Mr. Martin who's going to be here.

6 MR. McLEOD: Sure. And these valves have
7 absolutely nothing to do with this case.

8 THE COURT: I understand.

9 MR. McLEOD: These valves are not at Duke. And,
10 more importantly, a lot of the valves at Duke didn't
11 have asbestos-containing parts. This is just to insert
12 prejudice into their case because they don't have a lot
13 of evidence against us. That's all it is, and we
14 object.

15 MR. BOUCH: I hate to interrupt, Your Honor, but I
16 think I can make it real simple. If you look at B3,
17 Crosby JQ Series valves, we began to make them in 1936.
18 It's on Page 8, Your Honor.

19 THE COURT: What about that?

20 MR. BOUCH: Okay. And if you go to C at the
21 bottom, 3 talks about the same valve, JQ Series valves
22 still in production. We have no objection to that.

23 What we do object to, Your Honor, is if you look
24 at Number 11 on B, Crosby IPS Series valves 1933.

25 THE COURT: So your real objection is all this

1 historical information about other valves that are no
2 longer in use.

3 MR. BOUCH: If they have Duke documents that show
4 we had Model Number XYZ and they can put in XYZ --

5 THE COURT: You want it confined just to valves
6 that were used at Duke?

7 MR. BOUCH: If we made a valve in 1933 one time
8 for use on four ships never made again, that's our
9 objection.

10 THE COURT: I understand that. Mr. McLeod has
11 done a good job of elucidating that also.

12 And, again, this simply comes down to this,
13 Ms. Farrise. There are some historical data here, and
14 there is some data that's very directly pertinent to
15 Duke's operations. And what they're asking is that I
16 exclude historical data.

17 What basis in law would there be for me to allow
18 the historical data to come in?

19 MS. FARRISE: Let's take the example that they
20 specifically challenged.

21 THE COURT: The Navy use?

22 MS. FARRISE: The Navy use. As you heard in
23 opening statement -- there are multiple issues, by the
24 way, that are in dispute in this trial. And as you
25 heard in opening statement, we contend that one of the

1 ways that Crosby knew, although they should have known
2 about its own product, that the asbestos in particular
3 was hazardous is because they were a government
4 contractor going back to time infinitum.

5 And when you sell to the government in 1930 and
6 1940 and 1950, the government, the federal government
7 and the state governments, regulated the use of
8 asbestos. They said it's dangerous. It's microscopic.
9 It's going to hurt people, and you need to protect
10 people.

11 So this is evidence that shows that, going back to
12 1930, one time supplying multiple valves on a Navy ship
13 being a government contractor, that you were on notice
14 that asbestos was hazardous in no uncertain terms
15 because of federal regulations and by virtue of that
16 status. And the federal government told you by virtue
17 of being a government contractor how to protect people.

18 And our claim is that despite that and all of the
19 other knowledge that was coming into you from all
20 different sources about the fact that asbestos was
21 hazardous, when Mr. Jolly gets to Duke by 1979, you
22 have still not put a warning on there; you have still
23 not, according to other interrogatories, done a single
24 test to determine whether or not the asbestos in the
25 product that you are selling is hurting people.

1 So while this particular one, because he didn't
2 work on these Navy ships, may not be relevant to the
3 issue of what the I.D. is at Duke, it is certainly
4 relevant to the knowledge and the notice of hazards and
5 how to protect people that Crosby and Fisher had. And
6 it's undeniable.

7 So, coupled with other evidence, expert testimony
8 about, yes, companies the size of these companies
9 selling to the government no question absolutely knew,
10 by the 1930s, this is evidence of that, and they can't
11 stand here and say, "Well, you don't have any evidence
12 that we sold to the government, that we were a
13 government contractor. You don't have any evidence
14 that we sold asbestos to the government." This is our
15 evidence. So --

16 THE COURT: I think I understand the direction of
17 the argument.

18 MR. McLEOD: If I may respond real quick, Your
19 Honor. Ms. Farrise is talking about the Walsh-Healey
20 Act. It wasn't even enacted until 1952, 20 years after
21 some of these valves. These valves are entirely
22 irrelevant to even the point that she just tried to
23 make.

24 THE COURT: Well, here is my thought about this.
25 And, of course, both sides discussed asbestos, and both

1 sides in their opening statement mentioned the Navy and
2 the old uses of asbestos long ago.

3 I think there ought to be some limit on the
4 historical evidence. I don't know if it all has to be
5 exactly valves that were used at Duke, but I do
6 understand the contention they make that the real old
7 history is just a piling-on kind of situation, and that
8 part is prejudicial.

9 So here is what I'm going to do. I am going to
10 exclude any reference to valves that can't be tied in
11 either -- and one of those '30s valves that is then
12 referenced is the same kind of thing that's now being
13 used is a good example of one that would come in, but I
14 am going to limit the use of valve information to
15 valves that -- his exposure was in the '70s, right?

16 MS. FARRISE: His exposure began in 1979, Your
17 Honor. And I was going to say that the second issue of
18 contention, which I didn't get to speak to, I know is
19 going to be this issue of time period because if you
20 look at the statements, the admissions of Crosby, they
21 have this thing where it says, for instance, "Phased
22 out in 1975." And I bet that the defendants will say
23 that's irrelevant to Mr. Jolly. But it's not. Because
24 a big part of our case is that they sold replacement
25 parts.

1 THE COURT: Well, the replacement parts, yes, I
2 think that comes into it, but I also think there's some
3 part of the history that's pertinent on notice and
4 other things that have to do with their historical use
5 of asbestos and their knowledge that that's what they
6 were using. But I am going to just pick an arbitrary
7 number which may not satisfy either one of you but may
8 take the sting out of a bunch of the very old stuff,
9 and I'm going to say that no historical information
10 with respect to valves earlier than 1965. And I just
11 pick that as an arbitrary date that's somewhat before
12 most of these plants came online but might involve the
13 use of some products that were in that age group.

14 MS. FARRISE: Your Honor, the plaintiffs object to
15 that because the opening statement of the defendant was
16 these plants are 40 and 50 years old. What is also
17 going to be the evidence is that these valves live a
18 long time, 100 years in some cases. They are not the
19 kind of things that you change out like a car every
20 20 years.

21 So if they were put in service when these plants
22 were built 50 years ago and they were phased out but --

23 THE COURT: You talking about Duke plants?

24 MS. FARRISE: Yes, Duke plants in particular.

25 And Crosby continued to, with the outages and the

1 shutdowns, supply the replacement asbestos gaskets for
2 these vehicles, if you will, that remain in service for
3 decades to come; the fact that they phased it out and
4 substituted it with a new model doesn't matter.

5 THE COURT: Ms. Farrise, I'm about to celebrate my
6 50th wedding anniversary. I guess I'm kind of like the
7 Jollys in that regard. And that will take you back to
8 1968. So my concept was that you would get plenty of
9 ancient information if you cut it off at 1965, and
10 that's what my ruling is going to be.

11 MS. FARRISE: Okay. But, Your Honor, just for the
12 record, the pertinent time period, even if you're going
13 to look at 50 years, because that's what they're
14 saying, is, if Mr. Jolly comes on in 1979 and starts
15 being in the area where they're removing gaskets in
16 '80, 50 years before that is 1930. That is how come
17 these valves actually matter.

18 And the second point is, while you don't want to
19 have historical information, the quality of our
20 evidence is this is Crosby specifically admitting
21 actual knowledge because we were government contractors
22 in the 1930s and '40s versus vague stuff that we put on
23 to say there was vaguely information out there to
24 government contractors.

25 So if we have to choose about what kind of stuff,

1 we'd rather have admissions and actual knowledge that
2 we were government contractors as opposed to the more
3 vague "this covered a class of people in terms of just
4 the weight of that evidence." And so that's our
5 objection to the court saying you can't put in Crosby's
6 specific statement that, "Yes, we knew. We were
7 government contractors," and, "Yes, we knew, therefore,
8 we were subject to regulations."

