

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

RECEIVED
JUN 10 2019
SC Court of Appeals

Appellate Case No. 2018-001965

Jerry Howard Crawford, individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent,

v.

Celanese Corporation; Aurora Pump Company; Carrier Corporation; CNA Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation; Covil Corporation; Crane Co.; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Flowserve Corporation, individually and as successor-in-interest to Anchor/Darling Valve Company and individually as successor-in-interest to Durco Pumps; Flowserve US Inc.; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Ford Motor Company; Genuine Parts Company, d/b/a Rayloc (a/k/a NAPA); The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Grinnell, LLC f/k/a Grinnell Corp., f/k/a ITT Grinnell Corp.; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Ingersoll-Rand Company; John Crane, Inc.; Metropolitan Life Insurance Company, a wholly owned subsidiary of Metlife Inc.; National Automotive Parts Association (NAPA); Parker-Hannifin Corporation; Pneumo Abex, LLC, successor-in-interest to Abex Corporation; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and as successor-in-interest to Marley Cooling Towers Co.; Standard Motor Products, Inc., sued as successor-in-interest to EIS Automotive; United States Fidelity & Guaranty Company; The William Powell Company, Defendants,

Of Which Covil Corporation is the Appellant.

RECORD ON APPEAL - VOLUME 2 OF 8

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8 VIDEOGRAPHER: Mic, please.

9 THE WITNESS: There's one in front.

10 BY MR. WALL:

11 Q. Mr. Glenn, you were asked I about some
12 of the things reviewed. Did you review the
13 deposition of Mr. Russell Johnson?

14 A. I have that I have that deposition.

15 Q. Okay all right did you review the and
16 I'm not saying you read every word of it did you
17 review the deposition of Don buck from Daniel
18 construction?

19 A. I did. I did look over that
20 deposition, yes.

21 Q. Okay and did you attempt to get in
22 touch with Mr. Charles Mac?

23 A. Yes atelephoned to call him and left a
24 message.

25 Q. Did you review any newspaper articles

ROUGH DRAFT

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1 about the fire at Covil?

2 A. I don't raise seeing.

3 Q. He me ask you if you went into the
4 database and looked at information in the Covil
5 data base dealing with Celeanese, correct?

6 A. Correct.

7 Q. And you looked at those?

8 A. Yes these are the documents that came
9 from the word search.

10 Q. Did you also do the same thing with
11 Daniel?

12 A. Yes, I did and these are the Daniel.

13 Q. Are there any sales records in any of
14 those documents?

15 A. I have not WLAKed through these in
16 detail yet. It's just voluminous but I don't know
17 that Mr. Wall.

18 Q. All right but these are the only
19 documents that you're aware of is that right?

20 A. That, yes.

21 Q. And you are aware that's the total
22 limit of documents that Covil has dealing with its
23 facilities and its sales is 25,000; is that
24 correct?

25 A. Yes that's what I've been -- yes.

ROUGH DRAFT

1 Q. And you have possession of those?

2 A. They're electronic files yes.

3 Q. Right and you have the ability to go
4 in and put in name and see what they have?

5 A. I do.

6 Q. Did you.

7 MR. WALL: Strike that that's all I
8 have that's all I have?

9 MR. CHAPMAN: Okay I'd like to mark
10 those if we could.

11 MR. RAINSFORD: Yeah.

12 THE WITNESS: That's DANSZ and this is
13 Ceeleanese.

14 MR. CHAPMAN: So Exhibit 14 will be the
15 Ceeleanese documents and Exhibit 15 will be the
16 dance documents.

17 (Plaintiff EXH. #, DESCRIPTION, marked
18 for identification.).

19 (Plaintiff EXH. #, DESCRIPTION, marked
20 for identification.)

21 MR. WALL: Let me go I want to go back
22 and ask another question I forgot.

23 MR. CHAPMAN: Okay.

24 BY MR. WALL:

25 Q. In reviewing the deposition of Mr.

ROUGH DRAFT

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1 Buck did you see where he testified that the only
2 thing in the whole Daniel work file is only one
3 reference to Covil and that was three workers that
4 were putting on the fireproofing?

5 A. THOOTS correct.

6 MR. WALL: Thank you that's all I have.

7 EXAMINATION

8 BY MR. CHAPMAN:

9 Q. Sir, what we just marked as exhibits
10 14 and 15 are these all documents that you told me
11 earlier you found pursuant to where word search?

12 A. Yes.

13 BY MR. CHAPMAN:

14 Q. Have you reviewed all of these
15 documents?

16 A. Not all of them.

17 Q. Okay do us know if these are in any
18 kind of order?

19 A. They don't appear to be.

20 Q. Say that the Celeanese documents is
21 half all centimeter thick?

22 A. Yes.

23 Q. And the DONSZ document is maybe an
24 inch thick?

25 A. Yes.

ROUGH DRAFT

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1 Q. And you have not reviewed all of
2 these?

3 A. No.

4 Q. Do you know what they say?

5 A. GREN they're not in order so it's a
6 difficult proposition to get through them.

7 Q. So you did look at RUS RUS and John
8 Kellum's testimony?

9 A. Yes I did.

10 Q. From what case was Mr. John's
11 testimony?

12 A. That might have been the COMBUGS
13 engineering is a.

14 Q. Okay and what were you able to LRN

15 troll that transcript, nor I didn't spent a lot of
16 some time with it but more just what he did what
17 his recollectionings were about KOEFRM and his
18 work at Covil?

19 Q. Okay so did you just TLIP through it
20 or did you read it?

21 A. I just pretty much MRIPed ly that
22 yeah.

23 Q. Okay how long of a deposition was it?

24 A. I was probably 100 maybe 170 pages I'm
25 not sure.

ROUGH DRAFT

204

1 Q. There bucks deposition was that a
2 deposition you grave in this case?

3 A. Yes.

4 Q. And did you lip through THOOT or did
5 you read that?

6 A. I read that more KWLOESly.

7 Q. Okay went you say you red it more
8 CLOEGSly did you read ever page of it?

9 A. I probably read ever page of buck.

10 Q. That's my handiwork I'll apologize for
11 that SCOMBL what were you able to learn from Mr.
12 BRUK's deposition?

13 A. Well I read that I spent time with
14 that because it was specific to Ceeanese
15 Spartanburg plant and I learned that he he
16 encountered some things of Mr. Crawford's
17 deposition he feels that Dan would not have done
18 that job would a physical barrier between the two
19 space INTLS and does Covil sitting here today have
20 any information about that one way or the other.

21 A. I haven't seen anything. As I said
22 Covil only had three employees in there and they
23 weren't putting on insulation on a Poly line.

24 Q. And aside from he relying on what Mr.
25 Buck said in his deposition in this case has Covil

ROUGH DRAFT

205

1 sought those documents from Daniel?

2 A. I don't know that they have.

3 Q. Counsel for Ceeanese asked you a
4 question about Mr. Waters Dwayne waters?

5 A. Yes.

6 Q. And he asked you if you looked into
7 that EFTH of whether that happen at Spartanburg?

8 A. I'm not I can't recall waters yet I've
9 heard the name but I haven't seen any document
10 from him.

11 Q. All right so let me just clear it up?

12 A. All right.

13 Q. Have you done any work, sir, to try to
14 figure out one, what Mr. Waters said was true or
15 not true?

16 MR. WALL: Object to the form of the
17 question.

18 THE WITNESS: No.

19 BY MR. CHAPMAN:

20 Q. Have you done anything to try to
21 figure out if that affected the Ceeleanese
22 Spartanburg MRANL?

23 MR. WALL: Object to the form of the
24 question.

25 THE WITNESS: I so have not.

ROUGH DRAFT

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1 BY MR. CHAPMAN:

2 Q. Do you know if anybody at Covil has
3 done anything to try to answer those questions?

4 MR. WALL: Object to the form of the
5 question there is no one at Covil.

6 THE WITNESS: Yeah I don't know.

7 BY MR. CHAPMAN:

8 Q. And what I mean bring anyone at Covil,
9 any counsel anybody who works for Covil anything?

10 MR. WALL: Objection.

11 THE WITNESS: I don't know.

12 MR. WALL: That calls for
13 attorney-client privilege. One thing else on the.

14 MR. WALL: Go ahead.

15 THE WITNESS: On the Celeanese MRANL is
16 that Mr. Buck said that Mr. Crawford was wrong in
17 saying he swept up dust and asbestos. I'm not
18 sure SKRAUF said that but he was very specific
19 that Daniel would have been PONS B for cleaning up
20 all of that work and disposing of it in all proper
21 way.

22 BY MR. CHAPMAN:

23 Q. Does Covil have any information that
24 what Mr. Crawford said about that is true or
25 untrue?

ROUGH DRAFT

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1 MR. WALL: Object to the form of the
2 question.

3 THE WITNESS: Mr. Crawford, no.

4 MR. CHAPMAN: All right that's all I've
5 got anybody else anybody on the phone.

6 MR. WALL: Anybody still on the phone.

7 VIDEOGRAPHER: This concludes the video
8 deposition today the time on the video monitor is
9 252 p.m. we're now off the record.

10 MR. RAINSFORD: E TRAN with exhibits.

11 MR. CONNER: We TRAN.

12 MR. WALL: E TRAN with Exhibits
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14
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25

ROUGH DRAFT

EXHIBIT 11

2012 WL 6044778

Only the Westlaw citation is currently available.

United States District Court, D.
South Carolina, Charleston Division.

CYTEC CARBON FIBERS LLC; Cytec,
Engineered Materials Inc., Plaintiffs,

v.

Jonathan HOPKINS; R & H Investments,
LLC; H & H Construction & Development,
Inc.; Scott McAllister; Helm Builders, LLC;
Sewell W. Crisman, IV; Carolina Consulting
Engineers, Inc.; and Carolina Construction
Management Consultant, Defendants.

Civil Action No. 2:11-0217-RMG-BM.

|
Oct. 22, 2012.

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REPORT AND RECOMMENDATION

BRISTOW MARCHANT, United States Magistrate
Judge.

*1 This action has been filed by the Plaintiffs against numerous Defendants alleging fraud, RICO, unfair trade practices, and other claims arising out of various construction projects. Plaintiffs have filed a motion to strike pleadings and for a default judgment against the remaining Defendants¹ (herein referred to as “the Defendants”).² Plaintiffs assert in their motion that these Defendants have “consistently failed to provide documents they have admitted remain in their possession, have refused to provide any formal responses to discovery, have deleted important text messages directly related to

this case, and have generally stonewalled discovery” See Plaintiff’s Motion to Strike Pleadings and For Default Judgment, p. 3.

1 Four Defendants—Jonathan Hopkins, H & H Construction and Development Inc., Helm Builders, LLC, and R & H Investments, LLC, are already in default. See Court Docket Nos. 84, 85.

2 Since Plaintiffs are, in part, seeking a default against some of the named Defendants, which is dispositive, a Report and Recommendation is being entered for review by the Court, rather than an order. 28 U.S.C. § 636(b)(1)(A).

On September 24, 2012, Defendants Crisman, Carolina Construction Engineers, Inc., and Carolina Constructions Management Consultants filed a response to the motion, detailing certain actions they have taken to participate in discovery in this case and to distinguish their conduct in pretrial discovery from the Defendants McAllister and Helm Builders, LLC. On September 27, 2012, Defendants Scott McAllister and Helm Builders, LLC filed a response to the motion. Plaintiffs filed a reply to both responses on October 1, 2012.

**(Defendants Crisman, Carolina
Construction Engineers, Inc., and Carolina
Construction Management Consultants)**

With regard to Defendant Crisman, Plaintiffs assert that “[t]he primary act justifying the relief requested is the deletion of ... requested text messages between Defendant Crisman and pro se Defendant Jonathan Hopkins-co-conspirators in the alleged fraud.” See Plaintiffs’ Reply Memorandum [Court Docket No. 153], p. 2.³ Federal District Courts are vested with a wide range of inherent powers that allow them to govern their courtrooms and all litigation processes before them. *Chambers v. Nasco*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). An example of these inherent powers is the discretionary power of a Federal District Court to levy appropriate sanctions against a party who prejudices its opponent through the spoliation of evidence that the spoliating party had reason to know was relevant to litigation. *Glover v. BIC Corporation*, 6 F.3d 1318 (9th Cir.1993).⁴ Spoliation is a form of destruction; if evidence is intact, it has not been spoliated. *Nucor Corp. v. Bell*, 251 F.R.D. 191, 203–204 (D.S.C.2008). In order to sanction a party

to litigation for spoliation of evidence, the Court must determine first whether or not there was a duty to preserve the evidence at issue. *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y.1991). If a duty existed, the Court must also consider the prejudice suffered by the non-spoliating party and the level of culpability of the spoliator.

3 Plaintiffs also seek information requesting clarification on the organization of the documents previously supplied, which was apparently ordered by Judge Gergel on August 27, 2012. See Plaintiffs' Reply, pp. 1-2. That issue is discussed separately. See discussion, *infra*.

4 In their briefs, the parties address this motion under the Fourth Circuit's four-part test from *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503-505 (4th Cir.1977). However, since this motion involves an allegation of spoliation of evidence, it is necessary to address that issue first before discussing the *Wilson* test. See discussion, *infra*.

A party bringing a motion for sanction based on spoliation of evidence bears the burden of establishing three independent elements before the Court may determine which sanction, if any, is appropriate. These three elements are as follows:

*2 (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind'; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107-08 (2d Cir.2002).

Element One: A party has a duty to preserve evidence during litigation and at any time "before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998)). Plaintiffs have the burden of establishing that at the time the text messages at issue were deleted, that Crisman had control of the telephone and was under an obligation to preserve all the text messages. Here, it is not contested that Crisman knew or should have

known that he had a duty to preserve all text messages relevant to this lawsuit. Indeed, Crisman contends that he was trying to download the messages from his phone to his computer for production to the Plaintiffs when they were inadvertently deleted. See Crisman Affidavit, ¶¶ 2-6. Therefore, the first element of spoliation has been satisfied.

Element Two: Plaintiffs also have the burden of establishing that the destruction of the evidence at issue was accompanied by Crisman having a culpable state of mind. In other words, the spoliating party must have acted with the requisite level of intent, the extent of which will affect the nature of any sanction imposed.

Willful spoliation occurs when a party has clear notice of an obligation to preserve evidence and proceeds to intentionally destroy evidence in spite of its obligation not to. *Computer Associates Int'l. v. American Fundware, Inc.*, 133 F.R.D. 166, 170 (D.Colo., 1990). However, "willfulness" is not required in order to satisfy the "culpable state of mind" factor. The moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach a duty to preserve it], or negligently." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-112 (2d Cir.2001). Further, while some courts require a showing of bad faith in order to impose sanctions, "the Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D.Md.2008) (citing *Silvestri*, 271 F.3d at 590.).

Here, Crisman argues that the deletion of the messages was accidental and that he not only contacted Apple and Verizon regarding the deleted messages, but that he also executed authorizations for Plaintiffs to directly contact Verizon to determine if the messages could be retrieved (which it appears uncontested that they cannot be). Hence, the text messages were deleted, at a minimum, due to Plaintiff's apparent negligence. See Crisman Affidavit, ¶¶ 2-6. Therefore, the evidence before the Court shows that Plaintiff's conduct satisfies at least the required minimum level of culpability needed for spoliation sanctions to be imposed. *Byrnie*, 243 F.3d at 107-112 [Negligence enough]; *Sampson*, 251 F.R.D. at 179 [Only a showing of fault is required].

*3 **Element Three:** Plaintiffs also have the burden of establishing that the messages on the phone were relevant

to their claims, to the extent that a reasonable factfinder could conclude that the deleted text messages would have supported Plaintiffs' claims. For purposes of a spoliation analysis, the proper standard for " 'relevant' means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Ordinarily, "the party seeking an adverse inference sanction must adduce sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.' " *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir.1998)); *Brynie*, 243 F.3d at 110.

"A failure to preserve documents in bad faith, such as intentional or willful conduct, alone establishes that the destroyed documents were relevant." *Sampson*, 251 F.R.D. at 179. "The reason relevance is presumed following a showing of intentional or willful conduct is because of the logical inference that, when a party acts in bad faith, he demonstrates fear that the evidence will expose relevant, unfavorable facts." *Sampson*, 251 F.R.D. at 179 (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995); see also *Residual Funding*, 306 F.2d at 109. Here, however, there is no evidence of willful or intentional conduct. Rather, the deletion of the evidence at issue was apparently through inadvertence or negligence. *Crisman Affidavit*, ¶¶ 2–6. As for relevance, Crisman attests that in his deposition when he was asked if he had any communications with the Defendant Hopkins, he told Plaintiffs' counsel that he had received a few text messages from Hopkins and agreed to make them available to Plaintiffs' counsel. See *Crisman Affidavit*, ¶ 2. Crisman then attests that "[t]hose text messages were only messages received after this litigation started, and after the Plaintiffs had performed their forensic analysis. I informed Mr. Hopkins that I did not want to have any communications with him as a result of his actions that entangled me in this lawsuit." See *Crisman Affidavit*, ¶ 6. Crisman further argues in his brief that even "[a]ssuming that the text messages contained any evidence at all, that evidence would be merely cumulative and in no way would change the ultimate conclusion of the expert report, forensic investigation, or the Plaintiffs' allegations." See Response Memorandum, p. 4.

However, this conclusory assertion by Crisman is not sufficient to show that this evidence was not relevant and could not have benefitted the Plaintiffs.

Cf. Leon v. IDX Systems Corp., 464 F.3d 951, 959 (9th Cir.2006)["[B]ecause 'the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist,' a party 'can hardly assert any presumption of irrelevance as to the destroyed documents,' "] (quoting *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1206 (8th Cir.1982)). If fact, Crisman does not even assert that the messages were not relevant. Rather, he simply argues that since they were cumulative, the deletion of them would not have prejudiced the Plaintiffs. Therefore, the undersigned finds that a reasonable factfinder could conclude that the lost text messages would have supported Plaintiffs' claims. *Kronisch*, 150 F.3d at 127.

*4 Sanctions to be Imposed as a Result of Spoliation.

Having concluded that the Plaintiffs have properly established the required elements of spoliation, the next step is to determine the appropriate sanction to be imposed. *Sampson*, 251 F.R.D. at 180 [Where "the [spoliation elements] are met, then any sanctions imposed must suit 'the purpose of leveling the evidentiary playing field and ... the purpose of sanctioning the improper conduct.' "] (quoting *Vodusek*, 71 F.3d at 156). Plaintiffs seek entry of a default judgment as the appropriate sanction for spoliation; however, "[d]efault judgment is a harsh sanction and district courts should be reluctant to impose that penalty." *Nucor*, 251 F.R.D. at 201. See also *Loveless v. John's Ford, Inc.*, 232 Fed. Appx. 229, 236 (4th Cir.2007) (stating a severe sanction such as dismissal "should only be imposed when a lesser sanction will fail to serve the foregoing purposes "[l]eveling the evidentiary playing field"). Default, like a dismissal, is a severe sanction and "should be avoided if a lesser sanction will perform the necessary function." *Silvestri*, 271 F.3d at 591.

In determining which sanction is appropriate, "there is no single test or set of considerations that has been developed to apply to circumstances of spoliation.... 'Determination of the correct sanction for a discovery violation is a fact-specific inquiry,' [*Ehrenhaus v. Reynolds*, 965 F.2d 916, 919 (10th Cir.1992)], and in making such a determination trial courts are accorded broad discretion." *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 287–88 (E.D.Va.2001) (quoting *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 102 (D.Colo.1996)). A key factor courts consider in determining which, if any, spoliation sanction is appropriate is the "degree of prejudice suffered by the opposing party;" *Schmid v. Milwaukee Elec.*

Tool Corp., 13 F.3d 76, 79 (3d Cir.1994); see also *Almarri v. Gates*, No. 2:05-2259, 2008 WL 4449858 at —2-3 (D.S.C. Oct.2, 2008); and in order to evaluate the extent of prejudice caused to a moving party, courts consider the amount and nature of the additional available evidence. See, e.g., *Nucor*, 251 F.R.D. at 202; *Powell v. Town of Sharpsburg*, 591 F.Supp.2d 814, 821(E.D.N.C.2008) [giving an adverse inference instruction when spoliated documents constituted only a part of “a collection of evidence” the jury would consider].

Based on the fact that the Plaintiffs have access to other evidence which will likely support their claims,⁵ the undersigned concludes that if a sanction is to be imposed due to the deletion of these text messages, an adverse inference jury instruction is the more appropriate sanction to be imposed, rather than a default judgment, and recommends that the trial judge consider an adverse jury instruction in this case if a sanction is deemed necessary. Cf. *Nucor*, 251 F.R.D. at 194 [A lessor sanction of an adverse inference jury instruction does not require a showing of bad faith, and is appropriate if the spoliator's “willful conduct resulted in [the evidence's] loss or destruction.”], (quoting *Vodusek*, 71 F.3d at 156) (citing *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 217-18 (1st Cir.1982)); see also *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir.2004) [adverse inference instruction may be imposed in absence of bad faith]; *Sharpsburg*, 591 F.Supp.2d at 821.

⁵ It is noted that Plaintiffs state in their reply brief that “Plaintiffs’ forensic accounting report from Ernst & Young does provide significant accounting support for Plaintiffs’ allegations.” *Plaintiffs’ Reply Brief*, p. 3.

*5 Finally, Plaintiffs also seek information from Crisman requesting clarification on the organization of the documents previously supplied, which was apparently ordered by Judge Gergel on August 27, 2012. See Plaintiffs’ Reply, pp. 1-2. If he has not already done so, Crisman should comply with Judge Gergel’s August 27, 2012 order within seven (7) days of the date of any order adopting this Report and Recommendation, unless contrary instructions are otherwise set forth in that order. Further, as Crisman failed to comply with the Court’s previous order, an assessment of fees and costs should be considered as a sanction for Plaintiffs’ having had to file this second motion.⁶ Crisman is also specifically warned that failure to comply with any new

instructions may result in the imposition of additional sanctions, including monetary sanctions and/or the entry of a default judgment as to him. See discussion, *infra* [outlining appropriate sanctions for failure to comply with Court’s orders regarding discovery].⁷

⁶ Plaintiffs should file an affidavit of fees and costs addressing this issue for the Court’s consideration in the event the Court determines imposition of such a sanction is warranted.

⁷ It is not clear whether Plaintiffs’ discovery requests to Carolina Construction Engineers are still outstanding, as there is no pending motion to compel, and the Defendants Carolina Construction Engineers, Inc. and Carolina Construction Management Consultants were not referenced in Judge Gergel’s August 27, 2012 order. If, however, Carolina Construction Engineers still has outstanding discovery to which it has not responded, discovery responses should be provided by this Defendant to the Plaintiffs within ten (10) days of the date of this Report and Recommendation. In light of the file history, a failure to do so will be considered a sanctionable event. No further action is necessary as to these Defendants at this time.

(Defendant McAllister)

Although Defendants McAllister and Helm Builders, LLC, discuss an alleged conflict of interest as way of background information in their memorandum, this issue is not presently before the Court and, therefore, is not being addressed herein. With regard to the discovery issues, these Defendants point out that certain individuals have been deposed, and concerning the written discovery, they represent,

[v]irtually all of the documents requested by the Plaintiffs in discovery is already in the possession of the Plaintiffs, with the exception of some documentation regarding the financial condition of Helm Builders, which the Plaintiffs are well aware of as well. In addition Helm Builders voluntarily agreed that should any additional documentation be found responsive to the Plaintiffs discovery

requests that Helm Builders would voluntarily submit to additional depositions on these issues.

Helm Builders also contends that the conflict of interest issue created an objection to certain discovery materials and that they have not abused the discovery process. However, when Plaintiffs' motion to compel as to these Defendants was filed on August 6, 2012, these Defendants did not respond, and on August 27, 2012, Judge Gergel ordered Defendants Crisman, Helm Builders, LLC, and McAllister to either respond to the discovery requests at issue in the relevant motions to compel or to submit privilege logs within seven (7) days of the date of his order. These Defendants apparently did not comply with Judge Gergel's order, nor did they timely file a motion to reconsider asserting any reasons for why they could not comply. The Plaintiffs then filed the current motion to strike pursuant to Rule 37(b), Fed. R.Civ.P., asserting therein that, notwithstanding the Court's Order of August 27, 2012, Defendants Helm Builders, LLC, and McAllister had failed to answer or respond to the Plaintiffs' discovery requests. In addition to seeking to strike these Defendants' pleadings and have them held in default,⁸ Plaintiffs request fees and costs incurred as a result of having to file this motion.

⁸ Although Plaintiffs reference Helm Builders, LLC in their motion, this Defendant is already in default. See footnote 1, *supra*.

*6 Rule 37(b) (2), Fed.R.Civ.P., provides that if a party fails to obey an order to provide or permit discovery, the Court in which the action is pending may make such orders in regard to such failure as are just, including entering a default judgment. The Court of Appeals for the Fourth Circuit has developed a four-prong test to determine when and what sanctions are appropriate under Rule 37, Fed.R.Civ.P. *Wilson*, 561 F.3d at 503–505. The Court must consider (1) whether the non-complying party acted in bad faith; (2) the amount of prejudice the non-compliance caused the adversary; (3) the need for deterrence of the particular sort of non-compliance; and (4) whether less drastic sanctions would have been effective. *Id.*

The record in this case shows that these Defendants have failed to respond to the Plaintiffs' discovery requests, have failed to file responses to motions of the Plaintiffs,

and have failed to comply with the Court's order concerning discovery. In their reply, Plaintiffs also state that Defendant McAllister has failed to comply with the Court's order to reimburse Plaintiffs for stalled depositions. See Reply Memorandum, p. 7; see also Court's order dated September 19, 2012. Although these Defendants now attempt to argue that a conflict of interest justified their not complying with certain discovery requests, they did not raise this issue in a response in opposition to Plaintiffs' motion to compel or in a response in opposition to Plaintiffs' motion for costs against Defendant McAllister. They have also failed to timely move for the Court to reconsider either of its orders on this basis. Hence, the undersigned finds that these Defendants have acted in bad faith in not responding to discovery requests and motions, and in failing to comply with this Court's orders. Therefore, Plaintiffs meet the first and third prongs of the Fourth Circuit's four prong test.

While these Defendants have engaged in the conduct described herein, the continuation of this action in this manner has caused the Plaintiffs to incur continuing costs and expenses associated with filing its motions to compel, for costs, and to strike in this lawsuit. Further, these Defendants' failure to cooperate in discovery has prejudiced the Plaintiffs' ability to ascertain the facts and prepare its prosecution of its claims in this action. Therefore, the facts in this case clearly also satisfy the second prong of the Fourth Circuit's four prong test.

As for the fourth prong of the Fourth Circuit's four prong test, the record in this file shows that these Defendants failed to respond to notices and filings received from the Plaintiffs, have failed to provide responses to discovery requests, and have failed to comply with instructions from the Court. Defendant Helm Builders, LLC, is already in default; therefore, that is not an issue with respect to that Defendant. Defendant McAllister did respond to Plaintiffs' motion to strike and for default, and states that much of the discovery Plaintiffs seek is already in Plaintiffs' possession and that Defendants will also participate in further discovery if necessary. *Defendants' Response Brief*, p. 8. Therefore, with regard to Defendant McAllister, the Court finds that a less drastic remedy may be appropriate, with the sanction of default held in abeyance pending compliance by McAllister with a less drastic remedy.

*7 Specifically, McAllister should be required to 1) provide responses to all outstanding discovery requests within ten (10) days of the date of any order adopting this Report and Recommendation; 2) pay Plaintiffs' fees and costs incurred for having to file the current motion (note: only the amount of fees and costs chargeable to this Defendant), also within this ten (10) day period;⁹ and 3) pay the fees and costs set forth in the Court's order of September 19, 2012, again within this same ten (10) day period. If McAllister complies with these requirements, Plaintiffs' motion should otherwise be denied. However, if McAllister fails to do so, an order of default should be entered against this Defendant. *Cf. Ballard v. Carlson*, 882 F.2d 93, 95–96 [Magistrate judge's prior explicit warning that a recommendation of dismissal would result from Plaintiff failing to obey his order was proper grounds for the district court to dismiss suit when Plaintiff did not comply despite warning], *cert. denied sub nom.; Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954, n. 2 (4th Cir.1987) [noting that warning to parties was a “salient fact” that distinguished cases in which default judgment

was appropriate sanction for discovery abuse under Rule 37]; *see also Mutual Federal Savings and Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 92 (4th Cir.1989).

⁹ Plaintiffs' counsel should prepare and file an affidavit of fees and costs for consideration by the Court.

(Conclusion)

Based on the foregoing, Plaintiffs' motion to strike pleadings and for a default judgment should be **granted**, in part, and **denied**, in part, as set forth more fully hereinabove.

The parties are referred to the notice page attached hereto.

IT IS SO ORDERED.

All Citations

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	C.A. NO.: 2017-CP-42-04429
JERRY HOWARD CRAWFORD and	)	
EVELYN KAY CRAWFORD,	)	
	)	
Plaintiffs	)	REPLY TO PLAINTIFF'S MOTION FOR
	)	SANCTIONS AGAINST DEFENDANT
-versus-	)	COVIL CORPORATION
	)	
CELANESE CORPORATION, et al	)	
	)	
Defendants.	)	
	)	

The Defendant, Covil Corporation (hereinafter referred to as "Covil"), by and through its undersigned attorney, hereby responds to Plaintiff's Motion for Sanctions against Covil for spoliation of evidence and abuse of discovery process.

FACTUAL BACKGROUND

The undersigned attorney for Covil has been representing Covil for approximately thirty (30) days in this case. The prior 30(b)(6) witness produced by prior counsel was declared insufficient by this Court and the result thereof Covil's pleadings were struck in three cases, including *Howe v. Air & Liquid Systems Corporation, et al.*

Due to that situation, the undersigned attempted to find a person who will be able to give fact testimony as to the depositions and documents in control of Covil to be able to respond to all reasonable inquiries as to actions undertaken by Covil.

Covil Corporation ceased business in 1991. Its corporate charter was revoked in 1993. Covil has no current employees. The last 30(b)(6) representative(s) were Palmer Covil, himself, who is now deceased and James Covil who rarely worked on the insulation side of the business.

One of the claims by Plaintiff is that Covil's documents were not destroyed in the 1973 fire.

A review of all the depositions of Covil employees will establish that a fire occurred in 1973. The fire is also confirmed by a Greenville Newspaper of the time. Messrs. Covil all contend that all or substantially all the documents prior to 1973 were destroyed. Covil became involved in this litigation in approximately 1978. At that time, and over a period of time, Covil Corporation delivered all of what it claimed were all of its records still in existence to its then counsel.

The undersigned is informed that those documents consisted of some employment records and approximately 25,000 records database. The database has been produced to Plaintiff's counsel in this case and used by them. In fact, that Exhibit #2 and Exhibit #3 to Plaintiff's motion, contain documents which contain the bates number of the Covil record of factual background.

The new 30(b)(6) witness, Robert Glenn, testified that he had only been involved in being a 30(b)(6) witness for Covil for approximately two weeks. In that period of time, he has not been able to review all of the records that are in possession of Covil but testified that he reviewed the depositions of Mr. Covil, Jim Covil, Russell Johnson, the records in the data base that were covered under the word search "Celanese" and the documents in the data base covered by the word search "Daniel".

More importantly, the deposition notice to Covil define the premises as Celanese Plant in Spartanburg and no where else, and matters dealing with the Plaintiff Crawford. None of the issues addressed in Plaintiff's motion for sanctions deal with those issues. They deal with irrelevant and immaterial issues.

In addition, Plaintiff's motion was served upon defense counsel in the afternoon of July 10, 2018 with motions hearing scheduled for Columbia on July 11, 2018. That was insufficient time for counsel to provide a meaningful review of the records and preparation of a memo in opposition

to Plaintiff's motion. Defense counsel for Covil deserves the right to supplement this memorandum before commencement of trial.

Dated this 10th day of July, 2018.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.

s/Mark H. Wall

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ATTORNEYS FOR COVIL CORPORATION

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL CIRCUIT

JERRY HOWARD CRAWFORD,)
 Individually and as Personal) **C/A NO. 2017-CP-42-04429**
 Representative of the Estate of **EVELYN**)
KAY CRAWFORD)

) Plaintiff,
 v.) In re:
) Asbestos Personal Injury Litigation
) Coordinated Docket.

CELANESE CORPORATION,)
 et al.,)
)
) Defendants.

**PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING
 THE VERDICT AND FOR NEW TRIAL ABSOLUTE**

COMES NOW Jerry Crawford and the Estate of Evelyn Crawford, Plaintiffs in the above-styled case, by and through their attorneys of record, and file this Motion for New Trial Absolute and for Judgment Notwithstanding the Verdict. In support thereof, Plaintiffs would respectfully show the Court as follows:¹

INTRODUCTION AND BACKGROUND

This case was filed on December 4, 2017 in the Court of Common Pleas of Spartanburg, South Carolina. Plaintiffs are suing for the losses suffered as the result of Mr. Crawford's exposures to asbestos which occurred in South Carolina while Mr. Crawford worked at the Hoerchst-Celanese facility in Spartanburg. It was undisputed at trial that these exposures to Covil supplied insulation

¹ The trial transcript in this case was not complete in time to satisfy the deadline for filing a motion for new trial in this case. Consequently, all factual assertions contained herein are made to the best of counsels' recollection.

substantially contributed to cause Mr. Crawford's mesothelioma, a universally fatal asbestos related cancer. Plaintiffs called two expert witnesses and defendants called none. Both experts offered opinions that the exposures to Mr. Crawford from Covil's insulation was a substantial factor in Mr. Crawford's mesothelioma. Counsel for the defense declined to cross Dr. Brody and counsel's cross of Dr. Maddox did not deal with Mr. Crawford's exposures to Covil in any way.

The only evidence in the case was that Covil corporate supplied the asbestos insulation used by Daniel both for the construction of the Celanese facility in 1966 and during new construction between 1970 and 1974.

Moreover, there was no effort by Covil to controvert the damages suffered by Mr. Crawford.

Because the evidence at trial demonstrated that no other reasonable inference than that insulation supplied by Covil caused Jerry Crawford's mesothelioma and Plaintiff's damages, Plaintiffs respectfully request that this Court enter a judgment non obstante veredicto on the issues of liability and damages, as well as grant a new trial.

ARGUMENT AND AUTHORITIES

I. THE COURT SHOULD GRANT JNOV.

On a motion for a directed verdict or a JNOV, this Court should view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See, e.g., RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). The Court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *See Strange v. S. C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). However, "if no reasonable jury could have reached the challenged

verdict," the Court must grant a motion for JNOV. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). Moreover, if the undisputed evidence shows that Plaintiffs' claims are barred as a matter of law, JNOV should properly be granted. *See, e.g., Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 91, 588 S.E.2d 87, 90 n.3 (2003) ("As a practical matter South Carolina's Motion for JNOV and the federal Motion for Judgment as a Matter of Law are the same.").

Because the evidence affords only one reasonable inference in favor of the Plaintiffs, JNOV is properly granted by the Court in this matter.

II. THE COURT SHOULD GRANT A NEW TRIAL.

A. Legal Standard

Plaintiffs request, in addition and in the alternative, that this Court grant a new trial. This Court has authority under South Carolina Rule of Civil Procedure 59, either on motion of a party or on its own initiative, to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." S.C. R. CIV. P. 59.² "[T]he court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness." *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921 (S.C.App., 2008); *see Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994) (holding the court may order a new trial based upon the erroneous admission of testimony when the record shows error and prejudice). The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008). Granting a new trial is particularly appropriate in cases of cumulative errors, such as the present case.

² The Court likewise has the power to grant a new trial under South Carolina Rule of Civil Procedure 50.

See Wall v. Keels, 331 S.C. 310, 501 S.E.2d 754 (S.C.App.1998) (holding that erroneous limitation of voir dire, when combined with improper jury argument by counsel which appealed to economic interests of members on jury, after which jury awarded no damages to plaintiff, justified a new trial). The presence of multiple errors in this case, including charge error and improper jury argument, weighs heavily in favor of a new trial.

B. Covil's improper statements during closing argument warrant a new trial.

"The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial." *Scoggins v. McClellion*, 321 S.C. 264, 269, 468 S.E.2d 12 (S.C.App. 1996), citing *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). The South Carolina Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994), citing, *South Carolina Highway Dept. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1977). The South Carolina Supreme Court has also held that when a remedy is not adequately remedied at the trial level, that a new trial can be appropriate. *Scott v. International Agr. Corp.*, 180 S.C. 1, 184 S.E. 133 (S.C. 1936).

Covil made not one, but two, outrageous and prejudicial statements during closing argument. Despite being clearly instructed not to discuss the ability of Covil to pay any judgment against it, Covil's counsel violated this Court's order and again made statements designed to communicate to the jury that it could not pay any judgment against it. Plaintiffs objected to this argument at the time and reiterated the objection before the jury was charged. The Court declined to accept Plaintiffs offered instruction that the Court inform the jury that it could pay damages in this case. The failure

to so instruct the jury was error sufficient to grant a new trial.

Further, counsel for Covil told the jury that Dwaine Waters had a lawsuit pending and inferred that his testimony could not be trusted. These statements clearly violated the Court's motions in limine rulings regarding other litigation. Plaintiffs timely objected to the improper argument and requested an instruction to the jury that Mr. Waters did not have his own lawsuit. The Court declined to grant the instruction.

The flagrant and severely prejudicial nature of counsel's statements, clearly intended to prejudice the jury against Plaintiffs, justifies a new trial so that Plaintiffs may have the merits of their case determined by a jury untainted by the seriously improper conduct of opposing counsel. As a simple instruction to disregard is inadequate to address the damage resulting from the undeniably improper jury argument, a new trial is necessary.

C. A new trial should be granted under the "Thirteenth Juror" Doctrine.

South Carolina's thirteenth juror doctrine is a well-established standard for granting a new trial. See *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct.App.1996). "Under the 'thirteenth juror doctrine,' a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (S.C.App. 2000), *aff'd*, 353 S.C. 481, 506, 579 S.E.2d 293, 306 (S.C. 2003), quoting, *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (S.C. App. 1996). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715 (Ct.App.1996) ("Traditionally, in South Carolina, circuit court judges have the

authority to grant a new trial upon the judge's finding that justice has not prevailed.”). Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 S.E.2d 746 (S.C.App. 2003); *see also Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct.App.1994) (stating the trial court may take its own view of the evidence). Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

“South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (S.C.,2002), quoting, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). In fact, as the “thirteenth juror,” the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id.* As the South Carolina Supreme Court explained in *Folkens*:

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the ‘thirteenth juror’ vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id.

Here, the jury's verdict denying Plaintiffs any recovery whatsoever is clearly against the preponderance of the evidence. Plaintiffs presented more than sufficient evidence on every element of their causes of action. Defendants failed to present the necessary evidence to support any of their affirmative defenses. The result in this case is clearly the result errors in instructing the jury, errors

in the admission of evidence, and of prejudice cultivated by the Defendants. Upon weighing the evidence in this case, the Court, acting in its capacity as the thirteenth juror, should rule that the verdict is against the preponderance of the evidence and grant a new trial so that justice may prevail.

CONCLUSION

This motion will be supported by a memorandum of law and evidence to be filed after the trial transcript has been completed and made available to Plaintiffs. Plaintiffs will file their memorandum in support in 30 days following the receipt of the trial transcript and will inform all parties and the Court on the date of receipt of that transcript.

For the reasons set forth herein and to be supplemented in the memorandum of law, Plaintiffs have demonstrated that only one reasonable inference can be had from the record that Covil was and is liable to the Plaintiffs for the damages sought, that substantial prejudicial error in this case required a new trial, and that the clear preponderance of the evidence as found by the Court also warrants a new trial.

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request that this Court:

1. Grant Plaintiffs' JNOV motion and enter a finding of liability on all counts for the Plaintiffs and award compensatory damages and punitive damages;
2. Also grant Plaintiffs' Motion for New Trial Absolute in the event that the Court's decision on JNOV is vacated or reversed at any point in time;
3. And grant any and all such other relief to which Plaintiffs may be justly entitled.

[Signature appears on the following page.]

Respectfully submitted,

/s/ Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on counsel for all parties via US Mail Standard First Class, and/or electronic mail this 30th day of July 2018.

/s/Theile B. McVey

Theile B. McVey

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	C.A. NO.: 2017-CP-42-04429
JERRY HOWARD CRAWFORD and	)	
EVELYN KAY CRAWFORD,	)	
	)	
Plaintiffs	)	
	)	
-versus-	)	MEMORANDUM OPPOSING
	)	PLAINTIFF'S MOTION FOR JNOV
	)	
CELANESE CORPORATION, et al	)	
	)	
Defendants.	)	
	)	

Defendant, Covil Corporation ("Covil"), submits this memorandum opposing Plaintiff's request for a Judgment Notwithstanding the Verdict and new trial absolute ("JNOV") filed July 30, 2018 (hereinafter "the Motion"). In the Motion asks for relief in the form of a new trial due to alleged prejudicial statements made by counsel for Covil during closing arguments. Secondly, within the Motion is a renewed request for a directed verdict on liability pursuant to the "Thirteenth Juror" Doctrine. As will be set forth, Plaintiff's motion should be denied.

I. Standard & Introduction.

First, Plaintiff's memorandum suggests that a more thorough and complete motion will be filed upon receipt of the trial transcript. See, n. 1. To the extent that Plaintiffs intend to raise additional arguments, or otherwise recast their motion, the same is improper as the motion was required to be filed within ten days and cannot be extended. Boone v. Goodwin, 444 S.E.2d 524 (S.C. 1994); C&S National Bank v. Easton, 427 S.E.2d 640 (S.C. 1993).

Second, "only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. A motion for a JNOV is merely a renewal of the directed verdict motion." RFT

Management Co. LLC v. Tinsley & Adams LLP, 732 S.E.2d 166, 170-71 (S.C. 2012). “Moreover, “[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” Id. at 171. “In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.” Id.

Plaintiffs motion argues that Covil’s counsel made two allegedly inappropriate statements, to wit: 1) that counsel’s statement that Covil lost its charter was designed to cause the jury to believe it had no ability to pay a judgment in violation of the Court’s earlier rulings; and 2) that Dwaine Waters filed a lawsuit against Covil and, thus, his testimony was biased. Plaintiffs never moved for a mistrial. Additionally, the statements were withdrawn immediately after they were made and the court gave curative instructions. Plaintiffs take these two statements made to argue the need for a new trial, despite having not moved for a mistrial.

II. Plaintiffs Did Not Move for a Mistrial and Waived Right to do so.

Plaintiffs did not move for a mistrial. A motion for a mistrial after the verdict where no motion is made prior to that verdict is improper and not preserved. State v. Penland, 273 S.E.2d 765 (S.C. 1981). By moving for a JNOV on the basis of closing arguments of counsel, Plaintiffs are essentially asking for a mistrial. “A trial court is vested with wide discretion in determining the scope of argument.” Id. The court determined three important things during the trial: A) that the statements made by counsel for Covil did not rise to the level of warranting a mistrial; B) the curative instructions were appropriately given to the jury; and C) that in addition to the charge, the jury was told by counsel virtually immediately after the statements were made that the comments were withdrawn. A “new trial” based upon alleged improper comments during a closing is

addressed by a motion for mistrial, not a JNOV. Plaintiffs failure to move for a mistrial constitutes waiver of this issue.

Alternatively, the comments alone were not so egregious so as to have deprived Plaintiff of a “fair trial.” Gill v. State, 552 S.E.2d 26 (S.C. 2001) (recognizing defendants burden to show lack of fair trial based on closing comments). Here, a curative instruction was given, counsel admonished, and neither topic was mentioned again. This was an appropriate remedy and no reversible error occurred. Mishoe v. QHG, 621 S.E.2d 363 (S.C. Ct. App. 2005). Plaintiffs have not met their burden of proof regarding the loss of a “fair trial.” In fact, a review of the trial transcript, upon information and belief, will demonstrate that Plaintiffs received favorable rulings on procedural matters and evidentiary matters throughout the trial. From the Plaintiffs point of view, they were given every opportunity and inference to convince the jury that Covil was liable to Plaintiffs. Simply put, they did not convince the jury.

Finally, in looking at the comments themselves, neither warrant a new trial. With regard to the loss of a corporate charter, nothing was said by the undersigned regarding finances, ability to pay, or insurance. Further, the fact that the business has been closed since the early 1990s was a fact presented. It is the Plaintiffs that argue this loss of charter – which is a legal issue in and of itself – equates to financial insolvency. It is not an argument that Covil made or attempted to make. Rather, it was a matter of fact related to the winding up of the business. Regardless, it is an inconsequential statement. Austin v. Stokes-Craven Holding Corp., 691 S.E.2d 135 (S.C. 2010)(finding comments in closing arguments about net worth and ability to pay “inconsequential”).

With regard to the comment on Mr. Waters and the existence of his lawsuit, the court similarly addressed the issue via curative instructions, admonished counsel, and no further mention of the

subject occurred. The trial court complied with its obligation. Moreover, the jury should never have considered the testimony of Mr. Waters in their deliberation as Mr. Waters did not work with Mr. Crawford at any job location. The sole purpose of Mr. Waters testimony was for purposes of establishing punitive damages. This was an issue that the jury never reached. A JNOV is not warranted.

III. “Thirteenth Juror” Doctrine is Inapplicable.

To be sure, Plaintiffs are disappointed with a defense verdict in this case. However, “[a] motion for a JNOV is merely a renewal of the directed verdict motion.” RFT, 732 S.E.2d at 171 (citations omitted). “If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied.” Howard v. Roberson, 654 S.E.2d 877, 880 (S.C. Ct. App. 2007). “When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” Id. The court should apply the same standard when considering a JNOV motion by “viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” RFT, 732 S.E.2d at 171 (citing Elam v. SC Dep’t of Transp., 602 S.E.2d 772 (S.C. 2004). Moreover, “[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” Id. at 171.

In the case at bar, there were multiple factors which tended to show that Covil was not liable to Plaintiffs. The records of Covil Corporation, which were generated after the May 1973 fire and were included in any work form the date of the fire through 1974 did not establish any work by Covil at the Celanese Plant at issue. Moreover, the corporate representative of Celanese (Spartanburg) clearly established that he had reviewed the records of Celanese, that Celanese would

have had to approve any contract with any subcontractor, supplier or vendor. Daniel nor Celanese could find no documents that supported that Covil provided any services to the Celanese Plant. Finally, the corporate representative of Daniel, Mr. Buck, testified that he went through the forty (40) boxes of documents that made up the Celanese project for Daniel and found no reference to any work done or provided by Covil other than three employees of Covil providing fire retardant materials for the structural steel. Additionally, the records of Daniel establish that Daniel's own employees provided the insulation for the project. Finally, the documents of Daniel establish that Covil was neither a subcontractor nor a vendor to Daniel on the Celanese (Spartanburg) Project.

Clearly, the jury accepted those facts and found in Covil's favor. Where a reasonable jury could accept those facts, a JNOV is improper.

IV. Conclusion.

Wherefore, Covil asks this court to deny the Plaintiffs request for a JNOV and a new trial absolute.

Dated this 3rd day of August, 2018.

Respectfully submitted,

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ATTORNEYS FOR COVIL CORPORATION

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL CIRCUIT

JERRY HOWARD CRAWFORD,)
Individually and as Personal) **C/A NO. 2017-CP-42-04429**
Representative of the Estate of)
EVELYN KAY CRAWFORD)
)
Plaintiff,) In re:
v.) Asbestos Personal Injury Litigation
) Coordinated Docket
CELANESE CORPORATION,)
et al.,)
)
Defendants.)

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL
ABSOLUTE**

Plaintiff Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, by and through his undersigned counsel, hereby submits this Memorandum in Support of Plaintiff's Motion for Judgment Notwithstanding the Verdict and for New Trial Absolute pursuant to Rules 50 and 59(e) of the South Carolina Rules of Civil Procedure, or, in the alternative, for a New Trial pursuant to the Thirteenth Juror Doctrine, on the grounds that the evidence presented to the jury supported only one conclusion: that the insulation supplied by Covil Corporation ("Covil") caused Jerry Crawford's mesothelioma and damages to Plaintiff. This request is based on the following:

INTRODUCTION

The trial of this matter began on July 16, 2018. Plaintiff's evidence as to Covil's liability was overwhelming and Covil failed to introduce any evidence to conflict any of the elements of Plaintiff's claims. Evidence presented during Plaintiff's case-in-chief, including testimony from

Mr. Crawford and others established that Mr. Crawford was exposed to substantial amounts of asbestos-containing insulation cut and otherwise disturbed in his presence at the Spartanburg Celanese plant throughout 1970 to 1974.¹ Covil offered no evidence that Mr. Crawford was not so exposed.

Second, Harley Neelands testified that Covil supplied thermal insulation to the Spartanburg Celanese facility during the 1970 to 1974 period. Mr. Neelands' testimony was corroborated by admissions from Covil and testimony from multiple other witnesses that Covil consistently supplied insulation for Daniel Construction. Covil attempted to counter this testimony by eliciting testimony from its own representative that it possessed no records of sales of insulation to Spartanburg Celanese. However, a fire at Covil's facility in 1973 destroyed all records from 1973 and beforehand, rendering such testimony moot regarding sales in the 1970 to 1973 period.

Third, through the expert testimony of Dr. Arnold Brody and Dr. John Maddox, Plaintiff introduced undisputed testimony that Mr. Crawford's exposures to Covil's asbestos-containing insulation constituted a substantial factor in causing his mesothelioma. Covil offered no expert testimony to the contrary.

Fourth, primarily through admissions from Covil's corporate representative, Plaintiff established that Covil acted willfully and wantonly in distributing asbestos-containing thermal insulation without warning its customers and the end users of the product. Covil admitted that, by 1965, it knew that asbestos exposure could cause fatal disease. Despite such knowledge, Covil made, in its own words, a conscious "business decision" to never warn end users like Mr.

¹ The citations to the trial transcript, abbreviated "TT," are to the rough transcript. The parties do not yet have the final trial transcript. In some instances, there are gaps and undecipherable words in the rough transcript. When quoting the transcript, Plaintiff has taken the liberty of inserting in brackets what appears to be the correct testimony.

Crawford and those similarly situated. Indeed, Covil sold asbestos-containing insulation in boxes labeled 'asbestos-free.'" Covil introduced no evidence to the contrary.

Finally, Plaintiff introduced uncontested evidence of the substantial damages that Mr. Crawford endured as a result of his mesothelioma. Medical damages exceeded a half million dollars. Mr. Crawford endured major surgery, chemotherapy side effects, tremendous pain, emotional distress and anxiety. He is expected to lose over ten years of life from this disease.

The jury nevertheless returned a defense verdict. It found Covil was not negligent, Covil was not strictly liable for selling products that caused Mr. Crawford's mesothelioma, and Covil did not breach any warranty in selling its products. (Ex. F, Verdict Form.)

Throughout trial, Covil's counsel made improper statements about Covil's lack of assets that implied Covil would be unable to satisfy any judgment levied by the jury. Counsel also improperly told the jury that one of Plaintiff's witnesses, Dwaine Waters, had a lawsuit pending against Covil. These statements were improper and encouraged the jury to base its decision on prejudice and passion as opposed to the evidence presented during trial.

Because the evidence presented to the jury yields only one reasonable inference, this Court should find that Plaintiff is entitled to a Judgment Notwithstanding the Verdict (JNOV). Additionally, as a result of the improper and unduly prejudicial statements made by Covil's counsel during trial, this Court should also find that Plaintiff is entitled to a New Trial Absolute or a New Trial pursuant to the Thirteenth Juror Doctrine. Further, because Plaintiff is entitled to JNOV, this Court should also assess compensatory damages against Covil. As set forth below, the Crawford family should be awarded at least eight million dollars in compensatory damages.

Therefore, for the reasons set forth herein, Plaintiffs ask the Court to grant Plaintiff's request for a JNOV, a New Trial, and assess damages against Covil.

FACTS & PROCEDURAL BACKGROUND

Plaintiff commenced this action on December 4, 2017, via a Summons and Complaint filed in the Spartanburg County Court of Common Pleas. He sought recovery for damages suffered as a result of his malignant pleural mesothelioma. He was diagnosed with mesothelioma in November 2017. Plaintiff alleged that he was exposed to asbestos working at the Hoechst Celanese facility in Spartanburg, South Carolina from 1970 to 1974. At the time of trial, Covil Corporation was the only remaining defendant in this matter. Against Covil, Plaintiff had three discrete causes of action: negligence, strict liability, and breach of implied warranty.

I. Pretrial Ruling & Jury Instructions

On July 11, 2018, this Court held a pre-trial hearing. While examining motions *in limine* filed by the parties, this Court ruled that the parties would be unable to mention “[o]ther cases involving counsel[.]” (**Ex. H**, Pre-Trial Hearing Transcript, 7/11/18, at 236:3-4.) Additionally, the Court prohibited any references to “wealth, assets, so forth and so on” unless and until the jury was determining punitive damages. (*Id.* at 241:17-21.)

II. Evidence Offered by Plaintiff²

A. Plaintiff proved by fact witnesses and expert testimony that Mr. Crawford was exposed to asbestos-containing insulation at the Spartanburg Celanese plant.

² Prior to Plaintiff calling his first witness, this Court instructed the jury as follows:

Ladies and gentlemen of the jury, as the result of rulings that I have made, I am instructing you now that Jerry Crawford, the plaintiff in this matter, was exposed to asbestos insulation supplied by and installed by Covil Corporation at Celanese between 1970 and 1974.

(**Ex. A**, TT 7/16/18, at 51:18-23.) This instruction was given as the result of sanctions levied against Covil for its failure to cooperate during the discovery phase of this matter. Covil’s counsel noted to this Court that if this instruction was followed by the jury, Plaintiff was essentially being granted a directed verdict on the issue on liability. (*Id.* at 37:18-38:6.) Plaintiff disagreed, as he would still have to prove causation. (*Id.* at 38:7-9.) This Court agreed with Plaintiff and the jury was instructed as stated. Plaintiff argued for directed verdict at the end of his case-in-chief and requested that the Court not give consideration to this presumption.

Mr. Crawford testified, via video deposition, about how he was exposed to asbestos-containing insulation dust. (Ex. E, Plaintiff's "As Played" List, at pgs.14-36.) Mr. Crawford worked at the Hoechst Fiber (Celanese) plant in Spartanburg, South Carolina from 1970 to 1974. (*Id.* at p.16, ¶ 6, 12:20-13:5.) During that time, he worked at three locations within the plant: the poly building, the continuous line building and the warehouse. (*Id.* at p.18, ¶ 11, 18:19-20:14.) Daniel Construction constructed an addition to the continuous line building during the period Mr. Crawford worked there. (*Id.* at p. 20, ¶ 18, 23:10-24:6.) Daniel installed insulation on the new lines in this area. (*Id.* at p. 19, ¶¶ 14-15, 21:14-16, 21:18-22:5.) Throughout this period, Mr. Crawford testified that he saw them cut insulation for steam pipes, which created "a good bit of dust." (*Id.* at p. 19, ¶¶ 12-14, 20:23-25, 21:2-6, 21:7-10; p. 20, ¶¶ 19-20, 24:25-25:2, 25:7-9; p. 21, ¶¶ 21-22, 25:14-16.) He was therefore close enough to see visible dust. Mr. Crawford testified that this work caused him to breathe that dust in. (*Id.* at p. 20, ¶¶ 19-21, 24:25-25:2, 25:7-9, 25:12.) After construction was completed, the dust created from such work remained in his workspace. (*Id.* at p. 22, ¶¶ 25-26, 29:10-12, 29:14-16.) Daniel Construction also repaired the insulation in the poly building. (*Id.* at p. 21, ¶ 24, 28:20-29:3.)

Mr. Harley Neelands corroborated Mr. Crawford's testimony about the quantity of dust created from the insulation work performed at the Celanese plant. Mr. Neelands worked for Daniel Construction at the Celanese plant in Spartanburg. (*Id.* at p. 46, ¶ 46, 124:6-11.) They insulated pipe at the Celanese plant. (*Id.* at p. 46, ¶ 46, 124:22-25.) Mr. Neelands testified that they used Kaylo half-moon insulation, "mud" insulation and Kaylo block insulation. (*Id.* at p. 46-47, ¶¶ 48-49, 125:23-126:4, 126:19-21, 126:19-21, 126:23-127:2.) He described how dust was created from cutting the Kaylo insulation, mixing the mud insulation and cleaning up afterwards. (*Id.* at p. 46, ¶ 48, 126:5-12; p. 47, ¶ 49, 127:5-11; p. 48, ¶¶ 50-51, 130:18-22, 130:24-25.) Their

clothes were covered with white chalky dust at the end of each day. (*Id.* at p. 48, ¶¶ 51-52, 131:9-13, 131:16-18.)

