THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2020-000662

RECEIVED
Jun 15 2020
SC Court of Appeals

Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey, ... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc ..... Defendants,

of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ..... Appellants.

and

Terran Dupree, ... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; Imerys Talc America, Inc. f/k/a Luzenac America, Inc.; Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy, Inc.; Rite Aid of South Carolina, Inc., ... Defendants,

of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the ..... Appellants.

MEMORANDUM IN SUPPORT OF IMMEDIATE APPEALABILITY

This memorandum is provided to this Court in response to a letter request questioning appealability. The circuit court's order consolidating two unrelated cases for trial is immediately appealable, because it deprives Appellants Johnson & Johnson and Johnson & Johnson Consumer,

Inc. (together, "J&J") of substantial rights. J&J therefore has a right to appeal the order under section 14-3-330 of the South Carolina Code.

J&J filed a motion to transfer this case to the Supreme Court, along with a petition asking the Supreme Court to grant a writ of certiorari to review the consolidation order if it determines the order is not immediately appealable. *See* Pet. for Cert., attached as Exhibit 1. The parties fully briefed the appealability issue in their briefing on the motion and petition. The issue of appealability is thus pending before the Supreme Court and awaiting decision. The motion to transfer was made for efficiency so the issue of immediate appellate review of the circuit court order could be determined fully by the Supreme Court.

BACKGROUND

Respondent Mary Margaret Devey alleges that her late husband, Robert L. Devey, contracted and died from mesothelioma as a result of being exposed to asbestos in Johnson's Baby Powder, which he used for over five decades. *See* Ex. A to Pet. for Cert., *Devey* Amend. Compl. at ¶¶ 1, 10, 36. Respondent Terran Dupree alleges that at the age of 14, she was diagnosed with peritoneal mesothelioma of the abdomen as a result of exposure to asbestos in Johnson's Baby Powder as an infant and child. *See* Ex. B to Pet. for Cert., *Dupree* Compl. at ¶¶ 1, 10–11.

Respondents in both suits moved to consolidate their cases for trial.[1] The circuit court orally granted the motion to consolidate despite admitting their differences. *See* Ex. C to Pet. for Cert., 3/13/2020 Hr'g Tr. at 153:21–165:22; *see also* Ex. D to Pet. for Cert., 4/10/2020 Email from J. Toal to Louis Herns (confirming that the court's oral ruling was final).

[1] *See generally* Ex. E to Pet. for Cert., Pltfs' Mot. to Consolidate; Ex. F to Pet. for Cert., J&J's Opposition.

In its ruling from the bench, the court noted that "[t]here are certainly factual differences between these two plaintiffs. And some factual difference between the exposure in terms of an occupational exposure in addition to an exposure to baby powder in the case of Mr. Devey." *Id.* at 164. Nevertheless, the court concluded that the answers to the questions of "whether Johnson & Johnson Baby Powder contains asbestos" and whether "the use of Johnson & Johnson Baby Powder by Mr. Devey and Miss Dupree resulted in their contraction of mesothelioma" depends on "an almost completely common set of facts." *Id.* at 164–65.

These cases present an emerging and important issue facing the asbestos docket in South Carolina: consolidation of multiple cases for trial, even cases that are drastically different. In *Devey* and *Dupree*, the plaintiff or decedent asserts that his or her disease was caused by asbestos allegedly present in Johnson's Baby Powder. But the similarities end there. These two cases are as different as can be. They represent the quintessential example of cases that should not be consolidated into a single trial.

While consolidation of multiple cases may appear to create efficiencies, "the benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). That is why states across the country have limited consolidations especially in the context of allegations of asbestos exposure. The supposed efficiencies are ephemeral. As one court recognized: "Joinder 'of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of asserted claims.'" *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) (citation omitted). Consolidation allows plaintiffs to improperly bolster their claims by stacking allegations before the jury. And it generates confusion inhibiting the defendant's ability to present its defense. These factors also often lead to increased damages awards. Three J&J talcum powder trials have been held in South Carolina, and

the plaintiffs have not won any of them. Plaintiffs do not want to lose trials at a more efficient rate through consolidation. They want to tilt the scales of the trials in their favor.

As just one example of how Plaintiffs bolster their claims through consolidation, a key question at trial is whether Johnson's Baby Powder contains asbestos. Unlike many traditional asbestos cases, asbestos is not an intended component of Johnson's Baby Powder. At trial, J&J explains to the jury that, in fact, there is no asbestos present in its baby powder based on decades of testing. But if the jury hears the claims of multiple plaintiffs who both used Johnson's Baby Powder and subsequently developed mesothelioma, they may well assume that there *must* be something to the plaintiffs' allegations.

The more dissimilar the cases, the more the unfairness compounds. The unique facts of each case are critical to J&J's different defenses. But the jury may not be able to keep track of these differences or may simply overlook them. This can occur because when faced with multiple plaintiffs, juries are unable to "compartmentaliz[e] certain evidence that applies to one case but not the other." *Minter v. Wells Fargo Bank, N.A.*, 2012 WL 1963347, at *1 (D. Md. May 30, 2012). These trials involve complicated scientific arguments which are difficult enough for a jury. Consolidation multiplies the scientific concepts the jury must grapple with, making the trial exponentially more difficult and complex.

As a result, "by trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016). This phenomenon has a name: the "perfect plaintiff"—i.e., a composite plaintiff "pieced together for litigation" based on "the most dramatic" features of each individual case. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

All of these problems with consolidation are present here. *Devey* and *Dupree* are profoundly different cases. Mr. Devey is deceased, while Ms. Dupree is living and currently cancer-free. That alone is especially problematic because "dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living." *Malcolm*, 995 F.2d at 351–52. Mr. Devey was 70 years old at the time of his death, and Ms. Dupree is 20 years old (she was diagnosed at age 14). Mr. Devey was diagnosed with pleural mesothelioma, cancer in the lining of the lung often associated with asbestos exposure. Ms. Dupree was diagnosed with peritoneal mesothelioma, a cancer in the lining of the abdomen that is less strongly associated with asbestos exposure, particularly in women.

Mr. Devey "worked with asbestos" while employed at a Garlock facility which manufactured asbestos-containing products. His pleural mesothelioma likely developed from exposure to asbestos there. Ms. Dupree has no similar known occupational exposure to asbestos. Her peritoneal mesothelioma likely developed as a result of naturally occurring genetic errors during cell replications. Studies show that between 95% and 99% of peritoneal mesotheliomas in women develop this way. Mr. Devey has a personal history of other types of cancers suggesting a genetic predisposition to developing cancer, while Ms. Dupree has no similar history of cancer.

Mr. Devey says he used Johnson's Baby Powder for over 55 years from the 1960s until 2017. Ms. Dupree says she used Johnson's Baby Powder for 12 years from 1999–2011. The different timeframes affect the arguments relating to dose: the amount of asbestos exposure each plaintiff claims. As courts recognize, exposure to asbestos "fortunately does not always result in disease"; an individual must have a sufficiently high dose. *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 352 (Tex. 2014). Those doses are different between the cases. The most similar aspect of the two plaintiffs is their similar sounding last names, which only serves to exacerbate the confusion that

will infect the trial. All these differences mean different expert and fact witnesses will be necessary, and the evidence regarding compensatory damages will be different.

That both cases involve claims for punitive damages further prevents a fair trial. The Due Process Clause of the U.S. Constitution "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of a specific plaintiff's individual case. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). That assurance is not possible in a consolidated case like this one.

Plaintiffs do not address all the differences between the two plaintiffs. Plaintiffs' theory seems to be that if they can identify *any* common issue between cases, then those cases can be consolidated no matter how many other dissimilarities exist or how much consolidation prejudices the defendant. Plaintiffs have not cited a single case like this one: plaintiffs with different diseases, with different alternative causation defenses, where one is living and the other is deceased. Consolidation under these circumstances violates J&J's fundamental right to a fair jury trial.

For a full explanation regarding how the consolidation order prejudices J&J and deprives it of its substantial rights, *see* J&J's petition for certiorari filed with the Supreme Court, attached as Exhibit 1.

ARGUMENT

The circuit court's order consolidating *Devey* and *Dupree* is immediately appealable. Plaintiffs do not argue that consolidation orders are never immediately appealable. *See* Resp. Memo. at 4 ("An order consolidating cases for trial is a non-final, interlocutory order, which is *generally* not appealable." (emphasis added)). Likewise, J&J does not argue that *all* consolidation orders are immediately appealable. While the general rule is that an appeal may only be pursued after a final judgment, certain orders "affecting a substantial right" are immediately appealable.

S.C. Code § 14-3-330(2). "In a well-established exception to the general rule," the Supreme Court "repeatedly ha[s] held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). For example, the denial of the right to a trial by jury is immediately appealable. *Lester v. Dawson*, 327 S.C. 263, 267 (1997). Similarly, an "order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed." *Hagood*, 362 S.C. at 197, 607 S.E.2d at 710. And "orders establishing [an] 'opt-in' notification procedure" in the context of class actions are immediately appealable because they affect substantial rights and the mode of trial. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008).

The appellate courts must analyze the appealability of a consolidation order on a case-by-case basis, as they do in all other cases. *See Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019). And they must consider the *effect* of the order, not its label. *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303–04 & n.6, 705 S.E.2d 475, 478–79 & n.6 (Ct. App. 2011). Thus, to determine whether a consolidation order is immediately appealable under section 14-3-330 of the South Carolina Code, the substance and effect of the order must be assessed. The consolidation order at issue here is immediately appealable because it has the effect of depriving J&J of its substantial right to a fair jury trial for the reasons discussed below and in J&J's petition for certiorari.

The consolidated trial accordingly deprives J&J of its right to a fair jury trial, as discussed above and more fully in the petition for certiorari. *see* Exhibit 1. Consolidation unfairly allows Plaintiffs to bolster their allegations simply by stacking the allegations on top of each other. If a jury hears the claims of multiple plaintiffs who used Johnson's Baby Powder and subsequently

developed mesothelioma, they may well unfairly assume that there *must* be something to the plaintiffs' allegations. But it may be difficult to ascertain after trial whether this sort of reasoning influenced the jury. Accordingly, an appeal only after the final judgment is not adequate to protect J&J's interests. *See Hagood*, 362 S.C. at 197, 607 S.E.2d at 710 ("[A]n appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney."). That is just one example of the prejudice to J&J.

No South Carolina appellate court has addressed the appealability of a consolidation order like the one at issue here. Although the Supreme Court mentioned the appealability of a consolidation order in *South Carolina Public Service Authority v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986), *Arnold* does not control.

First, the Supreme Court issued the *Arnold* opinion after the South Carolina Public Service Authority appealed a final judgment against it, and the court considered only two issues in the appeal: (1) whether a case remains stayed in the trial court when the appellate court has dismissed an appeal but a petition for rehearing remains pending; and (2) whether the trial court properly consolidated the cases. *Id.* at 585–86, 340 S.E.2d at 536–37. The Supreme Court merely recited its dismissal of the interlocutory appeal as the fact forming the basis for its holding that the dismissal of the appeal restored jurisdiction to the circuit court in spite of the appellant's petition for rehearing. *Id.* at 586, 340 S.E.2d at 537.

Second, although the consolidation order in *Arnold* predated the South Carolina Rules of Civil Procedure, the consolidation at issue was analogous to permissive joinder under the current rules, which allow all persons to join as plaintiffs—or to be joined as defendants—if any right to relief at issue arose "out of the same transaction, occurrence, or series of transactions or

occurrences and if any question of law or fact common to [all plaintiffs or all defendants] will arise in the action." *See* Rule 20(a), SCRCP.

In *Arnold*, the trial court consolidated condemnation actions filed by a single plaintiff—a state agency—against six adjacent landowners *at the landowners' request*. *Id.* Condemnation actions asserted by a single state agency against six adjacent landowners arise out of the same series of transactions or occurrences and have common questions of fact and law. *See id.* Further, the six defendant landowners *consented* to the consolidation. *Id*. at 585, 340 S.E.2d at 536 ("The landowners moved to consolidate the actions for trial"). Accordingly, the Supreme Court's determination in *Arnold*—that the consolidation order at issue in that proceeding was not appealable—is logical. *That* consolidation order merely consolidated six nearly identical claims the state agency asserted against adjacent landowners.

In contrast, the appealed order in this case consolidated two unique cases filed by different plaintiffs arising from different occurrences and based on different sets of facts, and is thus not controlled by *Arnold*. *See Thompson*, 426 S.C. at 295, 826 S.E.2d at 870 ("[B]y its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis."); *Wetzel*, 364 S.C. at 592, 615 S.E.2d at 438 (stressing that appealability is controlled by the *effect* of an order, rather than its label).

Further, the consolidation order in this case forces J&J to try two unrelated cases simultaneously, which deprives J&J of its right to a fair jury trial in each case—thus affecting J&J's substantial rights. As such, the consolidation order regarding these two separate matters infringes on and diminishes the J&J's right to a jury trial in each matter, with respect to each plaintiff. The South Carolina Constitution requires that the right to a jury trial be fully protected. *See* S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged

with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.").

J&J is entitled to a fair jury trial in ***each*** case. The improper consolidation of these two disparate cases prejudices J&J by depriving it of this right. As noted above, the two cases consolidated for trial involve different injuries, different types of exposure, different durations of exposure, different mitigation, different diagnoses, and different defenses. The conflation of these two disparate cases into a single trial deprives J&J of a meaningful jury trial in either of the cases, resulting in an order affecting the mode of trial that is immediately appealable, and must be immediately appealed. *See e.g.*, *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709; *Salmonsen*, 377 S.C. at 452, 661 S.E.2d at 87.

Plaintiffs fail to specifically analyze the appealability of the order at issue in this case. Instead, they quote—in bold and out of context—a sentence in *Ellis by Ellis v. Oliver*: "The merger of actions under consolidation is never so complete as to deprive any party of a substantial right." Resp. Memo at 5 (quoting *Ellis by Ellis v. Oliver*, 307 S.C. 365, 367, 415 S.E.2d 400, 401 (1992)). That case had nothing to do with when an interlocutory appeal is permissible. There, the lower court held that the case could be venued where any one of the multiple consolidated defendants resided. But each defendant had the "right to have venue in the county of his residence." *Ellis*, 307 S.C. at 368, 415 S.E.2d at 401. The court simply ruled that consolidation could not be used to deprive a defendant of that right. *Ellis* is a particularly bizarre case for Plaintiffs to cite as the Supreme Court reversed the lower court's order in a pre-trial appeal. That is similar to what J&J is asking this Court to do now: ensure before trial that consolidation does not deprive J&J of its substantial rights—in this case, its right to a fair jury trial.

CONCLUSION

This consolidation is extraordinary. Plaintiffs do not cite a single case like it. This Court should rule that the consolidation order is immediately appealable.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Nicholas A. Charles
C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

MILLIGAN & HERNS, PC

Louis P. Herns
SC Bar No. 3087
E-Mail: louis@milliganlawfirm.com
721 Long Point Road, Ste. 401
Mt. Pleasant, SC 292464
(843) 971-6750

Attorneys for Appellants Johnson & Johnson and Johnson & Johnson Consumer, Inc.

Columbia, South Carolina
June 15, 2020

Exhibit 1

(Petition for Certiorari with Accompanying Exhibits)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899

Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey, ... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc ..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ..... Petitioners.

And

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Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the ..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rules 245 and 240 of the South Carolina Appellate Court Rules, Petitioners Johnson & Johnson and Johnson & Johnson Consumer, Inc. (together "J&J") hereby petition this Court to issue a writ of certiorari in the above-captioned actions and reverse the circuit court's

March 13, 2020 ruling consolidating *Devey* and *Dupree* for trial. J&J understands this Court exercises its powers to issue extraordinary writs sparingly, as it should. In this instance, however, the exercise of this Court's extraordinary writ power is warranted.[1] These proceedings present exceptional circumstances and raise critical issues that both affect the public interest and have a significant impact on J&J's rights, including its constitutional right to a full and fair jury trial.

INTRODUCTION

These cases present an emerging and important issue facing the asbestos docket in South Carolina: consolidation of multiple cases for trial, even cases that are drastically different. In fact, the same circuit court indicated it planned to consolidate five more cases on the asbestos docket for a single trial shortly after its order here. And the circuit court suggested that it would consolidate more trials going forward. In *Devey* and *Dupree*, the plaintiff or decedent asserts that his or her disease was caused by asbestos allegedly present in Johnson's Baby Powder. But the similarities end there. These two cases are as different as can be. They represent the quintessential example of cases that should not be consolidated into a single trial.

While consolidation of multiple cases may appear to create efficiencies, "the benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). That's why states across the country have limited consolidations especially in the context of allegations of asbestos exposure. And the supposed efficiencies are ephemeral. As

[1] J&J has a good faith belief that the circuit court's ruling may be immediately appealable, and indeed may be required to be immediately appealed. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). Accordingly, in parallel with the filing of this Petition, J&J has filed with the Court of Appeals a notice of appeal from the circuit court's ruling and has moved to transfer that appeal to this Court pursuant to Rule 204(b), SCACR. This Petition is filed as an alternative means of relief should it be determined that the circuit court's ruling is not immediately appealable. If this Court determines the circuit court order is not immediately appealable, this Court should nevertheless review the circuit court's order by way of the issuance of this Writ.

one court recognized: "Joinder 'of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of asserted claims.'" *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) (citation omitted). Presenting *Devey* and *Dupree* to the jury requires presenting the facts pertaining to two different plaintiffs, with different witnesses, along with different defenses. Combining the two cases would add to the length of trial while injecting confusion and unfairness.

Consolidation is unfair because it allows the plaintiffs to bolster their allegations simply by stacking the allegations on top of each other. As just one example, a key question at trial is whether Johnson's Baby Powder contains asbestos. Unlike many traditional asbestos cases, asbestos is not an intended component of Johnson's Baby Powder. At trial, J&J explains to the jury that, in fact, there is no asbestos present in its baby powder based on decades of testing. But if the jury hears the claims of multiple plaintiffs who both used Johnson's Baby Powder and subsequently developed mesothelioma, they may well assume that there *must* be something to the plaintiffs' allegations.

The more dissimilar the cases, the more the unfairness compounds. The unique facts of each case are critical to J&J's different defenses. But the jury may not be able to keep track of these differences or may simply overlook them. This can occur because when faced with multiple plaintiffs, juries are unable to "compartmentaliz[e] certain evidence that applies to one case but not the other." *Minter v. Wells Fargo Bank, N.A.*, 2012 WL 1963347, at *1 (D. Md. May 30, 2012). These trials involve complicated scientific arguments which are difficult enough for a jury. Consolidation multiplies the scientific concepts the jury must grapple with, making the trial exponentially more difficult and complex.

As a result, "by trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio v.*

Monsanto Co., 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016). This phenomenon has a name: the "perfect plaintiff"—i.e., a composite plaintiff "pieced together for litigation" based on "the most dramatic" features of each individual case. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

All of these problems with consolidation are present here. *Devey* and *Dupree* are profoundly different cases. Mr. Devey is deceased, while Ms. Dupree is living and currently cancer-free. That alone is especially problematic because "dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living." *Malcolm*, 995 F.2d at 351-52.

Mr. Devey was 70 years old at the time of his death, and Ms. Dupree is 20 years old (she was diagnosed at age 14). Mr. Devey was diagnosed with pleural mesothelioma, cancer in the lining of the lung often associated with asbestos exposure. Ms. Dupree was diagnosed with peritoneal mesothelioma, a cancer in the lining of the abdomen that is less strongly associated with asbestos exposure, particularly in women.

Mr. Devey "worked with asbestos" while employed at a Garlock facility which manufactured asbestos-containing products. His pleural mesothelioma likely developed from exposure to asbestos there. Ms. Dupree has no similar known occupational exposure to asbestos. Her peritoneal mesothelioma likely developed as a result of naturally occurring genetic errors during cell replications. Studies show that between 95% and 99% of peritoneal mesotheliomas in women develop this way. Mr. Dupree has a personal history of other types of cancers suggesting a genetic predisposition to developing cancer, while Ms. Dupree has no similar history of cancer.

Mr. Devey says he used Johnson's Baby Powder for over 55 years from the 1960s until 2017. Ms. Dupree says she used Johnson's Baby Powder for 12 years from 1999-2011. The different

timeframes affect the arguments relating to dose: how much asbestos each plaintiff claims to be exposed to. As courts recognize, exposure to asbestos "fortunately does not always result in disease;" an individual must have a sufficiently high dose. *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 352 (Tex. 2014). Those doses are different between the cases. The most similar aspect of the two plaintiffs is their similar sounding last names, which only serves to exacerbate the confusion that will infect the trial.

That both cases involve claims for punitive damages further prevents a fair trial. The Due Process Clause of the U.S. Constitution "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of a specific plaintiff's individual case. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). That assurance is not possible in a consolidated case like this one.

The plaintiffs' claims in the two cases and J&J's responses to them are very different. The differences in these cases highlights the often unfair and inefficient nature of a consolidated trial in the personal injury context. Nowhere is that problem more acute than here, as Plaintiffs will be able to juxtapose Ms. Dupree, a young and cancer-free living Plaintiff, with the deceased Mr. Devey, and suggest, without sound scientific basis, that Ms. Dupree is likely to suffer the same fate.

This Court should weigh in now to provide guidance on the issue of consolidation. Otherwise the courts may face a spate of asbestos consolidation appeals. Any hope of gaining efficiency through consolidation would backfire if verdicts are undone and remanded for individual trials. Judicial efficiency counsels in favor of granting the petition to lay out the ground rules for consolidation, particularly in such an extraordinary consolidation as the one presented here where the plaintiffs are so different and the unfairness so manifest.

This Court should issue a writ of certiorari to correct the lower court's ruling.

BACKGROUND

Respondent Mary Margaret Devey alleges that her late husband, Robert L. Devey, contracted and died from mesothelioma as a result of being exposed to asbestos in Johnson's Baby Powder, which he used for over five decades. *See* Ex. A, *Devey* Amend. Compl. at ¶¶ 1, 10, 36. Respondent Terran Dupree alleges that at the age of 14, she was diagnosed with peritoneal mesothelioma of the abdomen as a result of exposure to asbestos in Johnson's Baby Powder as an infant and child. *See* Ex. B, *Dupree* Compl. at ¶¶ 1, 10–11.

The facts of these cases vary in several significant ways, as illustrated in the chart below.

	Devey	**Dupree**
Status	Deceased	Living and cancer-free
Age	70 at time of death	20
Age at Diagnosis	69	14
Cause of Action	Wrongful Death	Personal Injury
Diagnosis	Pleural Mesothelioma (lining of the lung)	Peritoneal Mesothelioma (lining of the abdomen)
Medical History	Skin cancers, melanoma, and ependymoma	Not identified
Alleged Manner of Johnson's Baby Powder Use	Primarily personal use and use on others	Primarily from others applying powder to her, and also personal use.
Alleged Duration of Johnson's Baby Powder Use	55+ years	12 years
Alleged Years of Talcum Powder Use	1960s-2017	1999-2011
Alternative Causation	Occupational exposure to asbestos	Naturally occurring peritoneal mesothelioma
Damages Sought	Loss of consortium	Compensatory

Respondents in both suits moved to consolidate their cases for trial.[2] The Honorable Jean H. Toal orally granted the motion to consolidate despite their admitted differences. *See* Ex. C,

[2] *See generally* Ex. E, Pltfs' Mot. to Consolidate; Ex. F, J&J's Opposition.

3/13/2020 Hr'g Tr. at 153:21-165:22; *see also* Ex. D, 4/10/2020 Email from J. Toal to Louis Herns (confirming that the court's oral ruling was final).

In its ruling from the bench, the court noted that "[t]here are certainly factual differences between these two plaintiffs. And some factual difference between the exposure in terms of an occupational exposure in addition to an exposure to baby powder in the case of Mr. Devey." *Id.* at 164. Nevertheless, the court concluded that the answers to the questions of "whether Johnson & Johnson Baby Powder contains asbestos" and whether "the use of Johnson & Johnson Baby Powder by Mr. Devey and Miss Dupree resulted in their contraction of mesothelioma" depends on "an almost completely common set of facts." *Id.* at 164-65.

J&J appealed the circuit court's order by serving a Notice of Appeal on April 13, 2020, and filing it with the Court of Appeals on April 23, 2020. *See* Ex. G, Notice of Appeal; *see also* Rule 203(d)(1)(B), SCACR. Immediately thereafter, J&J moved to transfer the appeal to this Court, so this Court could consider the appealability issue and, if necessary, certiorari issue raised hereby.

ARGUMENTS

This Court should issue a writ reversing the circuit court's consolidation ruling. Rule 42(a) of the South Carolina Rules of Civil Procedure provides that a court may consolidate actions when they involve "a common question of law or fact." Rule 42(a), SCRCP. "The moving party has the burden of persuading the court that consolidation is desirable." *Keels v. Pierce*, 315 S.C. 339, 341, 433 S.E.2d 902, 904 (Ct. App. 1993) (affirming denial of motion to consolidate).

Consolidation is inappropriate if it leads to inefficiency, inconvenience, or unfair prejudice to a party. *See Hopper v. Session*, No. 5:17-cv-03364-MGL-KDW, 2018 U.S. Dist. LEXIS 92769, *3 (D.S.C., April 30, 2018) (citing *EEOC v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998)). A

consolidated trial would not just be prejudicial, it would deprive J&J of a fair trial in violation of its Due Process rights. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."); *Desert Empire Bankv. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980) ("[A] trial court must ... determine whether the permissive joinder of a party will comport with the principles of fundamental fairness.").

Consolidation would allow the plaintiffs to bolster their claims merely by stacking allegations on top of each other. *See infra* § I. The cases involve different claims, different defenses, and different evidence, making a consolidated trial less efficient and confusing. A jury may well not be able to keep track of all these differences. *See infra* § II. The problem is exacerbated in the context of punitive damages because the Due Process Clause requires courts to provide assurances that any punitive award is tailored to each individual plaintiff. *See infra* § III. Numerous states have placed strict restrictions on consolidations in the context of allegations of asbestos exposure. *See infra* § IV. Given the extraordinary nature of this consolidation, the Court should grant the petition for a writ of certiorari. *See infra* § V.

I. Consolidation Permits Plaintiffs To Bolster Their Claims Merely By Multiplying Allegations

A central question at trial will be whether Johnson's Baby Powder is contaminated with asbestos. J&J will explain to the jury that no asbestos is present at all. A consolidation of cases will inevitably bolster the plaintiffs' cases and weaken J&J's defense without any actual additional evidence. A jury could think that there *must* be something to Plaintiffs' allegations if multiple people developed cancer after using Johnson's Baby Powder.

The potential for this kind of thinking is why courts frequently exclude evidence of other lawsuits. If these two cases weren't consolidated, evidence about Mr. Devey would never be

admissible in Ms. Dupree's case, and vice versa. *See, e.g., Davenport v. Goodyear Dunlop Tires N. Am., Ltd.*, No. 1:15-CV-03752-JMC, 2018 WL 833606, at *3 (D.S.C. Feb. 13, 2018) ("Evidence of other lawsuits is inadmissible under Rule 403. Evidence of other lawsuits is likely to confuse and mislead the jury and it is highly prejudicial.") (internal ellipses omitted).[3] Mere allegations are not evidence. And the plaintiffs should not be able to pile multiple plaintiffs' allegations together before the jury to make it seem like "there's a there there."

This concern is buttressed by academic research. Professor Steven D. Penrod, who has specialized in the study of the legal and psychological aspects of jury decision-making for decades, has explained that numerous studies "clearly and fairly uniformly demonstrate that when evidence of consolidated claims is presented to a jury, the jury is substantially more likely to find against a defendant on a given claim than if it had not heard evidence of the other claims." *See* Ex. H, 4/12/19 Penrod Aff. ¶¶ 1–7.

In addition, studies show that jurors who are confronted with multiple claims against a defendant "are substantially more likely to draw the inference that the defendant" has a propensity to commit bad acts and therefore demand a lesser showing of proof on the elements of the

[3] *See also, e.g. Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) ("Courts are reluctant to cloud the issues in the case at trial by admitting evidence relating to previous litigation involving one or both of the same parties."); *McLeod v. Parsons Corp.*, 73 F. App'x 846, 854 (6th Cir. 2003) (affirming the exclusion of other-lawsuit testimony, because "the potential for prejudice that would have accompanied this evidence would have substantially outweighed its probative value, and this evidence would have misled the jury"); *Ross v. Am. Red Cross*, 567 F. App'x 296, 308 (6th Cir. 2014) (affirming the exclusion of other-lawsuit testimony, even where it "would have provided relevant background information," because any "probative value is substantially outweighed "by the risk that the jury will draw improper conclusions from other incidents in which [the defendant] allegedly caused injuries"); *Park W. Radiology v. CareCore Nat. LLC*, 675 F. Supp. 2d 314, 330 (S.D.N.Y. 2009) ("[A]ny probative value of references to the Other Litigations is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, and waste of time.")

plaintiffs' claims, "even though there is no logical basis for concluding that the evidence is stronger." *See id.* ¶¶ 28–31. The relevant academic studies demonstrate not only that consolidation of claims against a defendant for trial increases the likelihood that a jury would find a defendant liable but also that it "generally increases the amount of the damage award." *Id.* ¶ 18; *see also id.* ¶ 12.

Instructions from the judge regarding the issue is no solution. A number of studies show that "judicial instructions are not effective in mitigating the prejudicial effect of consolidating" multiple claims against a defendant—and that the issuance of such instructions can actually increase the likelihood that a defendant will be held liable by highlighting the issue for the jury. *Id.* ¶ 47.

J&J deserves a fair trial, not one unfairly skewed by trying different cases at the same time.

II. The highly individualized factual and legal questions presented by each Plaintiff's claims renders consolidation improper.

Consolidation of dissimilar cases is especially prejudicial. It enables a jury to fill gaps in one plaintiff's case with evidence relevant only to the other's. "[B]y trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016); *see also Goodman v. H. Hentz & Co.*, 265 F. Supp. 440, 443 (N.D. Ill. 1967) (separate trials required when "a jury may be inclined to find in favor of all plaintiffs on the liability issue because of the stronger case made by only some of the plaintiffs").

This phenomenon has a name: the "perfect plaintiff"—i.e., a composite plaintiff "pieced together for litigation" based on "the most dramatic" features of each individual case. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). This can occur because

when faced with multiple plaintiffs, juries are unable to "compartmentaliz[e] certain evidence that applies to one case but not the other." *Minter v. Wells Fargo Bank, N.A.*, 2012 WL 1963347, at *1 (D. Md. May 30, 2012).[4]

The nuances of each case which are critical to J&J's defense could easily get lost because the jury may be unable to keep track of which evidence is associated with which plaintiff. The evidence and arguments pertaining to each are different. Moreover, the jury could be swayed by sympathy for a particular plaintiff, or particular aspects of an individual plaintiff's case, and hold a defendant liable to all plaintiffs based on factors that apply to only one or even none of them.[5]

The risks of confusion are especially potent in cases, like these, involving complex and unfamiliar theories of scientific causation. Science is hard–and it is made exponentially harder when the jurors are forced to grapple with different scientific theories and evidence for multiple plaintiffs. As discussed below, the jury will hear about two different types of cancer with different causation theories applied to plaintiffs with different asbestos exposures and different medical

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[4] *See also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (noting that "the potential for prejudice resulting from a possible spill-over effect of evidence" in a joint trial is "obvious"); *Leeds v. Matrixx Initiatives, Inc.*, No. 2:10cv199DAK, 2012 U.S. Dist. LEXIS 47279, at *7–8 (D. Utah Apr. 2, 2012) ("[I]f the unique details of each case were consolidated during a single trial, 'the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice.'" (citation omitted)); *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447 (noting the plaintiffs had diverse medical histories and that consolidating cases for trial "would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself").

[5] *See Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiff[s'] unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."); *Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954) (due process was not "possible in the circumstances under which these consolidated cases were tried" where there was "so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times").

histories. But absent consolidation, the jurors would never need to hear about these potentially confusing differences that are only relevant to one of the two plaintiffs.

These differences also mean little efficiency is gained at the expense of injecting confusion and unfairness into the trial. "The desire for judicial efficiency would not be served, since the unique details of each case would still need to be presented to the jury." *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460 (E.D. Mich. 1985). Presenting the different cases for two plaintiffs would still take nearly the same time as two separate trials.

The stark differences in the cases makes consolidation improper and prejudicial.

A. The plaintiffs' different diseases lead to different causation evidence and defenses.

Ms. Dupree was diagnosed with peritoneal mesothelioma (cancer in the lining of the abdomen). Mr. Devey was diagnosed with pleural mesothelioma (cancer in the lining of the lung). These are different diseases with different scientific studies surrounding them. The evidence and defenses for the two are different.

As one J&J expert has testified, "asbestos exposure is much more strongly associated with the risk of pleural mesothelioma than the risk of peritoneal mesothelioma. One has to make a very clear distinction between the two." Ex. I, 12/13/18 Moolgavkar Dep. at 25:12–17. Consolidating the two trials risks the jury overlooking this critical distinction. The distinction is important because epidemiological evidence "shows very strongly that [the] vast majority of peritoneal mesothelioma" in the United States, "and perhaps better than 95 to 99 percent of all peritoneal mesothelioma among women in the United States are occurring without exposure to any environmental agents, specifically cannot be attributed to any asbestos exposure and occur spontaneously as a consequence of the naturally occurring biological processes." *Id.* at 26:10-26.

That evidence is relevant to only to Ms. Dupree's case; not Mr. Devey's. But this will likely confuse a jury hearing both cases at the same time. The jury may very well simply attribute "mesothelioma" generally to asbestos exposure without keeping track of which evidence goes to which type of mesothelioma for which plaintiff. That is not a fair trial.

Moreover, Ms. Dupree is female, while Mr. Devey is male. This is also relevant to the evidence of causation. Per J&J's expert, pleural mesothelioma in males has been strongly impacted by asbestos use in the United States, but the same is not true for pleural mesothelioma in females or peritoneal mesothelioma. *See* Ex. J, 12/29/17 Moolgavkar Dep. at 280:7–281:1.

Lumping together a plaintiff with a type of mesothelioma linked to asbestos exposure with a plaintiff with a type of mesothelioma *not* linked to asbestos exposure in the same way will be very confusing for the jury and unfairly prejudicial to J&J.

B. The plaintiffs' different exposures to asbestos lead to different causation evidence and defenses

Critical to J&J's defense is demonstrating to the jury what *did* cause each plaintiff's disease if not Johnson's Baby Powder. The answer to that question—along with the evidence relevant to presenting that defense—is different for each plaintiff.

Mr. Devey was employed by Garlock, a facility that handled raw asbestos and manufactured asbestos-containing products. *See* Ex. K, 3/12/18 Devey Dep. at 6:16 to 9:13. Mr. Devey by his own admission "worked with asbestos" there, and suspected he breathed it in during the course of his employment. See Ex. L, 3/13/18 Devey Dep. at 17:4-9, 32:19–22. In fact, Mr. Devey's oncologist told him that this occupational exposure to asbestos caused his pleural mesothelioma. *Id.* at 56:7–21. None of his treating physicians even suggested to him that talc or Johnson's Baby Powder contributed to his mesothelioma. *Id.* at 57:18–24. As a result, Mr.

Devey's pleural mesothelioma was most likely caused by his work with asbestos at Garlock—not Johnson's Baby Powder.