9 Accordingly, the other part, you know, goes --
10 gets put together with another piece of evidence.

11 THE COURT: I understand that, and I'm not
12 limiting what you do in that regard. I'm making a very
13 specific ruling about a very specific matter which is
14 these interrogatories. And all you will have to do is
15 to redact certain listed valves from this
16 interrogatory, anything that was referenced as before
17 1965 unless it's also tied up to a later valve. That's
18 my concept about how to do it. But if I satisfy no
19 one, I may change that.

20 Mr. Rice.

21 MR. REID: Reid, Your Honor.

22 MS. FARRISE: So you mean "phased out by 1965,"
23 that's what you're saying?

24 THE COURT: That's correct. Y'all are going to
25 have to make some judgments about things that are no

1 longer in any use and wouldn't have had any effect on
2 him.

3 MR. REID: Your Honor, Philip Reid. Thank you for
4 the ruling. Just want to ask a practical question.

5 We understand the only live witnesses today will
6 be Jolly family members, so we don't perceive this will
7 be used today because they won't have any knowledge
8 about it. Mr. Martin will be here Friday. You will
9 recall the colloquy last week about getting our
10 representatives here, and we moved forward on that. I
11 just wanted to tell you that Mr. Martin will be here
12 Friday.

13 THE COURT: My idea may change when I talk to him,
14 but at the present time, that's my approach to it.

15 MR. REID: We accept that. I'm just saying I
16 don't perceive this even being used until then.

17 MS. FARRISE: I object to basically what I
18 perceive to be sort of calendaring on the record
19 because it's a waste of time, but we plan to call and
20 offer the statements of Crosby today. We plan to say
21 in a question-and-answer form that Crosby was asked a
22 question and here is how they answered it in written
23 form. And I don't believe that the law, but I could be
24 wrong, says we need to have a witness on the stand to
25 read interrogatories.

1 THE COURT: He's not making that point. He
2 just -- we're not in that -- this is admission of a
3 party opponent. This is a sworn statement of a party
4 opponent. They're not into that whole business again.

5 MS. FARRISE: We plan on doing that today as time
6 permits.

7 THE COURT: I have faith that y'all will be able
8 to comply with that.

9 MR. McLEOD: Your Honor, there's just one more
10 objection. Thank you for permitting us to argue this.
11 It is very important. We've taken care of 15, 16 and
12 17.

13 We also have objections to, if you look at 30, 34,
14 38, 67, and 70, the plaintiffs have redacted part of
15 the answer and in many cases have just left incomplete
16 sentences. We -- Rule -- it's our position that Rule
17 106 completeness, we would like the entire answers
18 read.

19 THE COURT: I haven't got time right now to go
20 through all of these, Mr. McLeod, and see what would
21 constitute a complete answer as opposed to what they
22 put in.

23 MR. McLEOD: Well, Mr. Holder handed you up the
24 unredacted copy --

25 THE COURT: Yeah. I've got the unredacted and the

1 redacted copy, but you just rattled off about ten
2 numbers, and we have a jury that's supposed to come in
3 now and begin this trial.

4 Tell me what I'm supposed to do. You want me to
5 sit down right now and go through every one of the
6 numbers?

7 MR. McLEOD: Your Honor, maybe at a break. It's
8 pretty simple. We want them to read the entire answer,
9 not just part of it. It's pretty simple.

10 MS. FARRISE: Our position is it's objections of
11 the lawyers which is not evidence and other
12 self-serving nonresponsive statements that lawyers have
13 put in there having nothing to do with the question.

14 So we, for instance, are offering the part that
15 comes without waiver of our objections, here is our
16 answer. The jury doesn't need all the clutter of the
17 lawyer banter.

18 MR. McLEOD: Your Honor, these are statements of
19 Crosby. I'll just point to the first one, 34. If you
20 look at the unredacted copy very quickly, Number 34 on
21 Page 29, the plaintiffs have offered in evidence,
22 starting on Line 25, an incomplete sentence, "Crosby
23 states that its valves were packaged in cardboard
24 boxes, wooden boxes, or flat pallets with the name
25 'Crosby' in black lettering on the side of the box."

1 But the whole answer begins with, "Crosby did not
2 manufacture or sell asbestos-containing products."

3 THE COURT: Well, of course, if that's what you
4 want in, I'm back to letting everything in because that
5 is a reference to -- that is a global reference to
6 whether Crosby manufactured or sold asbestos-containing
7 products. And the big colloquy we just got into was on
8 Interrogatory Number 14, "Yes, Crosby, have you ever
9 engaged at any time in processing, marketing, or sale
10 of products containing asbestos fibers?" And the
11 answer was, "Yes, Crosby manufactured some valves that
12 incorporated component parts manufactured by its
13 suppliers that contained encapsulated chrysotile
14 asbestos for a period of years."

15 So, you know, if we -- if we're going to get sauce
16 for the goose and sauce for the gander going here and
17 we're going to have complete answers, then I'll give
18 you the complete answers, but we're going to have
19 complete answers for everything, including all those
20 valves because I can't see any real way to deal with it
21 any other way.

22 MR. McLEOD: We'll just withdraw that objection
23 and stick with your original ruling, Your Honor, would
24 be fine.

25 THE COURT: Well, I don't know if I'm --

1 MR. McLEOD: I mean, there's different grounds for
2 each, so.

3 THE COURT: Well, I don't perceive it exactly that
4 way.

5 I think the best thing to do is read the entire
6 response and be done with it, Ms. Farrise, and that
7 includes lawyer banter and everything else. If we're
8 going to do all valves, we're going to do all responses
9 to all the other interrogatories and we're just going
10 to have a very complete record of what was said.
11 That's the only thing I know to do.

12 MS. FARRISE: And I don't disagree with that
13 because, as you hit it right on the head, they're going
14 to say this statement, "We did not manufacture or
15 sell." Then we ought to be able to put in the
16 impeaching testimony, "Yes, you did. You started in
17 1930. You sold to the Navy; you sold to Duke; you sold
18 to anybody who would buy it."

19 THE COURT: That's where I am now. Maybe I should
20 have looked at all of these before I got involved in
21 this much argument where the even-handed thing to do is
22 let all this interrogatory material in, so that is what
23 I'm going to do.

24 So the court's ruling is all of the designated
25 material from the interrogatories in the *Gibson vs.*

1 American Fillbrite (phonetic) case that have been
2 designated by the plaintiff are coming in.

3 MS. FARRISE: Thank you, Your Honor.

4 THE COURT: What else?

5 MS. FARRISE: I just wanted to alert the court
6 we're ready to go. Mr. Dale Jolly is going to testify
7 today. He is here. By that I mean in town, but he's
8 not ready to take the stand. So we're working our
9 best, given his health, to try to find a time where he
10 can actually take the stand. So I'm alerting the court
11 because we could be -- and we're in contact with the
12 family. We may have to be sort of in the middle of
13 publishing documents and we say, "We need to put him on
14 the stand now," and interrupt that presentation.

15 THE COURT: Well, it's your case so you put it up
16 as you see fit. That's a little interruption. I don't
17 know if the defendant would object to any of that. The
18 order of how you do it is up to you. I'm sensitive to
19 his health situation, but I'm also sensitive to my jury
20 and how respectfully we need to treat their time as
21 well.

22 MS. FARRISE: It's a delicate situation, Your
23 Honor. Thanks so much.

24 THE COURT: Very much so.

25 Now, Ms. McVey, you sent some other e-mail to me

1 last night. What was that?