Plaintiff offered various evidence proving that the insulation used in Mr. Crawford's presence, in fact, contained asbestos. Mr. Bruce Bowyer testified on behalf of CNA Holdings, the entity now responsible for Celanese. (*Id.* at p. 2, ¶ 4, 12:18-20.) He agreed that the additions to the plant described by Mr. Crawford and Mr. Neelands occurred in the early 1970s. (*Id.* at p. 8, ¶ 26, 91:4-12.) Mr. Bowyer agreed that plant specifications called for amosite asbestos-containing insulation. (*Id.* at p. 7, ¶ 18, 86:3-13.) Mr. Bowyer also referred to a plant survey conducted in 1995 which shows the quantity of asbestos-containing insulation removed from various areas of the plant. (*Id.* at p. 8, ¶ 26, 91:4-12.) In the area where Mr. Crawford worked, over 77,749 lineal feet of insulation was removed and 90% of that insulation contained asbestos. (*Id.* at p. 10, ¶¶ 37-39, 173:7-12, 174:12-22.) In other words, 13.2 miles of asbestos-containing insulation were removed (out of 14.7 total miles). Because the insulation removed contained asbestos, it stands to reason the insulation installed in the early 1970s contained asbestos. Further, Covil, through its corporate representative Robert Glenn, admitted that Kaylo insulation contained asbestos during the relevant time period. Mr. Neelands testified that they installed Kaylo half-moon and block insulation. (*Id.* at p. 46-47, ¶¶ 48-49, 125:23-126:4, 126:19-21, 126:19-21, 126:23-127:2.) Covil admitted that such Kaylo insulation contained asbestos through 1972 to 1973. (**Ex. B**, TT 7/17, at 273:12-24.)

Expert testimony by Dr. John Maddox also established that Mr. Crawford was exposed to asbestos-containing insulation dust at the Celanese plant. Dr. Maddox was qualified to testify as an expert in the diagnosis and causation of asbestos-related diseases from various asbestos-containing products. (**Ex. B**, TT 7/17/18, at 153:15-154:5.) Dr. Maddox testified that removing

asbestos-containing thermal insulation creates “very high levels of [asbestos] exposure.” (*Id.* at 177:15-179:12.) The exposure, as Dr. Maddox informed the jury, could reach levels of 100 fibers per cubic centimeter. (*Id.*) Additionally, the asbestos dust remains in the air for some afterwards and can be carried to adjacent spaces, even other rooms. (*Id.*)

B. Plaintiff introduced multiple lines of evidence showing that Covil supplied and installed the asbestos-containing insulation at Spartanburg Celanese that Mr. Crawford inhaled.

Mr. Harley Neelands, a former employee of Daniel Construction, testified that Covil supplied the insulation used at the Celanese plant. Mr. Neelands worked for Daniel Construction installing insulation at the Celanese plant in Spartanburg during the relevant time period. (**Ex. E**, at p. 46, ¶ 46, 124:6-11, 124:22-25.) He testified that Daniel Construction purchased the insulation that it installed at the Celanese plant in Spartanburg from Covil. (*Id.* at p. 49, ¶ 57, 134:6-17.) He confirmed this testimony a second time: he stated that Covil supplied the insulation used at the Celanese Spartanburg plant. (*Id.* at p. 49, ¶ 58, 135:22-25.) Covil admitted that it sold Kaylo brand asbestos-containing insulation, the same brand that Mr. Neelands identified as being installed at the Spartanburg Celanese plant. (**Ex. B**, TT 7/17/18, at 274:3-5.)

Plaintiff also presented documentary evidence demonstrating that Covil was the insulation supplier at Spartanburg Celanese during the time that Mr. Crawford worked on the premises.

Mr. Neelands’ testimony is further corroborated by evidence that Covil supplied insulation to Daniel and Covil acted as an insulation subcontractor. Covil made significant admissions about its relationship with Daniel Construction. Covil, through its representative Robert Glenn, admitted that Covil sold insulation to industrial contractors. (**Ex. B**, TT 7/17/18, at 270:15-271:8.) Covil agreed that Daniel Construction was one of its largest customers. (*Id.* at

278:17-19.) Covil agreed this relationship with Daniel Construction began in the early 1960s. (*Id.* at 278:20-24.) Second, Daniel Construction, through its representative, agreed that it did business with Covil as an insulation supplier and insulation subcontractor. (**Ex. E**, at p. 11, ¶ 4, 11:14-17; pp. 13-14, ¶¶ 16-17, 102:7-18, 103:2-6.) Third, Mr. Machen Carpenter served as an employee for Covil for many years. (**Ex. J**, Machen Carpenter Deposition Excerpts, 10:24- 11:1; 11:15-16.) He testified that Covil and Daniel Construction were “like that,” referencing their closeness in working together. (*Id.* at 53:18-54:14.) Fourth, Dwaine Waters, a former Covil employee, testified by videotaped deposition. Mr. Waters testified that if Daniel had the maintenance contract, Covil did the insulation work. (**Ex. E**, at p. 55, ¶ 24, 402:3-5.)

Every witness testified that Daniel Construction had the maintenance contract at the Spartanburg Celanese plant during the years that Mr. Crawford work there, thereby implicating Covil as a supplier and subcontractor. As discussed above, two eyewitnesses – Mr. Crawford and Mr. Neelands – identified Daniel Construction performing the work in question. Covil admitted, through its corporate representative, that Daniel Construction was present at the Spartanburg Celanese plant. (**Ex. B**, TT 7/17/18, at 278:25-279:5.) Mr. Bowyer, representative for Celanese, agreed that Daniel Construction installed the insulation on the steam piping in the relevant areas at the relevant time. (**Ex. E**, at p. 8, ¶¶ 27-29, 91:13-23, 93:9-12.) Don Buck, representative for Daniel Construction, testified that Daniel Construction was at the facility every year between 1970 to 1974. (*Id.* at p. 12, ¶ 8, 16:20-24.)

During direct examination, Covil asked Mr. Glenn about his search for documents reflecting Covil’s sales to the Spartanburg Celanese plant. He testified that he performed a word search of Covil’s documents and found nothing regarding the Spartanburg Celanese plant. (**Ex. B**, TT 7/17/18, at 305:6-306:12.) He also stated that a fire occurred in 1973, thereby causing

Covil to lose all sales information from 1973 and beforehand. (*Id.* at 307:11-14.) Thus, Covil could have sold asbestos-containing insulation to the plant in the 1970 to 1973 period and there would be no record anyway. Additionally, although Mr. Glenn performed a word search, he only actually read about 100 of the 24,000 pages of documents available to him. (*Id.* at 267:1-10.) Mr. Glenn was never employed by Covil and never heard of the company until a few weeks before trial. (*Id.* at 259:7-17.) Even still, Covil's representative reviewed Don Buck's deposition transcript and confirmed that Mr. Buck "referred to a document that seemed to say that Covil was listed possibly as a vendor." (*Id.* at 306:16-24.)

In contrast to the testimony from Covil's corporate representative, Machen Carpenter testified that Covil's office complex was protected by a fire wall and the office complex was not destroyed by the 1973 fire. (**Ex. J**, at 103:16-21.) Moreover, Covil's documentation was kept in a vault which would not have been destroyed by the 1973 fire either. (*Id.* at 103:21-22.) Mr. Carpenter testified that the documents were likely destroyed by means other than the fire. (*Id.* at 103:22-25.)

C. Plaintiff established that Mr. Crawford's exposure to asbestos-containing insulation supplied by Covil was a substantial factor in the development of his mesothelioma.

Covil admitted that, based on the science, there is a relationship between asbestos exposure and mesothelioma. (**Ex. B**, TT 7/17/18, at 270:15-271:8.)

In addition to this admission, Plaintiff introduced causation testimony from two expert witnesses: Dr. Arnold Brody and Dr. John Maddox. Dr. Arnold Brody, an expert qualified in the areas of cell biology and experimental pathology, testified about how asbestos gets into the body and how it causes disease. (**Ex. A**, TT 7/16, at 90:4-9; 91:14-130:6.) Specifically, Dr. Brody testified that there was only one way for an asbestos product to get into the lymph nodes in the body and that is through inhalation. (TT 7/16, at 112:20-21.) According to Dr. Brody, because

lymph “is a circulation,” if there are lymph nodes around the lung where the mesothelia cells are, the asbestos fibers could be deposited there. (TT 7/16, at 112:23-113:2.) Dr. Brody went on to explain that asbestos causes cancer in that it either displaces genes necessary for the normal distribution of chromosomes or it produces “reactive oxygen species” which damages DNA. (TT 7/16, at 121:16-122:19.) He was not cross-examined by Covil.

Dr. John Maddox was qualified to testify as an expert in the diagnosis and causation of asbestos-related diseases from various asbestos-containing products. (Ex. B, TT 7/17/18, at 153:15-154:5.) Dr. Maddox offered all of his opinions to a reasonable degree of medical and scientific certainty. (*Id.* at 154:16-19.) Dr. Maddox testified that he had reviewed Jerry Crawford’s pathology records and opined that Jerry Crawford has “a malignant mesothelioma of the biphasic type of his right pleura.” (*Id.* at 155:22-156:4.) Importantly, Dr. Maddox opined that Jerry Crawford’s mesothelioma was asbestos related because he “did not see . . . any other type of exposure that had contributed to his mesothelioma.” (*Id.* at 157:7-12.) He also testified that, based on the medical and epidemiological literature available, asbestos causes mesothelioma and that it did not take a lot of asbestos to cause mesothelioma. (*Id.* at 158:12-160:14.) Dr. Maddox informed the jury that, as of the Selikoff conference in 1967, it was known that some pipe insulation contained asbestos, including amosite and chrysotile, and, if it contained asbestos, it was hazardous. (*Id.* at 177:15-178:3.) Dr. Maddox stated that “almost all cases of mesothelioma are caused by asbestos exposure.” (*Id.* at 180:3-11.)

Dr. Maddox testified in response to a hypothetical which assumed (1) that Jerry Crawford worked at the Celanese Spartanburg facility from 1970 to 1974 where thermal system insulation, containing amosite asbestos, was being worked on and installed, (2) that Jerry Crawford was close enough to the dust from the thermal insulation that he breathed that dust, (3) that Jerry

Crawford also swept up work that was being done on the thermal systems insulation, (4) the work that Jerry Crawford performed at Celanese around thermal system insulation occurred regularly throughout 1970 through 1974, and (5) that Jerry Crawford was diagnosed with mesothelioma. (*Id.* at 211:22-212:18.) With those facts in mind, Dr. Maddox opined that Jerry Crawford's exposure to asbestos-containing thermal insulation at Celanese from 1970 through 1974 was a substantial contributing cause to the development of his mesothelioma. (*Id.* at 212:21-213:1.) Additionally, Dr. Maddox testified that Jerry Crawford's mesothelioma will cause his death. (*Id.* at 213:2-6.)

Covil cross-examined Dr. Maddox. With the caveat that he is not qualified to offer testimony on the medico-legal aspects of OSHA, Dr. Maddox agreed that OSHA stated that employers owe a duty to warn employees about workplace hazards. (*Id.* at 224:23-225:9.)

Covil asked Dr. Maddox questions about how he attributes causation. When cross-examined about the source of his clinical history, Dr. Maddox explained that he relied on an exposure history as a basis for attribution. (*Id.* at 225:14-226:3.) Dr. Maddox clarified that each "significant" exposure to asbestos contributed to Mr. Crawford's mesothelioma, not merely every exposure. (*Id.* at 228:19-229:6.) Dr. Maddox was asked about whether Mr. Crawford's exposures to any asbestos-containing brakes constituted a substantial contributing factor in the development of his mesothelioma. He could not and did not render such an opinion. (*Id.* at 229:7-230:11.) While he agreed that there may be an asbestos exposure that occurred, he never stated that this component exposure, if any, was a substantial factor. (*Id.* at 230:12-23.) Covil posed a hypothetical to Dr. Maddox. It asked him to assume that Mr. Crawford was exposed on a daily basis to asbestos-containing insulation at Celanese installed by Daniel and manufactured, essentially the same hypothetical asked in direct but without including the assumption that Covil

supplied the insulation. Dr. Maddox responded that the “asbestos involved in those exposure contributed to Mr. Crawford’s cumulative dose” of asbestos which caused his mesothelioma. (*Id.* at 231:24-232:11.)

D. Primarily through admissions of Covil’s representative, Plaintiff introduced evidence that (1) Covil knew that inhaling asbestos dust from asbestos-containing insulation causes fatal disease by 1965 yet (2) knowingly failed to act to reduce the risk to Mr. Crawford.

Dr. Maddox provided some testimony about what was knowable and known in the scientific community about the hazards of exposure to asbestos. He testified that the first case reports regarding the lethality of asbestos dated to the 1890s among asbestos textile workers. (Ex. B, TT 7/17/18, at 169:16-170:13.) By the 1930, there was a published study which concluded a significant hazard for asbestos textile workers, along with other asbestos-containing materials like gaskets and brake linings. (*Id.*) In the 1940s and 1950s, the scientific community gradually gained awareness of the malignant diseases caused by asbestos exposure. (*Id.* at 170:14-171:6.) An epidemiologic study showed a statistically significant association between asbestos exposure and lung cancer by 1955. (*Id.*) In the 1960s, articles began appearing that associated asbestos exposure with mesothelioma. (*Id.* at 171:7-172:8.)

Covil, through its representative Robert Glenn, admitted that it received information about the hazards of asbestos from numerous sources beginning in the 1960s. First, Covil was aware that various insulation unions raised concerns about the hazards of asbestos in the mid-1960s. (*Id.* at 290:4-11.) Also, Covil was a member of the Southeast Insulation Contractors Association since the 1960s. (*Id.* at 287:23-288:4.) Covil’s president, Palmer Covil, served as a director and president of that organization. (*Id.* at 288:5-9.) Covil was a member of the National Insulation Contractors Association (“NICA”). (*Id.* at 288:10-12.) Mr. Palmer Covil attended trade organization conferences and conventions. (*Id.* at 288:18-22.) He received and read trade

organization magazines. (*Id.* at 288:23-289:5.) Mr. Covil generally understood what was going on in the industry in the 1960s. (*Id.* at 289:6-9.) Additionally, Mr. Palmer Covil attended a conference in the mid-1960s in which Dr. Irving Selikoff spoke. (*Id.* at 290:17-25.) Covil agreed that Dr. Selikoff is a reliable source about asbestos hazards. (*Id.* at 291:1-4.)

Covil admitted that it knew that asbestos was hazardous. Covil knew that asbestos can cause asbestosis since 1965. (*Id.* at 289:22-25.) Covil knew in 1965 that asbestosis can be a fatal disease. (*Id.* at 290:1-3.) Therefore, Covil knew in 1965 that exposure to asbestos can cause death. (*Id.* at 297:19-21.) Covil possessed actual knowledge of OSHA regulations regarding asbestos in 1971. (*Id.* at 291:18-292:5.) Records demonstrate that a Covil employee had developed asbestosis by 1972. (*Id.* at 291:13-17.)

Covil knew of ways to warn and protect consumers and end users like Mr. Crawford. Covil first saw warning labels on asbestos-containing products in 1968. (*Id.* at 291:9-12.) Covil knew of ways to protect its own employees. Covil provided respirators to its own employees in the 1950s. (*Id.* at 289:13-16, 293:7-10.) Covil implemented x-ray programs for its own employees beginning in about 1972. (*Id.* at 292:9-16.) In 1972, Covil began implementing measures to protect its own employees from asbestos, such as dust control measures like industrial vacuums and exhaust ventilation. (*Id.* at 292:17-293:2.)

Despite such knowledge, Covil did nothing to protect others. First, Covil failed to investigate. It admitted that it never had a research department. (*Id.* at 294:13-20.) Covil never had a medical director. (*Id.* at 294:21-25.) Covil never hired an industrial hygienist to investigate the hazards of asbestos. (*Id.* at 295:6-13.) Nevertheless, Covil continued to sell asbestos-containing insulation until at least 1973 and an invoice admitted into evidence shows that it sold asbestos-containing Thermobestos until at least 1974. (*Id.* at 293:21-294:8.) Covil sold other

asbestos-containing products like asbestos cloth until 1977. (*Id.* at 294:9-12.) Other asbestos-free insulation products were available and Covil sold them. (*Id.* at 275:14-24.) Covil failed to warn of the dangers associated with the use of the asbestos-containing products that it was distributing. Covil never placed a warning on its boxes of asbestos-containing products. (*Id.* at 296:13-297:3.) After 1965 when Covil knew that exposure to asbestos could cause death, Covil never took it upon itself to place that information on boxes of asbestos that it sold. (*Id.* at 297:22-298:1.) Even though Covil told its own employees to wear respirators since the 1950s, it never put that information on any of the boxes that it sold. (*Id.* at 298:2-15.) Covil, in its contracting work, never warned others it worked around about the hazards of asbestos. (*Id.* at 298:16-20.) Covil takes the position that it is up to the manufacturers of asbestos products to pass on information downstream to the users. (*Id.* at 293:11-20.) Covil made a “business decision” to not any warnings on the asbestos-containing products that it sold. (*Id.* at 299:1-11.)

Consequently, Mr. Crawford never received any warnings about the hazards of asbestos. Mr. Crawford testified that no one ever warned him about the dangers of working with or around asbestos. (*Ex. E*, at p. 27, ¶¶51-55, 51:8-52:12.) Mr. Crawford stated that if he had known that working with and around asbestos was dangerous he would have “found another job away from asbestos.” (*Id.* at p. 27, ¶55, 52:13-17.)

Covil agreed that supplying asbestos-containing insulation in boxes labeled “asbestos free” is a hazard. (TT 7/17, at 295:17-24.) Mr. Dwaine Waters was an employee for Covil. He testified that Covil sold and installed asbestos-containing insulation in boxes labeled “asbestos free.” (*Ex. E*, at pp. 59-60, ¶¶ 17-31, 527:6-529:9.) Mr. Waters informed his supervisors of this conduct, but they continued to do so anyway because Covil thought it needed to get rid of the asbestos-containing insulation in its warehouse. (*Id.*)

E. Plaintiff introduced evidence regarding the substantial damages incurred as a result of Mr. Crawford's mesothelioma.

Mr. Crawford first found out that something was wrong with health in August 2017 when experiencing shortness of breath. (*Id.* at p. 27, ¶¶ 56-58, 52:21-53:6.) He went to the emergency room where he had fluid drained from his right lung. (*Id.* at p. 27, ¶ 58, 52:25-53:10.)

Mr. Crawford took chemotherapy for his mesothelioma. *Id.* at p. 29, ¶¶ 61-64, lns. 14-10.) He explained that the doctors put in a port on the left side of his chest for him to receive his chemotherapy treatments. (*Id.* at p. 29, ¶¶ 61-63, lns. 17-5.) He also noted that the chemotherapy makes him nauseous. (*Id.* at p. 29, ¶¶ 63-64, lns. 6-10.) Mr. Crawford testified that the chemotherapy treatments do not make him feel better and he takes chemotherapy treatments every three weeks. (*Id.* at p. 30, ¶¶ 67-70, lns. 16-10.)

Mr. Crawford also provided testimony regarding activities that he could no longer do because of his mesothelioma. He noted that he could no longer work in his yard, could no longer go to the gym for exercise, could no longer attend certain church meetings, and could no longer take his grandchildren out. (*Id.* at pp. 30-32, ¶¶ 70-78, lns. 11-22.)

Mr. Crawford testified that he didn't know what to expect moving forward. The chances of Mr. Crawford's cancer being cured were "about 20 percent." (*Id.* at p. 32, ¶¶ 78-80, lns. 23-2.) He described this news as devastating because he thought about not seeing his grandchildren or great-grandchildren grow up. (*Id.* at p. 32, ¶¶ 81-86, lns. 5-16.) Mr. Crawford also expressed gladness because the 20 percent chance was "better than zero." (*Id.* at p. 32, ¶¶ 81-82, lns. 6-8.)

Dr. Maddox also testified as to what kind of pain a person with mesothelioma experiences. He noted that the individual usually initially comes the doctor because of shortness of breath which is from the accumulation of fluid in the lungs. (TT 7/17, at 213:7-15.) The individual could also be experiencing chest wall pain, weight loss, and loss of appetite. (TT 7/17,

at 213:16-22.) Dr. Maddox also explained that if a patient has a pleural effusion, the doctors can drain the fluid in the chest. (TT 7/17, at 215:2-9.) Draining the fluid, according to Dr. Maddox, is a somewhat painful process because sometimes there is a sharp stabbing and, occasionally, a temporary feeling of nausea. (TT 7/17, at 215:18-216:4.) Dr. Maddox also explained that chemotherapy is a treatment options that will usually extend the life of the mesothelioma patient if the tumor is sensitive to the type of chemotherapy administered. (TT 7/17, at 217:5-10.) Dr. Maddox described the different types of chemotherapy which can include a mixture of drugs. Chemotherapy can cause various side effects including fatigue and loss of appetite. (TT 7/17, at 217:15-219:9.) Dr. Maddox testified

What I'm trying to say is in the end stages, whatever the cause of death may be, it's going to be extremely unpleasant. Air hunger is usually very prominent. Air hunger is when you are smothering. You are unable to catch a breath because you don't have lung tissue sufficient to breathe anymore. That's generally treated by morphine. Morphine reduces air hunger, but then it also reduces the -- the impulse to breathe. So it becomes then a downward spiral.

(TT 7/17, at 221:7-16.)

According to Dr. Maddox, Jerry Crawford will incur future medical expenses as a result of his mesothelioma depending on his response to chemotherapy and, eventually, hospice. (TT 7/17, at 221:17-222:2.) Lastly, Dr. Maddox testified that, according to the Department of Social Security's actuarial tables, Jerry Crawford's life expectancy, at age 72, would have been an additional 13 years. (TT 7/17, at 222:3-10.) However, the mesothelioma shortened his life expectancy significantly, to, on average, approximately 14 months post-diagnosis. (TT 7/17, at 222:20.)

Jerry Crawford's daughter, Patty Giles, also testified at trial. Patty testified that her parents, Jerry and Evelyn Crawford, were married for 48 years and that they were devoted to each other. (Ex. C, TT 7/18/18, at 339:3-8.) They liked to work in the yard together, raking

leaves, cutting grass, and taking care of the flower beds. (TT 7/18, at 339:9-19.) Jerry also drove Evelyn everywhere because Evelyn never learned to drive. (TT 7/18, at 339:22-25.) Patty testified that he parents like to take day trips to the beach or to the mountains or to the lake. (TT 7/18, at 340:7-13.) Jerry Crawford also loved to play with his grandkids. (TT 7/18, at 340:24-25.)

Patty testified that her father was a hard worker, who would walk miles to work after his car had broken down. (TT 7/18, at 341:2-17.) However, Mr. Crawford never missed work. (TT 7/18, at 341:24-25.) Patty testified about finding out that her father had cancer. She stated that throughout the summer, Mr. Crawford has been getting more and more short of breath until “finally he couldn’t—really couldn’t breathe at all[.]” (TT 7/18, at 342:8-10.) He went to the emergency room and admitted to the hospital after an x-ray revealed that he had fluid on his lungs. (TT 7/18, at 342:11-13.) The doctors drained the fluid from Mr. Crawford’s lungs and referred him to a lung specialist. (TT 7/18, at 342:17-21.) Mr. Crawford had to have the fluid drained from his lungs at least four more times. (TT 7/18, at 342:25-343:5.) Mr. Crawford was having fluid drained from his lungs approximately every two weeks, when his chest became tight and painful for him to breathe. (TT 7/18, at 343:23-344:4.) Eventually, the lung specialist recommended the use of a catheter to drain the fluid from Mr. Crawford’s lungs at home. (TT 7/18, at 344:5-8.) Patty testified that she went to her parents’ home every three days to drain the fluid from her father’s lungs. (TT 7/18, at 344:18-19.) Before the catheter was inserted, the doctors performed a biopsy and informed Mr. Crawford and his family that he had cancer. (TT 7/18, at 345:1-346:24.) A week after the biopsy, Mr. Crawford and his family learned that he had mesothelioma. (TT 7/18, at 348:4-10.)

Patty testified briefly about Evelyn Crawford’s passing. She stated that Evelyn started out with a “little cough” which eventually became bronchitis. (TT 7/18, at 351:11-17.) Patty noted

that Evelyn did not want to make a big deal about not feeling well because she was worried about Mr. Crawford. (TT 7/18, at 351:25-352:4.) The bronchitis got worse and Mr. Crawford took Evelyn to an urgent care facility who rushed her to the hospital via ambulance. (TT 7/18, at 352:5-10.) At this point, Evelyn had developed pneumonia, and was placed on a ventilator. (TT 7/18, at 352: 16-22.) When she could communicate with Patty, Evelyn would express worry about Mr. Crawford. (TT 7/18, at 352:23-353:4.) Evelyn Crawford died on March 6, 2018. (TT 7/18, at 353:12-13.)

After Evelyn's passing, Mr. Crawford had surgery to remove 95% of the lining of his lung, leaving only the lining that was near his heart. (TT 7/18, at 355:12-356:1.) Doctors also removed part of his right lung. (TT 7/18, at 356:10-12.) Since the surgery, Mr. Crawford was still in pain and he was still having trouble breathing. He had developed a cough and it was difficult for him to talk and he got tired easily. (TT 7/18, at 357:12-258:1.) Mr. Crawford's doctor said that he had a 20% percent chance of survival. (TT 7/18, 358:25-359:5.)

III. Covil's Case-in-Chief and Improper Arguments to the Jury

Covil's case-in-chief consisted of video and read-in depositions from Palmer Covil, Bruce Bowyer, and Theo Buck. Covil failed to tender such testimony as part of the official record.³

During closing arguments, counsel for Covil argued that the evidence weighed in favor of Covil. He began his closing with the following:

Good morning. We have met. I'm Mark Wall. Covil Corporation lost its corporate charter in 1997—1981 and went out of business in 1991.

(Ex. D, TT 7/19/2018, at 476:24-477:1.) Plaintiff objected to these statements and counsel's

³ The testimony delivered through these depositions was not transcribed for the Trial Transcript. Plaintiff contacted Covil for its "As Played" List in an effort to fairly relay the presentation of evidence to the jury during trial. However, Covil has failed to provide the requested information.

statement “as to when—as to whether and when Covil lost its corporate charge[]” was withdrawn. (TT 7/19, at 477:2-11.) Covil’s counsel’s very next statement was:

But it did go out of business in 1991.

(TT 7/19, at 477:14.) Counsel then continued with his argument to the jury. Minutes later, counsel for Covil turned his attention to the witnesses presented by Plaintiff. He stated:

Mr. Waters is suing Covil. Mr. Waters is suing—

(TT 7/19, at 479:21-22.) Plaintiff’s counsel objected to this statement and the Court immediately instructed the jury as follows:

THE COURT: Ladies and gentlemen of the jury, Mr. Wall withdraws the statement that Mr. Waters is suing Covil. There is no evidence about that placed before you, and you are to disregard that statement.

(TT 7/19, at 480:4-7.)

After entertaining motions for directed verdict from Covil and prior to Plaintiff’s motions for disrected verdict, this Court commented on the strength of Plaintiff’s evidence:

I have not seen a case that contains as strong a constellation of liability evidence as I see in this case, and so I will be looking very carefully at what my responsibilities should be in terms of whether to direct a verdict on liability before this case is submitted to the jury.

I’m not saying I will do it. I simply want to be fair to everyone and say that I am concerned about this. . . . He can deal with only what he is given by the client to deal with, but quite apart from the direction of finding that I made as a response to the discovery violations of this defendant, the evidence that has been presented in the case quite separately from that is -- is -- at this point almost uncontroverted evidence of liability. And so I’m concerned about that and I just want to let you know that.

(TT 7/18, at 379:1-17.) Nevertheless, the Court submitted the case to the jury and the jury returned with a verdict in favor of Covil on Plaintiff’s negligence, strict liability, and breach of implied warranty claims. (TT 7/19, at 553:6-554:2; **Ex. F**, Verdict Form.)

ARGUMENT AND AUTHORITIES

I. PLAINTIFF IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT.

Based on the evidence presented at trial, there was no legally sufficient basis for a jury to find for Covil. Specifically, based on the grounds listed below, the evidence affirmatively demonstrates that Plaintiff is entitled to judgment as a matter of law on the causes of action asserted by Plaintiff, as well as Plaintiff's prayer for actual and punitive damages.

A. Standard for Judgment Notwithstanding the Verdict

On a motion for a directed verdict or a judgment notwithstanding the verdict (JNOV), this Court should view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See, e.g., RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). This state's Supreme Court has recognized that a motion for a JNOV "requires a court to determine the sufficiency of the evidence." *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 81, 588 S.E.2d 87, 89 (2003). The Court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *See Strange v. S. C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). However, "if no reasonable jury could have reached the challenged verdict," the Court must grant a motion for JNOV. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). Since Covil failed to present sufficient evidence to dispute the elements of Plaintiff's causes of action, this Court should grant Plaintiff's Motion for Judgment Notwithstanding the Verdict.

B. Covil submitted no evidence to dispute Plaintiff's negligence claim.

The elements of negligence are well established. To prove a cause of action for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the

defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). Plaintiff presented sufficient evidence to support every element of his negligence claim against Covil, and Covil failed to present any significant evidence to the contrary.

As the Court instructed, Covil owed Mr. Crawford a duty of care because Covil knew of the risk of harm and failed to take reasonable steps to warn of or prevent the harm. Covil admitted that, by 1965, it knew that asbestos exposure could cause fatal disease. Thereafter, it received information from numerous sources about asbestos hazards, including trade organizations, a speech by Dr. Selikoff, the insulator unions, and manufacturers of asbestos-containing insulation. Despite such knowledge, Covil made, in its own words, a conscious "business decision" to never warn end users like Mr. Crawford and those similarly situated. Covil chose to protect its own employees by asking them to wear respirators and implementing dust control measures, but consciously chose not to warn others. Covil introduced no evidence to the contrary.

Covil's conduct caused Mr. Crawford to develop mesothelioma. Mr. Crawford described working in close proximity to others cutting, installing and repairing insulation. Mr. Neelands confirmed that such work created substantial amounts of dust. Covil offered no evidence to the contrary. Importantly, Mr. Neelands also testified that Covil supplied the insulation for this project. Covil admitted, and several other witnesses confirmed, that that Covil consistently supplied insulation for Daniel Construction. Covil elicited testimony from its own representative that it possessed no records of insulation sales to Spartanburg Celanese. However, the testimony that a fire in 1973 destroyed all records from 1973 and beforehand, rendered the assertion that

Covil had no records of sales of thermal insulation to Spartanburg Celanese moot as to the 1970 to 1973 period. Further, according to Machen Carpenter's testimony, Covil's documentation would have been protected from destruction by the 1973 fire but were likely intentionally destroyed after the fire. The absence of sales records in no way constitutes affirmative evidence that no sales occurred, especially when such records are incomplete and eyewitness testimony establishes such sales. Covil's own representative even recognized a document listing Covil as a vendor to Spartanburg Celanese plant during the relevant period. Expert testimony from Dr. Arnold Brody and Dr. John Maddox showed that Mr. Crawford's exposures to Covil's asbestos-containing insulation constituted a substantial factor in causing his mesothelioma. Covil offered no expert testimony to the contrary.

Plaintiff established uncontested evidence of substantial damages. Covil does not dispute that Mr. Crawford developed mesothelioma and medical damages exceeded a half million dollars. Mr. Crawford endured major surgery, chemotherapy side effects, tremendous pain, emotional distress and anxiety. He is expected to lose over ten years of life from this disease.

Even viewing the evidence in the light most favorable to Covil, the only reasonable inferences which may be drawn from the evidence presented during trial are as follows:

- (1) Covil negligently supplied and/or installed asbestos-containing thermal insulation to the Celanese facility located in Spartanburg where Jerry Crawford worked; and
- (2) Covil knew that exposure to asbestos could cause death; and
- (3) Jerry Crawford inhaled asbestos-laden dust created during the installation or removal of asbestos-containing insulation installed by or purchased from Covil; and
- (4) As a result of his exposure to the asbestos-containing thermal insulation from Covil, Jerry Crawford developed mesothelioma.

No reasonable jury could conclude from the evidence presented that the elements of Plaintiff's negligence claim were not met. Plaintiff's motion for JNOV as to his negligence claim should be granted.

C. Covil offered no evidence to dispute Plaintiff's strict liability claim.

Section 15-73-10 of the South Carolina Code provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm caused to the ultimate user or consumer. . . ." S.C.Code Ann. § 15-73-10 (2005) (emphasis added). This section imposes strict liability upon the manufacturer and seller of a product for an injury to any "user or consumer" if the product reaches the user or consumer without substantial change in the condition in which it is sold. *Id.*; *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592 (1994).

Plaintiff's evidence established that asbestos exposure causes fatal disease. Plaintiff submitted (1) testimony from two highly qualified expert witnesses and (2) admissions from Covil that asbestos causes mesothelioma and by 1965 it knew that asbestos can cause fatal disease. Covil continued to sell asbestos products until 1977, despite selling asbestos-free alternatives all along. Covil offered no evidence to suggest to the jury that asbestos is not unreasonably dangerous. Covil offered no evidence that the asbestos-containing thermal insulation was substantially changed when Mr. Crawford was exposed to it.

As discussed in the above section and the statement of facts, even when viewed in the light most favorable to Covil, the evidence presented supports only the following conclusions: (1) Mr. Crawford was exposed to asbestos insulation at Spartanburg Celanese, (2) Covil supplied it, (3) it was knowable at the time that asbestos was unreasonably dangerous, (4) Mr. Crawford's exposures to asbestos caused his mesothelioma and (5) the Crawford family sustained

considerable damages. No reasonable jury could conclude from this evidence that the elements of Plaintiff's strict liability claim were not met. Plaintiff's motion for JNOV as to his strict liability claim should be granted.

D. Plaintiff is entitled to JNOV on his breach of implied warranty claim.

Claims for breach of implied warranty, like strict liability, require Plaintiff to establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 462-463 (Ct. App. 1997). Plaintiff submits that all of the evidence which supports granting his motion for JNOV as to his negligence and strict liability claims also support granting his motion for JNOV as to his implied warranty claim. No reasonable jury could conclude from the evidence presented that the elements of Plaintiff's breach of implied warranty claim was not met. Plaintiff's motion for JNOV as to his implied warranty claims should be granted.

II. PLAINTIFF IS ENTITLED TO A NEW TRIAL (1) BECAUSE OF PREJUDICIAL MISCONDUCT AND (2) PURSUANT TO THE THIRTEENTH JUROR DOCTRINE

A. Standard for granting a new trial

This Court has authority under South Carolina Rule of Civil Procedure 59, either on motion of a party or on its own initiative, to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." S.C. R. CIV. P. 59.⁴ "[T]he court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness." *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921 (Ct. App. 2008); see *Howard v. State Farm Mut. Auto. Ins. Co.*, 316

⁴ The Court likewise has the power to grant a new trial under South Carolina Rule of Civil Procedure 50.

S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994) (holding the court may order a new trial based upon the erroneous admission of testimony when the record shows error and prejudice). The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008). Granting a new trial is particularly appropriate in cases of cumulative errors, such as the present case. *See Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (Ct. App. 1998) (holding that erroneous limitation of *voir dire*, when combined with improper jury argument by counsel which appealed to economic interests of members on jury, after which jury awarded no damages to plaintiff, justified a new trial). The presence of multiple errors in this case, including insufficient charge and improper jury argument, weighs heavily in favor of a new trial.

B. Statements made by Covil's defense counsel during opening statements and closing arguments were improper and irreparably prejudicial.

The conduct of counsel at trial can warrant the need for a new trial when it "infects" the trial with unfairness thereby making the jury's verdict a denial of due process. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Additionally, while a single point of error raised alone may be insufficient to warrant a new trial, the cumulative effect of multiple errors is enough to require a new trial. *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995) (citing *Myers v. Moffett*, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); *Ryan v. United Parcel Service*, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do)). As our courts have stated, "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is

insufficient to justify reversal.” *Id.* Arguments by counsel which invite the jury to base its verdict on considerations not relevant to the merits of the case are improper. *Hoeffner v. The Citadel*, 311 S.C. 361 (1993).

During the trial of this matter, counsel for Covil made multiple statements to the jury which were not relevant to the issues before it, were improper, and were unduly prejudicial. During opening statement, Covil’s counsel told the jury that Covil was a “defunct, out-of-business corporation with no employees, no business, and no earnings.” (TT 7/16, at 73:24-74:1.) Throughout trial, counsel continued to reinforce that Covil had no assets and, essentially, no money to satisfy a judgment against it. Additionally, during closing argument, Covil’s counsel reiterated to the jury that Covil was no longer in business. Even after admonishment from the Court that statements related to Covil’s business status were improper, counsel continued to inform the jury that Covil had not been in business since 1991.

The statements made by Covil’s counsel were irrelevant to the issues for resolution by the jury. Additionally, the statements regarding Covil’s wealth, assets, and business status violated the *in limine* rulings made on those issues by this Court. Counsel’s only purpose for mentioning the status of Covil’s business was to unfairly prejudice the jury and encourage the jury to return a defense verdict. Counsel’s statements were made during the compensatory damages phase of trial—where a defendant’s assets and wealth are irrelevant. As the United States Supreme Court has recognized “reference to [the defendant’s] assets . . . ha[s] little to do with the actual harm sustained by the [plaintiff].” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427, (2003). These types of statement were repeatedly interjected into trial by Covil’s counsel and served only to encourage the jury to disregard the evidence before it and return a verdict in favor of Covil. Although this Court instructed the jury that its deliberations should not include any

consideration regarding Covil's ability to pay a judgment, that instruction was insufficient to cure the prejudice created by Covil's counsel's improper statements regarding Covil's corporate status.

Further, during closing statement, Covil's counsel informed the jury that one of Plaintiff's witnesses, Dwaine Waters, had a separate lawsuit against Covil. This statement alone entitles Plaintiff to a new trial. Not only did the statement violate this Court's *in limine* Orders prohibiting evidence and mention of lawsuits involving Covil, defense and Plaintiff's counsel, but, in addition to the statements regarding Covil's corporate status, served only to inject issues into the trial of this matter which were wholly improper, irrelevant, and unsupported by any of the evidence that had been placed before the jury. Counsel's statement was also designed to create and incite improper bias against Mr. Waters' credibility as a witness. Appeals to local prejudice are improper and should not be made in the trial of a case. *Norris v. Ferre*, 315 S.C. 179, 182, 432 S.E.2d 491, 493 (1993).

Covil's counsel's statements during opening statements and closing arguments were improper and the instructions from this Court to the jury to disregard the improper statements were insufficient to assure that Plaintiff received a fair trial and insufficient to ensure that the jury examined the evidence before it and rendered a verdict free from passion and/or prejudice. These statements irreparably prejudice the jury against rendering a verdict in Plaintiff's favor, and, as a result, Plaintiff is entitled to a new trial.

III. THIS COURT SHOULD GRANT PLAINTIFF A NEW TRIAL PURSUANT TO THE THIRTEENTH JUROR DOCTRINE.

South Carolina's thirteenth juror doctrine is a well-established standard for granting a new trial. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996). "Under the 'thirteenth juror

doctrine,' a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 506, 579 S.E.2d 293, 306 (2003), quoting, *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715 (Ct. App. 1996) ("Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed."). Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003); see also *Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 1994) (stating the trial court may take its own view of the evidence). Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

"South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002)(quoting, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). In fact, as the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id.* As the South Carolina Supreme Court explained in *Folkens*:

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the ‘thirteenth juror’ vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id.

Here, the jury’s verdict denying Plaintiff any recovery is clearly against the preponderance of the evidence. As discussed above, Plaintiff presented more than sufficient evidence on every element of his causes of action. Covil failed to present the necessary evidence to support any of its affirmative defenses or to rebut the essential elements of Plaintiff’s claims. The defense verdict rendered in this case is clearly the result of insufficient instructions to the jury and of prejudice against Plaintiff cultivated by Covil. Upon weighing the evidence in this case, this Court, acting in its capacity as the thirteenth juror, should rule that the verdict is against the preponderance of the evidence and grant a new trial so that justice may prevail.

IV. THIS COURT SHOULD AWARD DAMAGES IN CONJUNCTION WITH ORDERING JNOV AND/OR A NEW TRIAL.

Appellate courts in South Carolina have acknowledged that “[t]he trial court is vested with considerable discretion over the amount of a damages award[.]” *Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 446, 803 S.E.2d 475, 487 (Ct. App. 2017). “The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate . . . and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption of some other improper motives.” *Graham v. Town of Latta, South Carolina*, 417 S.C. 164, 183, 789 S.E.2d 71, 80 (Ct. App. 2016). *See also Carson v. CSX Transp., Inc.*, 400 S.C. 221, 241, 734 S.E.2d 148, 158-59 (2012) (holding that an award of zero damages was legally incorrect and thus warranted a new trial).⁵

⁵ In several other cases, the Court of Appeals has held such verdicts inadequate. *See Watson v. Town of Pendleton*, 294 S.C. 155, 363 S.E.2d 234 (Ct. App. 1987) (pointing out 3 ways trial court may cure

When the verdict is so grossly inadequate, “it become the duty of the trial judge . . . to set aside the verdict absolutely.” *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993).

Under this case law, it is clear that the zero verdict awarded by the jury in this matter is inadequate and that Mr. Crawford was entitled to recover for his losses. Jerry Crawford was entitled to damages in four categories: medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. The jury was also instructed that future damages should be awarded in accordance with the evidence presented. (TT 7/19, at 543:1-544:6.) The jury was also instructed that it could consider Mr. Crawford’s life expectancy which was a little more than eleven (11) years given his age of 73 at the time of trial. (TT 7/19, at 544:1-3.)

Plaintiff presented sufficient evidence of Jerry Crawford’s damages. The parties stipulated that Jerry Crawford’s “reasonable and necessary medical bills related to his treatment of mesothelioma total[ed] \$567,937.64[.]” (TT 7/17, at 142:13-17.) Plaintiff presented evidence sufficient for the jury to determine Jerry Crawford’s pain and suffering. Mr. Crawford’s daughter, Patty, testified that her father could no longer do things with his wife Evelyn once he got sick. She also testified that her father had 95% of the lining of his lung removed—a procedure that Dr. Maddox described as painful. Additionally, Dr. Maddox testified that the medical procedures which are necessary to treat Mr. Crawford’s mesothelioma, like repeatedly removing fluid from his lungs, would be painful. Likewise, Dr. Maddox testified to the various side effects of the chemotherapy given to treat Mr. Crawford’s cancer.

verdict of zero damages); *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990) (holding that where liability is admitted, plaintiff is entitled to award of damages unless proof completely fails); *Haskins v. Fairfield Elec. Coop.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984) (trial court abused discretion in refusing to award wife new trial on damages on grounds of inadequacy where jury found for plaintiff but awarded no damages), *overruled in part on other grounds*, *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

As to future medical and future pain and suffering, Dr. Maddox informed the jury that Mr. Crawford's death from mesothelioma, which is a certainty, would be painful and unpleasant. He testified that while morphine would reduce air hunger or the feeling of smothering, it would also reduce Mr. Crawford's impulse to breathe.

Consequently, a damages award is required by the evidence presented by Jerry Crawford, his family, and medical experts during trial regarding his physical suffering and emotional trauma in connection with his mesothelioma diagnosis. Plaintiff asked the jury for \$8 million and submits that is the appropriate measure of Jerry Crawford's damages.

An \$8 million damages award would be consistent with damages awards in comparable cases. See *Kapuschinsky v. U.S.*, 259 F. Supp. 1, 8 (D.S.C. 1966); *Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976). One of the most relevant verdicts from this state is *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas), attached hereto as **Ex. G**, a mesothelioma case tried before the Honorable D. Garrison Hill in Richland County in 2013. The plaintiff in that case, Lloyd Garvin, was 74 years old at the time of trial, with a life expectancy of almost 11 years. (*Id.* at p. 37.) There were a number of facts that made his damages less compelling than Jerry Crawford's, however. Unlike Mr. Crawford, Garvin did not enjoy good health prior to his diagnosis. (*Id.*) Additionally, Garvin remained cancer-free after surgery to remove the tumor, and because he had a very rare type of mesothelioma the evidence was that there was a 50% chance that the mesothelioma would never return and he would not have any further medical expenses. (*Id.* at 38.) His past medical expenses were only \$149,000, and any possible future medical expenses were not expected to exceed \$150,000 to \$300,000. (*Id.*) Judge Hill noted that Mr. Garvin's total economic damages were no more than \$300,000 to \$450,000. (*Id.* at p. 39.) Despite these facts, the jury awarded Garvin \$10 million in compensatory damages

and his wife \$1 million in loss of consortium damages.⁶

Here, this Court is well within its authority to award Mr. Crawford damages for his past and future medical expenses and pain and suffering—two elements of damages that were unchallenged by Covil. This Court has previously examined that damages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million. See **Ex. I**, *Order Denying Defendants' Post-Trial Motions and Granting Plaintiffs' Motion for New Trial Nisi Additur*, filed in *Jolly v. General Electric Company, et al.*, C/A No. 2016-CP-42-1592, Court of Common Pleas, County of Spartanburg, 12/15/17, pgs. 6-7. The court's analysis of damages awards in similar cases as reviewed when granting additur in *Jolly*, lends further support to a determination from this Court that the jury's zero-dollar award to Jerry Crawford was inadequate to compensate him for his losses.

The South Carolina Supreme Court has held that the goal of compensatory damages is “to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.” *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). The jury's zero-dollar verdict in this case is insufficient to restore the Mr. Crawford to the same position he was in before he was diagnosed with mesothelioma. While no amount of money can accomplish such a restoration, the inadequacy of the jury's award should be remedied by this Court through JNOV and/or a new trial.

CONCLUSION

For the reasons set forth herein, Plaintiff has demonstrated that only one reasonable inference can be had from the record that Covil was and is liable to the Plaintiff for the compensatory damages sought, that substantial prejudicial error in this case requires a new trial,

⁶ Judge Hill granted a new trial *nisi remittur* and reduced Mr. Garvin's award to \$1.5 million (the loss of consortium award was not challenged). (*Id.* at 38-39.)

and that the clear preponderance of the evidence also warrants a new trial.

WHEREFORE PREMISES CONSIDERED, Plaintiff respectfully requests that this Court:

1. Grant Plaintiff's JNOV motion and enter a finding of liability on all counts for Plaintiff and award compensatory damages;
2. As alternative grounds for relief, also grant Plaintiff's Motion for New Trial;
3. And grant any and all such other relief to which Plaintiff may be justly entitled.

Respectfully submitted,

s/ Theile B. McVey

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on counsel for all parties via Certified U.S. Mail Return Receipt, U.S. Mail Standard First Class, and/or electronic mail this 25th day of September 2018.

s/ Theile B. McVey
Theile B. McVey

Plaintiffs Memorandum in Support of Motion for JNOV

Exhibits A through D

Rough Draft of the trial transcript dated July 16 through 19, 2018

Removed with consent of counsel to avoid duplication

(Official Trial Transcript has been designated separately)

#

EXHIBIT E

Crawford Vs

Bowyer, Bruce (Vol. 01) - 06/27/2018

1 CLIP (RUNNING 00:23:52.114)

 out of the way, we can get going. Good morning, sir. ...

BB-0627-0000911

39 SEGMENTS (RUNNING 00:23:52.114)



1. PAGE 9:11 TO 10:03 (RUNNING 00:00:38.589)

11 out of the way, we can get going. Good morning, sir.
 12 A. Good morning.
 13 Q. What is your name?
 14 A. Bruce Bowyer.
 15 Q. Mr. Bowyer, have you been deposed before?
 16 A. Yes, I have.
 17 Q. How many times?
 18 A. I'm just guessing, 10 or 12.
 19 Q. And how young a man are you today, sir?
 20 A. I'm 71 years young.
 21 Q. Okay. You said that those 10 or 12 times
 22 you have been deposed, have all of those been on
 23 behalf of CNA Holdings?
 24 A. Yes, in one form -- corporate form or
 25 another, yes.
 00010:01 Q. Okay. And when I say CNA Holdings, to any
 02 jury that may be watching this video, is that the
 03 same thing, in this instance, as Hoechst Celanese?

2. PAGE 10:05 TO 10:05 (RUNNING 00:00:00.591)

05 THE WITNESS: Yes.

3. PAGE 10:07 TO 12:08 (RUNNING 00:02:00.206)

07 Q. All right, sir. I understand you're a
 08 little under the weather this morning, so if you need
 09 to take a break at any point, just let me know, not a
 10 problem.
 11 A. I'm actually getting better, so --
 12 Q. Okay.
 13 A. -- hopefully won't be so bad.
 14 Q. I hope to not keep you here too long. I
 15 think I have read all of your previous transcripts
 16 enough to have them memorized, so I don't -- I don't
 17 want to re-ask you a lot of questions that you have
 18 been through. That being said, I want to cover --
 19 recover some ground to some extent to kind of set the
 20 stage --
 21 A. Sure.
 22 Q. -- for today.
 23 Before I do that, let me ask you, sir: Why
 24 do you believe, in your own words, that you have been
 25 designated as the corporate representative for CNA
 00011:01 Holdings? Talk to me.
 02 A. From my personal knowledge, as well as
 03 document review.
 04 Q. What personal knowledge is that?
 05 A. Well, I worked for the corporation for, let
 06 me think, I have to remember, 28 years.
 07 Q. And did you ever work at the Spartanburg
 08 facility?
 09 A. Yes, I did.
 10 Q. When did you work at Spartanburg?
 11 A. From 1990 to the end of '01.
 12 Q. Prior to 1990, did you ever have occasion to

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13 visit Spartanburg?
 14 A. Yes.
 15 Q. And to be clear, the facility at
 16 Spartanburg, not the city.
 17 A. Yes, yes, I understood that.
 18 Q. All right. Throughout the deposition today,
 19 if I refer to just Spartanburg, do you understand I'm
 20 meaning the facility and not the city of Spartanburg?
 21 A. As am I.
 22 Q. All right. When did you visit Spartanburg?
 23 A. Well, I was in the Charlotte office, which
 24 was the headquarters for the Fiber Division from 1984
 25 to 1990, and so I had industrial hygiene oversight
 00012:01 for that facility, as well as others.
 02 Q. All right. And you are an industrial
 03 hygienist?
 04 A. I retired my certification. I used to be
 05 certified as a -- but I am no longer.
 06 Q. Okay. What period of time were you
 07 certified?
 08 A. From 1983 to probably 2014 or '15.

4. PAGE 12:18 TO 12:20 (RUNNING 00:00:06.297)

18 something I forgot. You understand that you are here
 19 today, sir, on behalf of CNA Holdings, Celanese?
 20 A. Yes, I do.

5. PAGE 17:13 TO 17:21 (RUNNING 00:00:16.248)

13 Q. First is: Are you saying that Poly 1, as he
 14 described it, is Batch Poly?
 15 A. That's correct.
 16 Q. All right. And Poly 2, as he described it,
 17 is Conti Poly?
 18 A. That's correct.
 19 Q. And Conti Poly, C-O-N-T-I, that stands for
 20 continuous polymerization?
 21 A. That's correct.

6. PAGE 69:20 TO 70:02 (RUNNING 00:00:19.652)

20 Q. All right. Sir, I will represent to you
 21 that I pulled this off of the South Carolina
 22 Department of Health and Environmental Control
 23 website late last night. Would you be able to tell
 24 me what we're looking at?
 25 A. Can you give me a minute? It's --
 00070:01 Q. Sure, take your time.
 02 A. I am trying to identify -- yeah, this looks

7. PAGE 70:03 TO 70:23 (RUNNING 00:01:06.088)

03 like the well locations, sampling locations, at the
 04 Spartanburg site; Spartanburg meaning the Auriga --
 05 actually, there's a couple of different companies on
 06 this site, but what used to be the Celanese site
 07 entirely.
 08 Q. Okay. And so I understand that there are
 09 marks here for other purposes.
 10 A. Yes.
 11 Q. The well locations and things.
 12 The map itself, the site itself, what are we
 13 looking at?
 14 A. Well, it's bordered by Interstate 85, and
 15 then several other roads I don't remember the name
 16 of. It also includes -- I don't know if it's still
 17 Johns Manville, but they -- when Celanese sold the
 18 site, Johns Manville purchased part of it, and

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19 another company purchased another part of it, and
 20 there was another part that was sold to another
 21 company, so there were actually three different
 22 owners on this same site. Now, they're physically
 23 separated, so it wasn't like they shared space.

8. PAGE 70:24 TO 72:02 (RUNNING 00:01:32.412)

24 Q. Okay. On part or all of this map, sir, is
 25 what was formerly known as Hoechst Celanese in
 00071:01 Spartanburg?
 02 A. Yes. All of this -- all of Hoechst
 03 Celanese, I believe, is on this site, is on this map.
 04 Q. Do you believe this to be a fair and
 05 accurate representation of Hoechst Celanese?
 06 A. Yes, at a point in time, not today.
 07 Q. What point in time?
 08 A. Well, the mid to late '90s when it was --
 09 when Celanese sold the site to, I think, three
 10 different other parties.
 11 Q. Okay. And would you be able to tell me,
 12 sir, which buildings were or not there in the early
 13 to mid '70s?
 14 A. To some extent, yes. I mean, some of these
 15 buildings were there that weren't there later; they
 16 were removed, demolished. So some of the
 17 representations on here are not -- are things that
 18 aren't there now. But, yes, I could give you a
 19 fairly good picture of it.
 20 Q. Okay. What I would like to do, and I
 21 attempt fate by trying to print this again, but is
 22 that Exhibit 4, is that what we marked it as?
 23 A. Yes.
 24 Q. So I would like to mark Exhibit 5 as another
 25 copy of this just so we have a clean copy, and what I
 00072:01 will do, sir -- do you have a pen with you?
 02 A. Yes.

9. PAGE 75:05 TO 76:04 (RUNNING 00:00:45.713)

05 Q. All right, sir, we're back. And if the
 06 members of jury watching this wonder what in the heck
 07 we're doing, you have my laptop in front of you; is
 08 that right?
 09 A. That's correct.
 10 Q. And you have got the same map on that screen
 11 as what is in Exhibit 4; is that right?
 12 A. Yes.
 13 Q. Okay. Do you have the laptop there because
 14 you can see a little bit better?
 15 A. Yes, I can --
 16 Q. Okay.
 17 A. -- actually read some.
 18 Q. All right. So you have a red pen and a blue
 19 pen there in front of you. I want to go through and
 20 kind of see if you can outline some of the site
 21 specific plants -- or not plants but buildings there
 22 before you on Exhibit 4. Okay?
 23 A. Yes.
 24 Q. So first, we did confirm that what we're
 25 looking at on Exhibit 4 is Hoechst Celanese?
 00076:01 A. That's correct.
 02 Q. All right. Would you be able to tell me,
 03 just circle in red, where the front gate is?
 04 A. Front gate? Right there. So that would be

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10. PAGE 76:05 TO 76:11 (RUNNING 00:00:22.221)

05 right there.
 06 Q. All right. And just so we can try to keep
 07 this in some sort of order, can you put a little red
 08 "1" next to that? Thank you.
 09 All right. Now, we have heard about a
 10 couple of different buildings in this case. Where is
 11 the Batch Poly building?