J&J's alternative causation defense with respect to Ms. Dupree is entirely different. Ms. Dupree does not appear, at this stage in discovery, to have been exposed to asbestos. But as discussed above, approximately 95%-99% of female peritoneal mesotheliomas in the United States occur through natural biological processes without any exposure to asbestos. Ex. I, 12/13/18 Moolgavkar Dep. at 26:10-26. That was most likely the cause of Ms. Dupree's peritoneal mesothelioma—not Johnson's Baby Powder. And not asbestos, like Mr. Devey.

These two distinct defenses with completely different evidence should not be consolidated into a single trial. Because Ms. Dupree has no currently-known alternative exposure to asbestos, the jury may be less persuaded by J&J's defense that Mr. Devey's occupational exposure was the true cause of his pleural mesothelioma. A jury might very well think: *Why is the exposure from Garlock relevant if there's someone right in front of us who contracted mesothelioma without any other exposures?* This is exactly the kind of piecing together of a "perfect plaintiff" that courts prohibit.

C. The plaintiffs have different medical histories lead to different causation evidence and defenses.

The two plaintiffs have unique medical histories. Most importantly, *Devey* is brought on behalf of a decedent, while Ms. Dupree is living and cancer free. This risk is plain: "dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living." *Malcolm*, 995 F.2d 351–52. Plaintiffs' motion below itself demonstrates how this distinction can be exploited to the jury. They argued that both individuals "suffered or will suffered the same fate: death." Ex. E, Pltfs' Mot. to Consolidate at 4. That statement is not accurate as Ms. Dupree is currently cancer free. It is simply not appropriate to tell the jury that

Ms. Dupree will suffer the same fate as Mr. Devey. *See In re New York City Asbestos Litig.*, 22 Misc. 3d 1109(A), 880 N.Y.S.2d 225 (Sup. Ct. 2009) ("[R]egardless of the fact that decedent Walsh shares a smoking lung cancer factor common to five other living plaintiffs, consolidating Walsh with any of the living plaintiffs' cases will prejudice Defendants in the latter cases *inter alia* because of the possibility that a jury will attribute the fate of the deceased to the living plaintiffs at this juncture especially where it appears that the living plaintiffs are long term cancer survivors who are not at risk of immediately dying of their cancer.").

Other aspects of the plaintiffs' unique medical histories and treatment also weigh against consolidation. Mr. Deprey has had various skin cancers and melanomas and—at the time of his death—ependymoma (a brain or spinal cord cancer). In fact, he had to discontinue chemotherapy due to his ependymoma diagnosis. See Ex. L, 3/13/18 Devey Disc. Dep. Tr. at 63:5-11. This history of cancers suggests that Mr. Devey may possess a genetic susceptibility to cancer.

But Mr. Devey's medical history and medical treatment, including his melanomas, skin cancers, and ependymoma are completely irrelevant to Ms. Dupree's claims. Ms. Dupree who was diagnosed with peritoneal mesothelioma only at age 14 has no similar past history of cancer. Her treatment was also quite different. She underwent surgery and chemotherapy, and she is currently cancer free. The jury may misinterpret Mr. Devey's lengthy history of cancer as prescient of Ms. Dupree's medical future, prejudicing defendants.

Evidence regarding Ms. Dupree's and Mr. Devey's medical history, diagnosis, and medical treatment are all essential to the claims in the respective matters. This evidence must be considered in assessing the claims in both cases separately.

D. The plaintiffs' different exposures to Johnson's Baby Powder leads to different causation evidence and defenses.

Mr. Devey alleges he used baby powder for over 55 years from the 1960s until 2017. By contrast, Ms. Dupree alleges she used baby powder for 12 years from 1999 until 2011. This is not just a minor difference. An important aspect of J&J's defense is dose: even if plaintiffs were correct that some amount of asbestos is present in Johnson's Baby Powder, the levels would be so low as to not cause harm. "One of toxicology's central tenets is that the dose makes the poison." *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 352 (Tex. 2014). Exposure to asbestos "fortunately does not always result in disease," an individual must have a sufficiently high dose. *Id.* "Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." *Id.* at 338; *see also id.* (requiring "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease").

Ms. Dupree has significantly less exposure to Johnson's Baby Powder than Mr. Devey. Accordingly, her alleged exposure to asbestos would be lower as well. The jury may not be able to keep track of these different exposure levels, particularly with all the other differences between the two plaintiffs. This not only adds additional confusion but also represents another example of the "perfect plaintiff" problem. The jury may overlook Ms. Dupree's lower exposure and "fill that gap" with Mr. Devey's higher exposure in the same trial. *Cf.* Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 Judicature 292, 295 (1989) ("[M]any jurors are unable to comprehend the principle that exposure to a toxic chemical dosage of one part-per-billion

produces a different biological effect than exposure to the same chemical at one part-per-million.").

Consolidation of these two plaintiffs where their use of the product is so different further prejudices J&J.

E. Different fact and expert witnesses will be necessary to resolve each plaintiff's claims.

Consolidation is also inappropriate because each case will require a variety of different fact and expert witnesses, each of whose testimony will be entirely plaintiff-specific. The circuit court's consolidation ruling failed to address the considerable amount of time and expense dedicated to each plaintiff's individual fact witnesses that will have no bearing on the other case. Moreover, the tenor of the fact witnesses' testimony will vary significantly by plaintiff: Mr. Devey's fact witnesses may mourn his loss, which could poison the jury against J&J in its case with Ms. Dupree.

The expert witness testimony will also differ. Each plaintiff's case will turn on testimony from different experts based on the plaintiff's/decedent's medical history, the type of mesothelioma at issue, and the different asbestos and/or asbestos-containing products the plaintiff/decedent has been exposed to throughout his or her life.

F. The plaintiffs' differences lead different damages evidence and defenses.

The different available legal remedies are important legal distinctions in these cases. In *Devey*, Plaintiff is the heir of the decedent, and she brings claims for wrongful death and loss of consortium. *See* Ex. A, *Devey* Amend. Compl. In contrast, Ms. Dupree claims damages for personal injury. *See* Ex. B, *Dupree* Compl. Because the damages available in *Devey* and *Dupree* are distinct, the two cases will require presentation and consideration of different evidence.

The *Devey* Plaintiff seeks damages for pecuniary losses as a result of Mr. Devey's death, funeral expenses, damages Mr. Devey incurred between the time of his alleged injury and his death, and the loss of consortium and companionship she has been deprived of as a result of Mr. Devey's death. In contrast, Ms. Dupree is living and cancer-free.

Furthermore, there is a significant risk that, if these cases were consolidated, the jury would improperly award damages to the living, cancer-free plaintiff, Ms. Dupree, based upon the death of Mr. Devey.

III. Consolidation poses additional, unique risks of unfair prejudice with respect to punitive damages.

The consolidation order poses unique fairness and prejudice concerns because both of these cases involve a claim for punitive damages. The jury's consideration of punitive liability elevates the risk to J&J's rights because the Due Process Clause of the U.S. Constitution "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of a specific plaintiff's individual case. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

In *Philip Morris*, the United States Supreme Court held that Due Process prohibits an award of punitive damages not specifically tied to a defendant's conduct toward that particular plaintiff. As the Court explained, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353. The Court further held that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation . . . The jury will be left to speculate." *Id.* at 354. The Court reiterated that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

Here, consolidating two separate personal injury actions involving different exposure histories pursuant to different legal theories and factual allegations would violate the Due Process Clause. Critically, both plaintiffs are "strangers" to one another's case, as the Court explained in *Phillip Morris*. But for the reasons explained above, the jury is likely to blur the distinctions between the plaintiffs' separate cases and could well return a verdict in each case that awards punitive damages to each plaintiff based on the elements of the others' case. As such, the consolidation order regarding these two separate matters infringes on and diminishes the Defendant's right to a jury trial in each matter, with respect to each Plaintiff. In South Carolina, the State Constitution requires that the right to a jury trial be fully protected. *See* S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.").

J&J is entitled to a fair jury trial in ***each*** case. The improper consolidation of these two disparate cases prejudices J&J by depriving it of this right. As noted above, the two cases consolidated for trial involve different injuries, different types of exposure, different durations of exposure, different mitigation, different diagnoses, and different defenses. The conflation of these two disparate cases into a single trial deprives J&J of a meaningful jury trial in either of the cases.

As noted by the Supreme Court, "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one," and "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." *Philip Morris*, 549 U.S. at 355, 357. Similarly, if these cases are consolidated, it will enable plaintiffs to paint J&J as having engaged in outrageous misconduct stretching back decades against large groups of people. Indeed, Prof. Penrod describes precisely this phenomenon, explaining that the aggregation of separate claims in a single trial amplifies the risk that the jury will

conclude that the defendant has a propensity to commit bad acts. Ex. H, Penrod Aff. ¶¶ 28–31. This is almost certain to result in "punish[ing J&J] for harm [allegedly] caused [to] strangers." *Philip Morris*, 549 U.S. at 355. For this reason too, consolidation is improper.

IV. Numerous jurisdictions have banned or placed strict restrictions on the consolidation of asbestos cases.

Numerous jurisdictions have all but ended the practice of consolidated asbestos trials because they are unfair and fuel the filing of more claims. For example, and without limitation, the following states have adopted reforms in this area:

- **Michigan.** Administrative Order adopted by the Michigan Supreme Court banning the bundling of asbestos cases for trial. *Prohibition on Bundling Cases,* Admin. Order No. 2006-6 (Mich. Aug. 9, 2006), see also, Editorial, *Unbundling Asbestos,* Wall St. J., Aug. 21, 2006, at A10 (supporting the administrative ban on bundling);

- **Mississippi.** Mark A. Behrens, *Asbestos Litigation Screening Challenges: An update*, 26 T.M. Cooley L. Rev. 721, note 35;

- **Ohio.** Ohio R. Civ. P. 42(A)(2) (without consent of all parties a court may only consolidate pending actions relating to the same exposed person and members of that person's household);

- **Texas.** Tex. Civ. Prac. & Rem. Code Ann. § 90.009 (consolidation allowed only with consent of all parties);

- **Delaware.** *In re* Asbestos Litig., No. 77C-ASB-2 (Del. Super Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1) (prohibiting the joinder of asbestos plaintiffs with different claims);

- **Kansas.** Kan. Stat. Ann. § 60-4902(j) (consolidation allowed only with consent of all parties);

- **Georgia.** Ga. Code Ann. § 51-14-11 (consolidation allowed only with consent of all parties);

- **Pennsylvania.** In re Mass Tort and Asbestos Programs, General Court Regulation No. 2012-01, at 2-3 (Pa. Ct. Comm. Pl. Phila. County Feb. 15, 2012) (consolidation allowed only with consent of all parties); and

- **San Francisco.** *San Francisco Trial Judge Vacates His Own Consolidation Order,* Harris Martin's Columns – Asbestos, May 2008 at 13 (Superior Court judge vacating his prior consolidation order), see also, James C. Parker & Edward R. Hugo, *Fairness Over*

Efficiency: Why We Overturned San Francisco's Sua Sponte Asbestos Consolidation Program (explaining why the San Francisco Superior Court overturned its consolidation program).

Below, Plaintiffs cited a consolidated trial in Missouri of 22 different plaintiffs' claims that talcum powder contained asbestos that caused them to develop ovarian cancer. But that trial ("*Ingham*") merely proves the point. The jury returned a uniform verdict, finding the defendants liable to all 22 plaintiffs and awarding *identical* compensatory awards—treating the plaintiff who has been cancer-free for the last 33 years as equivalent to those with less favorable prognoses and those who had died from their cancers. *See* Julie Steinberg, *J&J Fights $4.7B Verdict Finding Talc Caused Ovarian Cancer*, BLOOMBERG LAW (Nov. 19, 2018) (noting the jury awarded "the same $25 million in compensatory damages to each family").

In short, the supposed "efficiency" of the *Ingham* trial was purchased at the expense of any semblance of fairness or rationality in the final verdict, which is currently on appeal. Notably, after the same judge attempted to consolidate the claims of 13 talcum-powder plaintiffs for a subsequent joint trial, the Missouri Supreme Court granted a Preliminary Writ of Prohibition to halt the proceedings so that the appellate court could review the propriety of consolidation. *See* Ex. M, Preliminary Writ of Prohibition, *State ex rel. Johnson & Johnson, et al., v. The Hon. Rex M. Burlison*, No. SC97637 (Mo. Jan. 14, 2019).

Following that order, a Missouri trial court has since denied consolidation. Ex. N, *Schulte, et al. v. Johnson & Johnson, et al.*, No. 1622-CC00536 (Mo. Cir. Ct. Feb. 14, 2019) and *Bhuyan v. Johnson & Johnson, et al.*, No. 1822-CC00722 (Mo. Cir. Ct. Feb. 14, 2019) (orders denying consolidation). Other states, too, have denied consolidation of two claimants alleging asbestos in talc. Ex. O, *Blinkinsop v. Albertsons Companies Inc, et al.*, No. JCCP 4674/BC677764 (Cal. Super. Ct. L.A. Cty., Dec. 15, 2017

V. The Improper Consolidation Warrants Granting A Writ Of Certiorari.

The South Carolina Constitution provides "[t]he Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. Const. Art. V, § 5; *see also* S.C. Code Ann. § 14-3-310 (same). Rule 245(a) of the South Carolina Appellate Court Rules allows an extraordinary writ to be issued "[i]f the public interest is involved, or if special grounds of emergency or other good cause exist why the original jurisdiction of the Supreme Court should be exercised." Rule 245(a), SCACR. The decision to issue a writ of certiorari is discretionary with the Court. *Floyd v. Thornton*, 220 S.C. 414, 68 S.E.2d 334 (1952). This Court has exercised its discretion to issue extraordinary writs in appropriate circumstances.[6] The Rule 245(a) factors are met here as well, and the circumstances warrant the exercise of an extraordinary writ.

Consolidation is an emerging trend on the asbestos docket. Last year, the circuit court consolidated three cases for trial: *Taylor*, *Greene*, and *Hill*. Then shortly after the consolidation of *Devey* and *Dupree* here, the circuit court indicated it would order consolidation of five additional cases for a single trial: the *Asprey*, *Archer*, *D'Amico*, *Smith*, and *White*. In that consolidation, only one plaintiff of the five alleges asbestos exposure from Johnson's baby Powder. That means that, over the last year, ten cases were consolidated in some fashion, with no apparent end in sight. In fact, the circuit court indicated that it would be consolidating more baby powder cases in the future.

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[6] *See, e.g.*, *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009) (granting writ a second time in the same proceeding to review trial court's discovery ruling); *In re: Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998) (granting writ of certiorari to review trial court's decision related to medical device litigation involving numerous issues of public import); *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 439 S.E.2d 257 (1993) (reviewing trial court order requiring production of confidential hospital documents); *S.C. Dept. of Parks, Recreation, and Tourism v. Brookgreen Gardens*, 309 S.C. 388, 424 S.E.2d 465 (1992) (granting writ pursuant to Rule 229); *Breeden v. S.C. Democratic Executive Committee*, 226 S.C. 204, 84 S.E.2d 723 (1954) (writ granted to make final determination as to who would be lawful nominee for public office).

In ruling from the bench, the court stated: "So I believe that not only to these cases, but for what it will teach us as we move through this — the other Johnson & Johnson Baby Powder cases or other defendant baby powder manufacturing cases that are pending in South Carolina now asbestos docket which I manage, it behooves us to take some steps towards judicial economy in the interest of giving both plaintiffs and defendants their day in court on a basis that can be as accelerated as possible particularly for living mesothelioma claimants as is anticipated by the statutory laws of South Carolina that discuss how to docket and how to schedule the trial of these cases." *See* Ex. C, 3/13/2020 Hr'g Tr. at 165:11-12.

This Court should provide guidance on consolidation now before numerous consolidations occur in the future. More and more cases will likely be consolidated. Any plan to gain efficiency by consolidation may well backfire if the consolidations are later deemed improper. For example, the two cases of *Devey* and *Dupree* could require *three* trials if the consolidation is later reversed. Guidance now could also serve to limit the number of appeals raising consolidation in the future. Accordingly, judicial efficiency counsels in favor of *granting* the writ requested here and issuing clear guidance that may prevent the future expenditure of additional judicial time and resources in conducting multiple consolidated asbestos trials, considering the appeals therefrom, and potentially retrying those cases on remand.

Moreover, these consolidation questions are "[n]ovel questions of law concerning issues of significant public interest." *In re: Breast Implant Product Liability Litigation*, 331 S.C. 540, 542 n.2, 503 S.E.2d 445, 447 n.2 (1998). The talc litigation itself is not a "mature tort." There "'are few prior verdicts, judgments, or settlements'"; where "'additional information may be needed'" before aggregation should be considered; where further trials are needed to fully understand "'the contours of various types of claims within the . . . litigation'"; or where "significant appellate

review of [] novel legal issues" has not yet concluded. *In re Levaquin Prods. Liab. Litig.*, No. 08-1943 (JRT), 2009 WL 5030772, at *3–4 (D. Minn. Dec. 14, 2009) (first alteration in original) (quoting Manual for Complex Litigation § 22.314, at 359 (4th ed. 2004). Courts should "proceed with extreme caution when consolidating claims of immature torts." *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 208 (Tex. 2004) (citation omitted).

This Court providing guidance by granting a writ is especially appropriate in the context of the asbestos docket. The asbestos docket is *sui generis*: created by this Court, established and maintained by this Court's Orders, and subject to this Court's supervision and control. *See, e.g.*, S.C. Supreme Court Order 2019-05-28-02; S.C. Supreme Court Order 2019-03-28-01; S.C. Supreme Court Order 2017-03-03-01; S.C. Supreme Court Order 2009-06-29-01. This Petition seeks only what this Court already, from time to time, provides regarding the asbestos docket, namely special oversight and management. And because this Petition differs in context and type from consolidation orders entered in the course of the circuit courts' general litigation dockets, the grant of the writ sought here would not open the floodgates and invite an influx of petitions from every consolidation order, regardless of context.

Finally, the consolidation here is extraordinary for the reasons discussed above. It would be hard to find two more dissimilar plaintiffs/decedents than Mr. Devey and Ms. Dupree to consolidate in a single trial. There appear to be few, if any, limits on consolidations going forward. A trial of this sort would be fundamentally unfair in violation of J&J's due process rights. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process.").

A writ on this extraordinary and important issue is warranted.

CONCLUSION

This Court should grant the Petition and reverse the circuit court's ruling consolidating the two cases for trial.

[*SIGNATURE PAGE ATTACHED*]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

MILLIGAN & HERNS, PC

Louis P. Herns
SC Bar No. 3087
E-Mail: louis@milliganlawfirm.com
721 Long Point Road, Ste. 401
Mt. Pleasant, SC 292464
(843) 971-6750

Attorneys for Appellants Johnson & Johnson and Johnson & Johnson Consumer, Inc.

Columbia, South Carolina
April 23, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899

Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey, ... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc ..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ..... Petitioners.

And

Terran Dupree, ... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; Imerys Talc America, Inc. f/k/a Luzenac America, Inc.; Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy, Inc.; Rite Aid of South Carolina, Inc., ... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the ..... Petitioners.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Johnson & Johnson and Johnson & Johnson Consumer, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s)

hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleading(s): **Petition for a Writ of Certiorari**

Served:

MOTLEY RICE LLC
W. Christopher Swett
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

NEXSEN PRUET LLC
Amy Harmon Geddes
1230 Main Street, Suite 700
Columbia, SC 29201

WALL TEMPLETON & HALDRUP, P.A.
Mark H. Wall
145 King Street, Suite 300
Charleston, SC 29401

HAYNSWORTH SINKLER BOYD
Moffatt G. McDonald
W. David Conner
Scott E. Frick
1 North Main Street, 2nd Floor
Greenville, SC 29601

Meredith S. Keane
Senior Paralegal

April 23, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
MARY MARGARET DEVEY, Individually and as Personal Representative of the Estate of ROBERT L. DEVEY	C/A No. 18-CP-10-790
Plaintiffs,	
v.	
JOHNSON & JOHNSON A New Jersey Corporation	(Wrongful Death, Consortium, Survival) Mesothelioma
JOHNSON & JOHNSON CONSUMER, INC. A New Jersey Corporation	**AMENDED SUMMONS**
CVS PHARMACY, INC A Rhode Island Corporation	Plaintiffs Demand A Jury Trial
PIGGLY WIGGLY CAROLINA COMPANY, INC. A South Carolina Corporation	
METROPOLITAN LIFE INSURANCE COMPANY A New York Corporation	
RITE AID OF SOUTH CAROLINA, INC. A South Carolina Corporation	
Defendants.	

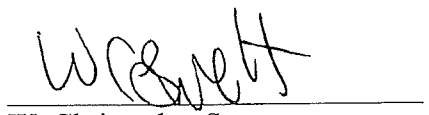
FILED
2019 FEB 26 AM 10:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Amended Complaint on the subscribed at their office at 28 Bridgeside Blvd., Mt. Pleasant, South Carolina, 29464, within thirty (30) days after the service hereof; exclusive of the day of such

service; and if you fail to answer the Amended Complaint within the time aforesaid, plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

MOTLEY RICE LLC



W. Christopher Swett
Plaintiffs' Attorney

Dated: February 25, 2019

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
MARY MARGARET DEVEY, Individually and as Personal Representative of the Estate of ROBERT L. DEVEY Plaintiffs, v. JOHNSON & JOHNSON A New Jersey Corporation JOHNSON & JOHNSON CONSUMER, INC. A New Jersey Corporation CVS PHARMACY, INC A Rhode Island Corporation PIGGLY WIGGLY CAROLINA COMPANY, INC. A South Carolina Corporation METROPOLITAN LIFE INSURANCE COMPANY A New York Corporation RITE AID OF SOUTH CAROLINA, INC. A South Carolina Corporation Defendants.	C/A No. 18-CP-10-790 (Wrongful Death, Consortium, Survival) Mesothelioma **AMENDED COMPLAINT** Plaintiffs Demand A Jury Trial

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

Now comes Plaintiff Mary Margaret DeVey, Individually and as Personal Representative of the Estate of Robert L. DeVey, deceased, and sues the Defendants. Plaintiff amends her Complaint and alleges as follows:

PARTIES

1. Plaintiff is a citizen and resident of the State of South Carolina. ROBERT L. DEVEY was exposed to asbestos while using Johnson & Johnson Baby Powder (the "PRODUCTS") in various homes from the 1960s through the 2000s. The dust and fibers from the asbestos-containing products permeated his person and clothes. As a direct and proximate result of his inhalation and ingestion of dust particles and fibers, he was diagnosed with Mesothelioma on or about November 21, 2017 which resulted in his death October 21, 2018.

2. Defendant JOHNSON & JOHNSON is a New Jersey corporation with its principal place of business in the State of New Jersey. At all pertinent times, JOHNSON & JOHNSON was engaged in the business of manufacturing, marketing, testing, promoting, selling, and/or distributing asbestos-containing TALC PRODUCTS to which ROBERT L. DEVEY was exposed. At all pertinent times, JOHNSON & JOHNSON regularly transacted, solicited, and conducted business in all States of the United States, including the State of South Carolina. JOHNSON & JOHNSON can be served via its agent for process: M.H. Ullman, Registered Agent, One Johnson & Johnson Plaza, New Brunswick, NJ 08933.

3. Defendant JOHNSON & JOHNSON CONSUMER, INC. is a New Jersey corporation with its principal place of business in the State of New Jersey. At all pertinent times, JOHNSON & JOHNSON CONSUMER, INC. was engaged in the business of manufacturing, marketing, testing, promoting, selling, and/or distributing asbestos-containing TALC PRODUCTS to which ROBERT L. DEVEY was exposed. At all pertinent times, JOHNSON & JOHNSON CONSUMER, INC. regularly transacted, solicited, and conducted business in all States of the United States, including the State of South Carolina. JOHNSON & JOHNSON CONSUMER, INC. can be served via its agent for process: Johnson & Johnson Registered Agent, One Johnson & Johnson Plaza, New Brunswick, NJ 08933.

4. Defendants JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER, INC. are hereinafter referred to as the "Talc Defendants."

5. All other defendant corporations (hereinafter "Product Defendants") or their predecessors in interest, at all times relevant, engaged in one or more of the following activities involving asbestos fibers in their asbestos-containing products including, but not limited to, the mining, milling, manufacturing, designing, distributing, supplying, selling, specifying, using, recommending, and/or installing asbestos materials or other dangerous products. The application or use of asbestos or asbestos-containing products in conjunction with their products or the selling of said products was a foreseeable use.

6. At all times pertinent hereto, the defendant corporations acted through their duly authorized agents, servants and employees who were in all times acting within the course of their respective employment and in the course and scope of their duties in furtherance of the business of the defendant corporations and for their benefit.

JURISDICTION

8. As evidenced by the caption of the instant Complaint, which is specifically incorporated herein, some of the defendants are foreign corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their respective contacts with the State of South Carolina and/or their respective conduct of substantial and/or systematic business in South Carolina which subjects them to the jurisdiction of the South Carolina Courts pursuant to the South Carolina Long Arm Statute, as well as the due process clause of the United States and South Carolina Constitutions.

9. At all pertinent times, all Defendants were engaged in the research, development, mining, manufacturing, processing, designing, testing, supplying, selling, labeling, and marketing of asbestos-containing PRODUCTS, and introduced such products into interstate commerce with knowledge and intent that such products be sold in various States, including South Carolina, and/or conspired to suppress the knowledge about the hazards of such asbestos-containing PRODUCTS being distributed, marketed, supplied, sold, and used in the State of South Carolina.

10. ROBERT L. DEVEY was exposed to asbestos-containing PRODUCTS for which the Defendants are responsible and developed mesothelioma while living in South Carolina. Specifically, he was diagnosed with mesothelioma in November 2017 at MUSC Health in Charleston, South Carolina.

11. During the time Decedent was exposed to asbestos fibers from PRODUCTS of various defendants, the PRODUCTS reached Decedent's locale without any substantial change in their condition from the time they were sold or distributed by the Defendants.

12. Mesothelioma is a progressive, insidious disease and, on information and belief, such exposure in South Carolina substantially contributed to Decedent's contraction of his mesothelioma and ultimate death caused by breathing dust and fibers from defendants' asbestos-containing products.

13. Venue is proper in Charleston County pursuant to S.C. Code § 15-7-30.

ALLEGATIONS COMMON TO ALL COUNTS

14. Talc was the main substance used in talcum and baby powders during the 1960s through the 2000s.

15. The JOHNSON & JOHNSON defendants manufactured the PRODUCTS.

16. PIGGLY WIGGLY CAROLINA COMPANY, INC., CVS PHARMACY, INC. and RITE AID sold the PRODUCTS to ROBERT L. DEVEY.

17. The talc mined and incorporated into the PRODUCTS by defendants and sold by defendants to ROBERT L. DEVEY contained up to 50% asbestos.

18. At all pertinent times, a feasible alternative to the PRODUCTS has existed. Cornstarch is an organic carbohydrate that is quickly broken down by the body with no known health effects. Cornstarch powders have been sold and marketed for the same uses with nearly the same effectiveness.

19. Historically, JOHNSON & JOHNSON Baby Powder has been a symbol of freshness, cleanliness, and purity. During the time in question, the JOHNSON & JOHNSON defendants advertised and marketed this product as the beacon of "freshness" and "comfort", eliminating friction on the skin, absorbing "excess wetness" helping keep skin feeling dry and comfortable, and "clinically proven gentile and mild."

COUNT ONE

Negligence as to All Defendants

20. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

21. Defendants, at all times material hereto, acted through their respective officers, employees and agents, who in turn were acting within the scope of their authority and employment in furtherance of the business of Defendants.

22. Defendants were engaged, directly or indirectly, in the business of mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing or retailing the PRODUCTS and placed them in the stream of commerce.

23. At all pertinent times, Defendants had a duty to exercise reasonable care to consumers, including ROBERT L. DEVEY, in the design, development, manufacturing, testing, inspection, packaging, promotion, marketing, distribution, supplying, labeling and/or sale of the PRODUCTS.

24. Defendants, directly or indirectly, caused their asbestos-containing PRODUCTS to be sold to or used by ROBERT L. DEVEY in his home.

25. ROBERT L. DEVEY neither misused nor materially altered the PRODUCTS, and they were in the same or substantially similar condition that they were in at the time that they left the hands of the Defendants.

26. At all relevant times, the PRODUCTS were used in an intended and foreseeable manner, and ROBERT L. DEVEY was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested the asbestos dust and fibers emanating from said PRODCUTS.

27. During the time that Defendants were engaged, directly or indirectly, in the business of mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing or retailing the PRODUCTS, Defendants knew or in the exercise of reasonable care should have known, that their asbestos PRODUCTS were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as ROBERT L. DEVEY.

28. Defendants knew, or the exercise of reasonable care should have known, that the use of their asbestos PRODUCTS would cause asbestos dust and fibers to be released into the air and would create dangerous and unreasonable risks of injury to the lungs, respiratory systems, and other bodily organs of users of their products and to others breathing that air and coming into contact with that dust.

29. ROBERT L. DEVEY did not know the nature and extent of the injuries that would result from contact with and exposure to Defendants' asbestos PRODUCTS or from the inhalation or ingestion of the asbestos dust and fibers.

30. Defendants knew, or in the exercise of reasonable care should have known, that consumers such as ROBERT L. DEVEY would come into contact with and be exposed to their asbestos PRODUCTS and would inhale or ingest asbestos dust and fibers as a result of the ordinary and foreseeable use of said PRODUCTS.

31. Despite the facts set forth above, Defendants were negligent, grossly negligent, willful, wanton, reckless and careless, and breached their respective duties of care in one or more of the following respects:

(a) In designing and placing into the stream of commerce PRODUCTS that were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as ROBERT L. DEVEY.

(b) In manufacturing and placing into the stream of commerce PRODUCTS that were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as ROBERT L. DEVEY.

(c) In selling and placing into the stream of commerce PRODUCTS that were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as ROBERT L. DEVEY.

(d) In failing to warn or provide sufficient warnings to ultimate users such as ROBERT L. DEVEY of the risks, dangers and harms associated with exposure to, contact with, and the use and handling of Defendants' asbestos PRODUCTS, including the inhalation or ingestion of the asbestos dust and fibers resulting from the ordinary and foreseeable use of the PRODUCTS;

(e) In failing to package their asbestos PRODUCTS in a manner that would assure that users such as ROBERT L. DEVEY would not come into contact with or be exposed to the asbestos dust and fibers resulting from the ordinary and foreseeable use of Defendants' asbestos PRODUCTS;

(f) In failing to properly test their PRODUCTS to determine adequacy and effectiveness or safety measures, if any, prior to releasing the PRODUCTS for consumer use and failing to test their PRODUCTS to determine the increased risk of cancer, including mesothelioma, resulting from the ordinary and foreseeable use of the PRODUCTS;

(g) In failing to inform the ultimate users such as ROBERT L. DEVEY as to the safe and proper methods of handling and using the products or of any safeguards or protective equipment necessary so that he would not inhale or ingest the asbestos dust and fibers resulting from the ordinary and foreseeable use of Defendants' asbestos PRODUCTS;

(h) In failing to instruct the ultimate users such as ROBERT L. DEVEY as to any methods available for reducing the type of exposure to the asbestos PRODUCTS which causes increased risk of cancer, including mesothelioma;

(i) In failing to remove the PRODUCTS from the market when Defendants knew or should have known the PRODUCTS were defective;

(j) In failing to develop alternate products or seek substitute materials in lieu of the use of asbestos in the PRODUCTS;

(k) In failing to use reasonable care in the specification, selection, and distribution of component parts for the PRODUCTS;

(l) In marketing and labeling the asbestos PRODUCTS as safe for all uses despite knowledge to the contrary;

(m) In ignoring and suppressing medical and scientific information, studies, tests, data and literature which Defendants acquired during the course of their normal business activities concerning the risk of asbestosis, scarred lungs, cancer, mesothelioma, respiratory disorders and other illnesses and diseases to people such as ROBERT L. DEVEY who were exposed to Defendants' asbestos PRODUCTS;

(n) In disregarding medical and scientific information, studies, tests, data and literature concerning the causal relationship between the inhalation or ingestion of asbestos dust and fibers, and such diseases as asbestosis, mesothelioma, scarred lungs, cancer, respiratory disorders and other illnesses and diseases; and

(o) In failing to act like a reasonably prudent company under similar circumstances.

32. Defendants otherwise acted negligently, recklessly and with intentional disregard for the welfare of ROBERT L. DEVEY in the mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing, retailing, or otherwise placing in the stream of commerce their asbestos PRODUCTS.

33. At all times relevant, it was feasible for Defendants to have warned ROBERT L. DEVEY, tested their asbestos PRODUCTS, designed safer PRODUCTS and/or substituted asbestos-free PRODUCTS;

34. Each Defendant's negligence was a substantial factor in causing ROBERT L. DEVEY's mesothelioma.

35. As a direct and proximate result of the Defendants' negligence and the breaches complained of herein, ROBERT L. DEVEY was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

36. ROBERT L. DEVEY developed mesothelioma and died as a direct and proximate result of said exposure to asbestos PRODUCTS.

37. As a direct and proximate result of the Defendants' negligent and/or grossly negligent misconduct or omissions, ROBERT L. DEVEY has:

(a) suffered serious personal injuries, which have caused permanent impairment;

(b) endured physical pain and suffering;

(c) suffered mental and emotional distress;

(d) suffered scarring and permanent disfigurement and disability;

(e) has incurred unnecessary medical expenses – past, present and future;

(f) experienced loss of enjoyment of life – past, present, and future; and

(g) has been injured and damaged on such other and further particulars as the evidence may show.

38. Wherefore, Plaintiff demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper

COUNT TWO

Strict Liability as to All Defendants

39. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

40. Defendants were engaged, directly or indirectly, in the business of mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing or retailing the PRODUCTS and placed them in the stream of commerce.

41. Defendants knew or had reason to know that ROBERT L. DEVEY and other persons similarly situated would be ultimate users or consumers of their asbestos PRODUCTS or would be exposed to their asbestos PRODUCTS.

42. Defendants sold or otherwise placed the asbestos PRODUCTS into the stream of commerce in a defective condition, unreasonably dangerous to ROBERT L. DEVEY and other persons similarly situated.

43. Throughout the many years that ROBERT L. DEVEY and other persons similarly situated were exposed to and used Defendants' asbestos PRODUCTS, said asbestos PRODUCTS reached the users and consumers without substantial change in the condition in which they were sold.

44. The ordinary and foreseeable use of Defendants' asbestos PRODUCTS constituted a dangerous and ultra-hazardous activity and created an unreasonable risk of injury to users and bystanders.

45. The Defendants' PRODUCTS posed potential risks that were known and/or should have been known by Defendants at the time of design, manufacture, distribution, and/or sale.

46. The Defendants' PRODUCTS presented a substantial danger during intended ordinary and reasonably foreseeable use not readily recognizable to the ordinary user.

47. The danger associated with the use of the Defendants' PRODUCTS as designed outweighed the utility.

48. Defendants' asbestos PRODUCTS were defective in that they were incapable of being made safe for their ordinary and intended use and purpose, and Defendants failed to give any warnings or instructions, or failed to give adequate or sufficient warnings or instructions about the risks, dangers and harms associated with the use of their asbestos PRODUCTS.