2 MS. McVEY: Your Honor, we just asked, Fisher
3 Controls, I think it's their Exhibit 1440, it's in the
4 National Register, it's the Asbestos Information Act,
5 we just ask you to take judicial notice of that.

6 THE COURT: Is there any problem with that,
7 Mr. Rice (sic)?

8 MR. BOUCH: I'll speak to that, Your Honor. I
9 think if you look at the first sentence in that, that
10 is not a government regulation. It is not a government
11 law. It is a summary of material submitted to the EPA
12 by some asbestos manufacturers in 1988 and 1990.

13 THE COURT: I noticed that it doesn't include
14 either Crosby or Fisher.

15 MR. BOUCH: Exactly, Your Honor. And we object to
16 that. You know, it really doesn't have anything --
17 there's nothing in there -- I think one or two
18 references to valves, but -- and I might be even
19 incorrect on that.

20 THE COURT: There is reference to valves because I
21 read the whole thing last night.

22 MR. BOUCH: And the idea, Your Honor, is we
23 stopped making, and I don't think there's any evidence
24 that will come in, we stopped selling the stuff in
25 1987.

1 THE COURT: Let me just do this. I don't want to
2 hold up the train any further, but I get what you're
3 talking about. Now, I could not figure out just from
4 looking at it what the pertinence of it would be, but
5 I'll take another look at it before we decide to take
6 judicial notice of it.

7 MS. FARRISE: Can we tell you what we think the
8 relevance is?

9 THE COURT: Sure.

10 MS. FARRISE: So you heard yesterday in defense
11 opening statement that there was this product, for
12 instance, called Kaylo, K-a-y-l-o --

13 THE COURT: All right. Yeah. And Kaylo is
14 mentioned in there.

15 MS. FARRISE: And Kaylo is mentioned in there.
16 And so what --

17 THE COURT: It's an Owens Corning product.

18 MS. FARRISE: Yes, it is.

19 THE COURT: And that was said by Mr. Bouch. When
20 he talked about it, he talked about -- he was talking
21 about different kinds of asbestos, and he mentioned
22 Owens Corning and Kaylo in that context.

23 MS. FARRISE: And he mentioned that the witnesses
24 would say they recalled Kaylo, and that's how they're
25 going to seek to prove that Mr. Jolly was exposed to

1 asbestos from thermal insulation.

2 The Asbestos Information Act was a law that was
3 passed by Congress which said we want to know --

4 THE COURT: You don't have to go into all that.

5 MS. FARRISE: So the response of the Kaylo maker
6 was, "We stopped putting asbestos in it in 1972." So
7 witnesses can come in here and I.D. Kaylo from sun up
8 to sundown, but unless and until they can show us after
9 1972, it's asbestos-free.

10 THE COURT: Here is what I'm going to do with
11 that. I'm not going to take it that far right now.
12 This is obviously something that's going to come up in
13 cross-examination on Mr. Jolly or one of your other
14 witnesses, and I'll deal with it as it comes then.

15 MS. FARRISE: Well, it was published in the
16 Federal Register, which is exactly --

17 THE COURT: I know exactly what it is.

18 MS. FARRISE: So it's not going to come up with
19 Mr. Jolly, but it will come up -- it should just come
20 in as a statement published in the Federal Register
21 after --

22 THE COURT: I'm not going to deal with it that
23 way. I'm going to wait until it becomes pertinent to
24 whatever else is going on with that issue.

25 MS. FARRISE: Thank you, Your Honor.

1 So we're ready.

2 THE COURT: Very good. Bring the jury in.

3 (WHEREUPON, the jury entered open court at
4 9:47 a.m.)

5 THE COURT: Good morning, ladies and gentlemen of
6 the jury. Please take your seats.

7 We are ready to begin testimony in the case this
8 morning. I hope you had a pleasant evening and look
9 forward to you hearing the testimony that will be
10 presented today.

11 Plaintiffs' counsel is kind of getting settled and
12 set to move forward, and their presentations will be a
13 combination of testimony and certain documents and
14 other matters that will be read into the record, so let
15 them get ready to go.

16 And, Ms. McVey, when y'all are ready, you may
17 proceed.

18 MS. FARRISE: Your Honor, I am putting my hands on
19 it, but good morning, ladies and gentlemen.

20 We would like to offer into evidence documents
21 from the Duke Power Company, a few, and also, from
22 Fisher and Crosby, invoices and purchase orders.

23 THE COURT: All right.
24 Counsel.

25 MR. McLEOD: Same objection.

1 THE COURT: Would you like to renew your
2 objection?

3 MR. McLEOD: Same objection, Your Honor.

4 THE COURT: Overruled, and the documents will be
5 admitted, Ms. Farrise.

6 MS. FARRISE: Thank you, Your Honor. Let me just
7 get some I.D. on them. That would be helpful. Hang
8 on.

9 So I have some technical help here, Your Honor.
10 (WHEREUPON, Plaintiffs' Exhibit Numbers 6364.01,
11 .02 and .03 were admitted into evidence.)

12 MS. FARRISE: The first document, Your Honor, for
13 identification is going to be Plaintiffs'
14 Exhibit 6364.01, .02, and .03. We don't have 6,000
15 exhibits, but for reasons that we won't go into, this
16 is what this is.

17 I'm going to put down the cover page. It's the
18 Crosby Valve & Gage Company. Date, September 7, '73.
19 Ship to Duke Power, Oconee Nuclear Station Number 2.
20 Service job. The description is to test with air set
21 device 16-6R10HA secondary safety valves. Service
22 engineer. August 29, 1973, for a total of \$795.51.

23 So we're offering or we have been admitted the
24 invoice from Crosby Valve to Duke.

25 Next is the same, which is a purchase order to

1 Crosby Valve & Gage Company dated -- where is our date?
2 Anyway -- oh, at the top, September 19, 1973. Duke
3 Power Company, Seneca, South Carolina, to cover the
4 cost of one serviceman to assist in setting the main
5 steam safety valve on Unit Number 2, Oconee Nuclear
6 Station, confirmation.

7 Next is an invoice from the Crosby Valve & Gage
8 Company entered June 26, 1973, to Duke Power Company,
9 Oconee Nuclear Station, Seneca, South Carolina.
10 Service job. Description, to inspect, repair, and test
11 as required 16HA-656R10 main steam safety valves, shop,
12 two men required, service engineer, July 4th through
13 July 6th and July 9, 1973. Total cost \$1,152.27.

14 Purchase order dated March 22, 1974, to Crosby
15 Valve & Gage Company to Duke Power, Oconee Nuclear
16 Station, Seneca, South Carolina to cover serviceman to
17 supervise installation of Unit Number 3 main steam
18 relief valve.

19 Next, Your Honor, the plaintiffs would offer a
20 document identified as Exhibit 1012-6 from the Duke
21 Power documents. It's an invoice, and I'd like to
22 publish it.

23 (WHEREUPON, Plaintiffs' Exhibit Number 1012-6 was
24 admitted into evidence.)

25 THE COURT: Very good.

1 Same objection from Mr. McLeod?

2 MR. McLEOD: I would like to see a copy.

3 THE COURT: Let him see a copy.

4 MS. FARRISE: We sent you copies, but we certainly
5 have one.

6 THE COURT: Show him a copy.

7 MS. FARRISE: This is a document dated March 6,
8 '91 from Fisher to Duke Power. Ship to Duke Power
9 Company, Oconee Nuclear Station, Seneca, South
10 Carolina. Item Number 00010. Description,
11 1P927299102, gasket, spiral wound.

12 And now I'm going to turn over --

13 Your Honor, sorry. First day of trial and the
14 technology.

15 Anyway, customer order number -- this is still the
16 first page -- 06650-77. Purchase order number
17 A06650-77. Item Number 10. Part number 1P927299102.
18 Gasket, flanged fitting type, spiral-wound material,
19 316SS with asbestos, size 3-9/16 times 4-5/16.
20 Application, for Fisher V-Ball valve.