11. PAGE 76:12 TO 77:16 (RUNNING 00:01:22.267)

12 A. It's right along -- Batch Poly would be
 13 somewhere right along in here, although -- and it
 14 says this drawing is not to scale, so it's not exact.
 15 So it would be -- you want me to do this in red?
 16 Q. Please. Put a circle around it.
 17 A. I'm going to draw a square, is that -- or a
 18 rectangle.
 19 Q. That's fine.
 20 A. Because it really is rectangular. And
 21 again, since it's not to scale, I'm just estimating.
 22 Q. Would you be able to put a red "2" next to
 23 that?
 24 A. Yes.
 25 Q. Where would the Continuous Poly building be?
 00077:01 A. It would be right along -- do you want me to
 02 do it in red?
 03 Q. Please.
 04 A. Okay. And then put a "3" by that?
 05 Q. Please. And so I understand, the Batch
 06 Poly, which you have boxed with a red "2," that's the
 07 same as Poly A?
 08 A. Poly 1.
 09 Q. Poly 1. I'm sorry.
 10 A. He may have referred to it as Poly A, but I
 11 think he -- I remember Poly 1, but Batch Poly.
 12 Q. And the Continuous Poly is Poly 2?
 13 A. Poly 2, yes.
 14 Q. What about the warehouse where Mr. Crawford
 15 worked?
 16 A. That would have been probably right in here.

12. PAGE 77:17 TO 78:14 (RUNNING 00:01:06.139)

17 Do you want me to do that?
 18 Q. Please.
 19 A. I'm not sure exactly what that building is,
 20 because -- and I messed up my "2." That's a "4"?
 21 Q. Yes.
 22 A. Okay.
 23 Q. So to be clear, because these buildings are
 24 kind of close to each other, the Warehouse is boxed
 25 with a "4" to the right, the Batch Poly is boxed with
 00078:01 a "2" to the right, and the "3" -- I'm sorry, the
 02 Continuous Poly is boxed with a "3" on top of it; is
 03 that correct?
 04 A. That's correct.
 05 Q. What about the Staple buildings, where are
 06 those?
 07 A. Staple is starting back here, and including
 08 the Warehouse, all the way up to here.
 09 Q. Let me ask you: The Staple, is it one
 10 building or two buildings?
 11 A. Staple A and B is essentially one building.
 12 I mean, there's walls internally, but it's not to
 13 separate Staple A from Staple B.
 14 Q. Will you please box or circle the Staple

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13. PAGE 78:15 TO 78:19 (RUNNING 00:00:21.077)

15 building.
 16 A. Let's see. And this will include the
 17 Warehouse for Staple. And put a "4" here?
 18 Q. A "5."
 19 A. Right, "5". Thank you.

14. PAGE 79:25 TO 81:07 (RUNNING 00:01:43.386)

25 Q. Okay. Thank you for doing that, sir.
 00080:01 A. Sure.
 02 Q. I have one kind of clarification. The box
 03 number "4" was the Warehouse. What kind of warehouse
 04 was that?
 05 A. That was the Chip Warehouse, which is
 06 essentially a bunch of silos or tanks that the chip
 07 is stored in before it's either processed somewhere
 08 else or shipped off site to a customer.
 09 Q. Is there a different poly warehouse besides
 10 what we boxed number "4"?
 11 A. There are different storage areas. Poly was
 12 the chip, as we called it, was a raw material for
 13 staple. So it would go into a -- the chip that was
 14 going to be used in the staple area would go into a
 15 silo designated for staple. It would not go into the
 16 Chip Warehouse.
 17 Q. Okay. And again, just to -- I know you and
 18 I, at least I have a basic understanding, you
 19 probably have a greater understanding. The jury, who
 20 is not oriented to this, let me just ask you: Staple
 21 and chip are kind of the two end products; is that
 22 fair?
 23 A. What it indicates of staple, chip is an
 24 intermediate product for staple. But, yes, the chip
 25 can be used in making plastic bottles, PET bottles
 00081:01 like Coke or Pepsi or whatever it comes in.
 02 Q. All right. So I think what might be good is
 03 to kind of go back and start a little from the
 04 beginning. What was the purpose of this plant?
 05 A. To make polyester.
 06 Q. And what was that polyester used for or in?
 07 A. In beverage soda bottles. In production of

15. PAGE 81:08 TO 83:05 (RUNNING 00:02:46.306)

08 fiber. I mean, there were other uses. Maybe some of
 09 the polymer may have been used in film. I really
 10 don't know all of them, but --
 11 Q. Different uses?
 12 A. Different uses. None of them -- none of the
 13 product that was made at this site was a consumer
 14 product.
 15 Q. Okay. Would you be able to give the jury
 16 kind of a brief run-through understanding of the
 17 process in which that the poly went through the plant
 18 or the manufacturing process of this plant?
 19 A. Of the polyester?
 20 Q. Yes, sir.
 21 A. Well, there is two. One is Batch Poly, and
 22 the other one is Conti Poly. The chemical process is
 23 very similar, it's just that in Batch, it's like you
 24 do one cup of coffee at a time, that's a batch.
 25 So you put the chemicals in a tank, it goes
 00082:01 through some period of time and some heat or
 02 whatever, maybe some additives put in. It's held in
 03 that tank for awhile, it's transferred to another
 04 tank, and other things happen there -- more heat,

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05 less pressure, sometimes it's under a vacuum to
 06 remove the solvents.
 07 And then at some point, and I don't remember
 08 how many vessels there are in the batch process, at
 09 some point, the polymer, it's now a plastic, molten
 10 plastic, is discharged into the process of making the
 11 little chips, or it's like a die except it's smaller.
 12 That's the batch process.
 13 And then that product would be transferred
 14 to a silo either to be transferred to Staple to make
 15 staple or it would be put into a silo for shipping to
 16 an off-site customer.
 17 Q. All right. And how is that different from
 18 the continuous process?
 19 A. Well, the continuous process, you're feeding
 20 the chemicals in the front end, it goes through
 21 several, if I remember right, four different stages,
 22 or vessels, where it -- the length of the polymer is
 23 gradually increased through those vessels to where it
 24 starts off as basically two raw materials, and it
 25 forms into -- it's -- the chemical name is
 00083:01 polyethylene terephthalate or polyester. And it
 02 comes out of the final vessels, goes -- comes out of
 03 a die, different than the chip die, but it's a die
 04 plate that has holes in it and it comes out in
 05 strings that are cooled and then put into a cutter,

16. PAGE 83:06 TO 84:02 (RUNNING 00:01:07.249)

06 into dies. So it's now a chip.
 07 Q. Okay. And we have been using the terms chip
 08 and staple. I don't think we have actually defined
 09 those terms. When you say "chip," what are you
 10 referring to?
 11 A. It's the little die that's the plastic, the
 12 polyester plastic, that's ready to be made into
 13 something else. Staple is a fiber. When it's
 14 finally processed, it looks very much like cotton,
 15 and in fact, they use balers to bale the staple
 16 fiber, and it's sold to customers that process it,
 17 either mix it with cotton as a blend or even use it
 18 just as polyester.
 19 Q. Okay.
 20 A. The old leisure suits.
 21 Q. In the -- and if it makes sense to break it
 22 up, let me know. In both the batch and continuous
 23 process, is steam needed to make that go?
 24 A. Well, heat is needed, yes.
 25 Q. Okay. And where did you get the heat from?
 00084:01 A. From the boilers, both Dowtherm and steam
 02 boilers.

17. PAGE 84:23 TO 85:20 (RUNNING 00:01:00.843)

23 Q. Understood. And you said Dowtherm?
 24 A. Yes.
 25 Q. How is Dowtherm different than the boiler?
 00085:01 A. Dow -- well, they have Dowtherm boilers.
 02 Okay?
 03 Q. Understood.
 04 A. But the medium -- steam is water. It's
 05 heated and becomes a vapor. Dowtherm is a similar
 06 kind of process except they can get much higher
 07 temperatures with Dowtherm at much lower pressures.
 08 So the mechanical integrity -- or not the integrity
 09 but the design of the systems for Dowtherm don't have
 10 to be anywhere near as robust as they would be if

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11 they tried to use steam to do the same thing.
 12 Q. Whether it's a traditional steam boiler or a
 13 Dowtherm boiler, both are operating at high heat; is
 14 that right?
 15 A. Dowtherm is higher than steam, but, yes.
 16 Q. Would there be piping associated with the
 17 traditional steam boilers and the Dowtherm boilers?
 18 A. Yes.
 19 Q. And would that piping need to be insulated?
 20 A. Yes.

18. PAGE 86:03 TO 86:13 (RUNNING 00:00:26.341)

03 Q. Did you ever use amosite insulation?
 04 A. I -- I know the term amosite. I don't know
 05 if the insulation we used contained amosite or not.
 06 Q. Would it surprise you, sir, if the specs in
 07 this case produced, I think by Celanese and at least
 08 by Daniel's, show that amosite was spec'd?
 09 A. Yes, I do remember that now that you
 10 reminded me.
 11 Q. Okay. That doesn't surprise you?
 12 A. No, it doesn't. That was an industry
 13 standard.

19. PAGE 86:18 TO 86:22 (RUNNING 00:00:14.748)

18 Q. So Poly 1 is the same as the Batch Poly?
 19 A. That's correct.
 20 Q. Okay. And that is number --
 21 A. "2".
 22 Q. -- "2" on our chart.

20. PAGE 86:23 TO 87:13 (RUNNING 00:00:41.674)

23 Poly 1, the Batch Poly building, that's
 24 where the Batch Poly was made?
 25 A. Right.
 00087:01 Q. Do you know when, sir, Poly 1 was built?
 02 A. Late '60s is when it started. I mean, it
 03 was a process; it wasn't that they built them all at
 04 the same time, and I don't know the chronology of
 05 when the first one was built and when the last one
 06 was built.
 07 Q. Do you know, sir, if Poly 1 was part of the
 08 original construction of the plant?
 09 A. Yes.
 10 Q. Okay. So if the plant was built around
 11 1966, does that sound about right when Poly 1 would
 12 be built?
 13 A. Excuse me. Yes.

21. PAGE 87:14 TO 87:17 (RUNNING 00:00:16.499)

14 Q. Did Poly 1 require steam piping?
 15 A. Yes.
 16 Q. Was that steam piping insulated?
 17 A. Yes.

22. PAGE 87:18 TO 87:21 (RUNNING 00:00:08.819)

18 Q. Would that steam piping have been insulated
 19 when the plant was originally built or when the
 20 building was originally built?
 21 A. It would have been insulated before startup.

23. PAGE 87:22 TO 87:24 (RUNNING 00:00:08.250)

22 Q. Do you know who built that building?
 23 A. It was Daniel's. Daniel's was the general

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24 contractor on that building.

24. PAGE 89:14 TO 89:23 (RUNNING 00:00:28.421)

14 Q. Do you know how much piping there was in
15 Poly 1 that needed to be insulated?

16 A. Well, all the Dowtherm and steam lines.
17 The, like, potable water lines and things like that
18 would not have to be.

19 Q. Would it be fair to say, sir, that there
20 were, in Poly 1, miles of steam and Dowtherm piping
21 that needed to be insulated?

22 A. There was a lot. I don't know how to
23 quantify it. I mean, I can't even estimate the size

25. PAGE 90:17 TO 90:25 (RUNNING 00:00:31.103)

17 Q. Okay. All right. I want to ask you about
18 Poly 2 now. And Poly 2 is the same thing as the
19 Continuous Poly?

20 A. That's correct.

21 Q. And it's the same as number "3" on our map;
22 is that right?

23 A. Correct. Yeah, I just say approximately,
24 because that drawing is not to scale, so that's
25 generally correct.

26. PAGE 91:04 TO 91:12 (RUNNING 00:00:29.123)

04 Q. Do you know, sir, when Poly 2 was built?

05 A. I believe the original contract for CP1
06 started in '71, and then they kind of progressed one
07 after the other from then on. I think CP2 was like
08 '73 when the contract for it was signed, if I
09 remember right.

10 Q. Would it be fair to say, sir, that it was
11 sometime in the early '70s?

12 A. That's when CP1 started, yes.

27. PAGE 91:13 TO 91:15 (RUNNING 00:00:13.693)

13 Q. Okay. Sir, did Poly 2 need steam piping?

14 A. Yes.

15 Q. Was the steam piping in Poly 2 insulated?

28. PAGE 91:16 TO 91:23 (RUNNING 00:00:21.359)

16 A. Yes.

17 Q. Do you know if the steam piping associated
18 with Poly 2 that was insulated, was that done before
19 startup?

20 A. It would be insulated. The line would be
21 insulated before they started up the line, yes.

22 Q. Do you know who built Poly 2?

23 A. Daniel's. At least in the initial phases.

29. PAGE 93:09 TO 93:15 (RUNNING 00:00:15.564)

09 Q. And was there a lot of, similar to Poly 1, a
10 lot of steam piping that needed to be insulated?

11 A. There was a lot of piping that needed to be
12 insulated, yes.

13 Q. And when you say "piping," are we talking
14 about steam piping?

15 A. Steam, Dowtherm, chilled water. There may

30. PAGE 93:19 TO 94:02 (RUNNING 00:00:12.110)

19 Q. So there were a lot -- for both Poly 1 and
20 Poly 2, there were a lot of things that needed to be

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21 insulated?
 22 A. Correct.
 23 Q. For both of them, some of which was steam
 24 piping?
 25 A. Yes.
 00094:01 Q. And some of which was the Dowtherm piping?
 02 A. Yes.

31. PAGE 159:15 TO 159:22 (RUNNING 00:00:27.997)

15 Q. This is Bates Crawford 7959. What are we
 16 looking at here, sir?
 17 A. It's a letter to Charles Powell, who was an
 18 environmental engineer. It's dated November 18,
 19 1985, and it talks about 600 linear feet of asbestos
 20 on a back haul line from Batch Poly area Spartanburg,
 21 and it talks about the intent to remove asbestos
 22 materials.

32. PAGE 169:13 TO 169:16 (RUNNING 00:00:04.143)

13 All right, sir. I'm going to hand you
 14 what's being marked as Exhibit 13.
 15 (Exhibit No. 13 was marked for
 16 identification.)

33. PAGE 169:17 TO 170:09 (RUNNING 00:00:45.860)

17 Q. And this is Bates Crawford 18973.
 18 A. Uh-huh. Yes.
 19 Q. All right, sir. If I am understanding this
 20 document correctly, it appears to be a Plant Survey,
 21 1995, of the Spartanburg Site, up at the top.
 22 A. Yeah. I'm sorry, that's what it says.
 23 Yeah, I thought you were wanting me to read it first.
 24 Q. Is that true?
 25 A. Yes, that's what it says.
 00170:01 Q. Okay. Any reason to dispute that?
 02 A. No.
 03 Q. Okay. And it goes and it lists out
 04 different areas that were surveyed, the amount of
 05 asbestos-containing insulation that was there, either
 06 linear or square feet and the percentage of asbestos.
 07 A. Right.
 08 Q. Is that right?
 09 A. Well, it was the percent -- that's the

34. PAGE 170:10 TO 170:11 (RUNNING 00:00:04.710)

10 percent of the insulation in that area that contains
 11 asbestos.

35. PAGE 170:24 TO 171:05 (RUNNING 00:00:14.198)

24 Q. Fair enough. So if they surveyed, right,
 25 100 square feet and it says 50 percent asbestos, then
 00171:01 50 square feet of that is asbestos containing?
 02 A. Right.
 03 Q. Okay. All right. So the areas, the fourth
 04 one down, is Batch Poly?
 05 A. Right.

36. PAGE 171:18 TO 171:25 (RUNNING 00:00:15.960)

18 Q. So it's 17,353 lineal feet and 12,763 square
 19 feet?
 20 A. Right.
 21 Q. And of that, 60 percent was asbestos
 22 containing?
 23 A. Right.

Crawford Vs

24 Q. Do you see down at the bottom, Conti Poly,
25 bottom of that first section?

37. PAGE 173:04 TO 173:08 (RUNNING 00:00:21.207)

04 Q. Okay. So let me ask it this way: For Poly
05 lines 1 through 6, it appears, were surveyed?
06 A. Yes.
07 Q. Okay. And the total survey of 1 through 6
08 equated to 77,749 lineal feet and 24,130 square feet?

38. PAGE 173:09 TO 173:12 (RUNNING 00:00:06.046)

09 A. Right.
10 Q. Okay. On lines 1 and 2, 90 percent was
11 asbestos containing?
12 A. Right.

39. PAGE 174:12 TO 174:22 (RUNNING 00:00:29.005)

12 Q. All right. So what we can tell from the
13 document, sir, right, is that, regardless of what
14 line it was, that the almost 78,000 lineal feet and
15 just over 24,000 area feet was sampled -- surveyed?
16 A. Surveyed, which doesn't mean it was sampled.
17 Q. It was surveyed, right?
18 A. (Witness nodded head.)
19 Q. Okay. And that's broken down, 1 and 2, it
20 says 90 percent; 3 and 4, it says 50 percent; and 5
21 and 6 says 20 percent cloth only.
22 A. Right.

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1 CLIP (RUNNING 00:07:22.594)

 All right. How are you, sir? ...

DB-0619-0000614

17 SEGMENTS (RUNNING 00:07:22.594)



1. PAGE 6:14 TO 7:03 (RUNNING 00:00:18.353)

14 Q. All right. How are you, sir?
15 A. I'm fine. How are you?
16 Q. Good. Good. What's your name?
17 A. I'm Don Buck.
18 Q. All right. Mr. Buck, have you been
19 deposed before, sir?
20 A. Yes.
21 Q. How many times?
22 A. A dozen, maybe. Somewhere in that
23 neighborhood.
24 Q. Approximately a dozen times?
25 A. Yes.
00007:01 Q. And were all those times asbestos
02 litigation cases?
03 A. Yes.

2. PAGE 8:11 TO 8:19 (RUNNING 00:00:09.948)

11 Q. Okay. Have you testified at trial
12 before, sir?
13 A. Yes.
14 Q. How many times have you testified at
15 trial?
16 A. Twice.

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17 Q. Okay. And were both of those times as
18 a corporate representative for Daniel?
19 A. Yes.

3. PAGE 9:03 TO 10:01 (RUNNING 00:01:08.284)

03 Q. All right. Sir, I know you you've
04 testified before, and I've read a lot of your prior
05 transcripts --
06 A. Okay.
07 Q. -- but can you just give me a thumbnail
08 of your educational background and your work
09 history and a little bit about you.

10 A. I graduated from Vanderbilt with a
11 civil engineering degree in 1966. I went in the
12 army from '66 to '68. Served a tour in Vietnam;
13 came back from there. Went to work for Ebasco
14 Services out of New York City building power plants
15 and then worked for them for about two years -- I'm
16 sorry for my voice. I don't -- I don't know -- my
17 sinuses or what, but I apologize -- worked for them
18 for two years.

19 Then I was -- ended up in Kansas City
20 and worked for a small local firm there called
21 Aztech. Worked for them for a year and a half and
22 moved to Wilmington, North Carolina and went to
23 work for Algernon Blair until '74.

24 Then in '74 I went to work for Daniel
25 Construction Company. And I worked for them until
00010:01 2000 when I retired.

4. PAGE 11:14 TO 11:17 (RUNNING 00:00:04.458)

14 Q. All right. You do understand today
15 that you are the corporate representative for
16 Daniel?

17 A. Yes, I do.

5. PAGE 13:02 TO 13:06 (RUNNING 00:00:17.275)

02 Q. What documents did you review?

03 A. I reviewed contracts. I reviewed the
04 depositions -- Mr. Crawford's deposition. I
05 reviewed correspondence, work orders, purchase
06 orders, engineering documents, drawings.

6. PAGE 13:07 TO 14:08 (RUNNING 00:00:40.935)

07 MR. CHAPMAN: Okay. All right. For
08 the record, cut all this part out of the video;
09 there's a break here.

10 BY MR. CHAPMAN:

11 Q. Okay. I want to go through some of
12 that list. When you say contracts, what contracts
13 do you mean?

14 A. The contracts between Hystron and
15 Hoechst and Daniel.

16 Q. Do you recall how many contracts there
17 were?

18 A. Oh, gosh, there's probably over a
19 dozen.

20 Q. And for members of the jury who may or
21 may not be watching this video, when you say
22 Hystron, is Hystron known as any other entity
23 that --

24 A. Well, I -- yeah. Hystron was made up
25 of Hoechst Fibers, Uhde, and Hercules. They
00014:01 formed Hystron, okay?

02 Q. And when you say Hystron, are we

Crawford Vs

03 talking about the Celeanese Hoechst plant in
04 Spartanburg?

05 A. Yes, we are.

06 Q. Okay.

07 A. Same thing.

08 Q. All right.

7. PAGE 14:12 TO 14:24 (RUNNING 00:00:33.729)

12 Q. Do you recall the years of the
13 contracts that you reviewed, sir?

14 A. Yeah. We started there in 1966, and I
15 think we were in there until 1997.

16 Q. The contracts in 1966 -- were those the
17 contracts for the original construction of the
18 Spartanburg facility?

19 A. I believe it was.

20 Q. Okay. Do you recall, sir, if any of
21 the other contracts were for construction at the
22 Spartanburg facility?

23 A. Oh, yeah. They were contracts that
24 were renewed every so often for construction.

8. PAGE 16:20 TO 16:24 (RUNNING 00:00:08.622)

20 Was Daniel Construction at the
21 Spartanburg facility between 1970 and 1974?

22 A. Oh, yeah.

23 Q. Every year?

24 A. Every year.

9. PAGE 94:09 TO 94:17 (RUNNING 00:00:24.601)

09 Q. All right. So they're probably a
10 couple of duplications; right now there are 15 of
11 them. Each one has a cover page that says Hoechst
12 Fibers Incorporated, polyester manufacturing
13 facility Spartanburg, South Carolina. Construction
14 progress report for month of -- and then each one
15 has a different month. They don't appear to be
16 necessarily in order, but they all appear to be
17 from 1973.

10. PAGE 94:18 TO 94:21 (RUNNING 00:00:08.460)

18 Okay. Let's see if I can find one of
19 the duplicates -- that would make things easy.
20 Once we get them, I would like to mark these
21 collectively as Exhibit 6.

11. PAGE 95:09 TO 96:05 (RUNNING 00:01:12.566)

09 Q. Just so we can get kind of an
10 understanding of what these are and what kind of
11 information this holds.

12 A. Okay.

13 Q. Can you just describe for me what these
14 -- what is this document?

15 A. Well, Daniel -- all Daniel projects
16 turned in a monthly progress report to the home
17 office. And they were basically this format. The
18 -- section one is construction activity and general
19 progress. It goes through the different work.
20 Section two is engineering projects,
21 and it starts on page 7. It talks about the
22 drawings and information needed and this type of
23 thing.

24 Page 9 through 13 is the project -- the
25 status of the project schedule. Okay. And then 14

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00096:01 and 15 -- let me get to here -- are personnel and
 02 main power on the job. And you can see that on
 03 this -- on this month we had 309 craft people on
 04 the job and we had subcontractors that brought that
 05 total to 364 on the -- this is on page 15, okay?

12. PAGE 97:18 TO 97:18 (RUNNING 00:00:02.857)

18 Q. Sir, I'm going to hand you what I'm

13. PAGE 97:19 TO 98:10 (RUNNING 00:00:29.392)

19 marking as Exhibit 7. And this appears to be the
 20 same or a very similar document to what we just
 21 marked generally in Exhibit 6, although I have not
 22 flipped through page by page to confirm that.
 23 This is a construction progress report,
 24 true?
 25 A. Uh-huh. Yes.
 00098:01 Q. From Daniel Construction Company?
 02 A. Yes.
 03 Q. For Spartanburg?
 04 A. Yes.
 05 Q. February 1973?
 06 A. Yep.
 07 Q. And this particular document is Bates
 08 12844 through 12864?
 09 A. Yeah.
 10 Q. All right. I just want to look at a

14. PAGE 98:11 TO 99:02 (RUNNING 00:00:50.107)

11 couple of things in here. At the bottom where it
 12 says page 1, which is Bates 12847.
 13 A. Yes.
 14 Q. This -- the top of this page is
 15 construction activity and general progress?
 16 A. Yeah.
 17 Q. And this is talking specifically about
 18 the polymerization facility?
 19 A. Yes -- continuous polymerization.
 20 Q. Okay. And point number 3 says
 21 insulation of piping continues as pipe is installed
 22 and released to the insulators. At this point in
 23 time, approximately 10 percent has been insulated?
 24 A. Right.
 25 Q. All right. And then if you'll flip,
 00099:01 sir, to where it says page 14, which is
 02 Bates 12860.

15. PAGE 99:03 TO 99:12 (RUNNING 00:00:16.138)

03 A. Page 14?
 04 Q. 14.
 05 A. Yes.
 06 Q. This lists -- at least for this
 07 month -- how many different trades were on the
 08 site?
 09 A. Uh-huh.
 10 Q. And for instance, there were 35
 11 insulators; is that true?
 12 A. Yeah.

16. PAGE 102:07 TO 102:18 (RUNNING 00:00:27.230)

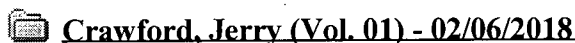
07 Sir, I want to ask you now about
 08 Daniel's relationship with Covil. Do you know what
 09 Covil is -- the business?
 10 A. It was an insulation subcontractor.

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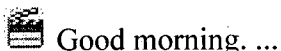
11 Q. Okay: Did Daniel do business with
 12 Covil?
 13 A. Yes, they were -- they were our
 14 insulation subcontractor at times.
 15 Q. Do you know when?
 16 A. Well, there were all different times.
 17 I mean, they -- they worked on different jobs for
 18 us at different times.

17. PAGE 103:02 TO 103:06 (RUNNING 00:00:09.639)

02 Q. Okay. Sir, was -- was -- to the best
 03 of your knowledge in relationship to Daniel, was
 04 Covil a supplier of insulation or a subcontractor
 05 or both?
 06 A. They were both.



1 CLIP (RUNNING 00:52:09.765)



JC-0206-0000721

107 SEGMENTS (RUNNING 00:52:09.765)



1. PAGE 7:21 TO 10:09 (RUNNING 00:01:43.088)

21 Q. Good morning.
 22 A. Good morning.
 23 Q. Will you tell us your full name,
 24 please.
 25 A. Jerry Howard Crawford.
 00008:01 Q. Mr. Crawford, you ever have to answer
 02 questions from lawyers before?
 03 A. No, sir.
 04 Q. You a little bit nervous today?
 05 A. Just a little bit.
 06 Q. Okay. I told you I'd start off with
 07 some easy questions, all right?
 08 A. Okay.
 09 Q. Now, the lady who's sitting to your
 10 right -- I told you she's got to write down
 11 everything that gets said, okay?
 12 A. Okay.
 13 Q. So the one thing that will make her
 14 really mad is if people talk at the same time, all
 15 right?
 16 A. Okay.
 17 Q. And if she gets mad, she's going to
 18 throw her shoe at me and not at you, okay?
 19 A. Okay.
 20 Q. All right. So I'm going to try to make
 21 sure that -- make sure that you let me finish my
 22 question before you answer. I'll let you finish
 23 your answer before I ask you another question,
 24 okay?
 25 A. Okay.
 00009:01 Q. And every time I ask you something or
 02 anybody else asks you something, you got to answer
 03 out loud, all right?
 04 A. Okay. I got it.
 05 Q. She can't take down like nods, head
 06 shakes, anything like that.
 07 A. Right. I got it. I got it.

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08 Q. All right. And the reason we've got
 09 the video camera there at the back is because we
 10 may have to show this tape in court some day, so
 11 just kind of pretend that the jury is on the other
 12 side of that camera lens, all right?
 13 A. Okay.
 14 Q. Now, Mr. Crawford, where do you live?
 15 A. At 400 Pacolet Highway, Gaffney, South
 16 Carolina.
 17 Q. Were you born and raised in Gaffney?
 18 A. Yes, I was.
 19 Q. Lived any place else during your life?
 20 A. Only in Blacksburg for a little while.
 21 Q. That's South Carolina, also?
 22 A. Yeah, South Carolina too.
 23 Q. So born and bred in South Carolina?
 24 A. Right. Yes, sir.
 25 Q. Are you married?
 00010:01 A. Yes, sir.
 02 Q. What's your wife's name?
 03 A. Evelyn Kay Crawford.
 04 Q. Y'all have kids?
 05 A. Yes, we do.
 06 Q. How many kids?
 07 A. We have three.
 08 Q. Okay. What are their names?
 09 A. Danny Ray Crawford and Tessa Quinn.

2. PAGE 10:10 TO 11:18 (RUNNING 00:01:00.419)

10 Q. Yeah.
 11 A. And Patty Giles.
 12 Q. And I'm not going to make you name them
 13 all, but you got grandkids too, don't you?
 14 A. Oh, I do.
 15 Q. How many grandkids?
 16 A. Eight.
 17 Q. Eight?
 18 A. Yeah.
 19 Q. I hear you got great-grandkids too?
 20 A. Yeah, I got -- I got -- well, I got
 21 four.
 22 Q. Is that right?
 23 A. Four. Yeah.
 24 Q. Now, one of your grandkids just got
 25 into Harvard; is that right?
 00011:01 A. Oh, that's right.
 02 Q. Is that right?
 03 A. She did.
 04 Q. Are you going to help pay for that bill
 05 for go to Harvard?
 06 A. Oh, I'd like to. I really would.
 07 Q. You're under oath.
 08 A. I really would.
 09 Q. Sitting here today, Mr. Crawford, are
 10 you in good health?
 11 A. No.
 12 Q. Okay. Why do you say no?
 13 A. Because I have lung cancer.
 14 Q. Do you know what kind of lung cancer
 15 you have?
 16 A. All I know it's the type that is caused
 17 by breathing asbestos.
 18 Q. Let me ask it this way --

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3. PAGE 11:21 TO 11:22 (RUNNING 00:00:02.913)

21 Q. Does the word mesothelioma mean
22 anything to you?

4. PAGE 11:24 TO 12:10 (RUNNING 00:00:20.007)

24 THE WITNESS: Yes.
25 BY MR. HENDERSON:
00012:01 Q. Why does it mean something to you?
02 A. That's the kind of cancer that is
03 caused by asbestos.
04 Q. Have you had -- I'm asking a yes or no
05 question now, okay?
06 A. Okay.
07 Q. Have you had conversations with your
08 doctors about what causes the type of cancer that
09 you have?
10 A. Yes, I have.

5. PAGE 12:13 TO 12:15 (RUNNING 00:00:07.047)

13 Q. Based on the conversations you have had
14 with your doctors, what is your understanding of
15 what caused the type of cancer that you have?

6. PAGE 12:17 TO 13:08 (RUNNING 00:00:46.290)

17 THE WITNESS: My doctor told me that
18 asbestos is the only thing I can get it from.
19 BY MR. HENDERSON:
20 Q. Is there a time in your life when you
21 were exposed to asbestos?
22 A. Yes, sir.
23 Q. When was that?
24 A. In the year between 1970 and 1974.
25 Q. What was going on in your life between
00013:01 1970 and 1974 that exposed you to asbestos?
02 A. That's the time I worked at Hoechst
03 fiber in Spartanburg.
04 Q. Here in Spartanburg, South Carolina?
05 A. Yes. Yes.
06 Q. Now, how were you exposed to asbestos
07 while you were working in the Spartanburg -- at
08 Hoechst in Spartanburg?

7. PAGE 13:10 TO 14:01 (RUNNING 00:00:51.723)

10 THE WITNESS: McDaniels Construction
11 [sic] was installing new poly lines, and they had
12 to put -- it's got to have hot water pipes -- and
13 when it was putting the insulation -- cutting
14 insulation down, they put a good bit of dust in the
15 air.
16 MR. HENDERSON:
17 Q. Now, let's take a step back. You
18 mentioned something called poly lines.
19 A. Oh yeah.
20 Q. What kind of business was Hoechst in
21 Spartanburg?
22 A. It was a -- it was a fiber line.
23 They -- they had -- they made poly and it changed
24 it over to fiber.
25 Q. And what is poly?
00014:01 A. It's a -- it's a -- that's where the --

8. PAGE 14:02 TO 14:06 (RUNNING 00:00:34.243)

02 the -- the whole process starts. You know, it's a

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03 -- it's a -- what it looks like is a hot clear --
 04 it's a hot -- white-like paste and it comes on a --
 05 it comes out hot through the ceiling and it goes
 06 over a drum and it goes through some -- the cooling

9. PAGE 14:07 TO 15:22 (RUNNING 00:01:29.704)

07 across and it goes back and it cuts it up into
 08 little squares.
 09 Q. What do you do with this? What do you
 10 do with poly?
 11 A. And then they transfer it over to
 12 another department where they change it over to
 13 fiber.
 14 Q. So am I understanding you correctly,
 15 poly is a type of fiber --
 16 A. Yeah. Yeah.
 17 Q. -- they made at Hoechst?
 18 A. Yeah. Yeah. Okay. What it starts
 19 off, it's poly, I know -- it's poly when it starts
 20 off in the poly building. See, I worked in the
 21 poly building -- what they call the poly building.
 22 It's what they call it.
 23 Q. And you answered my next question. I
 24 was just fixing to ask you --
 25 A. Yeah. Okay.
 00015:01 Q. -- where did you work?
 02 A. Okay.
 03 Q. You said the poly building?
 04 A. Yeah. That's right.
 05 Q. Can you describe the poly building for
 06 the jury -- for folks who haven't seen it before.
 07 A. Oh wow.
 08 Q. How many floors did it have?
 09 A. It's got -- I ain't sure exactly. I
 10 know it's got at least three or four -- four I
 11 think. It's at least three or four. I don't know
 12 exactly.
 13 Q. What floor did you work on?
 14 A. Second floor.
 15 Q. And what was your job on the second
 16 floor in the poly building at Hoechst?
 17 A. Oh, back then it was to change the
 18 liquid poly -- the hot liquid -- to change it over
 19 to chips and it then it goes in a big -- like a big
 20 silo.
 21 Q. And what exactly were you doing each
 22 day when you did that job?

10. PAGE 15:23 TO 17:20 (RUNNING 00:02:02.508)

23 A. Just -- just -- all right. When I was
 24 in on the continuous line when it completely came
 25 out -- when it came out of the top -- over the top
 00016:01 -- you added -- when it was ready, you had to open
 02 up a valve and let it come out on a great big
 03 cooling drum.
 04 It had water all over, and it was just
 05 turning around. And then it would go through a
 06 trough and then it goes through -- and then it goes
 07 through to what they call a slicer-dicer. It cuts
 08 it in little slices and then it goes in a big
 09 container, but -- all right.
 10 That was -- and when another line's
 11 off, you -- when it got ready, you go to another
 12 line. It was running. There was like several
 13 lines running at one time. They take about an hour

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14 a piece, and it was so many hours apart they keep
 15 coming off.
 16 And when I was -- I was working on the
 17 other side too -- the continuous line, and they
 18 just continuously -- run continuously.
 19 Q. I'm going to ask you a couple of
 20 follow-ups -- I'm sorry. Did I interrupt you?
 21 A. No. No.
 22 Q. I didn't meant to.
 23 I'm going to ask you a couple of
 24 follow-up questions to make sure I understand what
 25 you are describing for us.
 00017:01 A. Okay.
 02 Q. Let me start this way. When you worked
 03 at Hoechst, did you work at the same location
 04 during the entire time you were there or did you
 05 work at more than one location?
 06 A. Yeah, at more than one location.
 07 Q. How many different locations did you
 08 work at?
 09 A. Oh, I know three locations.
 10 Q. What were those three locations?
 11 A. It was -- the poly building where they
 12 run batches off, and the continuous poly building,
 13 and also the warehouse.
 14 MS. SHOFNER: I'm sorry. What was the
 15 third one?
 16 MR. HENDERSON: I believe he said
 17 warehouse; is that right?
 18 THE WITNESS: Warehouse. Warehouse,
 19 yes.
 20 MS. SHOFNER: All right.

11. PAGE 18:15 TO 19:19 (RUNNING 00:00:55.137)

15 Q. So did you work at those three
 16 locations in that order -- the poly building, then
 17 the continuous line, and then the warehouse?
 18 A. Oh, I'm sorry.
 19 Q. You -- you told us that you worked at
 20 three different places?
 21 A. Oh, right. Yes. Yes.
 22 Q. You said the poly building, the
 23 continuous line --
 24 A. Yeah.
 25 Q. -- and then the warehouse?
 00019:01 A. Yeah.
 02 Q. Did you work at those three different
 03 places in that order? First, the poly building,
 04 then the continuous line, and then the warehouse?
 05 A. No, sir.
 06 Q. Okay. Where did you work first when
 07 you went out to Hoechst?
 08 A. The poly building.
 09 Q. Where did you work second?
 10 A. The warehouse.
 11 Q. And third?
 12 A. Over there on the continuous line.
 13 It's the poly building too. It's poly line too,
 14 but it's continuous.
 15 Q. So earlier you were describing the
 16 process to us.
 17 A. Uh-huh.
 18 Q. What I want to ask you is: What was
 19 your job when you worked in the poly building?

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12. PAGE 19:20 TO 20:25 (RUNNING 00:01:41.307)

20 A. It's to -- I and some other guys would
 21 -- when it got ready -- when the poly came out, we
 22 would open it up -- the valves -- and let the poly
 23 out -- actually, to change it over from the hot
 24 liquid to change it over to little dices.
 25 Q. You mentioned hot liquid. What's the
 00020:01 hot liquid? Is that the poly --
 02 A. Yeah, it's the poly.
 03 Q. -- or something else?
 04 A. Yeah, it's the poly. It is the poly.
 05 And it comes out up from over the
 06 ceiling. That's where it came from. And then it
 07 comes on the drum -- a cooling drum where there's
 08 water all around it, and it's big. It continues to
 09 turn it and then you pulled it off and when it
 10 comes off you just roll it up with your hands. You
 11 got to have gloves on. And it's wet gloves. And
 12 then you rolled it up and you just lay it down.
 13 And you take the end of it around up under the drum
 14 on around and then you put it in the crossing
 15 trough.
 16 As you go by you let the flaps down --
 17 little rollers -- that was made like a 45-degree
 18 angle and you just set them down on the way across
 19 and then you run it on through and put it in the
 20 dicer back there at the back -- what they call --
 21 what they call -- slicer-dicer is what they call
 22 it.
 23 Q. So do you believe you were exposed to
 24 asbestos when you were working in the poly building
 25 a Hoechst?

13. PAGE 21:02 TO 21:06 (RUNNING 00:00:13.833)

02 THE WITNESS: Yes.
 03 MR. HENDERSON:
 04 Q. How?
 05 A. Because when Daniel construction
 06 company put in the new continuous line they was --

14. PAGE 21:07 TO 21:16 (RUNNING 00:00:30.362)

07 they had to have -- it's got to have steam pipes,
 08 and they was cutting a lot of steam -- insulation
 09 -- was cutting insulation and was creating a bit of
 10 dust.
 11 Q. You've mentioned a company called
 12 Daniel a couple of times?
 13 A. Oh yeah.
 14 Q. And I want you to explain how Daniel
 15 fit in with the work that was going on at Hoechst
 16 when you were there.

15. PAGE 21:18 TO 22:18 (RUNNING 00:01:09.112)

18 THE WITNESS: Oh, Daniels [sic] is the
 19 company that put the new lines in.
 20 BY MR. HENDERSON:
 21 Q. When you say the new lines, is that the
 22 same as the continuous lines?
 23 A. That's right. That is right. It is
 24 the continuous line.
 25 Q. But you've used that word lines a few
 00022:01 times. What do you mean when you say lines?
 02 A. Oh, a line is the part where the poly
 03 comes out and -- and it -- and it goes to --

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04 through the trough and cooling and it goes in the
 05 dicer -- the slicer-dicer.
 06 Q. So is a line like an assembly line?
 07 A. No, I wouldn't call it an assembly line
 08 'cause it just -- when you get started, it just
 09 keeps going. You have to keep watching it to keep
 10 it going.
 11 Q. I understand. If I follow you though,
 12 there is more than one line out there processing
 13 the poly?
 14 A. Oh yes.
 15 Q. How many were there total in the poly
 16 building?
 17 A. Okay. In the side that just runs the
 18 batches off, it was -- I don't know exactly. I

16. PAGE 22:19 TO 22:24 (RUNNING 00:00:14.484)

19 know -- at somewhere around 12.
 20 Q. If I understand you correctly -- and
 21 you correct me if I'm wrong -- while you were
 22 working in the poly building, construction was done
 23 to create some new continuous lines?
 24 A. Oh yes. Oh yes.

17. PAGE 23:01 TO 23:03 (RUNNING 00:00:08.639)

00023:01 THE WITNESS: It was -- they made a new
 02 building right beside of it -- exactly right beside
 03 -- right to it.

18. PAGE 23:10 TO 24:06 (RUNNING 00:00:58.984)

10 Was there any construction at Hoechst
 11 while you were working there?
 12 A. Yes, sir.
 13 Q. What was constructed while you were
 14 working at Hoechst?
 15 A. The new continuous line.
 16 Q. When did that construction happen while
 17 you were at Hoechst?
 18 A. It -- I can't remember exactly when,
 19 but it was -- it was in that time range.
 20 Q. Where were you working when the new
 21 construction happened?
 22 A. In the poly building.
 23 Q. And where was this new construction in
 24 relation to the poly building?
 25 A. It was really -- it was right beside of
 00024:01 it because it was part of the poly building. It
 02 was an addition. It was an addition to the
 03 continuous -- to the -- to the side that runs the
 04 batches off.
 05 Q. And who did the construction?
 06 A. Daniel Construction Company.

19. PAGE 24:25 TO 25:02 (RUNNING 00:00:11.322)

25 Q. We were talking about construction of
 00025:01 the new continuous lines and my question to you
 02 was: Did that construction expose you to asbestos?

20. PAGE 25:07 TO 25:10 (RUNNING 00:00:13.852)

07 A. Oh yes, it did. It did because they
 08 was cutting a lot of insulation and it was creating
 09 a good bit of dust.
 10 Q. Did you breathe that dust in?

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21. PAGE 25:12 TO 25:14 (RUNNING 00:00:00.554)

12 THE WITNESS: Yes.
 13 BY MR. HENDERSON:
 14 Q. What were they cutting this insulation

22. PAGE 25:15 TO 25:19 (RUNNING 00:00:18.869)

15 for?
 16 A. Oh, to go on steam pipes.
 17 Q. And where were these steam pipes
 18 located?
 19 A. They was right next to the poly lines.

23. PAGE 25:20 TO 27:06 (RUNNING 00:01:25.979)

20 As a matter of fact, it was right -- it came down
 21 and it went in where the hot water trough was
 22 because the water had to be hot because it -- when
 23 the poly came -- when the liquid came out of the --
 24 where it came out over the top and went over the
 25 drum and if it went through the water -- went
 00026:01 through water trough before it got to the
 02 slicer-dicer. And then if it was too hot, it would
 03 crack up and bust. It had to be a certain
 04 temperature. It had to be warm.
 05 Q. Right now, Mr. Crawford, are you
 06 talking to us about the poly building or continuous
 07 line building?
 08 A. Both of them were the same.
 09 Q. They were both built the same way?
 10 A. Both of them had to go through a trough
 11 -- a water trough.
 12 Q. Did they both have steam lines?
 13 A. Yes, they both had steam lines, yeah.
 14 Q. And I'm calling it the continuous line
 15 building. Is that the right name for that
 16 building?
 17 A. Yeah, that's what they called it, yeah.
 18 Q. Okay. If I use a name that doesn't
 19 make any sense, you correct me, okay?
 20 A. Yeah. Yeah.
 21 Q. Was there insulation on the pipes in
 22 the poly building and the continuous line
 23 building --
 24 A. Oh, yeah. Oh, yes.
 25 Q. No, that's okay. Make sure you let me
 00027:01 finish my question --
 02 A. Oh, I'm sorry. I'm sorry.
 03 Q. -- we're going to get in trouble, okay?
 04 A. I'm sorry. I'm sorry.
 05 Q. I don't want to get in trouble.
 06 A. Okay.

24. PAGE 28:20 TO 29:03 (RUNNING 00:00:22.304)

20 Q. I was asking you about whether or not
 21 there were steam lines in the poly building and in
 22 the continuous line building.
 23 Was there insulation on pipes on both
 24 buildings or only one building?
 25 A. Both buildings.
 00029:01 Q. Who repaired the insulation in the poly
 02 building while you were working there?
 03 A. Daniels Construction Company.

25. PAGE 29:06 TO 29:12 (RUNNING 00:00:21.868)

06 Q. Do you remember how long construction

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07 took place on the continuous line building?
 08 A. It was several months. I can't even
 09 remember exactly how long -- how many months.
 10 Q. There's something I don't understand.
 11 You said you were exposed to asbestos while they
 12 were building the continuous building?

26. PAGE 29:14 TO 30:07 (RUNNING 00:00:50.286)

14 THE WITNESS: Oh, yes, and after too.
 15 I had to run the lines afterwards and then the dust
 16 was still there.
 17 BY MR. HENDERSON:
 18 Q. So at the time they were building the
 19 continuous line building, you were working in the
 20 poly building, correct?
 21 A. Yes, sir.
 22 Q. So if you're working in the poly
 23 building, how could you have been exposed to
 24 asbestos when they were building the continuous
 25 line building?
 00030:01 A. Because when they knocked the wall out,
 02 they left a big -- a great big door in between. It
 03 was -- it was just right next to it.
 04 Q. While you were working in the poly
 05 building and they were building the continuous line
 06 building, would you ever have to walk near where
 07 the construction was taking place?

27. PAGE 30:09 TO 30:13 (RUNNING 00:00:08.811)

09 THE WITNESS: Yes, sir.
 10 BY MR. HENDERSON:
 11 Q. Okay. Why would you have to walk over
 12 to where the construction was taking place?
 13 A. Because the new -- the restrooms and

28. PAGE 30:14 TO 30:14 (RUNNING 00:00:03.203)

14 locker rooms were over there.

29. PAGE 34:24 TO 35:01 (RUNNING 00:00:04.859)

24 Q. Mr. Crawford, have you ever done any
 25 auto work?
 00035:01 A. Well, I helped my brother-in-law.

30. PAGE 35:02 TO 36:24 (RUNNING 00:02:13.701)

02 Q. Who is your brother-in-law? What's his
 03 name?
 04 A. Eddy Gene Clary. He was -- he was a
 05 mechanic. He had a garage right in -- right in
 06 front of his house -- one he built himself.
 07 Q. So what were you doing over at
 08 Eddie Gene's garage?
 09 A. Well, I live right next to him. I live
 10 right next to him.
 11 Q. Were y'all -- we're y'all friends?
 12 A. He was my brother-in-law, you know?
 13 Q. And that means you could be friends and
 14 could not be friends is why I ask.
 15 A. Well, he was a nice guy.
 16 Eddie Gene Clary -- he was a nice guy.
 17 Q. Is that right?
 18 A. He was.
 19 Q. So when he lived next door to you, how
 20 often would you be over at his garage?
 21 A. All through the weekend -- through the

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22 weekend.
 23 Q. Pretty much every weekend or just
 24 some --
 25 A. Yeah -- yeah, just about every weekend.
 00036:01 Q. And what would you be doing over at
 02 Eddie Gene's garage on the weekends?
 03 A. Oh, Eddie had a lot of customers come
 04 in and have brakes put on -- a lot of them because
 05 he was so cheap. Matter of fact, he was cheap with
 06 me too. Mine was a low price, you know, and he --
 07 when he put them on -- oh, I would help him -- help
 08 him prime up the brakes.
 09 Q. Now, for folks who don't know -- what
 10 does it mean to prime up brakes?
 11 A. He would get up under there and -- what
 12 they call bleeding. What I meant -- what I meant
 13 was bleeding.
 14 Somebody has to mash the -- the brakes
 15 seem to be full of brake fluid first, you know, to
 16 make sure it's slam full. And then you have to --
 17 he'd get under it -- under the wheel -- and then it
 18 would -- he'd tell you to start pumping it, pumping
 19 it, pumping it -- pump it up.
 20 And then he'd tell you to hold it. He
 21 would take the -- the pipe that loosens the brake
 22 pipe up and let the fluid come out to get the air
 23 out of it. And then he'd tighten it back up and
 24 then -- so yeah, I usually did that every weekend.

31. PAGE 36:25 TO 37:03 (RUNNING 00:00:09.667)

25 I was down there with him.
 00037:01 Q. Did you do anything else to help
 02 Eddie Gene perform brake jobs at his auto shop?
 03 A. It was -- okay. Yes, I'd help him blow

32. PAGE 37:04 TO 38:24 (RUNNING 00:01:41.884)

04 it out. Blow the dust out of it.
 05 Q. What are you talking about?
 06 A. I always had a lot of dust.
 07 Q. Huh?
 08 A. The brakes -- the brakes always had a
 09 lot of dust in it --
 10 Q. Okay.
 11 A. I would help him blow it out.
 12 Q. Now, hang on a second. What -- how do
 13 go from bleeding brakes to blowing dust out? What
 14 are you talking about?
 15 A. Oh, no. When he first opened it up,
 16 there'd be dust in there. He had to clean it out.
 17 Q. Now, you got -- I warned you. I don't
 18 know a lot about brake jobs, so I'm going to have
 19 to ask you a bunch of basic questions, okay?
 20 A. Okay. All right.
 21 Q. When you say open it up, open what up?
 22 A. Oh, first he would take -- the car is
 23 jacked up. And then take -- you have to take the
 24 lubes off to take the wheel off. And then that
 25 little hub there -- you have to pull that out, and
 00038:01 that would be a -- it would be a lot of dust in
 02 there that -- that's from the brakes wore out --
 03 wore out brakes -- it would be a lot of dust in
 04 there. And he just -- he had a air hose, and he'd
 05 blow them out.
 06 Q. Now, you're talking about Eddie Gene
 07 blowing out the dust. Is that something that you

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08 did or were you near him when he did it?
 09 A. Yeah -- well, he did it mostly, mostly,
 10 mostly -- most of it.
 11 Q. So I want to make sure I understand.
 12 Is this something you know he did or you actually
 13 see him do it?
 14 A. Yeah, I actually see him do it because
 15 he had to -- to clean it off. Yeah.
 16 Q. How close were you to Eddie Gene when
 17 he did this?
 18 A. I was right there in the building with
 19 him, you know, right there with him.
 20 Q. Like would you say in the building?
 21 A. Yeah. Yeah. In the shop.
 22 Q. Were you as close to him as you and I
 23 are now, or further away?
 24 A. Yeah, about as close as we are now.

33. PAGE 39:06 TO 39:07 (RUNNING 00:00:04.095)

06 Q. How far apart would you say we are
 07 sitting right now from each other?

34. PAGE 39:08 TO 39:08 (RUNNING 00:00:01.050)

08 A. Three and four feet.

35. PAGE 39:14 TO 39:18 (RUNNING 00:00:10.185)

14 Q. The -- you okay?
 15 A. I'm okay.
 16 Q. The dust that you are describing that
 17 would get created when Eddie Gene was blowing out
 18 the drum -- did you breathe any of that dust in?

36. PAGE 39:20 TO 41:01 (RUNNING 00:01:37.426)

20 THE WITNESS: Yes, I did, but I didn't
 21 think anything about it at the time.
 22 BY MR. HENDERSON:
 23 Q. What time period are we talking about
 24 when Eddie Gene had this garage?
 25 A. Let me see. I'd say from 1960 to 1970.
 00040:01 When --
 02 Q. Do you remember -- go ahead.
 03 A. The garage was still there, but I moved
 04 away. In 1970, I moved away --
 05 Q. Where did you --
 06 A. -- I moved --
 07 Q. -- go ahead.
 08 A. It was -- I was -- it wasn't really
 09 Blacksburg, but it was what they call -- it was a
 10 mill village called Cherokee Falls. At that time
 11 -- 1970, I moved to -- I move to Gaffney. Yeah.
 12 Q. Can you remember what types of cars
 13 Eddy Gene was doing work on while you were there
 14 working at his garage?
 15 A. Oh, yep. Personal cars and also
 16 trucks.
 17 Q. Can you remember who made the personal
 18 cars he did work on?
 19 A. He had all kinds, really. He had
 20 Fords, Chevrolets, Dodge -- all of them.
 21 Q. How about the trucks -- can you
 22 remember who made the trucks he did work on?
 23 A. Yeah, it was all of them, too. Fords
 24 and Chevrolet.
 25 Q. About how many times do you think you
 00041:01 were helping Eddie Gene perform brake jobs?

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37. PAGE 41:03 TO 41:06 (RUNNING 00:00:10.604)

03 THE WITNESS: The whole time I was
04 there -- let me see. I want to say about -- I
05 don't know exactly. I want to say roughly about
06 75, maybe.

38. PAGE 41:12 TO 41:22 (RUNNING 00:00:28.813)

12 Q. Let's take it a step back. When
13 Eddie Gene was performing his brake jobs, would it
14 be fair to say he's taking off old brakes and
15 putting on new brakes?
16 A. Oh yes, that's right. New brake shoes.
17 Q. New brake shoes?
18 A. Yeah. Yeah. Yeah, that's right.
19 Q. Do you know where he bought his new
20 brake shoes?
21 A. He bought a lot of them at Advance.
22 Q. Was there any place else he bought new

39. PAGE 41:23 TO 42:12 (RUNNING 00:00:50.244)

23 brake shoes?
24 A. Well, he did go to Auto Zone.
25 Q. Any place else you remember?
00042:01 A. Well, there was -- first, there was a
02 new parts place right there on 29 -- right outside
03 of Blacksburg.
04 Q. Do you remember the name of it?
05 A. It was -- I believe it was Harris's.
06 Q. Are those all of the places that you
07 remember Eddie Gene buying brakes -- Advance, Auto
08 Zone, a place you think was called Harris's?
09 A. Yeah. Yeah. It's a -- well, Harris's
10 is still up there but he build a church right over
11 there in front of it. It's right there -- it's a
12 few miles outside -- it's like a few miles north of

40. PAGE 42:13 TO 43:08 (RUNNING 00:00:41.564)

13 the -- wait a minute -- south of the city of
14 Blacksburg.
15 Q. Did he ever buy new brakes at auto
16 dealerships?
17 A. Oh, I never did -- I never did saw him
18 do that but --
19 Q. Can you remember -- I'm sorry. I
20 didn't mean to interrupt you.
21 A. It's okay.
22 Q. No. No. I thought you were done
23 talking.
24 A. Okay. Okay.
25 Q. Now, remember you can't fold your arms
00043:01 over your microphone.
02 A. Yeah. Yeah.
03 Q. Do you need to take a break?
04 A. I'm okay.
05 Q. Okay. Now, a couple of times we've
06 been talking you've folded your arms over your
07 chest. Is there a reason why you do that?
08 A. Yes, my chest hurts.

41. PAGE 43:19 TO 44:03 (RUNNING 00:00:15.389)

19 Q. Mr. Crawford, I've noticed you crossing
20 your arms and I'm not sure if the question was
21 clear when I asked you --
22 A. Okay.

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23 Q. -- why do you cross your arms over your
24 chest?
25 A. Because my chest feels tight and I got
00044:01 pain.
02 Q. Would you like to take a short break?
03 A. Oh, I'm okay.

42. PAGE 44:19 TO 44:22 (RUNNING 00:00:11.466)

19 Q. Mr. Crawford, I think when we stopped I
20 was asking you questions about the brake work you
21 were around Eddie Gene when he did his garage. Do
22 you remember leaving off there?

43. PAGE 44:24 TO 45:05 (RUNNING 00:00:14.829)

24 THE WITNESS: Yes. Yes, sir.
25 BY MR. HENDERSON:
00045:01 Q. Now, I asked you if you remember where
02 Eddie Gene bought the new brakes that he used. I
03 want to ask you another question.
04 Do you remember who made the new brakes
05 that Eddie Gene used?

44. PAGE 45:06 TO 45:11 (RUNNING 00:00:14.983)

06 A. I think it was Dow something.
07 Q. Dow?
08 A. I think.
09 Q. Was it just one company or more than
10 one company?
11 A. Yeah, I think it was -- I'm sure it was

45. PAGE 45:12 TO 45:17 (RUNNING 00:00:14.629)

12 more than one company. At the time he was -- time
13 I was there.
14 Q. Can you remember any other companies
15 that made the new brakes that Eddie Gene used?
16 A. I can't -- I can't think of the names
17 right now.

46. PAGE 49:03 TO 49:08 (RUNNING 00:00:17.929)

03 Q. Do you remember if Eddie Gene worked on
04 anyone's brakes several times?
05 A. Oh, he worked on a lot of people's
06 brakes because people came from all around.
07 Q. Did he have repeat customers?
08 A. Oh yes.