49. As a direct and proximate result of the defective condition of Defendants' asbestos PRODUCTS, ROBERT L. DEVEY was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

50. ROBERT L. DEVEY developed mesothelioma and died as a direct and proximate result of said exposure to asbestos PRODUCTS and has:

(a) suffered serious personal injuries, which have caused permanent impairment;

(b) endured physical pain and suffering;

(c) suffered mental and emotional distress;

(d) suffered scarring and permanent disfigurement and disability;

(e) has incurred unnecessary medical expenses – past, present and future;

(f) experienced loss of enjoyment of life – past, present, and future; and

(g) has been injured and damaged on such other and further particulars as the evidence may show.

51. Wherefore, Plaintiff demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper.

COUNT THREE
Breach of Warranty as to All Defendants

52. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

53. Defendants expressly or impliedly warranted that their asbestos PRODUCTS, which they mined, milled, produced, processed, compounded, converted, designed, manufactured, sold, imported, supplied, distributed, merchandised, or otherwise placed in the stream of commerce, were merchantable, reasonably fit for ordinary use, and safe for their intended purposes.

54. Defendants breached said warranties in that their asbestos PRODUCTS were defective; ultra-hazardous; dangerous; unfit for use; not merchantable; not safe for their intended, ordinary and foreseeable use and purpose; and certain harmful, poisonous and deleterious matter was given off into the atmosphere when ROBERT L. DEVEY used the asbestos PRODUCTS.

55. As a direct and proximate result of Defendants' breach of warranties, ROBERT L. DEVEY was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

56. ROBERT L. DEVEY developed mesothelioma and died as a direct and proximate result of said exposure to asbestos PRODUCTS.

57. As a direct and proximate result of the Defendants' breach of warranties, ROBERT L. DEVEY has:

(a) suffered serious personal injuries, which have caused permanent impairment;

(b) endured physical pain and suffering;

(c) suffered mental and emotional distress;

(d) suffered scarring and permanent disfigurement and disability;

(e) has incurred unnecessary medical expenses – past, present and future;

(f) experienced loss of enjoyment of life – past, present, and future; and

(g) has been injured and damaged on such other and further particulars as the evidence may show.

58. Wherefore, Plaintiff demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper.

COUNT FOUR

Fraud and Misrepresentation as to All Defendants

59. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

60. Defendants failed to disclose and intentionally and negligently misrepresented to ROBERT L. DEVEY and other persons similarly situated the health risks created by the ordinary and foreseeable use of Defendants' asbestos PRODUCTS.

61. Defendants knew that their misrepresentations were false and acted with a reckless disregard for the truth with the intent that their misrepresentations be relied upon by consumers, such as ROBERT L. DEVEY.

62. ROBERT L. DEVEY was ignorant of the falsity of Defendants' misrepresentations, which were material to his use of the PRODUCTS.

63. ROBERT L. DEVEY relied upon said misrepresentations, and his reliance was foreseeable to Defendants.

64. As a result of Defendants' conduct, omissions and misrepresentations, ROBERT L. DEVEY was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

65. ROBERT L. DEVEY developed mesothelioma and died as a direct and proximate result of said exposure to asbestos PRODUCTS.

66. As a direct and proximate result of the Defendants' misrepresentations, Plaintiff has:

(a) suffered serious personal injuries, which have caused permanent impairment;

(b) endured physical pain and suffering;

(c) suffered mental and emotional distress;

(d) suffered scarring and permanent disfigurement and disability;

(e) has incurred unnecessary medical expenses – past, present and future;

(f) experienced loss of enjoyment of life – past, present, and future; and

(g) has been injured and damaged on such other and further particulars as the evidence may show.

67. Wherefore, Plaintiff demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper

COUNT FIVE

Violation of the South Carolina Unfair Trade Practices Act as to All Defendants

68. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

69. Defendants' misrepresentations, actions and omissions described above and hereafter constitute unfair and deceptive acts and practices in the conduct of trade and commerce in violation of South Carolina Code section 39-5-20.

70. Defendants' misrepresentations, actions and omissions are capable of repetition and adversely affect the public interest.

71. Defendants' use of unfair and deceptive methods and practices was, and is, a willful and knowing violation of South Carolina Code section 39-5-20.

72. Decedent has been injured and damaged as set forth above as a result of Defendants' unfair and deceptive trade practices and acts.

73. Wherefore, Plaintiff is informed and believes that he is entitled to recover actual damages, attorneys' fees, and treble the actual damages pursuant to South Carolina Code section 39-5-140 from Defendants, jointly and severally, for unfair and deceptive trade practices and acts and prays for such relief.

COUNT SIX

Wrongful Death as to All Defendants

74. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

75. As a result of the development of mesothelioma caused by breathing defendant's asbestos-containing PRODUCTS, Decedent suffered and sustained very serious injuries to his person requiring medical treatment, conscious pain and suffering, and ultimately death.

76. Plaintiff alleges that as a result of the aforesaid wrongful death of Decedent, Decedent's beneficiaries have and will suffer pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, deprivation of use and comfort of Decedent's society, all both past and future, and funeral expenses, all to the beneficiaries actual and punitive damages in an amount to be determined by the trier of fact.

77. Wherefore, Plaintiff prays judgment, joint and several, against the Defendants for compensatory and punitive damages in amounts to be determined by the trier of fact, and the costs of this action.

COUNT SEVEN

Loss of Consortium as to All Defendants

78. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

79. The Defendants' combined and respective actions and inactions were each a direct and proximate cause of decedent's injuries and a tortious violation of MARY MARGARET DEVEY's right to the companionship, aid, society and services of his spouse.

80. As a direct and proximate result of the conduct and misconduct of the Defendants, MARY MARGARET DEVEY has suffered and continues to suffer the loss of consortium, household services, aid, society, support, and companionship.

81. Wherefore, MARY MARGARET DEVEY demands judgment against all Defendants, jointly and severally, for the loss of consortium, household services, aid, society, support, and companionship to which he is entitled with his spouse.

Punitive Damages as to All Defendants

82. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

83. The actions and inactions of Defendants were of such a character as to constitute a pattern or practice of willful, wanton and reckless misconduct causing substantial harm and resulting in damages to Plaintiffs.

84. More specifically, Defendants acted with a conscious and flagrant disregard for the rights and safety of Decedent, and/or deliberately engaged in willful, wanton and reckless disregard for the life and safety of Decedent.

85. Examples of Defendants' willful, wanton and reckless misconduct include, but are not limited to:

a) Purposefully not warning consumers about the hazards of their asbestos PRODUCTS despite knowing that ordinary and foreseeable use created an unreasonable risk of lung disease and cancer, including mesothelioma, to ultimate users;

b) The intentional inadequacy and delay of safe use instructions on their asbestos PRODUCTS;

c) Never issuing recall-type letters or notices to ultimate and prior users;

d) Frustrating the publication of articles on the asbestos health hazards in the literature;

e) Top management officials of Defendants rejected advice of medical and other corporate officials to warn of the hazards of their asbestos PRODUCTS; such rejection by top management officials being motivated by the possibility of adverse effects on profits;

f) Refusing to advise consumers of medical findings known to Defendants concerning the dangers of asbestos exposure; and

g) Suppressing the dissemination of information to consumers, including Decedent, concerning the hazards of asbestos exposure.

86. By reason of the foregoing, Defendants are liable for punitive and exemplary damages.

87. Wherefore, Plaintiff demands judgment against Defendants, jointly and severally, for punitive and exemplary damages, plus interest, costs and attorneys' fees for having to bring this action, and such other and further relief as this Honorable Court or jury may deem just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

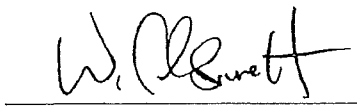
88. For a trial by jury and judgment against the Defendants, jointly and severally, for such sums as actual and other compensatory damages in an amount as a jury may determine;

89. For exemplary and punitive damages against Defendants in an amount as a jury may determine to halt and deter such conduct;

90. For the costs of this suit, including attorney's fees, expenses, and interest; and

91. For such other and further relief to which they may be entitled and as this Honorable Court may deem just and proper.

BY:
MOTLEY RICE LLC



W. Christopher Swett (SC Bar No. 78251)
28 Bridgeside Blvd.
PO Box 650001
Mt. Pleasant, SC 29464
Tel: (843) 216-9000
Fax: 843-216-9450
cswett@motleyrice.com
ATTORNEY FOR PLAINTIFFS

February 25, 2019
Mt. Pleasant, SC

EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

TERRAN DUPREE,

Plaintiffs,

vs.

JOHNSON & JOHNSON
A New Jersey Corporation

JOHNSON & JOHNSON CONSUMER, INC.
A New Jersey Corporation

IMERYS TALC AMERICA, INC. f/k/a
LUZENAC AMERICA, INC.
A Delaware Corporation

PIGGLY WIGGLY CAROLINA
COMPANY, INC.
A South Carolina Corporation

CVS PHARMACY, INC
A Rhode Island Corporation

RITE AID OF SOUTH CAROLINA, INC.
A South Carolina Corporation

Defendants.

C/A No. 18-CP- 10 - 2899

PERSONAL INJURY
(Mesothelioma)

COMPLAINT
JURY TRIAL DEMANDED

FILED
2018 JUN -8 PM 1:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Now comes Plaintiff TERRAN DUPREE, who reached the age of majority on August 6, 2017, by and through undersigned counsel, alleges the following causes of action against Defendants:

Date served: 6/20/2018 Product(s): ASB
Company(s) served: JJ, JJCI
Method served: HS FX CM RM OTHER
Date received by LD: 6/25/2018 No postmark:
Service type: Initial Add'l Refiled Amended Multi #
JJL# 20180111079 Paralegal: MD

PARTIES

1. TERRAN DUPREE resides at 745 George Washington Blvd., Sumter, South Carolina 29154. TERRAN DUPREE was exposed to asbestos from the use of Johnson & Johnson Baby Powder (the "PRODUCTS") beginning at birth in 1999. The dust and fibers from the asbestos-containing PRODUCTS permeated her person and clothes. As a direct and proximate result of TERRAN DUPREE's inhalation and ingestion of asbestos dust particles and fibers, she was diagnosed with Peritoneal Malignant Mesothelioma on or about 2014. TERRAN DUPREE was a minor until August 6, 2017. TERRAN DUPREE did not know, nor should she have known that she had a cause of action until it was revealed for the very first time during litigation in 2017 that Johnson & Johnson's Baby Powder contained asbestos, which is a signature cause of mesothelioma, and that Johnson & Johnson had actively concealed this fact for over 40 years.
2. Defendant JOHNSON & JOHNSON is a New Jersey corporation with its principal place of business in the State of New Jersey. At all pertinent times, JOHNSON & JOHNSON was engaged in the business of manufacturing, marketing, testing, promoting, selling, and/or distributing asbestos-containing PRODUCTS to which TERRAN DUPREE was exposed. At all pertinent times, JOHNSON & JOHNSON regularly transacted, solicited, and conducted business in all States of the United States, including the State of South Carolina. JOHNSON & JOHNSON can be served via its agent for process: M.H. Ullman, Registered Agent, One Johnson & Johnson Plaza, New Brunswick, NJ 08933.
3. Defendant JOHNSON & JOHNSON CONSUMER, INC. is a New Jersey corporation with its principal place of business in the State of New Jersey. At all pertinent times, JOHNSON & JOHNSON CONSUMER, INC. was engaged in the business of manufacturing,

marketing, testing, promoting, selling, and/or distributing asbestos-containing PRODUCTS to which TERRAN DUPREE was exposed. At all pertinent times, JOHNSON & JOHNSON CONSUMER, INC. regularly transacted, solicited, and conducted business in all States of the United States, including the State of South Carolina. JOHNSON & JOHNSON CONSUMER, INC. can be served via its agent for process: Johnson & Johnson Registered Agent, One Johnson & Johnson Plaza, New Brunswick, NJ 08933.

4. Defendant IMERYS TALC AMERICA, INC. f/k/a LUZENAC AMERICA, INC. f/k/a CYPRUS INDUSTRIAL MINERALS COMPANY is a Delaware corporation with its principal place of business in California. At all pertinent times, IMERYS TALC AMERICA, INC. f/k/a LUZENAC AMERICA, INC. f/k/a CYPRUS INDUSTRIAL MINERALS COMPANY has been in the business of mining and distributing asbestos-containing talc for use in talcum powder based products, including the asbestos-containing PRODUCTS to which TERRAN DUPREE was exposed. IMERYS TALC AMERICA, INC. is the successor or continuation of LUZENAC AMERICA, INC. and is legally responsible for all liabilities incurred when it was known as LUZENAC AMERICA, INC. IMERYS TALC AMERICA, INC. f/k/a LUZENAC AMERICA, INC. can be served via its agent for process: CT Corporation, 120 South Clayton Avenue, St. Louis, MO 63105.

5. Defendant PIGGLY WIGGLY CAROLINA COMPANY, INC. is a South Carolina corporation with its principal place of business in South Carolina. At all pertinent times, PIGGLY WIGGLY CAROLINA COMPANY, INC. was engaged in the business of marketing, promoting, selling, and/or distributing asbestos-containing PRODUCTS to which TERRAN DUPREE was exposed. At all pertinent times, PIGGLY WIGGLY

CAROLINA COMPANY, INC. regularly transacted, solicited, and conducted business in the State of South Carolina. PIGGLY WIGGLY CAROLINA COMPANY, INC. can be served via its agent for process: David R. Schools, 884 Johnnie Dodds Blvd. Suite 201, Mt. Pleasant, SC 29464.

6. Defendant CVS PHARMACY, INC. is a Rhode Island corporation with its principal place of business in Rhode Island. At all pertinent times, CVS PHARMACY, INC. was engaged in the business of marketing, promoting, selling, and/or distributing asbestos-containing PRODUCTS to which TERRAN DUPREE was exposed. At all pertinent times, CVS PHARMACY, INC. regularly transacted, solicited, and conducted business in the State of South Carolina. CVS PHARMACY, INC. can be served via its agent for process: CT Corporation System, 450 Veterans Memorial Parkway, Suite 7A, East Providence, Rhode Island 02914.

7. Defendant RITE AID OF SOUTH CAROLINA, INC. ("RITE AID") is a South Carolina corporation with its principal place of business in South Carolina. At all pertinent times, RITE AID OF SOUTH CAROLINA, INC. was engaged in the business of marketing, promoting, selling, and/or distributing asbestos-containing PRODUCTS to which TERRAN DUPREE was exposed. At all pertinent times, RITE AID OF SOUTH CAROLINA, INC. regularly transacted, solicited, and conducted business in the State of South Carolina. RITE AID OF SOUTH CAROLINA, INC. can be served via its agent for process: CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC 29223.

JURISDICTION

8. As evidenced by the caption of the instant Complaint, which is specifically incorporated herein, some of the defendants are foreign corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their respective contacts with the State of South Carolina and/or their respective conduct of substantial and/or systematic business in South Carolina which subjects them to the jurisdiction of the South Carolina Courts pursuant to the South Carolina Long Arm Statute, as well as the due process clause of the United States and South Carolina Constitutions.

9. At all pertinent times, all Defendants were engaged in the research, development, mining, manufacturing, processing, designing, testing, supplying, selling, labeling, and/or marketing of asbestos-containing PRODUCTS, and introduced such products into interstate commerce with knowledge and intent that such products be sold in various States, including South Carolina, and/or conspired to suppress the knowledge about the hazards of such asbestos-containing PRODUCTS being distributed, marketed, supplied, sold, and used in the State of South Carolina.

10. TERRAN DUPREE was exposed to asbestos-containing PRODUCTS for which the Defendants are responsible and developed mesothelioma while living in South Carolina. Furthermore, she has received medical treatment for her mesothelioma in South Carolina.

11. Mesothelioma is a progressive, insidious disease and, on information and belief, such asbestos exposure was a substantial cause of TERRAN DUPREE's contraction of her mesothelioma caused by breathing dust and fibers from Defendants' asbestos-containing PRODUCTS.

12. Venue is proper in Charleston County pursuant to S.C. Code § 15-7-30.

ALLEGATIONS COMMON TO ALL COUNTS

13. Talc was the main substance used in talcum and baby powders during the time period at issue in this case.

14. Talc is a magnesium trisilicate and is mined from the earth. IMERYS TALC AMERICA, INC. f/k/a LUZENAC AMERICA, INC. mined the talc used in the PRODUCTS.

15. The JOHNSON & JOHNSON defendants designed, manufactured and placed the PRODUCTS in the stream of commerce.

16. PIGGLY WIGGLY CAROLINA COMPANY, INC., CVS PHARMACY, INC. and RITE AID sold the PRODUCTS to TERRAN DUPREE or her family.

17. The talc mined and incorporated into the PRODUCTS by defendants and sold by defendants to TERRAN DUPREE contained up to 50% asbestos.

18. At all pertinent times, a feasible alternative to the PRODUCTS has existed. Cornstarch is an organic carbohydrate that is quickly broken down by the body with no known health effects. Cornstarch powders have been sold and marketed for the same uses with nearly the same effectiveness.

19. IMERYS TALC AMERICA, INC. has continually advertised and marketed talc as safe for human use.

20. IMERYS TALC AMERICA, INC. supplies customers, such as JOHNSON & JOHNSON, with material safety data sheets for talc. These material safety data sheets are supposed to convey adequate health and warning information to its customers.

21. Historically, JOHNSON & JOHNSON Baby Powder has been a symbol of freshness, cleanliness, and purity. During the time in question, the JOHNSON & JOHNSON defendants advertised and marketed this product as the beacon of "freshness" and

"comfort", eliminating friction on the skin, absorbing "excess wetness" helping keep skin feeling dry and comfortable, and "clinically proven gentile and mild."

COUNT ONE
Negligence as to All Defendants

22. Plaintiff adopts and re-alleges each prior paragraph, where relevant, as if set forth fully herein.

23. Defendants, at all times material hereto, acted through their respective officers, employees and agents, who in turn were acting within the scope of their authority and employment in furtherance of the business of Defendants.

24. Defendants were engaged, directly or indirectly, in the business of mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing or retailing the PRODUCTS and placed them in the stream of commerce.

25. At all pertinent times, Defendants had a duty to exercise reasonable care to consumers, including TERRAN DUPREE, in the design, development, manufacturing, testing, inspection, packaging, promotion, marketing, distribution, supplying, labeling and/or sale of the PRODUCTS.

26. Defendants, directly or indirectly, caused their asbestos-containing PRODUCTS to be sold to or used by TERRAN DUPREE in her home.

27. TERRAN DUPREE neither misused nor materially altered the PRODUCTS, and they were in the same or substantially similar condition that they were in at the time that they left the hands of the Defendants.

28. At all relevant times, the PRODUCTS were used in an intended and foreseeable manner, and TERRAN DUPREE was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested the asbestos dust and fibers emanating from said PRODCUTS.

29. During the time that Defendants were engaged, directly or indirectly, in the business of mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing or retailing the PRODUCTS, Defendants knew or in the exercise of reasonable care should have known, that their asbestos PRODUCTS were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as TERRAN DUPREE.

30. Defendants knew, or the exercise of reasonable care should have known, that the use of their asbestos PRODUCTS would cause asbestos dust and fibers to be released into the air and would create dangerous and unreasonable risks of injury to the lungs, respiratory systems, and other bodily organs of users of their products and to others breathing that air and coming into contact with that dust.

31. TERRAN DUPREE did not know the nature and extent of the injuries that would result from contact with and exposure to Defendants' asbestos PRODUCTS or from the inhalation or ingestion of the asbestos dust and fibers.

32. Defendants knew, or in the exercise of reasonable care should have known, that consumers such as TERRAN DUPREE would come into contact with and be exposed to their asbestos PRODUCTS and would inhale or ingest asbestos dust and fibers as a result of the ordinary and foreseeable use of said PRODUCTS.

33. Despite the facts set forth above, Defendants were negligent, grossly negligent, willful, wanton, reckless and careless, and breached their respective duties of care in one or more of the following respects:

a. In designing and placing into the stream of commerce PRODUCTS that were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as TERRAN DUPREE.

b. In manufacturing and placing into the stream of commerce PRODUCTS that were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as TERRAN DUPREE.

c. In selling and placing into the stream of commerce PRODUCTS that were defective, ultra-hazardous, dangerous and otherwise highly harmful to consumers such as TERRAN DUPREE.

d. In failing to warn or provide sufficient warnings to ultimate users such as TERRAN DUPREE of the risks, dangers and harms associated with exposure to, contact with, and the use and handling of Defendants' asbestos PRODUCTS, including the inhalation or ingestion of the asbestos dust and fibers resulting from the ordinary and foreseeable use of the PRODUCTS;

e. In failing to package their asbestos PRODUCTS in a manner that would assure that users such as TERRAN DUPREE would not come into contact with or be exposed to the asbestos dust and fibers resulting from the ordinary and foreseeable use of Defendants' asbestos PRODUCTS;

f. In failing to properly test their PRODUCTS to determine adequacy and effectiveness or safety measures, if any, prior to releasing the PRODUCTS for

consumer use and failing to test their PRODUCTS to determine the increased risk of cancer, including mesothelioma, resulting from the ordinary and foreseeable use of the PRODUCTS;

g. In failing to inform the ultimate users such as TERRAN DUPREE as to the safe and proper methods of handling and using the products or of any safeguards or protective equipment necessary so that she would not inhale or ingest the asbestos dust and fibers resulting from the ordinary and foreseeable use of Defendants' asbestos PRODUCTS;

h. In failing to instruct the ultimate users such as TERRAN DUPREE as to any methods available for reducing the type of exposure to the asbestos PRODUCTS which causes increased risk of cancer, including mesothelioma;

i. In failing to remove the PRODUCTS from the market when Defendants knew or should have known the PRODUCTS were defective;

j. In failing to develop alternate products or seek substitute materials in lieu of the use of asbestos-containing talc in the PRODUCTS;

k. In failing to use reasonable care in the specification, selection, and distribution of component parts for the PRODUCTS;

l. In marketing and labeling the asbestos PRODUCTS as safe for all uses despite knowledge to the contrary;

m. In ignoring and suppressing medical and scientific information, studies, tests, data and literature which Defendants acquired during the course of their normal business activities concerning the risk of asbestosis, scarred lungs, cancer, mesothelioma,

respiratory disorders and other illnesses and diseases to people such as TERRAN DUPREE who were exposed to Defendants' asbestos PRODUCTS;

n. In disregarding medical and scientific information, studies, tests, data and literature concerning the causal relationship between the inhalation or ingestion of asbestos dust and fibers, and such diseases as asbestosis, mesothelioma, scarred lungs, cancer, respiratory disorders and other illnesses and diseases; and

o. In failing to act like a reasonably prudent company under similar circumstances.

34. Defendants otherwise acted negligently, recklessly and with intentional disregard for the welfare of TERRAN DUPREE in the mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing, retailing, or otherwise placing in the stream of commerce their asbestos PRODUCTS.

35. At all times relevant, it was feasible for Defendants to have warned TERRAN DUPREE, tested their asbestos PRODUCTS, designed safer PRODUCTS and/or substituted asbestos-free components into the PRODUCTS;

36. Each Defendant's negligence was a substantial factor in causing TERRAN DUPREE's mesothelioma.

37. As a direct and proximate result of the Defendants' negligence and the breaches complained of herein, TERRAN DUPREE was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

38. TERRAN DUPREE developed mesothelioma as a direct and proximate result of said exposure to asbestos PRODUCTS.

39. As a direct and proximate result of the Defendants' negligent and/or grossly negligent misconduct or omissions, Plaintiff has:

a. suffered serious personal injuries, which have caused permanent impairment;

b. endured physical pain and suffering;

c. suffered mental and emotional distress;

d. suffered scarring and permanent disfigurement and disability;

e. has incurred unnecessary medical expenses – past, present and future;

f. experienced loss of enjoyment of life – past, present, and future; and

g. has been injured and damaged on such other and further particulars as the evidence may show.

40. Wherefore, TERRAN DUPREE demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper

COUNT TWO

Strict Liability as to All Defendants

41. Plaintiff adopts and re-alleges each prior paragraph, where relevant, as if set forth fully herein.

42. Defendants were engaged, directly or indirectly, in the business of mining, milling, producing, processing, compounding, converting, designing, manufacturing, selling, merchandising, importing, supplying, distributing or retailing the PRODUCTS and placed them in the stream of commerce.

43. Defendants knew or had reason to know that TERRAN DUPREE and other persons similarly situated would be ultimate users or consumers of their asbestos PRODUCTS or would be exposed to their asbestos PRODUCTS.

44. Defendants sold or otherwise placed the asbestos PRODUCTS into the stream of commerce in a defective condition, unreasonably dangerous to TERRAN DUPREE and other persons similarly situated.

45. Throughout the many years that TERRAN DUPREE and other persons similarly situated were exposed to and used Defendants' asbestos PRODUCTS, said asbestos PRODUCTS reached the users and consumers without substantial change in the condition in which they were sold.

46. The ordinary and foreseeable use of Defendants' asbestos PRODUCTS constituted a dangerous and ultra-hazardous activity and created an unreasonable risk of injury to users and bystanders.

47. The Defendants' PRODUCTS posed potential risks that were known and/or should have been known by Defendants at the time of design, manufacture, distribution, and/or sale.

48. The Defendants' PRODUCTS presented a substantial danger during intended ordinary and reasonably foreseeable use not readily recognizable to the ordinary user.

49. The danger associated with the use of the Defendants' PRODUCTS as designed outweighed the utility.

50. Defendants' asbestos PRODUCTS were defective in that they were incapable of being made safe for their ordinary and intended use and purpose, and Defendants failed to give any warnings or instructions, or failed to give adequate or sufficient warnings or

instructions about the risks, dangers and harms associated with the use of their asbestos PRODUCTS.

51. As a direct and proximate result of the defective condition of Defendants' asbestos PRODUCTS, TERRAN DUPREE was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

52. TERRAN DUPREE developed mesothelioma as a direct and proximate result of said exposure to asbestos PRODUCTS and has:

    a. suffered serious personal injuries, which have caused permanent impairment;

    b. endured physical pain and suffering;

    c. suffered mental and emotional distress;

    d. suffered scarring and permanent disfigurement and disability;

    e. has incurred unnecessary medical expenses – past, present and future;

    f. experienced loss of enjoyment of life – past, present, and future; and

    g. has been injured and damaged on such other and further particulars as the evidence may show.

53. Wherefore, TERRAN DUPREE demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper.

COUNT THREE
Breach of Warranty as to All Defendants

54. Plaintiff adopts and re-alleges each prior paragraph, where relevant, as if set forth fully herein.

55. Defendants expressly or impliedly warranted that their asbestos PRODUCTS, which they mined, milled, produced, processed, compounded, converted, designed, manufactured, sold, imported, supplied, distributed, merchandised, or otherwise placed in the stream of commerce, were merchantable, reasonably fit for ordinary use, and safe for their intended purposes.

56. Defendants breached said warranties in that their asbestos PRODUCTS were defective; ultra-hazardous; dangerous; unfit for use; not merchantable; not safe for their intended, ordinary and foreseeable use and purpose; and certain harmful, poisonous and deleterious matter was given off into the atmosphere when TERRAN DUPREE used the asbestos PRODUCTS.

57. As a direct and proximate result of Defendants' breach of warranties, TERRAN DUPREE was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

58. TERRAN DUPREE developed mesothelioma as a direct and proximate result of said exposure to asbestos PRODUCTS.

59. As a direct and proximate result of the Defendants' breach of warranties, Plaintiff has:

    a. suffered serious personal injuries, which have caused permanent impairment;

    b. endured physical pain and suffering;

    c. suffered mental and emotional distress;

d. suffered scarring and permanent disfigurement and disability;

e. has incurred unnecessary medical expenses – past, present and future;

f. experienced loss of enjoyment of life – past, present, and future; and

g. has been injured and damaged on such other and further particulars as the evidence may show.

60. Wherefore, TERRAN DUPREE demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper.

COUNT FOUR

Fraud and Misrepresentation as to All Defendants

61. Plaintiffs adopt and re-allege each prior paragraph, where relevant, as if set forth fully herein.

62. Defendants failed to disclose and intentionally and negligently misrepresented to TERRAN DUPREE and other persons similarly situated the health risks created by the ordinary and foreseeable use of Defendants' asbestos PRODUCTS.

63. Defendants knew that their misrepresentations were false and acted with a reckless disregard for the truth with the intent that their misrepresentations be relied upon by consumers, such as TERRAN DUPREE.

64. TERRAN DUPREE was ignorant of the falsity of Defendants' misrepresentations, which were material to her use of the PRODUCTS.

65. TERRAN DUPREE relied upon said misrepresentations, and her reliance was foreseeable to Defendants.

66. As a result of Defendants' conduct, omissions and misrepresentations, TERRAN DUPREE was exposed to and came in contact with Defendants' asbestos PRODUCTS and inhaled or ingested asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos PRODUCTS.

67. TERRAN DUPREE developed mesothelioma as a direct and proximate result of said exposure to asbestos PRODUCTS.

68. As a direct and proximate result of the Defendants' misrepresentations, Plaintiff has:

a. suffered serious personal injuries, which have caused permanent impairment;

b. endured physical pain and suffering;

c. suffered mental and emotional distress;

d. suffered scarring and permanent disfigurement and disability;

e. has incurred unnecessary medical expenses – past, present and future;

f. experienced loss of enjoyment of life – past, present, and future; and

g. has been injured and damaged on such other and further particulars as the evidence may show.

69. Wherefore, TERRAN DUPREE demands judgment against Defendants, jointly and severally, for all actual and compensatory damages together with interest, if applicable, and all costs of this action and for such other and further relief as this Honorable Court and/or jury may deem just and proper.

Punitive Damages as to All Defendants

70. Plaintiff adopts and re-alleges each prior paragraph, where relevant, as if set forth fully herein.

71. The actions and inactions of Defendants were of such a character as to constitute a pattern or practice of willful, wanton and reckless misconduct causing substantial harm and resulting in damages to TERRAN DUPREE.

72. More specifically, Defendants acted with a conscious and flagrant disregard for the rights and safety of TERRAN DUPREE, and/or deliberately engaged in willful, wanton and reckless disregard for the life and safety of TERRAN DUPREE.

73. Examples of Defendants' willful, wanton and reckless misconduct include, but are not limited to:

    a. Purposefully not warning consumers about the hazards of their asbestos PRODUCTS despite knowing that ordinary and foreseeable use created an unreasonable risk of lung disease and cancer, including mesothelioma, to ultimate users;

    b. The intentional inadequacy and delay of safe use instructions on their asbestos PRODUCTS;

    c. Never issuing recall-type letters or notices to ultimate and prior users;

    d. Frustrating the publication of articles on the asbestos health hazards in the literature;

    e. Top management officials of Defendants rejected advice of other corporate officials and doctors to warn of the hazards of their asbestos PRODUCTS or quit using talc

as a component; such rejection by top management officials being motivated by the possibility of adverse effects on profits;

f. Refusing to advise consumers of medical findings known to Defendants concerning the dangers of asbestos exposure; and

g. Suppressing the dissemination of information to consumers, including TERRAN DUPREE, concerning the hazards of asbestos exposure from the PRODUCTS.

74. By reason of the foregoing, Defendants are liable for punitive and exemplary damages.

75. Wherefore, TERRAN DUPREE demands judgment against Defendants, jointly and severally, for punitive and exemplary damages, plus interest, costs and attorneys' fees for having to bring this action, and such other and further relief as this Honorable Court or jury may deem just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

76. For a trial by jury and judgment against the Defendants, jointly and severally, for such sums as actual and other compensatory damages in an amount as a jury may determine;

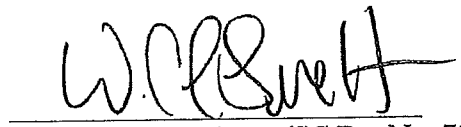
77. For exemplary and punitive damages against Defendants in an amount as a jury may determine to halt and deter such conduct;

78. For the costs of this suit, including attorney's fees, expenses, and interest; and

79. For such other and further relief to which she may be entitled and as this Honorable Court may deem just and proper.

[SIGNATURE LINE ON NEXT PAGE]

BY:
MOTLEY RICE LLC



W. Christopher Swett (SC Bar No. 78251)
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
Tel: (843) 216-9000
Fax: 843-216-9450
cswett@motleyrice.com

ATTORNEY FOR PLAINTIFF

June 7, 2018
Mount Pleasant, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF COLLETON) COMMON PLEAS

DAVID D. ROLLINS,)
Plaintiff,)
Vs) CASE NO. 2019-DP-25-00118
AIR & LIQUID SYSTEMS)
CORPORATION, et al.)
Defendants)

MARCH 13, 2020
RICHLAND, SOUTH CAROLINA

HONORABLE CHIEF JUSTICE JEAN H. TOAL

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

BY: THEILE B. MCVEY, ESQUIRE
ETHAN A. HORN, ESQUIRE
Attorney for the Plaintiff

BY: JAMES H. ELLIOTT JR, ESQUIRE
THURMAN W. ZOLLICOFFER, JR, ESQUIRE
Attorneys for the Defendant John Crane

KATHERINE A. SPIRES
REGISTERED PROFESSIONAL REPORTER

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF COLLETON) COMMON PLEAS

NELL ASHWORTH, Individually)
and as Personal)
Representative of the)
Estate of ROBERT J. ASHWORTH,)
Plaintiff,)
Vs) CASE NO. 2019-CP-25-325
FISHER CONTROLS INTERNATIONAL)
INC., et al,)
Defendants)

MARCH 13, 2020

RICHLAND, SOUTH CAROLINA

HONORABLE CHIEF JUSTICE JEAN H. TOAL

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

BY: THEILE B. MCVEY, ESQUIRE
Attorney for the Plaintiff

BY: YANCEY A. MCLEOD, III, ESQUIRE
Attorney for the Defendant Waste Management

greatly. Mr. Devey has had skin cancers, melanoma, and Ependymoma, E-P-E-N-D-Y-M-O-M-A. No other cancers have been identified in Ms. Dupree. The personal injury use is of the product was different. Mr. Devey primarily used it on his body and on his children. Ms. Dupree, it was applied to her as a child and she for a short time had personal use.

The time of use of the Johnson & Johnson product for Mr. Devey was over 55 years. When you compare that to Ms. Dupree who had the use of Johnson & Johnson Baby Powder of only 12 years. The years of use for Mr. Devey were the 1960s to 2017. And Ms. Dupree was 1999 to 2011.

The exposures are gravely different. Mr. Devey had occupational exposure to both crocidolite and chrysotile asbestos when he worked a the Garlock manufacturing plant in Palmyra, New York. You certainly know from past cases that crocidolite is a definite cause of pleural mesothelioma in men. Ms. Dupree has no identified alternative exposures.

Now, the damages sought for Mr. Devey, loss of consortium and Ms. Dupree, compensatory damages. They are very different cases when you look at the facts. Rule 42(a) of the South Carolina Rules of Civil Procedure does permit consolidation of cases that

involve "A common question of law and fact." The facts in these cases, these two cases are very dissimilar and there is no common issue.

As noted in *Hopper verses Session*, US District Court case in 2018, "Consolidation is inappropriate if it leads to inefficient, inconvenient or unfair prejudice to a party." I submit to you that the unfair prejudice is what Mr. Swett is looking for when he wants these two cases consolidated.

To address the factual differences. They are as far as the east is from the west. Mr. Swett has asserted that they deal with the same disease. They don't. One is a pleural mesothelioma in elderly gentleman and one is a peritoneal mesothelioma in Ms. Dupree of the abdomen. They are very different.