21 And I think I probably showed it, but I'm not
22 sure. Oconee Nuclear Station, 1991.

23 (WHEREUPON, Plaintiffs' Exhibit Number 6359 was
24 admitted into evidence.)

25 MS. FARRISE: Plaintiffs offer Exhibit 6359 which

1 is a Crosby document at the top, obviously. Crosby
2 safety/relief valve installed at Duke Power Company,
3 McGuire, Unit Number 1. And this one, for the record,
4 bears a Bate of Crosby Duke 00013 for that particular
5 page.

6 Next is Crosby utility, Duke Power Company.
7 Station, McGuire, Unit Number 1, valve location,
8 pressurizer, Duke, factory number. Quantity, three.
9 Size, assembly number. Main steam Duke. Factory
10 number. Quantity, 20. Assembly number. Reheater
11 turbine; in terms of the valve location. Quantity,
12 six. Size 18 AA 24 JPV-A style.

13 Auxiliary valves and then Duke. Quantity, five.
14 W-HTD. Quantity, two.

15 Next, Your Honor, is 6364-1.

16 THE COURT: I don't know why I thought 6364-1 had
17 already come in. Am I wrong? The very first one, you
18 had 6364.

19 MS. FARRISE: Apparently, Your Honor, my copy is
20 incorrect. You are correct. It's supposed to be
21 6364-04.

22 THE COURT: The one you're introducing now?

23 MS. FARRISE: Yes, Your Honor.

24 THE COURT: Very good.

25 (WHEREUPON, Plaintiffs' Exhibit Number 6364-04 was

1 admitted into evidence.)

2 MS. FARRISE: Dated -- this is a purchase order
3 dated August 16, 1982, to Crosby Valve & Gage Company,
4 care of fluid engineering sales. Ship to Duke Power
5 Company, McGuire Nuclear Station in Cornelius, North
6 Carolina. Item Number 1 is Items 1 and 2 pertain to
7 Series 600 Sage safety relief valve. Sage model, has
8 number 6G5111-B, 1 1/2 inch inlet, 2 1/2 inch outlet,
9 factory number, tag, et cetera.

10 Turning over to Item Number 7.

11 THE COURT: 647?

12 MS. FARRISE: No. Item 7 on the document.

13 THE COURT: On 6364-04. Okay.

14 MS. FARRISE: It's a multipage document.

15 THE COURT: I got it. I see the item numbers. I
16 got you. It's Number 7 down at the bottom.

17 MS. FARRISE: Yes.

18 Item Number 7, seal cap for 3/4-inch inlet,
19 one-inch outlet, Crosby Sage safety relief valve, set
20 pressure 275PSIG 150 degrees F water, service Sage
21 Model Number 43145-B, Asbestor gaskets, Duke purchase
22 order number C-45368, factory number, tag number.

23 Next, Your Honor, plaintiffs offer into evidence
24 Exhibit 1012-02 which is a multipage document as well.
25 It is a purchase order.

1 (WHEREUPON, Plaintiffs' Exhibit Number 1012-02 was
2 admitted into evidence.)

3 MS. FARRISE: And I guess I should have asked can
4 everybody see? It's kind of far away.

5 (WHEREUPON, jury indicates in the affirmative.)

6 MS. FARRISE: Purchase order dated September 3,
7 1992. Fisher Controls Company, care of Robert E. Mason
8 Company. Ship to Duke Power Company, Oconee Nuclear
9 Station, Seneca, South Carolina. Item Number, in the
10 third page, 7 -- I guess it's on the fourth page. Item
11 Number 7, four each, and then there's something. And
12 then continuing on, Item Number 7, gasket. Type,
13 relay. Application, for Fisher 3570 positioner
14 furnished to DP Company, spec CNS-1205.06-3.
15 Manufacturer, Fisher Controls Company. Sorry.

16 Item 10, two each, gasket, size 1/4-inch thick
17 material, asbestos. Application, for Fisher Control
18 pressure relief valve. Manufacturer, Fisher Controls
19 Company.

20 (WHEREUPON, Plaintiffs' Exhibit Number 1012-03 was
21 admitted into evidence.)

22 MS. FARRISE: Next, Your Honor, plaintiffs would
23 offer Exhibit 1012-03, which is a Duke Power Company
24 purchase order dated March 24, 1993, to Fisher Controls
25 Company, ship to Duke Power Company, Oconee Nuclear

1 Station, Seneca, South Carolina. Item Number 3, right
2 there -- sorry, Item Number 9, three each, gasket,
3 flanged fitting. Type, spiral wound. Material 316 SS
4 with asbestos. Size, 1-13/16 I.D. Application, for
5 globe valve. Type, DBQ. Size, one inch.

6 Manufacturer, Fisher Controls Company. Unit 2, \$166.

7 The first page, I'm going to publish Item Number
8 1.

9 Gasket type, bonnet. Application, for Fisher
10 globe valve. Model, 475-DBQ. Manufacturer, Fisher
11 Governor Company.

12 Next, Your Honor, plaintiffs would offer 1012-4.

13 (WHEREUPON, Plaintiffs' Exhibit Number 1012-04 was
14 admitted into evidence.)

15 MS. FARRISE: This is a purchase order, Duke Power
16 purchasing department, dated May 19, 1993, to Fisher
17 Controls Company. Ship to Duke Power Company, Oconee
18 Nuclear Station. Item Number 3, cage valve. Valve
19 style, diaphragm control. Valve size, eight inch by
20 ten inch. Application, for eight-by-ten inch Fisher
21 diaphragm control valve.

22 Item Number 8, six each. Part or I.D. number --

23 MR. REID: Is this the same document?

24 MS. FARRISE: Same document. Item Number 8.

25 Gasket, flanged fitting. Type, spiral wound.

1 Material, 316 SS with asbestos. Size, 3 9/16 inch x 4
2 inch x 5/16 OD x .125 thick. Application, for Fisher
3 V-Ball valve, U type, ten-inch.

4 Next, Your Honor, plaintiffs would offer
5 Exhibit 1012-5.

6 (WHEREUPON, Plaintiffs' Exhibit Number 1012-05 was
7 admitted into evidence.)

8 MS. FARRISE: This is a purchase order to Fisher
9 Controls Company, ship to Duke Power Company, Oconee
10 Nuclear Station, dated May 24, 1982. Item Number 2,
11 two each, gasket, Sage, 3 x 1 1/2 inch x 4 x 3/32 inch
12 x 1/32 inch asbestos. Spec, FMS-17A2 P/N1R384604022
13 for a Fisher four-inch globe valve.

14 Item Number 3, two gaskets, bonnet, 5 inch by 6
15 3/32 inch x 1/32 inch, asbestos. Spec, FMS-17A2. Part
16 number 1R, et cetera. For a Fisher four-inch globe
17 valve.

18 Item Number 8. Gasket, adapter, 5 by 5 by 15/32
19 of an inch times 1/32 of an inch, asbestos. Spec,
20 FMS-17A2. Part number, blah, blah, blah. For a Fisher
21 four-inch globe valve.

22 Item 10, two each, gasket, seat ring, 3 1/2 inches
23 x 3 29/32 of an inch x 1/32, asbestos. Spec, FMS-17A2,
24 P/N, for a Fisher four-inch globe valve.

25 (WHEREUPON, Plaintiffs' Exhibit Number 1012-07 was

1 admitted into evidence.)