47. PAGE 49:11 TO 49:11 (RUNNING 00:00:03.391)

11 Q. Can you remember any of his repeat

48. PAGE 49:12 TO 49:14 (RUNNING 00:00:06.477)

12 customers?
13 A. Yeah, but most of them I didn't know.
14 But I just -- I know they just keep showing up.

49. PAGE 50:03 TO 50:04 (RUNNING 00:00:03.592)

03 Q. How many repeat customers do you
04 remember at Eddie Gene's garage?

50. PAGE 50:06 TO 50:06 (RUNNING 00:00:01.439)

06 THE WITNESS: There was a lot -- I

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51. PAGE 50:23 TO 51:11 (RUNNING 00:00:31.029)

23 Q. Mr. Crawford, when we talked this
24 morning, I asked you about three different places
25 that you worked. I asked you about Hoechst,
00051:01 Timken, and I asked you about CNA. Those are not
02 the only jobs you've had in your lifetime, are
03 they?

04 A. Oh, no.

05 Q. It was just a few of the places that
06 you worked?

07 A. Oh right. Oh yeah, that's just a few.

08 Q. When you were working at those three
09 jobs, did anybody ever warn you about the dangers
10 of working with or around asbestos?

11 A. Absolutely not.

52. PAGE 51:17 TO 51:20 (RUNNING 00:00:04.881)

17 Q. Did anybody warn you about the danger
18 of working with asbestos at any of those three jobs
19 we talked about?

20 A. No.

53. PAGE 51:23 TO 51:25 (RUNNING 00:00:04.380)

23 Q. Did anybody ever warn you about the
24 dangers of working around people who were working
25 with asbestos --

54. PAGE 52:03 TO 52:10 (RUNNING 00:00:17.386)

03 Q. -- on any of the jobs we've talked
04 about?

05 A. No.

06 Q. Did anybody ever tell you during that
07 time period when you worked at these different jobs
08 that we've discussed that working with or around
09 people who were working with asbestos could cause
10 cancer?

55. PAGE 52:12 TO 52:17 (RUNNING 00:00:16.627)

12 THE WITNESS: No.

13 BY MR. HENDERSON:

14 Q. If you had known that asbestos was
15 dangerous, what would you have done?

16 A. I would have found another job away
17 from asbestos.

56. PAGE 52:21 TO 52:22 (RUNNING 00:00:04.122)

21 Q. When did you first find out that
22 something was wrong with your health?

57. PAGE 52:23 TO 52:23 (RUNNING 00:00:06.804)

23 A. It was this past year in 2017, about --

58. PAGE 52:24 TO 53:17 (RUNNING 00:00:52.840)

24 I think it was about August.

25 Q. What happened?

00053:01 A. Oh, I had -- I was giving out of
02 breath, and I run out of breath quick, you know?
03 So I went to the emergency room and they did a
04 X-ray on my chest and it said it had fluid in my
05 chest -- in my lung. My right lung had fluid in
06 it.

07 Q. Did they do something about it?

08 A. Well -- oh yeah, they drained it out.

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09 They put me in the -- in the -- in intensive care
 10 up at Mary Black, up here in Gaffney.
 11 Q. And you said they drained the fluid
 12 after that?
 13 A. Oh, yes. Yes, they did.
 14 Q. Did they have to drain the fluid one
 15 time or more than one time?
 16 A. Oh, well, at one time there, and then I
 17 went to the chest place the next month. Let me

59. PAGE 53:18 TO 54:23 (RUNNING 00:02:00.904)

18 see, that was -- oh yeah, they drew that out on
 19 -- I remember seven -- exactly 17 -- wait a minute.
 20 September the 13th -- the first time in
 21 Mary Black. And then after that, I went to -- I
 22 started going to chest -- the chest place over on
 23 221 in Spartanburg. And then that doctor -- it was
 24 about a month later. It wasn't over a month. He
 25 sent me up here to Spartanburg Regional, and they
 00054:01 drew it out again.
 02 Q. So is that three times that you had to
 03 have fluid drained?
 04 A. Let me see. It was one time there and
 05 it was -- wait a minute. I know it was one time
 06 over there at Mary -- over here -- over here at
 07 Mary Black in Gaffney. And over at Spartanburg
 08 Regional -- I know at least twice because, first,
 09 the workers up there at Mary Black -- I mean,
 10 Spartanburg Regional. I'm sorry.
 11 Spartanburg Regional drew it out, and
 12 about a few weeks later it was Dr. O. over there at
 13 the chest place. He drew it out himself. And
 14 then after that he told me that -- he would -- he
 15 suggested to have the tube put in -- in my lung.
 16 Q. Do you have a tube in your lung right
 17 now?
 18 A. Yes, sir.
 19 Q. What's it called?
 20 A. They called it a catheter. Catheter.
 21 Q. Have you been having trouble with your
 22 catheter?
 23 A. Well, yes, it -- it -- well, it's --

60. PAGE 54:24 TO 56:01 (RUNNING 00:01:09.992)

24 it's -- my wife -- my daughter checked it and said
 25 it was -- it's -- she didn't like the looks of it,
 00055:01 and also the fluid won't come out. No fluid comes
 02 out.
 03 Q. Are you having trouble with your
 04 catheter today?
 05 A. Well, it's -- yeah, I'm having a little
 06 bit of trouble with it because it's loose.
 07 Q. If you need to stop and take a break,
 08 will you tell us?
 09 A. I will.
 10 Q. Is the catheter painful?
 11 A. Well, my chest is painful -- my chest
 12 is.
 13 Q. What side of your body -- I think
 14 you're indicating the right side of your body, but
 15 I want to make sure that I understand you.
 16 Can you show the jury where the
 17 catheter is located on your body.
 18 A. It's right -- it's -- it's -- let me
 19 see. It's between my side and my back. As a

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20 matter of fact, I can feel it right now. Right
 21 there. Right here (Indicating).
 22 Q. Does that affect the way you sleep?
 23 A. Oh, it does. It does.
 24 Q. How so?
 25 A. Well, I can't -- I lay a certain way
 00056:01 and I just lay on -- I can't turn over. I have to

61. PAGE 56:02 TO 56:21 (RUNNING 00:00:55.402)

02 lay on my back, and I can't move, you know?
 03 Q. When the fluid builds up in your lung,
 04 is it painful?
 05 A. Oh well, what happens is when fluids
 06 builds up, I can't -- it cuts the air off because
 07 it's full of fluid instead of air, and I get out of
 08 breath a lot.
 09 Q. Did they put the catheter in your side
 10 so you can drain your fluid at home without having
 11 to keep going to the hospital?
 12 A. Oh, that's right. That's exactly why.
 13 That's exactly.
 14 Q. What other treatment are you receiving
 15 right now for your Mesothelioma aside from the
 16 catheter?
 17 A. Chemo. And they got a port right there
 18 on my left -- of my chest (Indicating).
 19 Q. What do you mean when you say a port?
 20 A. It's a -- well, it's what they put
 21 in -- they put -- it's -- the chemo nurse puts

62. PAGE 56:22 TO 56:22 (RUNNING 00:00:04.063)

22 the -- the little -- a valve -- like the valve goes

63. PAGE 56:23 TO 57:09 (RUNNING 00:00:29.756)

23 in right there (Indicating). That's where the
 24 chemo goes in -- on a little pipe.
 25 Q. So am I understanding you correctly,
 00057:01 you had a surgery to put a valve in your chest?
 02 A. Uh-huh, that's right. That's right.
 03 Q. And when you say chemo, you mean
 04 chemotherapy, right?
 05 A. That's right. I do. I do.
 06 Q. For people who are not familiar with
 07 the chemotherapy, can you describe what it's like
 08 when you undergo it.
 09 A. Well, it's afterwards, it gives you

64. PAGE 57:10 TO 57:10 (RUNNING 00:00:08.444)

10 nauseate -- nauseated, you know?

65. PAGE 57:11 TO 57:20 (RUNNING 00:00:29.701)

11 Q. You mentioned a nurse earlier -- a
 12 chemo nurse?
 13 A. Yeah, that's right.
 14 Q. Does the chemo nurse come to your house
 15 or do you have to go see her at a clinic?
 16 A. I go right -- I see her right down here
 17 at Gibbs Cancer Clinic.
 18 Q. So walk us through what happens when
 19 you go to that facility for chemo treatment.
 20 A. Oh, okay. I sat down and then she

66. PAGE 57:21 TO 58:13 (RUNNING 00:00:53.562)

21 puts -- she's got this -- I don't know what you

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22 call it. It's a -- a little thing that moves
 23 around with all of those -- what they are going to
 24 put in me hooked up to?
 25 Q. Yes, sir.
 00058:01 A. All these here fluids -- well, the
 02 fluids -- and it's got pipes -- little pipes run
 03 through it and then she's got a sharp -- like a
 04 needle -- on the end of one of them. And then she
 05 just pushes it through -- through my skin.
 06 The catheter -- you can't even see it.
 07 All you can see is just the skin -- the puffed-up
 08 skin -- all you can see. But she knows exactly
 09 where it is, and she just sticks it right through
 10 my skin.
 11 Q. And how long do you sit there for chemo
 12 treatment?
 13 A. Oh man, about -- let me see. Over an

67. PAGE 58:14 TO 58:22 (RUNNING 00:00:28.267)

14 hour -- let me see. Let me see. It's like about
 15 an -- at least an hour and a half or two hours.
 16 Q. How do you feel after chemo? Do you
 17 feel better?
 18 A. No, I start -- I start feeling weaker.
 19 Q. How long do you feel weaker for after
 20 you have chemo performed?
 21 A. Well, it keeps -- it keeps getting --
 22 it's like -- about two weeks. Because what happens

68. PAGE 58:23 TO 58:25 (RUNNING 00:00:30.505)

23 is is your immune system starts going down for
 24 about -- the chemo nurse says it's like about ten
 25 or 11 days it starts -- your immune system keeps

69. PAGE 59:01 TO 59:08 (RUNNING 00:00:18.485)

00059:01 going down and then after about 11 days, it
 02 gradually starts building back up until three
 03 weeks. I take chemo every three weeks and then
 04 after three weeks, it starts all over again.
 05 Q. So how many times have you gone through
 06 that cycle already?
 07 A. Three times.
 08 Q. When is your next cycle; do you know?

70. PAGE 59:09 TO 59:13 (RUNNING 00:00:10.116)

09 A. It's a -- wait a minute. Like about a
 10 week away.
 11 Q. Are there things that you used to be
 12 able to do that you can't do anymore because you
 13 have Mesothelioma?

71. PAGE 59:15 TO 59:20 (RUNNING 00:00:11.627)

15 THE WITNESS: Yeah.
 16 BY MR. HENDERSON:
 17 Q. Let me ask that a different way to make
 18 sure we're clear on this.
 19 I want you to tell the jury how having
 20 Mesothelioma has affected your life.

72. PAGE 59:21 TO 60:07 (RUNNING 00:00:38.996)

21 A. Okay. Well, I can't -- I can't do any
 22 yard work like I used to.
 23 Q. Did you enjoy doing yard work?
 24 A. Yes -- well, like I'm seeing the yard

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25 full now. It's full -- my whole yard is slammed
 00060:01 full of leaves because I can't get to it.
 02 Q. Now, I asked you do you like doing yard
 03 work -- you know you're under oath, right?
 04 A. That's right. Well, I don't like doing
 05 the yard work, but I like the results after.
 06 People -- there's a lot of people --
 07 well, when my -- my brother goes to church right

73. PAGE 60:08 TO 60:09 (RUNNING 00:00:11.238)

08 down -- right down below it, and we have -- I've
 09 been going up on Wednesdays on -- to the restaurant

74. PAGE 60:10 TO 60:18 (RUNNING 00:00:28.245)

10 up here -- the men meet together and have breakfast
 11 together.
 12 Q. Yes, sir.
 13 A. And I've been going with him, but I
 14 can't -- I can't do it now because it's -- when
 15 it's a lot of people around -- I got -- I'm
 16 supposed to wear a mask when there's a lot of
 17 people around, but I can't talk with it on.
 18 Q. Why are you supposed to wear a mask?

75. PAGE 60:20 TO 61:06 (RUNNING 00:00:49.636)

20 THE WITNESS: Because my immune system
 21 has gone down. It's down because of the chemo.
 22 And then to keep from catching the flu.
 23 And anyway, they was a -- a lot of them was
 24 making -- was telling me about they ain't never
 25 seen so many leaves in the yard when there's
 00061:01 nothing I can do about it, you see? And that
 02 really gets on my nerves.
 03 BY MR. HENDERSON:
 04 Q. What is Silver Sneakers?
 05 A. Silver Sneakers? That's Humana's
 06 program where they let you go into a gym and they

76. PAGE 61:07 TO 61:07 (RUNNING 00:00:06.387)

07 pay for it. And -- okay. And I once was on the

77. PAGE 61:08 TO 62:21 (RUNNING 00:01:54.942)

08 Silver Sneakers -- before even I found out I had
 09 lung cancer, I had to quit because I --
 10 Q. Why did you have to -- go ahead. I'm
 11 sorry.
 12 A. Sorry.
 13 Q. It's okay.
 14 A. I couldn't -- I couldn't stand up to
 15 it -- doing the exercise because I get out of
 16 breath.
 17 Q. Did you have --
 18 A. Yeah, because my lungs was hurting.
 19 Q. Did you like to exercise?
 20 A. Oh, yes, I did.
 21 Q. What kind of exercise did you like to
 22 do?
 23 A. The kind that was on the stair steps
 24 and the bicycle. It was in the gym room. Yeah.
 25 Q. Were there things that you like to do
 00062:01 with your family that you can't do the same way
 02 since your diagnosis?
 03 A. Oh, yeah. My daughter got a swimming
 04 pool and that's where they have all the parties --

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05 at her swimming pool, and I can't -- no, I -- well,
 06 it's in the warmer weather, I can't -- but at the
 07 end of the year, I didn't have the breath then to
 08 -- to get in the pool and do the exercises, you
 09 know, and play with them. And --
 10 Q. Do your grandkids like ice cream?
 11 A. Huh?
 12 Q. Do your grandkids like ice cream?
 13 A. Oh, they love ice cream. They love it.
 14 Q. Do you take them for ice cream?
 15 A. Oh, yes, I do. Yeah.
 16 Q. Has that been affected by your
 17 mesothelioma?
 18 A. Oh, yeah, yeah, it really has. It
 19 really has.
 20 Q. What do you mean?
 21 A. Well, I just ain't got the energy to

78. PAGE 62:22 TO 62:25 (RUNNING 00:00:18.617)

22 get out -- I don't know.
 23 Q. Have your doctors talked to you about
 24 what to expect moving forward?
 25 A. Okay. They said the chances of getting

79. PAGE 63:01 TO 63:01 (RUNNING 00:00:08.996)

00063:01 a cure is about -- in the past -- it's past -- past

80. PAGE 63:02 TO 63:02 (RUNNING 00:00:05.449)

02 patients, it cured about 20 percent.

81. PAGE 63:05 TO 63:06 (RUNNING 00:00:12.836)

05 Q. How did it feel to hear that news?
 06 A. It was devastating, but I'm just glad I

82. PAGE 63:07 TO 63:08 (RUNNING 00:00:11.944)

07 got -- I'm glad I got 20 percent of a chance.
 08 That's better than zero. Sorry.

83. PAGE 63:09 TO 63:09 (RUNNING 00:00:01.162)

09 Q. It's okay. Take your time. I don't

84. PAGE 63:10 TO 63:12 (RUNNING 00:00:04.051)

10 want to rush you. I thought you were about to say
 11 something else; I couldn't tell.
 12 A. Well, it's devastating to think about

85. PAGE 63:13 TO 63:14 (RUNNING 00:00:02.574)

13 I'm going to have to leave my -- I might have to
 14 leave my grandchildren and my grand --

86. PAGE 63:15 TO 63:17 (RUNNING 00:00:13.159)

15 grandchildren. Oh, I'd like to see them grow up --
 16 to be a teenager.
 17 I keep thinking back all the time, but

87. PAGE 63:18 TO 63:19 (RUNNING 00:00:09.334)

18 that -- I'll see what happens. I don't know what's
 19 my next -- what's going to come next. This is -- I

88. PAGE 63:20 TO 63:21 (RUNNING 00:00:16.610)

20 only found out about this cancer -- it's been less
 21 than a year. But I still got it, and so...

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89. PAGE 63:22 TO 64:01 (RUNNING 00:00:20.295)

22 Oh, the doctor said that it's in -- I
 23 got these -- what do you call them -- what do they
 24 call them? Them ol' cells -- cancer cells -- in
 25 that there -- it's in that --
 00064:01 Q. The pleura?

90. PAGE 64:03 TO 64:04 (RUNNING 00:00:05.589)

03 THE WITNESS: Yeah. Yeah. It's like a
 04 thin -- sheet in there or best I can describe it.

91. PAGE 64:05 TO 65:01 (RUNNING 00:01:08.428)

05 And it's all -- where I got the cancer cells is on
 06 that, and he can -- he can take them off if it's
 07 too -- he has to wait to get in there to see if
 08 it's too thick, 'cause see, it's so thin --
 09 BY MR. HENDERSON:
 10 Q. Are you talking about what to expect at
 11 your next doctor visit?
 12 A. I'm talking about when the operation
 13 comes.
 14 Q. Okay.
 15 A. When he takes them out -- first, the
 16 doctor decided to take chemo before the operation
 17 because they said it's a -- they said they have a
 18 better chance on the operation if you take the
 19 chemo first before the operation.
 20 And then he said if it's not all the
 21 way through, he can take them off. But if it's all
 22 the way through, he can't, you know?
 23 Q. So am I understanding you correctly --
 24 are you waiting to find out just how bad your
 25 condition is?
 00065:01 A. That's absolutely right.

92. PAGE 65:03 TO 65:06 (RUNNING 00:00:05.561)

03 THE WITNESS: That's absolutely right.
 04 MR. HENDERSON: Mr. Crawford, I think
 05 that's going to do it for me in terms of questions
 06 I've got for you this morning.

93. PAGE 274:21 TO 274:24 (RUNNING 00:00:08.058)

21 Q. Okay. Now, do you recall when the
 22 first time that you would have switched from the
 23 poly number one to poly number two?
 24 A. Okay. I think it was at least a year

94. PAGE 274:25 TO 274:25 (RUNNING 00:00:06.570)

25 before -- it was before I quit working there.

95. PAGE 280:16 TO 280:22 (RUNNING 00:00:24.739)

16 Q. Can you describe the poly building for
 17 me. How big was it? And let's describe it in 1970
 18 when you first started working there.
 19 A. It was -- it was at least three or four
 20 floors.
 21 Q. Okay. So three or four stories high?
 22 A. Yeah.

96. PAGE 282:07 TO 282:10 (RUNNING 00:00:09.459)

07 Q. All right. That's fine. On the
 08 different levels, were there different, I guess,
 09 equipment, and --

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10 A. Oh, yeah.

97. PAGE 282:14 TO 282:20 (RUNNING 00:00:17.475)

14 Q. Okay. Did you work -- were you mainly
15 assigned to one level, or did you -- were you
16 assigned to all of the different levels in the poly
17 building?

18 A. At different times I worked on
19 different levels, but it was mostly on the second
20 shift -- I mean, the second level --

98. PAGE 282:25 TO 283:02 (RUNNING 00:00:05.503)

25 Q. And if you were on the second floor,
00283:01 could you see what was going on the third level or
02 the first level?

99. PAGE 283:05 TO 283:06 (RUNNING 00:00:02.389)

05 THE WITNESS: I remember -- I -- okay.
06 I know -- I know -- okay. All I can say -- I know

100. PAGE 283:07 TO 283:14 (RUNNING 00:00:18.903)

07 some of the floors had grates, because I remember
08 walking over the grates.

09 BY MS. SHOFNER:

10 Q. Okay. So if it had a grating -- if it
11 had -- the walkways were made out of grates, you
12 could look down and at least see part of the next
13 level, correct?

14 A. Correct.

101. PAGE 286:10 TO 287:17 (RUNNING 00:01:40.405)

10 Q. Was most of the work being done on the
11 second level?

12 A. Yeah, most of it was being done on the
13 second.

14 Q. All right.

15 A. The second and the third. And the
16 third -- back over to the backside they had what
17 they call the control room where they mash the
18 button and the different chemicals would go into or
19 mix together some way and it would cause the -- it
20 would make that liquid poly -- the hot poly --
21 that's where it was made right there.

22 Q. Okay.. And that was on the third level?

23 A. And it had -- yes, on the third level
24 and it had on top of the ceiling, it had a big -- a
25 big tank and that's where all of that went in to.

00287:01 Q. Okay.

02 A. You got time for it to come off until
03 it was ready.

04 Q. And in the second level, what was on
05 the -- what was going on the second level?

06 A. Oh, that's where the -- where the hot
07 liquid came -- it was white-looking. It was white
08 hot liquid. It was -- when it come out -- when it
09 got ready, somebody had opened up. It had a little
10 wheel on it and opened it up and let it come out
11 and then fall down on the drum. And that's where
12 it got cooled down and then it run through -- it
13 run through a trough with hot water in it.

14 Q. Okay.

15 A. And that's where the steam pipes went
16 in to the side of the trough where the hot water
17 was.

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102. PAGE 321:23 TO 321:24 (RUNNING 00:00:02.902)

23 Q. So what did they do with the old
24 restrooms that were in the poly one?

103. PAGE 321:25 TO 322:18 (RUNNING 00:00:35.276)

25 A. I'm thinking back -- I think it was --
00322:01 they had the locker rooms over -- over in other
02 building.

03 Q. All right. So you had restrooms in
04 poly one and restrooms in poly two area?

05 A. Yeah, but I didn't -- we didn't use it.
06 after they built the other side. We didn't use
07 them.

08 Q. Okay. But then they put the new locker
09 room over on poly two or in the poly two building,
10 correct?

11 A. Correct.

12 Q. Okay. So at the end of the day or at
13 the beginning of the day you would go to the locker
14 room, leave your stuff, and then go report to your
15 shift, correct?

16 A. That's right. That's true.

17 Q. And that what was in the poly two area?

18 A. That's right. That's right.

104. PAGE 323:02 TO 323:06 (RUNNING 00:00:12.696)

02 Q. Okay. So at least twice a day you
03 would go into the poly two area to go to the locker
04 room? Once in the morning and once after your
05 shift ended?

06 A. That's true.

105. PAGE 339:13 TO 340:12 (RUNNING 00:01:08.480)

13 Q. How often did you have to dust the poly
14 two building area or clean up?

15 A. Well, when I wasn't on break, I just --
16 I just -- didn't have nothing to do, always keeping
17 the floor swept -- swept up.

18 Q. Are you just talking about just general
19 cleaning after every shift that you would have to,
20 whether you were --

21 A. No, no, no. I always kept it clean
22 because -- yeah, I kept it clean, you know.

23 Q. Okay. And would you have to keep this
24 clean after every -- after your shift every --
25 every time that -- every day? Were you responsible
00340:01 for cleaning and sweeping after every shift?

02 A. Yeah, I knew to keep it clean, yeah. I
03 just knew to keep it clean.

04 Q. Okay. And my question is: Did you
05 sweep up after every shift?

06 A. It was all during the day. At the end
07 of the shift it was already clean. I made sure it
08 was already clean.

09 Q. Okay. How often did you sweep up
10 during a shift?

11 A. Oh man. Just every time I got a chance
12 all during the day --

106. PAGE 343:25 TO 344:03 (RUNNING 00:00:08.031)

25 Q. Okay. And then in poly two, do you
00344:01 know where the dust came from when you were in poly
02 two that you would have to sweep up?

03 A. Oh, see -- yeah, some of it came from

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107. PAGE 344:04 TO 344:08 (RUNNING 00:00:20.873)

04 when they was putting the lines in -- the
 05 insulation on the steam pipes and I believe some of
 06 it was coming from out there on the back -- back of
 07 the -- I believe it was coming from the back of the
 08 -- where it went in the slicer-dicer.

 NEELANDS, HARLEY (Vol. 01) - 12/08/2016

1 CLIP (RUNNING 00:23:09.552)



Good morning, Mr. Neeland. How are you? ...

HN-1208-0003124

58 SEGMENTS (RUNNING 00:23:09.552)



1. PAGE 31:24 TO 32:06 (RUNNING 00:00:14.105)

24 Q. Good morning, Mr. Neeland. How are you?
 25 A. Good morning.
 00032:01 Q. Thank you for being here with us this
 02 morning.
 03 Tell us who you are.
 04 A. Harley Neelands.
 05 Q. Where do you live, Mr. Neeland?
 06 A. 3475 Hughes Road, Clover, South Carolina.

2. PAGE 34:03 TO 34:18 (RUNNING 00:00:33.626)

03 Q. All right. And did you work as an insulator?
 04 A. Yes, ma'am.
 05 Q. When did you start doing that work?
 06 A. In 1968.
 07 Q. Okay. And when you started in 1968, who were
 08 you working for?
 09 A. Daniel Construction.
 10 Q. And what did -- what was your job for Daniel?
 11 A. Start off was an insulator helper.
 12 Q. Okay. And what does an insulator helper do?
 13 A. Well, he gets material, mixes mud and carries
 14 it to the people out on the job. The people that's
 15 actually doing the work.
 16 Q. Okay. And do you help the higher-ups, the
 17 actual insulators?
 18 A. Oh, yeah. Yeah.

3. PAGE 77:05 TO 77:14 (RUNNING 00:00:17.687)

05 Q. All right. And what year do you think that
 06 was? I know you started at '68 in Bo--- at Bowater.
 07 A. The very next year, about '69 probably.
 08 First part of '69, somewhere along in that.
 09 Q. Okay. 1969, you went to Fiber Industries in
 10 Salisbury, North Carolina?
 11 A. Yes, ma'am.
 12 Q. Okay. And who were you -- were you still
 13 employed by Daniel?
 14 A. Yes, ma'am.

4. PAGE 77:17 TO 77:23 (RUNNING 00:00:19.007)

17 Q. All right. And what were you all doing at
 18 Fiber Industries in Salisbury?
 19 A. Basically same thing at Bowater but just on a
 20 different system. It was, you know, totally different.

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21 The fiber plant was totally different, you know.
 22 Smaller pipes, different type things, but it's still
 23 basic insulation is what we was doing.

5. PAGE 79:02 TO 79:04 (RUNNING 00:00:05.906)

02 Q. All right. I'm sorry. So next we went to
 03 Fiber Industries in Salisbury.
 04 A. Yes, ma'am.

6. PAGE 79:07 TO 80:15 (RUNNING 00:01:19.639)

07 Q. And tell me what you did for them. What --
 08 what was Celanese making at the time or Fiber
 09 Industries making at the time?
 10 A. They made some kind of fiber that went into
 11 tires and stuff, I think, at that time.
 12 Q. Okay.
 13 A. With the polyester core or some kind of
 14 something that went in automobile tires, I think.
 15 Q. Okay. And tell me what you all were -- what
 16 were you all doing at Fiber Industries?
 17 A. We was covering pipes up there of stuff that
 18 had to keep -- they had some type of chemical that had
 19 to stay hot, you know, from -- it would circulate
 20 through the machines or whatever. The chemical had to
 21 stay hot, and we had to insulate the pipe to keep
 22 whatever the material was hot when it was going through
 23 production or whatever they was doing with it.
 24 Q. Okay. So was this new construction that you
 25 all were insulating, or were you all --
 00080:01 A. Yeah.
 02 Q. All right. So when you all came in to do
 03 your work, was it during a shutdown?
 04 A. No. They were already running but just
 05 adding -- building a new part.
 06 Q. Okay. All right. And Fuzz was working with
 07 you during this time period?
 08 A. Yeah.
 09 Q. All right. And how long do you think you and
 10 Fuzz were at Fiber Industries in Salisbury?
 11 A. I think seven, eight months, I think. I
 12 think.
 13 Q. Okay. And you said that you guys were
 14 insulating pipe?
 15 A. Yeah.

7. PAGE 81:09 TO 81:24 (RUNNING 00:00:40.421)

09 What were you all building that was new or
 10 what were you insulating that was new at the Fiber
 11 Industries plant?
 12 A. Pipes, stuff, machines, some type of machines
 13 they call it. I don't know what the machines were.
 14 Something to use in the -- to make that fiber that
 15 made -- that went in the tires.
 16 Q. Okay. And so the pipe that you were
 17 insulating, was that hot pipe or steam?
 18 A. Yes, it's hot. Yeah.
 19 Q. All right. And what materials were you using
 20 to insulate at the Fiber Industries plant?
 21 A. That Kaylo-type stuff, powder stuff.
 22 Q. Okay. When we talked to -- when we talked
 23 about insulating pipe at Fiber Industries, did you do
 24 it the same way as you did at Bowater?

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8. PAGE 82:01 TO 82:12 (RUNNING 00:00:27.202)

00082:01 THE WITNESS: Same place, the same thing.
02 Most of them were smaller scale. It wasn't as big --
03 most wasn't as big a pipe and stuff as there.
04 BY MS. MCVEY:
05 Q. Okay.
06 A. There were some of those machines that had
07 some type of headers and stuff, you know, was built.
08 One pipe and then a bunch of little pipes come off of
09 it that went to headers and stuff before it went to
10 those chemical lines or whatever.
11 Q. Okay. So when you were insulating pipe at
12 Fiber Industries and -- well, all right. Let me --

9. PAGE 82:22 TO 83:13 (RUNNING 00:00:40.902)

22 Q. When you were insulating the pipes at Fiber
23 Industries --
24 A. Yeah.
25 Q. -- can you walk us through the process again
00083:01 about how you did that. What was the first step?
02 A. Well, the first thing, you know, they had the
03 same type insulation that come in two halves most of
04 the time and you just put those two halves around the
05 pipe and wire it on there and beat the wires in and
06 such as that. And sometimes -- certain situations,
07 sometimes you fix it where you put metal on certain --
08 in certain areas. You fabbed it out, like I talked
09 about before, you know, with the cloth and -- and
10 stuff. It's according -- according to what the
11 situation called for.
12 Q. Okay. And so would you have to make cuts in
13 that insulation?

10. PAGE 83:15 TO 83:18 (RUNNING 00:00:05.313)

15 THE WITNESS: Yeah.
16 BY MS. MCVEY:
17 Q. Okay. And when you made those cuts, what, if
18 any, conditions did that create?

11. PAGE 83:20 TO 83:23 (RUNNING 00:00:04.509)

20 THE WITNESS: It creates dust. Any time you
21 saw insulation, you got dust.
22 BY MS. MCVEY:
23 Q. Okay. And where did that dust go?

12. PAGE 83:25 TO 84:11 (RUNNING 00:00:19.675)

25 THE WITNESS: In the air and on your clothes.
00084:01 BY MS. MCVEY:
02 Q. And then -- so that's the first step. You
03 need to make the cut to put the two halves on the pipe;
04 is that right?
05 A. Yeah.
06 Q. And then the next step would be to put that
07 air on that we talked about?
08 A. Put the wire on and beat it in.
09 Q. All right. And when you beat that wire into
10 the insulation, what, if any, conditions did that
11 create?

13. PAGE 84:13 TO 84:15 (RUNNING 00:00:01.201)

13 THE WITNESS: Creates dust.
14 BY MS. MCVEY:
15 Q. And where does that dust go?

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14. PAGE 84:17 TO 85:03 (RUNNING 00:00:22.795)

17 THE WITNESS: On your clothes.
 18 BY MS. MCVEY:
 19 Q. All right. And then the next step would be
 20 what?
 21 A. To either, like I say, put the metal on the
 22 metal jacket, whatever it called for, or either
 23 sometimes they put cloth on it. It's according to
 24 where it was and who was going to be exposed to it.
 25 Q. Okay. So when you put the metal sheet on top
 00085:01 of the insulation --
 02 A. Yes, ma'am.
 03 Q. -- did that create any conditions?

15. PAGE 85:05 TO 85:09 (RUNNING 00:00:03.643)

05 THE WITNESS: Oh, yes.
 06 BY MS. MCVEY:
 07 Q. What kind of conditions did that create?
 08 A. Dust.
 09 Q. And where did that dust go?

16. PAGE 85:11 TO 85:18 (RUNNING 00:00:11.286)

11 THE WITNESS: On your clothes.
 12 BY MS. MCVEY:
 13 Q. All right. If you -- when you -- and if
 14 didn't use the metal sheet but you used the cloth --
 15 A. Yeah.
 16 Q. -- did that create any conditions?
 17 A. Oh, yeah.
 18 Q. What kind of conditions did that create?

17. PAGE 85:20 TO 85:23 (RUNNING 00:00:04.727)

20 THE WITNESS: Dust. Any time you fool with
 21 insulation, you got dust.
 22 BY MS. MCVEY:
 23 Q. All right. And where would that dust go?

18. PAGE 85:24 TO 87:15 (RUNNING 00:01:17.669)

24 MR. COLLIER: Object to the form.
 25 THE WITNESS: On your clothes.
 00086:01 BY MS. MCVEY:
 02 Q. And then -- so that's just the straight pipe;
 03 is that right?
 04 A. Yeah.
 05 Q. All right. Any other steps to insulating
 06 that pipe?
 07 A. Not on the straight stuff, no, ma'am.
 08 Q. All right. And then did you have elbows at
 09 the --
 10 A. Yeah.
 11 Q. -- Fiber Industries plants as well?
 12 A. Yeah, plenty of them. Yeah.
 13 Q. All right. And can you walk us through,
 14 again, how you insulated those elbows.
 15 A. Well, some of them we cut -- it's according
 16 to where it was at. Some of them we cut the miters and
 17 actually wired them on there. And sometimes up there
 18 at Salisbury, they had a fab shop that made those
 19 things and brought them out on the job. But, still,
 20 you had to wire them on there and beat the wires in.
 21 Q. Okay. So sometimes at the Fiber Industries
 22 plant, you guys would make the cuts; is that right?
 23 For the elbow?
 24 A. Yeah.

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25 Q. All right. And sometimes they would have
00087:01 already made the cuts for you?
02 A. They would have them glued together, and you
03 just wire them on there and bring them out on the job.
04 See, if you had a job, say, it had -- some of those
05 machines had a hundred elbows on it.
06 Q. Okay.
07 A. They would cut them maybe in the shop and
08 bring them out. All you did was wire them on there and
09 smooth them up and then put the mud on them and then
10 put the cloth on them and paint the cloth out.
11 Q. Okay. All right. So the times that you had
12 to actually make -- you or Fuzz had to make the actual
13 cuts in the elbow --
14 A. Yeah.
15 Q. -- did that create any conditions?

19. PAGE 87:22 TO 88:10 (RUNNING 00:00:22.048)

22 THE WITNESS: On your clothes.
23 BY MS. MCVEY:
24 Q. And then if -- even if -- if the fab shop
25 made the cuts for you --
00088:01 A. Yeah.
02 Q. -- you guys still had to put the wire on?
03 A. Still got to smooth -- put the wire on and
04 then smooth them out and then mud -- put the cloth on.
05 Q. Okay. And I know I'm making you crazy to go
06 through all these steps, but I've got to do it. So
07 when you put the wire on, when you would beat it into
08 the insulation --
09 A. Yes, ma'am.
10 Q. -- did that create any conditions?

20. PAGE 88:12 TO 89:05 (RUNNING 00:00:37.659)

12 THE WITNESS: Created dust. Yes, ma'am.
13 BY MS. MCVEY:
14 Q. All right. And you would have to beat that
15 wire into the elbow no matter if you made the cut or if
16 the fab shop made the cut?
17 A. That's right, yeah.
18 Q. All right. And then after you beat the wire
19 in, what was the next step, was it mud?
20 A. Yeah, mud. Yes, ma'am.
21 Q. And tell us about that mud. Which kind of
22 mud were you using at the Fiber Industries plant?
23 A. Same type mud. You just take, like I say, on
24 the smaller jobs like that, you mix it most of the time
25 in a bucket. Instead of mixing it in a big volume like
00089:01 we did on some of the turbines and boilers and stuff,
02 you mix it in a bucket most of the time if you didn't
03 need much.
04 Q. All right. And when you -- did it come in
05 the same 50-pound bags?

21. PAGE 89:08 TO 89:20 (RUNNING 00:00:19.207)

08 Q. All right. Let me ask a better question.
09 What kind of bag -- did it come in a bag?
10 A. Yeah.
11 Q. All right. And how big were the bags?
12 A. 50 pounds, I'm assuming.
13 Q. All right. And this is, again, at the Fiber
14 Industries plant?
15 A. Yeah. Yeah.
16 Q. All right. And so when you would take the
17 bag and would you pour it into a bucket?

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18 A. Dump it over in the bucket, yeah. When you
19 poured mud in the water, dust would come up.
20 MS. MCVEY: Okay.

22. PAGE 89:24 TO 89:24 (RUNNING 00:00:01.827)

24 Q. And where would that dust go?

23. PAGE 90:01 TO 90:16 (RUNNING 00:00:30.012)

00090:01 THE WITNESS: On your clothes.
02 BY MS. MCVEY:
03 Q. All right. And then you take a trough (sic)
04 -- what would you do, I'm sorry, to put the mud on?
05 A. Take a trowel and put it on there with a
06 trowel and to let it dry and spread it out, paint it
07 out. Put the cloth on it and paint it out.
08 Q. All right. And if you had to smooth out that
09 mud after it dried, what kind of tools did you use for
10 that?
11 A. Well, we had a little rasp or a piece of wire
12 or something, really, with a piece of wire or anything
13 to take the rough edgings off it. Just get it a little
14 bit smoother.
15 Q. Okay. And would that create any conditions
16 when you were smoothing it out?

24. PAGE 90:18 TO 90:21 (RUNNING 00:00:04.420)

18 THE WITNESS: Any time you rub insulation,
19 you got dust. Unless it's wet.
20 BY MS. MCVEY:
21 Q. And where would it go?

25. PAGE 90:23 TO 93:08 (RUNNING 00:01:55.389)

23 THE WITNESS: In the air.
24 BY MS. MCVEY:
25 Q. All right. And then the next step would be
00091:01 to put that cloth on?
02 A. Yeah. Paint it out.
03 Q. All right. And would you have to cut that
04 cloth?
05 A. Yeah.
06 Q. All right. And then tell me what you would
07 do after you put the cloth on?
08 A. Paint it.
09 Q. All right.
10 A. Mast it.
11 Q. All right.
12 A. Waterproof it.
13 Q. All right. And that's the same type of
14 product you talked about using at Bowater; is that
15 right?
16 A. Same thing.
17 Q. All right. So that's the elbow. Did we
18 cover that process?
19 A. Yes.
20 Q. All right. So we covered the pipe, we
21 covered the elbow.
22 A. Yeah.
23 Q. And then you said you guys insulated some
24 other equipment?
25 A. Yeah. But I don't really know what they call
00092:01 the machines and stuff we was doing, but it's just --
02 it's basically the same thing. All of it was the same
03 thing. Before you insulate the pipes and the elbows
04 the valves --
05 Q. Okay.

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06 A. -- just basic insulation.
 07 Q. All right. So I'm going to talk to you a
 08 little bit about the valves as well.
 09 A. Yeah.
 10 Q. I'm sorry. We're talking, again, about the
 11 valves at Fiber Industries?
 12 A. Yeah.
 13 Q. All right. And the size pipes that you
 14 use -- that you guys were insulating at Fiber
 15 Industries, were they different than the size pipes you
 16 were using -- you were insulating at Bowater?
 17 A. Basically the same thing.
 18 Q. Okay. About the same different sizes?
 19 A. Yeah. On a smaller scale mostly at Fiber
 20 than was at Bowater.
 21 Q. Okay. How -- can you describe the range of
 22 the size of pipe at Fiber?
 23 A. Well, mostly it went from probably a two-inch
 24 pipe to maybe a six- or eight-inch pipe, you know.
 25 Q. Okay. So a little bit -- you didn't --
 00093:01 A. As a whole at Fiber, we use thicker material
 02 and more of it because the pipes were hotter.
 03 Q. Okay.
 04 A. They had some kind of -- instead of the way
 05 we was doing steam lines at Bowater, they use something
 06 they call DOWTHERM. It was a product that run through
 07 there that would withstand more heat than steam would
 08 and the pipes got hotter.

26. PAGE 93:12 TO 93:13 (RUNNING 00:00:03.897)

12 THE WITNESS: So you had to put thicker
 13 insulation or more of it.

27. PAGE 93:16 TO 94:17 (RUNNING 00:00:45.723)

16 BY MS. MCVEY:
 17 Q. And the thicker insulation, are you talking
 18 about that half-moon insulation?
 19 A. Yeah. The thickness, yeah. Say, for
 20 instance, you might at Bowater, you might put two
 21 inches of insulation on some of it. Up there, you
 22 might use four inches thick.
 23 Q. Okay.
 24 A. Because the pipes was hotter.
 25 Q. Okay. At Fiber?
 00094:01 A. Yeah.
 02 Q. All right. When you were insulating, did you
 03 insulate valves at Fiber Industries?
 04 A. Yes, ma'am.
 05 Q. All right. And tell us how you insulated
 06 those valves.
 07 A. Same procedure you did with the pipe. Just
 08 took, like, say, if you used a bigger material.
 09 Q. Okay. So you would have to take that
 10 preformed?
 11 A. Preformed and cut it, yeah.
 12 Q. All right. And when you made those cuts,
 13 what, if any, conditions did that create?
 14 MR. COLLIER: Object to the form.
 15 THE WITNESS: Dust.
 16 BY MS. MCVEY:
 17 Q. All right. And where did that dust go?

28. PAGE 94:19 TO 95:01 (RUNNING 00:00:12.428)

19 THE WITNESS: On your clothes. On your
 20 clothes.

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21 BY MS. MCVEY:
22 Q. Okay. And would you -- what would you do
23 next? Would you have to take that wire again?
24 A. Yeah, and put wires on there.
25 Q. All right. And did you have to beat the wire
00095:01 in?

29. PAGE 95:03 TO 95:08 (RUNNING 00:00:12.813)

03 THE WITNESS: Beat the wire in and you would
04 have to mud the ends to fill in the cracks, you know,
05 to make it fit the pipe and seal it off.
06 BY MS. MCVEY:
07 Q. Okay. So when you beat that wire in for the
08 valves, did that create any conditions?

30. PAGE 95:10 TO 95:12 (RUNNING 00:00:02.762)

10 THE WITNESS: It created dust.
11 BY MS. MCVEY:
12 Q. All right. And where did that dust go?

31. PAGE 95:14 TO 96:09 (RUNNING 00:00:32.200)

14 THE WITNESS: On your clothes.
15 BY MS. MCVEY:
16 Q. All right. And so you did the pre--- prefab
17 insulation?
18 A. Yeah.
19 Q. Then you did the wire?
20 A. Yeah.
21 Q. An then what was the next step?
22 A. You mud the ends of the valves and stuff and
23 then put the cloth on them and put metal on the
24 straight parts of it.
25 Q. Okay. So you had to mix mud. Did you have
00096:01 to mix the mud again?
02 A. Yeah.
03 Q. All right. And tell us again how you mix the
04 mud for the valve.
05 A. Put water in a five-gallon bucket and dumped
06 the mud in there and stirred it with your hand.
07 Q. Okay. And what, if any, conditions did that
08 create when you dumped the mud into the five-gallon
09 bucket?

32. PAGE 96:11 TO 96:14 (RUNNING 00:00:04.579)

11 THE WITNESS: Dumped the mud on the water,
12 you got dust.
13 BY MS. MCVEY:
14 Q. Okay. And where did that dust go?

33. PAGE 96:16 TO 96:20 (RUNNING 00:00:07.237)

16 THE WITNESS: On your clothes.
17 BY MS. MCVEY:
18 Q. All right. And when you were mixing the mud
19 into the water, did that create any conditions?
20 A. Yes, ma'am.

34. PAGE 96:23 TO 97:03 (RUNNING 00:00:06.434)

23 Q. What conditions did which create?
24 MR. COLLIER: Object to the form.
25 THE WITNESS: It creates dust any time you
00097:01 handle it.
02 BY MS. MCVEY:
03 Q. All right. And where did that dust go?

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35. PAGE 97:05 TO 97:12 (RUNNING 00:00:13.870)

05 THE WITNESS: On your clothes.
 06 BY MS. MCVEY:
 07 Q. All right. And after you put the mud on, did
 08 you have to smooth that out after it dried?
 09 A. Yeah.
 10 Q. All right. And when you smoothed that out,
 11 did that create any condition?
 12 A. Yes, ma'am. Creates dust.

36. PAGE 97:15 TO 97:16 (RUNNING 00:00:02.465)

15 Q. Okay. And where did the dust go?
 16 A. On your clothes.

37. PAGE 97:19 TO 98:18 (RUNNING 00:00:43.881)

19 Q. All right. So we talked about pipes. We've
 20 talked about valves. We talked about elbows that Fiber
 21 Industries used Salisbury.
 22 A. Yeah.
 23 Q. And then you talked about other equipment
 24 that you all insulated; is that right?
 25 A. Yeah.
 00098:01 Q. All right. And you don't know what that
 02 equipment was?
 03 A. I don't know what you call the machines. No,
 04 ma'am.
 05 Q. Okay. Can you describe the size of the
 06 machines that you were insulating?
 07 A. Well, it was something that was probably a
 08 hundred feet long, and it had 50 pipes coming out of
 09 it. Like a big header, you know. And ever where one
 10 of those pipes come out, it made some type of yarn or
 11 string or some kind of fiber --
 12 Q. Okay.
 13 A. -- that come out of that machine.
 14 Q. All right. So were you all insulating all
 15 the pipes going into that machine?
 16 A. Yeah. Yeah.
 17 Q. All right. And then did you actually
 18 insulate the machine itself?

38. PAGE 98:20 TO 98:24 (RUNNING 00:00:06.344)

20 THE WITNESS: We didn't. No, ma'am.
 21 BY MS. MCVEY:
 22 Q. Okay. That wasn't -- did you -- were you --
 23 you and Fuzz around anybody who was insulating that
 24 machine?

39. PAGE 99:01 TO 99:18 (RUNNING 00:00:31.801)

00099:01 THE WITNESS: They had some kind of people
 02 that was doing that. They put some kind of a board on
 03 it. I don't know it what that stuff was. It was some
 04 kind of a -- looked like a white-looking board.
 05 BY MS. MCVEY:
 06 Q. Okay. And did they put any other materials
 07 on it that you could see?
 08 A. Metal over that -- over whatever that board
 09 was they was putting on.
 10 Q. Okay. You didn't -- there was no mud put on
 11 that particular machine?
 12 A. No. Not that part of it, no.
 13 Q. All right. Did you insulate any other
 14 equipment at Fiber Industries in Salisbury?
 15 A. Not as I can remember, no, ma'am.

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16 Q. All right. And I think you testified that
 17 you were there for, what, seven or eight months?
 18 A. Yes.

40. PAGE 99:21 TO 100:14 (RUNNING 00:00:38.817)

21 Q. All right. And what hours were you all
 22 working then?
 23 A. Ten-hour days. Four ten-hour days.
 24 Q. Okay. And during your ten-hour days, were
 25 you all insulating every day?
 00100:01 A. Yes, ma'am.
 02 Q. All right. And so whether you were
 03 insulating the pipe or the elbow or the valves, would
 04 you all have to clean up after yourselves?
 05 A. That's right. Yes, ma'am.
 06 Q. And talk to us about how you cleaned up at
 07 Fiber Industries.
 08 A. Take a broom, sweep it up. And then take a
 09 dustpan or a piece of metal and scoop it up and dump it
 10 in the trash can.
 11 Q. Okay. And when you were sweeping up, were
 12 you all sweeping up insulation?
 13 A. Yes, ma'am.
 14 Q. All right. Did that create any conditions?

41. PAGE 100:16 TO 100:18 (RUNNING 00:00:02.487)

16 THE WITNESS: Yes, ma'am. It created dust.
 17 BY MS. MCVEY:
 18 Q. All right. And where did that dust go?

42. PAGE 100:20 TO 100:23 (RUNNING 00:00:09.423)

20 THE WITNESS: On your clothes and in the air.
 21 BY MS. MCVEY:
 22 Q. And when you scooped it up and you put it in
 23 the trash can, did that create any conditions?

43. PAGE 100:25 TO 101:03 (RUNNING 00:00:01.936)

25 THE WITNESS: Oh, yeah. When you dump it
 00101:01 over in there, the dust came back out.
 02 BY MS. MCVEY:
 03 Q. And where did that dust go?

44. PAGE 101:05 TO 102:01 (RUNNING 00:00:40.044)

05 THE WITNESS: On your clothes.
 06 BY MS. MCVEY:
 07 Q. All right. And would you all clean up every
 08 day?
 09 A. Yes, ma'am. That was a part of it. You had
 10 to clean up before you leave.
 11 Q. All right. So for seven or eight months,
 12 however long you all were at Salisbury, you and Fuzz
 13 were insulating every day?
 14 A. Yes, ma'am.
 15 Q. And you were cleaning up every day?
 16 A. Yeah.
 17 Q. And where did you all get your insulation
 18 supplies at -- at Fiber Industries?
 19 A. You mean where did they get it, or where did
 20 we get it at?
 21 Q. Well, did you get it onsite or did you --
 22 A. Yeah. They had it there, brought it in. And
 23 sometimes, though, we'd go to the warehouse and pick it
 24 up. Sometimes they had helpers would bring it out to
 25 you.

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00102:01 Q. Okay. Was it a Fiber Industries' warehouse?

45. PAGE 102:03 TO 102:03 (RUNNING 00:00:01.333)

03 THE WITNESS: Yes, ma'am.

46. PAGE 124:03 TO 125:03 (RUNNING 00:00:52.051)

03 Q. Okay. Did you guys work in other plants
04 together during that time period?

05 A. Yes, ma'am.

06 Q. Did you work together at the Celanese
07 Spartanburg plant?

08 A. Yes, ma'am.

09 Q. Okay. And who were you employed by when you
10 were working at the Celanese Spartanburg?

11 A. Daniel Construction.

12 Q. All right. And what were you all doing at
13 the Celanese Spartanburg plant?

14 A. Basically the same thing we talked about at
15 Salisbury. Basically the same type plant, just
16 different -- different organization.

17 Q. Okay. So were you all doing new
18 construction?

19 A. Yeah.

20 Q. In Spartanburg?

21 A. Yeah.

22 Q. Okay. And were you guys insulating straight
23 pipe?

24 A. Pipes, yeah. Pipes and headers such as that,
25 yes, ma'am.

00125:01 Q. And at the Spartanburg Celanese plant, was it
02 the same size pipes as we discussed at Fiber
03 Industries?

47. PAGE 125:05 TO 125:13 (RUNNING 00:00:18.097)

05 THE WITNESS: Basically the same thing, yes,
06 ma'am.

07 BY MS. MCVEY:

08 Q. Okay. So it ranged from, I think you
09 testified, two- to about eight-inch pipe?

10 A. Yes, ma'am.

11 Q. All right. And the way that you insulated
12 the pipe at Celanese, did you use the same materials
13 you used at Fiber Industries?

48. PAGE 125:23 TO 126:21 (RUNNING 00:00:51.501)

23 Q. Okay. All right. Let me ask you, what
24 material -- what insulation material were you all using
25 on the pipe at Celanese Spartanburg?

00126:01 A. Mostly that Kaylo-type stuff.

02 Q. Okay. And that was the half-moon insulation
03 we talked about?

04 A. Yes, ma'am. Yeah.

05 Q. All right. And the way you put that
06 insulation on, was it the same at Celanese Spartanburg
07 as it was at Fiber Industries?

08 A. Same procedure. You wired it on. Same
09 thing.

10 Q. Okay. And did it create the same type of
11 condition that --

12 A. Same dust. Same thing, yes, ma'am.

13 Q. All right. And did you also insulate elbows
14 at Celanese Spartanburg?

15 A. Elbows, valves, tees, same thing.

16 Q. Okay. And when -- was it the same process
17 and same materials?

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18 A. Yes, ma'am. Same thing.
 19 Q. Okay. So did you have to use the block
 20 insulation at Celanese Spartanburg as you did at Fiber
 21 Industries?

49. PAGE 126:23 TO 129:03 (RUNNING 00:01:28.454)

23 THE WITNESS: Basically the same thing, yes,
 24 ma'am. Same type stuff.
 25 BY MS. MCVEY:
 00127:01 Q. All right. Was it the Kaylo insulation?
 02 A. Yeah.
 03 Q. And do you have to apply mud on those elbows?
 04 A. Yes, ma'am.
 05 Q. And was it the same type of mud as you used
 06 at Fiber Industries?
 07 A. Same thing, yes, ma'am.
 08 Q. And did it create the same conditions?
 09 A. Same dust, yes.
 10 Q. And the same procedure?
 11 A. Same procedure, yes, ma'am.
 12 Q. All right. And did you also insulate valves?
 13 A. Yes! Valves, tees, elbows.
 14 Q. And what's a tee?
 15 A. That's where two pipes goes together like
 16 that. Where one tees into the other.
 17 Q. Okay. You insulated those at Celanese
 18 Spartanburg?
 19 A. Yeah. Everywhere. Same thing, yeah.
 20 Q. And you did those at Bowater and you did it
 21 at Fiber Industries?
 22 A. Yeah.
 23 Q. All right.
 24 A. Any time you tie one pipe into another one,
 25 they call it a tee.
 00128:01 Q. Okay. And the tee, were you using the same
 02 type of insulation?
 03 A. Same thing. Cut it to fit it.
 04 Q. All right. And did you have to mud the tee?
 05 A. If you good enough at cutting it, you didn't
 06 have to.
 07 Q. Were you good enough at cutting it?
 08 A. Yeah.
 09 Q. All right. Did sometimes you have to mud the
 10 tee?
 11 A. Sometimes you have a hole or something you'd
 12 fill it with mud, yeah.
 13 Q. Okay. And was the -- did you use the same
 14 type of mud at Cela---
 15 A. Same thing, yeah.
 16 Q. And let me get my question out just to make
 17 the court reporter's life a little bit easier.
 18 A. Okay.
 19 Q. Same type of mud that you used at Celanese as
 20 you did --
 21 A. Same thing, yeah.
 22 Q. -- at Fiber Industries?
 23 A. Yeah.
 24 Q. Okay. And the way you mix it was the same?
 25 A. Same thing, yeah.
 00129:01 Q. All right. And the conditions created were
 02 the same?
 03 A. Same thing.

50. PAGE 129:08 TO 130:22 (RUNNING 00:01:23.116)

08 Q. And so you did elbows the same or similar as

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09 you did at Fiber Industries in Salisbury?
 10 A. Yes, ma'am.
 11 Q. And you did the pipes the same or similar as
 12 you did at Fiber Industries?
 13 A. Yes, ma'am.
 14 Q. And the valves, you did them the same?
 15 A. Same thing.
 16 Q. All right. And it was the same type of
 17 materials?
 18 A. Yes. All basic insulation, yeah.
 19 Q. All right. Did you insulate any other
 20 equipment at Celanese Spartanburg that you can recall?
 21 A. No, ma'am.
 22 Q. All right. So you just did pipes, elbows,
 23 valves?
 24 A. Yeah.
 25 Q. How long were you all at the Spartanburg
 00130:01 plant?
 02 A. I don't know. I'm saying six or eight
 03 months. I know it sounds odd that you're at a plant so
 04 long, but, see, they did these things in phases. And
 05 that's as long as you -- when you finish a project, you
 06 move on to another job or something. I know it sounds
 07 odd that you don't work but six or eight months in a
 08 place. But it goes through phases and construction
 09 phases. When the job runs out, you either get laid off
 10 or they move you to another place.
 11 Q. Okay. So for those six or eight months that
 12 you were at Celanese Spartanburg, what were your hours
 13 like?
 14 A. Well, we worked four, ten-hour days there.
 15 Q. Okay. And were you doing insulation work all
 16 those ten hours?
 17 A. Oh, yeah. Yeah.
 18 Q. Okay. And the way you described cleaning up
 19 every day at Fiber Industries in Salisbury, was that
 20 the same way you did it at Celanese?
 21 A. Same thing. Yes, ma'am.
 22 Q. Okay. And did it create the same conditions?