Mr. Swett argues that they involve the same asbestos containing product, Johnson & Johnson Baby Powder. Well, that don't. Mr. Devey was exposed to crocidolite and chrysotile asbestos in an occupational manufacturing setting at the Garlock plant. So from that standpoint, the exposures are completely different.

You know from the trials that you have presided over that occupational asbestos exposure specifically to crocidolite is significantly associated with an increased risk of pleural mesothelioma especially in

men.

On the other end of the spectrum, the overwhelming majority, some 99 percent of a peritoneal meso cases of the abdomen in women in the United States cannot be attributed to asbestos exposure. They are simply spontaneous or idiopathic. They merrily occur as a consequence of a biological process in the body. They are not caused by any outside manifestation that exists on the earth.

As you know from past trials, pleural mesotheliomas in men in the United States are strongly associated with asbestos exposure and that's what Mr. Devey had. In females, it's different. Particularly for peritoneal mesothelioma. Just don't occur.

Lumping the two different plaintiffs with two different diseases and two different exposures will be confusing to the jury and grossly prejudicial to the defendants. I believe that's what Mr. Swett is looking for. Mr. Devey is deceased. Ms. Dupree is living and her cancer is in remission.

The Second Circuit in the Malcolm case know that the notion of trying both claims of wrongful death and personal injury plaintiffs in a single consolidated trial is "troublesome." Because "the dead plaintiffs may present the jury with a powerful demonstration of

the fate that awaits those plaintiffs who are still living." And that's what's being looked for here. That's what Mr. Swett wants. He has stated that in his brief that both plaintiffs will suffer -- have or will suffer the same fate. In his brief "death."

We're all going to die. And there's no indication that Ms. Dupree at this point is going to die of mesothelioma. The consolidated case would require different fact in expert witnesses. The fact witnesses in the Devey case would be mournful and experiencing grief which can poison the jury with regards to the defendants with the Dupree case.

I mentioned the different exposures. Mr. Devey had the crocidolite and chrysotile occupation exposure at Garlock and his own oncologist told him that his occupational exposure caused his pleural mesothelioma. That's Exhibit I.

In interview in the Charleston newspaper, he pointed to the Garlock exposure and said that that's what caused his mesothelioma. And there was not a word of talcum powder or baby powder or any cosmetic product in the interview.

Ms. Dupree had no established asbestos exposure which is typical for females with the disease peritoneal mesothelioma of the abdomen. They have very different

medical histories and that's not surprising given the fact that they are different individuals separated by many years of age.

You got an elderly man with multiple cancers and you've got a 20 year old female with no significant medical history. Each claim will involve individualized medical evidence and expert testimony. Damages are distinct for the two as well as one seeks for wrongful death and one seeks compensatory.

I'd like to next address prejudice because I think that is very much present in consolidated cases. As noted in *Hopper verses Session* on page 4, consolidation is inappropriate if it results in unfair prejudice to a party. And as noted in *Malcolm*, 995 F.2nd 350, "Benefits of efficiency can never be purchased at the cost of fairness." That's what we're looking for here from the plaintiffs. They want to throw fairness out the window. Consolidation of these two cases would result in that prejudice and deny the defendant -- the defendants the right to a fair trial.

There is so much disparity in the facts and the allegations that a fair trial would pretty much be impossible. And that's due to the "evidence spillover" affect. It would simply confuse the jurors dealing with a 70 year old deceased male and a 20 year old living

female. They're very different cases.

What is said in one case may apply in the jurors' minds to both cases. And the jury can lose track of the evidence and the case differences and render a verdict simply by putting both cases in the same bucket. The verdict may not be based on matters of individual case merits.

I would reference you to in re *Carroll*, 182 F.R.D. 447 in which it was noted that plaintiffs had diverse medical histories and the consolidating cases for trial "would compress critical evidence of specific causation and marketing to a level which would deprive the defendant of a fair opportunity to defend itself."

The lumping blend by the juries that happens in consolidated cases is very real. Mr. Swett cited 22 consolidated cases in Missouri. Well, what happened to those 22 consolidated cases? They were consolidated, claims concerned to talcum powder in ovarian cases and the jury returned in all 22 cases identical verdicts. There was no difference. The ones that had been cancer-free for 30 plus years got the same compensation monetary amount as those who had died from ovarian cancer. That is unfair prejudice.

I have no doubt that the judge thought that an effective judicial instruction could be given to the

jury to avoid the prejudicial effect of the consolidation in the Missouri cases. The jury showed otherwise.

Now Mr. Swett mentioned in his brief the Missouri cases and cited back to you as reason for consolidating these two cases. But as Paul Harvey would say, you need the rest of the story. The Missouri Court of Appeals issued a writ throwing out a consolidation of 13 of the cases involving Johnson's Baby Powder. Later after the Court of Appeals order, the trial court denied consolidation of the cases and that is of the exhibit noted on page 2 of my opposition.

So the 22 cases that were tried to a verdict, all of a sudden they were -- the case didn't take place. They were thrown out.

Consolidation and punitive damages is a particularly troublesome issue. The Supreme Court in Philip Morris USA case cited on page 16 noted the due process clause of the Constitution "requires states to provide assurance" that a juries' punitive damages verdict is tailored to the facts of a specific plaintiff's individual case. If you put two cases together, you're not going to get that. Due process will be violated.

Further, the Supreme Court noted in Philip Morris that due process prohibits an award of punitive damages

not specifically tied to a defendant's conduct towards that particular plaintiff.

For the reasons articulated in my brief and those that I presented to the Court, I respectfully request the Court to deny the motion to consolidate as the facts of these two cases are far different. And if denied, Johnson & Johnson and Johnson & Johnson Consumer Inc. their right to a constitutional fair trial and due process. Thank you.

THE COURT: Thank you, Mr. Herns. Any reply, Mr. Swett?

MR. SWETT: Yes, Your Honor, briefly. May it please the Court. Your Honor, just like to take a few minutes just to address some facts, get a little more into the details. Again, both of these plaintiffs have the same damages. There are personal injury damages involved in both. We're not seeking wrongful death damages in Ms. Dupree's case.

There was some mention of occupational exposure. So when Mr. Devey was deposed and he was literally on death's doorstep, and if you read the next page from what Johnson & Johnson cites, his doctor didn't tell him that occupational exposure caused his mesothelioma. Doctor told him that asbestos probably caused his mesothelioma. There's a big difference there. And we

can get into that at trial and, you know, he said one thing that could be read one way, but that's what he testified to.

And even if he did have other exposures, under our standard it's not the cause, it's whether the certain defendant's product was a substantial contributing cause. And I guarantee you -- I know for a fact, so you've heard today that they're alleging that asbestos caused Mr. Devey's mesothelioma. They can't argue that Ms. Dupree's mesothelioma was idiopathic or spontaneous. Because, one, she's had genetic testing and she doesn't have BAP1 mutation.

Two, in every deposition they've been trying to prove or their theory of the case is that her father through his occupational -- his occupation as a firefighter brought home asbestos and caused her mesothelioma. So there's going to be indication both of these cases are going to be the same. It's asbestos it's just not our talc, not our asbestos. It's the same case.

So you're not going to have, you know, they may attempt to have Acknose or somebody arguing spontaneous, but we've got genetic testing in Ms. Dupree's case. She doesn't have the BAP1 mutation. That's going to be a nonissue.

And, really, I mean, we have the burden as the plaintiff and the issue -- the common issues that the judge -- the jury is going to have to decide is did baby powder have asbestos in it? Did asbestos in the baby powder cause these individuals or contribute substantially to their mesotheliomas? Those are common issues. And Your Honor knows that we see these same witnesses, same documents, days and days of corporate representative testimony in the first trial, why would we repeat that over and over when we can handle these common issues and spend an extra two hours getting the damages specific testimony in one other case and really make an efficient use of our time and resources.

And, again, I would point Your Honor to the example and I can get the verdict sheets from the recent New Jersey trial and I can file them on the record if needed, but they have individual verdict sheets for all four of the consolidated New Jersey plaintiffs and the jury was very attentive and they individualized the damages. And there -- and Johnson & Johnson briefed that.

In fact, if you look at page -- I'm not going to spend a lot of time on this, but there's a page in the defendant's brief that mentions three plaintiffs. Because this is the same briefing -- the is the same

briefing that Judge Viscomi -- it's the exact same brief and they just changed it. And she consolidated the cases. In light of this exact same briefing.

On one page of their brief it talks about towards the end, it talks about these three plaintiffs. And that was the Barden case up in New Jersey because we don't have three plaintiffs in this case. So I would say these arguments have been tried and failed in New Jersey in front of Judge Viscomi. She consolidated the cases.

Your Honor, I just ask again reiterate, I think it's appropriate to consolidate these cases. And unless Your Honor has any questions, I'll rest on that.

THE COURT: Very good.

MR. HERNS: Thank you.

THE COURT: All right. In the case of Mary Margaret Devey verses Johnson & Johnson and Johnson & Johnson Consumer Inc., 2018-CP-10-790; and Terran, T-E-R-R-A-N, Dupree against Johnson & Johnson and Johnson & Johnson Consumer Inc., 2018-CP-10-2899; both cases pending in Charleston County, I grant the plaintiff's motion to consolidate. I find that there are sufficient common issues of fact and law that judicial economy in the trial of these lengthy but very similar cases would be well served by consolidating these cases.

I do not consolidate 21 cases as was done in Missouri. I can understand the confusion that may arise in such a large consolidation. This is a consolidation of two cases. And I believe the jury will well be able to differentiate between the two cases in the areas where differentiation is needed.

Each case is a personal injury case involving the personal injury damages and no others. There are certainly factual differences between these two plaintiffs. And some factual difference between the exposure in terms of an occupational exposure in addition to an exposure to baby powder in the case of Mr. Devey. And a personal exposure to Johnson & Johnson Baby Powder and allegedly some take-home exposure to occupational type asbestos exposure in the case of Ms. Dupree or Miss Dupree. But those differences can be very easily made in a way that is comprehensible to the jury.

The big issue in this case is whether Johnson & Johnson Baby Powder contains asbestos. And whether -- and the second issue is whether Johnson & Johnson -- the use of Johnson & Johnson Baby Powder by Mr. Devey and Miss Dupree resulted in their contraction of mesothelioma.

The answer to these questions depends on an almost

completely common set of facts. Because the big issue in these type cases and particularly in these baby powder cases is a clash of experts who are very well-known and seen time after time in these cases. A constellation of experts on the plaintiff's side and on the defendant's side a corporate representative is always one individual from Johnson & Johnson and other expert witnesses that are common to everyone of these cases that I've tried and I've now tried several Johnson & Johnson cases to verdict or to impasse.

So I believe that not only to these cases, but for what it will teach us as we move through this -- the other Johnson & Johnson Baby Powder cases or other defendant baby powder manufacturing cases that are pending in South Carolina now asbestos docket which I manage, it behooves us to take some steps towards judicial economy in the interest of giving both plaintiffs and defendants their day in court on a basis that can be as accelerated as possible particularly for living mesothelioma claimants as is anticipated by the statutory laws of South Carolina that discuss how to docket and how to schedule the trial of these cases.

So I will acknowledge the very well researched and well presented arguments of plaintiffs and defendant and realizing that the matter is not one of -- upon which

bright minds can't always agree, I nevertheless think it is in the best interest of justice generally and for the participants in these two cases to consolidate them to trial in November and that is what I have ordered be done.

MR. SWETT: Your Honor, I think I heard you, but I just want to make sure I heard you correctly. And you make your ruling, you considered the fact that Ms. Devey has the small component of wrongful death damages as well? You considered that and still --

THE COURT: Yes. But the -- again, they're just two cases. And the individualized claims are very easy to explain in an individualized way to the jury. Frankly, this is a much easier case to try than cases that have one plaintiff, but a host of defendants. And I've tried those cases many times. Those cases sometimes present more difficult considerations to the jury than does this.

But Johnson & Johnson still has available to it all kinds of theories that involve other sources of possible contraction of cancers which it will be free to explore in each of these cases. And I think can explore in a way that protects the individual nature of the decision that must be made.

I will tell you with respect to both the actual and

punitive damages, separate verdicts will be submitted. I will bifurcate the punitive damage part of the case as I always do in asbestos cases and in the punitive part of the case there won't be any confusion about what is being asked. It will be asked with respect to each case individually. And that may vary depending on what the evidence discloses about the contraction and what the state of knowledge was of J&J at the various points in times when the exposure was had.

So I think that judicial efficiency is much served by a consolidation of these very similar expert witness presentations that take up the vast majority of these cases and those things which are individualized for the two plaintiffs and to the various defenses involving those individual plaintiffs can certainly be explored in a way that does not inhibit or negatively affect either plaintiffs or defendant.

MR. SWETT: Thank you, Your Honor.

THE COURT: All right. What else do I need to do?

MS. MCVEY: I don't think there's anything else.

THE COURT: Mr. Herns, anything further?

MR. HERNS: No, Your Honor. Nothing further.

THE COURT: Very good. Court will be adjourned.

- - -END OF REQUESTED TRANSCRIPT OF RECORD- - -

EXHIBIT D

From:	Toal, Jean
To:	Louis Herns
Cc:	Selert, Hali; Chris Swett (cswett@motleyrice.com); LeBlanc, Sarah; Jackie Mazade
Subject:	Re: Motion to Consolidate DeVey and Dupree
Date:	Friday, April 10, 2020 10:56:27 AM
Attachments:	image001.jpg

Louis: sorry to be tardy replying to this. Attending Stations and Good Friday devotions remotely. You are correct but if you feel you need more to preserve your clients' position for appeal, let me know. Be safe and well. Have a blessed Easter. Jean Toal

Sent from my iPhone

On Apr 9, 2020, at 5:22 PM, Louis Herns <Louis@milliganlawfirm.com> wrote:

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***
Dear Judge Toal,

Trust that you are staying healthy during these "Stay at Home" times.

I am writing regarding the Hearing that was held regarding the Motion to Consolidate the DeVey and Dupree Motley Rice cases pending in Charleston. You granted Mr. Sweet's motion and placed your reasons for granting the motion on the record at the end of the hearing. After the hearing had concluded, I approached the bench to give my card to the Court Reporter and exchange pleasantries with you. During our discussions, I addressed whether a written Order would be filed and believe you stated that the record should suffice. I am writing to confirm that a written Order granting Mr. Swett's Motion to Consolidate will not be forthcoming.

As I end all my e-mails these days: "Stay healthy my friend."

Louis

MILLIGAN
<image001.jpg>
HERNS

Louis P. Herns, Esq.
Milligan Herns, PC
721 Long Point Road
Suite 401
Mt. Pleasant SC 29464
(843) 971-6750
(843) 834-2377 (Cell)
louis@milliganlawfirm.com<mailto:louis@milliganlawfirm.com>

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EXHIBIT E

ELECTRONICALLY FILED - 2020 Feb 13 12:16 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1002899

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
TERRAN DUPREE, Plaintiff, v. JOHNSON & JOHNSON, et al., Defendants.	)	C/A No. 18-CP-10-2899

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
MARY MARGARET DEVEY, Individually and as Personal Representative of the Estate of ROBERT L. DEVEY, Plaintiff, v. JOHNSON & JOHNSON, et al., Defendants.	)	C/A No. 18-CP-10-790

Plaintiffs in the above-captioned cases hereby move the Court to consolidate these actions for trial and grant such further and other relief as the Plaintiffs are entitled. Notice is hereby given that Plaintiffs will seek a hearing on these motions and a ruling by the Court at the March 2020 motions hearing for pending South Carolina asbestos cases. In support of their Motions to Consolidate, Plaintiffs respectfully would show the Court as follows:

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INTRODUCTION

Consolidating cases "is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with days of the same witnesses, exhibits and issues from trial to trial. Central Wesleyan Coll. v. W.R. Grace & Co., 143 F.R.D. 628, 631 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. 1993). As this Court has learned over the last several years, the cases before it are replete with the same factual scenarios, defendants, experts and testimony. The defendants' experts assert in each case that there is no meaningful asbestos exposure, and the plaintiffs' experts contradict that testimony. For these reasons and the factual reasons set forth below, Plaintiffs respectfully move this Court to consolidate the two above-captioned cases for trial.

FACTS AND BACKGROUND

Each of these two cases represents a victim of mesothelioma, which developed due to asbestos exposure from regular and frequent use of Johnson's Baby Powder. Each of the Plaintiffs (or Decedent) was diagnosed with mesothelioma. Each of the cases is venued in Charleston County with a date-certain trial to begin November 9, 2020, and both cases have been following the same scheduling order deadlines for discovery. Similarly, these cases involve the same defendants: Johnson & Johnson and Johnson & Johnson Consumer, Inc. Moreover, the exact same South Carolina attorneys are involved in both cases.

The overlapping nature of the experts also supports consolidation. Dr. William Longo (materials scientist), Dr. Arnold Brody (general causation), and Dr. Terry Spear (industrial hygienist) are experts for the Plaintiffs in both cases. Each case also involves a pathologist, either Dr. John Maddox or Dr. Richard Kradin. Additionally, because the defendants are the same in both cases, defendants have retained and disclosed overlapping defense experts in both cases.

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If consolidated, Plaintiffs would be able to present expert witness testimony for both cases in a similar amount of time it would take if trial proceeded for only one case. To be more concrete, Plaintiffs estimate needing only one to two additional hours total to present expert testimony in both cases than if the cases were tried separately.

LAW AND ARGUMENT

Rule 42(a) of the South Carolina Rules of Civil Procedure allows this Court to consolidate "actions involving a common question of law or fact." Rule 42(a), SCRCP. The South Carolina Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. In South Carolina, "[c]onsolidation is within the broad discretion of the trial court" Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993).

As stated above, the South Carolina Rules of Civil Procedure provide for the consolidation of matters when they involve a common question of law or fact. See Rule 42(a), SCRCP. When two actions are pending before the same court, the court may order their consolidation so as to avoid unnecessary costs or delays and to avoid duplicitous litigation. Id. The South Carolina Supreme Court specifically enumerated the purpose of Rule 42(a) in Alcorn v. Ford Motor Co., stating that "[t]he purpose of consolidation is to prevent the multiplicity of litigation, to save the parties unnecessary costs, to conserve court time and space and to clear congested court dockets." 276 S.C. 180, 276 S.E.2d 925 (1981). A consolidation order does not merge separate claims or remove the separate identity of distinct causes of action. See Ellis v. Oliver, 307 S.C. 365, 415 S.E.2d 400 (1992). The merger of actions under consolidation is never so complete as to deprive any party of a substantial right. Id.

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Here, the two cases at issue involve common questions of law and fact in that both Plaintiffs used Johnson's Baby Powder on a regular and frequent basis, both developed mesothelioma (a disease caused by asbestos exposure), and testing has revealed asbestos contamination in Johnson's Baby Powder during their years of use. Both Plaintiffs experienced similar symptoms, received similar care, and suffered or will suffered the same fate: death. In both cases, Plaintiffs will have to prove Johnson & Johnson's historical knowledge of asbestos and that, more likely than not, Johnson's Baby Powder contained asbestos.

Consolidation of asbestos cases has long been a solution to resolution of numbers of these cases. Recently, twenty-two (22) talc cases involving Johnson & Johnson were consolidated for trial in Missouri. Johnson & Johnson sought a new trial after the multi-billion-dollar verdict, but that motion was denied and the Order included a notation by the clerk of Johnson & Johnson's reprehensible conduct in marketing asbestos-laden products to babies and mothers. See Order Denying Motion for New Trial (Attached as **Exhibit 1**). Similarly, Superior Court Judge Ana C. Viscomi, who oversees all asbestos cases filed in the Superior Court of New Jersey, recently consolidated for trial four (4) cases involving plaintiffs with mesothelioma following years of Johnson's Baby Powder use. See Order to Consolidate (Attached as **Exhibit 2**). Ultimately, Judge Viscomi held a consolidated compensatory trial and a consolidated punitive trial involving 3 out of 4 of these plaintiffs, regardless of the fact that plaintiffs included both male and female; living and deceased; and an age differential of 38 years old to 66 years old at time of filing.

Consolidation of asbestos cases in this state as well as across the country[1] is a process with a long history. Indeed, the Fourth Circuit, in affirming an opinion certifying a class by United

[1] Missouri is not the only state to continue its practice of consolidating asbestos cases for trial. See In re Asbestos Litig., 173 F.R.D. 81, 84 (S.D.N.Y. 1997) (federal courts of New York have approved consolidation of asbestos cases involving common or similar worksites, occupations, asbestos-related diseases, exposure time, status of discovery and/or counsel); Abadie v Metropolitan Life Ins. Co., 784

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States District Judge Sol Blatt, noted that asbestos cases involve the same repetitive issues: "(1) the general health hazards of asbestos; (2) when defendants knew or had reason to know of these hazards; (3) whether defendants failed to test their products or warn the public about them; (4) whether the asbestos industry engaged in any concerted action or conspiracy; and (5) whether defendants should be liable for punitive damages." Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993). The Fourth Circuit engaged in a lengthy discussion of the courts around the country that have consolidated cases whether via class action or traditional consolidation. Id. at 181-83. More recently, this Court consolidated three (3) asbestos cases for trial to commence on March 18, 2019. See Order (attached as **Exhibit 3**).

As the United States Court of Appeals for the Second Circuit has opined, "[c]onsolidation of tort actions sharing common questions of law and fact is commonplace. This is true of asbestos-related personal injury cases as well. The trial court has broad discretion to determine whether consolidation is appropriate. In the exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation."

Because the two cases at issue here involve the same asbestos-containing product, defendants, disease, experts, counsel, scheduling order and trial date, and venue these cases are precisely the type of cases which are ripe for consolidation, and Plaintiffs respectfully request that this Honorable Court consolidate them for trial to begin November 9, 2020.

CONCLUSION

This Court is tasked with ensuring the asbestos cases before it are resolved in an efficient, just and fair manner. Granting the instant Motion would conserve the very limited resources of

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So.2nd 46 (La. Ct. App. 2001) (Louisiana court consolidating for trial cases involving 129 shipyard workers and noting, in the face of complaints by one of the asbestos defendants, that the jury had clearly not been swayed by the volume of consolidated cases as they reached defense verdicts for eleven (11) of the workers.) Id.

this court and our state judiciary; ensure a just, speedy and inexpensive determination of each matter; and respect the time of South Carolina jurors while at the same time resolving two (2) similar cases in a single trial. A decision to grant this motion is well within the purview of Rule 42, SCRCP, and this Court's discretion.

WHEREFORE, the Plaintiffs pray that this Court consolidate these two civil actions, pursuant to Rule 42 of the South Carolina Rules of Civil Procedure, because of the substantially similar matters of fact and law that they present.

Respectfully submitted this 13th day of February, 2020,

MOTLEY RICE LLC

s/W. Christopher Swett
W. Christopher Swett (SC Bar No. 78251)
28 Bridgeside Blvd.
PO Box 650001
Mt. Pleasant, SC 29464
Tel: (843) 216-9000
Fax: 843-216-9450
cswett@motleyrice.com

ATTORNEY FOR PLAINTIFF

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of February 2020, a copy of the foregoing was electronically served to all counsel of record via the Court's e-filing system:

MOTLEY RICE LLC

s/*Sarah G. LeBlanc*
Sarah G. LeBlanc
Paralegal

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EXHIBIT 1

ELECTRONICALLY FILED - 2020 Feb 13 12:16 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1002899
ELECTRONICALLY FILED - 2019 Feb 12 6:12 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004940

FILED
DEC 19 2018
22ND JUDICIAL CIRCUIT
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STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

GAIL LUCILLE INGHAM, *et al.*,)
)
Plaintiffs,)
) Cause No. 1522-CC10417-01
vs.)
) Division No. 10
JOHNSON & JOHNSON, *et al.*,)
)
Defendants.)

ORDER

The Court has before it Defendants' Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for judgment notwithstanding the verdict, motion for new trials, and motion for new trials on damages or request for remittitur. The Court now rules as follows.

All parties were given a full and fair opportunity to adduce evidence and present argument over the course of a six week jury trial. Following the trial, a verdict was entered in favor of Plaintiffs and against Defendants.

Motion for Judgment Notwithstanding the Verdict

Defendants move for a judgment notwithstanding the verdict on all of Plaintiffs' claims. Defendants contend that the Court lacks jurisdiction over them, that venue is improper, that Plaintiffs did not prove causation, that Plaintiffs failed to prove their failure to warn claims, that Plaintiffs' claims are barred by the applicable statutes of limitation, that Plaintiffs' claims fail for other claim-specific reasons, and that Plaintiffs failed to proffer sufficient evidence to support the verdict on punitive damages claims. In addition, Defendant Johnson & Johnson separately argues that it is entitled to judgment notwithstanding the verdict as to the claims of Plaintiffs Andrea

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ELECTRONICALLY FILED - 2019 Feb 12 6:12 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004940

Schwartz Thomas, Marcia Owens and Sheila Brooks, because they failed to present evidence that they used the products at issue before 1979.

Rule 72.01(b) states:

> Motion for Judgment Notwithstanding the Verdict. A party may move for a directed verdict at the close of all the evidence. Whenever such motion is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than thirty days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict; or if a verdict was not returned, such party, within thirty days after the jury has been discharged, may move for judgment in accordance with the motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

A motion for judgment notwithstanding the verdict presents the question of "whether a submissible case was made." Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 759 (Mo. App. W.D. 2008)(citing Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820, 832 (Mo. App. E.D. 2005)). "To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict and the plaintiff is given the benefit of all reasonable inferences. Conflicting evidence and inferences are disregarded." Keveney v. Mo. Military Acad., 304 S.W.3d 98, 104 (Mo. banc 2010). "The jury's verdict will be reversed only if there is a complete absence of probative facts to support the jury's conclusion." Id. "A judgment notwithstanding the verdict is a drastic action that can only be

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granted if reasonable persons cannot differ on the disposition of the case." Delacroix v. Doncasters, Inc., 407 S.W.3d 13, 39 (Mo. App. E.D. 2013).

The Court finds that it should deny Defendants' motion for judgment notwithstanding the verdict. Many of Defendants' arguments have been addressed in prior orders of this Court and will be addressed briefly herein.

This Court has addressed Defendants' arguments related to jurisdiction in its prior orders. The Court finds that it has specific personal jurisdiction over Defendants under controlling precedent. See Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1779 (U.S. June 19, 2017); Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 231 (Mo. banc 2010). Plaintiffs have established facts adequate to invoke Missouri's long-arm statute and that support a finding of minimum contacts with Missouri sufficient to satisfy due process. The lawsuit arises out of and relates to Defendants' contacts with Missouri.

This Court has addressed Defendants' arguments related to venue in its prior orders. Venue is proper in this case under Section 508.010 RSMo.

Defendants contend that Plaintiffs failed to proffer reliable expert evidence of causation. The Court finds that the evidence presented on this issue was sufficient to support the jury's verdict. This Court found that Plaintiffs' expert witnesses were qualified to offer their opinions and their testimony was relevant and admissible under Section 490.065 RSMo. The evidence presented at trial includes the testimony of Plaintiffs' expert witnesses, evidence of the testing of the products at issue, including Defendants' own testing, Defendants' correspondence and the testimony of Defendant's corporate representative and chief medical officer. This evidence satisfies the standards for causation under all applicable state law. See e.g. Scapa Dryer Fabrics, Inc. v. Knight, 788 S.E.2d 421 (Ga. 2016); In re New York City Asbestos Litig., 48 Misc. 3d

460, 473 (N.Y. Sup. Ct. 2015); Bostic v. Georgia-Pacific Corp., 439 S.W.3d 332, 336-37 (Tex. 2014); Ford Motor Co. v. Boomer, 736 S.E.2d 724, 732 (Va. 2013); Gregg v. V-J Auto Parts, Co., 943 A.2d 216, 225 (Pa. 2007); Langness v. Fencil Urethane Sys., Inc., 667 N.W.2d 596, 606 (N.D. 2003); Benshoof v. Nat'l Gypsum Co., 761 F. Supp. 677, 679 (D. Ariz. 1991), *aff'd*, 978 F.2d 475 (9th Cir. 1992); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).

Defendants contend that Plaintiffs failed to prove their failure to warn claims. The Court finds that the evidence presented on this issue was sufficient to support the jury's verdict. This evidence includes the testimony of Plaintiffs' expert witnesses and the testimony of Defendant Johnson & Johnson's chief medical officer. This Court has previously considered Defendants' preemption argument on this issue and found that Plaintiffs' claims were not preempted.

Defendants argue that Plaintiffs' claims are barred by the applicable statutes of limitation. This was a fact issue for the jury to decide. See Powel v. Chaminade College Preparatory Inc., 197 S.W.3d 576, 582 (Mo. banc 2006). The Court submitted verdict directors to the jury on timeliness for each of the Plaintiffs to which this argument applies. The Court finds that sufficient evidence was presented to the jury on this issue such that their determinations on the timeliness of Plaintiffs' claims should not be set aside.

Defendants argue that that Plaintiffs' Ms. Kim and Ms. Groover-Mallard's claims fail because they are subsumed by the NJPLA. The Court finds that the claims submitted to the jury by Plaintiffs' Ms. Kim and Ms. Groover-Mallard were solely strict liability claims allowed under the NJLPA. See Dean v. Barrett Homes, Inc., 204 N.J. 286, 294, 8 A.3d 766, 771 (N.J. 2010).

Defendants argue that that Plaintiffs Ms. Owens, Ms. Packard, and Ms. Schwartz-Thomas's strict liability claims fail because they are not cognizable under the applicable state

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laws. The Court finds that this argument is moot because Plaintiffs Ms. Owens, Ms. Packard, and Ms. Schwartz-Thomas did not submit strict liability claims to the jury.

Defendants contend that Plaintiffs failed to proffer sufficient evidence to support the verdict on their punitive damages claims. First, Defendants contend that other state laws should apply herein regarding punitive damages. Missouri courts apply the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws Section 145 (1971) in deciding choice of law issues for tort claims. Kennedy v. Dixon, 439 S.W.2d 173, 184 (Mo. banc 1969); See also Harter v. Ozark-Kenworth, Inc., 904 S.W.2d 317, 320 (Mo. App. W.D. 1995).

Section 145 of the Restatement (Second) of Conflict of Laws provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.
>
> (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Kennedy v. Dixon, 439 S.W. at 184.

Considering the direct connection between Defendants' activities in Missouri and the injuries Plaintiffs received, as well as the fact that numerous Plaintiffs were first injured in Missouri, the Court finds that Missouri law should apply regarding Plaintiffs' claims for punitive damages.

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Second, Defendants contend that even under Missouri law, Plaintiffs have failed to present sufficient evidence to support their claims for punitive damages. "The test for punitive damages in a products liability case is a strict one." Angotti v. Celotex Corp., 812 S.W.2d 742, 746 (Mo. App. W.D. 1991). Punitive damages are allowed when "defendant knew of the defect and danger and secondly, that by selling the product with said knowledge, the defendant thereby showed complete indifference to or conscious disregard for the safety of others." Id. Punitive damages may also be recoverable "when there is evidence to show that a defendant had been put on notice of the fact that relevant information in regard to the dangerousness of a product was available to show that the product was actually known to constitute a health hazard to a given class of individuals and the defendant consciously chose to ignore the available information." Id. The Court finds that sufficient evidence was presented to the jury from which it could make such a finding.

Defendant Johnson & Johnson argues that it is entitled to judgment notwithstanding the verdict as to the claims of Plaintiffs Andrea Schwartz-Thomas, Marcia Owens and Sheila Brooks, because they failed to present evidence that they used the products at issue before 1979. The Court finds that Plaintiffs presented sufficient evidence of a participatory connection with the products at issue such that holding Johnson & Johnson liable is warranted under applicable law. Plaintiffs presented particular evidence regarding decisions, specifications and testing of the products at issue that were done by Defendant Johnson & Johnson rather than by its subsidiary. In addition, Plaintiffs presented sufficient evidence from which the jury could find that Defendant Johnson & Johnson owed a legal duty of care to Plaintiffs Andrea Schwartz-Thomas, Marcia Owens and Sheila Brooks.

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Accordingly, this Court must deny Defendants' motion for judgment notwithstanding the verdict.

Motion for New Trials

Defendants contend that they are entitled to new separate trials of each Plaintiffs' families' claims.

Rule 78.01 states as follows:

> The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all or part of the issues after trial by jury, court or master. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact or make new findings, and direct the entry of a new judgment.

"On a motion for new trial, the trial court may reconsider its rulings on discretionary matters, such as the admissibility of evidence, and may order a new trial if it believes that its discretion was not wisely exercised and that the losing party was thereby prejudiced." Anderson v. Kohler Co., 170 S.W.3d 19, 23 (Mo. App. E.D. 2005).

The Court has examined Defendants' claims in their Motion for New Trial and finds that Defendants have not shown good cause required for a new trial under Rule 78.01.

In particular, the Court notes that it did not err in admitting documents from Imerys Talc America, Inc. f/k/a Luzenac America, Inc. Missouri courts allow the admission of non-party co-conspirator statements against a Defendant conspirator. See State v. Ferguson, 20 S.W.3d 485, 496 (Mo. banc 2000)("Statements of one conspirator are admissible against another under the co-conspirator exception to the hearsay rule"); See also Sparkman v. Columbia Mut. Ins. Co., 271 S.W.3d 619, 622 (Mo. App. S.D. 2008)(recognizing the co-conspirator exception in civil cases).

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Motion for New Trials on Damages or Request for Remittitur

Defendants seek an order of this Court vacating the damages award and ordering new separate trials on damages. In the alternative, Defendants ask the Court to reduce the damages or give Plaintiffs the option of accepting remittitur.

Section 537.068 RSMo states in pertinent part:

> A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages.

"The circuit court should not sustain a motion for additur or remittitur under § 537.068 without having determined that the verdict is against the weight of the evidence and that the party moving for additur or remittitur is entitled to a new trial. Badahman, 395 S.W.3d at 38. Courts "generally defer to the jury's decision as to the amount of damages." Mackey v. Smith, 438 S.W.3d 465, 480 (Mo. App. W.D. 2014).

Substantial evidence was presented at trial that supports the compensatory damage awards entered herein, including evidence of the injuries, pain, suffering and impairment of Plaintiffs, their spouses and decedents. The jury's compensatory damage awards are fair and reasonable compensation for the injuries and damages proven by Plaintiffs at trial. This Court will defer to the jury's decision as to these damage amounts.

"Punitive damages may properly be imposed on a tortfeasor to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." Blanks v. Fluor Corp., 450 S.W.3d 308, 409 (Mo. App. E.D. 2014). "Punishing a tortfeasor through an award of punitive damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." Id. "And the Due Process Clause prohibits the imposition of grossly

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excessive or arbitrary punishments on a tortfeasor." Id. "A grossly excessive punitive damage award violates a tortfeasor's substantive right of due process in that it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." Id.

"No precise constitutional line or simple mathematical formula exists with regard to determining whether a punitive damage award is grossly excessive." Id. "The United States Supreme Court has set out three guideposts, commonly referred to as the Gore guideposts, when reviewing whether a punitive-damage award comports with due process: (1) the reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive-damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id.