2 MS. FARRISE: Next, Your Honor, plaintiffs offer
3 1012-07, which is a purchase order to Fisher Controls
4 Company. Ship to, Duke Power Company, Oconee Nuclear
5 Station, Seneca, South Carolina, dated September 10,
6 1985. Item Number 2, gasket. Body, asbestos. For
7 Model Number 621 pressure regulator with one-inch parts
8 on purge meter rack on Drawing Number AECC1192471, Rad
9 Waste Aerojet equipment. Fisher Control Part Number
10 1A832504032.

11 So, Your Honor, we will have other documents that
12 we will publish and offer into evidence. At this time,
13 however, we'd like to interrupt the offer of
14 documentary evidence and call to the stand Mr. Beverly
15 Dale Jolly.

16 THE COURT: Very well.

17 MR. BOUCH: Your Honor, can Mr. Holder and I have
18 just a brief word with you?

19 THE COURT: Certainly.

20 (WHEREUPON, a bench conference was held off the
21 record in the presence of the jury, but out of the
22 hearing of the jury.)

23 THE COURT: Good morning, Mr. Jolly. If you will
24 stand right there, the clerk will administer the oath
25 to you.

1 THE WITNESS: Good morning, ma'am.

2 BEVERLY DALE JOLLY,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 THE COURT: All right.

5 Ms. Farrise, your witness.

6 MS. FARRISE: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MS. FARRISE:

9 Q Good morning, Mr. Jolly.

10 A Good morning.

11 Q Can you hear me okay?

12 A Yes, ma'am.

13 Q Okay. First off, are you having any trouble with
14 your hearing?

15 A Yes, ma'am.

16 Q And why is that, as you understand it?

17 A Because the strong chemo I had a year ago.
18 Chemotherapy, yes, ma'am.

19 Q Has impacted your hearing?

20 A Yes, ma'am.

21 MS. FARRISE: So I'm going to stand a little
22 closer, Your Honor, if that's okay.

23 THE WITNESS: Yes, ma'am, yes.

24 BY MS. FARRISE:

25 Q Why don't you tell the ladies and gentlemen of the

1 jury, how old are you?

2 A I'm 73.

3 Q Okay. And did you retire from working?

4 A I did.

5 Q When was that?

6 A 2002.

7 Q Okay. And then did you go back to work?

8 A Yes, as a vendor..

9 Q As a vendor?

10 A Yep, at the same job, URS, yes.

11 Q And for how long did you work after you went back
12 to work or continued to work?

13 A 2015.

14 Q And what happened in 2015 that caused you to stop
15 working? Did you retire?

16 A Yes, ma'am. I had to. I was down at -- it was in
17 December. And I got to where I couldn't breathe at
18 Catawba. I couldn't climb the stairs.

19 Q Let me turn this microphone this way.

20 A And my right lung had filled up with blood, and I
21 didn't know it. And I went to Dr. Clary December the
22 28th. That's when the x-ray and they had to draw the
23 blood out, that's when they found the cancer. I had
24 mesothelioma, yes.

25 Q So, Mr. Jolly, just to be clear, did you stop

1 working because you were ill or because you retired or
2 some combination of both?

3 A I was ill. I was ill. And I guess you would say
4 a combination of both. But I was still healthy, you
5 know, at the time.

6 Q What was your job then, in 2015 December, when all
7 of this started and you had to stop working?

8 A Ultrasound. I did ultrasound with Duke Power
9 Company. Ultrasonics.

10 Q Okay.

11 A Yes.

12 Q So you were still working at Duke Power plants?

13 A Yes, ma'am. Yes, ma'am. At the three plants,
14 yes.

15 Q Mr. Jolly, have you lost any weight because of
16 your illness?

17 A Yes, ma'am. I lost about 45 pound.

18 Q Okay. And how are you doing right now, like
19 literally sitting in this chair, what's happening with
20 you?

21 A Pretty good right now. I have a little trouble
22 breathing, but that's to be expected with what I got,
23 you know.

24 Q So we're going to ask you to take your time, and
25 if you need a break --

1 A Thank you.

2 Q -- I'm sure that we can accommodate that. Okay?

3 A Yes.

4 Q Mr. Jolly, can you tell the jury if you're a
5 college graduate and what you studied and your work
6 after college?

7 A Yes, ma'am. I graduated from Limestone College in
8 1971, and I was a school teacher. I became a school
9 teacher. And one day -- you know, school teachers,
10 back then, didn't make much money, and I was working
11 all the time. I taught night school, the GED. And my
12 dad said he had been working with Duke Power Company
13 since 1946 or -7. He was in the Cinase (phonetic). He
14 said, "Why don't you come to work with Duke?" I
15 already had experience as a pipefitter, so I went to
16 work with Duke as a pipefitter then.

17 Q And when was that?

18 A 1979. Yes, ma'am.

19 Q And how long were you a pipefitter?

20 A Not long.

21 Q How long?

22 A Because in February -- in February, I think I went
23 in February of '79, and that fall I went to school with
24 Duke as an inspector, you know. You had to pass
25 certain math tests, and I passed all the math. And I

1 became a mechanical inspector then.

2 Q That was going to be my next question. What was
3 your next job after the six months when you had --

4 A Mechanical. I worked in mechanical, yes.

5 Q And that was about six months after you started?

6 A Yeah -- well, I tell you.

7 Q Uh-huh.

8 A They were shutting down the Cherokee plant then.

9 Q Uh-huh.

10 A And they shut it down. And I got -- luckily, I
11 got transferred to McGuire as mechanical. I already
12 had my certs. I had most of my certs, and I got
13 transferred to McGuire, yes, yes.

14 Q In terms of when did you -- strike that.

15 McGuire refers to a particular power plant,
16 correct?

17 A It's in Huntersville, yes. That's two nuclear
18 reactors.

19 Q That was going to be my next question. I know you
20 want to jump ahead, but hang on.

21 A I'm sorry.

22 Q I'll try to keep up if I can.

23 When did you go to McGuire, approximately?

24 A In early spring of 1980, like in January or last
25 of January or something like that, you know. Yes.

1 Q And you said -- was it a new plant or an old plant
2 that had been operating?

3 A It was new, under construction at the time.

4 Q So it was brand new?

5 A Yes. I mean, it was under construction and they
6 were building.

7 Q And when you went to McGuire, just so I have it
8 straight, your job was as a mechanical inspector?

9 A Right.

10 Q And how long did you stay being a mechanical
11 inspector before your job changed again?

12 A It was about four years.

13 Q 1984?

14 A Yes.

15 Q And what was your next job?

16 A I became an inspector.

17 Q What kind of inspector?

18 A Well, we did DOT training, Department of
19 Transportation training, and various soft skill
20 trainings, safety. And some of the chemicals, a lot of
21 them were using pentalene and stuff like that which was
22 very dangerous. And we could burn the pentalene at one
23 of the plants, I mean one of the coal-fired plants and
24 just stuff like that. Anything they wanted me to
25 teach, I could do it.

1 Q Because you got to be a teacher again at Duke
2 Power?

3 A Yes.

4 Q How long did you remain a teacher?

5 A In 1994. It was like July -- I remember that
6 date. It was July the 7th or something like that I
7 went to -- went into ultrasonics, yes.

8 Q Of 1994?

9 A Yes, ma'am.

10 Q I'm going to ask you briefly about these, but I
11 just want to get the broad time periods. Okay? And
12 how long did you remain in ultrasonics after July 7,
13 1994?

14 A From then until like 2015. That's when I got the
15 mesothelioma, yes, ma'am.

16 Q And you mentioned a little while ago, though, that
17 you retired in 2002. So help us understand how you can
18 say you were in ultrasonics from '94 to 2015 if you
19 retired in 2002.

20 A Well, I retired, and I stayed retired about two
21 months. And the vendor people called me and said, "We
22 need you back to work on the same crew." I went back
23 with the same crew. And I went back, you know. I had
24 to pass their test. They had a different set of tests,
25 ultrasonic tests. So I had to pass their test. And I

1 went back to work, and I stayed with that group until
2 2015, yes.