51. PAGE 130:24 TO 131:13 (RUNNING 00:00:26.418)

24 THE WITNESS: Yeah. That was a part of the
 25 job, clean up every day before you went home.
 00131:01 BY MS. MCVEY:
 02 Q. Okay. And when you would leave the Celanese
 03 plant in Spartanburg, you and Fuzz -- you all worked
 04 together at that plant; is that right?
 05 A. Yes.
 06 Q. Okay. You were near each other doing the
 07 same work?
 08 A. Yeah.
 09 Q. When you all would leave the plant at the end
 10 of the day, what did your clothes look like?
 11 A. White.
 12 Q. Okay. Covered with what?
 13 A. Chalky. White chalky dust, yes.

52. PAGE 131:16 TO 132:04 (RUNNING 00:00:25.263)

16 Q. All right. And was it the same dust that was
 17 created when you were insulating?
 18 A. Same thing.
 19 Q. All right. And you were employed by Daniel
 20 at the Spartanburg plant; is that right?
 21 A. Yes, ma'am.
 22 Q. All right. Was it the same at Fiber

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23 Industries where Daniel was doing new construction?
24 A. Yeah.
25 Q. All right. And the Celanese employees were
00132:01 not doing new construction; is that right?
02 A. No, ma'am.
03 Q. They were doing Celanese work?
04 A. Celanese work, yeah.

53. PAGE 132:21 TO 132:24 (RUNNING 00:00:03.283)

21 Q. And the same thing with Celanese, did
22 Celanese ever tell you to change your clothes before
23 you went home?
24 A. No, ma'am.

54. PAGE 133:02 TO 133:04 (RUNNING 00:00:06.508)

02 Q. All right. Did they ever tell you to -- warn
03 you about the dangers of asbestos?
04 THE WITNESS: No, ma'am.

55. PAGE 133:07 TO 133:09 (RUNNING 00:00:02.466)

07 Q. Okay. Did they ever provide you with any
08 protective equipment?
09 A. No.

56. PAGE 133:12 TO 133:23 (RUNNING 00:00:23.687)

12 Q. When you guys were insulating with the Kaylo
13 block and the mud, where did you get those materials?
14 A. Sometimes helpers bought it out, and
15 sometimes you go to a warehouse and get it --
16 Q. Okay.
17 A. -- or a supply room and get it.
18 Q. All right. And was the supply room on the
19 Celanese plant?
20 A. Yes, ma'am.
21 Q. And so you would get the materials from
22 Celanese?
23 A. Yes.

57. PAGE 134:06 TO 134:17 (RUNNING 00:00:23.492)

06 Q. Okay. So if you were working for Daniel at
07 the Celanese Spartanburg plant --
08 A. Yeah.
09 Q. -- who provided you with those materials?
10 A. I think they brought -- bought it from Covil
11 Insulation, and they brought it in there. I think.
12 Q. Okay. "They" being Daniel?
13 A. Yeah.
14 Q. Okay. And Covil was what?
15 A. They was like an insulation supplier.
16 Q. Okay.
17 A. And they was also a insulating company.

58. PAGE 135:22 TO 135:25 (RUNNING 00:00:04.867)

22 Q. Okay. At the Celanese Spartanburg plant?
23 A. Yes, ma'am.
24 Q. Covil supplied that insulation?
25 A. Yeah.

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1 CLIP (RUNNING 00:18:59.154)

 Thank you. Now, when you left Kmart, what was ...

DW-1016-0031414

36 SEGMENTS (RUNNING 00:18:59.154)



1. PAGE 314:14 TO 314:19 (RUNNING 00:00:21.118)

14 Q Thank you. Now, when you left Kmart, what was
15 your next job for employment?
16 A I went to work with Covil Insulation Company.
17 Q Okay. And what year do you believe that was
18 in?
19 A I believe that was in '72.

2. PAGE 315:23 TO 316:01 (RUNNING 00:00:09.972)

23 Q Okay. What -- let me just ask, I will try to
24 break it down. What did you start out at as Covil, your job
25 title?
00316:01 A As a helper, an apprentice like.

3. PAGE 316:02 TO 316:04 (RUNNING 00:00:16.223)

02 Q And what were your job responsibilities as a
03 helper or an apprentice?
04 A Mine was to keep the insulation up to the --

4. PAGE 316:05 TO 316:18 (RUNNING 00:00:42.411)

05 to the mechanics. That's what you call the top. Keep the
06 materials and wire and things like that, make up the mud in a
07 wheelbarrow and all, put it in buckets and take it to them
08 and clean up. Excuse me.
09 Q Now, did you say unload?
10 A Sir?
11 Q Did you say unload?
12 A Unload?
13 Q Unload the shipments of insulation?
14 A Yes, we would do that, take it off the trucks
15 and all.
16 Q Would that include unboxing it or taking the
17 insulation out of the boxes?
18 A Yes.

5. PAGE 316:20 TO 317:12 (RUNNING 00:01:31.122)

20 THE WITNESS: We would normally take it
21 out of the box as we got to use it, we needed
22 to use it.
23 BY MR. HOLDER
24 Q Sure. Did -- was it normal course for Covil
25 to set up its own little tool shack or tool shed or stock shed
00317:01 on a premise where they would keep stock insulation?
02 A Yes, we would have, a lot of times, a plant
03 that was like Owens-Corning we had a gang box and it was in a
04 specified area for -- for the construction work and that's
05 where we were. A lot of jobs, a lot of times, would have a
06 little building that we would put tools and supervisor and
07 all work from there, so it varied.
08 Q Sure. So when you say "gang box," is that the
09 shed where y'all kept or the unit or whatever where y'all
10 kept the tools or supplies?
11 A It was mainly where all the insulators would
12 come in in the mornings and it was just a big metal box and

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6. PAGE 317:13 TO 317:24 (RUNNING 00:00:34.702)

13 the supervisor always had the key to it to unlock it --
 14 Q Sure.
 15 A -- and all the insulators kept their tools, so
 16 they wouldn't get stolen.
 17 Q Did you-all have a meeting there before you
 18 would head out on your job?
 19 A That's where we would have the meetings and
 20 all, yeah.
 21 Q Would that be called a gang box meeting?
 22 A I guess you could call it that.
 23 Q Okay. In any of those meetings do you
 24 remember discussing the hazards of asbestos?

7. PAGE 318:01 TO 318:01 (RUNNING 00:00:01.004)

00318:01 THE WITNESS: No.

8. PAGE 318:11 TO 318:13 (RUNNING 00:00:06.209)

11 Q From your first day at Covil were you out in
 12 the field on work sites?
 13 A Yes, sir.

9. PAGE 318:14 TO 318:17 (RUNNING 00:00:11.607)

14 Q What was the position? What was your job
 15 title after helper or apprentice?
 16 A Oh, after the apprentice?
 17 Q After helper or apprentice, yes.

10. PAGE 318:18 TO 319:01 (RUNNING 00:00:30.832)

18 A It went by -- doggone been so long I may have
 19 it backwards, but it was like first class, second class,
 20 third class mechanic. I'm thinking the third class mechanic
 21 was the top mechanic.
 22 Q Okay. But it could be reversed?
 23 A It could be reversed because it's been --
 24 Q It could have gone third, second, first class?
 25 A Right. Which to me that would sound more
 00319:01 logical.

11. PAGE 319:14 TO 319:20 (RUNNING 00:00:27.801)

14 Q What would differ about your job role or job
 15 duties when you were working as a -- in this first class of
 16 mechanic?
 17 A Talking about the top or the bottom?
 18 Q When -- the first one after you graduated from
 19 helper?
 20 A Okay. First class you still perform the

12. PAGE 319:21 TO 320:10 (RUNNING 00:01:04.959)

21 helper's job, still done that.
 22 Q Okay.
 23 A But during that time they would allow you to
 24 go in, one of the mechanics teach you how to put on Kaylo or
 25 how to smooth mud, things like that. It's just kind of an
 00320:01 on-hands teaching process that they had and that was the
 02 difference.
 03 Q Was it less grunt work and more teaching and
 04 learning?
 05 A Sir?
 06 Q Was it less grunt work than the apprentice job
 07 and more instruction?
 08 A At that time it was about 50-50.
 09 Q Okay. Now, do you know how long it was until

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10 you graduated to the next class of mechanic?

13. PAGE 320:11 TO 321:16 (RUNNING 00:01:27.999)

11 A Yeah.
 12 Q How long?
 13 A It was about -- well, I don't think -- it was
 14 about four months, maybe, because Russell Johnson come on the
 15 job and gave me my next raise.
 16 Q Sure. Let me ask you this: Who's Russell
 17 Johnson?
 18 A Russell Johnson?
 19 Q Yes.
 20 A He -- Russell back then was a Road
 21 Superintendent for Covil Corporation and he worked out of
 22 Greenville office.
 23 Q And he worked out of where?
 24 A He worked out of the Greenville office.
 25 Q Okay.
 00321:01 A And he would come check on jobs, make sure
 02 they're doing okay and all.
 03 Q And his title was Road Superintendent?
 04 A Road Superintendent. He placed people on the
 05 jobs out in the field, you know.
 06 Q Would the Superintendents of each work site
 07 answer to him?
 08 A Well, we didn't have a Superintendent --
 09 Q Okay.
 10 A -- on our job.
 11 Q Who was the highest man from Covil on each job
 12 site?
 13 A The highest man on a job like that would be
 14 like a third class mechanic that Russell chose to do the job.
 15 Q And would he be a supervisor on that site?
 16 A He would be the supervisor on that job, yes.

14. PAGE 321:17 TO 321:25 (RUNNING 00:00:22.888)

17 Q Now, would Russell Johnson move up higher in
 18 the company?
 19 A Did Johnson?
 20 Q Did Russell Johnson that you just mentioned --
 21 A Yes.
 22 Q -- had he gone up higher in the company of
 23 Covil than Road Superintendent?
 24 A Yes, he went from Road Superintendent to
 25 Vice President to President when Mr. Covil retired.

15. PAGE 322:08 TO 322:25 (RUNNING 00:01:18.059)

08 Q Thank you. Now, for this second mechanic,
 09 second class, let me first ask you: When you described the
 10 job title as a mechanic, is that a term for an insulator?
 11 A That's a term for insulators, yes. That's the
 12 method in which they go through in stages to be an insulator.
 13 Q Sure. So it does not indicate that you were
 14 doing any automotive work at Covil?
 15 A No. No. It's completely different.
 16 Q Okay. I just wanted to clarify for anybody
 17 that's looking at this later. How long do you think you were
 18 a second class mechanic for Covil before you got your --
 19 A About a year, year and a half maybe. Took a
 20 little longer than last one.
 21 Q And so for your last job title it was either
 22 first class or third class, whichever, the top?
 23 A Mechanic, yeah.
 24 Q And was that -- that top class of mechanic, was
 25 that the position you held until you -- the time you left

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16. PAGE 324:25 TO 325:21 (RUNNING 00:01:20.982)

25 Do you know what a shutdown is?
 00325:01 A Oh, yes.
 02 Q Explain to the jury what a shutdown is.
 03 A Shutdown is when a piece of machinery is
 04 shut down for repairs or replacement.
 05 Q Sure and --
 06 A That's what I was -- we were doing at
 07 Owens-Corning when I first went there. They had 27 furnaces
 08 in a furnace hall and we were rebuilding one, but we
 09 constantly rebuilt those things back then.
 10 Q Now, when you would have a shutdown, would it
 11 be an entire plant would shut down or would just certain
 12 portions of it shut down to work on that equipment?
 13 A Just that particular area. It was where the
 14 machine was.
 15 Q Okay. Now, were there -- were there some
 16 plants where you as Covil were just on call? Like you might
 17 go there more than once?
 18 A They had maintenance contracts for that.
 19 Q Okay. And would Covil ever hold a maintenance
 20 contract with any of the plants that you worked in?
 21 A Yes, sir.

17. PAGE 325:25 TO 326:05 (RUNNING 00:00:31.813)

25 Q And what would a maintenance contract with a
 00326:01 certain plant entail for you as the worker?
 02 A Well, it would, you'd be there every day.
 03 It's like a -- it would be like just working for a particular
 04 company and going to the same place every day, but the
 05 maintenance they required us to be on the job. Anything that

18. PAGE 326:06 TO 326:06 (RUNNING 00:00:12.122)

06 was torn off by their people to replace, we would replace,

19. PAGE 326:07 TO 328:06 (RUNNING 00:02:59.266)

07 and then they would have maybe an extruder or whatever go
 08 bad, shut it down. We would be there to insulate that.
 09 Q Now, for these places that would have y'all
 10 come in and do work, did they have guys that could do the
 11 same work as y'all or did y'all do work that nobody else
 12 there could do?
 13 A Well, they didn't have -- they didn't have
 14 trained insulators.
 15 Q Okay. Now, could you, for a place or a plant
 16 where there was -- the relationship was a maintenance
 17 contract that you just described, could you also have
 18 shutdowns at that location?
 19 A Yeah -- yes.
 20 Q Okay. But certain places where you would work
 21 a shutdown wouldn't be a maintenance contract, is that fair
 22 to say?
 23 A Yes, true, that's the way it worked.
 24 Q Now, how about new construction, would you-all
 25 ever work new construction?
 00327:01 A Oh, yes.
 02 Q Now, is new construction something that you
 03 would have also worked on as part of a maintenance contract
 04 at a place or would it just be an individual contract to
 05 build this?
 06 A It would just be a contract for that
 07 particular job, for that particular plant --
 08 Q Sure.
 09 A -- or building.

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10 Q Okay. So, just to summarize, I've got three
11 different kinds of projects. Where you have a maintenance
12 contract is the first kind where you would have that kind of
13 as a home plant and go there every day for work and do
14 whatever jobs they may have at that plant, is that correct?

15 A Correct.

16 Q And then there's a second type of project that
17 would just be a shutdown, where it could happen at a place
18 where you have a maintenance contract, but you could also
19 just be hired to come in and work on that one piece of
20 equipment for that shutdown, is that correct?

21 A Yes.

22 Q Okay. And the third kind of project you might
23 work at a plant is a new construction project, which would be
24 a project that is for that specific either new premise or new
25 addition to a plant, is that correct?

00328:01 A True.

02 Q Okay. Can you think of any other types of
03 work projects that wouldn't fall under one of those three
04 categories?

05 A No, I think that that would pretty well cover
06 it.

20. PAGE 377:07 TO 377:10 (RUNNING 00:00:14.287)

07 Q Oh, no, I was going to ask which kinds do you
08 remember insulating. Let's start with the pumps, was that a
09 block insulation or was that the mud insulation you talked
10 about?

21. PAGE 377:12 TO 378:07 (RUNNING 00:00:48.792)

12 THE WITNESS: The pumps that I would
13 always use the size of the flange. I would
14 use that. Get that size pipe covering.

15 BY MR. HOLDER

16 Q Okay.

17 A And go over the flange.

18 Q Sure.

19 A And then I would cut it to a V and make the
20 top of where the top of the flange is.

21 Q Sure. What about for valves?

22 A Pardon?

23 Q What about for valves that you had to
24 insulate?

00378:01 DEFENSE COUNSEL: Objection.

02 THE WITNESS: The same way. Of course
03 you do mud it and all after you complete it,
04 the insulation.

04 BY MR. HOLDER

05 Q Where was that mud being mixed during this
06 job?

07 A It was usually mixed outside in a wheelbarrow.

22. PAGE 401:13 TO 401:16 (RUNNING 00:00:18.759)

13 Q Okay. All right. Now, during any of these
14 maintenance project jobs that you did at BASF during the
15 second stint, would you be working in the vicinity of other
16 workers removing packing from pumps?

23. PAGE 401:18 TO 401:24 (RUNNING 00:00:23.753)

18 THE WITNESS: Oh, yes. Yes. Daniel had
19 the contract, maintenance contract, on that
20 kind of thing and we worked very close with
21 Daniel.

22 BY MR. HOLDER

23 Q Did Daniel have the maintenance contract for

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24 BASF generally during that time?

24. PAGE 402:01 TO 402:05 (RUNNING 00:00:14.823)

00402:01 THE WITNESS: Yes. Yes, it sure did.
02 BY MR. HOLDER
03 Q And what -- if Daniel had the maintenance
04 contract at that time, what was Covil doing?
05 A Covil was doing the insulation work.

25. PAGE 402:16 TO 402:17 (RUNNING 00:00:11.492)

16 A Also, Daniel was there during all the
17 construction as well just like Covil.

26. PAGE 422:15 TO 422:17 (RUNNING 00:00:11.719)

15 Q Okay. Did any of Daniel workers ever warn you
16 about the hazards of asbestos from the work they were doing
17 while you were there?

27. PAGE 422:19 TO 422:24 (RUNNING 00:00:15.048)

19 THE WITNESS: None, no.
20 BY MR. HOLDER
21 Q Did you ever notice if Daniel had a safety man
22 on-site possibly hired by -- possibly employed by another
23 company?
24 A No, they didn't.

28. PAGE 453:11 TO 453:12 (RUNNING 00:00:07.154)

11 Q Okay. Did you ever -- while working at Covil
12 did you ever have to work at Celanese --

29. PAGE 453:14 TO 453:15 (RUNNING 00:00:02.949)

14 MR. HOLDER: -- Fiber Industries it went
15 by sometime?

30. PAGE 453:17 TO 454:02 (RUNNING 00:00:24.534)

17 THE WITNESS: Yeah.
18 BY MR. HOLDER
19 Q Okay. In what town do you remember working
20 at Fiber Industries or a Celanese?
21 A Pardon?
22 Q In what town was that plant located, the Fiber
23 Industries?
24 A I can't.
25 Q Okay. Let me ask you this: Did you ever work
00454:01 or do any projects at a Hurst Celanese or Fiber Industries in
02 Greenville, South Carolina?

31. PAGE 454:04 TO 454:18 (RUNNING 00:00:24.977)

04 THE WITNESS: Yeah, I think it is right
05 outside of Greenville.
06 MR. HOLDER: Okay.
07 THE WITNESS: Yeah, I've worked there.
08 BY MR. HOLDER
09 Q Okay. And was that while you were working for
10 Covil?
11 A Yes.
12 Q Okay. And do you remember about how long that
13 project was?
14 A I wasn't there very long at all.
15 Q Okay. Do you think -- well, let me ask you
16 this: Were you ever at any other Hurst Celanese, Fiber
17 Industries?
18 A Hm-hm.

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32. PAGE 455:09 TO 455:19 (RUNNING 00:00:42.713)

09 Q Okay. Do you know approximately how long the
 10 shutdown you would have worked at the Greenville Hurst
 11 Celanese?
 12 A No, I was just kind of floating at that time.
 13 Going in and they had a job and I'm back out.
 14 Q Okay. Do you remember what your task was,
 15 what you had to do?
 16 A Yes, I insulated steam pipe.
 17 Q And during this shutdown at the Hurst Celanese
 18 in Greenville did you -- were you doing your work in the
 19 proximity of other crafts?

33. PAGE 455:21 TO 456:02 (RUNNING 00:00:12.523)

21 THE WITNESS: Yes, it was crafts all
 22 around.
 23 BY MR. HOLDER
 24 Q Okay. When you were at the Hurst Celanese in
 25 Greenville, were you working in close proximity to
 00456:01 pipe fitters?
 02 A Yes.

34. PAGE 456:05 TO 456:07 (RUNNING 00:00:05.000)

05 Q Okay. Were you working in close proximity to
 06 valve technicians at Celanese?
 07 A Yes.

35. PAGE 456:10 TO 456:11 (RUNNING 00:00:04.699)

10 Q Were you working in close proximity to welders
 11 at Hurst Celanese, in Greenville?

36. PAGE 456:13 TO 456:16 (RUNNING 00:00:04.843)

13 THE WITNESS: To -- repeat?
 14 BY MR. HOLDER
 15 Q To welders at Hurst Celanese in Greenville?
 16 A Oh, yes. Yes.

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1 CLIP (RUNNING 00:24:01.109)

 (BY MR. HOLDER) Okay. Now, did there come a ...

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53 SEGMENTS (RUNNING 00:24:01.109)



1. PAGE 517:22 TO 517:25 (RUNNING 00:00:11.647)

22 Q. (BY MR. HOLDER) Okay. Now, did there come a
 23 time when you left Covil?
 24 A. Yes. Yes.
 25 Q. Okay. Now, did you insulate for anywhere

2. PAGE 518:01 TO 518:15 (RUNNING 00:01:00.805)

00518:01 else?
 02 A. No, after Covil -- Covil lost the contract
 03 with Duke Power. It was this big deal, you know, about
 04 the asbestos and the stealing and things like that --
 05 Q. What's --
 06 A. -- certain people.
 07 Q. What's the stealing? Explain, to me, that.
 08 What was related to losing the contract at Duke?

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09 A. I guess if you steal enough, you --
 10 Q. Well, I mean -- okay. Who -- who was
 11 stealing, and what was being stolen? Explain it to me.
 12 A. Oh, okay. Well, this -- you know, I don't
 13 have anything to prove no more than you could look up
 14 the records, the court records, and find out. But Covil
 15 had the contract there. And Russell Johnson was the

3. PAGE 518:16 TO 518:16 (RUNNING 00:00:11.907)

16 president, at that time, of Covil Corporation, and he

4. PAGE 518:17 TO 519:08 (RUNNING 00:01:08.838)

17 had his brothers running the job. They were
 18 supervisors, you know, over the job, and they would take
 19 just whatever they needed, you know. If you look at it,
 20 it's like a big candy store to somebody that's building
 21 a house. And he was building a house and --
 22 Q. What is like a candy store?
 23 A. Materials or anything, you know. I-beams,
 24 plywood, nails, insulation.
 25 Q. So stuff was being removed from the Duke
 00519:01 worksite?
 02 A. Uh-huh.
 03 Q. Okay.
 04 A. Things started just walking away and -- a lot
 05 of expensive tools and such, and I think they got to
 06 watching and found out what was going on.
 07 Q. Okay.
 08 A. Anyway, they lost the contract.

5. PAGE 521:23 TO 522:07 (RUNNING 00:00:40.459)

23 Were -- when you started at your -- at
 24 work at Covil, did you learn or were trained how to tell
 25 different insulation apart?
 00522:01 A. Oh, sure. Sure. That's one of the first
 02 things you do when you go to work in insulation.
 03 Q. Sure. What were -- when you started, what
 04 were the different types that you had? I mean, were
 05 they all asbestos-containing or none of them
 06 asbestos-containing, or how was it?
 07 A. Well --

6. PAGE 522:09 TO 522:13 (RUNNING 00:00:24.604)

09 A. -- it was -- a lot of it when I first went
 10 was -- contained asbestos. You had -- you had your mud.
 11 Then you had a -- excuse me. You had a finish mud
 12 called blue mud. It was -- had a whole lot of asbestos
 13 in it.

7. PAGE 522:17 TO 522:22 (RUNNING 00:00:08.861)

17 Q. Were there asbestos-free or non-asbestos --
 18 A. Oh.
 19 Q. -- types of insulation?
 20 A. Oh. Fiberglass.
 21 Q. Okay.
 22 A. We used fiberglass and urethane, Styrofoam --

8. PAGE 522:23 TO 523:17 (RUNNING 00:00:50.649)

23 Q. Now --
 24 A. -- things like that, that would use, you know,
 25 some colder or -- type things. But, yeah, that -- we
 00523:01 had non-asbestos materials, too.
 02 Q. Okay. Now, did they look different, from just
 03 looking at them?

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04 A. Back then --
 05 Q. Uh-huh.
 06 A. -- yes. They were different colors.
 07 Q. Do you -- do you know what colors
 08 asbestos-containing insulation would have been?
 09 A. Well, back then, the -- you're talking about
 10 the board and the pipe?
 11 Q. I'm talking about any kind, yeah.
 12 A. Okay. Well, the blue mud, naturally, when you
 13 made it, it -- it was kind of dark blue --
 14 Q. Sure.
 15 A. -- and it got that nickname.
 16 Q. Sure.
 17 A. Excuse me. The -- we always called it Kaylo,

9. PAGE 523:18 TO 523:20 (RUNNING 00:00:15.294)

18 you know, the piping and the board.
 19 Q. Uh-huh.
 20 A. And it was normally a white.

10. PAGE 523:21 TO 524:19 (RUNNING 00:01:06.195)

21 Q. Uh-huh.
 22 A. They made some high-temp that was pink, a
 23 light pink --
 24 Q. Okay.
 25 A. -- in color.
 00524:01 Q. Okay.
 02 A. And you could -- you could tell it as soon as
 03 you -- because you could actually see fibers, you know,
 04 sticking out of the material.
 05 Q. Sure.
 06 A. And when you cut it, you would know it, you
 07 know. You'd see it everywhere. But, yeah.
 08 Q. Now, could you also -- was there a color to,
 09 like, fiberglass insulation?
 10 A. Pardon?
 11 Q. Was there a color to fiberglass insulation?
 12 A. Yeah. It -- it was kind of a yellow. It was
 13 just -- yeah.
 14 Q. Was it -- was it the same -- the fiberglass
 15 insulation the same consistency as the asbestos
 16 insulation? Did it --
 17 A. No.
 18 Q. -- crumble more? Was it --
 19 A. No.

11. PAGE 524:21 TO 524:22 (RUNNING 00:00:04.367)

21 Q. (BY MR. HOLDER) -- more solid?
 22 A. It was more flexible. The -- the Kaylo was a

12. PAGE 524:23 TO 525:01 (RUNNING 00:00:17.024)

23 hard substance, kind of like a 2-by-4.
 24 Q. Okay.
 25 A. Well, matter of fact, we had -- we -- we cut
 00525:01 it with saws, is what we done. Excuse me. The

13. PAGE 525:02 TO 525:05 (RUNNING 00:00:23.882)

02 fiberglass insulation, say, in pipe -- we'll go back,
 03 kind of keep them both -- you'd cut it with a knife.
 04 It -- most of the -- well, all of the fiberglass
 05 insulation come with a -- a backing glued to it. It was

14. PAGE 525:06 TO 525:10 (RUNNING 00:00:18.320)

06 like a -- a woven, vinyl-type backing that was glued

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07 around the insulation itself.
 08 Q. Okay.
 09 A. And that's where we -- we would cut that with
 10 knives.

15. PAGE 526:18 TO 526:20 (RUNNING 00:00:06.390)

18 Q. (BY MR. HOLDER) Okay. Would you be able to
 19 determine whether it was asbestos-containing or
 20 non-asbestos insulation?

16. PAGE 526:22 TO 526:23 (RUNNING 00:00:00.497)

22 A. Yes.
 23 Q. (BY MR. HOLDER) Okay.

17. PAGE 526:24 TO 527:08 (RUNNING 00:00:13.750)

24 A. That was --
 25 Q. That's okay. Just let me ask -- I'll ask the
 00527:01 next question.
 02 Did --
 03 A. Excuse me.
 04 Q. That's okay.
 05 A. Go ahead.
 06 Q. Did there come a time, ever, in your career
 07 when you noticed asbestos-containing insulation arriving
 08 in asbestos-free boxes to the worksites?

18. PAGE 527:10 TO 527:10 (RUNNING 00:00:00.547)

10 A. Yes.

19. PAGE 527:12 TO 527:24 (RUNNING 00:00:55.189)

12 Q. (BY MR. HOLDER) When was the first time this
 13 ever occurred?
 14 A. The very first time --
 15 Q. That you remember.
 16 A. -- was at BASF.
 17 Q. And explain how you discovered this situation.
 18 A. We had been -- I have to tell a little short
 19 story to --
 20 Q. Sure.
 21 A. -- to make the whole point.
 22 Q. Please. Give us context.
 23 A. We had been laid off from BASF for a short
 24 period of time. It seems like -- I believe it was like

20. PAGE 527:25 TO 528:01 (RUNNING 00:00:08.786)

25 three weeks. During that time, the only person there,
 00528:01 insulation, was the supervisor, and BASF gave the Covil

21. PAGE 528:02 TO 528:02 (RUNNING 00:00:11.145)

02 supervisor some men to work. So when we come back, they

22. PAGE 528:03 TO 528:03 (RUNNING 00:00:06.210)

03 went back to their regular jobs. We come back, and we

23. PAGE 528:04 TO 528:05 (RUNNING 00:00:12.471)

04 were supposed to insulate steam line -- excuse me --
 05 running through --

24. PAGE 528:15 TO 528:16 (RUNNING 00:00:09.046)

15 A. Anyway, we went there to do that. I walked in
 16 the building. There was all kinds of building material

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25. PAGE 528:17 TO 528:17 (RUNNING 00:00:07.734)

17 there. Boxes were labeled Owens Corning fiberglass,

26. PAGE 528:18 TO 528:22 (RUNNING 00:00:38.951)

18 Kaylo-free, or something like that. Asbestos-free is
19 what it said. Looked in it. Opened them up. They
20 were full -- they were -- it was the Kaylo with the
21 asbestos in it. Looked up on the pipe, and sure enough,
22 those B -- BASF guys had literally been putting it on.

27. PAGE 528:23 TO 528:23 (RUNNING 00:00:05.462)

23 So I went to the supervisor and asked him

28. PAGE 528:24 TO 528:25 (RUNNING 00:00:14.855)

24 did he know that that was asbestos pipe covering we were
25 using, because that was one of the reasons that we had

29. PAGE 529:01 TO 529:02 (RUNNING 00:00:07.574)

00529:01 left and -- so that they would have ample time to get a
02 lot -- all that off -- all that old stuff off.

30. PAGE 529:03 TO 529:08 (RUNNING 00:00:30.864)

03 They -- when I -- I approached him about
04 it, told him about it, and he said, "Yeah, I know it."
05 He said, "But don't" -- "they don't know it, so don't
06 say anything about it." He said -- he said, "Covil's
07 got a warehouse full of this stuff they've got to get
08 rid of somehow." And so, I guess, like a dummy, I went

31. PAGE 529:09 TO 529:12 (RUNNING 00:00:12.092)

09 on back to work.
10 Q. Sure. Did you fear if you said anything, you
11 could lose your job?
12 A. Well --

32. PAGE 529:14 TO 529:15 (RUNNING 00:00:09.829)

14 A. -- anything like that, that will jeopardize
15 the company, yeah. It was -- Covil Corporation, when I

33. PAGE 529:16 TO 529:16 (RUNNING 00:00:06.840)

16 first went to work with it, was an excellent company.

34. PAGE 529:17 TO 529:18 (RUNNING 00:00:15.720)

17 They -- Palmer Covil started -- built it up. He -- he
18 paid very good salaries. He made sure that his men,

35. PAGE 529:19 TO 529:20 (RUNNING 00:00:12.435)

19 their work, was above the average, things like that.
20 So, in other words, he put -- he put -- he put the care

36. PAGE 529:21 TO 530:04 (RUNNING 00:00:19.435)

21 and the desire in the men to want to have -- be noted
22 for that.
23 Q. (BY MR. HOLDER) Sure.
24 A. To be the best.
25 Q. Did there come a time when that changed?
00530:01 A. Sir?
02 Q. Did there come a time when that changed at
03 Covil?
04 A. Oh, yes. Well --

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37. PAGE 530:06 TO 530:07 (RUNNING 00:00:08.291)

06 A. -- it changed when Mr. Covil got out of the
07 scene and Russell Johnson come in. But that's mainly

38. PAGE 530:08 TO 530:11 (RUNNING 00:00:17.677)

08 when this kind of thing started happening. But that was
09 the very first time that I had run across --
10 Q. (BY MR. HOLDER) And this --
11 A. -- it actually going on like that, you know.

39. PAGE 530:23 TO 531:23 (RUNNING 00:01:43.331)

23 Q. Do you know if -- if this continued, if this
24 happened again while you were at BASF?
25 A. You might get a box in occasionally that would
00531:01 be -- have asbestos in it.
02 Q. Would it be -- the whole box be full of
03 asbestos insulation?
04 A. Yeah. Yeah, uh-huh.
05 Q. Okay. Would the entire shipment be asbestos
06 insulation, or would it be mixed in?
07 A. No, it would -- it was like, "Hey, we've got
08 to get rid of this," and top the order off with it is
09 kind of what it looked like. But they --
10 Q. Did there -- oh, sorry. Go ahead.
11 A. They -- they shipped it in like it was the
12 regular asbestos-free Kaylo and -- but -- and we used
13 it.
14 Q. Sure. Did -- do you know if this ever
15 occurred, to your knowledge, in another location after
16 you left BASF?
17 A. Yes.
18 Q. Where was that?
19 A. It was at McGuire Nuclear.
20 Q. Okay. And was it the same type thing,
21 asbestos-free boxes?
22 A. It was -- yeah, it was the same type boxes.
23 It was the same type asbestos pipe covering or -- or the

40. PAGE 531:24 TO 532:09 (RUNNING 00:00:44.586)

24 block. It was packaged the same way.
25 Q. In asbestos-free boxes?
00532:01 A. In asbestos-free boxes. And it come in by a
02 Covil truck --
03 Q. Uh-huh.
04 A. -- of course.
05 Q. Now, where would that be -- where would a
06 shipment be dropped off or unloaded?
07 A. It would be dropped off at -- at McGuire.
08 Q. Okay.
09 A. They had a couple of 18-wheeler -- what do you

41. PAGE 532:10 TO 532:12 (RUNNING 00:00:25.484)

10 call these things? -- the boxes, the cargo boxes, and
11 they kept the material there, you know, for future jobs.
12 And that's where we put it. They had -- excuse me.

42. PAGE 532:13 TO 532:16 (RUNNING 00:00:24.463)

13 We had -- we had to remove the fiberglass -- I mean,
14 fiberglass -- the -- the asbestos insulation out of the
15 boxes, put the boxes back in the -- in the trailer. A
16 lot of times, we would put boxes -- put, actually,

Crawford Vs

43. PAGE 532:17 TO 534:10 (RUNNING 00:02:04.145)

17 Kaylo-free insulation back in those boxes and send it
 18 back out.
 19 Q. New Kaylo insulation or Kaylo insulation that
 20 had been taken off?
 21 A. No, it was insulation sent in perfectly good,
 22 but it -- it was -- they -- they were using that as a
 23 storage for whatever, so they --
 24 Q. Sure.
 25 A. -- would take it out and resell it,
 00533:01 basically --
 02 Q. Yeah.
 03 A. -- is what they were doing on that deal.
 04 Q. Did -- and I just want to make sure I'm
 05 understanding your testimony. They would -- are you
 06 saying they would unload and take asbestos-containing
 07 insulation out of the asbestos-free boxes and send the
 08 asbestos-free boxes back to Covil?
 09 A. They would send them back to Covil, and they
 10 would also send asbestos-free insulation back out and --
 11 Q. Would it have been, like, kind of replaced
 12 with the asbestos insulation that just came in?
 13 A. Pardon?
 14 Q. Would it have -- the -- the asbestos-free
 15 insulation that was going back out, was it being
 16 replaced by the asbestos-containing insulation that was
 17 coming in?
 18 A. Well, that, I don't know --
 19 Q. I'm just trying to -- wonder --
 20 A. -- because it was --
 21 Q. Do you --
 22 A. Yeah, we -- we thought it was crazy. I --
 23 Q. I guess --
 24 A. But either way, it was a -- it was a -- it was
 25 some kind of shifty deal going on there. I asked Sonny
 00534:01 Cumby (phonetic) about it, because he had been there,
 02 you know, the whole time, and he said that,
 03 occasionally, Covil would get stuff from there --
 04 Q. Uh-huh.
 05 A. -- and send it out to other jobs.
 06 Q. Uh-huh. Now --
 07 A. That just didn't make good sense to me --
 08 Q. No, it doesn't --
 09 A. -- you know.
 10 Q. -- doesn't make a lot of sense.

44. PAGE 534:12 TO 534:25 (RUNNING 00:01:03.345)

12 Q. (BY MR. HOLDER) Let me ask -- and this may be
 13 the question I should have asked -- do you know why they
 14 were sending asbestos-free insulation that hadn't been
 15 used yet back to Covil from Duke?
 16 A. I think they were so desperate to get rid of
 17 the -- the asbestos insulation to where, if they had
 18 ordered "X" amount of boxes of material and -- and had
 19 it delivered --
 20 Q. Uh-huh.
 21 A. -- at, we'll say, "X" spot, "Y" spot,
 22 whatever. Then they would -- they would go and replace
 23 it like that. And I could --
 24 Q. Sure.
 25 A. -- I can see that, because they used to order,

45. PAGE 535:01 TO 535:13 (RUNNING 00:00:35.985)

00535:01 on big jobs, insulation --
 02 Q. Sure.

Crawford Vs

03 A. -- and it would come in, and they'd go ahead
 04 and have it there on the job. I've seen --
 05 Q. Sure.
 06 A. I've seen boxcar loads come in, you know --
 07 Q. I got you.
 08 A. -- at different sites.
 09 Q. Sure. Now, did the practice -- help me here.
 10 Did the practice of selling asbestos-containing
 11 insulation in asbestos-free boxes -- did that increase
 12 in the amount they were doing from BASF to Duke, or was
 13 it about the same amount of --

46. PAGE 535:15 TO 535:16 (RUNNING 00:00:04.290)

15 Q. (BY MR. HOLDER) -- asbestos-containing
 16 insulation that was coming into the worksite at Duke?

47. PAGE 535:18 TO 536:02 (RUNNING 00:01:05.994)

18 A. Well, it was more --
 19 Q. (BY MR. HOLDER) Okay.
 20 A. -- because Catawba was still in the process of
 21 being constructed. BASF was on maintenance. It was
 22 just maintenance. And it was whatever was torn off
 23 or -- or what -- if they -- if they had put in a new
 24 system, it would be for the lines and things like that,
 25 that they -- you know, in other words, it was -- it was
 00536:01 a whole lot more. And BASF was a chemical plant, so,
 02 therefore, it's not going to require as much insulation,

48. PAGE 536:03 TO 536:07 (RUNNING 00:00:12.241)

03 either.
 04 Q. Uh-huh. Now, during any of this time when all
 05 this was going on, did anyone ever tell you that the
 06 asbestos in this could cause cancer?
 07 A. No, huh-uh.

49. PAGE 536:10 TO 536:16 (RUNNING 00:00:12.836)

10 Q. (BY MR. HOLDER) But you knew -- did you know
 11 that it was supposed to be asbestos-free insulation
 12 coming rather than asbestos insulation coming?
 13 A. Yeah. Yeah.
 14 Q. But did you know that was because of the
 15 dangers and hazards to your health?
 16 A. Well, I --

50. PAGE 536:18 TO 536:24 (RUNNING 00:00:23.300)

18 A. -- I knew from looking at the box. It
 19 would -- it was saying that, and I kind of wondered
 20 about it and talked to --
 21 Q. (BY MR. HOLDER) The asbestos-free boxes?
 22 A. Uh-huh. I talked to two or three of my
 23 friends about it that worked -- we worked close
 24 together, and --

51. PAGE 537:23 TO 539:08 (RUNNING 00:01:25.794)

23 Q. (BY MR. HOLDER) Now, who was this, exactly?
 24 Do you remember?
 25 A. These were the Burley (phonetic) boys.
 00538:01 Q. Okay.
 02 A. Brothers.
 03 Q. And where were the Burley brothers -- do you
 04 remember the worksite?
 05 A. They -- pardon?
 06 Q. Do you remember where the Burley brothers
 07 worked with you at, like what worksite?

Crawford Vs

08 A. Yeah. Yeah, we worked on -- we worked on
 09 several jobs together.
 10 Q. Okay.
 11 A. I mean, I'd -- I'd --
 12 Q. Did they work up here in Anderson?
 13 A. -- have to go through a whole big thing if
 14 I -- but we --
 15 Q. But the Burley brothers that you worked
 16 with --
 17 A. Yeah.
 18 Q. -- were they supervisors to you?
 19 A. No. They would be, if -- if they sent them
 20 out.
 21 Q. They could be?
 22 A. Yeah. We were all pretty -- but they -- they
 23 were trustworthy family men.
 24 Q. Sure.
 25 A. And they told us -- said, "Well" -- said, "You
 00539:01 know" -- "you know Russell's crooked, and he's going to
 02 put every dime he can in his pocket." That's one of the
 03 things they -- they said.
 04 Q. And who is Russell?
 05 A. He was the -- he was Roe's (phonetic)
 06 superintendent at that time.
 07 Q. Okay. And --
 08 A. But he -- he -- you know, I asked him about --

52. PAGE 539:09 TO 539:09 (RUNNING 00:00:09.071)

09 about the asbestos-free, when did that happen, and I --

53. PAGE 539:10 TO 539:25 (RUNNING 00:00:51.602)

10 they gave me a date. I can't remember. But then they
 11 went ahead with the old insulators. Everybody actually
 12 thought -- said, "Well, they wouldn't have made it all
 13 these years and used it all those years if it'd hurt" --
 14 "if it would hurt people like that, so just" -- "just
 15 ignore it and go on." And that's -- that was the
 16 attitude of all the insulators at that time --
 17 Q. Okay.
 18 A. -- about it. So it was easy to get away
 19 with --
 20 Q. Sure.
 21 A. -- because of that.
 22 Q. Did anyone ever tell you that this stuff that
 23 you were working with could cause cancer, could make you
 24 have mesothelioma?
 25 A. No, huh-uh.

TOTAL: 6 CLIPS FROM 6 DEPOSITIONS (RUNNING 02:29:34.288)

EXHIBIT F

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUITJerry Howard Crawford and the Estate
of Evelyn Kay Crawford,)

Civil Action No. 2017-CP-42-04429

Plaintiffs,)

v.)

Covil Corporation,)

Defendants.)

VERDICT FORM**NEGLIGENCE**

1. We the Jury find that Covil Corporation was negligent, and its negligence was a proximate cause of Jerry Crawford's injury and damages:

☐ YES☒ NO**STRICT LIABILITY**

2. We the Jury find Covil Corporation is strictly liable for selling products that were a proximate cause of Jerry Crawford's injury and damages:

☐ YES☒ NO**IMPLIED WARRANTY**

3. We the Jury find Covil Corporation breached the Implied Warranty in selling its products and its breach was a proximate cause of Jerry Crawford's injury and damages:

☐ YES☒ NO

4. If you answered YES to any of Questions 1, 2, or 3, please state the amount of actual damages that have been proven by the greater weight of the evidence.

\$ _____ Jerry Crawford's actual damages

\$ _____ actual damages for Mrs. Crawford's Loss of Consortium

5. If you answered YES to Questions 1, 2, or 3, please answer Question 5. We, the Jury, by unanimous vote, find by clear and convincing evidence that the conduct of Covil Corporation was willful, wanton, or reckless:

_____ Yes _____ No

Sandra Burdick

Juror Foreperson

7/19/18

Date

EXHIBIT G

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017CP4008675

Lloyd Strom Garvin

BW/IP International Inc

Velda Garvin

Byron Jackson Pump Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

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

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 10th day of Dec., 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Theile Branham McVey

Mark H. Wall

Robert O. Meriwether

Timothy W. Bouch

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LLOYD STROM GARVIN, and
VELDA GARVIN,
Plaintiff,

v.

AGCO CORPORATION f/k/a ALLIS
CHALMERS COMPANY, et al.,
Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 2012-CP-40-6675

2014 DEC 10 AM 11:08
JEANETTE W. Mc
C.C.P. & S.S.RICHLAND COUNTY
FILED**ORDER DENYING IN PART AND GRANTING IN PART
DEFENDANT CRANE CO.'S MOTION FOR POST-TRIAL RELIEF**

In this asbestos case, Defendant Crane Co. ("Crane") moves for relief from the jury's September 11, 2013 verdict. For the reasons set forth below, Crane's motions for judgment notwithstanding the verdict and new trial absolute are DENIED, but Crane's motion for new trial nisi remittitur is GRANTED.

I. The Evidence at Trial

Viewing the record in the light most favorable to Plaintiffs, sufficient evidence supports the jury's finding that Plaintiff Lloyd Garvin suffers from malignant mesothelioma proximately caused by exposure to asbestos. Mr. Garvin and his wife, Velda, brought this action against companies that made asbestos products Mr. Garvin allegedly worked with during his career as a maintenance mechanic and millwright. Evidence at trial indicated that during his employment at the Graniteville textile plant from 1964 to 1972 and the Carolina Eastman plastics plant from 1974 to 2003, he was exposed to asbestos gaskets and packing while installing and repairing pumps and valves, including Crane valves.

From 1964 to 1972 at Graniteville, Mr. Garvin installed and maintained new pumps and valves. The Graniteville site included many different buildings, and Mr. Garvin worked at all of the site's facilities.

After leaving Graniteville, Mr. Garvin worked at Carolina Eastman for about 30 years. He started as a millwright in the construction division and eventually became a millwright foreman and then a millwright general foreman. The site manager at Carolina Eastman, Doyle Ridgell, testified that there were seven or eight plants that each made a different product, and Mr. Garvin worked in all of them at various times. He worked on the construction of new buildings, installing new valves and pumps. He also did maintenance and repair work on valves and pumps. There was testimony that even after Mr. Garvin became a foreman in the 1970s, he was a "working foreman," who did hands on work on valves and pumps with his crew.

There was evidence that Mr. Garvin installed new Crane valves and repaired them at both Graniteville and Carolina Eastman. He first worked on Crane valves in 1964, and last worked around them in the 1990s. He recalled that Crane valves were "all over" Carolina Eastman. (Garvin Discovery Depo., at 115:2-8.) Documentary evidence, including Crane Co. specifications for various types of valves used at Carolina Eastman, confirmed that Crane's asbestos-containing valves were present at Carolina Eastman. Mr. Ridgell testified that Mr. Garvin worked on all the Crane valves at the plant, including rebuilding Crane valves.

Evidence showed Crane standardized the use of asbestos gaskets and packing on all of its bronze, iron and steel valves. Asbestos was the standard offering from Crane up into the 1980s. Crane's manuals and drawings from Carolina Eastman list asbestos gaskets and/or packing in the Crane valves present at that facility. The evidence showed that every Crane valve at Carolina

Eastman had asbestos-containing gaskets or packing. Mr. Garvin testified that he knew how to tell the difference between gaskets made of asbestos and gaskets made of other materials, and he identified the valve gaskets as asbestos. Plaintiffs' occupational medicine expert, Dr. Edwin Holstein, and defense expert Dr. Victor Roggli testified that Crane valves utilized asbestos gaskets and packing.

Mr. Garvin removed gaskets and packing from Crane valves. About 80% of the valves had flange gaskets. Crane valves also had an internal gasket on the top of the valve. It was part of Mr. Garvin's job as a mechanic to remove and replace asbestos gaskets on valves. He estimated that the gaskets stuck to the metal valve about 75% of the time. When the gaskets stuck, he had to scrape them off with a putty knife, scraper, hammer, wire brush, power wire brush, or end grinder. It took up to half an hour to scrape off a gasket, and it was a dusty process.

Mr. Garvin also removed and replaced asbestos packing on Crane valves. All new valves came with packing that had to be removed during maintenance work, using a special tool called a packing puller. The old packing came out in pieces. Sometimes Mr. Garvin had to use compressed air to blow out the old packing. Removing packing created visible dust, as did cleaning up the packing debris.

Crane supplied its valves with asbestos gaskets and packing, and there was evidence that Mr. Garvin performed maintenance on new Crane valves that he or others had installed. When Mr. Garvin started at Carolina Eastman in 1974, he was involved in constructing a seven-story building, called 17L01 or the polymer building, and all of his work as millwright on this construction involved installing new equipment. Mr. Ridgell testified that Mr. Garvin installed new pumps and valves in that building, and once construction was complete Mr. Garvin and

another millwright maintained and repaired the pumps and valves. Mr. Garvin did first maintenance on new valves that came with packing. He performed this work himself, and was also in close proximity to work on pumps and valves done by others.

Dr. Holstein testified regarding causation of Mr. Garvin's mesothelioma from his exposure to asbestos while working on Crane valves. Dr. Holstein testified that the gaskets and packing in Crane valves contained asbestos. This testimony was based on Crane's specifications for the plants where Mr. Garvin worked as well as historical evidence that asbestos gaskets were virtually always used in valves in industrial operations during the relevant time period.

Dr. Holstein testified that Mr. Garvin's exposure to asbestos gaskets and packing supplied directly by Crane was a substantial factor in causing his mesothelioma. Dr. John Maddox, a pathologist who specializes in asbestos-related disease, agreed that Mr. Garvin's exposure to asbestos from Crane valves was a substantial factor in causing his mesothelioma. Crane presented testimony from pathologist Dr. Victor Roggli, who testified Mr. Garvin had insufficient exposure to asbestos from Crane valves to cause his mesothelioma.

Mr. Garvin has an especially rare form of mesothelioma that originated in his testicles called mesothelioma of the tunica vaginalis testis, a subset of the more common peritoneal mesothelioma. There was evidence that Mr. Garvin's mesothelioma may be fatal, although there was also testimony that with mesotheliomas of this type there is a 50% chance of recovery. He was in remission at the time of trial.

A jury trial was held against Crane and two other defendants, Durco and Byron Jackson, in August and September 2013. The jury was charged the law of negligence, strict product liability, and breach of implied warranty. They returned a verdict of \$10 million in compensatory

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damages to Lloyd Garvin and \$1 million in compensatory damages for loss of consortium to Velda Garvin. After a bifurcated trial on punitive damages, the jury awarded \$11 million in punitive damages against Crane, \$11 million against Durco, and \$5 million against Byron Jackson.¹

Crane now seeks judgment notwithstanding the verdict, a new trial absolute, and a new trial nisi remittitur. It contends that there was no competent evidence that Mr. Garvin was exposed to asbestos gaskets and packing supplied by Crane. Crane further challenges the jury's willful and wanton finding, and the amounts of both the compensatory and punitive damages awards.

II. Ruling on Motion for Judgment Notwithstanding the Verdict and New Trial Absolute

A. Standard of Review

In ruling on a motion for JNOV, the trial judge must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. JNOV should be granted when only one reasonable inference can be drawn from the evidence and no reasonable jury could have reached the challenged verdict. The trial judge does not have authority to decide credibility or resolve conflicts in the evidence. Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive, the trial judge is required to

¹ Plaintiffs resolved their claims with Durco and Byron Jackson post-verdict.

grant a new trial absolute. Cock-N-Bull Steak House, Inc., v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).

B. Exposure

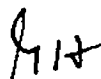
Crane contends there was insufficient evidence for the jury to find Mr. Garvin was substantially exposed to asbestos gaskets and packing provided by Crane at the time the valves were sold to his work sites. The court disagrees. There is substantial evidence that Crane supplied asbestos gaskets and packing in the valves it sold to the Graniteville and Carolina Eastman plants, including Crane documents specific to those plants. There was testimony from Mr. Garvin and Mr. Ridgell indicating that Mr. Garvin did the first maintenance job on Crane valves that were newly installed by either Mr. Garvin or other workers. This was not an isolated or unique scenario, as it was part of Mr. Garvin's job to repair and rebuild Crane valves. When he repaired a Crane valve, Mr. Garvin had to scrape off the asbestos gaskets and remove the asbestos packing in a manner that created visible dust in the air.

Crane argues that Mr. Garvin only had exposure to asbestos flange gaskets and points to Mr. Garvin's testimony that he did not work on bonnet gaskets. The jury also heard evidence, however, that he worked on gaskets internal to Crane valves, including Mr. Garvin's testimony that he worked on the gasket on the top of the Crane valve, Mr. Ridgell's testimony that Mr. Garvin had to clean the face of the valve, and Dr. Holstein's review of the evidence showing that Crane valves came from the factory with internal gaskets in place and that Mr. Garvin would have been exposed to those internal gaskets when working on Crane valves. Crane's corporate witness, Anthony Pantaleoni, acknowledged there was evidence of Mr. Garvin's work on internal gaskets on valves.

Crane contends Dr. Holstein engaged in improper speculation in testifying that Crane valves contained asbestos and that Mr. Garvin was exposed to asbestos materials originally supplied with Crane equipment. Dr. Holstein's testimony was not speculative. It was based on a proper foundation in the fact testimony and documentary evidence in this case, as well as his knowledge and experience of the historical use of asbestos materials in valves in industrial settings.² Dr. Holstein has spent years evaluating asbestos health hazards in plants and factories, interviewing hundreds of workers for epidemiological research. He teaches industrial hygienists and relies on their work to evaluate exposures that cause disease. This broad knowledge about the use of asbestos gaskets and packing as the only available material for hot systems during the relevant time period was sufficient to support his testimony that Crane valves contained asbestos. Dr. Holstein was relying on numerous other sources, however, including Mr. Garvin's testimony that he was working with asbestos gaskets, Crane testimony that its valves were designed for use with asbestos, and site-specific documents that indicated all the Crane valves at Carolina Eastman contained asbestos gaskets or packing. His testimony conformed to the requirement that an expert may base an opinion on facts or data "perceived by or made known to the expert at or before the hearing." Rule 703, SCRE.

Dr. Holstein's testimony about Garvin's exposure was helpful to the jury and did not implicate any Rule 403 concerns. His specialized knowledge assisted the jury in understanding the evidence and determine an important fact in issue. Rule 702, SCRE. Dr. Holstein's expertise in teaching others about asbestos exposure and disease helped the jury understand the testimony

² A defense expert (Dr. Roggli) similarly testified that gaskets used in steam applications, like those described by Mr. Garvin, were likely asbestos-containing in the 1960s and 1970s.



and documents regarding Mr. Garvin's work with Crane valves and exposure to original asbestos materials from that work. Dr. Holstein's testimony complied with all requirements for scientific expert witnesses and was properly presented to the jury. See Watson v. Ford, 389 S.C. 434, 699 S.E.2d 169 (2010); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

Although Dr. Holstein's testimony was directed at one of the central issues in this case, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. Dr. Holstein's testimony aided the jury but did not tell them what result to reach or otherwise usurp their function. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 403, 237 S.E.2d 753 (1977). The court notes that defense expert Charles Blake offered opinions about Mr. Garvin's work practices and asbestos exposures, reaching the opposite conclusion that there was no evidence of any exposure to asbestos products made or supplied by Crane. The jury properly considered both sides of this issue, and its resolution in Plaintiffs' favor is supported by competent evidence, including the testimony of Dr. Holstein.

C. Stream of Commerce / Foreseeable Use

Crane claims that it was error to instruct the jury that "[a] Defendant cannot, however, be liable for an allegedly defective product it did not design, recommend, specify, require, manufacture, sell or place in the stream of commerce." (TT 9/11/13, at 207). Crane maintains that it can only be liable for products it placed in the stream of commerce, and has no liability for asbestos materials it only recommended, specified, or required.

A close, fair reading of the charge as a whole does not support Crane's strained position. The court charged the jury repeatedly that a Defendant manufacturer could only be held

responsible for a product that (a) was defective at the time it left the Defendant's hands and (b) Defendant placed in the stream of commerce. The jury was told at least 14 different times about these concepts. South Carolina law provides, and the jury was charged, that under any products liability theory, the plaintiff must show that "the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant," 5 Star, Inc. v. Ford Motor Co., 408 S.C. 362, 759 S.E.2d 139 (2014); Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995); (TT 9/11/13, at p. 199), and the product is "expected to and does reach the user or consumer without substantial change." S.C. Code Ann. § 15-73-10(1)(b); (TT 9/11/13, at p. 199).

At no point was the jury instructed that a manufacturer could be liable for products it did not itself place in the stream of commerce. In fact, the sentence Crane criticizes follows a sentence discussing a manufacturer's liability for incorporating a defective component part into its own product. Despite Crane's concern, nowhere in the charge is the phrase "replacement parts" used.

Crane further claims the jury charge improperly used the word "specify." To the extent Crane's argument can be followed, it appears to claim the word "specify" would befuddle the jury. Crane argues that "specify" is "inherently vague and subject to multiple interpretations." Crane Motion for Post-Trial Relief at 7 n. 5. Crane may find the word "specify" to be hopelessly confusing, but no reasonable juror would. The word has a well-established, lucid meaning that has been passed down for centuries. The American Heritage Dictionary defines it as meaning "[t]o state explicitly," Webster's Third New International as "to mention or name in a specific or explicit manner; tell or state precisely or in detail," and The Oxford English Dictionary as "[t]o

mention, speak of, or name (something) definitely or explicitly." Blackstone did not find the word troublesome in a legal setting. See Blackstone, Commentaries on the Laws of England II at 319 (1766) ("But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding."). Crane fails to explain how there could be any confusion about the meaning of the word "specify" in the context in which it was used. The Court is confident the jury understood manufacturers may be specific about the component parts to be used in their products, just as manufacturers may also "recommend" or "require" particular components.