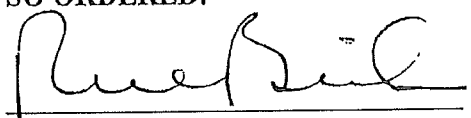
In this case, the Court finds that the punitive damage awards comport with due process. First, substantial evidence was adduced at trial of particularly reprehensible conduct on the part of Defendants, including that Defendants knew of the presence of asbestos in products that they knowingly targeted for sale to mothers and babies, knew of the damage their products caused, and misrepresented the safety of these products for decades. Second, Defendants' actions caused significant physical harm and potential physical harm, including causing ovarian cancer in Plaintiffs or Plaintiffs' decedents. Third, Missouri state law imposes significant potential penalties in comparable cases under the Missouri Merchandising Practices Act.

The Court finds that Defendants have not shown good cause for a new trial on the damage awards entered herein. The Court cannot determine that the verdict was against the weight of the evidence and accordingly cannot sustain Defendants' request for remittitur.

The Court now **ORDERS** and **DECREES** as follows.

Defendants' Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for judgment notwithstanding the verdict, motion for new trials, and motion for new trials on damages or request for remittitur are hereby **DENIED**.

SO ORDERED:



Rex M. Burlison
Circuit Judge
Division 10

Dated: December 19, 2018

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EXHIBIT 2

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ANA C. VISCOMI J.S.C.
SUPERIOR COURT OF NEW JERSEY
56 PATERSON STREET
P.O. BOX 2633
NEW BRUNSWICK, NEW JERSEY 08903-2633

FILED
FEB - 1 2019
ANA C. VISCOMI, J.S.C.

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DOUGLAS and ROSALYN BARDEN

Plaintiff(s),

v.

BRENNTAG NORTH AMERICA et al.

Defendants.

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION, MIDDLESEX
COUNTY VICINAGE
DOCKET NUMBER: MID L-1809-17AS

Civil Action

ORDER TO CONSOLIDATE

DAVID CHARLES ETHERIDGE and
DARLENE PASTORE ETHERIDGE

Plaintiff(s),

v.

BRENNTAG NORTH AMERICA et al.

Defendants.

DOCKET NUMBER: MID L-0932-17AS

D'ANGELA MCNEILL-GEORGE,

Plaintiff(s),

v.

BRENNTAG NORTH AMERICA et al.

DOCKET NUMBER: MID L-7049-16AS

WILLLIAM and ELIZABETH RONNING
,

Plaintiff(s),

v.

BRENNTAG NORTH AMERICA et al.

DOCKET NUMBER MID L-6040-17AS

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WHEREAS, the above-captioned matters involve plaintiffs who have been diagnosed with peritoneal mesothelioma; and,

WHEREAS, these plaintiffs all allege that they utilized Johnson & Johnson Baby Powder and that such powder, was comprised of talc supplied, at times, by Imerys Talc America and/or its predecessors/successors, and/or Windsor Minerals; and,

WHEREAS, these plaintiffs, further allege that the source talc and the cosmetic talcum powder was contaminated with asbestos; and,

WHEREAS, these plaintiffs further allege that Johnson & Johnson Baby Powder, with talc supplied by Imerys Talc America and/or its predecessors/successors, and/or Windsor Minerals was a substantial contributing factor in the development of their mesothelioma; and

WHEREAS, Middlesex MCL Asbestos historically accommodates living mesothelioma plaintiffs on an expedited trial track; and,

WHEREAS, all of these matters have been listed as "trial ready" on multiple occasions; and,

WHEREAS, this court has historically *sua sponte* consolidated cases involving a common question of law or fact arising out of the same transactions or series of transactions in accordance with R. 4:38-1 and R. 4:38A;

IT IS HEREBY ORDERED, on this 1st day of February, 2019:

1. These matters are consolidated for the compensatory phase of trial pursuant to R. 4:38-1 and R. 4:38A.
2. A pre-trial conference is scheduled for March 8, 2019 at 10:00 a.m., in Courtroom 203.

ANA C. VISCOMI, J.S.C.

TO: Christopher Placitella, Esq.
Moshe Maimon, Esq.
Leah Kagan, Esq.
John Garde, Esq.
John McMeekin, Esq.

cc. Agatha Dzikiewicz, Esq.
Special Master
Dolores Taylor, Team Leader

EXHIBIT 3

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
DENVER D. TAYLOR and **JANICE TAYLOR,**	)	**C/A No. 2018-CP-40-04940**
	)	In Re:
Plaintiffs,	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
AIR & LIQUID SYSTEMS CORPORATION, et al.	)	
	)	
Defendants.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
RHONDA ELAINE GREENE, Individually and as Personal Representative of the Estate of **ELLA FAY GREENE,**	)	**C/A No. 2018-CP-40-00173**
	)	In Re:
Plaintiff,	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
ARMSTRONG INTERNATIONAL, INC., et al.	)	
	)	
Defendants.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JAMES MICHAEL HILL, JR. as Executor of the Estate of **JAMES MICHAEL HILL,**	)	**C/A No. 2018-CP-40-04680**
	)	In Re:
Plaintiff,	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
ADVANCE AUTO PARTS, INC., et al.	)	
	)	

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Defendants.)

ORDER ON MOTION TO CONSOLIDATE

Before the Court is Plaintiffs' First Amended Motion to Consolidate. Plaintiffs' first filed this Motion to Consolidate on January 3, 2019 seeking to consolidate the above captioned cases and the *Glenn* matter tried before this Court in January of 2019. Plaintiffs then filed their amended motion seeking to consolidate the *Taylor, Hill* and *Greene* matters. For the reasons articulated at the hearing on this matter on February 21, 2019 and herein, the Plaintiffs' Amended Motion to Consolidate is GRANTED.

INTRODUCTION

Consolidating cases "is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, days of the same witnesses, exhibits and issues from trial to trial." *Cent. Wesleyan Coll. v. W.R. Grace & Co.,* 143 F.R.D. 628, 631 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. 1993)(quoting U.S. District Judge Robert Parker from *Jenkins v. Raymark Industries, Inc.,* 782 F.2d 468 (5th Cir.1986), *reh'g denied,* 785 F.2d 1034 (5th Cir.1986) which certified a class of more than 800 asbestos injury claims).

As this Court has learned over the last two years, the cases before it are replete with the same factual scenarios, defendants, experts and testimony. While the location of where a gasket was removed may change, the process to remove that gasket and the exposure testimony does not. Typically, the defendants' experts assert that there is no meaningful exposure and the plaintiffs' experts contradict that testimony.

FACTS AND BACKGROUND

Each of these cases represents a victim of mesothelioma which developed due to asbestos exposure from work in industrial facilities in and around South Carolina working with or near

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asbestos containing materials including, among other things, gaskets, insulation and packing. Each of the Plaintiffs (or now Decedents) was diagnosed with pleural mesothelioma. Each of the cases is venued in Richland County.[1] These cases involve a number of the same defendants, but this is not dispositive of the matter. Each of these cases, whether tried together or separately, involve multiple defendants and multiple jobsites. However, at the time of the hearing on this matter, Resolute Forest Products, CBS (Westinghouse), Covil, Daniel International, Gorman Rupp, Goulds Pumps, Ingersoll Rand, Spirax Sarco, and Zurn were all defendants in each of the cases. Additionally, there are a number of defendants in 2 of the 3 cases.

The overlapping nature of the experts also supports consolidation. Dr. Brody is an expert in each case. Each case involves a pathologist, either Dr. Maddox or Dr. Staggs. Additionally, either Dr. Frank or Dr. Holstein are the occupational medicine doctors involved and could likely be streamlined to one witness. Charlie Ay is involved in all three cases given his extensive experience working with and abating the asbestos products at issue in each case. To the extent that additional time is required to present experts, it seems to this court that that time is minimal in comparison to the amount of Court time required to try these cases separately with the experts giving essentially the same testimony three times.

TIMING OF THIS MOTION

As a preliminary matter, Defendants raise the issue of the timing of this motion. The initial motion was filed on January 3, 2019. The trial date of this matter is March 18, 2019. The amount of time between the filing of the motion and the currently scheduled trial date is 74 days. The scheduling order for the asbestos docket entered by the previous judge overseeing this docket states

[1] Although venue is the same in the instant cases, having venue be the same for all cases which are proposed to be consolidated is not a prerequisite to consolidation. Courts in South Carolina are permitted to change the venue of a case for any number of reasons, including for the convenience of the parties and in the interest of justice.

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that the court will set cases for trial with 120 days notice. The order further notes that any party who seeks to consolidate cases will move for consolidation within 45 days of the order setting those cases for trial. Viewed another way, the order envisions giving the defendants 75 days notice of consolidation. I have taken a different approach to setting cases for trial since taking the bench. My practice has been to set cases for trial in blocks of 4-5 cases each for the entire calendar year. The trial calendar for 2019 was entered by me on October 19, 2018. Thus, under the defendants' interpretation of the case management order, Plaintiffs would have been required to file a motion to consolidate on December 3, 2018, more than 105 days before trial. It seems clear to this Court, that this deadline of the scheduling order has not been in effect for more than two years as the Court has been setting cases for trial far in advance of the previously mentioned 120 days. Even if the Court were bound to give the defendants 75 days of notice for consolidation, Plaintiffs filed the instant motion one (1) day late. The court, under the circumstances finds this to be excusable. Thus, the Court finds the instant motion was timely filed.

LAW AND ARGUMENT

Rule 42(a) of the South Carolina Rules of Civil Procedure allows this court to consolidate "actions involving a common question of law or fact." Rule 42(a), SCRCP. The South Carolina Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. In South Carolina, "[c]onsolidation is within the broad discretion of the trial court." *Keels v. Pierce,* 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993) (quoting *Worthy v. Chalk,* 44 S.C.L. (10 Rich.) 141 (1856)).

As stated above, the South Carolina Rules of Civil Procedure provide for the consolidation of matters when they involve a common question of law or fact. See Rule 42(a), SCRCP. When two actions are pending before the same court, the court may order their

consolidation so as to avoid unnecessary costs or delays and to avoid duplicitous litigation. *Id.* The South Carolina Supreme Court specifically enumerated the purpose of Rule 42(a), SCRCP in *Alcorn v. Ford Motor Co.*, stating that "[t]he purpose of consolidation is to prevent the multiplicity of litigation, to save the parties unnecessary costs, to conserve court time and space and to clear congested court dockets." 276 S.C. 180, 276 S.E.2d 925 (1981).

A consolidation order does not merge separate claims or remove the separate identity of distinct causes of action. *See Ellis by Ellis v. Oliver*, 307 S.C. 365, 415 S.E.2d 400 (1992). The merger of actions under consolidation is never so complete as to deprive any party of a substantial right. *Id.*

These three cases involve common questions of law and fact in that Plaintiffs all worked in industrial facilities (including all at properties owned by three common defendants, Bowater, Celanese and International Paper), utilizing the same or similar work practices and all ultimately developing mesothelioma, a disease caused from asbestos exposure. Plaintiffs each experienced similar symptoms, received similar care, and all suffered or will suffer the same fate: death.

Consolidation of asbestos cases has long been a solution to resolution of numbers of these cases. Recently 22 talc cases were consolidated for trial in Missouri. *See* Order Denying Motion for New Trial, *Ingham, et al. v. Johnson &Johnson, et al.*, Cause No. 1522-CC-10417-01, Missouri Circuit Court, 22nd Judicial Circuit.

But consolidation of asbestos cases in this state as well as across the country is a process with a long history. Indeed, the Fourth Circuit in affirming an opinion certifying a class by U.S. District Judge Sol Blatt note that asbestos cases involve the same repetitive issues "(1) the general health hazards of asbestos; (2) when defendants knew or had reason to know of these hazards; (3) whether defendants failed to test their products or warn the public about them; (4) whether the

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asbestos industry engaged in any concerted action or conspiracy; and (5) whether defendants should be liable for punitive damages." *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993). The Fourth Circuit engaged in a lengthy discussion of the courts around the country that have consolidated cases whether via class action or traditional consolidation. *Id.* at 181-183.

Further, Missouri is not the only state to continue its practice of consolidating cases for trial. The New York asbestos litigation CMO specifically permits consolidation of cases. The federal courts of New York have also approved of consolidation where some, but not all, of the following factors are met: "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged ..." *In re Asbestos Litig.*, 173 F.R.D. 81, 84 (S.D.N.Y. 1997).

Similarly, Louisiana state courts have approved of consolidating actions. In 2001, a case involving 129 shipyard workers was consolidated for trial. *Abadie v. Metropolitan Life Ins. Co.*, 784 So.2nd 46 (La. Ct. App. 2001). The court noted that in the face of complaints by one of the defendants, Westinghouse, that the jury had clearly not been swayed by the volume of consolidated cases as they reached defense verdicts for eleven (11) of the workers. *Id.*

As the U.S. Second Circuit Court of Appeals opined, "[c]onsolidation of tort actions sharing common questions of law and fact is commonplace. This is true of asbestos-related personal injury cases as well. The trial court has broad discretion to determine whether consolidation is appropriate. In the exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation."

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Because the three cases here involve the same or similar types of work, the same disease, parallel tracked discovery, and the same counsel, these cases are precisely the type of cases which are ripe for consolidation.

CONCLUSION

This Court is tasked with ensuring the asbestos cases before it are resolved in an efficient, just and fair manner. Granting this motion would conserve the very limited resources of this court, ensure a just, speedy, and inexpensive determination of each matter, and respect the time of South Carolina jurors while at the same time resolving three (3) similar cases before it in a single trial. A decision to grant this motion is well within the purview of Rule 42 and this Court's discretion.

Therefore, the court, having considered the facts in these cases, the law applicable to consolidation and the arguments of counsel, the Court finds that consolidating the above captioned cases for trial is appropriate. As a result, the Court hereby GRANTS the motion to consolidate.

AND IT SO ORDERED.

Jean Hoefer Toal, Chief Justice of the
South Carolina Supreme Court (Retired),
Acting as Circuit Court Judge

February 25, 2019

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Richland Common Pleas

Case Caption: James Michael Hill , plaintiff, et al vs Advanced Auto Parts Inc , defendant, et al

Case Number: 2018CP4004680

Type: Order/Consolidate

IT IS SO ORDERED.

s/ Jean H. Toal #2758

EXHIBIT F

ELECTRONICALLY FILED - 2020 Mar 03 6:08 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1000790

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON MARY MARGARET DEVEY, Individually, And as Personal Representative of the Estate of ROBERT L. DEVEY, Plaintiffs, v. JOHNSON & JOHNSON, et al. Defendants	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-10-790

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON TERRAN DUPREE, Plaintiff, vs. JOHNSON & JOHNSON, et. al., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-10-2899

DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER, INC.'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE

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DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER, INC.'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE

COMES NOW Defendant Johnson & Johnson Consumer, Inc. ("JJCI"), f/k/a Johnson & Johnson Consumer Companies, Inc., and for its Opposition to Plaintiffs' Motion to Consolidate the above-captioned cases ("*Devey*" and "*Dupree*," respectively), states as follows:

INTRODUCTION

Plaintiffs seek to consolidate for trial two ***very*** different cases. In one, *DeVey*, plaintiff brings a wrongful death action for her late husband, who was 70-years-old when he died, purportedly from pleural mesothelioma. His medical history included various skin cancers and melanomas, and, at the time of his death, ependymoma. His occupational history included exposure to commercial asbestos-containing products. In the other case, *Dupree*, the nineteen-year-old plaintiff brings a personal injury action for her diagnosis at age fourteen of peritoneal mesothelioma of the abdomen. She has no significant medical history or known exposures to asbestos. After successful treatment, Ms. Dupree is cancer-free.

Plaintiffs ask this Court to allow the jury to consider the claims of a nineteen-year-old in remission beside the claims of a senior widow, because both Ms. Dupree and Mr. Devey allegedly used Johnson's Baby Powder. Plaintiffs' motion to consolidate makes plain their intention to use this juxtaposition to persuade a jury that, *because* seventy-year-old Mr. Devey with occupational exposure to asbestos died of pleural mesothelioma, *then* nineteen-year-old Ms. Dupree *will die* of mesothelioma, *despite the fact* that she is in remission and has a different disease. Plaintiffs' state: "Both plaintiffs experienced similar symptoms, received similar care, and suffered or will suffered the same fate: death." Plaintiffs' Motion to Consolidate at 4. Plaintiffs' statement is not remotely accurate. Ms. Dupree and Mr. Devey had *different* diagnoses and received *very different* care. Ms.

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Dupree was diagnosed with peritoneal mesothelioma of the abdomen and successfully underwent chemotherapy and surgery. She participates in a clinical trial that requires her to take a daily pill. Mr. Devey received no surgery for his mesothelioma and discontinued chemotherapy due to the diagnosis of a *different* cancer, ependymoma. Plaintiffs' unsupported leap that Ms. Dupree "will suffer[] the same fate: death" as Mr. Devey is the most prejudicial risk of consolidation imaginable. Plaintiffs cannot be permitted to use consolidation as a proxy for causation. Nor may Plaintiffs encourage the jury to award damages to a living, cancer-free plaintiff based upon the "fate" "suffered" by a deceased plaintiff.

Plaintiffs next misleadingly ask this Court to follow the lead of Missouri, which consolidated 22 plaintiffs in an ovarian cancer case against Johnson & Johnson last year. But Plaintiffs strategically omit the fact that the Missouri Court of Appeals subsequently issued a writ thwarting the consolidation of thirteen cases involving Johnson's Baby Powder. *See* Preliminary Writ of Prohibition, *State ex rel. Johnson & Johnson, et al., v. The Hon. Rex M. Burlison*, No. SC97637 (Mo. Jan. 14, 2019) attached hereto at **Exhibit A**. Following that order, the Missouri trial court has since denied consolidation. *Schulte, et al. v. Johnson & Johnson, et al.*, No. 1622-CC00536 (Mo. Cir. Ct. Feb. 14, 2019) and *Bhuyan v. Johnson & Johnson, et al.*, No. 1822-CC00722 (Mo. Cir. Ct. Feb. 14, 2019) (orders denying consolidation), collectively attached hereto at **Exhibit B**. Other states, too, have denied consolidation of two claimants alleging asbestos in talc. *See Rimondi v. BASF Catalysts, LLC, et al.*, No. MID-L-2912-17AS (N.J. Sup. Ct. Dec. 21, 2018) (Hr'g. Tr. at 9-10), attached hereto at **Exhibit C**; *Blinkinsop v. Albertsons Companies Inc, et al.* No. JCCP 4674/BC677764 (Cal. Super. Ct. L.A. Cty.Dec. 15, 2017) (Notice of Ruling), attached hereto at **Exhibit D**.

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As discussed in more detail below, JJCI opposes the consolidation of *Devey* and *Dupree*, including for pretrial proceedings and trial.

BACKGROUND

Plaintiffs' motion to consolidate applies to *Devey v. Johnson & Johnson, et al.,* Case No. 2018-CP-10-790 and *Dupree v. Johnson & Johnson, et al.,* Case No. 2018-CP-10-2899. The facts of these cases vary in several significant ways, as illustrated in the chart below.

	Devey	**Dupree**
Status	Deceased.	Living and cancer-free.
Age	70 at time of death.	20
Age at Diagnosis	69	14
Cause of Action	Wrongful Death.	Personal Injury.
Diagnosis	Pleural Mesothelioma.	Peritoneal Mesothelioma of the Abdomen.
Medical History	Skin cancers, melanoma, and ependymoma.	Not identified.
Alleged Manner of Johnson's Baby Powder Use	Primarily personal use and use on others.	Primarily from others applying powder to her, and also personal use.
Alleged Duration of Johnson's Baby Powder Use	55+ years.	12 years.
Alleged Years of Talcum Powder Use	1960s-2017	1999-2011
Alternative Exposures to Asbestos	Occupational exposure.	Not identified.
Damages Sought	Loss of consortium.	Compensatory.

ARGUMENT

Rule 42(a) of the South Carolina Rules of Civil Procedure provides that a court may consolidate actions when they involve "a common question of law or fact." SCRCP 42(a). "The moving party has the burden of persuading the court that consolidation is desirable." *Keels v. Pierce*, 315 S.C. 339, 341 (Ct. App. 1993) (affirming denial of motion to consolidate). Consolidation is inappropriate if it leads to inefficiency, inconvenience, or unfair prejudice to a

party. *See Hopper v. Session*, 2018 U.S. Dist. LEXIS 92769, *3 (S. C. District Court April 30, 2018) (citing *EEOC v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998)).

As courts across the country have recognized, consolidation of asbestos cases in particular "is a herculean task" that should not be taken lightly. *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). As the Second Circuit explained, "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Id.* Accordingly, courts considering consolidation must be "mindful of the dangers of a streamlined trial process in which testimony must be curtailed and jurors must assimilate vast amounts of information" and the "systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice." *Id.* at 350 (citation omitted). In short, courts must "take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *Id.* (citation omitted).

These concerns are especially heightened in personal injury litigation where plaintiffs' claims turn on case-specific inquiries related to specific causation and other individualized issues that are likely to become confused in a joint trial of multiple plaintiffs' cases. *See, e.g., In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 444, 447 (D.N.J. 1998) (noting that "'concern for a fair and impartial trial'" is "'paramount'" in determining whether to allow claims to proceed jointly, and denying motion to consolidate 14 drug product-liability cases for trial, finding "[a] consolidated trial . . . would compress critical evidence of specific causation and marketing to a level which would deprive [defendant] of a fair opportunity to defend itself") (citation omitted); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) ("Joinder 'of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of asserted claims.'") (citation omitted). This is so because "[i]t would be practically impossible for a jury to keep track of all of the facts and applicable law regarding each

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of the [numerous] plaintiffs" and therefore "the purpose behind [consolidation] – to enhance judicial economy – would not be furthered by allowing all of the Plaintiffs to join together in a single action and single trial." *Adams v. Alliant Techsystems, Inc.*, No. 7:99cv00813, 2002 U.S. Dist. LEXIS 2295, at *6 (W.D. Va. Feb. 13, 2002); *see also Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460 (E.D. Mich. 1985) (where cases would require separate medical and other factual inquiries, "[c]onsolidation would make trial confusing, unmanageable and perhaps inequitable . . . since the unique details of each case would still need to be presented to the jury"). Ultimately, instead of promoting efficiency, joinder in such contexts would only sow confusion and prejudice. *See Bailey v. N. Tr. Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000) (severing action because "[t]he jury may simply resolve the confusion [created by different plaintiffs' factual situations] by considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case").

As set forth in more detail below, all of these concerns are present here. The specific facts underlying the claims in *Devey* and *Dupree* are highly individualized and disparate, and, thus, confusing those facts would be easy to do, making consolidation highly prejudicial. Given the dissimilarities in Plaintiffs' claims, consolidation would undermine, rather than promote, the interests of convenience and efficiency. JJCI's due process right to a fair trial will be severely compromised should Plaintiffs be permitted to tell a jury that nineteen-year-old Ms. Dupree, in remission, "will suffer[] the same fate: death" as the late Mr. Devey. Plaintiffs' Motion to Consolidate at 4. Accordingly, Plaintiffs' motion for consolidation should be denied.

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I. CONSOLIDATION IS IMPROPER GIVEN THE HIGHLY INDIVIDUALIZED FACTUAL AND LEGAL QUESTIONS PRESENTED BY EACH PLAINTIFF'S CLAIMS.

A. Important factual differences preclude consolidation of Plaintiffs' claims.

Plaintiffs' motion ignores the significant differences underlying *Devey* and *Dupree*, oversimplifies the issues before the Court, and grossly conflates the facts of each case. For example, Plaintiffs assert "the two cases at issue here involve the same . . . disease." Plaintiffs' Motion to Consolidate at 5. However, Ms. Dupree was diagnosed with *peritoneal* mesothelioma of the abdomen and Mr. Devey was diagnosed with *pleural* mesothelioma, *as well as many other cancers*. In fact, Mr. Devey had to stop chemotherapy due to an ependymoma diagnosis. *See* March 13, 2018 Devey Disc. Dep. Tr. at 63:5-11, attached hereto at **Exhibit E**. Plaintiffs allege that "the two cases at issue here involve the same asbestos-containing product," Johnson's Baby Powder. Plaintiffs' Motion to Consolidate at 5. But, in fact, Mr. Devey testified that he was employed at a facility that handled raw asbestos and manufactured several asbestos-containing products, to which he was likely exposed. Most troubling, Plaintiffs seek to use Mr. Devey's death as a warning to the jury that Ms. Dupree – although she is cancer-free – will die of mesothelioma. *See id.* at 4 ("Both plaintiffs experienced similar symptoms, received similar care, and suffered or will suffered the same fate: death."). The differences between *Devey* and *Dupree*, as elaborated below, are critical to a jury's assessment of liability and damages.

Plaintiffs have different diseases with likely different causes. Ms. Dupree's diagnosis of peritoneal mesothelioma of the abdomen is *not* the same disease as Mr. Devey's diagnosis of pleural mesothelioma. As one expert has testified, "asbestos exposure is much more strongly associated with the risk of pleural mesothelioma than the risk of peritoneal mesothelioma. One has to make a very clear distinction between the two." December 13, 2018 Moolgavkar Dep. Tr. at

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25:12-17, attached hereto at **Exhibit F**. In fact, as much as 99 percent of all peritoneal mesothelioma cases amongst women in the United States cannot be attributed to asbestos exposure and occur naturally as a consequence of biological processes. *Id.* at 26:7-19.

Moreover, Ms. Dupree is female, while Mr. Devey is male, which is relevant to an analysis of mesothelioma causation. *See* December 29, 2017 Moolgavkar Dep. Tr. at 280:7-281:1, attached hereto at **Exhibit G** (testifying that when comparing trends in different types of mesothelioma amongst males and females, "it becomes very clear" that pleural mesothelioma in males has been strongly impacted by asbestos use in the United States, but the same is not true for pleural mesothelioma in females or peritoneal mesothelioma.").

As this Court recalls from *Boyd-Bostic v. Johnson & Johnson, et al.*, Case No. 2017-CP-16-0400, which involved a plaintiff with pericardial mesothelioma, pericardial mesothelioma "is a very distinct entity from pleural mesothelioma." November 18, 2018 Moolgavkar Dep. Tr. at 66:17-67:1, attached hereto at **Exhibit H**. Analogous to the epidemiology on peritoneal mesothelioma, the epidemiology on pericardial mesothelioma strongly suggests that inhalation exposure to any kind and any level of asbestos does *not* increase one's likelihood of developing this kind of mesothelioma. *Id.*

Lumping together a deceased plaintiff with a type of mesothelioma linked to asbestos exposure with a living plaintiff with a type of mesothelioma *not* linked to asbestos exposure will be very confusing for the jury and unfairly prejudicial to JJCI.

One case involves a decedent, while one plaintiff is living cancer-free. Another factor that weighs heavily against consolidation is that *Devey* is brought on behalf of a decedent, while Ms. Dupree is living and in remission. As the Second Circuit explained in *Malcolm*, this difference is significant and weighs heavily against consolidation. *Malcolm*, 995 F.2d 351-52 (stating that

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the notion of trying the claims of both wrongful death and personal injury plaintiffs in a single consolidated trial is "troublesome" because "the dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living") (*quoting In re Joint E. & S. Dists. Asbestos Litig.*, 125 F.R.D. 60, 65-66 (E.D.N.Y. 1989)). Plaintiffs intimated in their Motion that they intend to exploit this significant difference by suggesting that Ms. Dupree can expect the same fate as Mr. Devey. *See* Plaintiffs' Motion to Consolidate at 4 ("Both plaintiffs . . . suffered or will suffered the same fate: death.").

Different fact and expert witnesses will be necessary to resolve each plaintiff's claims. Consolidation is also inappropriate because each case will require a variety of different fact and expert witnesses, each of whose testimony will be entirely plaintiff-specific. Plaintiffs' motion fails to address the considerable amount of time and expense dedicated to each plaintiff's individual fact witnesses that will have no bearing on the other case. Moreover, the tenor of the fact witnesses' testimony will vary significantly by plaintiff: Mr. Devey's fact witnesses may mourn his loss, which could poison the jury against JJCI in its case with Ms. Dupree.

The expert witness testimony will also differ. Each plaintiff's case will turn on testimony from different experts based on the plaintiff's/decedent's medical history, the type of mesothelioma at issue, and the different asbestos and/or asbestos-containing products the plaintiff/decedent has been exposed to throughout his or her life.

Plaintiffs' alleged exposure to asbestos varied. The sources and types of exposure in each case are significantly different. Mr. Devey described his occupational history as "having worked with asbestos." Ex. E at 32:19-22. Mr. Devey was employed by Garlock, a facility that handled raw asbestos and manufactured asbestos-containing products. March 12, 2018 Devey Disc. Dep. Tr. at 6:16-9:13, attached hereto at **Exhibit I**. He testified that he "suspected" that he must have

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breathed asbestos while working at this facility. *Id.* at 17:4-9. Moreover, Mr. Devey testified that his oncologist told him that his occupational exposure to asbestos caused his pleural mesothelioma. *Id.* at 56:7-21.[1]

In contrast, Ms. Dupree does not appear, at this stage in discovery, to have been exposed to asbestos. As noted above, this is not unusual for a patient with *peritoneal* mesothelioma.

Plaintiffs have distinct medical histories. While Ms. Dupree and Mr. Devey both allege a type of mesothelioma, their medical histories and medical treatment will require separate consideration and defenses. Two distinct individualized medical claims each require extensive and complex testimony, particularly when one is an elderly man with multiple cancers and the other is a teenage female with no significant medical history. Evidence regarding Ms. Dupree's and Mr. Devey's medical history, diagnosis, and medical treatment are all essential to the claims in the respective matters. This evidence must be considered in assessing the claims in both cases separately. Mr. Devey's medical history and medical treatment, including his melanomas, skin cancers, and ependymoma are completely irrelevant to Ms. Dupree's claims. The jury may misinterpret Mr. Devey's lengthy history of cancer as prescient of Ms. Dupree's medical future, prejudicing defendants and conflating damages. The sheer volume and complex nature of individualized medical evidence that will be required for both claims from medical experts and treatment providers warrants denial of Plaintiffs' motion.

For all of these reasons, it would not be feasible to present the facts of both cases in one manageable trial, and the jury may struggle to keep all the varying facts straight in attempting to produce individualized and unbiased verdicts.[2]

---

[1] Mr. Devey also testified that none of his treating physicians suggested to him that talc or Johnson's Baby Powder contributed to his mesothelioma. *Id.* at 57:18-24.

[2] It is worth noting, too, the similarity between the Plaintiffs' names, Dupree and Devey. These similar sounds may exacerbate any existing confusion born from consolidation.

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B. <u>The need to assess different damages for different causes of action makes consolidation inappropriate</u>.

The different available legal remedies are important legal distinctions in these cases. In *Devey*, Plaintiff is the heir of the decedent, and she brings claims for wrongful death and loss of consortium. *See* Complaint, *Devey v. Johnson & Johnson, et al.*, No. 2018-CP-10-190 (S.C. Ct. C.P., Charleston Cty. Feb. 14, 2018), attached hereto at **Exhibit J**. In contrast, Ms. Dupree claims damages for personal injury. *See* Complaint, *Dupree v. Johnson & Johnson, et al.*, No. 2018-CP-10-2899 (S.C.Ct. C.P., Charleston Cty. Jun. 7, 2018), attached hereto at **Exhibit K.** Because the damages available in *Devey* and *Dupree* are distinct, the two cases will require presentation and consideration of different evidence. The *Devey* Plaintiff seeks damages for pecuniary losses as a result of Mr. Devey's death, funeral expenses, damages Mr. Devey incurred between the time of his alleged injury and his death, and the loss of consortium and companionship she has been deprived of as a result of Mr. Devey's death. In contrast, Ms. Dupree is living cancer-free and is thus not seeking injuries related to her death.

Furthermore, there is a significant risk that, if these cases were consolidated, the jury would award damages to the living, cancer-free plaintiff, Ms. Dupree, based upon the death of Mr. Devey. However, it would be entirely inappropriate to award a plaintiff in remission damages for future death, or to suggest that Ms. Dupree's death from mesothelioma is inevitable. For this reason alone, courts have refused to consolidate claims of living and deceased individuals. *See In re New York City Asbestos Litig.*, 22 Misc. 3d 1109(A), 880 N.Y.S.2d 225 (Sup. Ct. 2009) ("regardless of the fact that decedent Walsh shares a smoking lung cancer factor common to five other living plaintiffs, consolidating Walsh with any of the living plaintiffs' cases will prejudice Defendants in the latter cases *inter alia* because of the possibility that a jury will attribute the fate of the deceased

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to the living plaintiffs at this juncture especially where it appears that the living plaintiffs are long-term cancer survivors who are not at risk of immediately dying of their cancer.").

II. CONSOLIDATION OF THESE CASES WOULD SEVERELY PREJUDICE JJCI AND DENY IT DUE PROCESS OF LAW.

A. A Consolidated Trial Would Cause Unfair Prejudice And Confusion By Conflating Dissimilar Claims And Overwhelming The Jury.

Consolidation is inappropriate if it results in unfair prejudice to a party. *See Hopper*, 2018 U.S. Dist. LEXIS 92769 at *3. It is well established that courts considering multi-plaintiff trials should be "cautious" and "make sure that the rights of the parties are not prejudiced . . . ." *Dupont v. S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966); *see also, e.g., Rollins v. St. Jude Med., Inc.*, No. 08-0387, 2010 WL 1751821, at *1 (W.D. La. Apr. 28, 2010) (joint trial of multiple plaintiffs' claims not appropriate where the "transactions forming the basis of the suits are entirely separate, or where consolidation would prejudice the rights of the parties involved"); *Sapiro v. Sunstone Hotel Inv'rs, L.L.C.*, Nos. CV 03 1555 PHX SRB, CV 04 1535 PHX JWS, 2006 WL 898155, at *1 (D. Ariz. Apr. 4, 2006) ("[C]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial.") (citation omitted); *Minter v. Wells Fargo Bank, N.A.*, Nos. WMN-07-3442, WMN-08-1642, 2012 WL 1963347, at *1 (D. Md. May 30, 2012) ("While the Court does not savor the idea of sitting through much of the same evidence twice, it is the Court's job to do so in order to ensure fairness for all parties before the tribunal."). Indeed, the "benefits of efficiency can never be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350.

One significant potential source of prejudice in consolidated cases arises when the presentation of multiple plaintiffs translates in the jury's mind to an automatic resolution of a disputed issue. *See, e.g., Sidari v. Orleans Cty.*, 174 F.R.D. 275, 282 (W.D.N.Y. 1996)

("consolidation of the two cases would likely be overly prejudicial to the defendants" because "lumping" the claims together "amounts to guilt by association"). This concern is buttressed by academic research. Professor Steven D. Penrod, who has specialized in the study of the legal and psychological aspects of jury decision-making for decades, has explained that numerous studies "clearly and fairly uniformly demonstrate that when evidence of consolidated claims is presented to a jury, the jury is substantially more likely to find against a defendant on a given claim than if it had not heard evidence of the other claims." (*See* Aff. of Steven D. Penrod ("Penrod Aff.") ¶¶ 1-7, April 12, 2019 (attached as **Exhibit L**).) In addition, studies show that jurors who are confronted with multiple claims against a defendant "are substantially more likely to draw the inference that the defendant" has a propensity to commit bad acts and therefore demand a lesser showing of proof on the elements of the plaintiffs' claims, "even though there is no logical basis for concluding that the evidence is stronger." (*See id.* ¶¶ 28-31.)

Here, there can be no question that consolidation of Plaintiffs' claims would result in significant prejudice and compromise each defendant's right to a fair trial given the significant disparity in Plaintiffs' allegations and the sheer amount of evidence at issue.