3 Q Did you like your job, Mr. Jolly?

4 A I loved it.

5 Q What did you like about it?

6 A I like the people.

7 Q Mr. Jolly, when you -- during this period, 1980 to
8 '84, was your work as a mechanical inspector within
9 power plants?

10 A Yes, ma'am.

11 Q That type of location?

12 A Yes, ma'am.

13 Q And how about when you got to be a teacher of
14 other workers about certain issues including chemical
15 safety, 1984 to '94; did you work within the power
16 plant?

17 A Yes. We'd go around and instruct at all the
18 plants, yes.

19 Q And can you describe for the jury where in the
20 plants you would do your instruction work? Was it on
21 the floor of the operations or where?

22 A Most of the time there, it would be in conference
23 rooms.

24 Q Conference rooms?

25 A Yes, ma'am.

1 Q Like a classroom?

2 A Yes, yes.

3 Q And then ultrasonic work, starting in 1994,
4 July 7th to be specific --

5 A Yes.

6 Q -- did you work in the power plant in terms of
7 where you actually worked, or were you in the power
8 plant --

9 A I was in the power plants.

10 Q And could you just tell the jury, why did you
11 change from being an instructor to going to work that
12 took you back into the power plant? What happened?

13 A Well, they were cutting down on the instructors.
14 You know, they were going to reduce them. They figured
15 they didn't need that many of them at that point in
16 time in the history of Duke Power Company. And I
17 decided it was time to get out because they was going
18 to lay a bunch of people off that fall. And I had a
19 person that come to me and said, "Dale, we don't have
20 room for you in mechanical, but we do in ultrasonics,"
21 which is like a twin job to mechanical. And I went to
22 work with ultrasonics, yes.

23 Q Now, I want to ask you mostly about the first job
24 that you had or really the second as a mechanical
25 inspector through 1984. This part right here. Okay?

1 A Yes.

2 Q That time period.

3 A Yes, yes, yes.

4 Q Well, let me back up. Well, are you okay?

5 A Yes, ma'am.

6 Q Okay.

7 Did all of your work in terms of the work that was
8 within a power plant occur at McGuire, or did you go to
9 other power plants during this approximately four-year
10 period?

11 A I went to all three.

12 Q Okay. Tell us what those were. Well, you were at
13 McGuire.

14 A McGuire, which is in Huntersville, Catawba, which
15 is in Rock Hill, and Oconee, which is in Seneca. You
16 know, it's located -- that's the address of it. It's
17 in Seneca, yes, ma'am.

18 Q And are all of these nuclear power plants?

19 A Yes, ma'am.

20 Q And we talked about McGuire being new.

21 A Yeah.

22 Q How about Catawba, was that an older plant or was
23 that something --

24 A Okay. It was still under construction also, yes,
25 ma'am.

1 Q Okay. So it was new?

2 A Yes, yes.

3 Q It was going to be new?

4 A It was going to be new. It was in the process to
5 becoming the way it is.

6 Q And how about Ocone in Seneca?

7 A It was --

8 Q Wait. Sorry. When had that been built, if you
9 know?

10 A It was built from like '68 to '73 or -4, something
11 like that. It was finished by the time I became
12 mechanical, yes, ma'am.

13 Q And what's your understanding of when it was
14 finished and became operational such that it could
15 create energy that people could buy from Duke Power?

16 A I would think -- I don't know the exact date.

17 Q Generally speaking. Like I know you knew
18 July 7th. I'm not asking for the exact date,
19 Mr. Jolly.

20 A I'd say around '73 or something like that, the
21 last unit. There's three units there.

22 Q That was going to be my next question, which is
23 how many units, if you know, were at each of these
24 power stations?

25 A Okay.

- 1 Q How many at McGuire?
- 2 A Two.
- 3 Q And are they just called Unit 1 and Unit 2?
- 4 A Yes, ma'am.
- 5 Q How many at Catawba?
- 6 A Two. Yes, ma'am.
- 7 Q And are they also called Catawba Units 1 and Unit
- 8 2?
- 9 A Exactly, yes.
- 10 Q How about Oconee?
- 11 A Three.
- 12 Q Now, can you generally tell the ladies and
- 13 gentlemen of the jury what a unit is.
- 14 A Well, it is a self-contained unit -- oh, I'm
- 15 sorry.
- 16 (Microphone top fell off microphone.)
- 17 Q That's okay. I'll get it.
- 18 A It's got its own turbine. It's got its own
- 19 auxiliary building, turbine, and its own reactor. It's
- 20 totally separate. Some of them are kind of combined
- 21 together, but it's really totally separate from the
- 22 other units, you know. It's a separate entity within
- 23 itself, yes, ma'am.
- 24 Q Do you need some water?
- 25 A No. I'm fine.

1 Q Mr. Jolly, how big are these units?

2 A Big. Very big.

3 Q As big as this courtroom?

4 A Oh --

5 Q Smaller?

6 A I couldn't -- it's hard to describe.

7 Q If you were trying to describe it in terms of a
8 commercial building in stories, how many stories high
9 might it be?

10 A From the basement, I'm thinking about from the
11 basement -- I don't even know how many steps. It is
12 high. I'd say six stories. Six or seven or maybe even
13 more, you know. Because you're looking at a basement,
14 underground, a lot of the public don't see. It goes
15 underground maybe 150 feet, you know. You don't see
16 that.

17 Q I want to jump right into valves. Are you okay
18 with that?

19 A Yes, ma'am.

20 Q What is a valve? What does it do in the context
21 of a power plant?

22 A Well, it can open up the flow or shut off the flow
23 of a unit or a line or a system, yes, ma'am.

24 Q And --

25 A You can open and close it. The control room

1 normally does that.

2 Q And --

3 A On the big valves.

4 Q How in the world would a control room impact the
5 flow of fluid in a valve away from the control room?

6 A Well, it was hooked up to the valve. They had the
7 control, and it was -- I don't know exactly how they
8 done it. But they wouldn't let you in the control room
9 unless you had a real -- you had to have a real good
10 reason. Special permission. And they could push a
11 button and open and close that valve. Open it or close
12 it. Push a button to open it, push another button and
13 it would close it. That's the way they did it.

14 Q Okay. And did they also throughout these units
15 have gauges for the various valves that would --

16 A Yes, ma'am. They knew the pressure going through
17 that line, yes.

18 Q Mr. Jolly, you had your deposition taken about a
19 year ago. Do you remember that?

20 A Yes, ma'am.

21 Q Over several days?

22 A Yes, ma'am.

23 Q And you were asked questions, correct?

24 A Yes, ma'am.

25 Q Mr. Jolly, was the deposition a situation where

1 you just show up and volunteer information and tell
2 people what you know, or do you answer the questions
3 that people ask you?

4 A You answer the questions.

5 Q Okay. Do you recall being asked over multiple
6 days of deposition the simple question, "Are you
7 familiar with Crosby valves?"

8 A No.

9 Q Nobody asked you?

10 A No.

11 Q Were you asked over many days of deposition the
12 simple question, "Mr. Jolly, during your work history,
13 do you remember working with Fisher Control valves and
14 equipment?"

15 A No, ma'am, no.

16 Q Okay. So let us ask you now. Mr. Jolly, when you
17 worked, and I'm going to limit it right now to your
18 work as a mechanical inspector in the '80 to '84 time
19 frame, did you work around valves manufactured by
20 Crosby?