Crane argues the charge instructed the jury that it could find a manufacturer liable if the manufacturer merely specified, recommended or required a product it neither made, sold or placed in the stream of commerce. Accepting Crane's premise would entail a finding that the jury failed to follow the charge as a whole (which repeated ad nauseum the stream of commerce and defendant control requirements), and an order by this trial court defying South Carolina's longstanding product liability law regarding foreseeable use. What Crane is really driving at is adoption of the "bare metal defense" by a South Carolina court. The term "bare metal" is misleading and, as used here, is semantic advocacy rather than a useful doctrinal description. There is no evidence Crane sold "bare metal" valves or pumps; in fact, the evidence is to the contrary. The record demonstrates that Garvin was exposed to substantial and medically causative levels of asbestos dust when working on or replacing original Crane products that contained asbestos placed by Crane directly into the stream of commerce. Despite this stubborn fact, Crane contends that when its original asbestos parts wore out, the pump or valve somehow disappeared from the stream of commerce, even though it remained as an integral, working part

of a massive industrial plant. Crane argues its legal responsibility ceased when the asbestos it supplied no longer accompanied the product.

Crane seeks to align this case with O'Neil v. Crane Co., 53 Cal.4th 335, 266 P.3d 987 (Cal.2012) where the California Supreme Court held that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another's product unless the defendant's own product substantially contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." Id., 266 P.3d at 991. The immovable obstacle to Crane's efforts is the record, particularly evidence that Mr. Garvin experienced substantial asbestos exposure to original Crane asbestos products. Even if this exposure never occurred, it was undisputed Crane placed into the stream of commerce products that not only contained asbestos, but specified they be replaced by asbestos parts. Such a scenario was explicitly mentioned by O'Neil as a problem its ruling did not address.³ Viewed objectively, the manufacturer's product—defective when it left Crane's hands because it contained asbestos and specified asbestos for future use—remained defective and unreasonably dangerous when its specifications were heeded not only by its owner/user, but by another

³ O'Neil noted that there was no evidence the Plaintiff was exposed to original asbestos products manufactured by Defendants. It also emphasized that the lack of evidence that Defendants specified asbestos be used for replacement gaskets or packing. O'Neil, 266 P.3d at 996 (finding Defendants "did not mandate or advise that [asbestos] be used with their products... the products were designed to meet the Navy's specifications. Moreover, there was no evidence that Defendant's products required asbestos-containing gaskets or packing in order to function."). These observations led the court to carefully explain the limited nature of its holding: "...[I]f the product manufactured specified or required the use of a defective replacement part, a stronger case could be made that the manufacturer's failure to warn was a proximate cause of resulting injury... These difficult questions are not presented in the case before us, and we express no opinion on their appropriate resolution." Id. at n. 6.

manufacturer. These facts would enable a jury to find a "combined use" sufficient to remove Mr. Garvin's exposure from O'Neil's reach.

No jurisdiction has approved the "bare metal" defense in the teeth of such specification evidence. The only federal court of appeals that has approved the defense did so on the basis that the Plaintiff could show no exposure to asbestos products manufactured by the Defendants. Lindstrom v. A-C Product Liability Trust, et al., 424 F.3d 488 (6th Cir. 2005). But Lindstrom did not involve or address the issue of whether the Defendants specified asbestos-containing replacement parts. Judge Robreno, the MDL judge for federal asbestos claims, relied heavily on Lindstrom in holding the bare metal defense applicable in maritime cases, Conner v. Alfa Laval, Inc., 842 F.Supp.2d 791 (E.D.Pa.2012), but there too no evidence of exposure to Defendants' original asbestos products or specifications appeared in the record. Id. at 802. Likewise, the sharply divided "bare metal" decisions of the Washington supreme court did not confront this precise issue, and that court has sheepishly realized the awkward logical limits of the principle. Compare Braaten v. Saberhagen Holdings, Inc., 198 P.3d 493 (Wash. 2008) (no evidence Defendants manufactured, recommended or specified replacement asbestos gaskets or packing) with Macias v. Saberhagen Holdings, Inc., 282 P.3d 1069 (Wash. 2012) (respirator manufacturer not entitled to summary judgment even though it did not manufacture asbestos products to which plaintiff exposed; distinguishing Braaten and finding that respirator was specifically designed for use that would inherently cause exposure).

O'Neil and other cases adopting the "bare metal" defense lean on Baughman v. General Motors Corp., 780 F.2d 1131 (4th Cir. 1986). Baughman dealt with tire rims, not asbestos. It is a decision best restricted to its facts. Mr. Baughman was injured when a CR-2 rim assembly

exploded while he was changing a tire on a 1979 GMC truck. It was undisputed that GM did not design, manufacture, require or specify the use of the CR-2. The original rim assembly was a CR-3, which has a different design. The Fourth Circuit held as follows:

Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own.

780 F.2d at 1132-33. The court did not discuss whether the result would have been different had GM specified the defective rim assembly. This is a fundamental point, for there was no claim that the original GM rim assembly was defective.

This latter fact also upends Crane's reliance on the policy rationales often articulated in support of the "bare metal" concept. Unlike GM, Crane had the opportunity to test and evaluate the asbestos gaskets and packing used in its valves and which injured Mr. Garvin (the jury was even given factors to use in deciding Crane's duty to test). There was no evidence the replacement gaskets and packing manufactured by others were different in material or design from Crane's original supplied products or specifications. The evidence showed Crane long knew of the risk asbestos posed, and it occupied the best position in the chain of distribution to warn consumers of those risks. Crane knew asbestos gaskets and packing would not last as long as its bare metal valves or pumps; consequently it knew those parts would have to be replaced, and replaced with similar if not identical parts whose manufacture was guided by Crane's design and specifications. To say Crane was no longer part of the "chain of distribution" when the original gaskets and packing wore out on its still-functioning product would be artificial, if not



silly. The drafters of the Restatement of Torts (Second) § 402A well understood these practicalities:

... the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id. at Comment c. These comments have been incorporated by reference and codified as the official legislative intent of our strict liability statute for over 40 years. S.C. Code § 15-73-30.

In a recent thoughtful opinion, a federal district court in Chicago set forth the most sensible approach to the "bare metal" defense. Quirin v. Lorillard Tobacco Co., 2014 WL 804305 (N.D. Ill. 2014). Mr. Quirin claimed his mesothelioma arose in part from exposure to asbestos while working with Crane valves as a machinist on the *USS Tolovana* from 1954-1957. The *Tolovana* utilized over 1000 Crane valves, some of which contained internal asbestos gaskets and packing. Crane also sold asbestos gaskets and packing, some of it purchased from third parties. The original gaskets and packing Crane supplied had likely been replaced before Quirin began service, and he could not specifically recall whether he had ever changed out packing original to a Crane valve. Indeed, there was "no direct evidence that Crane Co. supplied any replacement gaskets or packing that Mr. Quirin used on board." Id. at 3.

Crane moved for summary judgment, asserting it had no legal duty to warn Mr. Quirin of the danger of asbestos materials manufactured and supplied by others. Crane argued there was no evidence Mr. Quirin had any exposure to asbestos-containing products it had placed in the stream of commerce. Applying maritime law, the court held:

In general, consistent with the bare metal defense, a manufacturer is not liable for materials it did not supply. But a duty may attach where the defendant manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material, whether supplied by the original manufacturer or someone else.

Furthermore, even if replacement gaskets and packing for the Crane Co. valves were supplied by a third party, it is reasonable to infer that those replacement parts would have been substantially identical to the components originally supplied by Crane Co. Given these facts, a reasonable jury could find that Crane Co. had a duty to warn about the hazards of asbestos exposure resulting from work on its valves...

The court acknowledges that its conclusion differs from that reached by those courts that have relied on the "bare metal defense" to strictly limit liability where a manufacturer did not make the actual product allegedly causing asbestos exposure. It is not convinced, however, that a manufacturer should avoid liability on a failure-to-warn theory, where it designed its products to be used with asbestos-containing materials into the products it sold. On those facts, a jury could conclude that it was not just foreseeable, but inevitable, that the product would subject those working with it to the possible hazards of asbestos exposure. The manufacturer of the product was in a position to warn of dangers apparent at the time the product was sold.

Id. at 8.

Although Crane protests there was no evidence that it required the use of asbestos gaskets and packing with its valves, the evidence was sufficient to create a fact issue for the jury. Plaintiffs presented Crane manuals and drawings from Carolina Eastman that list asbestos

gaskets or packing as component parts in every valve Crane sold to that facility. There was also evidence that Crane generally designed its valves to be used with asbestos gaskets and packing, and also designed its valves with flanged connections that required asbestos gaskets, versus other connection designs not requiring gaskets.

Crane anticipated that maintenance workers would break down valves, open them up, and change the gaskets and packing. There was also evidence that Crane sold asbestos packing, internal gaskets, flange gaskets, and insulation as replacement parts for use with its valves, including the brand of gaskets used by Mr. Garvin. Mr. Ridgell testified that he would go to the valve manufacturer for replacement gaskets. Carolina Eastman records show Crane included asbestos gaskets and packing in spare parts kits. Crane recommended that work sites keep asbestos gaskets and packing as spare parts for Crane valves. Crane recommended the use of asbestos gaskets, particularly on steam systems, which is the exact type of applications fact witnesses described were in place at Carolina Eastman and Graniteville. Such evidence raises a reasonable inference that asbestos gaskets and packing were required component parts of Crane valves.

The Court finds evidence sufficient for the jury to conclude that when Mr. Garvin worked on Crane valves, the valves were in "essentially the same condition as when [they] left the hands of the defendant." Bragg, 319 S.C. at 539. Crane placed the injury-causing product in the stream of commerce, and there was ample evidence that Mr. Garvin worked on original Crane valves and gaskets. Crane's liability arises because its own valves caused injury as manufactured, supplied, and designed by Crane with asbestos gaskets and packing. When the asbestos gaskets and packing were replaced with the same materials that came with the valve, it was not a

"substantial change" in the condition of the product. The product remained the same as when sold—valves containing asbestos gaskets and packing.

Mr. Garvin's injury was caused by gaskets and packing that were no different than the gaskets and packing that came with the valves originally. Crane designed and sold its product with asbestos parts that were wear items that Crane knew had to be replaced, there was evidence that the replacement process itself created exposure to toxic asbestos dust, and the replacement parts were to Crane's design specifications.

In sum, the court finds the jury charge conformed to established South Carolina law that a manufacturer's liability extends to foreseeable dangers resulting from the anticipated or intended use of its products. See Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 84 (4th Cir. 1962); Fleming v. Borden, Inc., 316 S.C. 452, 458, 450 S.E.2d 589, 593; Claytor v. General Motors Corp., 277 S.C. 259, 262, 286 S.E.2d 129, 131 (1982); Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 359-60, 191 S.E.2d 774, 870 (1972); Mickle v. Blackmon, 252 S.C. 202, 233 (1969). A jury evaluates whether a product is unreasonably dangerous to the ordinary consumer according to the "conditions and circumstances that foreseeably attend the use of the product." Bragg, 319 S.C. at 543; Claytor, 277 S.C. at 262. A manufacturer is "expected to anticipate the environment which is normal for the use of his product and . . . must anticipate the reasonably foreseeable risks of the use of his product in such environment." Mickle, 252 S.C. at 233 (quoting Spruill, 308 F.2d at 83- 84). "[L]iability may be imposed upon a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller." Small v. Pioneer Mach., 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997).

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The issues of whether Crane's valves were in essentially the same condition when Mr. Garvin worked on them, and whether Crane could reasonably foresee that the asbestos gaskets and packing in its valves would be replaced with asbestos materials, were for the jury. If a manufacturer recommends, specifies, or requires that asbestos gaskets and packing be replaced with like materials, then the jury may conclude that the product is in essentially the same condition as when it left the manufacturer, that the manufacturer anticipated the subsequent alteration of the product, and that the manufacturer anticipated the reasonably foreseeable risks of using the product in an environment where routine repair and maintenance would require replacement of asbestos components.

Crane had wide berth to convince the jury it was not liable for defective replacement parts, and its skilled trial counsel attempted to do so in a thorough and professional manner. In addition to the instructions set forth above, the jury was instructed on legal cause, which focuses on foreseeability. They were also charged on intervening cause, and the requirement that to be liable the Defendant's product must have been defective at the time it left Defendant's hands, was placed in the stream of commerce by Defendant, and its condition was not substantially changed up to the time it injured Mr. Garvin. The jury applied this law to the facts and found for Mr. Garvin on all issues.

D. Causation

Crane argues that there was insufficient evidence that Mr. Garvin's mesothelioma was caused by his exposure to asbestos from Crane products. The Court does not find merit in any of Crane's arguments.

1. Frequency, Regularity, Proximity

First, Crane contends that there was no admissible evidence of the frequency, regularity, and proximity of Mr. Garvin's work with asbestos materials in Crane valves, as required by Henderson v. Allied Signal, Inc., 373 S.C. 179, 644 S.E.2d 724 (2007). The frequency, regularity, and proximity factors are designed to evaluate whether there was "actionable exposure" to dust from the defendant's asbestos product. Id. at 185. Dr. Holstein and Dr. Maddox testified that Mr. Garvin has an asbestos-related mesothelioma, that mesothelioma can be caused by relatively brief and low level cumulative exposures, and that there is no known threshold of exposure below which mesothelioma does not occur.

Plaintiffs presented sufficient evidence to support the jury's causation finding against Crane in this case. This is not a situation of mere "presence in the vicinity of static asbestos." Henderson, 373 S.C. at 185. Rather, Mr. Garvin scraped asbestos gaskets from the face and flanges of Crane valves, and removed asbestos packing from Crane valves with a packing puller. Mr. Ridgell described seeing visible dust when Mr. Garvin used a grinder to remove asbestos gaskets. All of the Crane valves at Carolina Eastman contained asbestos, and asbestos was also used on the Crane valves at Graniteville. Dr. Holstein's testimony about Mr. Garvin's exposure to Crane-supplied asbestos materials had an adequate foundation and assisted the jury.

In terms of the duration of this work, there was evidence that Mr. Garvin worked on Crane valves throughout his career, at both Graniteville and Carolina Eastman, from 1964 until the 1990s. Mr. Ridgell testified it was Mr. Garvin's job to rebuild and change out pumps and valves for weeks at a time.

Plaintiffs' experts discussed studies measuring asbestos fiber release from gaskets and packing up to 100,000 times higher than what is present in the background air, which are levels associated with doubling the risk for asbestos disease. Defense expert Dr. Roggli testified that there can be airborne asbestos at the level of 5 million particles per cubic foot and asbestos would still be invisible to the naked eye. He conceded that if a person can see asbestos dust, the level is well above background levels in the outside air.

Dr. Holstein testified about scientific research showing exposure to asbestos gaskets and packing is quite hazardous. Defense experts Dr. Roggli and Mr. Blake relied on the same studies, in which the authors state the need for protective measures when working with asbestos gaskets, describe exposures thousands of times higher than background, and quantify exposure levels from 1 fiber per cubic centimeter of air (f/cc) to 30 f/cc. Industry studies found similar results of 26 to 30 f/cc of asbestos released when working with asbestos gaskets. Other studies found the use of a grinder to remove asbestos gaskets, as Mr. Garvin did, releases asbestos at a level of 6.8 f/cc. Ten to twenty years before Mr. Garvin was last exposed to asbestos, the Bremerton study concluded that "asbestos, a fibrous mineral silicate which is a component of many gasket materials is a documented health hazard causing cancer and chronic lung disease known as asbestosis." (TT 9/9/13 at 145-46.) A study relied on by Crane's own experts found that gasket work releases asbestos at levels that "exceed all current and historical occupational safety and health administration excursion limits and some permissible excursion limits based on an 8 hour time weighted average." (TT 9/3/13 at 147-148; TT 9/9/13 at 136-137). Dr. Roggli also conceded that Material Safety Data Sheets from asbestos gasket suppliers Durabla, John Crane,



and Garlock, which supplied asbestos components sold by Crane, indicate that asbestos gaskets cause disease.

Based on the details of Mr. Garvin's exposure, Dr. Maddox concluded that asbestos exposures from scraping gaskets are orders of magnitude higher than the pollution in the ambient air (or background level). Dr. Maddox concluded Mr. Garvin's asbestos exposure from Crane valves was a substantial contributing cause of the development of his mesothelioma. Answering a hypothetical question based on facts later established by the evidence—including exposure to Garlock gaskets that contain 85%+ chrysotile asbestos, used over the span of three decades repeatedly with a grinder—defense expert Dr. Roggli testified that such exposure would substantially contribute to cause mesothelioma.

The evidence of Mr. Garvin's exposure to asbestos from Crane valves was more than sufficient to create a fact issue for the jury on the issue of causation.

2. Admissibility of Expert Causation Testimony

Crane challenges Plaintiffs' experts' causation opinion testimony as inadmissible and insufficient to establish causation under South Carolina law. The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Courts evaluating the admissibility of scientific expert evidence "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508 (1999); see also Watson v. Ford, 389 S.C. 434,

699 S.E.2d 169 (2010). While the trial court assesses the reliability of the expert's methodology, it is for the jury to determine the soundness of the facts underlying the expert's opinion and the correctness of his conclusions. See Milward v. Acuity Specialty Prods. Group, Inc., 639 F.3d 11, 22 (1st Cir. 2011).

Plaintiffs presented expert testimony from Dr. Arnold Brody, a cellular biologist specializing in the biological mechanisms of asbestos-related disease, Dr. Maddox, a board-certified pathologist with expertise in asbestos-related disease, and Dr. Holstein, a physician board-certified in occupational medicine and preventive medicine. The court finds each of these experts to be well-qualified to offer causation opinions, and finds their testimony reliable and helpful to the trier of fact.

Dr. Brody offered only general causation opinions and explained that it is the cumulative dose of asbestos that causes mesothelioma, because asbestos is a carcinogen and it is not possible to say that some doses of the carcinogen were not causative in the disease process. He also testified that numerous government agencies, including the EPA, OSHA, the National Cancer Institute, the World Health Organization (WHO), and the American Thoracic Society, have concluded that there is no safe level of exposure to asbestos.

Dr. Maddox is a board-certified anatomical and clinical pathologist who specializes in the diagnosis and attribution of mesothelioma. His specific causation opinions are based on fact witness testimony regarding the frequency, duration, and proximity of Mr. Garvin's exposure, Mr. Garvin's medical and pathology materials, Crane-specific documents, studies of the fiber release from asbestos gaskets and packing, and the peer-reviewed medical literature regarding the causation of mesothelioma. Mr. Garvin's exposures to asbestos gaskets from Crane valves

were several orders of magnitude above background levels, and constituted a significant component of his cumulative asbestos exposure that caused his mesothelioma. Dr. Maddox also testified about the reasonableness of Mr. Garvin's medical care, including that his medical bills to date were \$149,000, and that his medical expenses could be as much as \$300,000 more in the future.

Dr. Holstein is board-certified in occupational medicine and preventive medicine and has spent more than 40 years studying and teaching about the causation of asbestos-related disease in working environments. In addition to his consulting practice, he has been a Clinical Assistant Professor in the Division of Environmental Sciences at Mount Sinai School of Medicine since 1983 and has also served as a consultant to the National Cancer Institute and NIOSH. He evaluated Mr. Garvin's exposure according to the description of his work practices, the evidence of asbestos content in the valves present at Mr. Garvin's work sites, fiber release studies, and epidemiological studies of asbestos-related disease. He testified that Mr. Garvin's exposures from working with asbestos gaskets were 10,000 to 100,000 times above background levels. He determined that Mr. Garvin had frequent and regular exposure to original gaskets supplied with Crane valves and that these exposures were a substantial contributing cause of his mesothelioma.

Crane argues that Plaintiffs' expert medical witnesses testified that "every exposure to asbestos that Mr. Garvin sustained substantially contributed to cause his disease." The trial record does not contain any such testimony from any of Plaintiffs' experts. Ironically, the general acceptance of the opinion challenged by Crane is evidenced by testimony from its own expert, Dr. Victor Roggli, who has previously expressed the opinion that "each and every exposure to asbestos than an individual [with] mesothelioma experienced in excess of a background level is a

substantial contributing factor to the disease.” TT 9/3/13 at 70. Dr. Roggli also indicated that there is no known safe level of exposure to asbestos and that very low levels of exposure above background have been repeatedly demonstrated to cause mesothelioma, including peritoneal mesothelioma. Dr. Roggli testified that it is the total dose of asbestos, regardless of fiber type, that the patient experiences that causes the disease. These opinions were relevant, reliable, and admissible evidence for the jury to consider in evaluating causation.

There was evidence that the opinions expressed by Plaintiffs’ experts and Dr. Roggli, including that there is no safe level of exposure to asbestos and that mesothelioma can be caused by brief and low level exposures, are shared by numerous public health and regulatory agencies. These agencies include the EPA (“scientists have not been able to determine a ‘safe’ or threshold level for exposure to airborne asbestos”); OSHA (“There is no ‘safe’ level of asbestos exposure for any type of asbestos fiber. Asbestos exposures as short in duration as a few days have caused mesothelioma in humans.”); NIOSH (“[E]xcessive cancer risks have been demonstrated at all fiber concentrations studied to date. Evaluation of all available human data provides no evidence for a threshold or for a ‘safe’ level of asbestos exposure.”); the Consumer Products Safety Commission (“The Commission has noted that in the scientific literature there is general agreement that there is no known threshold level below which exposure to respirable free-form asbestos would be considered safe.”); the WHO (“there is no safe threshold level of exposure”); and the World Trade Organization (finding “on the basis of scientific evidence that ‘no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis”). These authorities support the court’s finding that Plaintiffs’ experts’ opinions are not only reliable and helpful to the trier of

fact, but also supported the jury's finding that Mr. Garvin developed mesothelioma from breathing asbestos fibers from Crane valves.

3. But-For Cause

The jury was instructed that to prove proximate causation in a negligence case, it must find that the injury would not have occurred "but for" the defendant's negligence. Such evidence was not lacking in this case.

The jury heard expert testimony that there is an inverse relationship between the dose or amount of asbestos a person breaths and the latency period of the disease. If the cumulative dose of asbestos is increased by exposure to asbestos products, then that shortens the latency period and causes the disease to develop more quickly. The court finds that this evidence that the latency of Mr. Garvin's disease was affected by his exposure to asbestos from Crane valves is sufficient to raise a genuine issue of material fact for the jury regarding but-for causation.

E. Knowledge Evidence

Crane contends that certain statements in trade association journals and other documents about the hazards of asbestos were inadmissible hearsay. The statements had been received by Crane from outside sources and were offered on the issue of notice. These statements were therefore not hearsay, as they were not offered for the truth of the matter asserted. Rule 801(c), SCRE. The hearsay rule does not apply to evidence offered solely to prove notice, as that relates to state of mind. Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972) (testimony that motor vehicle inspector told defendants prior to accident that car's tires were unsafe); Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951) (testimony "that Dr. Stanek had been told by someone in the operating room that the sponge count did not come out right"). Testimony to show notice of a

fact and not the fact itself is not hearsay. Baber v. Greenville Cty., 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997).

Crane specifically complains about the admission of testimony from its corporate representative, Mr. Pantaleoni, regarding a letter from a Crane customer, Foster Wheeler, stating that health hazards had been shown from minimal exposures. Evidence that Crane received that letter and had notice of the contents of that letter was not hearsay. The Court excluded the letter under Rule 403, SCRE, however. Although it was inadvertently shown to the jury in violation of this ruling, this was a harmless error because it was cumulative of other notice evidence already in the case. See Ramos v. Hawley, 316 S.C. 534, 536, 451 S.E.2d 27, 28 (Ct. App. 1994); Sligh v. Johnson, 288 S.C. 364, 367, 342 S.E.2d 620, 622 (Ct. App. 1986). In addition, Crane later opened the door to this evidence by presenting testimony from Mr. Pantaleoni claiming that Crane had no knowledge that asbestos gaskets and packing were harmful. The Foster Wheeler letter was therefore admissible as impeachment evidence to contradict Mr. Pantaleoni's claim, in addition to being relevant on the issue of notice.

Crane also objects that a document from the American Petroleum Institute (API) was inadmissible hearsay. The receipt and contents of this document were properly discussed on cross-examination of Mr. Pantaleoni and Dr. Roggli because the evidence was offered to show that Crane had access to information from API about asbestos hazards. Communications from trade organizations such as API to a defendant or management-level employee of the company are not hearsay when offered to show the information that Crane received about health concerns associated with asbestos exposure. The question of what was known and knowable to asbestos manufacturers is always a highly relevant area of inquiry in any asbestos case, and

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communications to the defendant from a variety of sources may be offered to show notice to a defendant.

F. S.C. Code § 15-38-15

Crane contends that that settled parties should have been allocated fault at trial. The short answer to this is that § 15-38-15 is inapplicable because the jury determined Crane's conduct to be willful and wanton. S.C. Code § 15-38-15(E). Even were this not true, the plain language of S.C. Code § 15-38-15 allows apportionment of fault only among the trial defendants. The legislature repeatedly refers to "defendants" in the pertinent sections of the statute. See S.C. Code Ann. § 15-38-15(A) ("[I]f indivisible damages are determined to be proximately caused by more than one *defendant*, joint and several liability does not apply to any *defendant* who conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (1) the fault of all the *defendants*; and (ii) the fault (comparative negligence), if any, of the plaintiff."); § 15-38-15(A) ("A *defendant* whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact."); § 15-38-15(B) ("Apportionment of percentages of fault among *defendants* is to be determined as specified in subsection (c)."); § 15-38-15(C)(3) ("The jury . . . shall . . . upon a motion by at least one *defendant*, where there is a verdict . . . against two or more *defendants* for the same indivisible injury . . . specify in a separate verdict . . . the percentage of liability . . . that is attributable to each *defendant*."); § 15-38-15(C)(3) ("In determining the percentage attributable to each *defendant*, any fault of the plaintiff . . . will be included so that the total of the percentages of fault attributed to the plaintiff and to the *defendants* must be one hundred percent."); § 15-38-15(E) ("Notwithstanding the

application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each *defendant's* percentage of liability as determined pursuant to subsection (c).").

The Legislature specifically chose the term "defendant" rather than "nonparty," "released party," or some other term. The Legislature meant what it said. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 ("Courts must presume that a legislature says in a statute what it means and means in a statute what it said there."). Giving the term its plain and ordinary meaning, a defendant is "[a] person sued in a civil proceeding" Black's Law Dictionary 482 (9th ed. 2009). Placing nonparties on the verdict form for apportionment of fault would contravene the express terms of the statute.

While it is true that § 15-38-15 (D) provides that Defendants "retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury...", the provisions of the statute dealing with verdict forms and how to practically apportion fault restrict their application to "defendants," i.e. parties. Subsection (D) retains a Defendant's right to argue non-party fault at trial even though the non-party does not appear on the verdict form, a right Crane exercised.

Any ambiguity in the statute may be resolved by considering its purpose when it was passed in 2005 to modernize joint and several liability. Construing the statute as a whole, and interpreting it in a practical, reasonable manner in accord with its purpose, see State v. Sweat, 688 S.E.2d 569, 575 (2010), the court finds that § 15-38-15 does not permit a jury to assess the fault of non-parties on the verdict form. The legislature chose its words carefully, and while subsection (D) mentions non-parties, there is no mechanism allowing them a place on the verdict

from. When a legislature includes particular language in one section of a statute but omits it in another, it is presumed to have done so deliberately. Russello v. United States, 464 U.S. 16, 23 (1983).

The legislative history sheds further light. Two unadopted versions of the Bill proposed language that Crane now seeks to have this court make the law. See Shaw, Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed by Nonparty Fault, 58 S.C. Law. Rev. 627, 633-34 (2007) (referring to prior versions of H.B. 3008 referred to House Judiciary Committee). The legislature's "rejection of the very language that would have achieved the result" Crane urges "weighs heavily" against Crane's interpretation. Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 (2006).⁴

A statute's words must be construed in context and in light of the intended purpose of the statute in a manner, which harmonizes with its subject matter and accords with its general purpose. In re Manigo, 398 S.C. 149, 729 S.E.32 (2012). The purpose of §15-38-15 was to end joint and several liability for *defendants* with less than fifty percent fault. Limiting the meaning of "defendants" to the parties on the verdict form maintains this purpose, as defendants are free to argue they have no fault or less than fifty percent of the fault. The successful defendant will enjoy the protection offered by the statute and avoid joint and several liability.

⁴ This principle of statutory interpretation regarding rejected proposed legislation should be known, especially in South Carolina, as *canis non insidiatus*, or "The Dog That Would Not Hunt," a corollary to the Canon of Canine Silence. See Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73-74 (2004) (Scalia, J., dissenting) (coining Canon to spoof idea that legislative silence about a subject may be used as evidence of legislative intent). The Canon has roots in Justice Stewart's decision in Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

In §15-38-15(C)(3), the percentages of fault of the plaintiff, if any, and that of the defendants must add up to one hundred percent. The court is certain the Legislature understood the law of percentages, and it left no percentage for allocation to non-parties. Roschen v. Ward, 279 U.S. 337, 339 (1929) (“[T]here is no canon against using common sense in construing laws as saying what they obviously mean.”) (Holmes, J.).

A jury simply cannot apportion fault to anyone other than the defendants at trial. The rule that the Plaintiff alone has the right to determine which tortfeasor to sue is a “firmly entrenched common law principle,” Chester v. S.C. Dep. Pub. Safety, 388 S.C. 343, 346; 698 S.E.2d 559 (2010), of which the Legislature was presumptively aware and intentionally chose not to disturb. See Fagnant v. K-Mart Corp., 2013 WL 6901907 (D.S.C. 2013) (reaching same interpretation of section 15-38-15).

G. Jury Conduct

Crane questions the jury’s empanelment and deliberations because it alleges that the trial lasted longer than the jury was originally told it would and the jury deliberated less than three hours. When a party alleges irregularities in the jury’s deliberations, “[t]he test is whether there is reason to suppose outside influences affected the jury’s verdict.” Parker v. Evening Post Publ. Co., 317 S.C. 236, 248, 452 S.E.2d 640, 647 (Ct. App. 1994). The court evaluates such a claim based on its “opportunity to view the trial, the character and intelligence of the jurors, and to consider whether the verdict, in light of the evidence, has so little support as to indicate corrupt or improper influence.” Id.

There is no evidence the jury’s verdict was affected by any improper outside influence. At the end of the second week of trial, the jury was informed the trial would continue into the

next week. The forelady discussed the matter with the jury members and informed the Court that no jurors had indicated they could not be present for an additional week. The jury was consulted about any scheduling conflicts due to the three extra days of trial, and those were accommodated. One juror expressed concern that two other jurors showed up late for trial one day, but she assured the court that this would not compromise her duties as a juror. In fact, the two she had a complaint about were alternate jurors who did not take part in deliberations.

The jurors were highly attentive throughout the trial and approached their duties studiously. The jury managed its time well, and their efficient deliberations cannot be spun as a signal that some sinister force was at work. See Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 636, (Ct. App. 2000). The deliberations were not unreasonably brief, and it is quite common for long trials to end with short deliberations, for the human mind can concentrate quite effectively when it has been adequately prepared. Id.; see also Curtis v. Blake, 392 S.C. 494, 504-505 (Ct. App. 2011) (brevity of jury deliberations alone does not suffice as a reason to set aside the verdict); Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 283, 670 S.E.2d 1, 11 (Ct. App. 2008) (noting the trial court should not base a decision on a thirteenth juror new trial motion on the brevity of jury deliberations).

Crane claims a new trial is warranted because the large amount of damages awarded could only be the result of "considerations not reflected by the evidence." It accuses the jury of reaching its verdict as a "result of passion, caprice, prejudice, partiality, corruption or some other improper motives." The Court cannot agree. As noted, the Court observed the jury to be conscientious, thoughtful, and properly focused on the evidence. Many of the jurors were avid note takers. They came from a wide variety of backgrounds, including a forensic technician for

the Federal Bureau of Investigation, a senior manager for the American Red Cross, a car mechanic, a maintenance worker at a nursing home, a retired Army soldier, a dental hygienist, a self-employed national security investigator, a retired social worker, an office manager, a nurse, a certified medical assistant at the Richland County Jail, and a retail manager. This rather diverse group reached a unanimous verdict for Plaintiffs on all questions.

While the jury did decide on a large award, the Court has no reason to conclude it was the result of any improper motive or outside consideration. Placing a value on pain and suffering is inherently subjective. In the Court's estimation, the members of the jury performed their civic duty admirably throughout the course of the three-week trial.

H. Willful and Wanton Conduct

Crane next argues there was insufficient evidence to support the jury's finding that its conduct was willful, wanton, or reckless, and that the jury's award of punitive damages should therefore be vacated. The record, however, contains ample evidence to support the jury's determination that Crane's conduct warranted punitive damages.

Plaintiffs presented sufficient evidence of Crane's knowledge of asbestos health hazards to raise a fact question for the jury regarding Crane's willful, wanton, and reckless conduct. Plaintiffs' evidence showed that Crane knew or should have known about the dangers of its products. Both categories of evidence are relevant in evaluating whether Crane's conduct was willful, wanton, and reckless, and in assessing punitive damages.

There was evidence that Crane had access to knowledge since the 1930s that asbestos exposure causes fatal disease. Thus, Crane knew of asbestos hazards approximately 50 years before Mr. Garvin's last exposure to asbestos from Crane valves. Crane knew about the

possibility that asbestos exposure could cause cancer as early as 1957. It knew about the risk of mesothelioma from exposure to asbestos products in the 1960s. It knew that the risk decreased when exposure levels decreased. Crane does not deny that it knew about the health hazards of asbestos exposure in the 1970s, including the risk of cancer and mesothelioma. Crane is aware of the EPA's position that there is no known safe level of exposure to asbestos.

The jury was presented with evidence that Crane continued to sell asbestos-containing materials years after it had actual knowledge of the danger, including up into the 1980s when Mr. Garvin was still working with Crane valves. Crane did not test its products and never warned. Crane did not pass on warnings it received from asbestos gasket suppliers in the 1980s. Dr. Roggli testified that where asbestos products release fibers above background and carry no conspicuous warning, the product is unreasonably dangerous. Crane told the jury that even knowing everything it does now, Crane would not have done anything differently today.

Plaintiffs also presented evidence that the magnitude of the risk is quite significant. The EPA has found that even one year of exposure at current limits of 0.1 f/cc could cause death and disease. 100,000 people die yearly from asbestos-related disease, and Crane is aware of that. Asbestos exposure contributes to 1 of 3 cancer deaths in the occupational setting in the U.S.

Crane argues that its conduct cannot be considered willful, wanton, and reckless because it was consistent with that of other manufacturers in the industry. Crane failed to point to any evidence in support, but even if it had, it would not preclude a finding of willful and wanton

conduct. Industry standards may be probative, but never dispositive. See Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192, 1198 (4th Cir. 1982).⁵

I. Punitive Damages

"[P]unitive damages serve at least three important purposes: punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights." Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000). Those purposes are served by an award of punitive damages in this case.

Although reviewable for compliance with due process, James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006), a jury's punitive damages award is "entitled to a strong presumption of validity." TXO Production Corp. v. Alliance Res. Corp., 509 U.S. 443, 453 (1993). In Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment

⁵ The frail idea that one's culpability is lessened by the fellow fault of one's company was memorably rejected long ago by Judge Learned Hand:

Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), cert. denied 287 U.S. 662 (1932); see also Wilson v. Bradlees of New England, Inc., 96 F.3d 552 (1st Cir. 1996) ("Industry standards serve many useful purposes, but we do not think Congress, if squarely asked to address the issue, would say that such a standard should extinguish a common-law claim of design defect. If the Defendant wants to show that they met a prevailing industry standard, fine; but this should not preclude a Plaintiff from showing that industry should have done more under certain conditions.") The jury here was charged on the limited relevance of "industry standards."

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review of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) and BMW of North America v. Gore, 517 U.S. 559 (1996). See Mitchell, 385 S.C. at 587. The jury was properly charged on these factors, and their findings by clear and convincing evidence, of Crane's willful, wanton and reckless conduct is firmly anchored in the record.

Reprehensibility is the most important consideration, Mitchell, 385 S.C. at 587, for the simple reason that some things are worse than others. A number of factors are relevant to reprehensibility, including whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." Id.

Crane continues to deny that Mr. Garvin had exposure to asbestos from Crane valves. This was a matter for the jury, whose finding that Mr. Garvin was exposed to asbestos from Crane valves was supported by the evidence. The jury was entitled to credit the evidence that Mr. Garvin was exposed to asbestos gaskets and packing supplied with Crane's new valves, as well as to replacement parts containing asbestos that Crane's design specified or required. The harm

caused was physical, and there was evidence of Crane's indifference to the risks posed by the asbestos products it widely distributed.

The jury did not base its award on harm to parties other than the Garvins, as Crane claims. The United States Supreme Court has recognized that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible" Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007). A jury may consequently take into account harm to nonparties in determining reprehensibility. Id. at 357. A jury may not, however, go further and use a punitive damages verdict to punish a defendant for harm caused to nonparties. Id. The jury was specifically instructed that it could not punish for harm to other parties. Such risk of harm was merely a consideration for the jury in evaluating the willful and wanton nature of Crane's conduct.

Also relevant is the ratio between the compensatory damages award, which represents the plaintiff's actual or potential harm, and the punitive damages award. Mitchell, 385 S.C. at 588. "[A] court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." Id. A single-digit ratio is generally thought to comport with due process. Id.

The legislature has capped punitive damages at three times the compensatory award. S.C. Code Ann. § 15-32-530. Such a cap is a public policy judgment that a 3:1 ratio is an inherently reasonable limit on punitive damages. The jury's award was well within this presumptively

reasonable ratio.

The Court rejects Crane's contention that punitive damages should not be permitted in asbestos litigation. Punitive damages are appropriate against an asbestos manufacturer even if there are other similar claims pending against it. See Greenville v. W.R. Grace & Co., 640 F. Supp. 559, 566 (D.S.C. 1986)(Wilkins, J.), *aff'd on other grounds*, 827 F.2d 975 (4th Cir. 1987). A manufacturer is not insulated from punitive damages simply because it may have caused widespread injury. *Id.* It was appropriate for the jury to award punitive damages in this case, and the award does not violate due process.

III. Ruling on Motion for New Trial Nisi Remittitur

The jury award against Crane was for \$10 million actual damages to Lloyd Garvin, \$11 million in punitive damages to Plaintiffs Lloyd and Velda Garvin, and \$1 million in compensatory damages to Plaintiff Velda Garvin. I find compelling reasons to grant a new trial nisi remittitur and reduce the jury's compensatory award to Mr. Garvin, as well as the punitive damages award.

A trial court has wide discretion to reduce an excessive verdict by granting a new trial nisi remittitur. The reduced judgment is a suggested settlement figure, which the Plaintiff may accept, or reject and request a new trial. Ruling on a new trial nisi remittitur "requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). The touchstone for deciding whether to disturb a jury's verdict by granting a nisi motion is whether the award excessively compensates the injured party. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). A famous decision by Judge Medina drives home the point: "[t]he very nature of the problem counsels restraint.

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Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand." Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (2d Cir. 1961).

Mr. Garvin was 74 years old at the time of trial. Although he had a life expectancy of an additional 10.78 years (S.C. Code Ann. § 19-1-150), he has suffered from a number of serious medical conditions in recent years unrelated to his asbestos exposure. Dr. Holstein testified that there were several "things that might affect [Mr. Garvin's] life span" aside from his mesothelioma, including his "history of heart disease, history of adult onset diabetes, history of chronic obstructive pulmonary disease, particularly, the asthmatic component, which can get worse at times." Additionally, there was evidence that before, during, and after Mr. Garvin was diagnosed with mesothelioma and underwent his surgery, he was on a morphine pump to allay pain from prior back surgeries.

The jury was unduly liberal in awarding Mr. Garvin \$10 million in compensatory damages, and this award is excessive. This Court finds compelling reasons warrant reduction of the compensatory damages award. As set forth above, Mr. Garvin is 74 years old and suffers from several serious medical conditions wholly unrelated to his diagnosis of testicular mesothelioma and his treatment for that disease. Additionally, Mr. Garvin has been cancer-free since his surgery. Finally, Mr. Garvin's economic damages amount to \$149,000.00, and, even if a likely future reoccurrence of cancer is taken into account, those future economic damages are not expected to exceed \$150,000 to \$300,000, for a total amount of economic damages equaling



no more than \$300,000 to \$450,000. Thus, based upon Mr. Garvin's pecuniary damages, the nature of his injury, his treatments, his age, and his life expectancy, compelling reasons justify reducing his actual damages award from \$10 million to \$1.5 million.

The jury awarded Plaintiffs \$11 million in punitive damages. The jury was unduly liberal in awarding this excessive amount. Based on the compelling reasons cited above, the Court grants Crane Co.'s motion for new trial nisi remittitur as to Mr. Garvin's punitive damages award, and reduces the award from \$11 million to \$3.5 million. The court finds this amount of punitive damages, as analyzed in light of the Mitchell factors discussed above, comports with due process.

Conclusion

The Court **GRANTS** Crane Co.'s motion for new trial nisi remittitur and reduces the compensatory award to Mr. Garvin to \$1.5 million, and the punitive damages award to \$3.5 million. Mr. Garvin of course may reject the remittitur, and a new trial will be scheduled. The jury's \$1 million award to Ms. Garvin for loss of consortium shall stand, as there is no compelling reason to disturb it. Finally, Crane's motions for judgment notwithstanding the verdict and new trial absolute are DENIED.⁶

IT IS SO ORDERED.

D. Garrison Hill

D. Garrison Hill
Circuit Judge

November 14, 2014
Greenville, South Carolina

⁶ Within 10 days of the date of this order, Plaintiffs shall share with Crane the settlement amounts and agreements received from third parties. The court will then schedule a hearing regarding set off at either party's request.

EXHIBIT H

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2 COUNTY OF SPARTANBURG) CASE NO. 2016CP4201593
 3 JACK WHITMIRE,)
 4 Plaintiff,) Transcript of Record
 5 vs.) Pretrial Hearings
 6 INGERSOLL-RAND,) Date: July 11, 2018
 7 COMPANY, ET. AL,)
 8 Defendants.

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10 B E F O R E:

11 The Honorable Jean C. Toal

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 18 Denise J. Lauder, RPR

19 Ninth Judicial Circuit

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(No exhibits were offered or
marked for identification.)

1 (The following proceedings were had
2 July 11, 2018, 10:28 a.m., Richland County
3 Courthouse, in re: Whitmire.)

4 THE COURT: We have new players here,
5 so let me remind you of a couple of things as we
6 get started. Welcome to all. These are pretrial
7 hearings in Whitmire against Ingersoll-Rand and
8 others. This is a Spartanburg County case,
9 2016-CP-42-01593. It is scheduled for trial next
10 Monday.

11 We are going to ask that when any
12 lawyer stands to address the Court that you say
13 your name and your client. And sometimes that will
14 be very repetitive, but these records are hard to
15 maintain with a lot of different counsel involved,
16 and so if you will help us out and do that, I'm
17 sure our court reporter will be grateful.

18 We are going to begin with motions to
19 dismiss; and there are three defendants who have
20 motions to dismiss that I've got in front of me.
21 So let's be sure we're correct about that.

22 And, again, the ones I've got are
23 Aurora Pump, Lawrence Pumps, which is also
24 Flowserve, and William Powell. Am I correct about
25 that?

1 MS. MCVEY: Yes, Your Honor.

2 THE COURT: All right. Then the first
3 question that I've got is to you, Ms. McVey. Does
4 plaintiff have any contentions about the timeliness
5 of the motions to dismiss?

6 MS. MCVEY: Yes, Your Honor. We put
7 that in part of our waiver argument in the personal
8 jurisdiction motion.

9 THE COURT: Right. So do you have
10 contentions about all three of these defendants in
11 terms of their -- the timeliness of the motions?

12 MS. MCVEY: Yes. Trey Branham is here
13 for the plaintiffs as well. We've divided the
14 argument up. I can say for Lawrence Pumps, yes, we
15 do.

16 MR. BRANHAM: Your Honor, Trey Branham
17 for the plaintiffs. We contend that all three of
18 the personal jurisdiction motions are not timely
19 filed in the case.

20 THE COURT: All right. Very good. And
21 you will cover that in your presentation?

22 MR. BRANHAM: Yes, Your Honor.

23 THE COURT: All right. Counsel, as I
24 hear your motions, I'm not forgetting about the
25 fact that there is an underlying question as to

1 whether you can make them at all. It's just more
2 for a matter of convenience I will hear them, but
3 subject to whatever rules I may make on their
4 timeliness.

5 Very good. All right. We will begin
6 with Aurora Pumps.

7 MR. GLENN: Your Honor, Jase Glenn on
8 behalf of the Defendant, Aurora Pump Company.

9 THE COURT: Mr. Glenn, glad to see you.

10 MR. GRAHAM: Good to see you, Your
11 Honor. Pleasure to be in front of you again.

12 Your Honor, I don't think the
13 jurisdictional facts in the case are really in
14 dispute. The plaintiffs filed their third amended
15 complaint in this case back in December of 2017.
16 They alleged in that complaint that they were going
17 to prove exposure both in South Carolina and North
18 Carolina to the defendant's product.

19 THE COURT: Let me just cut to the
20 chase. Let's assume that they don't prove the
21 upstate -- Pickens, or whatever it is -- exposure.
22 We are a lex loci delecti state and he died in
23 South Carolina, as I understand it, and so the
24 injury was suffered then.

25 So what kind of -- why do we need to

1 spend a lot of time on this? I want you to be able
2 to, of course, build any record that you need to
3 for purposes of appeal, but why isn't this a pretty
4 straightforward lex loci issue.

5 MR. GRAHAM: Your Honor, I think you
6 actually addressed that in an opinion called *Murphy*
7 *vs. Owens-Corning Fiberglas*. That's 356 S.C. 592.
8 It's a 2003 Supreme Court case.

9 In that case, it was actually a
10 door-closing statute case, but the question was,
11 where does an asbestos cause of action arise? And
12 in that case, the plaintiff had exposure in one
13 state and was diagnosed in a different state.

14 And Your Honor wrote in a concurrence
15 that agreed with the court of appeals, that in a
16 latent disease case, in fact, that was a
17 mesothelioma case, a cause of action arises in the
18 state where exposure occurred.

19 And so I think that's the basis for
20 saying that the specific jurisdiction would
21 certainly be proper if they show --

22 THE COURT: You're not arguing on
23 propriety here. You're arguing that I must dismiss
24 because jurisdiction can't be in South Carolina.
25 The fact that a cause of action did arise in one

1 state does not preclude the injury analysis that
2 lex loci delicti encompasses.

3 The cause of action -- I mean, suits
4 may be brought in many different states. They may
5 be in many different jurisdictions that might have
6 a piece in that jurisdiction in the cause of
7 action.

8 The plaintiff has chosen to bring the
9 action in South Carolina, so the question before me
10 is not whether the cause of action could have
11 arisen in any other state, but whether South
12 Carolina has jurisdiction to hear the matter.

13 And my first question to you deals with
14 that. Murphy deals with a different situation.

15 But here what I'm asking is for you to
16 analyze whether or not if the death from
17 mesothelioma occurred in South Carolina, which I
18 think is uncontroverted, that is enough to
19 establish jurisdiction in South Carolina to hear
20 this case. So that's what I want you to start
21 with.

22 MR. GRAHAM: Okay. Your Honor, let me
23 back up for a second then. I think there's no
24 dispute about general jurisdiction here. I think
25 what we're talking about is specific jurisdiction,

1 whether or not this specific cause of action
2 creates jurisdiction in South Carolina. All right.

3 So I'm not going to talk about general
4 personal jurisdiction at all unless the Court wants
5 to hear argument on that.

6 If we're talking about specific
7 jurisdiction, the South Carolina long-arm statute
8 makes specific reference to the term, arises out
9 of, activities within this state. And the Supreme
10 Court in the Coggeshall case that I know Your Honor
11 was a part of also talks about specific
12 jurisdiction within the context of whether or not
13 the defendant's conduct -- the cause of action
14 arises out of the defendant's conduct that is
15 directed at South Carolina.

16 And so, to me, the question about where
17 the cause of action arose is the key inquiry for
18 specific jurisdiction, and that is why I looked to
19 Murphy to answer that question. And Your Honor
20 stated in that opinion that it's the state where
21 the exposure happened, not where latent disease
22 later arose, you know, in some cases, and certainly
23 in this case, decades later.

24 I think that also the Bristol-Myers
25 Squibb case, which is, of course, the specific

1 jurisdiction case that the US Supreme Court came
2 out with last year, 137 S.C. 1773, talks about not
3 having specific jurisdiction where, in that case,
4 it was plaintiffs who had taken the defendant's
5 drug that they were alleging caused them damages,
6 but they never took the drug in California. And so
7 that was the ultimate problem there.

8 Does that answer -- I want to move to
9 the waiver argument unless Your Honor has further
10 questions about that.

11 THE COURT: Go ahead.

12 MR. GRAHAM: Okay. I didn't read in
13 the -- I completely understand the Court's inquiry.
14 I didn't read the plaintiffs -- at least in the
15 brief that they directed to us -- saying that they
16 think that there is specific jurisdiction.

17 The way I read it was that they think
18 that we waived it or forfeited it, as I think Ms.
19 McVey conveyed a second ago.

20 I would just remind the Court that,
21 again, in December, when they filed their last
22 complaint, they alleged that they were going to
23 prove South Carolina exposures. At that time,
24 there were also discovery responses that the
25 plaintiff had drafted and served on us, and they

1 are still the operative discovery responses today.

2 And those discovery responses indicate
3 that they were going to prove South Carolina
4 asbestos exposure including to pump, which is
5 obviously pertinent to my company -- my Defendant
6 Aurora Pump Company.

7 Over the past several months, we took
8 fact witness deposition testimony to explore
9 whether or not they were going to be able to prove
10 South Carolina exposure. The last co-worker who
11 was tendered by plaintiffs was Roland Blanton.

12 Mr. Blanton was deposed on May 4, 2018.
13 We filed our motion two-and-a-half-weeks later on
14 May 21st. And Mr. Blanton confirmed that the only
15 exposure that they were alleging was in South
16 Carolina.

17 Three days before that, we took
18 Mrs. Whitmire's deposition on May the 1st. She is
19 the only witness, as far as I can tell, who knows
20 anything about what Mr. Whitmire did at the site in
21 Pickens.

22 And all she was able to tell us was
23 that he worked there when he came home from
24 Vietnam, I believe, in late 1957 for four to six
25 weeks. She had no idea what he did other than

1 poured molten lead. She doesn't know about any
2 products that he worked with or around on that job
3 site.

4 And so if -- we really would not have
5 been able to file a motion until May of this year
6 because we didn't know what the facts were going to
7 show, Your Honor. We've cited the Court in our
8 reply brief that was filed on Friday, and I think
9 sent to your chambers first thing Monday morning,
10 that courts are generally reluctant to find a
11 waiver when dealing with specific jurisdiction,
12 which is what we're dealing with here.

13 The plaintiffs hang their hat on a case
14 here in South Carolina that's relatively new, the
15 *Maybank vs. BB&T* case. I'm sure Your Honor is very
16 familiar with that case.

17 THE COURT: Very.

18 MR. GLENN: In that specific case, the
19 relationship between the defendant who was
20 contesting jurisdiction and the plaintiff was clear
21 from the outset. They had a longstanding business
22 relationship between the plaintiff and the
23 defendant's subsidiaries. The plaintiff had owned
24 some of the defendant's stock for several years and
25 so they knew what the facts were.

1 In these asbestos cases, we begin the
2 case with a very generic complaint and then we
3 start taking co-worker deposition testimony. And
4 when that testimony is done, that's when we know
5 whether or not they are going to prove exposure
6 within the jurisdictional boundaries of South
7 Carolina.

8 And I would submit to Your Honor that
9 that was not completed until May 4th of this year,
10 just a couple of months ago.

11 The plaintiffs also cite to a host of
12 other cases from several circuits. I think that in
13 all of those cases they dealt, again, with parties
14 who had pre-existing relationships where everybody
15 knew what the jurisdictional allegations were going
16 to be from the outset of the litigation, and yet
17 the defendants waited some substantial period of
18 time before actually filing a motion to dismiss.

19 A lot of those cases involved contracts
20 or business relationships. There are three
21 asbestos cases that they cited that I'd like to
22 talk about. One of them is the Hamilton case.
23 That is a case that was in federal court. The
24 defendant -- actually, the case initially was in a
25 federal district court.

1 After a few months, it was moved to the
2 asbestos MDL in the Eastern District of
3 Pennsylvania. It was there for a few years and
4 then it came back. And then they waited another
5 several months before moving on the eve of trial.

6 Hamilton -- what is significant to me
7 about that case, and I think what is significant --
8 what was significant to the appellate court in
9 Hamilton was that, one, they waited four years to
10 move and, two, they really should have moved in
11 front of the MDL court, which had made clear that
12 it handles personal jurisdiction motions.

13 And the MDL court's specific purpose is
14 to handle discovery and pretrial issues. And then
15 once it's remanded back, that's essentially saying
16 to the transfer or lower court that this case is
17 ready for trial.

18 So I would argue, Your Honor, that when
19 discovery closed, they should have moved
20 immediately, which is exactly what we did in this
21 case.

22 They also cited the Branson case, which
23 I think is a North Carolina asbestos case. That
24 involved defendants who filed answers that were six
25 months late, and so that was a big issue for that

1 court.

2 It also involved the plaintiffs asking
3 for more time for discovery because the discovery
4 deadline was not over and, in fact, the court did
5 give them more time for discovery. So we would
6 argue that the Branson case really doesn't apply
7 here.

8 And then the last case that they cite
9 is a Roland -- I'm sorry, a Rhode Island State
10 Superior Court order from a case called *Bazor v.*
11 *ABEX*. There the defendant who was contesting
12 jurisdiction had taken the only fact witness, which
13 was the plaintiff, in 2010, and knew what the
14 factual allegations were in 2010 and waited to move
15 until 2014.

16 And to me, again, that's a completely
17 different case from what we're talking about here
18 where we waited until the last fact witness was
19 deposed and then moved the Court within less than
20 three weeks.

21 Is there anything else?

22 THE COURT: Nothing from me.

23 MR. GRAHAM: Your Honor, I think that
24 covers everything.

25 THE COURT: Let's hear from Mr. Branham

1 then.

2 MR. GRAHAM: All right.

3 MR. BRANHAM: Good morning, Your Honor.

4 THE COURT: Mr. Branham.

5 MR. BRANHAM: Trey Branham for the
6 plaintiffs. It's nice to see you again.

7 THE COURT: Yes, sir.

8 MR. BRANHAM: Judge, I'll be brief. I
9 agree with you on lex loci. Let me move to the
10 issue of Aurora and what they've done in discovery,
11 or not done in discovery, that's going to be also
12 taken up in a motion for sanctions later today that
13 I think goes to sort of the heart of this matter..

14 There is no question that there was
15 work performed in South Carolina at this Pickens
16 facility. The question is what was done there.
17 And, of course, Mr. Whitmire died before he gave a
18 deposition.

19 And so we asked Aurora for, amongst
20 others things, information about their distributors
21 and what they sold in South Carolina both to --
22 directly to North Carolina and perhaps the DuPont
23 facility, but also what they sold to the Pickens
24 facility.

25 And there was a lot of back and forth

1 in the motion for sanctions about whether they
2 should have to do that or they can do that and all
3 the rest of it. But certainly, as the Court has
4 talked about it on a number of occasions, we should
5 have the right to connect the dots.

6 And so the issue is whether or not
7 we've had proper discovery on this issue, if the
8 Court has a concerns about it, I think is the first
9 step.

10 The second step is this: --

11 THE COURT: Well, elucidate that. Go
12 on, tell me what.

13 MR. BRANHAM: Well, see -- so what the
14 question is, did they sell pumps to this Pickens
15 facility?

16 THE COURT: Yeah, I get that. What did
17 they do by way of -- you propounded discovery
18 requests of them early on asking for information
19 about whether they supplied pumps to the facility
20 he worked for in Pickens, right?

21 MR. BRANHAM: So we asked the question
22 to the corporate representatives in discovery, as
23 well as document requests for that.