First, and foremost, the risk of prejudice posed by consolidation of these cases is especially significant for JJCI because allegations pertaining to asbestos in JJCI's talcum powder products are in the relatively early stages of litigation. Courts have stressed that "lower courts [must] proceed with extreme caution when consolidating claims of immature torts." *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 208 (Tex. 2004) (citation omitted). "Immature torts" are those litigations in which there "'are few prior verdicts, judgments, or settlements'"; where "'additional information may be needed'" before aggregation should be considered; where further trials are needed to fully understand "'the contours of various types of claims within the . . . litigation'"; or

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where "significant appellate review of [] novel legal issues" has not yet concluded. *In re Levaquin Prods. Liab. Litig.*, No. 08-1943 (JRT), 2009 WL 5030772, at *3-4 (D. Minn. Dec. 14, 2009) (first alteration in original) (quoting Manual for Complex Litigation § 22.314, at 359 (4th ed. 2004), *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601, 603 (Tex. 1998)). Litigation involving allegations of asbestos in JJCI talcum powder is an "immature tort" because only a relatively small number of cases have been tried; none has been resolved on appeal; and significant disputes remain unresolved, particularly as they relate to the admissibility and reliability of plaintiffs' ostensible evidence that JJCI's products contain asbestos.

Second, a consolidated trial of Plaintiffs' claims would inevitably result in "evidence spillover," further prejudicing defendants. When faced with multiple plaintiffs, juries are unable to "compartmentaliz[e] certain evidence that applies to one case but not the other . . . ." *Minter*, 2012 WL 1963347, at *1 (declining to consolidate cases on prejudice grounds); *see also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (noting that "the potential for prejudice resulting from a possible spill-over effect of evidence" in a joint trial is "obvious"). As a result, there is a substantial risk in such trials that the jury would quickly lose track of the differences among plaintiffs and render verdicts that conflate different plaintiffs' claims and evidence. *See Leeds v. Matrixx Initiatives, Inc.*, No. 2:10cv199DAK, 2012 U.S. Dist. LEXIS 47279, at *7-8 (D. Utah Apr. 2, 2012) ("[I]f the unique details of each case were consolidated during a single trial, 'the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice.'") (citation omitted); *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447 (noting that the plaintiffs had diverse medical histories and that consolidating cases for trial "would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself").

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In addition, trials involving multiple plaintiffs raise the prospect that the jury could be swayed by sympathy for a particular plaintiff, or particular aspects of individual plaintiffs' cases, and hold defendants liable to all plaintiffs based on factors that apply to only one or even none of them. *See Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiff[s'] unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (noting the unfairness created when plaintiffs are able to present a "'perfect plaintiff' pieced together for litigation" based on "the most dramatic" features from individual constituent cases); *Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954) (due process was not "possible in the circumstances under which these consolidated cases were tried" where there was "so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times").

Third, trials involving multiple plaintiffs – particularly where one is deceased and one is living – raise the unfair prospect that the jury could be swayed by sympathy for a particular plaintiff, or particular aspects of individual plaintiffs' cases, and hold defendants liable to all plaintiffs based on factors that apply to only one or even none of them.

Once again, academic research underscores that the risks of prejudice and confusion increase rapidly with each additional plaintiff that is consolidated for a joint trial. As further discussed in Prof. Penrod's affidavit, the relevant academic studies demonstrate not only that consolidation of claims against a defendant for trial increases the likelihood that a jury would find a defendant liable but also that it "generally increases the amount of the damage award." (Penrod Aff. ¶ 18; *see also id.* ¶ 12.) In addition, joint trials result in "confusion about the evidence" (*id.* ¶

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35) because jurors tend to "lump or blend" together the evidence relevant to different claims (*id.* ¶ 36 (citation omitted)). According to Prof. Penrod, research demonstrates that, even "'when judging four plaintiffs (as compared with a single plaintiff drawn from the four), jurors not only tend to lump or blend . . . plaintiffs but also appear to use fewer probative trial facts, as compared with when either fewer plaintiffs or fewer witnesses presented testimony.'" (*Id.* (citation omitted).)[3] And in cases where jurors are confused about or simply lump together the evidence, they are more likely to render judgment against the defendant. (*Id.* ¶ 35.)

Indeed, the recent consolidated trial of 22 different plaintiffs' claims that talcum powder contained asbestos that caused them to develop ovarian cancer merely proves the point. The jury returned a uniform verdict, finding the defendants liable to all 22 plaintiffs and awarding *identical* compensatory awards – treating the plaintiff who has been cancer-free for the last 33 years as equivalent to those with less favorable prognoses and those who had died from their cancers. In short, the "efficiency" of the *Ingham* trial was purchased at the expense of any semblance of fairness or rationality in the final verdict, which is currently on appeal. Notably, after the same judge attempted to consolidate the claims of 13 talcum-powder plaintiffs for a subsequent joint trial, the Missouri Supreme Court granted a Preliminary Writ of Prohibition to halt the proceedings so that the appellate court could review the propriety of consolidation. *See* Exhibit A.

Finally, a number of studies have shown that "judicial instructions are not effective in mitigating the prejudicial effect of consolidating" multiple claims against a defendant – and that the issuance of such instructions can actually increase the likelihood that a defendant will be held

[3] The risks of confusion are especially potent in cases, like these, involving complex and unfamiliar theories of scientific causation. Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 Judicature 292, 295 (1989) (observing that, even in a "two litigant" toxic tort case, "juries are unable to comprehend the principle that exposure to a toxic chemical dosage of one part-per-billion produces a different biological effect than exposure to the same chemical at one part-per-million").

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liable by highlighting the issue for the jury. (Penrod Affidavit at ¶ 47.) *Accord, e.g.*, Matthew A. Reiber & Jill D. Wenberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. Cin. L. Rev. 929, 929 (2010) (concluding that juror "comprehension declines as complexity increases, particularly when the complexity arises from the presence of multiple parties or claims").

B. Consolidation Poses Additional, Unique Risks Of Unfair Prejudice With Respect To Punitive Damages.

Plaintiffs' consolidation proposal poses unique fairness and prejudice concerns for the additional reason that each of the three cases involves a claim for punitive damages. The jury's consideration of punitive liability elevates the risk to JJCI's rights because the Due Process Clause of the U.S. Constitution "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of a specific plaintiff's individual case. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

In *Philip Morris*, the United States Supreme Court held that Due Process prohibits an award of punitive damages not specifically tied to a defendant's conduct toward that particular plaintiff. As the Court explained, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353. The Court further held that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation . . . The jury will be left to speculate." *Id.* at 354. The Court reiterated that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

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Here, consolidating two separate personal injury actions involving different exposure histories pursuant to different legal theories and factual allegations would violate the Due Process Clause. Critically, both plaintiffs are "strangers" to one another's cases, as the Court explained in *Phillip Morris*. But for the reasons explained above, the jury is likely to blur the distinctions between the plaintiffs' separate cases and could well return a verdict in each case that awards punitive damages to each plaintiff based on the elements of all the others' cases. As noted by the Supreme Court, "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one," and "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." *Philip Morris*, 549 U.S. at 355, 357. Similarly, if these cases are consolidated, it will enable plaintiffs to paint JJCI as having engaged in outrageous misconduct stretching back decades against large groups of people. Indeed, Prof. Penrod describes precisely this phenomenon, explaining that the aggregation of separate claims in a single trial amplifies the risk that the jury will conclude that the defendant has a propensity to commit bad acts. (*See* Penrod Aff. ¶¶ 28-31.) This is almost certain to result in "punish[ing JJCI] for harm [allegedly] caused [to] strangers." *Philip Morris*, 549 U.S. at 355. For this reason, too, JJCI respectfully requests that the Court deny plaintiffs' motion to consolidate.

C. The Risk Of Unfair Prejudice To Defendants Outweighs Any Alleged Prejudice Posed By Proceeding With Single-Plaintiff Trials.

Finally, the foregoing risks of unfair prejudice and confusion are substantial and outweigh countervailing considerations of efficiency. While JJCI acknowledges the value of efficiency, the "'systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation.'" *In re Repetitive Stress Injury Litig.*, 11 F.3d 368,

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373 (2d Cir. 1993) (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)).

In *Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1456-57 (S.D. Ala. 1992), which involved a consolidation of ten plaintiffs, the court concluded that consolidation merely "provides courts with a skewed view" as to how to fix the problem of congestion. As that court explained:

> The "Try-as-many-as-you-can-at-one-time" approach is great if they all, or most, settle; but when they don't, and they didn't here, [the plaintiffs] got a chance to do something not many other civil litigants can do – overwhelm a jury with evidence. Evidence that would not have been admissible in any single plaintiff's case had these cases been tried separately. As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects.

Id. at 1457; *accord Malcolm*, 995 F.2d at 350, 354 (reversing consolidated asbestos trial where the court recognized "the liberal use of consolidated trials have ameliorated what might otherwise be a sclerotic backlog of cases," but "caution[ed] that it is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process"). The same is true here. The decision whether to consolidate must be driven by the likely fairness of the trial that would result – and not by considerations of speed.

CONCLUSION

As shown above, *Devey* and *Dupree* involve different factual and legal issues. Therefore, Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. respectfully requests that this Court deny Plaintiffs' Motion to Consolidate.

Respectfully Submitted,

MILLIGAN & HERNS, PC
721 Long Point Road, Suite 401
Mt. Pleasant, SC 29464
PH: (843) 971-6750
Fax: (843) 971-6509
E-Mail: louis@milliganlawfirm.com

BY: /s **LOUIS P. HERNS**
Louis P. Herns (3087)
Counsel for the Defendants Named Herein

March 3, 2020
Mount Pleasant, South Carolina

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EXHIBIT G

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

1320 Main Street | 17th Floor
Columbia, SC 29201
T 803.799.2000 F 803.256.7500
nelsonmullins.com

Nicholas A. Charles
T 803.255.9663
nick.charles@nelsonmullins.com

April 23, 2020

Via U.S. Mail, Facsimile, and E-Filing

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Mary Margaret Devey v. Johnson & Johnson et al. *and* Terran Dupree v. Johnson & Johnson et al.
Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899
Our File Nos. 003501.01848 & 003501.01849

Dear Ms. Kitchings:

Enclosed please find Appellants' Notice of Appeal in the above-referenced matter. We are submitting the original Notice of Appeal and a check for the $250.00 filing fee to the Court via U.S. Mail. Pursuant to the Supreme Court's orders addressing the operation of the appellate courts during the coronavirus emergency, we are also submitting copies of the Notice of Appeal to the Court via facsimile and via the new e-filing system.

All counsel of record have been served with the Notice of Appeal. By copy of this letter, we are notifying the circuit court and all counsel of record of this filing.

Respectfully,

Nicholas A. Charles

Enclosures
cc: W. Christopher Swett, Esquire
Amy Harmon Geddes, Esquire

Mark H. Wall, Esquire
Moffatt G. McDonald, Esquire
W. David Conner, Esquire
Scott E. Frick, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899

Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey,..... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ..... Appellants.

and

Terran Dupree,..... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; Imerys Talc America, Inc. f/k/a Luzenac America, Inc.; Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy, Inc.; Rite Aid of South Carolina, Inc.,..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the..... Appellants.

NOTICE OF APPEAL

Johnson & Johnson and Johnson & Johnson Consumer, Inc. appeal the trial court's March 13, 2020 order granting the plaintiffs' motion to consolidate the two above-captioned cases. Relevant portions of the transcript of a March 13, 2020 hearing at which the court issued its final order granting the motion to consolidate are attached hereto as Exhibit A.[1] An email from Judge Toal agreeing that the record of her ruling sufficed for her order and no written order was planned is attached as Exhibit B. Johnson & Johnson and Johnson & Johnson Consumer, Inc. received notice of the trial court's final order on March 13, 2020.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellants Johnson & Johnson and Johnson & Johnson Consumer, Inc.

Columbia, South Carolina

April 13, 2020

[1] Copies of the operative complaints showing the complete caption in each case are attached hereto as Exhibit C.

Other Counsel of Record:

Attorneys for Respondents Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey, and Terran Dupree
MOTLEY RICE LLC
W. Christopher Swett
E-Mail: cswett@motleyrice.com
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000

Attorneys for Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy, Inc.; and Rite Aid of South Carolina, Inc.
NEXSEN PRUET LLC
Amy Harmon Geddes
E-Mail: ageddes@nexsenpruet.com
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
(803) 771-8900

Attorneys for Metropolitan Life Insurance Company
WALL TEMPLETON & HALDRUP, P.A.
Mark H. Wall
E-Mail: mark.wall@walltempleton.com
145 King Street, Suite 300 (29401)
Post Office Box 1200
Charleston, SC 29402
(843) 329-9500

Attorneys for Imerys Talc America, Inc. f/k/a Luzenac America, Inc.
HAYNSWORTH SINKLER BOYD
Moffatt G. McDonald
E-Mail: mmcdonald@hsblawfirm.com
W. David Conner
E-Mail: dconner@hsblawfirm.com
Scott E. Frick
E-Mail: sfrick@hsblawfirm.com
Post Office Box 2048
Greenville, SC 29602
(864) 240-3200

Exhibit A

Trial Court Order

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF CHARLESTON) COMMON PLEAS

TERRAN DUPREE,)
Plaintiff,)
Vs) CASE NO. 2018-CP-10-2899
JOHNSON & JOHNSON, et al,)
Defendants)

MARCH 13, 2020
COLUMBIA, SOUTH CAROLINA

HONORABLE JEAN TOAL, JUDGE

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

BY: W. CHRISTOPHER SWEET, ESQUIRE
Attorney for the Plaintiff
BY: LOUIS P. HERNS, ESQUIRE
Attorney for the Defendants

KATHERINE A. SPIRES
REGISTERED PROFESSIONAL REPORTER

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF CHARLESTON) COMMON PLEAS

MARY MARGARET DEVEY,)
Individually and as Personal)
Representative of the Estate)
of ROBERT L. DEVEY,)
Plaintiffs,)
Vs)CASE NO. 2018-CP-10-710
JOHNSON & JOHNSON, et al,)
Defendants)

MARCH 13, 2020
COLUMBIA, SOUTH CAROLINA

HONORABLE JEAN TOAL, JUDGE

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

BY: W. CHRISTOPHER SWEET, ESQUIRE
Attorney for the Plaintiff
BY: LOUIS P. HERNS, ESQUIRE
Attorney for the Defendants

KATHERINE A. SPIRES
REGISTERED PROFESSIONAL REPORTER

briefing that Judge Viscomi -- it's the exact same brief and they just changed it. And she consolidated the cases. In light of this exact same briefing.

On one page of their brief it talks about towards the end, it talks about these three plaintiffs. And that was the Barden case up in New Jersey because we don't have three plaintiffs in this case. So I would say these arguments have been tried and failed in New Jersey in front of Judge Viscomi. She consolidated the cases.

Your Honor, I just ask again reiterate, I think it's appropriate to consolidate these cases. And unless Your Honor has any questions, I'll rest on that.

THE COURT: Very good.

MR. HERNS: Thank you.

THE COURT: All right. In the case of Mary Margaret Devey verses Johnson & Johnson and Johnson & Johnson Consumer Inc., 2018-CP-10-790; and Terran, T-E-R-R-A-N, Dupree against Johnson & Johnson and Johnson & Johnson Consumer Inc., 2018-CP-10-2899; both cases pending in Charleston County, I grant the plaintiff's motion to consolidate. I find that there are sufficient common issues of fact and law that judicial economy in the trial of these lengthy but very similar cases would be well served by consolidating these cases.

I do not consolidate 21 cases as was done in Missouri. I can understand the confusion that may arise in such a large consolidation. This is a consolidation of two cases. And I believe the jury will well be able to differentiate between the two cases in the areas where differentiation is needed.

Each case is a personal injury case involving the personal injury damages and no others. There are certainly factual differences between these two plaintiffs. And some factual difference between the exposure in terms of an occupational exposure in addition to an exposure to baby powder in the case of Mr. Devey. And a personal exposure to Johnson & Johnson Baby Powder and allegedly some take-home exposure to occupational type asbestos exposure in the case of Ms. Dupree or Miss Dupree. But those differences can be very easily made in a way that is comprehensible to the jury.

The big issue in this case is whether Johnson & Johnson Baby Powder contains asbestos. And whether -- and the second issue is whether Johnson & Johnson -- the use of Johnson & Johnson Baby Powder by Mr. Devey and Miss Dupree resulted in their contraction of mesothelioma.

The answer to these questions depends on an almost

completely common set of facts. Because the big issue in these type cases and particularly in these baby powder cases is a clash of experts who are very well-known and seen time after time in these cases. A constellation of experts on the plaintiff's side and on the defendant's side a corporate representative is always one individual from Johnson & Johnson and other expert witnesses that are common to everyone of these cases that I've tried and I've now tried several Johnson & Johnson cases to verdict or to impasse.

So I believe that not only to these cases, but for what it will teach us as we move through this -- the other Johnson & Johnson Baby Powder cases or other defendant baby powder manufacturing cases that are pending in South Carolina now asbestos docket which I manage, it behooves us to take some steps towards judicial economy in the interest of giving both plaintiffs and defendants their day in court on a basis that can be as accelerated as possible particularly for living mesothelioma claimants as is anticipated by the statutory laws of South Carolina that discuss how to docket and how to schedule the trial of these cases.

So I will acknowledge the very well researched and well presented arguments of plaintiffs and defendant and realizing that the matter is not one of -- upon which

bright minds can't always agree, I nevertheless think it is in the best interest of justice generally and for the participants in these two cases to consolidate them to trial in November and that is what I have ordered be done.

MR. SWETT: Your Honor, I think I heard you, but I just want to make sure I heard you correctly. And you make your ruling, you considered the fact that Ms. Devey has the small component of wrongful death damages as well? You considered that and still --

THE COURT: Yes. But the -- again, they're just two cases. And the individualized claims are very easy to explain in an individualized way to the jury. Frankly, this is a much easier case to try than cases that have one plaintiff, but a host of defendants. And I've tried those cases many times. Those cases sometimes present more difficult considerations to the jury than does this.

But Johnson & Johnson still has available to it all kinds of theories that involve other sources of possible contraction of cancers which it will be free to explore in each of these cases. And I think can explore in a way that protects the individual nature of the decision that must be made.

I will tell you with respect to both the actual and

punitive damages, separate verdicts will be submitted. I will bifurcate the punitive damage part of the case as I always do in asbestos cases and in the punitive part of the case there won't be any confusion about what is being asked. It will be asked with respect to each case individually. And that may vary depending on what the evidence discloses about the contraction and what the state of knowledge was of J&J at the various points in times when the exposure was had.

So I think that judicial efficiency is much served by a consolidation of these very similar expert witness presentations that take up the vast majority of these cases and those things which are individualized for the two plaintiffs and to the various defenses involving those individual plaintiffs can certainly be explored in a way that does not inhibit or negatively affect either plaintiffs or defendant.

MR. SWETT: Thank you, Your Honor.

THE COURT: All right. What else do I need to do?

MS. MCVEY: I don't think there's anything else.

THE COURT: Mr. Herns, anything further?

MR. HERNS: No, Your Honor. Nothing further.

THE COURT: Very good. Court will be adjourned.

- - -END OF REQUESTED TRANSCRIPT OF RECORD- - -

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, KATHERINE A. SPIRES, Registered Professional Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for South Carolina, on the 13th of March, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 28, 2020

Katherine A. Spires

Katherine A. Spires

Registered Professional Reporter

Exhibit B

Email from Judge Toal

-----Original Message-----
From: Toal, Jean <JToal@sccourts.org>
Sent: Friday, April 10, 2020 10:56 AM
To: Louis Herns <Louis@milliganlawfirm.com>
Cc: Selert, Hali <hselert@sccourts.org>; Chris Swett (cswett@motleyrice.com) <cswett@motleyrice.com>; LeBlanc, Sarah <sleblanc@motleyrice.com>; Jackie Mazade <Jackie@milliganlawfirm.com>
Subject: Re: Motion to Consolidate DeVey and Dupree

Louis: sorry to be tardy replying to this. Attending Stations and Good Friday devotions remotely. You are correct but if you feel you need more to preserve your clients' position for appeal, let me know. Be safe and well. Have a blessed Easter. Jean Toal

Sent from my iPhone

On Apr 9, 2020, at 5:22 PM, Louis Herns <Louis@milliganlawfirm.com> wrote:

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *** Dear Judge Toal,

Trust that you are staying healthy during these "Stay at Home" times.

I am writing regarding the Hearing that was held regarding the Motion to Consolidate the DeVey and Dupree Motley Rice cases pending in Charleston. You granted Mr. Sweet's motion and placed your reasons for granting the motion on the record at the end of the hearing. After the hearing had concluded, I approached the bench to give my card to the Court Reporter and exchange pleasantries with you. During our discussions, I addressed whether a written Order would be filed and believe you stated that the record should suffice. I am writing to confirm that a written Order granting Mr. Swett's Motion to Consolidate will not be forthcoming.

As I end all my e-mails these days: "Stay healthy my friend."

Louis

MILLIGAN
<image001.jpg>
HERNS

Louis P. Herns, Esq.
Milligan Herns, PC
721 Long Point Road
Suite 401
Mt. Pleasant SC 29464
(843) 971-6750

(843) 834-2377 (Cell)
louis@milliganlawfirm.com<mailto:louis@milliganlawfirm.com>

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899

Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey,..... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ..... Appellants.

and

Terran Dupree,..... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; Imerys Talc America, Inc. f/k/a Luzenac America, Inc.; Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy, Inc.; Rite Aid of South Carolina, Inc.,..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Johnson & Johnson and Johnson & Johnson Consumer, Inc., do

hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleading(s): **Notice of Appeal**

Served:

MOTLEY RICE LLC
W. Christopher Swett
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

NEXSEN PRUET LLC
Amy Harmon Geddes
1230 Main Street, Suite 700
Columbia, SC 29201

WALL TEMPLETON & HALDRUP, P.A.
Mark H. Wall
145 King Street, Suite 300
Charleston, SC 29401

HAYNSWORTH SINKLER BOYD
Moffatt G. McDonald
W. David Conner
Scott E. Frick
1 North Main Street, 2nd Floor
Greenville, SC 29601

Jessica Trautman
Administrative Assistant

April 13, 2020

EXHIBIT H

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON **MARY MARGARET DEVEY,** Individually and as Personal Representative of the Estate of **ROBERT L. DEVEY,** Plaintiff, **v.** **JOHNSON & JOHNSON, et al.,** Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT **C/A No. 2018-CP-10-790**
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON **TERRAN DUPREE,** Plaintiff, **v.** **JOHNSON & JOHNSON, et al.,** Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT **C/A No. 2018-CP-10-2899**

AFFIDAVIT OF STEVEN D. PENROD

BEFORE ME, the undersigned authority, personally appeared the affiant named below, who being by me duly sworn on his oath, deposed as follows:

1. My name is Steven D. Penrod. I am over 18 years of age. I submit this Affidavit in support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Consolidate in the above-captioned matters. I am of sound mind, and if called as a witness, I could and would competently testify to the statements herein.

2. I am a Distinguished Professor of Psychology at the John Jay College of Criminal Justice of the City University of New York. I hold a J.D. degree from the Harvard Law School, and a Ph.D. degree in social psychology, also from Harvard University. I have testified as an expert on a variety of social science and law issues in more than 150 cases in federal and state venues, including Wisconsin, Minnesota, Illinois, Ohio, Indiana, California, Texas, Oklahoma, New York, New Jersey, Maine, Connecticut, Massachusetts, New Hampshire, Maryland, the District of Columbia, Virginia, Delaware, and Pennsylvania. I am an author or co-author of approximately 150 publications. I have specialized in the study of the legal and psychological aspects of decision-making by juries for more than 35 years, am conversant with the literature on consolidation of claims and parties and have published research on the specific topics discussed in this Affidavit. My professional qualifications, including publications, grants, awards, and memberships, are set forth more fully in my *curriculum vitae*, attached to this Affidavit as Exhibit A.

3. I have been asked to render an opinion on: (1) the likely effect that consolidation of the claims of multiple plaintiffs against Johnson & Johnson and Johnson & Johnson Consumer Inc. for trial will have on the jury; and (2) the efficacy of limiting instructions designed to overcome the prejudice stemming from such consolidation.

4. In my opinion, if the claims of multiple plaintiffs are presented to the same jury, the result will be unfairly prejudicial to defendants because there is a substantially greater likelihood that the jury will find defendants liable and will award greater damages to the plaintiffs. It is also my opinion that jury instructions will not mitigate this unfair prejudice.

5. In forming these opinions, I have reviewed the relevant psychological research literature summarized below and listed in Exhibit B hereto.

6. I base my opinions on scientific studies of jury decision-making in which jurors are confronted with multiple charges or claims, as well as studies in which jurors are confronted with evidence that is intended for use in either a limited manner or that jurors are instructed not to consider at all. In my opinion, these studies clearly show that unfair prejudice results when jurors are exposed to information about other claims or charges against a defendant.

STUDIES ADDRESSING THE EFFECTS OF CONSOLIDATION

7. A number of researchers have studied the effect that consolidation of charges/claims against a defendant has on jury decision-making. The studies in this area clearly and uniformly demonstrate that when evidence of consolidated claims is presented to a jury, the jury is substantially more likely to find against a defendant on a given claim than if it had not heard evidence of the other claims. Although some of this research has been conducted within the context of criminal cases, it is directly relevant to the issues raised in the present civil cases because the research underscores the difficulties jurors have in keeping trial evidence neatly compartmentalized. The research further demonstrates the ways in which inappropriate use of evidence can produce prejudicial effects. The research also underscores my opinions that jurors are likely to misuse evidence presented about multiple plaintiffs/claims, that the result will be prejudice against defendants, and that efforts to constrain the jury's use of the evidence in order to avoid consolidation prejudice are extremely unlikely to succeed.

8. Among the studies supporting the conclusions above are: Bordens & Horowitz (1983); Goodman-Delahunty, Cossins & Martschuk (2016); Greene & Loftus (1985); Horowitz &

Bordens (1988); Horowitz & Bordens (1990); Horowitz & Bordens (2000); Horowitz, Bordens & Feldman (1981); Leipold & Abbasi (2006); Tanford & Penrod (1982); Tanford & Penrod (1984); Tanford & Penrod (1986); Tanford, Penrod & Collins (1985); Thomas (2010); White, (2006) and Wilford, Van Horn, Penrod & Greathouse (2018). Nearly all of these and other consolidation studies cited below have been published in peer-reviewed scientific journals. Most of my research and many other studies have been supported by grants from entities such as the National Science Foundation and the National Institute of Justice, and these studies were subjected to peer review even before they were funded and conducted. Complete references to the studies cited in this Affidavit are provided in Exhibit B hereto.

9. These studies reveal the difficulties jurors confront when trying to sort out evidence that is relevant to particular issues or parties and not relevant to other issues or parties. The research shows that consolidated trials result in: (1) **inferences** by the jurors that a defendant has a bad character; (2) **cumulation** or spilling over of evidence against the defendant; (3) **confusion** of evidence; and (4) **changes in weight of evidence** (i.e., the tendency of jurors in such cases to give greater weight to plaintiff/prosecution evidence, relative to defense evidence). All of these factors have been shown to result in prejudice against defendants. A consolidated trial of these cases will therefore likely lead jurors to draw negative inferences against defendants and increase the likelihood of a pro-plaintiff verdict. It is also likely that jurors will cumulate "evidence" across claims, confuse the evidence presented by various plaintiffs and give greater weight to individual items of plaintiff evidence than would be the case if the claims were tried separately.

ARCHIVAL VS. EXPERIMENTAL STUDIES: COMPLEMENTARY STRENGTHS

10. Research on consolidation effects has emerged from two types of studies (both of which have demonstrated prejudicial effects). First, researchers have conducted *archival studies* of actual cases, in which they compare outcomes from trials in which multiple cases, charges or defendants have been consolidated to cases that have not been consolidated. In addition, there are *experimental studies*, in which researchers compare outcomes in exemplar cases decided by mock jurors that are consolidated versus those that are tried separately. Australian researchers Goodman-Delahunty, Cossins & Martschuk (2016), published the most recent study of consolidation effects and have explained the advantages and disadvantages of archival studies:

> The advantage of such studies is that the observed relationships can be generalised across all jury trials with greater confidence than, for example, relationships between variables observed in a single trial or simulation. No two real trials will be exactly the same, so a finding that is robust across many trials is more likely to be broadly applicable to all relevant jury trials. One strength of archival studies is that they evaluate the verdicts of real-life juries, which have greater gravity due to their binding consequences. This is a feature that experimental trial simulations are less able to emulate. … But these studies do not reveal the extent to which the observed increases in conviction rates in joint trials can be attributed to any of the three hypothesised sources of unfair prejudice. The core of the problem is that a comparison of verdicts in joint trials versus separate trials … cannot reveal a causal relationship between joinder (and verdicts). Real-life trials involve unique and highly complex variables. No archival study can exclude the possibility that differences in verdicts were influenced by numerous other confounding variables…. Many potentially confounding variables cannot be controlled, manipulated or eliminated in archival studies. (*See* pp. 52-52 (footnotes omitted).)

11. Goodman-Delahunty, Cossins & Martschuk, (2016) note that experimental studies offer different benefits. For example:

> Crucially, causal conclusions can be more readily drawn from trial simulations because researchers control and construct the elements of a trial that they are interested in studying…. Inferences about the causal relationships between variables of interest – for example, the influence of joinder (on outcomes) … can be determined with greater confidence than in archival studies because researchers are able to reduce the extraneous

'noise' present in real trials. Because the only differences across experimental conditions are manipulated by the researcher/s prior to observing the behaviour in interest, researchers can isolate whether these differences caused any observed differences in jury reasoning and case outcomes. Another advantage is that the identical research problem can be replicated multiple times in an experimental simulation, whereas archival studies will always be beset by the possibility that the trials differed based on some confounding variable.... Trial simulations also have the methodological advantage of facilitating direct observations of the process of jury decision making, as well as the outcome of the trial. (*See* pp. 54-55 (footnotes omitted).)

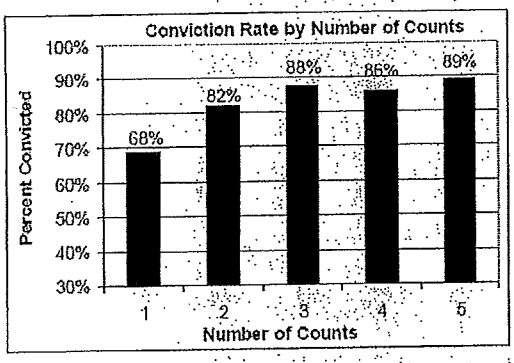
ARCHIVAL STUDIES DEMONSTRATE THAT CONSOLIDATION OF CLAIMS RESULTS IN PREJUDICE TO DEFENDANTS

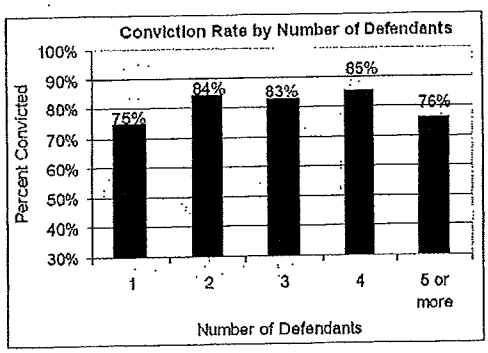
12. White (2006) examined outcomes in more than 4,600 asbestos cases, including bouquet trials (which White defines as "consolidated trials of a small group of plaintiffs selected from a large group of hundreds or thousands of asbestos claims" that are designed to "include[e] at least one of each" of several different types of plaintiffs) (*see* pp. 2-3, 375). White reported "that plaintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials, and ... plaintiffs' probability of being awarded punitive damages increases by 6 percentage points." (*See* p. 390.) According to White, "the bouquet trial . . . is associated with a huge increase—85 percentage points—in plaintiffs' probability of winning punitive damages and with an increase of $1.5 million in punitive damage awards." (*See* pp. 385 & 390.) In short, consolidation of cases (either in the form of a small consolidated trial or a bouquet trial) was associated with a substantial increase in liability judgments against defendants, accompanied by substantial increases in damages.

13. White (2006) also tested whether trying cases together made it more likely that jurors would reach the same or similar liability and damages judgments with respect to those cases than if the cases were tried separately. According to White:

For the actual two-plaintiff consolidations, the correlation coefficients for whether plaintiffs win and for expected total damages are .74 and .92, respectively. The correlation coefficients for larger consolidated trials are similarly high. However, the correlation coefficients for the random pairs and larger random groups are all close to zero ... These results support the hypothesis that consolidating cases for trial increases the degree of correlation of the outcomes and therefore makes going to trial more risky. In fact, they suggest that the increase in risk due to consolidation is extremely large. (*See* pp. 382-384.)

14. Leipold & Abbasi's (2006) study of 19,057 criminal trials in the United States produced similar findings. They reported that defendants in consolidated trials with two charges were 14% more likely to be convicted of the most serious count against them than were defendants tried on a single charge. As shown in the following Figure, the conviction rate rose if a second charge was added and rose again if a third count was tried, but peaked at that point. An increased rate of convictions was also observed for the consolidation of defendants (second figure).



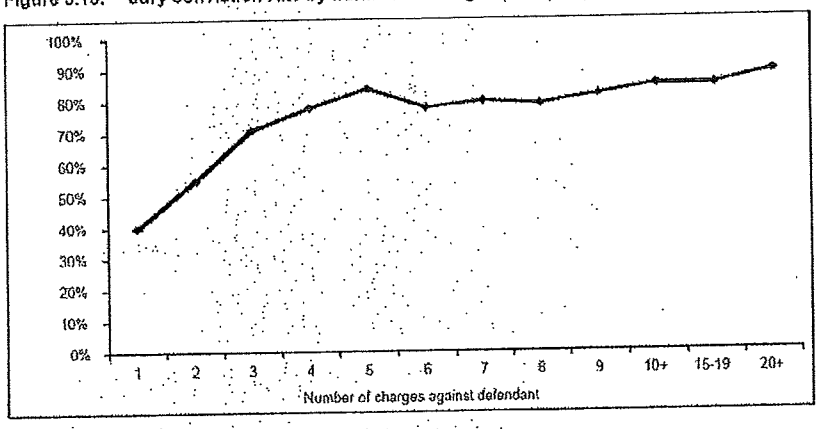


15. Based on the study, Leipold & Abbasi reached the following conclusions:

Now we can say not only that joinder "prejudices" the defendant, but that joinder unfairly causes prejudice. Unlike many other harms about which defendants complain, the effects of spillover evidence, inference of a criminal disposition, and jury confusion do not themselves further any policy goals, do not avoid risks of defendant manipulation, and do not even plausibly make trials more accurate or more fair – quite the contrary. So to say a defendant is not entitled to a separate trial just because his chances of acquittal are better is to say that a defendant should not be granted a severance merely to avoid a significant (~10%) risk that his conviction will be influenced by improper factors. (*See* p. 390)

16. Leipold & Abbasi's finding was replicated in Thomas (2010), which included an analysis of nearly 23,000 United Kingdom (UK) criminal trials. Thomas found that the probability of conviction rose significantly as the number of charges increased. As the following figure shows, jury conviction rates were 40% when a defendant was charged with one offense but rose steadily to 80% where there were five or more charges.