21 A Yes, ma'am.

22 Q At McGuire. Let's go there.

23 A Yes, ma'am.

24 Q Both units?

25 A Yes.

- 1 Q Catawba?
- 2 A Yes.
- 3 Q Both units?
- 4 A Yes.
- 5 Q Did they have Crosby valves that you worked around
- 6 at Ocone??
- 7 A Yes, ma'am.
- 8 Q All three units?
- 9 A Yes, ma'am.
- 10 Q How about Fisher --
- 11 A Yes, ma'am.
- 12 Q Wait for me. Wait for me. I'm going to ask it in
- 13 three just to spare your energy. When you worked at
- 14 both units at McGuire -- and we're going to talk about
- 15 the work in a minute -- Catawba and Ocone, did you
- 16 work around Fisher valves?
- 17 A Yes, ma'am.
- 18 Q Are you okay? We can take a break.
- 19 A Yes, ma'am. I'm fine.
- 20 Q Mr. Jolly, what's an outage or a shutdown?
- 21 A Well, when they bring a unit down to change the
- 22 uranium -- uranium lasts so long. Back then it didn't
- 23 last that long. Now it lasts a long time. They got
- 24 better uranium.
- 25 And they bring it down. And when they were

1 changing out the uranium core, they would work on all
2 the other sector-related systems required by the NRC.
3 They required them to split up everything into ten-year
4 segments. The NRC had them to do it. And you would
5 work on a tenth of the safety-related system that year
6 during the outage. One outage or two outages, you
7 still work on a tenth, a tenth of safety-related
8 valves.

9 Q Okay.

10 A Yes. And on the other valves. I mean not on the
11 safety related, you know, for the shutdowns, yes.

12 Q So, is a shutdown, also known as an outage, a time
13 where the plant is not operational? The unit is not
14 operational?

15 A Yes, ma'am.

16 Q Mr. Jolly, do you know what a flange is?

17 A Yes.

18 Q What is it?

19 A You can join two pipes together with it. You put
20 bolts in it and a gasket goes between it, yes, yes.

21 Q Did Crosby and Fisher valves at these units have
22 flange faces?

23 A Yes, they did, yes.

24 Q Are you okay?

25 A (Nodding.)

1 Q Can you just describe to the jury what your work
2 was as a mechanical inspector -- I'm sorry. I put
3 instructor -- mechanical inspector from 1980 to 1984 at
4 these plants?

5 A My job as a mechanical inspector on safety-related
6 systems and some of the other systems, the maintenance
7 crew would call us down and we had to sign off. I was
8 an inspector authorized by the NRC.

9 Q I'm sorry. What is the NRC?

10 A Nuclear Regulatory Commission.

11 Q Okay. Because we talked about the fact that these
12 are nuclear plants.

13 A Yes, ma'am.

14 Q And they are highly regulated by the NRC?

15 A Oh, yes.

16 Q Okay.

17 A Yes, ma'am.

18 Q Go ahead.

19 A When they would take one of these valves apart, we
20 had to verify the gasket that went back in it. Whether
21 it was rubber, asbestos, whatever, we had to verify the
22 number on it by the manufacturer's manual. And we were
23 trained in the manufacturer's manual. And we had to
24 document that because we were liable. We could go to
25 jail if we documented something that caused an accident

1 and killed somebody later. And we had to be on the
2 ball. We had to -- when we signed it off, that was it,
3 you know, that we had verified that gasket went with
4 that valve or that flange. And that's the way we did,
5 yes, ma'am.

6 And then when you went to put it back together,
7 before, when they took out the gasket a lot of times
8 they would call us. And we'd get there before they
9 even took out the gasket. And they would be cleaning
10 with a wire -- I know you have seen these little wire
11 brushes, air operated, b-z-z-z, you know. You had to
12 wear goggles. And we had to stand back a little bit,
13 but not much, and we wore safety glasses with eye
14 shields. And they would be grinding, and the dust
15 would be everywhere. And they had to clean that flange
16 off because they couldn't put the new gasket in because
17 it wouldn't torque up, you know, a hundred percent.

18 And I don't know if you know what torquing is, but
19 torque, we had to be there for the torquing of that
20 gasket to go in. We had to look at the gasket and say
21 this is the right number. And then they had to torque
22 that thing back in in a certain pattern. You know,
23 they go one two, three, four, in between, according to
24 how many. And we had a certain torque pattern for like
25 a 12-inch valve or 16 that was in our book, in our

1 paper that we carried around. And we would have to
2 watch them torque it up completely, whether it be
3 600 pounds -- some of them nuts even had 600-pound
4 torques on them. But they would torque that thing down
5 slowly and squeeze it together. If they didn't, some
6 of the pressure was like over 1,200 pounds per square
7 inch. In some lines it was even 10,000 pounds. It
8 could kill you. So we had to verify that, the gaskets
9 and the torquing back, and sometimes the cleaning, yes,
10 ma'am.

11 Q So, Mr. Jolly, it sounds like this business of
12 removing a gasket from a flange surface on a valve, the
13 process of removal --

14 A Yes, ma'am.

15 Q -- identifying the replacement gasket --

16 A Yes, ma'am.

17 Q -- and the reinstallation through this torquing
18 process --

19 A Yes, ma'am.

20 Q -- that's pretty serious business?

21 A It's very, very serious.

22 Q Now, let me ask you, Mr. Jolly. Could you or
23 anyone else at Duke simply choose on a valve to use any
24 kind of gasket that you wanted?

25 A Absolutely not.

1 Q Why not?

2 A It would break -- it would break the NRC's rule.
3 We couldn't do that. We could go to jail, you know.
4 We couldn't do it. And it might leak. And if you had
5 12,000 -- 1,200 pounds of steam shooting out a valve,
6 it can cut off somebody's arm or leg if they walked by
7 it. So it had to be the correct, per the
8 manufacturer's manual for that valve, whether it be --
9 whatever kind of valve it was, whether it be a Crosby
10 or Fisher or any other kind of valve, it had to be per
11 that valve, that size of the valve, the size. The head
12 gasket and, you know, the flange gasket had to be for
13 that size and that type of flange.

14 Q I don't want to cut you off. Something tells me
15 even though this water is sitting here, it's not in a
16 cup so you won't drink it.

17 A Thank you, ma'am.

18 Q Mr. Jolly, you referred to a manufacturer's manual
19 for the valves?

20 A Yes, ma'am.

21 Q Were there manuals for Crosby valves and Fisher
22 valves, the specific valves which were at these units?

23 A Yes, ma'am, exactly.

24 Q And what were they used for?

25 A They were used -- they told you which gasket to

1 use for a certain flange, you know, or valve, yeah.

2 They were very detailed. And they were good books, you
3 know.

4 Q So could you, Dale Jolly, go to the Crosby Valve
5 manual for a particular valve and it call for a 316 SS
6 asbestos gasket --

7 A Yes, ma'am.

8 Q Hang on.

9 A Yes, ma'am.

10 Q Was it that specific?

11 A Well, yes. I would say so, yes. It was specific,
12 yes.

13 Q But could you just look at it and say, you know
14 what, we don't really have those gaskets in stock.
15 We're just going to use vegetable gaskets or rubber
16 gaskets or cork gaskets. We're just going to freewheel
17 it and do our own thing.

18 Could you do that, Mr. Jolly?

19 A No, we couldn't do that.

20 Q I want to get a little specific just about one of
21 the units while we have you here. Okay?

22 A Okay.

23 Q The jury has seen a document that you have not
24 seen, but I'll put it up, Exhibit 6359. And it's a
25 photograph or a copy.