24 THE COURT: All right. And what
25 happened in the 30(b)(6)?

1 MR. BRANHAM: And so the argument that
2 Aurora makes -- and Ms. McVey can address the
3 motions for sanctions, so I'm doing this a little
4 bit off the top of my head. The argument that
5 Aurora makes is that all of their records are kept
6 by serial number only.

7 THE COURT: I'm real familiar with
8 that. That ground has been plowed many times
9 before.

10 MR. BRANHAM: Yes.

11 THE COURT: And I have taken the
12 position that they can get in there and get the
13 records that are -- that need to be gotten for this
14 case. So what did they do?

15 MR. BRANHAM: So we have not been, as I
16 understand it, and correct me if I'm wrong,
17 provided with pump records from Aurora to any --
18 either it be the DuPont facility or any of the
19 facilities in South Carolina because, again, the
20 argument is the only way we can search for that is
21 by serial number. So those have not produced.

22 Had those been produced, had those
23 records of sales been produced, it may have given
24 the plaintiffs an opportunity to connect certain
25 dots. And so that, in and of itself, at least

1 until that discovery is completed, ought to stop
2 this motion.

3 But even if it doesn't, even if it
4 doesn't, this case was filed April 25th of 2016.
5 The first co-worker, Mr. Tucker, was taken
6 December 15th of -- that can't be right. That
7 can't be right.

8 December 15th of 2016 was the first
9 co-worker. And December 16th of 2016 was the
10 second co-worker, Mr. Bingham, who identified
11 Mr. Whitmire, who was eventually taken on April 6th
12 of 2018. And they're right, there was a co-worker
13 who was taken in May of 2018.

14 But discovery doesn't just fall on the
15 plaintiffs, right? I mean, discovery -- they go
16 out and do discovery too. So certainly three of
17 the four co-workers, all of whom talk about the
18 work that was done at DuPont, were deposed or were
19 certainly known about by the defendants a long time
20 ago.

21 And the BB&T case says you can't sit on
22 the defense, you can't sit there and do nothing.
23 And so they've known about the testimony of at
24 least three of the four co-workers, and they pled
25 it in their answers. Presumably, they had a reason

1 to plead it in their answer, and they did nothing
2 until May 22nd, I think, is when they filed their
3 motion to dismiss.

4 And so we're more than two years after
5 that and the case law is replete with this, Your
6 Honor. If you're going to raise this defense, you
7 cannot participate in discovery, ask the Court for
8 relief, do all of the things that you're going to
9 do to litigate the case, and then at the very last
10 day come into court and ask to be dismissed because
11 the Court doesn't have jurisdiction. At some point
12 these defendants have submitted to the
13 jurisdiction.

14 And so even if the lex loci issue
15 doesn't get us there, and even if the discovery
16 issue doesn't get us there, the waiver issue gets
17 us there.

18 THE COURT: Okay.

19 MR. BRANHAM: Thank you.

20 THE COURT: All right. Mr. Glenn, your
21 reply?

22 MR. GLENN: Your Honor, I'll be very
23 brief.

24 THE COURT: Mr. Glenn, what I want to
25 know is, what, if anything, Aurora ever gave

1 plaintiffs to this good day that specifically
2 addresses the request for information about pumps
3 at Pickens and at DuPont?

4 MR. GLENN: And I'm -- like
5 Mr. Branham, Mr. Meriwether is arguing the
6 sanctions motion for us, so I have to defer to him
7 a bit; but, Your Honor, our understanding from the
8 order that you signed in the Howell case was that
9 the Court had sanctioned the way that Aurora
10 maintains its records in the ordinary course of its
11 business, and that Aurora would not be expected to
12 go through all 3 million pages of its records to
13 try to locate that because in many -- or, in fact,
14 I think, now most cases we would have records of
15 pump sales that would not relate to any job site at
16 all.

17 And so --

18 THE COURT: I'm not asking you about
19 what I did in Howell.

20 MR. GLENN: Okay.

21 THE COURT: I am asking you what you --
22 you are now raising as the big, big thing to
23 support your motion to dismiss that they never tied
24 Aurora to Pickens. So I don't know what you've
25 done to supply them with their request for

1 information about pumps at Pickens.

2 And what I'm understanding, in a
3 roundabout way, you're saying is you're still
4 relying on this. We can't find any records, and,
5 therefore, because our records are so voluminous --
6 and I'm not sympathetic to that, quite frankly, in
7 this particular case because you're using it as a
8 sword and using your inaccessibility as a shield.
9 And that was a little bit different than what was
10 being done in the Howell case.

11 And this isn't a fishing expedition
12 now. This is a specific request for information
13 you say you can't do any search that would divine
14 that information, but because they don't have it,
15 all right, they don't have South Carolina in their
16 jurisdiction. That -- I'm concerned about that.

17 MR. GLENN: I understand, Your Honor.
18 A couple of things that I would say. One is that
19 let's assume that there were such documents that
20 showed pump sales to Pickens. All right.

21 THE COURT: Yes.

22 MR. GLENN: I understand that Your
23 Honor's ruling under the scintilla standard is that
24 if there's testimony that a plaintiff worked on
25 pumps at a facility, and then there's testimony

1 that you sold pumps that had asbestos at that
2 facility, then the scintilla standard gets them
3 past summary judgment.

4 THE COURT: That's correct. But you're
5 preventing plaintiff from making that argument
6 because you're refusing to give them any
7 information about if the pumps were sold at a
8 previous facility.

9 MR. GLENN: Well, Your Honor we did put
10 up a corporate representative who talked about
11 South Carolina sales and he admitted that --

12 THE COURT: But your corporate
13 representative was put up and they're asking for
14 sanctions in connection with what he did; he didn't
15 know anything. It wasn't a question of talking
16 about -- he talked very generally about the
17 territories and this kind of thing, as I understand
18 it, but he had no information about Pickens and had
19 not bothered to look in his corporate reps. And
20 there are reps in South Carolina. He had -- he had
21 no contact with any of their records.

22 So that's what I understand to be the
23 situation with respect to providing any
24 information. Your 30(b)(6) guy just simply said, I
25 don't know.

1 MR. GLENN: Your Honor, our corporate
2 rep talked about the distributor that Aurora Pumps
3 had used in both South and North Carolina since the
4 1950s. That is a third party and has always been a
5 third party.

6 So to the extent that that distributor
7 would have sales records, those are not in Aurora's
8 custody and control. And I think that's in our
9 sanction brief. I know Mr. Meriwether, again, will
10 talk about that more.

11 But going back to let's assume that
12 there were these documents. We don't know if
13 Mr. Whitmire ever worked around a pump. We have no
14 witness who even tells us if he walked by a pump.
15 And so, Your Honor, even if there were such sales
16 records, we still, under Your Honor's scintilla
17 standard, would not have enough to show
18 jurisdiction here.

19 And so --

20 THE COURT: I understand your argument.

21 MR. GLENN: Okay.

22 THE COURT: And I'm -- I'm very
23 concerned about it in the context of using I can't
24 get to a third party and I can't even get to my own
25 records, but I'm going to use that as a shield from

1 being able to provide any information and it's all
2 on the plaintiff. That doesn't meet the smell test
3 to me with discovery.

4 And I'll withhold ruling on this before
5 I hear the discussion on sanctions, but my
6 inclination is that the burden is on you to satisfy
7 me that the motion to dismiss should be granted.

8 And right now, if I hear no more, I
9 think you've waived your right to make that
10 argument and I would deny the motion.

11 MR. GLENN: Okay. Your Honor, I
12 understand the ruling and I respectfully disagree.
13 And I hope you'll understand that we're protecting
14 that argument.

15 THE COURT: Oh, certainly. I always
16 understand that.

17 MR. GLENN: Thank you, Judge.

18 THE COURT: I served as an appellate
19 judge too long.

20 MR. GLENN: Thank you, Your Honor.

21 THE COURT: All right. The next motion
22 to dismiss is Lawrence Pumps, Flowserve.

23 MS. GOLDHABER: Good morning, Your
24 Honor. Catherine Goldhaber on behalf of Flowserve.
25 And just a little bit on that, Your Honor.

1 Flowserve is the company that is headquartered in
2 Texas and this branch of Flowserve is incorporated
3 in Delaware. So there's no general jurisdiction
4 here.

5 They acquired Lawrence Pumps, which was
6 a Massachusetts company that was headquartered and
7 based in Massachusetts and never registered to do
8 business in South Carolina. I realize we look at
9 who the company is today, but I had to point that
10 out.

11 Regarding the --

12 THE COURT: The long-arm statute would
13 take care of all that if, in fact, we've got
14 jurisdiction otherwise here, so I'm not impressed
15 with that.

16 MS. GOLDHABER: So regarding the
17 chronology in this case as to Lawrence Pumps, it's
18 a very different defendant than Aurora. Lawrence
19 Pumps was brought into the case in December of
20 2016, after the first two co-workers were deposed.
21 And it was Mr. Bingham who identified Lawrence
22 Pumps at the DuPont facility in North Carolina.

23 Despite the testimony only being as to
24 DuPont in South Carolina, when plaintiff filed
25 their complaint, including Lawrence Pumps, they

1 also included the South Carolina location.

2 In answering that complaint, Lawrence
3 Pumps did raise in their affirmative defenses that
4 this Court has no jurisdiction over Lawrence Pumps;
5 however, the issue was not right with the
6 allegation remaining about the South Carolina
7 exposure.

8 So it was not briefed for a hearing or
9 brought to a motion. We knew the result would be a
10 corporate rep's depo in continuation of discovery
11 to see if there is any connection with South
12 Carolina.

13 In the course of discovery, Lawrence
14 Pumps in the written discovery explicitly stating
15 it had no supply or sale to any of its pumps to
16 South Carolina. What's unique about Lawrence Pumps
17 is it has all its sales records. And in this case
18 it looked under both the Pickens and the Piedmont
19 city name and the location names provided to it.
20 As to South Carolina, it has no sales.

21 Lawrence Pumps is a smaller specialty
22 manufacturer. It only manufactured 30 to a hundred
23 pumps per year. It did not sell through
24 distributors. All its sales were direct.

25 And, in fact, in regards to the DuPont

1 facility, Lawrence Pumps has produced over 1,000
2 records. It produced documents of all its pump
3 sales and state pump files, and it put up its
4 corporate representative on two occasions to speak
5 to what was done in the investigation.

6 Notably, the continuation of the
7 corporate representative's deposition was after the
8 date that the brief out motion was filed. At the
9 time of the deposition of Mr. Smith, we now knew
10 that there was no evidence of exposure in South
11 Carolina.

12 Not only did he have no sales records,
13 there was no testimony by any witness that one of
14 our Lawrence Pumps got into that facility. So we
15 know there is no sale of a pump to the facility in
16 South Carolina where Mr. Whitmire would have
17 worked.

18 So with all of that being said, there
19 is no long-arm statute that will reach to Lawrence
20 Pumps for the jurisdiction of this case.

21 Your Honor, certainly you can hear that
22 the case has other defendants. Mr. Whitmire was a
23 South Carolina plaintiff, but if you look at the
24 *Coggeshall v. REACH* case --

25 THE COURT: The what?

1 MS. GOLDHABER: Coggeshall?

2 THE COURT: Oh, the Coggeshall.

3 MS. GOLDHABER: And there's also the
4 *Coggeshall v. Hilleret* case where the young boy was
5 hit by an aluminum bat in South Carolina. The
6 injury was in South Carolina, but the defendants in
7 that case, the NAACP and the Baseball Research
8 Center, did not have enough contact with South
9 Carolina for the Court to extend jurisdiction to
10 those specific to that.

11 For these reasons, Your Honor, I don't
12 believe that we have waived this argument, and I do
13 believe that under the current standing of the
14 personal jurisdiction law with Bristol-Myers Squibb
15 and how the South Carolina statute follows the due
16 process clause generally, there is no jurisdiction
17 as to Lawrence Pumps.

18 THE COURT: Thank you.

19 Ms. McVey?

20 MS. MCVEY: Good morning, Your Honor.

21 Let me address the Lawrence Pump issue and then
22 talk through a waiver, which you've heard a lot
23 about. I would disagree and argue to you that they
24 have waived their personal jurisdiction motion.

25 They were served the complaint after

1 the first two co-workers were completed and they
2 also got copies of those co-workers' depositions
3 and could see what the testimony said. They did
4 raise it in their answer, but they did not file
5 their motion to dismiss for personal jurisdiction
6 until June 8th.

7 Your Honor, I would argue that that is
8 waiver in and of itself, and you've heard about the
9 Maybank case. I know you're familiar with it. It
10 says that personal jurisdiction may be waived if a
11 party continues to participate in litigation after
12 challenging personal jurisdiction in their initial
13 responsive pleading to the Court.

14 They can make a motion to dismiss, and
15 they should have done that without waiving it.

16 In addition to that argument waiver,
17 and I can give you more detail if you need it, too,
18 but the other big argument against Lawrence is that
19 they consented to jurisdiction in South Carolina.
20 And let me tell you how they did that.

21 They registered to do business in South
22 Carolina; they had a registered agent in South
23 Carolina. And by doing those two things, we know,
24 under South Carolina law, that they consent to
25 jurisdiction.

1 The South Carolina Supreme Court in the
2 *Financial Federal Credit Union vs. Brown* case, and
3 that's 384 S.C. 555, said their service is
4 accomplished in a manner consented to by the
5 defendant. Service of process is valid and the
6 court has jurisdiction over the defendant for
7 purposes of entering judgment.

8 The other statutes in South Carolina
9 that are important is that the registered agent of
10 a foreign business or nonprofit corporation
11 authorized to transact business in this state if
12 the corporation's agent for service of process
13 noted for demand required or permitted by law to be
14 served on the foreign corporation.

15 And section 33-15-105 provides, Your
16 Honor, foreign corporations with a valid
17 certificate of authority have the same rights,
18 duties, and liabilities as domestic corporations.

19 The Supreme Court in South Carolina has
20 said in the *Foster vs. Morrison* case -- that's a
21 1954 decision, 226 S.C. 149. In that case, the
22 South Carolina Supreme Court indicated that as long
23 as the foreign corporation is not withdrawn from
24 doing business in the state, its registering and
25 appointment of an agent will be deemed in agreement

1 to personal jurisdiction in South Carolina courts.

2 Finally, Your Honor, the US Supreme
3 Court in the *Pennsylvania Fire Insurance Company*
4 *vs. Milling* case, 243 U.S. 93, says that a state,
5 like South Carolina, could validly deem a foreign
6 corporation to consent to jurisdiction through
7 compliance with the business registration statute.

8 Your Honor, I would argue by
9 registering to do business here, by having -- what
10 do you call that -- service, an agent for service,
11 they have agreed to jurisdiction in this state.
12 And I'd also argue that they have waived their
13 personal jurisdiction motion by not filing it until
14 June of this year.

15 THE COURT: All right. Well, they
16 argue that -- all right. Analyzing this as a
17 special jurisdiction or specific jurisdiction
18 matter rather than general jurisdiction, that
19 you've got to show that there was some exposure to
20 pumps here and that that's what the deficiency is.

21 MS. MCVEY: Your Honor, that is their
22 argument, that we have to show exposure to Lawrence
23 Pumps in South Carolina. And I would agree that
24 according to their corporate representative, they
25 did not find documents showing Lawrence Pumps at

1 Piedmont.

2 But then I would argue to you that that
3 doesn't matter in and of itself because they
4 consented to jurisdiction here by registering to do
5 business and all the other means we've talked
6 about, and that they waived it and they can waive
7 it just like the law says they can.

8 THE COURT: And what do you cite for
9 waiver?

10 MS. MCVEY: The fact that they were
11 served in December of 2016. They raised it in
12 their answer and then they did nothing with it,
13 despite all the discovery showing that Lawrence
14 Pumps weren't there. They could have talked to
15 their corporate rep, which they had acces to him,
16 to show that there was no Lawrence Pumps at the
17 Piedmont facility, and they didn't file the motion
18 until June 8th.

19 And the Supreme Court says that you
20 can't sit on it and hope it works out for you.

21 THE COURT: Was that motion filed
22 within the deadlines that the normal scheduling
23 order requires?

24 MS. MCVEY: It's a little confusing,
25 depending on how you look at that deadline. I

1 would argue, no, but it's a motion to dismiss
2 versus a motion for summary judgment. And so I'm
3 not sure the scheduling order addresses it.

4 THE COURT: All right.

5 In reply?

6 MS. GOLDHABER: Thank you, Your Honor.

7 What somewhat befuddles me is if they
8 knew that there was going to be no exposure in
9 South Carolina and we should have known the same,
10 why are there allegations of exposure in South
11 Carolina such that our motion wouldn't have been
12 right?

13 If they wanted to only go after
14 Lawrence Pumps housed in the North Carolina
15 location, that should have been the proceeding. So
16 to imply that we should have known that they had
17 brought allegations that would never be borne out
18 and, thus, should have raised this earlier, I don't
19 think it's a fair argument.

20 Regarding waivers, had we brought the
21 motion, you know, as the affirmative defenses
22 sooner, we would still be here today because they
23 would have wanted to depose the fact witnesses to
24 see if there was any testimony about South
25 Carolina. They would have wanted to ask their

1 corporate representative about what he did to
2 determine there were no sales to the location issue
3 in South Carolina. So there is no prejudice by the
4 waiver.

5 In regard to the timeliness of the
6 motion, I can't disagree with plaintiffs' counsel.
7 The deadlines aren't clear, but we just had a
8 general agreement to extend deadlines to Lawrence
9 Pumps while we were working through discovery.

10 As you'll see in the sanctions
11 discussion, the site in North Carolina was
12 identified as Brevard -- the Brevard facility.
13 When we did our investigation, we then learned that
14 it went by another name and voluntarily provided
15 additional documents to plaintiffs' counsel. So
16 that also occasioned the delay in the corporate
17 representative's deposition.

18 We've been very forthright with
19 discovery; however, in fairness to this Court about
20 how we all proceed in these cases, if we had tried
21 to argue this motion earlier, we would not have
22 been able to with the fact witnesses' depositions
23 going on.

24 They never withdrew the allegation of
25 exposure in South Carolina and so they were --

1 until those were shown to not be borne out, the
2 motion would not have even had standing to come
3 before you.

4 THE COURT: All right. Thank you very
5 much.

6 I will deny the motion at this time
7 based on waiver. And that's subject to whatever
8 further requirements might be needed in light of
9 what was revealed in the motions for sanctions.

10 All right. As to William Powell.

11 MR. ELLIOTT: Thank you, Your Honor.

12 James Elliot, for the record,
13 representing William Powell Company.

14 THE COURT: Good to see you, Jim.

15 MR. ELLIOTT: It's good to see you
16 again. I almost feel like everything has been
17 said.

18 THE COURT: Well, let me have the facts
19 with respect to your client.

20 MR. ELLIOTT: Sure. So William Powell
21 was sued in the initial pleading. I believe it was
22 served in or around May of 2016. We answered in
23 June of 2016. Based on my understanding of the
24 allegations and the exposures, we didn't believe
25 there was a personal jurisdiction specific basis

1 for argument against specific jurisdiction at the
2 time.

3 However, we amended our pleading or we
4 answered the -- I think it was the first amended
5 pleading in August of 2016, so a month and a half,
6 it might have been two months after we answered the
7 initial pleading. Did the boilerplate allegation
8 of personal jurisdiction as every else does;
9 however, in September of 2016, plaintiffs served
10 answers to interrogatories, I think it was
11 September 14, 2016.

12 In their answer to No. 4, they alleged
13 that they had exposure here in South Carolina. As
14 a result, we thought it futile at the time to file
15 a motion to dismiss based on personal jurisdiction,
16 Your Honor.

17 It didn't become clear -- well, I will
18 say that every answer to the pleadings after the
19 initial one that we pled boilerplate personal
20 jurisdiction, but we still believed we might be
21 subject to specific jurisdiction because of the
22 exposure here in South Carolina, and so we did not
23 file.

24 Discovery proceedings just like
25 everyone else explained, Your Honor, that it became

1 clear that the plaintiff was not exposed to a
2 William Powell product at the Pickens plant,
3 despite the fact that they had alleged in the
4 discovery responses that he worked at valves, which
5 Powell made valves, that he had been exposed at the
6 fitting plant.

7 Once discovery was over, like everyone
8 else, we filed a motion. I understand it's a
9 little odd. In fact, it's later than you might
10 file such a motion.

11 THE COURT: When did you file the
12 motion to dismiss?

13 MR. ELLIOTT: We did it at the deadline
14 under the scheduling order for motions. I think it
15 was May 8th is when we filed, 2018.

16 THE COURT: All right.

17 MR. ELLIOTT: And, Your Honor, I just
18 wanted to point out a couple things about how I
19 interpret the rules and what they require with
20 regards to alleging a defense that it's personal
21 jurisdiction or then filing a motion.

22 And so as you know, Your Honor, our
23 rules are patterned after federal rules. And a
24 couple of notes, federal rules contemplate that --
25 a Rule 12 motion on a particular defense may later

1 be filed where the defense was previously
2 unavailable to the party.

3 In the waiver section in the Federal
4 Rule 12(g)(2), it says the defense is waived by
5 omitting it from a motion and the circumstances
6 described in 12(g)(2), and it's titled, Limitation
7 on Further Motions. Specifically refers to a
8 limitations on a defense or objection that was
9 available to the party.

10 Our position is the defense wasn't
11 available until we knew that these folks --
12 Mr. Whitmire was not exposed to a Powell valve in
13 Pickens.

14 THE COURT: Well, you asserted it way
15 before you thought it was available.

16 MR. ELLIOTT: I know. I know.

17 THE COURT: And I think you're calling
18 it boilerplate when it suits you and -- but when it
19 doesn't suit you, you're saying, hey, I waited so
20 late to file a motion to dismiss because I didn't
21 think it was available. Which is it?

22 MR. ELLIOTT: It was not available;
23 however --

24 THE COURT: Then you filed a pleading
25 asserting a defense that wasn't appropriate.

1 MR. ELLIOTT: No, Your Honor. I did it
2 in order to -- a lot of courts have interpreted
3 that if you don't do it when you initially plead
4 it, then you waive it. And there are some folks
5 that think that even if you don't have it, you've
6 got to put it in there. That's my interpretation
7 of ruling that I've faced in South Carolina.

8 THE COURT: I understand your answer.

9 MR. ELLIOTT: Okay. A little different
10 argument as well about sort of the change of
11 circumstances. We have a change of circumstances,
12 one, facts. Plaintiff was not actually exposed in
13 South Carolina. And, two, in the Bristol-Myers
14 case -- and I understand the South Carolina
15 long-arm statute and how it's interpreted.

16 I had trial courts interpret it a
17 little bit differently than the way I think about
18 it. Sometimes it's looked at as if it's just
19 collapsed into a due process argument; and,
20 therefore, even if there's not an exposure in South
21 Carolina, if you have enough connections it would
22 still be subject to specific jurisdiction in a case
23 like this.

24 But I think the Bristol-Myers case,
25 when it came out in 2017, the Supreme Court

1 clarified that that's -- that's not how it worked
2 and that's not how it should work in South
3 Carolina.

4 So I think we have a little bit of a
5 change of the law in that regard and make that more
6 clear that specific jurisdiction does, in fact,
7 require exposure in the state where you're bringing
8 the lawsuit, Your Honor.

9 And I just -- I pointed out in my brief
10 that proposition was followed in the Gucci America
11 case, the Second Circuit case. That was in light
12 of the Daimler AG case, Your Honor. Remember where
13 they spoke -- the Supreme Court spoke specifically
14 on general jurisdiction.

15 Then the Bristol-Myers case comes out
16 and a couple cases follow about jurisdiction.
17 One's called Practice Management Support Services
18 out of the Northern District of Illinois. And it
19 said in that case the party can be excused for
20 failing to raise defense, according to defense,
21 that if timely asserted would have been futile
22 under the binding precedent.

23 And there was a case of *Feller vs.*
24 *Transamerica Life* out of California that followed
25 that same rule.

1 So my point is we had changes of
2 circumstances, understood plaintiff was exposed in
3 South Carolina turns out not to be true. And I
4 believe there was some clarification by the Supreme
5 Court with regard to how specific jurisdiction
6 applies.

7 THE COURT: All right. Thank you,
8 Mr. Elliott.

9 Mr. Branham.

10 MR. BRANHAM: Thank you, Your Honor.

11 Trey Branham for the plaintiffs. Your
12 Honor, William Powell is a little bit different
13 here. They didn't plead personal jurisdiction
14 issues in their original answer. There's case law
15 all over the place that says it's a waiver. We've
16 cited it to you; it's not really in dispute.

17 So then the argument becomes, well, the
18 law changed. And Mr. Elliott is right in the sense
19 that if there's a law change, then maybe that
20 solves the problem. The problem is that the -- and
21 they filed this in their reply and they talk about
22 it, is that the Bristol-Myers Squibb case didn't
23 change the law of specific jurisdiction.

24 And that's -- and he's conflating
25 Daimler, which is a general jurisdiction case, with

1 Bristol-Myers Squibb, which is a specific
2 jurisdiction case.

3 And the Supreme Court in Bristol-Myers
4 Squibb literally says, our settled principles
5 regarding specific jurisdiction control this issue.

6 And just to the extent that Your Honor
7 doesn't know about Bristol-Myers Squibb, it's
8 essentially a drug case where the plaintiffs
9 brought a whole group of people in California as
10 plaintiffs and a bunch of them didn't take the drug
11 in California. And the court said that's not going
12 to work. Daimler is a general jurisdiction case.

13 But the point about Bristol-Myers
14 Squibb is that the law didn't change. All
15 Bristol-Myers Squibb did was affirm what the law
16 was as to specific jurisdiction.

17 So the argument that we didn't raise a
18 specific -- the personal jurisdiction issue in our
19 original answer because we didn't think we could
20 under the law and the law changed just doesn't
21 apply, because Bristol-Myers Squibb, which is the
22 law he's citing and says changed, didn't change the
23 law at all.

24 So you have failure to file the
25 personal jurisdiction defense in the original

1 answer that waives it. There is no change of
2 circumstances. And, of course, you have the
3 waiting until May of this year before filing the
4 motion on personal jurisdiction.

5 And just to address that issue, even if
6 the question is about facts, you have to file that
7 motion. You've got to pursue that issue. You've
8 got to tell us it's an issue by filing a motion and
9 pursuing that. This waiting is what's going to --
10 is what's creating a problem.

11 And so for lots of reasons, the William
12 Powell motion should be denied and have sanctions
13 apportioned.

14 THE COURT: He contends that William
15 Powell did amend its pleading early on to assert
16 that defense after you filed your first amended or
17 second amended complaint, I don't know when, but at
18 some earlier point.

19 MR. BRANHAM: No question. And I don't
20 mean to question that at all. There's no question
21 that he, in an amended pleading, asserted personal
22 jurisdiction defense.

23 The problem is that under the case law
24 that we've cited, I'm happy to read it through for
25 you, is that that's not good enough; is that all of

1 the case law says that it has to be that the
2 objection to personal jurisdiction must be raised
3 at the time the first significant defensive move is
4 made, whether it be by way of a Rule 12 motion or
5 response of pleading, and that is *Emerging*
6 *Technologies* 711 F. Supp in the Eastern District of
7 Virginia. It is the Fifth Circuit, it is the
8 Fourth Circuit, and it's the Seventh Circuit.

9 So there is lots and lots of case law
10 directly on this issue about waiver. You have to
11 raise it first. It has to be in the original
12 pleadings, whether it's a Rule 12 motion or an
13 answer. And it's not. It's an amended pleading
14 that waives it.

15 THE COURT: Any reply, Mr. Elliott?

16 MR. ELLIOTT: Just briefly.

17 James Elliott for William Powell. The
18 two cases that I cited, Your Honor, from Illinois
19 and California, a party can be excused for failing
20 to raise a defense where the defense has timely
21 asserted would have been futile under binding
22 precedent and the defense did not waive personal
23 jurisdiction when asserted after Bristol-Myers
24 Squibb Appellate out of California.

25 Holding personal jurisdiction as

1 defense was not waived because it was not clear
2 that the defendant would have had viable basis for
3 challenging personal jurisdiction with respect to
4 the claim or Bristol-Myers Squibb.

5 Second part of that, what Mr. Branham
6 just argued is the catch 22, and it -- it shines a
7 light on your question to me and why I did what I
8 did, right? He's saying, well, hold on. You
9 waived it because you didn't put it in your initial
10 answer.

11 Well, Your Honor, I didn't think I had
12 to. And we did put it in an amended answer and --

13 THE COURT: And what happened that made
14 you change from not thinking this was a viable
15 defense to thinking it was a viable defense?

16 MR. ELLIOTT: I was worried about a
17 waiver. Just what's happening here. That's it.

18 THE COURT: But you had no additional
19 facts or anything else. You simply were worried
20 about a waiver and you raised it -- the initial
21 answer was made, what? In August of 2016?

22 MR. ELLIOTT: June.

23 THE COURT: June of 2016.

24 MR. ELLIOTT: And then August.

25 THE COURT: August. All right. So no

1 amended pleading has been filed, right? Or --

2 MR. ELLIOTT: I think he may have filed
3 an amended pleading.

4 THE COURT: That's what I think. I
5 think he filed an amended pleading and you filed an
6 amended answer.

7 MR. ELLIOTT: That's true.

8 THE COURT: So that's --

9 MR. ELLIOTT: That is true.

10 THE COURT: Now, let's say that I don't
11 buy his argument that you want to waive at that
12 time or -- how about the argument that the motion
13 to dismiss is pretty late filed in relation to
14 discovery and everything else.

15 Because that's what I'm much more
16 concerned about than I am a month or two later
17 filing an amended answer, an amended complaint, and
18 raising a defense. I don't think that's
19 unreasonable at all.

20 But I am concerned, as I am when --
21 we'll get to this on these discovery things -- you
22 folks, I don't think you thought I was going to try
23 this case. So right at the last, when you finally
24 figured out, yes, I really was going to do what I
25 said and an order was filed in December of last

1 year, suddenly there's this mad scramble to
2 inundate the Court with volumes upon volumes of
3 motions of various kind. And that's what concerns
4 me a little bit.

5 MR. ELLIOTT: Your Honor, I'm not under
6 that preconceived notion that you were not going to
7 try the case. I was in the Faber case and I was in
8 the arena for that very first case with you, and
9 you told us exactly what you were going to do
10 and --

11 THE COURT: And mercifully, you all
12 settled.

13 MR. ELLIOTT: But My point to you is, I
14 didn't a file motion because I didn't think that
15 you were going to try this case. I knew you were
16 going to try this case.

17 I've been handling asbestos cases, and
18 I know you don't want to hear about what happened
19 and a history about asbestos, but I've been doing
20 it for 20 years. And these motions like this don't
21 get heard until the end of discovery.

22 And I haven't been in front of Your
23 Honor enough to know whether or not you were
24 inclined previously to hear motions to dismiss on
25 personal jurisdiction --

1 THE COURT: No. I have one grand
2 session right at the end after you've completed
3 everything and completed mediation in which I do
4 all that, because I have very limited resources as
5 a senior judge. And so I hear it when I think it's
6 the most effective.

7 MR. ELLIOTT: And that's exactly what
8 Judge Hill said. He would not hear summary
9 judgments or file their motion until the day of
10 trial because he said --

11 THE COURT: Well, I think that's too
12 late, so I don't do it that way.

13 MR. ELLIOTT: But his reasoning was,
14 and I'd be doing this all the time, guys, I can't
15 do it, you know, because he had -- he had a --

16 THE COURT: I get all the history about
17 this.

18 MR. ELLIOTT: Yeah, but that's the
19 point I'm making, though.

20 THE COURT: I'm ready to go.

21 MR. ELLIOTT: That's why.

22 THE COURT: But the argument about the
23 motion to dismiss and when it's timely made is an
24 argument that if you sit on it so long, then it
25 changes the way it's done for a trial in terms of

1 discovery, preparation of trial, et cetera, et
2 cetera. All right.

3 If you're not really serious about it
4 and don't pursue it in terms of filing something
5 that early on that lets the plaintiff know, we're
6 really serious about this and we're going to pursue
7 it, then that makes plaintiff have to look
8 themselves in the eye and say, hey, what kind of
9 proof do I have on this issue?

10 MR. ELLIOTT: And the only response I
11 would provide there, Your, Honor, is we were still
12 deposing plaintiffs' witnesses up until the spring,
13 for one thing. And --

14 THE COURT: I understand the argument.

15 MR. ELLIOTT: Yeah. We've seen motions
16 to dismiss filed early and I haven't seen those
17 change the way that plaintiffs have operated.

18 THE COURT: I understand your argument.

19 All right. I am going to deny the
20 motion at this time; and, again, subject to
21 revisiting it when we talk about these other issues
22 that are kind of intertwined with this that
23 happened during discovery, which I think really
24 bears on the analysis I make about what happened
25 when in relation to the actual filing of the motion

1 to dismiss itself and whatever happened in
2 discovery.

3 So with that, we proceed to the
4 sanctions motions?

5 MS. MCVEY: Yes, ma'am.

6 THE COURT: All right. Ms. McVey,
7 Lawrence Pumps.

8 MS. MCVEY: Thank you, Your Honor.
9 Theile McVey for the plaintiffs again.

10 Your Honor, this is not a very
11 complicated motion. This is a motion dealing with
12 Lawrence Pump's 30(b)(6). And just by way of
13 background --

14 THE COURT: Let me see if I can lay my
15 hands on all of this.

16 MS. MCVEY: I have copies if you need
17 anything, too.

18 THE COURT: Well, let me get the --

19 All right. Ms. McVey, what else do you
20 have --

21 MS. MCVEY: Your Honor, I have a copy
22 of our brief, if that's helpful.

23 THE COURT: Okay. I have it someplace.
24 Hand it on up here so I have it.

25 MS. MCVEY: Okay.

1 THE COURT: Yeah. I have it,
2 Ms. McVey. I will just put this -- I'll give it
3 back to you.

4 MS. MCVEY: Okay. Your Honor, this is
5 kind of a narrow discovery dispute that involves
6 the deposition -- our 30(b)(6) deposition of
7 Lawrence Pumps.

8 Just by way of background, we noticed
9 the deposition in March. We had e-mails going back
10 and forth in April talking about we wanted the
11 witness to be prepared. And the first deposition
12 took place on May 29th, and the witness was
13 prepared on sales documents, but in review, it
14 seems both parties was not prepared to talk about
15 all the topics that the plaintiffs wanted to talk
16 about.

17 And so by consent, we agreed to come
18 back another day. We just said, you know what?
19 You're not prepared on everything. We get it.
20 Let's come back and do it again.

21 So the second deposition continued on
22 June 12th, and we looked on -- listed on page 7 in
23 our brief -- sorry, page 7 in our brief, the topics
24 we believe the 30(b)(6) witness was not prepared to
25 talk about.

1 For the purpose of this hearing today,
2 there are six topics I want to talk about. The
3 first is -- that we believe the 30(b)(6) was not
4 prepared to talk about, first is Lawrence's
5 knowledge of asbestos hazard.

6 Second, Lawrence's knowledge of
7 external insulation on the pumps. When they had
8 their service people go out to different sites,
9 insulation was not by the pump.

10 The third topic was knowledge of how
11 the pumps were repaired in the field, meaning the
12 taking off of insulation, taking off of gaskets and
13 packing.

14 The fourth topic was the availability
15 of substitutes for asbestos gaskets and packing of
16 the pumps. There is testimony that customers were
17 asking them for asbestos suits in the 1970s. What
18 did they do with that information? Where did they
19 look for asbestos suits? He was not prepared to
20 talk about that.

21 The fifth topic was the last date that
22 Lawrence sold asbestos-containing pumps. And
23 you'll hear from the defendants there's some
24 controversy about that.

25 In 1984, there's a memo saying, we're

1 not going to use asbestos anymore. And then in
2 1987, there's another document saying, okay, we'll
3 use asbestos, but only if you follow these six
4 steps, meaning you understand the hazards of that.

5 When was the last time they started
6 selling them? We didn't get an answer to that.

7 And then finally, Your Honor, the use
8 in Lawrence Pumps of crocidolite gaskets. And what
9 they say is, that's not relevant to this case
10 because in this case we only used chrysotile. And
11 it is absolutely relevant about Lawrence's
12 knowledge that they used asbestos.

13 And you know the steps because you had
14 through many of these trials -- the 1960 Wagner
15 study talked about the use of crocidolite gaskets.
16 And what the defense experts say is, but, hey, we
17 only use chrysotile.

18 Lawrence admitted that they used
19 crocidolite, and we want to know about that
20 information.

21 After the second deposition, those are
22 the topics we believe they were not prepared to
23 testify on. And so for that reason, on the eve of
24 trial, we're asking you for some sanctions. And I
25 can go into those sanctions now, or you can wait to

1 hear from them, however you want me to do it.

2 THE COURT: All right. I want you to
3 go into now what you would ask for as sanctions.

4 MS. MCVEY: Okay. Your Honor, we would
5 ask that Lawrence be deemed to have known in the
6 '60s and '70s that its pumps for high temperature
7 lines were insulated with asbestos-containing
8 insulation, and its employees on its service calls
9 saw and used or removed insulation before
10 performing repair work.

11 We would ask that it be deemed to have
12 been informed by its customers in the late 1970s
13 that the customers were requesting asbestos-free
14 substitutes for packing gaskets because of the
15 health hazard.

16 We would ask that Lawrence be deemed to
17 have continued to sell pumps with
18 asbestos-containing gaskets and packing until at
19 least the early 1990s.

20 And we would also ask that Lawrence
21 Pumps be deemed to have sold pumps with crocidolite
22 gaskets.

23 THE COURT: All right. Very good.

24 MS. MCVEY: Thank you, Your Honor.

25 MS. GOLDHABER: Your Honor, before I

1 approach, do you have a copy of Lawrence Pumps'
2 response to the motion?

3 THE COURT: Hang on.

4 MS. GOLDHABER: I was afraid you were
5 going to say that.

6 THE COURT: I have it here somewhere
7 and I just read it last night. Where it is, I
8 don't know. Is this the same thing you sent
9 yesterday pretty late?

10 MS. GOLDHABER: That was not me, Your
11 Honor. It should have gotten to you Monday.

12 THE COURT: Well, yeah, I take that
13 back. I couldn't open that ZIP file.
14 Unfortunately, the judicial department have screens
15 in such a way that when you-all send me these
16 enormous bulk files like that, and this ZIP file
17 had ten different things to it, I can't open that.
18 So, no, I have not seen it. So you need to hand it
19 up to me.

20 MS. GOLDHABER: Right. I will hand it
21 up to you and we can hopefully get -- so the
22 pertinent part, Your Honor, I'll hand you is
23 page 8.

24 THE COURT: All right. Now, again,
25 when you begin speaking, say your name and the

1 client you represent.

2 MS. GOLDHABER: Absolutely. I am
3 Catherine Goldhaber on behalf of Lawrence Pumps.

4 Your Honor, so we, in our response,
5 Lawrence Pumps addressed each individual contention
6 plaintiff raised as to not having information or
7 having an unprepared witness.

8 Lawrence Pumps was first brought into
9 this asbestos litigation in 2000, so there is
10 certainly a gap of knowledge that's unique to this
11 defendant as opposed to other defendants that were
12 in litigation since the '80s. And we're well aware
13 and concerned and involved with preservation of
14 documents and knowledge for that time period.

15 So Lawrence had to go back in time
16 respectively to try to obtain this information,
17 which it has done.

18 In our production of documents, we also
19 included -- there's only been -- in two cases
20 has -- the corporate representative has only been
21 deposed. The first one was Mr. Arnst's deposition,
22 Waldemar Arnst. He's now 91, so he was not
23 available for deposition in this case.

24 So Brian Smith, who is certainly a
25 younger man -- there aren't too many people left

1 from the early days -- he had to read Mr. Arnst's
2 deposition and absorb the corporate knowledge from
3 before.

4 While we were preparing for the first
5 deposition, Mr. Smith actually was the one who
6 looked through the pump specs and said, there are
7 some references to other serial numbers than the
8 ones you've requested here. They go to Cedar
9 Mountain, which seems to be a different location.

10 Then we had him read the plaintiffs'
11 co-workers' deposition testimony so that he could
12 tell us was this how the pumps would have been used
13 and maintained based on their description.

14 So when he read the testimony, he said,
15 you know what? They're calling the same location
16 Cedar Mountain.

17 So right before he was going to be put
18 up for deposition, which was the Tuesday after
19 Memorial Day, we then engaged in another full
20 search on our own initiative, reached out to
21 plaintiffs' counsel and said, this Brevard site is
22 also known as Cedar Mountain. We have more
23 documents coming for you.

24 And, Your Honor, our focus was on
25 providing them the specific information they would

1 need in this case as to Mr. Whitmire's exposure.

2 In our minds, the prior 30(b)(6) of
3 Mr. Arnst, which was taken in a greater time
4 span -- closer time span to the asbestos use,
5 provided the background information that they were
6 looking for in terms of the historical knowledge
7 and what was done and what the concerns were.

8 And our desire was to give them a
9 witness who could talk about the pumps at DuPont,
10 what was done and if that would have been how they
11 would have been maintained, and to make sure we had
12 given them all the information about the pumps that
13 were at issue in this case.

14 THE COURT: Let me stop and see if I
15 understand one thing. When was Mr. Arnst's
16 deposition taken?

17 MS. GOLDHABER: I believe it was in
18 2005. I don't have it in front of me.

19 THE COURT: And so when you were first
20 asked for 30(b)(6) information, you tendered
21 Mr. Arnst's 2005 deposition?

22 MS. GOLDHABER: No, Your Honor. We
23 agreed to produce a corporate representative, but
24 in producing one of the document requests was prior
25 to the 30(b)(6) deposition. So it was Mr. Arnst.

1 THE COURT: Right.

2 MS. GOLDHABER: So we gave them that
3 information, but we --

4 THE COURT: But the 30(b)(6) that you
5 offered was Mr. Brian Smith, right?

6 MS. GOLDHABER: Yes, Your Honor.

7 THE COURT: Uh-huh. All right. When
8 did you offer Mr. Smith?

9 MS. GOLDHABER: We began discussing
10 when he would be offered, I believe, in March or
11 April.

12 THE COURT: All right. And when was
13 his deposition taken?

14 MS. GOLDHABER: His deposition, due to
15 fitting it in -- we weren't trying to be evasive,
16 but there was a lot of discovery going on. Your
17 Honor, it was the Tuesday after Memorial Day.

18 THE COURT: Which is?

19 MS. GOLDHABER: May 29th.

20 THE COURT: And I guess I'm not fully
21 understanding. You know, it's not up to the
22 plaintiffs to prepare your witnesses. 30(b)(6)
23 requires that you tender a witness who knows about
24 things.

25 And that witness doesn't have to be the

1 witness that was present at the creation. That has
2 to be a witness that is a corporate representative
3 who is sufficiently familiar with the records of
4 the corporation to be able to answer questions.

5 And the questions that we're talking
6 about are some very specific questions about
7 materials that were used and things that were done
8 in the '70s forward.

9 MS. GOLDHABER: Yes. And I can walk
10 through, if you look at page 8 of the motion I gave
11 you. I tried to lay out where we claim -- where
12 plaintiffs claimed Lawrence Pumps was deficient,
13 and that was provided in the course of discovery.

14 That information was given to them. It
15 may not have been the answers they wanted, but
16 there were answers there, which I will address
17 counsel's point as she made them.

18 There was a question, what does
19 Lawrence know about the knowledge of hazards? That
20 was provided by both Mr. Smith, who had reviewed
21 Mr. Arnst's testimony, which is why I refer to it
22 in my response, but Mr. Smith also was aware of
23 what was done.

24 He spoke of longtime employees. They
25 were told -- when asked about asbestos, they were

1 told to be careful, but it was in the context of
2 all sorts of things that came into being with OSHA.

3 Mr. Arnst testified, and Mr. Smith
4 referenced that testimony, that Lawrence was aware
5 of the OSHA regulations and the occupational
6 hazards and generally came to know that asbestos
7 generally was a hazard.

8 As to gaskets and packing, they were
9 not informed that those specific products were a
10 hazard.

11 We produced MSDS sheets, which
12 Mr. Smith testified to, and those gaskets said
13 breathing protection wasn't necessary. So that's
14 what they knew about the hazards of asbestos.

15 And in any case, there's the asbestos
16 hazard and then the specific product at issue. In
17 this case, the focus is on the gasket and they did
18 provide that knowledge.

19 There was questions about the external
20 insulation on pumps, and that's what we had.
21 Mr. Smith look at the transcript for. He didn't
22 dispute that there would have been external
23 insulation on the pumps at DuPont. He read the
24 testimony and said, yes, they could have put that
25 on at DuPont.

1 The question was, did Lawrence Pump
2 know that would happen? And that's a question for
3 the jury, Your Honor. There shouldn't be a finding
4 on that by the Court.

5 What was foreseeable -- and in the
6 records there is -- I don't know, DuPont sheet.
7 And it says, this label must be put above specified
8 insulation, but there's no insulation specified in
9 our records.

10 So what they should have known specific
11 to DuPont is a question of fact. Plaintiff is
12 asking you to resolve that question.

13 THE COURT: Now, let me just stop you
14 there. You know, that's the old -- in another
15 context, bare metal argument.

16 If you make a pump that's going to be
17 used as Lawrence Pumps and used, then you know that
18 it's going to have to be insulated in order to be
19 used. Just as you know if it involves piping, it's
20 going to have to have a flange gasket.

21 So -- all right. Saying we don't know
22 what kind of insulation was used, all right, is
23 like we don't know what kind of gasket was used is,
24 in my own experience trying these cases, not a very
25 persuasive argument in discovery.

1 In discovery, what they want to know is
2 what kind of insulation you knew about that were
3 being used. And you would have had to have known
4 something more than just saying, well, you know, we
5 don't make the insulation.

6 MS. GOLDHABER: Lawrence Pumps did not
7 specify insulation. And we're not disputing
8 that -- would Lawrence Pumps have known there'd be
9 insulation on a pump in the field?

10 THE COURT: That's what they want to
11 know. What they want to know is whether -- because
12 you make a product that you know is going to
13 contain high-temperature material and is going to
14 have to be insulated, they want to know what you
15 know about what type of insulation is used on your
16 pumps and your pipe. All right.

17 And that's what they wanted your
18 corporate representative to be able to talk about.
19 So it's not enough to say, we don't specify. We
20 don't do. We don't do. We don't do. What they
21 want to know is what you did know.

22 MS. GOLDHABER: And he answered that.
23 He said, it's possible it was.

24 THE COURT: It's possibly it was what?

25 MS. GOLDHABER: That it could have been

1 insulated. So he --

2 THE COURT: That's not a good enough
3 answer, in my humble opinion. It's fundamental
4 that these pipes and pumps that they sell have to
5 be insulated. Everybody would know that that makes
6 something like this.

7 It can't be used unless it's insulated.
8 It can't expose the workers to extreme burns and
9 anything else as it would be or to the atmosphere
10 when you're using these type pumps. I mean, they
11 would have to know that.

12 So it's not enough to say, well, it
13 might be possible that some insulation could be
14 used. You-all are going to know more than that.
15 These pump manufacturers are going to know that
16 insulation is used and what kind of insulation is
17 used.

18 And the question is for him to get back
19 into the information in the records of the company
20 and find that out, and apparently that was not
21 done.

22 MS. GOLDBABER: They don't have records
23 in the company as to what insulation was used on
24 the pumps at DuPont. Your Honor, they don't have
25 that information. They produced full 70- to

1 80-page pump files and there was nothing. They
2 list spare parts necessary for the pump, but there
3 is no listing of insulation.

4 So it's not -- we didn't have
5 insulation hooks on these pumps. They are on pumps
6 generally. They didn't insulate these pumps in the
7 shop. They were sent out with the internal JM60
8 chrysotile gaskets, but they -- and if he is asked
9 on the stand, did you know these pumps would be
10 insulated, he won't dispute that.

11 But for it to be deemed by this Court
12 that that is the answer to the question seems...

13 THE COURT: But he's not answering the
14 question, other than in a very vague way, is what
15 is the foundation for the request for plaintiff,
16 that it be deemed an admission. Because plaintiff
17 contends that that is not a good faith 30(b)(6)
18 witness to just say, well, it might have been, when
19 the industry would well have known that these pumps
20 were going to be insulated.

21 That's the argument that I was
22 confronted with and that's what I'm asking you to
23 respond to.

24 It's not enough to tell me what -- if
25 you put him on the stand in the trial of this case

1 and ask him something, he may respond to it, but
2 the purpose of 30(b)(6) is to have a corporate
3 representative who is sufficiently knowledgeable
4 about the affairs of the company to be able to ask
5 direct questions that are being asked.

6 And what is directly being asked is
7 what they knew at Lawrence Pumps about what type of
8 insulation was being used on their pump. And to
9 say, some insulation might have been used, is, I
10 don't think, a good faith response.

11 MS. GOLDHABER: Your Honor, I don't
12 think that exact -- I'm trying to pull up the
13 transcript in that regard, but that exact, precise
14 question wasn't asked. And if you look at their
15 motion -- I think, if we look at the testimony, he
16 did answer that -- that precise question as you
17 have stated it I don't believe was asked.

18 There were more vague general questions
19 about asbestos and whether they sell pumps
20 insulated in the field, and he said he did.

21 So -- and if you look at what they want
22 to know in the second attempted deposition, which
23 is page 7 of their motion, that whether Lawrence
24 employees saw pumps insulated in the field, there
25 is no dispute that they probably did.

1 Yes, they would have seen them
2 insulated in the field. They did go out to the
3 field, but they didn't go to DuPont.

4 When they asked, did you see them at
5 DuPont, the answer was, we have no record our
6 people went to that particular site.

7 And then looking on -- they don't --
8 they don't ask you -- they don't ask what you're
9 being asked now to do. So if you look at page 7
10 the questions they ask -- the question of, did you
11 know these pumps would be insulated at DuPont is
12 not before us at this moment.

13 And that -- if they ask him on the
14 stand, which they can, he would -- he would -- I
15 don't think he would dispute that he knew they were
16 hot.

17 He said in the deposition -- he pointed
18 out while the witnesses testified there was
19 insulation on the back of the pump. We don't
20 dispute that.

21 He did talk about there are other ways
22 to protect yourself from the hot pumps, such as
23 gloves, different equipment, you can put bars
24 around them, but he didn't -- he's not going to try
25 to contradict that testimony. So --

1 THE COURT: What they're trying to find
2 out is whether Lawrence Pumps knew insulation was
3 going to be put on their pumps, and if it was --
4 how likely it was going to be asbestos insulation.
5 And he danced all around that, as I understand it,
6 and could not be pinned down on any kind of
7 knowledge of the company about what the standard in
8 the industry was at that time for the insulation of
9 these big pumps carrying very hot material. That's
10 what they wanted to know.

11 MS. GOLDHABER: That's not in the
12 motion, Your Honor.

13 THE COURT: Well --

14 MS. GOLDHABER: So if I --

15 THE COURT: -- don't respond to
16 everything that way, they didn't ask it or it's not
17 in the motion. What I'm asking you right now is
18 why your client couldn't have looked through his
19 records and asked the basic questions that would
20 define its liability in this matter, which is what
21 they knew about the use of asbestos in insulating
22 their pumps.

23 MS. GOLDHABER: They don't have the
24 records for that. So that -- they did look at
25 their records. That's not there.

1 Regarding what was known in the '60s,
2 he talked to the oldest employees he knew of who
3 were there in the '70s, and generally -- they're
4 not going to walk in and say, we had no idea that
5 there would be insulation on the pump. We don't
6 dispute that there is insulation on those pumps.
7 Will we sit here and say, we knew exactly what
8 would be put on our pumps? They can't say that.
9 It's a state-of-the-art testimony.

10 THE COURT: The question is real
11 simple: Did they know that asbestos was being used
12 on their pumps in the insulation? Yes or no?

13 MS. GOLDHABER: In this particular
14 facility?

15 THE COURT: In any use of their pumps
16 in the industry. Did they know that when they sold
17 pumps -- those pumps were being used to transmit
18 very, very hot material? Did they know that
19 asbestos insulation was going to be used on their
20 pumps?

21 MS. GOLDHABER: Your Honor, they don't
22 know if they knew that.

23 THE COURT: Well, that's not a
24 sufficient -- that is not a sufficient answer in my
25 view. All right. You know, many judges don't take

1 this discovery stuff seriously and just kind of
2 say, you-all work it out or we'll try the case. I
3 don't do it that way.

4 I deal with these discovery matters and
5 when you get down to the eve of trial and something
6 as fundamental as what you knew about what kind of
7 insulation was being used on the pumps is still met
8 with you don't know -- I don't know what they knew,
9 that's just not a sufficient response.

10 MS. GOLDHABER: Your Honor, may I
11 continue with the other points?

12 THE COURT: Yes, you may.

13 MS. GOLDHABER: Thank you, Your Honor.

14 THE COURT: That deals with what you
15 knew about asbestos hazards generally and what you
16 knew about external insulation, and so far you're
17 saying you don't know. So let's go to repairs in
18 the field.

19 MS. GOLDHABER: But we did talk about
20 hazards generally, Your Honor.

21 THE COURT: All right.

22 MS. GOLDHABER: They knew about OSHA.
23 They did not know gasket and packing hazards. They
24 knew asbestos generally could cause disease. That
25 they knew, and that information was provided.

1 How the pumps were repaired in the
2 field, they knew that it was foreseeable you would
3 need to remove the pump and take it out and repair
4 it. Specifically, DuPont had testimony that they
5 were in hazmat suits because of the materials being
6 processed. So there is that.

7 What were the available substitutes for
8 gasket and packing in the '70s? The way -- they
9 weren't a gasket or packing manufacturer. They
10 were a small 30- to 100-pump-a-year manufacturer.
11 They had a supplier who sent them gaskets and
12 packing. They put on what the customer wanted or
13 what was available due to the specifications.

14 So in information they had and the
15 brochures we produced, there were both types of
16 gaskets and packing specified for different
17 applications. So they had knowledge and that
18 information's been provided to counsel.

19 The last date of the sale of an
20 asbestos-containing pump they don't know. To find
21 out, they would have to go back and pull up every
22 pump record until they hit one.

23 They do know, and they have the records
24 for the sales of the pumps at issue in this case;
25 those pumps contained asbestos. They don't dispute

1 that. There is a 1987 memo that does set forth on
2 certain pumps there will be asbestos potentially
3 still used.

4 And so that information, I just don't
5 see how it's particularly relevant to this case.
6 We wouldn't dispute it went into the '80s, and we
7 think it's overly broad to do that investigation
8 and go file by file to confirm that there were no
9 pump sales with asbestos when it's just not an
10 issue in particular.

11 Regarding the crocidolite gaskets, they
12 don't dispute they supplied some crocidolite
13 gaskets, just not in this case. It's not at issue
14 as to Lawrence. In this particular case the
15 gaskets were chrysotile.

16 THE COURT: The responses were, they
17 don't know.

18 MS. GOLDHABER: No, they answered that
19 they sold pumps with chrysotile.

20 THE COURT: Listen again. Let me make
21 myself clear. I'm sorry. All right. Because I
22 understand it, you don't dispute that you sold
23 crocidolite gaskets on your pumps, but you say, not
24 in this case, because you don't know.

25 MS. GOLDHABER: No.

1 THE COURT: Or are you saying that the
2 affirmative testimony of Mr. Smith was, I have
3 looked at the sales of pumps for DuPont, and I know
4 as a matter of fact that we did not use crocidolite
5 gaskets on the pumps --

6 MS. GOLDHABER: Yes --

7 THE COURT: -- we sold to DuPont.

8 MS. GOLDHABER: Yes. We have the pump
9 specifications for every pump supplied.

10 THE COURT: Yes.

11 MS. GOLDHABER: And it's not just we
12 know had a serial number or whatever there. We
13 have a whole pump file, Your Honor, and it has what
14 is the specified equipment on each pump. And it
15 says JM60 gasket. And that JM60 gasket is
16 chrysotile. We know that. We provided that
17 information.

18 THE COURT: And that includes the
19 gaskets at play in this case?

20 MS. GOLDHABER: Yes, Your Honor.

21 THE COURT: In DuPont?

22 MS. GOLDHABER: Yes, Your Honor.

23 THE COURT: Then I guess I must have
24 not understood your argument. You said you don't
25 dispute that you sold chrysotile gaskets, just not

1 in this case. What did you mean by that?