Figure 3.15: Jury conviction rate by number of charges (n=22,907)



EXPERIMENTAL STUDIES ALSO DEMONSTRATE THAT CONSOLIDATION CAUSES PREJUDICE TO DEFENDANTS

17. There is a somewhat larger body of experimental research. These studies typically compare verdicts and judgments reached in an exemplar case when tried by itself versus when the case is consolidated with one or more additional cases. In contrast to archival studies, this method permits direct comparisons based on the same fact patterns and trial evidence. Experimental studies also permit collection of juror opinions about the evidence and the parties at issue in the case (which allows researchers to gain insight into possible causes of consolidation bias). These studies also permit comparisons of large numbers of juror/jury decisions in both separate and consolidated trials.

18. The prejudicial effects of consolidation have been observed in a number of experimental studies involving civil cases. These studies demonstrate that consolidation increases the likelihood a jury will find a defendant liable and generally increases the amount of the damage award. For example, Horowitz & Bordens (1990) found that only 25% of juries asked to decide only the causation issue in a toxic tort case involving multiple plaintiffs found for the plaintiffs, but, on average, 87.5% of juries asked to evaluate causation plus liability, and/or compensation and/or punitive damages found for the plaintiffs. Juries deciding liability alone voted for the plaintiffs 62.5% of the time versus 100% of the juries who were asked to decide liability plus one or more of the other outcomes.

19. In another civil trial study, Horowitz, ForsterLee & Brolly (1996) had jury-eligible adults watch videotapes of a complex toxic tort trial. The videos varied with respect to the amount of information communicated ("information load') and complexity of the language used by the witnesses. Information load and complexity influenced both liability and compensatory decisions. As shown in the following table, jurors made compensatory awards commensurate with plaintiffs' injuries only under conditions of low-load and less complex language.

Compensatory Awards as a Function of Plaintiffs and Simple or Complex Language

	Complex		Simple	
Plaintiff	*M*	*SD*	*M*	*SD*
Lawson	4.63_{b}	2.70	5.43_{a}	2.79
Beaumont	$4.92_{a,b}$	2.67	$4.89_{a,b}$	2.95
Gallagher	$4.93_{a,b}$	2.68	4.30_{b}	2.91
Stephens	4.31_{b}	3.12	3.33_{c}	2.99

20. Horowitz, ForsterLee & Brolly (1996) also found that information load significantly affected the type of information that jurors recalled about the cases they decided. Jurors in the high information load condition actually reported fewer case-related facts.

21. Horowitz & Bordens (2000) reported a study in which 135 jury-eligible adults were randomly assigned to one of five different aggregations of civil plaintiffs with 1, 2, 4, 6 or 10 claimants. The participants were shown a 5- to 6-hour trial involving claims by railroad workers of varied repetitive stress injuries. As with the other civil case studies, both liability and damage judgments were affected by consolidation. As shown in the Table below, the defendant railroad was more likely to be found liable as the number of plaintiffs involved in the case increased. In addition, the degree of fault assigned to the plaintiff(s) by the jury went down as the number of plaintiffs involved in the case increased, while defendant liability scores rose steadily. Damage awards rose through four plaintiffs.

Means and Standard Deviations for the Damage Award, Liability, and Plaintiff Liability Measures

No. of plaintiffs	Damage award		Liability		Plaintiff liability	
	M	*SD*	*M*	*SD*	*M*	*SD*
1	0.96_{a}	0.96	1.39_{ab}	0.57	0.60_{a}	0.27
2	1.21_{a}	1.20	1.41_{a}	0.50	0.51_{a}	0.25
4	3.54_{b}	2.14	1.19_{bc}	0.40	0.36_{b}	0.17
6	3.00_{bc}	1.64	1.09_{c}	0.27	0.34_{b}	0.11
10	2.32_{c}	1.12	1.00_{c}	0.00	0.27_{b}	0.12

Note. For liability scores, higher numbers denote lower defendant liability. For damage awards, higher numbers indicate higher awards. Plaintiff liability scores denote proportion of liability assigned to the plaintiff. Means with different subscripts in the same column differ significantly by a Tukey test. Damage awards of 1 resulted in compensation of $10,000, awards of 2 resulted in compensation of $10,001–50,000, and awards of 3 resulted in compensation of $100,000–200,000.

22. Studies have also demonstrated that jurors' knowledge of the size of the plaintiff population – without any presentation of the specific facts relevant to other plaintiffs' claims – can affect their assessment of a case. A study by Horowitz & Bordens (1988) addressed how mentioning the

size of the "plaintiff population" affected trial outcomes. Juries were randomly assigned to evaluate a toxic tort trial in which one of three conditions were present: (1) no information was given about the size of the plaintiff population; (2) jurors were told there were 26 plaintiffs in the plaintiff population; and (3) jurors were told that there were hundreds of plaintiffs in the plaintiff population. No other evidence was presented about the plaintiff population. The study found that jurors' knowledge regarding the size of the plaintiff population affected their decisions about the fault attributable to the named plaintiff. Specifically, when jurors were told "there were 26 or hundreds of plaintiffs in the [plaintiff] population, less fault was assigned to [the named plaintiff] (M = .499 and .412, respectively) than if no information was provided about [plaintiff] population size (M --- .612)." (*See* p. 219.) In addition, when the plaintiff population included hundreds of plaintiffs, punitive damages were, as shown below, dramatically higher with respect to all the named plaintiffs.

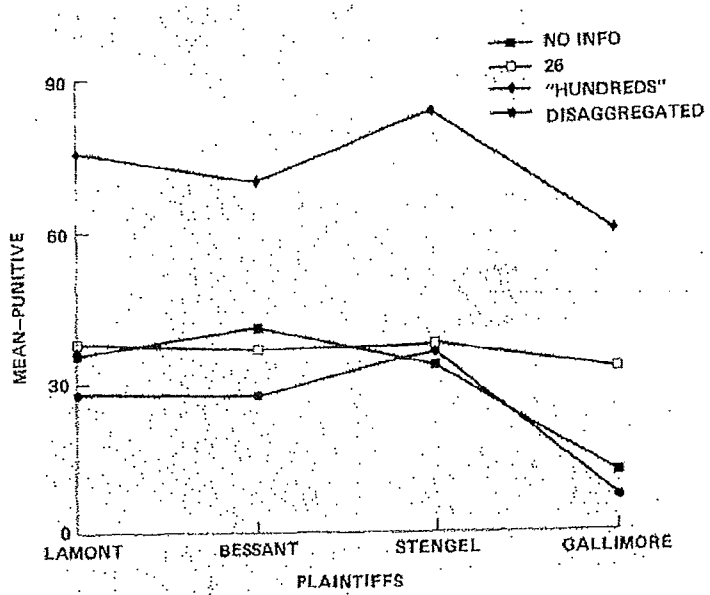


Fig. 1. Punitive damage awards in the no outlier condition.

23. One of the more exhaustive experimental consolidation studies is one that I conducted with my student Sarah Tanford in 1984 as part of a series of studies supported by the National Science Foundation in the 1980s (Tanford & Penrod (1984)). Tanford & Penrod (1984) studied the decision-making of 732 jury-qualified residents who participated in a realistic mock jury study. The jurors included 714 adults who had been summoned for jury service in Dane County, Wisconsin, 69% of whom had served on one or more juries. The 18 remaining participants were jury-qualified students at the University of Wisconsin. Participating jurors viewed one of several different versions of a re-enacted trial lasting between 50 and 120 minutes. The trial was based upon actual trial transcripts and involved a criminal defendant charged with either one or three offenses. Jurors heard evidence from an average of three witnesses. The offenses included burglaries, assaults and robberies. In addition to manipulating the number of charges against the defendant, this study also manipulated the similarity of the charges and evidence considered by jurors. Thus, some jurors viewed a trial in which the defendant was charged with a single burglary, some jurors viewed a trial with three different burglaries, and other jurors viewed a trial with a burglary, an assault and a robbery charge. In some trials, the evidence against the defendant was similar for all charges (e.g., all based upon circumstantial evidence) and in others the evidence was different for different charges (e.g., circumstantial, eyewitness and fingerprint). After watching their trial, jurors privately indicated their personal verdicts and then began deliberating in groups of six. Deliberations were videotaped with a video camera placed in the corner of the deliberation room so that deliberations could be analyzed later. The evidence presented to the jurors in the Tanford & Penrod (1984) study was not complex and the trials were very brief, regardless of how many charges were at issue.

24. The individual juror verdicts in the Tanford & Penrod (1984) study were strongly affected by consolidation. When jurors decided a burglary case consolidated with evidence on two other charges, they were 62% more likely to convict than when they considered the same burglary evidence by itself. The study confirms that, when evidence of multiple claims/charges against a defendant is considered by a single jury in a single trial, the probability of a finding adverse to the defendant is significantly higher than when a single charge is at issue. In the Tanford & Penrod (1984) study, there were also more convictions when evidence presented on the various charges was dissimilar (43%) than when evidence on the charges was similar (35%).

25. The results of the Tanford & Penrod (1984) study are typical of the findings from other experimental studies, and parallel those of the archival studies, outlined above.

26. The relevant experimental studies, like archival studies, clearly show that the magnitude of the effect that consolidation has on verdicts increases as more claims/charges are consolidated. For example, Tanford & Penrod (1982) found that conviction rates on a rape charge increased from 5% when tried alone (or with one other charge) to 27% when consolidated with two other charges (a 540% increase), and to 39% when consolidated with three other charges (a 780% increase). A similar pattern was observed for a trespass charge. In all these studies, the evidence on a given charge was always identical, whether jurors evaluated the charge separately or consolidated with other charges.

27. The latest study of the effects of joining criminal allegations against a defendant is an Australian study by Goodman-Delahunty, Cossins & Martschuk (2016), who compared separate and joint trials with various forms of evidence in the context of a child sexual abuse scenario. The study involved 90 mock juries and more than 1,000 jury-eligible citizens. The researchers found that

consolidated trials (as opposed to separate trials for the same offense) produced higher rates of errors in recall of trial evidence, stronger inferences about the defendant's sexual interest in boys, greater perceived intent, greater perceived poise and credibility for the complainant, greater defendant culpability, and, not surprisingly, greater defendant guilt (from about 80% not guilty to over 95% guilty).

CONSOLIDATION OF CLAIMS LEADS JURORS TO DRAW NEGATIVE CHARACTER INFERENCES ABOUT DEFENDANTS

28. Tanford & Penrod (1984) studied with particular care the reasons why the consolidation of multiple allegations against a defendant increases the probability of an adverse finding against the defendant. The strongest reason for the prejudicial effect of consolidation is that jurors in trials involving evidence of multiple allegations are substantially more likely to draw the inference that the defendant is "like a criminal" or has "criminal propensities." More broadly, Tanford & Penrod (1984) demonstrated that, when presented with evidence of multiple offenses, jurors find the defendant less sincere, less believable, less honest, more immoral, more likely to commit a future crime, less likeable, and more like a "typical criminal." This is the same pattern demonstrated in the new study by Goodman-Delahunty, Cossins & Martschuk, (2016), discussed above, and similarly applies in civil cases.

29. Negative impressions of defendants directly influence verdicts. This is because negative inferences about a defendant's character appear to lower the standard of proof to which jurors hold the prosecution/plaintiff evidence. (See the discussion of Bordens & Horowitz (1986), below.) Jurors are also more willing to find against defendants that they view negatively because the consequences of an erroneous decision seem less severe when the defendant is disliked. (Bordens & Horowitz (1986).)

30. In my opinion, consolidation of multiple plaintiffs' claims for trial in the present cases is likely to result in the jury drawing similar negative inferences against the defendants and thereby make it more likely that the jury will find defendants liable and increase the amount of damages awarded.

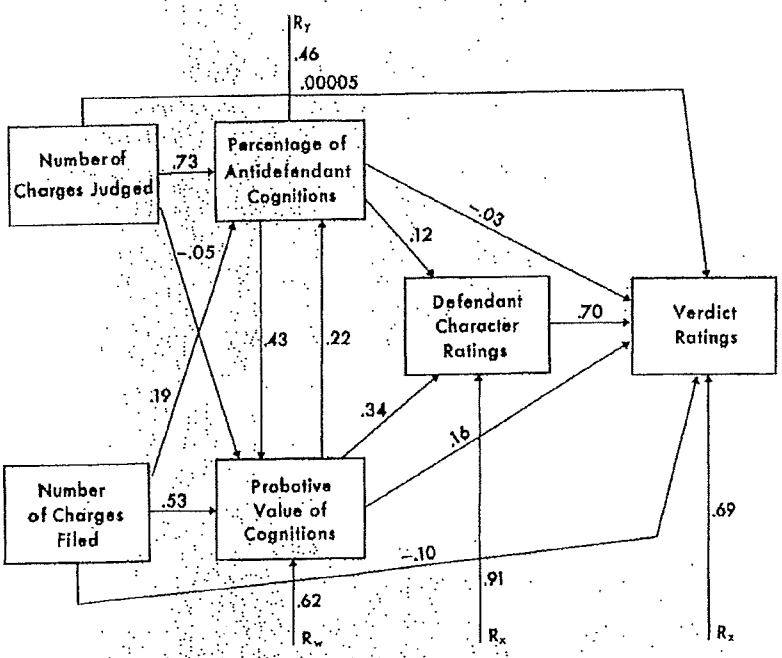
CONSOLIDATION OF CLAIMS AFFECTS JURORS' CONSIDERATION OF THE EVIDENCE

31. Negative impressions of a defendant against whom claims are consolidated also strongly influence jurors' assessments of trial evidence, and these assessments in turn influence verdicts. Tanford & Penrod (1984) found that consolidated charges produced stronger negative inferences about the defendant's criminal character than severed charges, and that those inferences influenced verdicts directly through distorted perceptions of the trial evidence. When a defendant seems more like a criminal (an impression strongly fostered by evidence of multiple offenses arising from separate incidents), this makes it appear to jurors that evidence offered by the prosecution with respect to a particular charge is more compelling and the defendant's evidence less compelling, even though there is no logical basis for concluding that the evidence is stronger. In short, an inference of criminality produced in consolidated trials makes identical items of prosecution evidence look stronger (more probative of guilt) than the identical items of prosecution evidence in severed trials.

32. The same pattern of "criminal inferences" and changes in the weight of evidence has also been observed by Tanford, Penrod & Collins (1985), and similar patterns of negative inferences about defendants were reported by Greene & Loftus (1985). The pattern of changes in rationales for verdicts reported by Goodman-Delahunty, Cossins & Martschuk (2016), described above are consistent with this cumulation effect. This research shows that jurors effectively cumulate

evidence of multiple offenses, which makes them more likely to convict on any given charge in a consolidated trial than if they considered only the evidence of that particular charge. Furthermore, the more charges that are consolidated, the greater the likelihood and strength of a criminal inference, the greater the apparent changes in the weight of evidence, and the greater the likelihood of conviction, even though the evidence on any particular charge remains unchanged.

33. Bordens & Horowitz (1986) tested, in some detail, the effect of consolidation on jurors' assessments of the defendants' character and levels of "anti-defendant" sentiment. Their model (below) shows that simple knowledge of the number of charges against a defendant increased anti-defendant feelings and negative perceptions of the defendant's character.



34. In my opinion, it is extremely probable that consolidation of the plaintiffs' cases in this litigation will similarly affect juror perceptions of the defendants' character and evaluation of the evidence. Because each plaintiff will offer allegations and evidence that defendants engaged in similar

alleged wrongdoing, the jury will be more likely to draw negative inferences about the defendants' character and have distorted perceptions of the probative value of the plaintiffs' evidence.

CONSOLIDATION OF CLAIMS RESULTS IN JUROR CONFUSION

35. Consolidation of claims also results in confusion about the evidence. Tanford & Penrod (1984), Bordens & Horowitz (1983) and Tanford, Penrod & Collins (1985) all documented consolidation-induced confusion of evidence, and this confusion is compounded where the consolidated charges are similar. Studies have shown that confusion is related to prejudicial judgments about the defendant (e.g., Bordens & Horowitz (1983)) and that jurors confused by multiple claims are more likely to find against the defendant.

36. In Horowitz & Bordens (2000), researchers noted that "when judging four plaintiffs (as compared with a single plaintiff drawn from the four), jurors not only tend to lump or blend ... plaintiffs but also appear to use fewer probative trial facts, as compared with when either fewer plaintiffs or fewer witnesses presented testimony." (Horowitz et al. (1996).) As Horowitz & Bordens (2000) explained, "[e]xperimental research on decision making in nonlegal contexts suggests that when the number of options reaches four, the ability of individuals to consider each alternative on its merits is compromised" because there "appears to be a limitation on the number of hypotheses or alternatives that people can maintain and operate on at one time." (*Id.*) In their study, Horowitz & Bordens (2000) reported that jurors found it easier to understand evidence and easier to understand the expert testimony in 1- and 2-plaintiff trials, as compared with the 4-, 6-, and 10-plaintiff trials. According to the study, "[w]ith respect to the impact of consolidation, the fate of the three 'focus' plaintiffs differed

substantially when they were part of different configurations of plaintiffs. Clearly, jurors were not judging the evidence pertaining to these plaintiffs on merits alone." (*See* p. 917.)

37. Based on my review of the materials I have been given regarding the instant litigation, it is my understanding that plaintiffs seek to consolidate the product-liability claims of multiple plaintiffs (presumably with varying medical histories and histories of product use). Such a consolidated trial is likely to be fairly long, with many witnesses and a fairly large number of documents presented to the jury. The published literature supports a conclusion that such a consolidated trial will result in significant juror confusion regarding the evidence, which makes it more likely that the jury will find against defendants.

LIMITING INSTRUCTIONS DO NOT MITIGATE THE PREJUDICE THAT RESULTS FROM THE CONSOLIDATION OF CLAIMS

38. Efforts to mitigate the prejudicial effects of consolidation by giving the jurors limiting instructions are exceedingly unlikely to offset the prejudice of joining several claims together in a single trial, and there is a serious risk that such instructions will aggravate the prejudice to defendants. There are several reasons for this. First, a substantial body of research shows poor juror comprehension of legal instructions. This research includes studies by Penrod & Tanford and Greene & Loftus, as well as that of Charrow & Charrow (1979), Cutler, Penrod & Schmolesky (1988) and Elwork, Sales & Alfini (1982). Researchers have evaluated juror comprehension of standard instructions from Arizona (Sigwirth & Henze (1973)); California (Charrow & Charrow (1979); Haney & Lynch (1994)); Florida (Buchanan, Pryor, Taylor & Strawn (1978); Elwork, Sales & Alfini (1982)); Illinois (Smith (1993)); Michigan (Elwork, Sales & Alfini (1977)); Nevada (Elwork, Sales & Alfini (1982)); Wisconsin (Heuer & Penrod (1988);

Heuer & Penrod (1989); Heuer & Penrod (1994a); Heuer & Penrod (1994b)); and Washington (Severance & Loftus (1982)).

39. Severance and Loftus (1982) reported that jurors find limiting instructions one of the most difficult instructions to comprehend. One portion of the research on limiting instructions has focused on instructions intended to limit the impact of information about a defendants' bad acts. This research has been conducted in both criminal and civil settings. Although providing jurors with limiting instructions appears to slightly improve actual jurors' understanding of the appropriate use of evidence of prior convictions (Kramer & Koening (1990)), their overall comprehension is still low. Approximately half of the participants in that study did not adequately comprehend limiting instructions. Because limiting instructions are intended to protect litigants against biasing information, lack of comprehension severely threatens the fairness of the trial.

40. Civil jury studies illustrate the problem with limiting instructions. Broeder (1959) found that mock juries awarded higher damages to a plaintiff after being instructed to disregard a statement that the defendant had insurance as opposed to when they were given no instructions. When jurors were told the defendant had no insurance, the average damage award was $33,000. When jurors were informed that the defendant had insurance, damages rose to $37,000. And when jurors were instructed to disregard the insurance information, the award rose to $46,000. *See also* Cox & Tanford (1989) (Experiment 2) (jury-eligible adults shown a videotape reenactment of a civil negligence trial recommended larger awards when given judicial admonitions to ignore certain evidence). Cox & Tanford (1989) (Experiment 2) characterized this as a "backfire effect." (*Id.*) Pickel (1995) similarly found that detailed legal explanations of limiting

instructions did not help mock jurors ignore inadmissible prior conviction evidence and resulted in a backfire effect.

41. In a variant on limiting instructions research, Casper et al. (1989) showed participants (253 adults called for jury duty and 283 undergraduate students) a videotape of a hypothetical illegal search and seizure civil suit brought against two police officers. The videotape had three possible outcomes: police found evidence of illegal conduct (guilty outcome) or police found nothing and later arrested a different person (innocent outcome) or no outcome was provided (neutral outcome). Jurors were then presented with instructions that included an admonition to disregard outcome information when assessing damages. Participants who watched the videotape indicating that the search resulted in the discovery of illegal conduct were significantly less likely to award damages to the subject of the search. In other words, jurors did not follow the judge's instructions not to consider outcome evidence.

42. Doob & Kirshenbaum (1973) found that participants were significantly more likely to find a defendant in a hypothetical burglary case guilty when presented with information indicating that the defendant had a prior criminal record than when no prior record information was given. Judicial instructions to use the information to determine credibility, rather than as an indicator of guilt, did not significantly reduce ratings of guilt.

43. Similarly, Hans & Doob (1976), whose participants were given a written summary of a hypothetical burglary case, found that groups who received evidence of prior conviction, accompanied by limiting instructions, were more likely to convict (40%) than groups who did not receive prior conviction evidence (0%). Furthermore, the content of jury deliberations was affected by the presence of inadmissible evidence. Groups exposed to prior conviction evidence

made significantly more negative statements about the defendant and significantly more positive statements about the prosecution evidence. The authors concluded that jurors do not use evidence regarding convictions to determine the credibility of statements made by the defendant. Instead, they are used as an indicator of guilt, despite judicial instructions not to use the information in this manner.

44. Wissler & Saks (1985) reported similar results in a study using adults recruited from the Boston area. Some of these participants were told that the defendant had previously been convicted of either a similar crime, a dissimilar crime, or were given no information about a prior conviction. Participants who received information about a defendant's prior record were instructed to use it only to determine the credibility of the defendant's statements and as an indication that the defendant has a criminal disposition. The type of prior conviction did not influence the defendant's credibility. Jurors who read about a defendant convicted of perjury did not view the defendant as less credible than jurors who read about any other defendant, including a defendant with no prior convictions. However, participants returned significantly more guilty verdicts for defendants with similar convictions (75%) than for defendants with dissimilar convictions (52.5%), perjury convictions (60%), or no convictions (42.5%).

45. Steblay, et al. (2006) provide the most exhaustive overview of the effects of limiting instructions. Their study is a meta-analysis of the effect of judicial instructions to disregard inadmissible evidence (IE) on juror verdicts. Their data include 175 hypothesis tests from 48 studies with a combined sample of 8,474 participants. The results revealed that inadmissible evidence has a reliable effect on verdicts consistent with the content of that evidence (inadmissible evidence could and did operate against both sides, depending on the study). Judicial instructions to ignore

the inadmissible evidence did not effectively eliminate the negative impact of the evidence. Steblay noted two civil studies in which this pattern was observed: "Schaffer (1984) provided defense-slanted IE (of pretrial negotiation) in a product liability case and found support, r=–.24, for the hypothesis that judicial instruction does not eliminate the impact of IE on jurors' decisions. Also using a product liability case, Landsman & Rakos (1994) found a similar impact with pro-plaintiff IE (damaging information regarding a recall of the product) despite judicial instruction to disregard that evidence, r=.33." (*See* p. 476.)

46. The results of both the civil and criminal studies support the conclusion that jurors have difficulty comprehending and applying legal instructions not to consider certain evidence.

CONSOLIDATION INSTRUCTIONS, IN PARTICULAR, DO NOT MITIGATE THE PREJUDICE THAT RESULTS FROM CONSOLIDATION

47. Studies have shown that judicial instructions are not effective in mitigating the prejudicial effect of consolidating multiple claims/charges. In Tanford & Penrod (1984) and Tanford, Penrod & Collins (1985), half of study participants asked to evaluate a judicial case involving multiple charges were given a set of very strong instructions not to infer that the existence of multiple charges was evidence of guilt and that the evidence pertaining to each charge should be considered separately. The instructions were patterned after those actually employed in the federal courts, but were stronger and more extensive.

48. Tanford & Penrod (1984) found these instructions to be totally ineffective in eliminating or even reducing the effects of consolidation. The conviction rate for jurors in consolidated trials who did not receive these instructions was 39% as compared with 38% for jurors who did. According to this study, instructions were also ineffective in influencing other measures of juror judgments. Other studies that have produced similarly discouraging results about the impact of consolidation

instructions include Greene & Loftus (1985) and Horowitz & Bordens (1985). The results from the large-scale Australian study by Goodman-Delahunty, Cossins & Martschuk (2016) confirm these conclusions and are "in line with a large body of empirical studies demonstrating the ineffectiveness" of jury instructions to mitigate the prejudicial effects of consolidation.

49. On the basis of this research, it is my opinion that it is extremely unlikely that a judicial instruction could effectively eliminate prejudicial inferences against defendants that would result from joining the claims of multiple plaintiffs for trial.

DELIBERATION DOES NOT MITIGATE THE PREJUDICE THAT STEMS FROM CONSOLIDATION

50. The prejudice that would be caused by consolidation will not be cured by the process of jury deliberations. Tanford & Penrod (1986) showed that jury deliberations do not offset biases created by consolidation. In that study, jurors in consolidated trials, questioned before deliberation, recommended conviction at a higher rate than jurors in single trials. After deliberation, the difference was even greater. In short, deliberation aggravated consolidation-related biases.

51. Goodman-Delahunty, Cossins & Martschuk (2016) looked at the distribution of factual recall errors during deliberation and asked whether they were associated with varying numbers of trial witnesses. They found that simpler, non-consolidated, cases were associated with fewer errors, as shown in the following figure.

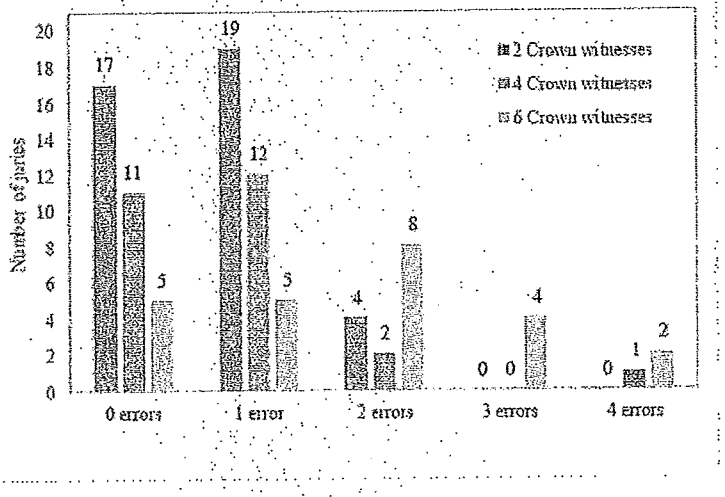


Figure 9. Number of factual recall errors in deliberation, by total number of prosecution witnesses

52. Based upon the foregoing, I conclude that it would be highly prejudicial to defendants if multiple claims against them were consolidated for trial. I anticipate that consolidation would cause jurors to draw negative inferences about the defendants, enhance the apparent probative value of evidence against the defendants, prompt confusion and accumulation of evidence against the defendants and prejudicially increase the risk of liability findings, damages and punitive damages awards against the defendants. I further conclude that limiting instructions and deliberation by jurors are extremely unlikely to overcome these multiple sources of prejudice. By far the most effective method of avoiding the problems detailed above is to try each claim separately before a separate jury.

Further Affiant sayeth not.

Steven D. Penrod

SUBSCRIBED AND SWORN TO before me on this ____ day of April, 2019.

Notary Public In and For
The State of NY

My Commission Expires: 09/07/2022

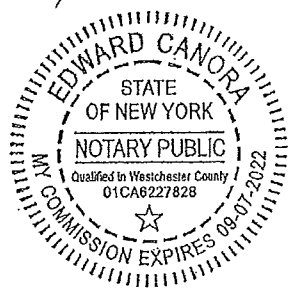


EXHIBIT B: BIBLIOGRAPHY OF SOURCES

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EXHIBIT I

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

SHARON PIPES	*	
	*	
Plaintiff,	*	
	*	CASE NO.
VS.	*	CJ-2017-3487
	*	
JOHNSON & JOHNSON, et al	*	
	*	
Defendants.	*	

****
TELEPHONIC DEPOSITION OF
DR. SURESH MOOLGAVKAR
DECEMBER 13, 2018
****

TELEPHONIC DEPOSITION OF DR. SURESH MOOLGAVKAR, a witness produced at the instance of the Plaintiff, was taken in the above-styled and -numbered cause on the 11th day of December, 2018, from 12:03 p.m. to 12:41 p.m., before Brooke Barr, CSR in and for the State of Texas, reported by machine shorthand, at US Legal Support, 5910 N. Central Expressway, Suite 100, Dallas, Texas 75206, pursuant to the Oklahoma Rules of Civil Procedure and any provisions stated on the record or attached hereto.

than chrysotile?

THE DEFENDANTS: Objection; form.

A. Well, the -- the evidence suggests, yes. The epidemiology suggests that tremolite is more potent than chrysotile, because we don't know whether pure chrysotile at any level can increase the risk of even pleural mesothelioma.

But when we are talking about potency factors here, I want it understood that we are right now talking about pleural mesothelioma. That is another story altogether.

Q. Okay. What's the difference?

A. Well, the difference is that asbestos -- asbestos exposure is much more strongly associated with the risk of pleural mesothelioma than the risk of peritoneal mesothelioma. One has to make a very clear distinction between the two.

Q. And amphibole asbestos cause peritoneal mesothelioma?

A. Amphibole asbestos at sufficient levels of exposure -- and we are talking now about the commercial amphiboles; namely chrysotile and amosite, and at sufficient levels of exposure, increased the risk of peritoneal mesothelioma.

Q. Tremolite is defined as an amphibole, true?

A. I said specifically that we have --

Q. I understand.

A. -- information on commercial amphibole. Tremolite is not a commercial amphibole, but it is in -- in the proper habit, that is -- asbestos form habit, that tremolite is an amphibole asbestos, yes.

Q. Okay. Do you have an opinion as to what, if anything, did cause Ms. Pipes' peritoneal mesothelioma?

A. Well, I -- I think the epidemiological evidence shows very strongly that vast majority of peritoneal mesothelioma is -- in the United States, in both men and women, and perhaps better than 95 to 99 percent of all peritoneal mesothelioma among women in the United States are occurring without exposure to any environmental agents, specifically cannot be attributed to any asbestos exposure and occur spontaneously as a consequence of the naturally occurring biological processes.

Age is a strong risk factor for development of spontaneous mesothelioma. And therefore, I believe, as I've stated in my report, the proximate cause of Ms. Pipes' peritoneal mesothelioma is the spontaneous or random accumulation of mutations in one of the mesothelial cells of the peritoneum, and

STATE OF TEXAS)
COUNTY OF DALLAS)

I, Brooke N. Barr, Certified Shorthand Reporter, duly commissioned and qualified in and for the State of Texas, do hereby certify that there came before me on the 13th day of December, 2017, at US Legal Support, 5910 N. Central Expressway, Suite 100, Dallas, Texas 75206, the following named person, to wit: DR. SURESH MOOLGAVKAR, who was duly sworn to testify the truth, the whole truth, and nothing but the truth of knowledge touching and concerning the matters in controversy in this cause;

That they were thereupon examined upon their oath, and their examination reduced to typewriting under my supervision;

That the deposition is a true record of the testimony given by the witness, and that review by the witness was waived by agreement of all parties.

I further certify that I am neither attorney nor counsel for nor related to any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in this action.

Given under my hand on this the 23rd day of December, 2018.

BROOKE N. BARR, CSR NO. 6521
CSR Expiration Date: 12/31/19
U.S. Legal Support, Firm #343
5910 N. Central Expressway
Suite 100
Dallas, Texas 75206
214-741-6001
214-741-6824 Fax

EXHIBIT J

IN THE SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO. MID-L-7385-16AS

STEPHEN LANZO, III, and KENDRA LANZO,

Plaintiffs,

vs.

CYPRUS AMAX MINERALS COMPANY, individually and as successor-in-interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc., and Resource Processors, Inc., and Windsor Minerals, Inc., et al.,

Defendants.

VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION

OF

SURESH H. MOOLGAVKAR, M.B., B.S., Ph.D.

VOLUME II (Pages 214-303)

Embassy Suites

3225 158th Avenue SE

Bellevue, Washington

DATE TAKEN: December 29, 2017

REPORTED BY: Cynthia A. Kennedy, RPR, CCR 3005

BY MS. ABRAMS:

Q. And -- and you look at trends in the SEER data, but is it correct, sir, that the SEER data doesn't give you any information about whether the individuals were exposed to asbestos or not?

A. That -- that is correct.

Q. Okay. Now, so, is it correct that from the SEER data, you really can't explain the incidents of mesothelioma arising absent exposure to asbestos just using that data alone.

A. Well, if you look at, compare the trends in -- in pleural mesothelioma among males with the trends in pleural mesotheliomas among females and with the peritoneal mesotheliomas in both males and females and compare those trends with the trends in the commercial use of asbestos in the United States, it becomes very clear that pleural mesothelioma rates among males have been strongly impacted by the commercial use of asbestos in the United States, in that the trends are rather similar with the 20- to 30-year latency period, but that the rates among females and the rates of peritoneal mesothelioma do not correspond to what is happening with the commercial use of asbestos, indicating that these are impacted much less than our pleural

mesotheliomas among males.

Q. In formulating that opinion, you are making the -- you are making the assumption that that the commercial -- trends in the commercial use of asbestos in this country reflect actual exposures of populations, rural and urban, to asbestos. In other words, the trends in commercial use of asbestos is an indicator of the exposure of urban and rural individuals to asbestos. Is that fair?

A. Well, the use of commercial asbestos in the United States is a -- is an indicator of what fraction of the population in any given year was exposed to -- to commercial asbestos.

Q. Okay. So then you are making that assumption, correct?

A. Well, it's an observation rather than an assumption.

Q. And you're also assuming that the trends of commercial use of asbestos reflect exposures to the urban population but not the rural population, correct?

A. No. There may be some fraction -- a higher fraction of the urban population may be exposed, but what I'm thinking of particularly are the individuals who were occupationally exposed in

CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I, the undersigned Washington Certified Court Reporter, hereby certify that the foregoing deposition upon oral examination of SURESH H. MOOLGAVKAR, M.B., B.S., Ph.D. Volume II was taken stenographically before me on December 29, 2017, and thereafter transcribed under my direction;

That the witness was duly sworn by me pursuant to RCW 5.28.010 to testify truthfully; that the transcript of the deposition is a full, true, and correct transcript to the best of my ability; that I am neither attorney for nor a relative or employee of any of the parties to the action or any attorney or financially interested in its outcome;

I further certify that in accordance with CR 30(e), the witness was given the opportunity to examine, read, and sign the deposition, within 30 days, upon its completion and submission, unless waiver of signature was indicated in the record.

IN WITNESS WHEREOF, I have hereunto set my hand and 30th day of December 2017.

/s/ Cynthia A. Kennedy, RPR

NCRA Registered Professional Reporter
Washington Certified Court Reporter No. 3005
License expires November 16, 2018

EXHIBIT K

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

ROBERT L. DEVEY and MARY M. DEVEY,

Plaintiff(s),

vs.