1 Hang on. I'm going to move this.

2 A It's okay.

3 Q I don't want to have you bending over here.

4 It's a black-and-white copy of a three-ring kind
5 of folder. Can you see that?

6 A Yes, ma'am, I see it. It is from a three-ring
7 folder.

8 Q And this refers to Crosby safety valves installed
9 at Duke Power, McGuire Unit Number 1?

10 A Yes, ma'am.

11 Q Okay. Did you see these kind of documents and
12 things during your work?

13 A Yes, ma'am.

14 Q The second page identifies that it is Crosby
15 valves, McGuire Station, Unit Number 1?

16 A Yes, ma'am.

17 Q And the valve location?

18 A Yes, ma'am.

19 Q Can you see that far?

20 A Yes, ma'am, I can. Yes.

21 Q Okay. And here we have, for instance, six Crosby
22 valves at the reheater turbine?

23 A Okay.

24 Q Of McGuire Number 1?

25 A Yes, ma'am. That's where it is.

1 Q Does that make any sense to you?

2 A Yes, ma'am.

3 Q Can you tell the jury what that means?

4 MR. REID: Objection to form, Your Honor. Vague
5 and indefinite.

6 THE COURT: Overruled.

7 BY MS. FARRISE:

8 Q Let me ask a smaller question. Mr. Jolly?

9 A Yes, ma'am.

10 Q Do you know what kind of valve they're talking
11 about when they refer to a reheater turbine valve at
12 Unit Number 1 at McGuire? Is that a kind of valve that
13 you understand what kind of equipment that is?

14 A Yes.

15 Q Okay. And, for instance, there's also a reference
16 to a valve -- 20 valves, actually, by Crosby at McGuire
17 Number 1 on the main steam. Do you see that?

18 A Yes, ma'am.

19 Q Does that make any sense to you?

20 A Yes, ma'am.

21 Q You know what a main steam valve is?

22 A Yes, ma'am.

23 Q Okay. Can you -- I took the document down because
24 I think it's --

25 A The documents, I was going to say --

1 Q We're not giving you an eye test.

2 A We got it and it would either say reheater valve
3 or main steam valve. We wouldn't go up to it on our
4 own, but we had a specific location that they would
5 send us to the main steam or the reheater turbine
6 valve. They'd send us to that specific location, you
7 know. We just didn't malingering off and go to it on our
8 own, you know.

9 Q I understand. My question, I think for
10 clarification, though, Mr. Jolly, is when you were
11 doing your work, they didn't say, "Go to the Crosby
12 Valve." They said, "Go to the valves on the Number
13 1 --

14 A That's right, exactly.

15 Q -- reheater turbine"?

16 A Yes, ma'am.

17 Q How big of valves are we talking about in terms of
18 size that we were just talking about?

19 A Some of them are very big.

20 Q What does that mean for us who only have --

21 A Some of them are big. Some of the main steam
22 valves, steam sump valves, you could fall off in it and
23 get hurt. I mean, it is this wide across.

24 Q Could I walk through the flange opening? Is it
25 taller than me?

1 A Well, you could. You wouldn't want to, though,
2 because it goes down like this and you would break your
3 neck. But, anyway, a lot of times we would -- when
4 they put the gaskets back on, there were maybe 65 bolts
5 around these things. They were big. I mean big. Yes,
6 main steam sump valves, yes.

7 Q So when you say 65 volts -- bolts, sorry.

8 A I mean -- yes.

9 Q I know, bolts.

10 A A lot. I mean, I'm not saying specifically 65.

11 Q I understand.

12 A Might have been 49 or 52. But it looks like that
13 because if you fell off into that valve, you could get
14 hurt.

15 Q Right. So if I'm standing there and I'm looking
16 at the Crosby valve on the main steam line of Unit
17 Number 1 at McGuire --

18 A Yes.

19 Q -- it would be a big, round opening?

20 A Yes. Some of them are big.

21 Q That would take like 60 and 70 bolts around to
22 connect it to the pipe?

23 A Yes, ma'am.

24 Q Would there be a gasket?

25 A Oh, yes, ma'am.

1 Q What kind?

2 A The kind specified by the manufacturer, yes,
3 ma'am.

4 Q Does the application of the line and the valve
5 make a difference like if it's a high -- if it's a high
6 temperature steam line, if it's a high pressure line?

7 A Yes, ma'am.

8 MR. REID: I just object because -- objection.
9 The question is vague. We're talking about valves
10 generally, apparently. I'd like counsel to clarify
11 that.

12 THE COURT: Well, Ms. Farrise, try to be specific.
13 Objection is overruled.

14 MS. FARRISE: Yes.

15 Q Mr. Jolly, you had to have a little schooling
16 about pipefitting and things like that, correct?

17 A Yes, ma'am.

18 Q What kind of training and background did you have
19 about how to join a pipe to a valve and those sorts of
20 things?

21 A It was fairly extensive. It was in a classroom
22 setup with actual models. We had to demonstrate that
23 we could do it to an instructor, the right torque
24 pattern, and using our manuals and verifying the
25 correct gasket and gasket number. It was fairly

1 strict. Yes, it was strict.

2 Q And as part of that general training, did you also
3 get some training on the type of gaskets that could be
4 used in certain type of settings like temperature
5 settings and things like that in a general way?

6 A Basically, yes, yes, yes.

7 Q Could you use, Mr. Jolly, a rubber gasket in a
8 line that was 1,200 degrees?

9 A No, ma'am.

10 Q Why not?

11 A It would melt. I mean, you know, it would leak,
12 yes.

13 Q Did you learn and were you trained to distinguish
14 a rubber gasket from a cork gasket from a fibrous
15 asbestos gasket?

16 A Yes, ma'am. Yes, ma'am.

17 Q Mr. Jolly, when you worked at -- let's just take
18 McGuire, Unit Number 1, did you see people, as part of
19 the outages that came after it went online, removing
20 gaskets from the main steam line on that unit?

21 A Would you repeat that again?

22 Q Sure. It was a long question. McGuire Number 1?

23 A Yes.

24 Q Did you ever work there when there was an outage?

25 A Definitely, yes.

1 Q Okay. And during the outage, did the flange to
2 the main steam line and the turbine reheater, those
3 valves --

4 A Yes.

5 Q -- did those flanges get broken?

6 A Yes, ma'am.

7 Q Okay. Why?

8 A Because mostly during an outage, any nuclear
9 safety-related equipment, and it's nuclear
10 safety-related deemed by the NRC, they have to do it.
11 They have to check them, put new gaskets on, you know.
12 Yes, ma'am.

13 Q And were you in the area when these gaskets on
14 these flange faces that were, in some cases many bolts,
15 removed?

16 A Yes.

17 Q And can you describe the process of removal of
18 these gaskets?

19 A Yes. They would break the flanges and either take
20 the top off and clean it using wire brushes or brass
21 brushes. Back then they could clean them with just
22 about anything. I think they changed their cleaning
23 techniques years later. It wasn't as abrasive, but
24 they could still clean it. And they would use little
25 90 grinders to clean off all around the bolts. And the

1 bolts had to be cleaned too. And the nuts had to be
2 looked at for defects. You know, any burr on them or
3 anything, you reject it, you reject the bolt or the
4 nut, anything that you saw, you were trained to look
5 at, you could reject that on your own. Nobody else
6 could tell you as an inspector what to do. I mean, you
7 had complete control over that job until you saw the
8 last bolt being torqued and the gasket put in, yes.

9 Q And did the process of removing the old gasket
10 with the grinders that you just described at McGuire,
11 let's say Unit Number 1, main steam line --

12 A Yes, ma'am.

13 Q -- did that create dust?

14 A Oh, definitely, yes. Dust is particles in the air
15 that you couldn't see because -- you know, particles
16 that you couldn't even see. You could tell. That's
17 why we had to wear ear plugs. It would just whine. It
18 was so loud. You know, that little 90 grinder was loud
19 so it would affect your hearing too. So we wore
20 earplugs or ear muffs to deflect the sound.

21 Q And did you breathe that dust, Mr. Jolly?

22 A Yes, ma'am. Yes, ma'am.

23 Q But you weren't working with the -- you weren't
24 removing the gasket yourself, so how did you breathe
25 the dust?