JOHNSON & JOHNSON, et al.,

Defendant(s).

CIVIL ACTION NO.
18-CP-10-790

DEPOSITION OF: ROBERT L. DEVAY

DATE: Monday, March 12, 2018

TIME: 1:12 p.m. through 2:58 p.m.

LOCATION: Oxner & Stacy, P.A.
235 Church Street
Georgetown, South Carolina

TAKEN BY: Attorneys for the Plaintiff(s)

COURT REPORTER: MADONNA M. FARRELL
Registered Professional Reporter
Certified Livenote Reporter
CaseViewNet Realtime Reporter

(Proceedings were interrupted.)
BY MR. HERNS:
Q. When did you begin working on your MBA at Northeastern University in Boston, Massachusetts?
A. '73.
Q. And how long did it take you to get your MBA?
A. Two years.
Q. So '75, you were graduating?
A. Yep.
Q. Now, after you graduated in December of 1970, from University of Albany, what was your first job?
A. After that, I became a cost accountant at Garlock.
Q. And that's Garlock and in Palmyra, New York?
A. Yes.
Q. And what were your duties as an accountant cost analysis?
A. It was just standard cost accounting job, which means trying to figure out what the cost of a gasket was or any product that they made, because they made tens of thousands of different little parts for cars and planes and trains and bridges and any other stuff.

So trying to help out to identify raw material, labor cost, final product cost, so that they could sell it.
Q. Okay. And you mentioned some things that Garlock made.
Did Garlock make seals, gaskets, and sheet gaskets?
A. It was a big plant. I suspect they did steel gaskets. I don't remember any steel gaskets where I --
Q. Sheet gaskets.
A. Sheet gaskets. Okay, sorry. Yeah.
Q. Okay.
A. Yes, they did.
Q. Did that facility also make asbestos cloth and packing?
A. They did.
Q. And did they make asbestos-containing pump packing?
A. Pump, I don't -- I don't know on that one. I don't know what pump packing is.
Q. Okay. How about rope packing?
A. I remember seeing rope packing. I think that was -- I think they probably did.
Q. And the rope packing at Garlock, it would

have contained asbestos?
MR. SWETT: Object to the form, calls for speculation.
THE DEPONENT: Yeah, I was an accountant, not an engineer. I don't know.
BY MR. HERNS:
Q. Okay. Now, to figure out the cost of a gasket, you would have to know the cost of the materials that were included into that gasket or other materials being manufactured, correct?
A. Uh-huh.
Q. Is that a "yes"?
A. Yes.
Q. So there were products being made at Garlock that you knew contained asbestos?
A. Yes.
Q. Did you ever have to go out on to the manufacturing floor at the Palmyra --
A. Palmyra.
Q. -- facility of Garlock?
A. Yes.
Q. And that was a manufacturing facility where they were making various gaskets, packing, rope that contained asbestos?
MR. SWETT: Object to the form.

THE DEPONENT: They made any number of things. Some of those were what you mentioned, yeah.
BY MR. HERNS:
Q. Okay. So they were using raw asbestos fibers on the manufacturing facility that you went into when you were employed by Garlock, correct?
A. Yeah. In the packing factory, they had the raw asbestos.
Q. Okay. How was the raw asbestos delivered to Garlock?
A. What I remember, it was just, like, big bales of cotton, except they were asbestos.
Q. Did they get a train car full or a truck full?
A. I think there was a train track. There must have -- it was a little bit further down the line. I think they came by train.
Q. By train?
A. Yeah, it was 50 years ago, almost. Yeah, it was 50 years ago.
Q. Did the Garlock facility have railroad tracks that ran by?
A. Yes.
Q. So it would be easy for the trains to unload

rate. Here's an indirect overhead rate.
I know I'm boring the hell of out of you. That is what it was. It was boring as hell. So I left in nine months.
Q. Understandable.
Do you know who supplied any of the raw asbestos that was used in the Garlock plant?
A. I do remember John-Mansville, for sure. They had a lot of their bales in the background.
Q. And when you were out on the manufacturing floor, not in your office crunching the numbers, but when you were out on the actual floor, were operations and manufacturing taking place?
A. Sure, sure.
Q. And the employees of Garlock would have been using the raw materials to make the various products that Garlock manufactured?
MR. SWETT: Object to the form.
THE DEPONENT: Yeah.
BY MR. HERNS:
Q. Did you see any visible dust in the air when you walked onto the manufacturing floor at Garlock?
A. This is what I would say, normal customary dust of any factory where I worked.
I worked in a few. They were all -- this

was pre-OSHA. I don't know, but they were all dirty and dusty. And this was, too.
Q. Okay. Could you --
A. But I'm not sure any more than any other one.
Q. Well, when you went out on the manufacturing floor, could you see visible dust in the air?
MR. SWETT: Object to the form.
THE DEPONENT: I think -- just a procedure -- when you say -- am I supposed to answer even if you --
MR. SWETT: Yes, you can answer unless I tell you not to answer. I'm just making the objection on the record.
THE DEPONENT: I guess I should have asked that about 20 minutes ago.
MR. SWETT: I should have told you that.
MR. HERNS: I should have told you that, as well. He and I will deal with that later, in other words.
THE DEPONENT: Okay.
BY MR. HERNS:
Q. Okay. Can you describe for me the conditions of the air inside the Garlock

manufacturing facility when you went out on to the plant floor?
A. It was just dirty old factory from early 1900s. It's in upstate in the northeast, lots of -- that's what I remember about it. Just gray, dark, dank.
Q. And when sunlight would come in through one of the windows, could you see anything floating in that sunlight beam?
A. Oh, sometimes, sure.
Q. Okay. Now, were you ever present in the manufacturing facility where they were opening one of the bales, big bales from Johns-Manville of asbestos and dumping into some type of hopper?
A. I don't remember. I remember that procedure. I used to get away from that one. But I do remember there used to be a big hopper, and some guy would drop a big bale of asbestos in the hopper, but I didn't.
Q. You didn't do that?
A. I didn't do it. And there was no reason for me to view it. I'm waiting for that little bit -- that little bit of asbestos that goes on that gasket.
I'm not going to get in the way of that, and

that was way in the back of the factory. That was -- they kept that as far away from people as possible, I guess.
Q. Do you believe that you breathed asbestos dust that was present in the Garlock facility in New York?
MR. SWETT: Object to the form.
THE DEPONENT: Oh, I suspect I did. I don't know.
BY MR. HERNS:
Q. Okay. If asbestos was in the air at the Garlock facility and you were present, do you think you would have breathed asbestos in the Garlock plant?
MR. SWETT: Object to the form, vague.
THE DEPONENT: Sounds logical.
BY MR. HERNS:
Q. What was your answer?
A. I said it sounds logical, but who knows?
Q. How often, if you know, did the Garlock plant receive a trainload, a boxcar shipment of the Johns-Manville asbestos, raw asbestos?
A. I have no idea.
Q. Do you know the types of asbestos that Garlock received from Johns-Manville?

BY MR. HERNS:
Q. Okay. So you actually went onto or called the number of an advertisement that you saw on TV about mesothelioma?
A. Yeah, but I didn't pursue it. They just bugged the hell out of you.
Q. Do you know who -- what company was associated with that phone number?
A. No, I don't.
Q. Was it --
A. I initiated the call to this law firm, but I mean, it's like, you know, your car warranty for God's sake. If they get your number you're going to get a call every day.
Then I just said no more. I whatever you did, unsubscribe. I think they pass a mail list around or something. I said enough --
Q. Okay. Now --
A. -- and then I just went through a methodical search to say who's a credible firm, not that the other ones weren't, but obviously, they have a great reputation in the area and been around for a long time. So I called Chris, and that's where we are.
Q. Okay. Now, you mentioned you had to

unsubscribe. I take it you're talking about e-mail.
A. Yeah, the little thing at the bottom.
Q. Right. Okay. Do you recall who you were receiving e-mails from, the name of the group?
A. I threw them away.
Q. Okay. Did you receive anything in the mail?
A. Well, yeah.
Q. U.S. postal?
A. I would probably -- I don't know. It might have been UPS or FedEx.
Q. Okay. Did you keep any written materials that you received from the mail, UPS or FedEx?
A. I'd have to go back and look. I cleaned up the file pretty good. I just ran out of room.
Q. If you would go back and look and provide anything that you have to your attorney, Mr. Swett, I'd appreciate it.
A. Okay.
(This page contains requested information.)
BY MR. HERNS:
Q. Has any treating physician who has seen you regarding your mesothelioma, has any treating physician told you that they believe that cosmetic

talc contributed to your mesothelioma?
MR. SWETT: Object to form, foundation.
THE DEPONENT: No, they haven't. They have not told me what they thought the cause was.
BY MR. HERNS:
Q. Has any treating physician told you that they believe exposure to asbestos fibers in products or manufacturing facilities caused your mesothelioma?
MR. SWETT: Object to form, foundation.
THE DEPONENT: I have heard that, yes.
BY MR. HERNS:
Q. And what doctor have you heard that from?
A. I'm trying to think if it was in stuff that I read or what other physician -- I think it must have been the oncologist at MUSC. What was his name?
Q. Your interrogatory responses note a Timothy Smith, Robert Miller and Terrill Huggins.
A. It probably would have been Huggins.
THE DEPONENT: Was it Huggins that --
MRS. DEVEY: Huggins did the needle biopsies.
THE DEPONENT: Yeah, Huggins did a

needle biopsy and said there's a presence of an asbestos --
MRS. DEVEY: No.
THE DEPONENT: No?
MRS. DEVEY: No. That was he --
MR. HERNS: (Indicating).
MRS. DEVEY: I'm sorry.
MR. HERNS: That's not a problem. Usually I would let you. You've helped him out a couple of times. This, I probably need to get from his memory.
Thank you, though. I'm sorry.
THE DEPONENT: I can't remember exactly what physician told me that it -- it -- it is more -- that asbestos is the primary or one of the causes of mesothelioma.
BY MR. HERNS:
Q. Okay. Just so the record's clear, has any physician told you that he believes your use of talc products or baby powder products resulted in your contracting mesothelioma?
MR. SWETT: Object to form.
THE DEPONENT: No, it never came up in discussion. What I mean, they didn't...
BY MR. HERNS:

MR. HERNS: That's it for the day.
(The deposition adjourned at 2:58 p.m.)

CERTIFICATE OF REPORTER

I, Madonna M. Farrell, Registered Professional Reporter and Notary Public in and for the State of South Carolina, do hereby certify that the deponent, ROBERT L. DEVAY, was duly sworn by me to testify to the truth, and that the above deposition, Pages 1 through 78, inclusive, was recorded stenographically by me and transcribed through computer-aided transcription by me to the best of my ability.

I FURTHER CERTIFY that the foregoing transcript is a true and correct transcript of the testimony given by the said witness at the time and place specified.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken, or financially interested in this action.

IN WITNESS WHEREOF, I have set my hand and seal this [!DAY #] of [!MONTH], [!YEAR].

Madonna M. Farrell
Registered Professional Reporter
Notary Public
My commission expires
August 20, 2025

EXHIBIT L

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

- - -

ROBERT L. DEVEY and MARY M. DEVEY,	)	
Plaintiffs,	)	Case No.
vs.	)	2018-CP-10-790
JOHNSON & JOHNSON, et al.,	)	
Defendants.	)	

TELEPHONIC DEPOSITION OF ROBERT L. DEVEY, VOLUME II

DATE TAKEN:	Tuesday, March 13, 2018
TIME BEGAN:	11:40 a.m.
TIME ENDED:	1:40 p.m.
LOCATION:	Telephonic Deposition
REPORTED BY:	G. Michael Alexander, RPR, CSR Magna Legal Services (866) 624-6221 www.MagnaLS.com

Chevy, Dodge, Plymouth, Edsel.

Q. Did he ever work on any cars or do any automotive jobs?

A. No.

Q. Did he ever do any drywall work or have a contractor do any drywall work on the house that you lived in when you were living with him?

A. Not that I remember, no.

Q. Did you ever assist him or anyone else in doing any roof work on any house that you lived in with your parents?

A. No.

Q. Did you ever do any insulation work with your father or anyone at the residence that you grew up in?

A. No.

Q. What was the cause of your father's death?

A. From cancer.

Q. And what type of cancer did he have?

A. They think it was stomach cancer.

Q. Any other relatives of yours that have had cancer that you can recall?

A. No.

Q. And how old is your mother?

A. Ninety-two.

A. Internal Tumor Board for input, I guess. I don't remember. Whatever the Tumor Board does.

Q. So you haven't seen any reports or findings of any tumor boards, just what he's told you by word of mouth?

A. He did get some report, I don't know what you would call it, I don't think it was a complete medical record. But basically it's been verbal, from the Tumor Board, two reports. But no written reports from the Tumor Board, no, unless they put it in the medical record.

Q. Did you, for any of the hospitals that you worked at, were you ever required to take a preemployment physical or an end-employment physical?

A. No.

Q. And was that at all of the different medical facilities that you worked at?

A. Yes. A TB test they make you do.

Q. Any examinations to get insurance, life insurance?

A. Yeah, having worked with asbestos, I had a physical.

Q. And nothing more recent in the last ten years?

A. No.

A. Pretty nondescript. You know it was a flowery, just clean, fresh.

Q. Did the smell ever change over the course of time during your use of it?

A. Not that I recall.

Q. All right. Did you ever use a Johnson & Johnson baby powder that had a yellowish tint to it?

A. Not that I recall.

Q. Have you ever purchased any Johnson & Johnson baby powder at Piggly Wiggly?

A. Probably not.

Q. Do you know if your wife has ever purchased any Johnson & Johnson baby powder from a Piggly Wiggly?

A. Don't know.

Q. Did you, I don't think I've asked you this, did you ever purchase Shower to Shower powder?

A. More than likely.

Q. Can you tell me where you would have purchased Shower to Shower from?

A. Probably CVS, Rite Aid.

Q. So were there CVSs and Rite Aids up in Massachusetts and Michigan?

A. Yeah. Yes.

Q. So are you telling me that you purchased

Shower to Shower when you were living up in Michigan or did you purchase Shower to Shower when you got down here to South Carolina?

MR. SWETT: Object to form.

THE WITNESS: I don't remember purchasing it. My wife did. I was working 60, 70 hours a week up in Michigan.

BY MR. HERNS:

Q. How about Massachusetts? Same answer?

A. I didn't work quite as many hours.

Q. In Massachusetts do you recall yourself ever purchasing any Shower to Shower?

A. Not specifically.

Q. Have you personally had any testing done on any Johnson & Johnson or Shower to Shower powder?

A. No.

Q. And do you have any personal knowledge that any of the Johnson & Johnson baby powder that you used contained asbestos?

MR. SWETT: Object to form.

THE WITNESS: No, I didn't know.

BY MR. HERNS:

Q. The same question for Shower to Shower. Do you have any personal knowledge that the Shower to Shower powder that you used contained asbestos?

research, that that particular diagnosis can be either malignant or nonmalignant. Were you told whether your ependymoma was malignant or not?

A. Yeah, it's malignant.

Q. And for the ependymoma have you had any radiation treatment?

A. No. He said it would do more harm than good.

Q. And have you had any chemotherapy for the ependymoma?

A. Same thing, more harm than good.

Q. And as far as you know is the ependymoma still present in your body?

A. The surgeon said he got as much as he could. And that it's very hard to get it all. But he said he had patients, who had it there for 15 years, after he took out the bulk of the tumor. So he says, you know, it's one of those, it could grow fast, it could grow slow, but we did the best we can, and we'll play it by ear. But he did not recommend any of those two treatments, which are typical --

Q. Right.

A. -- for that cancer.

Q. Right. And remind me, the surgery was at MUSC, is that correct?

CERTIFICATE OF REPORTER

I, G. Michael Alexander, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate, and complete record of what I could hear over a very poor telephone connection,

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 26th day of March, 2018 at Summerville, Dorchester County, South Carolina.

_____

G. Michael Alexander
Registered Professional
Reporter, CSR
My Commission expires
May 24, 2026

EXHIBIT M

In The Supreme Court of Missouri
en banc

January Session, 2019

State ex rel. Johnson & Johnson and Johnson & Johnson Consumer, Inc.,

Relators,

No. SC97637 **PRELIMINARY WRIT OF PROHIBITION**

The Honorable Rex M. Burlison,

Respondent.

THE STATE OF MISSOURI
to
The Honorable Rex M. Burlison,

Greetings:

WHEREAS, it has been represented to the Supreme Court of Missouri on the part of Relators, Johnson & Johnson and Johnson & Johnson Consumer, Inc., as indicated and set forth in the petition for writ of prohibition filed herein, and the Court being willing to maintain the rights of the State of Missouri and the laws and customs thereof;

NOW, THEREFORE, you, the said Honorable Rex M. Burlison, Judge, Circuit Court of St. Louis City, are COMMANDED to file a written return to the petition in this Court on or before February 13, 2019, and show cause, if any you have, why a writ of prohibition should not issue prohibiting you from doing anything other than vacating your order of January 2, 2019, denying Relators' motion to sever and transfer, in cause No. 1522-CC00419-01, entitled Vickie Forrest, et al., Plaintiffs, vs. Johnson & Johnson, et al., Defendants, and you, the said Honorable Rex M. Burlison, are COMMANDED in the meantime to take no further action in said cause, other than as set forth above, until the further order of this Court. Relators' motion to file exhibits under seal sustained.

Herein fail not at your peril.

Given under my hand and seal of
said Court, at the City of Jefferson,
this 14th day of January, 2019.

Betty Ann Buchon, *Clerk*

Lori S. Knaebel, *Deputy Clerk*

EXHIBIT N

FILED
FEB 14 2019
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

Edward Schulte, Rosann LeBorge, and Jeanne Hodges as Surviving Heirs of Evelyn Schulte, deceased.
VS

Johnson & Johnson, et al

CASE NO. 1622-CC00536 DIVISION 11 Feb 14, 2019

ORDER/JUDGMENT/MEMORANDUM

Parties appear for status conference and Plaintiffs Motion for Consolidation. Plaintiffs Motion for Consolidation is heard and denied. Court continues case for trial on December 2, 2019.

So Ordered

Judge

57427

DJJS 40229

FILED
FEB 14 2019
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

Mahendra Bhuyan

VS

Johnson & Johnson, et al.

CASE NO. 1822-CC00722 DIVISION 11 February 14 2019

ORDER/JUDGMENT/MEMORANDUM

Parties appear for status conference and Plaintiffs' Motion for Consolidation. Plaintiffs' Motion for Consolidation is heard and denied. Court continues case for trial on [redacted] September 23, 2019.

So Ordered

DLV 14

Craig A. Lubben
#53894 Atty for PTI Unn.

Anthony Cruz A545 40229

EXHIBIT O

E-SERVICE
61473910
Dec 15 2017
11:07AM
File & ServeXpress

Benno Ashrafi, Esq. (CSBN 247623)
Robert Green, Esq. (CSBN 216116)
WEITZ & LUXENBERG, P.C.
1880 Century Park East, Ste. 700
Los Angeles, California 90067
Telephone: (310) 247-0921
Facsimile: (310) 786-9927

Attorneys for Plaintiffs

WEITZ & LUXENBERG P.C.
A PROFESSIONAL CORPORATION
LAW OFFICES
1880 CENTURY PARKE EAST, SUITE 700
LOS ANGELES, CALIFORNIA 90067

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordinated Proceeding
Special Title (Rule 3.550)

LAOSD ASBESTOS CASES

ROBERT BLINKINSOP, an individual;
KAREN BLINKINSOP, an individual;

Plaintiffs,

v.

ALBERTSONS COMPANIES INC., et al.,

Defendants.

CASE NO. JCCP 4674 / BC677764
[Assigned to Hon. Steven J. Kleifield Department 324]

NOTICE OF RULING

DATE: December 14, 2017
TIME: 9:00 a.m.
DEPT: 324

Complaint filed: September 29, 2017

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 14, 2017, at 9:00 a.m. in Department 324 Honorable Judge Steven J. Kleifield presiding ordered as follows:

- Plaintiffs' Motion for Trial Setting Preference is continued to January 4, 2017 at 9:00 a.m. in Department 324.
- Plaintiffs' supplemental papers shall be filed by December 22, 2017 by 5 p.m.
- Defendants' replies to Plaintiffs' supplemental papers shall be filed by December 29, 2017 by 5 p.m.
- Plaintiffs' Notice of Motion and Motion to Consolidate Cases, *Blinkinsop, et al. v. Albertsons Companies Inc., et al.* BC677764 and *Johnson v. Albertsons Companies Inc., et al.* BC679466, is DENIED, without prejudice.
- The Court issued the attached MINUTE ORDER. A true and correct copy of the Order is attached hereto as Exhibit "A".

DATED: December 15, 2017

WEITZ & LUXENBERG, P.C.

Robert Green, Esq.
Attorneys for Plaintiffs

WEITZ & LUXENBERG P.C.
A PROFESSIONAL CORPORATION
LAW OFFICES
1880 CENTURY PARKE EAST, SUITE 700
LOS ANGELES, CALIFORNIA 90067

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

E-SERVICE
61472005
Dec 15 2017
06:56AM
File & ServeXpress

DATE: 12/14/17		DEPT.	
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674	Plaintiff	JENNIFER ALESIO
		Counsel	BENNO ASHRAFI
	Coordination Proceeding Special Title Rule (3.550)		MARK BRATT
		Defendant	ALEX P. CATALONA
	LAOSD ASBESTOS CASES	Counsel	IRA GOLDBERG
			NICHOLAS R. LANE
			REYNOLD MARTINEZ
			ADDITIONAL BELOW

NATURE OF PROCEEDINGS:

1) GROUP STATUS CONFERENCE FOR CASES HELD WITH THE LAW FIRM OF NAPOLI SHKOLNICK PLLC (1:45 PM)

2) MOTION OF PLAINTIFFS FOR ORDER TO APPORTION AND DISTRIBUTE FUNDS [BC535695-TINOCO] [9 AM]

3) MOTION OF DEFENDANT, JOHN K. BICE CO., INC., FOR SUMMARY JUDGMENT [BC656196-BIANES] [9 AM]

4) MOTION OF SPECIALLY APPEARING DEFENDANT, WHITTAKER, CLARK & DANIELS INC., TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION
[BC676287-HANESS] [9 AM]

5) MOTION OF PLAINTIFFS FOR PREFERENCE PURSUANT TO C.C.P. 36(A) AND (D)
[BC679466-JOHNSON] [9 AM]

6) MOTION OF PLAINTIFFS TO CONSOLIDATE CASES
[BC679466-JOHNSON] [9 AM]

7) MOTION OF PLAINTIFFS FOR PREFERENCE PURSUANT TO C.C.P. 36(D)
[BC677764-BLINKINSOP] [9 AM]

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			DEPT. 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674 Coordination Proceeding Special Title Rule (3.550) LAOSD ASBESTOS CASES	Plaintiff Counsel Defendant Counsel	JENNIFER ALESIO BENNO ASHRAFI MARK BRATT ALEX P. CATALONA IRA GOLDBERG NICHOLAS R. LANE REYNOLD MARTINEZ **ADDITIONAL BELOW**

NATURE OF PROCEEDINGS:

8) MOTION OF PLAINTIFFS TO CONSOLIDATE CASES
[BC677764-BLINKINSOP] [9 AM]

9) HEARING RE SCHEDULING OF FURTHER DEPOSITION OF PLAINTIFF ELDON ANGLE
[BC654313-ANGLE] [1:45 PM]

10) EX PARTE APPLICATION OF PLAINTIFFS FOR ORDER SHORTENING TIME AND ORDER ADVANCING HEARING DATE ON MOTION TO COMPEL DEFENDANT GRUNDFOS CBS, INC. TO PRODUCE A PERSON MOST QUALIFIED AND CUSTODIAN OF RECORDS FOR DEPOSITION, AND PRODUCTION OF DOCUMENTS AND FOR SANCTIONS
[BC654313-ANGLE] [8:30 AM]

11) EX PARTE APPLICATION OF PLAINTIFF FOR AN ORDER ALLOWING LEAVE TO FILE THIRD AMENDED COMPLAINT
[BC639512-O'DAY] [8:30 AM]

12) PLAINTIFFS' EX PARTE APPLICATION FOR ORDER BY DECLARATION OF ROGER E. GOLD FOR ORDER GRANTING DEFENDANT'S MOTION TO COMPEL FURTHER CROSS-EXAMINATION OF GEORGE KEOWN
[BC668443-KEOWN] [8:30 AM]

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			DEPT. 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674 Coordination Proceeding Special Title Rule (3.550) LAOSD ASBESTOS CASES	Plaintiff Counsel	JENNIFER ALESIO BENNO ASHRAFI MARK BRATT
		Defendant Counsel	ALEX P. CATALONA IRA GOLDBERG NICHOLAS R. LANE REYNOLD MARTINEZ **ADDITIONAL BELOW**

NATURE OF PROCEEDINGS:

The matters are called for hearing.

The Court hears argument of counsel and rules as follows:

RE: BC676287-HANESS

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore, Aurora Bowser, CSR No. 12801, has been previously signed and is on file.

As to Item No. 4 above, the motion to quash is continued to February 14, 2018 at 9:00 a.m. in Department 324.

Supplemental opposition and reply papers shall be filed pursuant to code.

Counsel for the moving party shall give notice.

RE: JCCP4674- GROUP STATUS CONFERENCE FOR CASES HELD WITH THE LAW FIRM OF NAPOLI SHKOLNICK PLLC

As to Item No. 1 above, the group status conference is held and continued to April 26, 2018 at 1:45 p.m. in Department 324.

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			DEPT. 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674 Coordination Proceeding Special Title Rule (3.550) LAOSD ASBESTOS CASES	Plaintiff Counsel	JENNIFER ALESIO BENNO ASHRAFI MARK BRATT
		Defendant Counsel	ALEX P. CATALONA IRA GOLDBERG NICHOLAS R. LANE REYNOLD MARTINEZ **ADDITIONAL BELOW**

NATURE OF PROCEEDINGS:

Counsel for the plaintiff shall give notice.

RE: BC656196-BIANES

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore, Aurora Bowser, CSR No. 12801, has been previously signed and is on file.

As to Item No. 3 above, the motion for summary judgment is argued and taken under submission this date.

Notice is deemed waived.

RE: BC679466-JOHNSON

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore, Aurora Bowser, CSR No. 12801, has been previously signed and is on file.

As to Item No. 5 above, the motion for trial setting preference is granted. The trial setting order is signed and filed this date.

The trial and final status conference are set for April 9, 2018 at 9:00 a.m. in Department 324.

The further status conference is set for February 9, 2018 at 9:00 a.m. in Department 324.

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			DEPT. 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674	Plaintiff	JENNIFER ALESIO
		Counsel	BENNO ASHRAFI
	Coordination Proceeding Special Title Rule (3.550)		MARK BRATT
		Defendant	ALEX P. CATALONA
	LAOSD ASBESTOS CASES	Counsel	IRA GOLDBERG
			NICHOLAS R. LANE
			REYNOLD MARTINEZ
			ADDITIONAL BELOW

NATURE OF PROCEEDINGS:

Counsel for the plaintiff shall give notice.

As to Item No. 6 above, the motion to consolidate cases is argued and denied without prejudice.

Notice is deemed waived.

RE: BC677764-BLINKINSOP

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore, Aurora Bowser, CSR No. 12801, has been previously signed and is on file.

As to Item No. 7 above, the motion for trial setting preference is held and continued to January 4, 2018 at 9:00 a.m. in Department 324.

Plaintiff's supplemental papers shall be filed by December 22, 2017 and defendants' replies shall be filed by December 29, 2017.

As to Item No. 8 above, the motion to consolidate cases is argued and denied without prejudice.

Notice is deemed waived.

RE: BC654313-ANGLE

As to Item No. 9 above, the parties inform the Court that they have agreed to take plaintiff's deposition

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			DEPT. 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674	Plaintiff	JENNIFER ALESIO
		Counsel	BENNO ASHRAFI
	Coordination Proceeding Special Title Rule (3.550)		MARK BRATT
		Defendant	ALEX P. CATALONA
	LAOSD ASBESTOS CASES	Counsel	IRA GOLDBERG
			NICHOLAS R. LANE
			REYNOLD MARTINEZ
			ADDITIONAL BELOW

NATURE OF PROCEEDINGS:

on December 21, 2017.

In light of the above, the hearing to schedule plaintiff's deposition is taken off calendar.

Notice is deemed waived.

As to Item No. 10 above, the ex parte application to advance the hearing on plaintiff's motion to compel is granted.

The motion to compel against defendant Grundfos CBS, Inc., set for January 10, 2018, is advanced to this date and continued to January 3, 2018 at 9:00 a.m. in Department 324.

The opposition shall be filed by December 21, 2017 and the reply shall be filed by December 26, 2017.

Counsel for the plaintiff shall give notice.

RE: BC639512-O'DAY

As to Item No. 11 above, the ex parte application for leave to file third amended complaint is granted. The order is signed and filed this date.

Counsel for the plaintiff shall give notice.

RE: BC668443-KEOWN

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			DEPT. 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674	Plaintiff	JENNIFER ALESIO
		Counsel	BENNO ASHRAFI
	Coordination Proceeding Special Title Rule (3.550)		MARK BRATT
		Defendant	ALEX P. CATALONA
	LAOSD ASBESTOS CASES	Counsel	IRA GOLDBERG
			NICHOLAS R. LANE
			REYNOLD MARTINEZ
			ADDITIONAL BELOW

NATURE OF PROCEEDINGS:

As to Item No. 12 above, the ex parte application is argued and granted as indicated in open court.

Defendant shall prepare a proposed order using exhibit B, attached to the opposition filed to this ex parte on December 13, 2017, and modify the order as follows:

1) Paragraph 2 of the proposed order shall read: "Honeywell shall be allowed to cross-examine Plaintiff George Keown at the aforesaid deposition for a period of not more than three(3) hours."

2) Paragraph 3 of the proposed order shall read: "The deposition shall take place on December 15, 2017 at 11:00 a.m."

3) Paragraph 4 of the proposed order shall read: "The scope of the aforesaid deposition shall be limited to:" and shall include subparts a) and b).

4) The Judge's name shall be spelled correctly to read: "Steven J. Kleifield."

Notice is deemed waived.

RE: BC535695-TINOCO

The Order Appointing Court Approved Reporter as

MINUTES ENTERED
12/14/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/14/17			**DEPT.** 324
HONORABLE STEVEN J. KLEIFIELD	JUDGE	A. MORALES	DEPUTY CLERK
HONORABLE 1	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. TORRES, C.A.	Deputy Sheriff	LISTED BELOW	Reporter

9:00 am	JCCP4674	Plaintiff	JENNIFER ALESIO
		Counsel	BENNO ASHRAFI
	Coordination Proceeding Special		MARK BRATT
	Title Rule (3.550)	Defendant	ALEX P. CATALONA
	LAOSD ASBESTOS CASES	Counsel	IRA GOLDBERG
			NICHOLAS R. LANE
			REYNOLD MARTINEZ
			ADDITIONAL BELOW

NATURE OF PROCEEDINGS:

Official Reporter Pro Tempore, Aurora Bowser, CSR No. 12801, has been previously signed and is on file.

As to Item No. 2 above, plaintiffs Mary Lou Tinoco and Jeanette M. Regalado are sworn and provide testimony this date.

The motion to apportion and distribute funds is granted. The order is signed and filed this date.

Counsel for the plaintiff shall give notice.

ADDITIONAL APPEARANCES:

REBECCA CUCU	MICHAEL EYERLY
SHAWNA FORBES-KING	JUSTIN R. HEIM
EDWARD MARTINOVICH	MARY MCKELVEY
JEREMY MILBRODT	FREDERIC NORRIS
GLEN R. POWELL	JENNIFER PRIETO
JULIA ROMANO	JOSH S. SULLIVAN

COURTCALL APPEARANCES:

KIMBERLY QUON	JESSICA J. THOMAS
ROGER E. GOLD	WILLIAM M. HAKE
HOMAIRA HOSSEINI	YAKOV P. WIEGMANN
PAUL S. LECKY	SAMANTHA JACKSON

MINUTES ENTERED
12/14/17
COUNTY CLERK

WEITZ & LUXENBERG P.C.
A PROFESSIONAL CORPORATION
LAW OFFICES
1880 CENTURY PARKE EAST, SUITE 700
LOS ANGELES, CALIFORNIA 90067

PROOF OF SERVICE

Blinkinsop, et al. v. Albertsons Companies Inc., et al.
LASC Case No. BC677764

I, Alexa K. Winter, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 1880 Century Park East, Suite 700, Los Angeles, California 90067.

On the date executed below, I served the foregoing document(s):

NOTICE OF RULING

☒**FILE & SERVE XPRESS**: I caused the above-referenced document to be electronically served on recipients designated on the Transaction Receipt located on the File & Serve*Xpress* (formerly known as LexisNexis File & Serve) website.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 15, 2017, in Los Angeles, California.

Alexa K. Winter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

RECEIVED
Jun 15 2020
SC Court of Appeals

Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899

Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey,..... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ..... Appellants.

and

Terran Dupree,..... Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; Imerys Talc America, Inc. f/k/a Luzenac America, Inc.; Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy, Inc.; Rite Aid of South Carolina, Inc.,..... Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Johnson & Johnson and Johnson & Johnson Consumer, Inc., do

hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleading(s): **Memorandum In Support of Immediate Appealability**

Served:

MOTLEY RICE LLC
W. Christopher Swett
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

Attorney for Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey and
Attorney for Terran Dupree

NEXSEN PRUET LLC
Amy Harmon Geddes
1230 Main Street, Suite 700
Columbia, SC 29201

Attorney for CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; and Rite Aid of South Carolina, Inc.

WALL TEMPLETON & HALDRUP, P.A.
Mark H. Wall
145 King Street, Suite 300
Charleston, SC 29401

Attorney for Metropolitan Life Insurance Company

HAYNSWORTH SINKLER BOYD
Moffatt G. McDonald
W. David Conner
Scott E. Frick
1 North Main Street, 2nd Floor
Greenville, SC 29601

Attorneys for Defendant Imerys Talc America, Inc. f/k/a Luzenac America, Inc.

Jessica Trautman
Administrative Assistant

June 15, 2020

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

Nicholas A. Charles
T 803.255.9663
nick.charles@nelsonmullins.com

1320 Main Street | 17th Floor
Columbia, SC 29201
T 803.799.2000 F 803.256.7500
nelsonmullins.com

June 15, 2020

RECEIVED
Jun 15 2020
SC Court of Appeals

Via E-Filing

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Mary Margaret Devey v. Johnson & Johnson et al. *and* Terran Dupree v. Johnson & Johnson et al.
Appellate Case No. 2020-000662
Our File Nos. 003501.01848 & 003501.01849

Dear Ms. Kitchings:

Enclosed please find a copy of Appellant's memorandum addressing appealability, as requested by the Court in its May 14, 2020 letter. We are submitting the filing via the court's e-filing system.

By copy of this letter, we are serving all counsel of a record with a copy of this filing

Respectfully,

s/ Nicholas A. Charles

Nicholas A. Charles

Enclosure
cc: W. Christopher Swett, Esquire
Amy Harmon Geddes, Esquire
Mark H. Wall, Esquire
Moffatt G. McDonald, Esquire
W. David Conner, Esquire
Scott E. Frick, Esquire

Louis P. Herns, Esquire
C. Mitchell Brown, Esquire