2 MS. GOLDHABER: They have asked that --
3 they want to know how often Lawrence Pumps sold
4 chrysotile gaskets generally. I don't think that's
5 relevant to this case because we know --

6 THE COURT: Relevance is not the --

7 MS. GOLDHABER: Sorry, Your Honor.

8 THE COURT: -- benchmark in the
9 objection in the 30(b)(6 deposition).

10 MS. GOLDHABER: We answered -- maybe
11 I'm not understanding your question.

12 THE COURT: You know what they're
13 getting at, and I don't think this is an issue.
14 You're a smart lawyer and probably are very
15 experienced in this area. What they did and --
16 number one, they want to know whether the pumps you
17 sold them had chrysotile gaskets. You said yes.

18 MS. GOLDHABER: No. I'm sorry, let me
19 stop you. I'm sorry, chrysotile, you're right.

20 THE COURT: Chrysotile.

21 MS. GOLDHABER: Yes.

22 THE COURT: They said they -- you admit
23 that ones that you sold them had chrysotile
24 gaskets?

25 MS. GOLDHABER: Yes, in our pumps.

1 THE COURT: Then they want to also know
2 at the time you're selling them that Mr. Whitmire
3 is being exposed to these gaskets, they want to
4 know what your general usage of chrysotile gaskets
5 generally was.

6 And the reason they want to know that
7 is because they want to know what your knowledge
8 generally and your practice generally in the
9 industry was at a time when there was some
10 information from Wagner and others that the blue
11 asbestos is very dangerous.

12 So they want to know if you were, in
13 general, selling chrysotile more broadly than
14 just -- they want to know whether DuPont is some
15 kind of aberration or that was generally what you
16 sold. My guess is it's probably generally what you
17 sold.

18 But what you chose to do is to answer
19 by saying, we don't know about all this because
20 it's all in these record we can't get to. And that
21 is what is the heart and soul and the fuss about
22 this 30(b)(6) deposition, as I understand it.

23 MS. GOLDBABER: Your Honor, they did
24 answer -- so for DuPont it's all chrysotile.
25 That's been documented. We have the specification

1 for each pump and what was contained in it.

2 Generally, they want to know did we
3 sell crocidolite gaskets, which we never were a
4 seller anyway -- were crocidolite gaskets in our
5 pumps. We have answered yes. So I don't think
6 there is an issue there.

7 THE COURT: Right.

8 MS. GOLDHABER: But crocidolite was not
9 in the pumps that were at DuPont. And there's no
10 question of fact there. We have the records for
11 every single pump as to what was in it, which is
12 unique because we're such a small manufacturer of
13 pumps.

14 So they -- each pump was specialized.
15 They have -- each pump was made to order. They
16 have the files for each pump. We produced the
17 files on the pumps for DuPont. There are only, I
18 think, seven or eight pumps that were supplied to
19 DuPont and we have the schematics. We have
20 drawings. It's all been produced to plaintiff.
21 That's all JM60, which is chrysotile and not
22 crocidolite.

23 THE COURT: All right. I understand
24 your argument.

25 Ms. McVey, your reply.

1 MS. MCVEY: Your Honor, just briefly
2 with the crocidolite, when I --

3 THE COURT: Come up here.

4 MS. MCVEY: I'm sorry, yes. Your
5 Honor, Thiele McVey for the plaintiff.

6 If counsel is representing that they
7 have answered yes and we sold crocidolite
8 generally, then I would accept that. That's not
9 the way the deposition read to us. In fact --

10 THE COURT: I am confused by what her
11 argument is. So let me see if I understand.

12 She just, as she was leaving the
13 podium, said, yes, we sold blue asbestos
14 crocidolite gaskets in a lot of the pumps we made.
15 But we did not sell them in the ones at DuPont is
16 the last thing she said, because we have records
17 that say we only put chrysotile there.

18 So she's not admitting crocidolite at
19 DuPont.

20 MS. MCVEY: And I understand that, but
21 if she's now admitting generally we sold
22 crocidolite, I would accept that. That's not the
23 way the deposition read.

24 THE COURT: What did his deposition
25 say?

1 MS. MCVEY: He seems to go all around
2 with it. He doesn't know it's crocidolite. He
3 called it blue asbestos, and then he said he didn't
4 really do anything to investigate it. It's very
5 unclear, so we want to narrow that down.

6 THE COURT: I understand. And if she's
7 now saying that it's -- that generally that's what
8 they did was sell blue asbestos by some --

9 MS. MCVEY: In some pumps. I'm not
10 saying every one of them.

11 THE COURT: In some pumps, but then by
12 some good fortune they did not use that kind of
13 asbestos in DuPont, then that's what we'll specify.

14 MS. MCVEY: Okay. Then I'll accept
15 that representation and we don't to deal with that
16 at this point.

17 THE COURT: Right.

18 MS. MCVEY: Your Honor, the question
19 was about what Lawrence did to investigate what
20 they knew about their pumps being insulated in the
21 field. And it's not just at any time in the '90s;
22 it's in the '60s and '70s when Mr. Whitmire would
23 have been working there.

24 And the question on page 239 of
25 Brian Smith's deposition on June 12th of this year,

1 the question: Have you spoken to anyone from
2 Lawrence about whether its pumps were ever
3 insulated in the field in the '60s and '70s?

4 The answer is no.

5 And that really is important to tell
6 you what kind of insulation is going to be on those
7 pumps. And so I don't believe that it's as been
8 represented. He didn't investigate anything about
9 that. He didn't go back and ask former employees.

10 And this is important because Lawrence
11 had service guys who would go into plants and look
12 about how their pumps were being repaired. And
13 they would see them taking off insulation we
14 alleged and getting into the pumps and doing that
15 work. And that's important for our case.

16 And our point is Lawrence didn't do
17 anything to investigate that, and that's the
18 problem.

19 MS. GOLDHABER: I'm sorry, what was
20 that page, line you just said?

21 MS. MCVEY: It's page 239, line 14.

22 MS. GOLDHABER: I don't have that. I
23 just want to follow where you are. I'm sorry.

24 MS. MCVEY: And, Your Honor, it's not
25 just knowledge on this point, not just their

1 knowledge about the asbestos gaskets and packing.
2 It's also their knowledge about the hazards of
3 asbestos insulation, what did they know and when
4 did they know that. They haven't answered that
5 question. And that's really what we're talking
6 about.

7 I'm happy to answer any other questions
8 you have, but I think that's all the rebuttal I
9 had.

10 THE COURT: All right. Just hang with
11 me for a minute. The first issue is what Lawrence
12 knew about asbestos hazards generally?

13 MS. MCVEY: Right.

14 THE COURT: And what you're saying is
15 he was not prepared to answer that, so what you
16 want to -- what do you want -- the sanctions for
17 him not being prepared to answer on that is you
18 want a stipulation of what?

19 MS. MCVEY: And this is as to the
20 external insulation. That's what we're really
21 focused on. And that was Lawrence would be deemed
22 to have known in the '60s and '70s that its pumps
23 for a high temperature were insulated with
24 asbestos-containing insulation, and its employees
25 saw and used or removed asbestos-containing

1 insulation from its pumps before performing repairs
2 and overhauls.

3 THE COURT: All right. I would direct
4 as a sanction for not having Mr. Smith prepared to
5 answer that question that it will be deemed that
6 they knew in the '60s and '70s that their pumps
7 were being insulated with asbestos, in particular
8 -- that you have just recited.

9 MS. MCVEY: Yes, Your Honor. Thank
10 you.

11 THE COURT: All right. Second,
12 external insulation.

13 MS. MCVEY: That was the one we just
14 addressed. I kind of combined the two.

15 THE COURT: All right. So they knew
16 about asbestos hazards generally in the '60s and
17 '70s, and they knew the external insulation on
18 their pipes contained asbestos.

19 MS. MCVEY: On their pumps, yes.

20 THE COURT: On their pumps, yes.

21 All right. Third, repairing in the
22 field.

23 MS. MCVEY: That was actually just
24 encompassed in that one sanction, I believe, that
25 they're employees saw the repairs being done in the

1 field.

2 THE COURT: That Lawrence Pump
3 employees saw repairs being made in the field on
4 their pumps involving the removal and -- removal of
5 asbestos-containing insulation and other materials.

6 MS. MCVEY: Yes.

7 THE COURT: All right. Four,
8 substitutes for gasket packing -- packaging --
9 packing. All right. What's the contention there
10 again?

11 MS. MCVEY: Your Honor, there is
12 evidence in this case, and Lawrence was asked about
13 it in their deposition that, well, customers and
14 suppliers were asking for -- I'm sorry. Customers
15 were asking for substitutes for asbestos gaskets
16 and packing in the 1970s. And the question was,
17 what did you do you about that?

18 THE COURT: And her response is, we
19 have specifications that offered both
20 asbestos-containing and nonasbestos-containing
21 gaskets. All right. She said that's what Smith
22 said or that's what their record disclosed.

23 MS. MCVEY: I don't believe that to be
24 true, and maybe she can point me to the testimony
25 and I missed it somewhere in there. But from my

1 reading of the deposition, it was, Lawrence did not
2 investigate why their customers were asking for
3 asbestos-free substitutes.

4 In other words, there were dangers with
5 asbestos gaskets and packing. People were asking
6 for substitutes. What did they do then?

7 THE COURT: And what was the testimony
8 on that?

9 MS. MCVEY: That they did not
10 investigate why the customers were asking for
11 substitutes.

12 THE COURT: All right. And what you
13 want is a stipulation that the customers were
14 asking for substitutes for asbestos-containing
15 gaskets.

16 MS. MCVEY: And packing.

17 THE COURT: And packing.

18 MS. MCVEY: And that would be starting
19 in the late 1970s.

20 THE COURT: All right. And I will, as
21 a sanction for their failure to prepare Mr. Smith
22 as a witness to testify on that subject impose the
23 stipulation.

24 All right. And then the last date for
25 asbestos pumps. All right. She said that they had

1 some information about asbestos-containing pumps as
2 late as 1987:

3 MS. MCVEY: And, Your Honor, my
4 understanding is that there was a memorandum in
5 1987 saying, we will continue to sell you
6 asbestos-containing pumps if you need the six-step
7 test. And my question is, and we didn't have an
8 answer to is, how long did that go on?

9 THE COURT: So when was the last date?
10 And what was their answer to when was the last
11 date?

12 MS. MCVEY: There was no -- there was
13 not an answer.

14 THE COURT: I mean, did he say, I don't
15 know or --

16 MS. MCVEY: He didn't know. He didn't
17 investigate.

18 THE COURT: Didn't investigate it. And
19 what are you asking for as a stipulation for the
20 last date when they were sold?

21 MS. MCVEY: That Lawrence Pumps sold
22 asbestos-containing pumps until the early '90s.

23 THE COURT: All right. As a sanction
24 for the failure to prepare Mr. Smith in that regard
25 that the -- that stipulation will be made to the

1 jury that the asbestos-containing pumps were sold
2 by Lawrence into the early '90s.

3 How about crocidolite gas?

4 MS. MCVEY: And I think we addressed
5 that based on counsel's representation.

6 THE COURT: Well, let's just be clear
7 of what was said in that regard. The
8 representation has been that she agrees with, we
9 sold crocidolite gaskets for some of our pumps.
10 For the DuPont pumps, we sold chrysotile gaskets.

11 MS. MCVEY: Well, and my concern about
12 this is that we sold crocidolite gaskets during
13 this time frame.

14 THE COURT: Right.

15 MS. MCVEY: And because, for us, it
16 goes to their knowledge about the dangers of
17 asbestos.

18 THE COURT: Right.

19 MS. MCVAY: So I think we're satisfied
20 at this point with that.

21 THE COURT: All right. That's a
22 stipulation that would be imposed as a sanction.

23 All right. Does that complete the
24 sanctions with respect to Lawrence?

25 MS. MCVEY: Yes, ma'am.

1 THE COURT: We'll move to the next.

2 Court Reporter, how are you doing?

3 THE COURT REPORTER: I'm good, Judge.

4 Thank you.

5 THE COURT: All right. Next is William
6 Powell. No, wait a minute.

7 MR. BRANHAM: I have Armstrong, Judge.

8 THE COURT: Armstrong.

9 MS. GOLDHABER: Your Honor, just before
10 we move on, my apologies.

11 THE COURT: Yes, ma'am.

12 MS. GOLDHABER: On the stipulation that
13 you are imposing as a sanction, is that -- the
14 phrasing of it is that Lawrence Pumps sold pumps to
15 DuPont that contained --

16 THE COURT: The phrasing is that you
17 generally sold pumps that contained crocidolite
18 during this period of time. And you have already
19 contended that, hey, but we're DuPont, we only sold
20 chrysotile.

21 MS. GOLDHABER: Right.

22 THE COURT: What they were looking for
23 if whether you generally sold pumps that contained
24 crocidolite, and that's what I'm going to -- as a
25 sanction for him not being prepared to answer that,

1 I'm going to say that you generally sold them.

2 You can then point to any specifics
3 about whether -- that's going to be a matter of
4 dispute between you-all. And you're going to say,
5 but, hey, here in the DuPont one, they were all
6 chrysotile. And you'll have to put up your
7 evidence on that, and presumably you will.

8 I'm not sanctioning you about that
9 because you said you provided that information.
10 You said, hey, we contend that it's chrysotile.
11 I'm not going to impose that as a stipulation
12 because that's going to be a contested piece of
13 evidence.

14 You're going to put up chrysotile, and
15 if they have any dispute with that, they're going
16 to say that. But what was not disclosed was that
17 you knew you were also selling chrysotile and
18 Mr. Smith was not prepared on that -- I mean,
19 crocidolite. Again, the blue asbestos. He was
20 very vague on that.

21 So what we're going to do is just say,
22 hey, we sold crocidolite gaskets, but with respect
23 to what happened at DuPont, you gave some
24 information, enough for them to be satisfied that
25 you're not going to be sanctioned, but I'm not

1 going to impose that without you proving it.

2 You're going to have to prove it.

3 MS. GOLDHABER: I was -- okay.

4 THE COURT: All right. Now we have
5 Armstrong.

6 MR. BRANHAM: Yes. There are two
7 motions pending as it relates to Armstrong. The
8 mediation is the ...

9 (Off-the-record conference.)

10 THE COURT: All right. I think I have
11 something here. Plaintiffs' motion for discovery
12 sanctions against Armstrong.

13 MR. BRANHAM: Sure, Judge. I'll take
14 that up. This is Trey Branham for the plaintiffs.

15 Judge, we filed a motion very shortly
16 after we took Armstrong's corporate representative.
17 And the representative, just to sort of list it
18 all, conducted no investigation about sales
19 summaries; made no attempt to contact the
20 distributor, who their own corporate rep believed
21 would have been the distributor to North Carolina
22 at the time; no attempt to determine sales areas,
23 even though they say that they possess maps of
24 sales areas; no attempt to determine what the
25 representatives communicated to anyone that they

1 sold to; no attempt to determine what Armstrong
2 TRAP magazine -- Armstrong TRAP magazine was a
3 magazine published by Armstrong -- so they made no
4 attempt to discover what Armstrong TRAP magazines
5 that they still possessed and what information
6 contained within them was relevant.

7 THE COURT: These are the service tract
8 guides?

9 MR. BRANHAM: That's right, Your Honor.
10 There's a picture, at least one page of it, in our
11 response brief.

12 THE COURT: Right.

13 MR. BRANHAM: And that's particularly
14 concerning considering that the rep testified that
15 he maintained some of them in his office.

16 He testified that he made no attempt to
17 discover the location of or the existence of a
18 videotape that was created by Armstrong that
19 instructs users how to replace gaskets.

20 He says he's seen it, but made no
21 attempt to find it or produce it; made no attempt
22 to determine whether Armstrong still maintains any
23 building materials from its tracts from the '60s,
24 '70s, or '80s; made no attempt to discover what
25 kinds of materials were in its tracts prior to

1 1954; and made no attempt to determine what kinds
2 of materials were used on the flange gaskets for
3 testing, even though he was involved in the
4 testing.

5 So that was what he didn't know.

6 And candidly, Your Honor, the responses
7 of Armstrong, which is addressed in our reply, is
8 what concerns me the most. Armstrong, essentially,
9 says a couple of things. First, that they don't
10 believe there's been any product ID'd so they
11 should be held to a lower standard in discovery.

12 This Court has repeatedly said that
13 that's not correct, that we're entitled to
14 discovery. But I want to take a second and address
15 the issue about what we have as it relates to
16 Armstrong here and in this case.

17 Armstrong traps were one of two types
18 of traps present at DuPont during Mr. Whitmire's
19 tenure. That's from Mr. Blanton's testimony.
20 Armstrong traps were present in the casting and CP
21 area in the powerhouse. That's also from
22 Mr. Blanton's testimony. And those are the two
23 places that Mr. Whitmire worked.

24 The steam traps were attached to steam
25 lines and DOWTHERM lines and 100 percent of the

1 steam lines and DOWTHERM lines are insulated.

2 Again, that's from Mr. Blanton's testimony.

3 Mr. Blanton further testified that the
4 traps were on the Dow lines, that Jack Whitmire
5 worked in the casting and CP area in the
6 powerhouse. That's Mr. Whitmire's, Jimmy
7 Whitmire's testimony, as well as Mr. Bingham's
8 testimony, and Mr. Tucker's testimony. That there
9 were hundreds of steam traps in the casting and CP
10 area.

11 And Mr. Blanton also confirmed the
12 presence of the traps in the powerhouse.
13 Roland Blanton confirmed that mechanics work on
14 steam traps. All mechanics did the same work.
15 Again, that is Mr. Blanton and Mr. Whitmire.

16 So in terms of our ability to connect
17 the dots, it's really clear that mechanics just
18 like Mr. Whitmire, because all mechanics did the
19 same work, would have worked on insulated and
20 uninsulated steam traps on the steam and DOWTHERM
21 lines just like all the other mechanics did.

22 So the idea that there is no evidence
23 that Mr. Whitmire worked on the traps is just
24 simply not accurate. And even if it were a basis
25 to not give complete discovery, it shouldn't be

1 counted.

2 Now, what the response was to our
3 motion was two things. First, they gave us an
4 affidavit that said, now I've gone and looked
5 after -- after we asked him all these questions
6 where he said he didn't know based on his
7 litigation affidavit and said, okay, so you got us.

8 I went back and looked and I found --
9 or didn't find, more importantly, X, Y, and Z.
10 That's not, again, how this works.

11 But I think, to me, the most concerning
12 and, candidly, the most telling issue is what was
13 written in their response. And this is a quote:
14 And most importantly, the principal of the present
15 Plaintiffs' counsel firm, Jessica Dean, deposed the
16 original Armstrong corporate witness at great
17 length in the *Powell vs. Allis-Chalmers* case.

18 That's true. She did depose him. I'm
19 not sure I would agree that it was at great length,
20 but what the answers to those questions were
21 informs this sanctions motion because it's exactly
22 the same issue. And I pulled it out in block
23 quotes in our reply.

24 He said he didn't know. He said he
25 didn't -- time and time again. Armstrong has a

1 stack of 821 documents -- or 827 documents that
2 they say that's the universe. We already know
3 that's not true because they don't release the
4 steam traps magazines, which was in corporate's
5 office.

6 But if you read the deposition that
7 Ms. Dean took ten years ago, it is replete with
8 obstruction by counsel, instructions not to answer
9 by counsel about the most basic of questions: When
10 did you know about the hazards of asbestos? What
11 did you do? Do you know that this can cause the
12 disease?

13 These are the types of questions and it
14 goes on for pages. Right? Don't answer that
15 question.

16 So the very deposition that they
17 provide to us and the Court -- let me back up.
18 They didn't provide it to the Court. I provided it
19 to the Court. The very deposition that they cite
20 to the Court for the proposition that ten years
21 ago -- we've been doing discovery on these guys for
22 ten years, and we've got all this information.

23 The very deposition that they cite to
24 you but don't provide, and now I know why because I
25 went back and read it, demonstrates exactly the

1 same kind of behavior we have in this case, which
2 is I'm not looking. I'm not producing. And when
3 you ask me questions, I'm not telling you anything.

4 Now, in the early case that's because
5 the lawyer said don't tell him, but here he just
6 says I'm not going to look. I didn't look. I'm
7 not going to tell you.

8 So we have a laundry list of things
9 that he was not prepared on, did not answer, could
10 not look. And then the response is, here's a
11 litigation affidavit that says, yeah, we're now
12 looking for some of this stuff -- still didn't
13 produce anything -- and that looked to the old
14 stuff, look to everything their firm had done in
15 the past. And when we do, we find the same path of
16 obstruction. So it is a pattern for Armstrong to
17 be doing this.

18 And, you know, one of the things that,
19 again, is super telling here is when you go and you
20 look at -- one of the arguments is, well, those
21 Armstrong TRAP magazines aren't relevant to
22 anything.

23 Now, set aside for a moment that
24 relevance isn't a good objection in a corporate
25 representative's deposition, is that they're not

1 relevant to anything because they don't talk about
2 stuff or how to use them. It's just not true.

3 I mean, I gave you one page and the one
4 page I gave you out of the steam TRAP magazine, the
5 question -- the article written by Armstrong is
6 "When Should You Insulation Steam Traps," right?
7 And they have a picture of insulated steam traps
8 and they have all of these calculations about heat
9 loss and all the rest of it. Right?

10 I mean, somebody pretty smart looked at
11 that issue and made a decision, presumably on some
12 economic basis, of when you should do that and when
13 you shouldn't. So it is candidly a little bit
14 beyond me that he would argue that that's not
15 relevant, even if that was a good objection.

16 So for all of these reasons, Your
17 Honor, we believe that sanctions are appropriate
18 and we would ask for the following sanctions.

19 THE COURT: I'm looking at your page 4.
20 Is that what you're looking at?

21 MR. BRANHAM: Yes, Your Honor, that is
22 page 4 and it goes into 5.

23 THE COURT: Right. It's seven
24 different stipulations --

25 MR. BRANHAM: That's correct.

1 THE COURT: -- that are asked for.

2 MR. BRANHAM: That's correct.

3 THE COURT: Okay. And those are on
4 steam traps deemed to be present in DuPont and a
5 trap deemed to contain asbestos. Armstrong deemed
6 to require and recommended insulating externally
7 with asbestos. Armstrong deemed to have sold
8 replacement asbestos-containing gaskets. Armstrong
9 deemed to have actual knowledge of the hazards of
10 asbestos. And Armstrong be ordered to search and
11 produce all documents that were identified as
12 either not having been searched for or not
13 produced. Armstrong to be ordered to pay
14 attorney's fees.

15 In terms of the stipulations, you are
16 asking for 1 through 5, correct?

17 MR. BRANHAM: That's correct, Your
18 Honor, with the two following instructions.

19 THE COURT: The business about being
20 ordered to produce all these documents, are you
21 still asking for that?

22 MR. BRANHAM: So, Judge, I think what I
23 would like on those two things -- I'm very
24 interested in the videotape. As I understand the
25 videotape, it actually demonstrates someone

1 removing gaskets from Armstrong traps and what that
2 looks like.

3 And that goes to two things, obviously:
4 One that it happened, and how did Armstrong
5 represent that it happened?

6 THE COURT: Now, when was that
7 videotape made?

8 MR. BRANHAM: As I understand that --
9 so the answer to the question, I don't know that we
10 have a year. Sounds like it was in the mid '80s.
11 Again, I haven't seen it, so --

12 THE COURT: All right.

13 MR. BRANHAM: Just because it's
14 produced doesn't mean they get to use it if for
15 some reason it's good for them, right? I mean, I
16 need to see it and see whether or not -- before we
17 deal with disability issues.

18 THE COURT: All right. And the final
19 claim is for attorney's fees and costs --

20 MR. BRANHAM: Yeah, we traveled.
21 Right?

22 THE COURT: Okay. I understand your
23 request.

24 MR. BRANHAM: And, Judge, there's also
25 an issue with mediation. I have to take that up --

1 THE COURT: Yes, I am very interested
2 in hearing about that issue. Why don't you just go
3 on and take it up now and then Armstrong can reply
4 to both.

5 MR. BRANHAM: Sure. We had mediation
6 in Charleston. Counsel's office is just down the
7 street from the mediator's office. They did send a
8 lawyer --

9 THE COURT: Who did they send to
10 mediation, Armstrong?

11 MR. BOGER: Your Honor, Tommy Boger
12 here on behalf of Armstrong International.

13 THE COURT: All right. Tom?

14 MR. BOGER: Tommy.

15 THE COURT: Boger?

16 MR. BOGER: Boger, yes, ma'am,
17 B-O-G-E-R.

18 THE COURT: All right.

19 MR. BRANHAM: They did send an attorney
20 to the mediation. I'm trying to be careful about
21 what I say that I talked to the mediator about in
22 confidentiality.

23 Suffice it to say that there was no one
24 present with authority to negotiate the case. As I
25 understand it from conversations with the mediator,

1 counsel present was not familiar with the case,
2 that eventually there was a phone call made. And,
3 I think, you could talk to Mr. Wills, Tom Wills,
4 who's the mediator in this case -- he needed more
5 information -- because I don't know exactly what
6 the exchange was between Mr. Wills and the national
7 counsel who called in.

8 So there was another lawyer that called
9 in, not a corporate representative or insurance
10 carrier. And no monetary offer was made as far as
11 I know.

12 Of course we filed our motion for
13 someone to be made available.

14 THE COURT: Right. Right.

15 MR. BRANHAM: The time at which the
16 national counsel apparently spoke to Mr. --

17 THE COURT: Right. The motion was
18 filed sometime after midday, as I recall it. And I
19 just happened to see it pop up on my iPhone, and my
20 clerk and I were able to examine it. And she was
21 able to send a response on my behalf to direct that
22 someone be made available who would have authority.

23 MR. BRANHAM: So, Judge --

24 THE COURT: And as I understand it, the
25 person made available was the national counsel by

1 telephone about 4:00.

2 MR. BRANHAM: That sounds about right
3 to me.

4 And, Judge, I will just note for the
5 record that at mediation the entirety of the
6 Whitmire family, not just one person of the family,
7 but the entirety of the family was there.

8 THE COURT: Right. And the mediation
9 commenced at what time?

10 MR. BRANHAM: I think we started at 9.

11 THE COURT: Nine?

12 MR. BRANHAM: 9:00. And they were all
13 present for the entire day.

14 THE COURT: All right. Let me -- just
15 because I have it on my mind, and I will forget
16 about it if I don't say it while it's fresh in my
17 mind.

18 Counsel for Lawrence Pumps, spell your
19 last name for me again.

20 MS. GOLDHABER: Certainly. G-O-L-D --

21 THE COURT: G-O-L-D?

22 MS. GOLDHABER: H-A.

23 THE COURT: H-A?

24 MS. GOLDHABER: B, as in boy.

25 THE COURT: B?

1 MS. GOLDHABER: E-R.

2 THE COURT: E-R. Goldhaber. And your
3 first name is?

4 MS. GOLDHABER: Catherine.

5 THE COURT: Catherine, yes, ma'am.

6 In terms of the stipulations that we
7 would use, you had a question about how the wording
8 would be on this thing. I think it's quite a valid
9 question and we will -- if those sanctions remain
10 in effect after today, in light of anything else
11 that is said, we will want to be way more precise
12 about that and you are entitled to that.

13 So I draw your attention to page 9 of
14 the plaintiffs' motions for discovery sanctions
15 against Flowserve. Beginning at page 9 and
16 continuing on page 10 and page 11.

17 They have some wording suggestions, and
18 I'm -- I spoke very generally, but you just might
19 look those over and we can talk again about the
20 wording of the directed stipulations.

21 MS. GOLDHABER: I'll speak with counsel
22 as well --

23 THE COURT: Exactly. Exactly.

24 MS. GOLDHABER: Absolutely.

25 THE COURT: All right. So now let's

1 return to Armstrong, and for the defense.

2 MR. WALL: Thank you, Your Honor.

3 THE COURT: Mr. Wall.

4 MR. WALL: Yes, Your Honor. Nice to
5 see you.

6 THE COURT: Nice to see you again. We
7 each had a lot less miles on us than we do now.

8 MR. WALL: And you've done better with
9 your miles than I have.

10 THE COURT: I disagree. You've done
11 very well with yours. Okay.

12 MR. WALL: Speaking of miles, Your
13 Honor, I've been in this litigation since 1976.

14 THE COURT: Yes, sir.

15 MR. WALL: And I still am. And I'll
16 probably get in a little trouble for this, but I'm
17 distressed with the way the litigation is going.
18 It used to be the plaintiffs and defendants worked
19 together; they put up witnesses; they tried a case.
20 Now we're apparently doing it the Texas way. We're
21 playing gotcha.

22 THE COURT: Well, I think you better
23 stop right there, Mr. Wall. I think that there are
24 sins on both sides in that regard, and I certainly
25 don't want you to use the word Texas and by any

1 stretch of the imagination refer to my good friend
2 Mr. Brown and his law firm.

3 They have performed with great
4 distinction in my court, just as your firm has. So
5 I think what we need to do is concentrate on the
6 matter at hand.

7 MR. WALL: And that's what I'm going to
8 try to do, Your Honor.

9 I represent Armstrong International.
10 Armstrong International did not get involved in
11 this litigation until the late 1990s.

12 By that time, using their records
13 retention program, they went back and threw out all
14 of -- the majority of their documents, not all of
15 the documents, they kept some, and found some.

16 So they have put together a package of
17 851 documents that are their records in this case,
18 and they have been producing those same documents
19 since 19 -- 2004, the exact same documents.
20 They're again being used in this case.

21 As for the 30(b)(6) witness, we
22 produced a man who has testified five times as a
23 corporate representative. He reviewed the prior
24 depositions of the two prior corporate
25 representatives, and he was vice president of sales

1 for more than 25 years. As I said, we've been
2 doing -- Armstrong has been doing this 21 times
3 since '04.

4 Contrary to what the plaintiffs told
5 you, there is no evidence of exposure of the
6 plaintiff to Armstrong traps. Three of the --

7 THE COURT: Mr. Wall, evidence of
8 exposure is not what we're here for.

9 MR. WALL: I understand.

10 THE COURT: We are here for --

11 MR. WALL: The only reason I bring it
12 up is because he raised it.

13 THE COURT: Well, that's a disputed
14 fact and apparently it will remain so, but what we
15 have to deal with now is the 30(b)(6) deposition.

16 MR. WALL: Yes, Your Honor.

17 They raised ten issues in their motion.
18 First was that we made no attempt to investigate
19 the sales summaries. Your Honor, we had no sales
20 summaries and we told them that these are all our
21 documents. We never kept any sales summaries.

22 In order to verify that, after the
23 motion came in, we sent Mr. Scare, who was our
24 30(b)(6), out to confirm one more time that there
25 were no such documents available to us, and there

1 were non e.

2 Next they argued there was no attempt
3 to contact anyone for Shepard Company who was our
4 representative. Well, Mr. Scare testified that the
5 Shepard Company was, in fact, a representative in
6 North and South Carolina, and they've been out of
7 business for many years.

8 In fact, one of the documents we
9 produced among our 800-some odd documents is a
10 report -- not a report, a request for some
11 information from Shepard. So there's no question
12 we know it. They knew it. We told them that.

13 Next, Your Honor, they asked for
14 territories -- maps of territories back in the '60s
15 and '70s. We didn't need to look at any maps of
16 territories because we testified that Shepard was,
17 in fact, the agent for North and South Carolina.
18 So there was no necessity of looking at those maps.

19 Armstrong made no attempt to find out
20 what Armstrong representatives told users in class
21 held by Armstrong. Your Honor, there was nothing
22 on the notice to request that. Nothing that gave
23 us any pause that we would need to go do that.

24 THE COURT: You know, you -- you're
25 offering him as your corporate representative and

1 there's no question of what Armstrong had trap
2 guides that contained information about insulation
3 repair, parts exchangeability because that's seen
4 in their 1956 magazine, and they do have a copy of
5 it.

6 So it really doesn't -- this -- your
7 corporate representative was supposed to try to
8 investigate whether it still possesses any
9 Armstrong trap guides, not whether or not they are
10 relevant to this proceeding. And that's what
11 they're fussing about is this --

12 MR. WALL: And we could not find
13 anything called Armstrong --

14 THE COURT: Let's not parse words.
15 There is a guide that has information about
16 installation, repairs, and parts exchangeability,
17 and that's what they want.

18 MR. WALL: And we produced three of
19 them in the 800 documents. There are three
20 distinct documents, which are the equivalent of the
21 sales trap guide.

22 THE COURT: The what?

23 MR. WALL: They're the equivalent of
24 what they're talking about. They tell what Secrest
25 is, what it does, what parts it has in it, how to

1 replace it, how to repair it, how to work on it.
2 There are three sets of those guides in the
3 documents we produced over -- my recollection, it's
4 over three different years. And we confirmed --

5 THE COURT: Did -- Mr. Wall, the
6 question is, you apparently beginning -- or the
7 company, beginning many years ago, developed this
8 list of 800 documents. And if you said that that's
9 all they produced and that's all they've continued
10 to produce for many, many years now, that's not the
11 question being asked.

12 The question that this corporate rep
13 was being asked whether he made any attempts now,
14 in this day and age, to go through Armstrong's
15 information and see if he could find an Armstrong
16 service trap guide.

17 And they further argued that some of
18 those trap guides were even present in the offices
19 of some of these corporate folks with whom your
20 corporate rep would have had dealings. And they
21 contend that your corporate rep said, no, I did not
22 try to find any Armstrong service trap guides.
23 I've given you what's in our packet of stuff we
24 give everybody, and that's it.

25 MR. WALL: That's a different question,

1 Your Honor.

2 THE COURT: All right. Well, the
3 question I want is all centers for this corporate
4 rep of yours -- it's not what you did in the '90s
5 and it's not what the standard practice is and it's
6 not referring back to some deposition that was
7 taken ten years ago.

8 It is what did this corporate rep do in
9 connection with the Whitmire case to answer this
10 series of questions. Did he do anything to
11 specifically go back and try to get the
12 information, or did he just simply say, I rely on
13 what's out there before?

14 MR. WALL: Your Honor, he did both. He
15 said, I relied on what was sent there before. I
16 looked at those depositions, looked at documents,
17 and I went back after this and looked again myself.

18 And we gave them an affidavit to that
19 effect and said, if you want to depose him, we'll
20 produce him for a deposition.

21 THE COURT: This was somebody other
22 than --

23 MR. WALL: Same guy.

24 THE COURT: -- the 30(b)(6)?

25 MR. WALL: Same guy. We said -- he

1 basically said, I'm positive it's not there because
2 we all looked before, but I did not look this time,
3 so let me go look this time. And so he went and
4 looked this time and gave an affidavit in effect
5 that he could not find those.

6 But we're saying we did produce three
7 documents which are the same thing, in our opinion,
8 in our production. And so they already had the
9 effect of what they're looking for.

10 The video, we've never seen it. We
11 have not -- strike that.

12 The corporate rep did not see the
13 video. They did not show the corporate rep the
14 video. He said, yes, I heard something about a
15 video. I heard some stuff about it, but I've never
16 seen it. I'm pretty sure that's what he said.

17 THE COURT: You know, that's just not
18 good enough, Mr. Wall. The video is something
19 that -- what they say is this: Despite being
20 personally shown an instruction video created by
21 Armstrong that instructed users how to repair its
22 steam traps, including scraping out the gasket
23 material, Armstrong made no attempt to further
24 investigate such video or produce it in this case.

25 Now, I'm not going to accept I kind of

1 looked again. I want to know where is the video.

2 MR. WALL: We do not know, Your Honor.

3 It was not shown to the witness.

4 THE COURT: It's not supposed to be.

5 They don't have it. They want your witness to go

6 back and find that video.

7 MR. WALL: And we were told we could

8 not find it.

9 THE COURT: We are told is not really
10 good enough.

11 MR. WALL: He went back out and went to
12 look for it.

13 THE COURT: That's not good enough for
14 me.

15 MR. WALL: After this occurred, he went
16 back out and went to look for it and --

17 THE COURT: That's not good enough.

18 All right. That -- he even agrees that it exists
19 because he apparently saw it at one time. So
20 somebody got that video and we're going to get that
21 video. And if we don't get that video, the
22 sanctions are going to be extreme.

23 The only reason I don't strike your
24 pleadings in this case is because that would make
25 the matter immediately appealable, and that's a

1 reward for bad conduct. It just means you don't
2 have to go to trial.

3 Well, Armstrong is going to trial, but
4 the sanctions are going to be pretty severe if we
5 don't locate that video.

6 And I'm not trying to be mean and it's
7 not your fault, but it is Armstrong's fault and I'm
8 not going to accept that from Armstrong. There is
9 no way in the world that that thing is not
10 available in the records of a big company like
11 this.

12 So I want that video produced and I
13 want it produced before this week is over.

14 MR. WALL: And, Your Honor, they can't
15 produce it because it's not available.

16 THE COURT: I'm not going to accept
17 that. I'm not going to accept that. We're going
18 to have an end to this once and for all. This is a
19 very specific piece of information and your
20 corporate representative has seen it, and we are
21 going to get it produced.

22 MR. WALL: I'm not sure he has seen it.
23 He said he saw a deposition in which it was
24 referred to. I don't think he saw it.

25 THE COURT: That is --

1 MR WALL: I could be wrong, but I --
2 that's my recollection of what occurred.

3 THE COURT: The plaintiff alleges that
4 he testified and saw this video. And on that
5 basis, we are going to get this video. All right.
6 Now, you can continue, but the video is a big one,
7 as far as that is concerned. That's number two.

8 MR. WALL: Yes, Your Honor.

9 THE COURT: Seven is the attempt to
10 investigate any bills or materials for its traps in
11 the '60s and '70s.

12 MR. WALL: And we -- again, we threw
13 all of those out. We stopped -- we did not retain
14 any of that information. That was not in our 80
15 and some odd pages, so we don't have it.

16 THE COURT: Well, here's what concerns
17 me. That is a stock answer that this company has
18 been giving for a long time. And there are other
19 ways to look at this. They said they threw
20 everything out at a certain point in time. I don't
21 know what they did and what they did not do, and
22 you don't either.

23 But they apparently created something
24 they thought was going to be a firewall, which is
25 these 800 documents that they'd want everybody to

1 see.

2 But there have got to be suppliers,
3 other people within a big corporation like this,
4 and I want to know very, very specifically how this
5 is being investigated and who is being contacted in
6 order to find out what is in any records anywhere
7 in Armstrong. This is not good faith compliance
8 with 30(b)(6) depositions, in my opinion.

9 MR. WALL: The distributor at issue is
10 not in business anymore. That's already been
11 discussed.

12 THE COURT: Armstrong has distributors
13 all over the country. Shepard had this particular
14 area, but Armstrong is a national corporation and
15 they have got people all over the country that use
16 these steam traps I will guarantee you.

17 And there is going to be a way to find
18 this material would be my bet. And I want them to
19 find it.

20 MR. WALL: Armstrong made no attempt to
21 investigate materials used in body gaskets. We
22 don't contest that it was not asbestos. All we do
23 is say we can't be sure, but our people prior said
24 it was asbestos. That works for us.

25 We have no records of it. We don't

1 contest that it was. We always say it's the prior
2 people said it -- said it was and that's okay. We
3 have no record.

4 Again, they made no attempt to
5 determine the type of gasket at the flange
6 connections. We leave that up to the purchaser of
7 the steam trap. And they could put anything they
8 want in there. It's a total different third party.
9 We don't know what is put in there.

10 THE COURT: Well, I've tried a lot of
11 these cases and plaintiffs' gaskets have been an
12 issue in a lot of them, Mr. Wall, and that doesn't
13 pass the smell test with me. That's what's called
14 the old bare metal defense and I haven't admitted
15 it in any case I've ever tried, and I don't know of
16 any trial judge in this day and age that did.

17 When you make flanges -- these pipe
18 companies, what they do is they make these pipes
19 with flanges because they are miles and miles and
20 miles of them that go through these flanges. And
21 when they have to be joined together, you have to
22 have something that's very heat resistant.

23 For many, many years what they used was
24 asbestos. They knew that. Any company that makes
25 flange materials knows that they're going to be

1 attached to a connector and that they've got to --
2 they can't be put together with bare metal. A
3 gasket has to be used.

4 Armstrong definitely knew that, as any
5 manufacturer would. Most of the time what they do
6 is they say, we don't make the gaskets, but their
7 reps provides you with the gaskets. When you or
8 DuPont or anybody else needs to order them, you
9 order them from the rep. And I'll guarantee you
10 that was exactly what was done here.

11 And it is not going to be sufficient to
12 say, we don't know anything about it and people can
13 put anything they want. That is not how any pipe
14 manufacturer or flange or attachment or
15 manufacturer of any kind of a pump or anything that
16 has a flange on it, that's not how they operate in
17 my opinion.

18 And I cannot believe Armstrong stands
19 alone in the country as someone who doesn't know
20 what goes into the flange gasket on the machinery
21 and material that they produce. So that's not good
22 enough.

23 MR. WALL: We did not make the flange.

24 THE COURT: Hey, many of these pipe
25 companies don't make the flange, but they know what

1 is in the flanges. They have a record to that
2 effect. They have personnel who deals deeply with
3 that. I guarantee you Armstrong had field reps
4 that knew about that.

5 So I'm not accepting that as an answer.
6 And if that's the answer, then we're going to make
7 some stipulations about it because that doesn't
8 pass the believability test with me.

9 MR. WALL: All right. We made no
10 attempt to figure out the flange gaskets used in 54
11 and 88. In our testing facility, we have no
12 records left as to what was used in our testing
13 facility. It wasn't on the outside. It was in our
14 own testing facility. That's what the question is.

15 THE COURT: All right.

16 MR. WALL: And, lastly, the Armstrong
17 TRAP magazine, we do not have a complete set of
18 those. The plaintiffs got those from the other
19 plaintiffs' lawyers in the New York City Library.

20 My witness testified, yes, I have a
21 couple of those in the office. I was not
22 maintaining them. They were not maintained. They
23 are not part of a regular production of documents.
24 They are not part of our regular inventory of
25 documents, and we do not have a listing of all of

1 the ones that were there, and they were not part of
2 the records of asbestos issues at Armstrong.

3 THE COURT: Did he make any attempt to
4 read through those trade publications that he does
5 have in his office and testify about them at the
6 30(b)(6) deposition?

7 MR. WALL: They did not ask for that
8 information.

9 THE COURT: I'm not asking you whether
10 they asked for them or not. They say they did.
11 I'm asking you whether he made any attempt to read
12 through this material and be prepared to discuss it
13 in connection with this deposition.

14 MR. WALL: If he was -- no, Your Honor
15 he was never asked to do that.

16 THE COURT: All right.

17 MR. WALL: So he wasn't asked -- did
18 not do that because it was just a couple sitting in
19 his office, and they were not official documents.

20 THE COURT: And did he make any
21 attempts to copy the ones that were sitting in his
22 office and provide them to the plaintiffs?

23 MR. WALL: Again, no, Your Honor.

24 THE COURT: All right.

25 MR. WALL: And, again, finally, Your

1 Honor, we again -- we also said we'd be glad to put
2 him up for a deposition again if you want to take
3 his deposition again.

4 THE COURT: It's way too late to do
5 that now.

6 MR. WALL: Well, we filed this --

7 THE COURT: How many times has he been
8 deposed already?

9 MR. WALL: Seven.

10 THE COURT: Well, it's way too late now
11 for putting him up --

12 MR. WALL: Five. Excuse me, five. No
13 one else has asked for this information.

14 THE COURT: Sir?

15 MR. WALL: No one else has asked for
16 this information.

17 THE COURT: You say that and the
18 plaintiffs say differently, and they will respond
19 and tell you why they say they did ask for them.

20 MR. WALL: This is the first motion for
21 sanctions we've ever received.

22 THE COURT: Well, that may be, but I
23 take discovery seriously. And it's not because
24 I've got my name on the dot out there. I've had
25 defense verdicts in these cases and I've had

1 plaintiffs' verdicts in these case.

2 I just try to keep the train on the
3 track in a fair way. And to have corporations come
4 here with a 30(b)(6) expert, their corporate
5 representative who is not prepared to discuss --
6 you don't have to tell them every question before
7 you come into a deposition, but you have to have
8 corporate representatives that are prepared to
9 discuss the matters at issue.

10 And I don't know of anything that could
11 be more fundamentally at issue on a case here than
12 the issue of these traps, how they're maintained,
13 what they're made of, the gaskets and how they
14 are -- and what they were made of, because that's
15 at the heart and soul of the claim of the
16 plaintiff. And Armstrong, if they've been in
17 litigation since the '90s certainly know that.

18 But this stonewall position that I can
19 get rid of all my files and my corporate
20 representative never has to look beyond the 800
21 documents that I've been producing for almost
22 20 years now in order to respond in this
23 litigation, is not going to pass the smell test
24 with me because that's not what 30(b)(6) says.

25 It says these corporate

1 representatives -- you get to pick who it is, but
2 the person you pick has got to be prepared enough
3 to discuss these matters.

4 When I say you, I'm not talking about
5 Mark Wall. I'm talking about your client,
6 Mr. Wall. And you can't do anything to change the
7 way they prepared this particular witness. But you
8 can communicate to them what I'm going to rule
9 about what they have to do.

10 MR. WALL: Your Honor, and finally, I'm
11 aware of no case law or cases or law or rules under
12 Rule 37 which allows the Court to change underlying
13 facts in the case. These are undisputed facts,
14 that the steam traps were not insulated. They were
15 not insulated and no one tried to get them
16 insulated and no one wanted them insulated.

17 So, Your Honor, you are attempting, if
18 you use these sanctions, to change the law in the
19 underlying case and I suggest that --

20 THE COURT: I understand your argument,
21 but what I'm going to do is sanction Armstrong in
22 certain regards. That's not changing the facts of
23 the case. That is punishing them for their failure
24 to obey the rules of this Court with respect to
25 discovery.

1 And that is something upon which the
2 cases all lead you. And we've got some in South
3 Carolina as well as around the country that talk
4 about what can be done by way of sanction.

5 The most serious sanction is to strike
6 your answer and you can immediately appeal that,
7 but short of that, there are other sanctions in
8 discovery that can be done, and one of them is to
9 stipulate facts in the absence of the corporate
10 representative making himself or herself familiar
11 with the facts that are being asked for.

12 And that's what I'm talking about. I'm
13 not talking about changing any facts. I'm talking
14 about stipulating to facts as a sanction for not
15 having the corporate representative prepared to
16 answer the question.

17 MR. WALL: It's our position to protect
18 the record.

19 THE COURT: Yes, sir.

20 MR. WALL: And that you do not have the
21 authority to do that.

22 And finally, Your Honor, we would
23 require a written order as pursuant to the rules as
24 your findings in the case.

25 THE COURT: I will make the orders on

1 the record here and you can get that by way of
2 ordering a typed copy of the transcript. I haven't
3 issued my order yet.

4 MR. WALL: I understand, but I'm just
5 requesting a written order.

6 THE COURT: Yes, what is it you cite
7 the proposition that I must have this order --

8 MR. WALL: Rule 37.

9 THE COURT: Rule 37?

10 MR. WALL: Yes, ma'am.

11 THE COURT: I'll take a look at it.

12 MR. WALL: Rule 37.

13 THE COURT: All right. Ms. McVey, your
14 reply?

15 MR. BRANHAM: If it's okay with you,
16 Judge, I'll take Ms. McVay's position.

17 THE COURT: All right. Mr. Branham.

18 MR. BRANHAM: Judge, I will be super
19 brief. There was a number of representations that
20 we didn't ask for stuff, particularly the Armstrong
21 TRAP magazine and the video.

22 Any and all documents -- this is No. 7
23 from our document request for depositions: Any and
24 all documents relating to any and all sales
25 literature, including but not limited to sales

1 literature, promotional literature, regarding
2 asbestos-containing products or equipment
3 manufactured, marketed, promoted, or sold by the
4 defendant. That's No. 7.

5 And then No. 5 is for any
6 asbestos-containing product you manufactured or
7 sold for any purposes at issue between 1967 and
8 1999. Produce all product manuals, including but
9 not limited to any owner's manual, any shop manual,
10 or any other repair manual or maintenance manual,
11 or other literature produced or recommended by you
12 and associated with such asbestos-containing
13 products.

14 Sorry, I'm going really fast.

15 THE COURT REPORTER: You really were.

16 THE COURT: Yeah, don't go that fast.

17 MR. BRANHAM: Sorry. I will do better.

18 So this is the Armstrong TRAP magazine
19 that I have. It's advertising their traps. I
20 think it's probably promotional literature, which
21 is exactly what was requested in here.

22 And then counsel indicated that nobody
23 anyplace ever talked about insulating an Armstrong
24 trap. Armstrong did. See, it says right here:
25 Does it pay to insulate steam traps? And on here

1 are pictured insulated steam traps from Armstrong.

2 THE COURT: Yeah, I saw that in an
3 attachment.

4 MR. BRANHAM: It talks about when to
5 insulate. It talks about insulation thickness. A
6 survey published recently by the American Society
7 of Heating and Ventilation Engineers indicates that
8 a thickness of insulation ordinarily used indoors
9 for all temperatures not exceeding steam at this
10 certain particular pressure. Right?

11 It's in their own magazine. So the
12 idea that these were never indicated by anybody to
13 be insulated flies in the face of their own
14 particular literature.

15 Mr. Scare says he has seen the video.
16 Armstrong says that -- he says, we made lots of
17 videos. Not just one, lots of videos. And we
18 asked him, where is it?

19 I don't know. I haven't looked.

20 So I will tell you that I am very --
21 the Court seems to be incredibly concerned by the
22 idea that the video he has seen now apparently no
23 longer exists. I just want to make sure that I'm
24 reserving our rights on that issue, if it no longer
25 exists, to seek spoliation sanctions, because I

1 think he said he saw it in a prior deposition.

2 And so if it now no longer exists,
3 that's well after they indicated in litigation.

4 And if that no longer exists, then I think we're
5 talking spoliation sanctions. So I have a great
6 deal of concern about that.

7 The last point I'll make, the corporate
8 representative testified that he didn't go talk to
9 the people that were doing the servicing. They had
10 a service group. He didn't talk to the people who
11 were out in the field to learn what they did.

12 It's not just about documents. It's
13 not just about what they have in a documentary
14 form. It's about all of the people at Armstrong
15 and what do those people know. What has he done to
16 go figure out what those people did? And there's
17 lots of way to gain that knowledge.

18 THE COURT: He contends that the local
19 representatives are out of business now.

20 MR. BRANHAM: Perhaps. I don't know
21 the answer. Right? I mean, I agree that that's
22 what was said in the deposition, but how does he
23 know that? Is there any record at Armstrong of who
24 the owner was? Did we ask the owner? Right? Do
25 you have the record of who the owner was so I can

1 go ask the owner?

2 I mean, there are a hundred different
3 ways to skin that particular cat. Right? Just
4 because somebody's gone, I mean, you know, Covil
5 technically doesn't exist, right? They're just in
6 the insurance business. But there's information on
7 those guys that's still out there that comes from a
8 lot of different places.

9 So the question is -- they have to do a
10 reasonable search, and it sure doesn't sound like
11 they did a reasonable search. And I think that one
12 of the reasonable things to do is figure out, you
13 know, do we have any information about the
14 distributors that would allow us, or allow the
15 plaintiffs, right -- they won't even give it to
16 me -- to go figure out who was employed there.

17 You know, I'll take on that burden, but
18 you have to at least look to figure out what you've
19 got.

20 THE COURT: I understand the argument
21 on that. One thing that is not going to --
22 Mr. Wall, was to talk about the mediation
23 sanctions. So I'm going to let you come back up on
24 that.

25 MR. WALL: Mr. Boger is going to talk

1 about that. He's going to talk to you about that.

2 MR. BOGER: Good afternoon, Your Honor.
3 Tommy Boger on behalf of Armstrong. I'm going to
4 respond to plaintiffs' motion for sanctions as to
5 the mediation in this matter. And by my count, the
6 points that were made by counsel earlier were, one,
7 that Armstrong had no one present with authority;
8 two, that counsel attending the mediation, meaning
9 me, was not familiar with the case; and, three,
10 there was a phone call between the mediator and
11 national counsel in the afternoon.

12 My understanding is that Your Honor has
13 submitted -- or granted their motion via e-mail on
14 the day of mediation that says, they need somebody,
15 a representative, by phone available to attend the
16 mediation by the afternoon. If that's not
17 occurred, that the sanctions motion would be
18 granted or further sanctions would be looked into
19 by the Court.

20 In response to those -- plaintiffs'
21 points, we did have someone present with authority.

22 THE COURT: Who was that?

23 MR. BOGER: We had Patrick Foley, who
24 is the national counsel representative for
25 Armstrong, and who is in touch with the three

1 representatives -- insurance representatives, that
2 he is essentially the essential person that they
3 funneled offers in response to demands.

4 THE COURT: All right. Patrick Foley
5 is an Armstrong employee?

6 MR. BOGER: He is their national
7 counsel.

8 THE COURT: He is national counsel.
9 And was he present in Charleston, South Carolina?

10 MR. BOGER: He was not present in
11 Charleston, South Carolina.

12 THE COURT: All right. Well, at the
13 beginning of this mediation at 9:00 when it began,
14 who was present from Armstrong?

15 MR. BOGER: I was.

16 THE COURT: All right, sir. Did you --

17 MR. BOGER: Mr. Foley was -- I'm sorry.

18 THE COURT: Did you have any authority
19 to negotiate and settle this matter?

20 MR. BOGER: I did, in conjunction with
21 Mr. Foley.

22 THE COURT: I'm asking whether you
23 yourself had any authority to negotiate or settle
24 this matter?

25 MR. BOGER: Not without consultation

1 with Mr. Foley.

2 THE COURT: All right. And when did
3 you first contact Mr. Foley?

4 MR. BOGER: Upon receiving the demand
5 from Mr. Wills, and then also that was after a
6 discussion with plaintiffs' counsel, Ms. Dean, as
7 well.

8 THE COURT: Well, there obviously was
9 some interaction between you and Mr. Wills that
10 gave rise to his concern that there was nobody
11 there for Armstrong that had authority. Am I right
12 about that?

13 MR. BOGER: I think the way I would put
14 it is that Mr. Wills and I discussed the demands
15 and he asked what was the response was. And I told
16 him that I was going to have to discuss the demands
17 with Mr. Foley and then provide him an offer to the
18 extent there would be one. So --

19 THE COURT: You did not have any
20 ability to formulate an offer or respond to any
21 request for an offer by the mediator as the
22 mediation began; is that correct?

23 MR. BOGER: I'm sorry, say that again.

24 THE COURT: You did not have any
25 authority to formulate an offer yourself and

1 communicate it to the mediator as this mediation
2 began; is that correct?

3 MR. BOGER: No, that's correct.

4 THE COURT: All right. Now, the
5 mediation rules require that someone be present at
6 the mediation that has the authority to make an
7 offer; does it not?

8 MR. BOGER: It does.

9 THE COURT: And Armstrong did not
10 comply with that with anybody that was present at
11 the mediation as it began, correct?

12 MR. BOGER: Yes, Your Honor, I would
13 have to agree with your phrasing on that.

14 THE COURT: And then as the mediation
15 continued -- all right. Was there some question
16 from to begin with about Mr. Foley being on
17 vacation or not being available to discuss the
18 matter?

19 MR. BOGER: We had contact with
20 Mr. Foley while at the mediation.

21 THE COURT: I understand that contact
22 was made very late in the mediation after Mr. Wills
23 expressed a concern that there was no one who had
24 any authority for Armstrong as he began the
25 negotiation process.

1 And you, of course, concede that there
2 was no one present from Armstrong that had that
3 authority present in the mediation as the rules
4 require.

5 So when that first occurred, as I
6 understand it, there was some question about
7 whether Mr. Foley could be contacted; am I right
8 about that?

9 MR. BOGER: I was able to contact Mr.
10 Foley after receiving the demand from the plaintiff
11 to discuss a response.

12 THE COURT: When were you able to
13 contact him?

14 MR. BOGER: In -- prior to lunch.

15 THE COURT: Did you communicate that
16 you had been in touch with Mr. Foley with either
17 Mr. Wills or the plaintiffs' representative?

18 MR. BOGER: I did. I communicated to
19 Mr. Wills prior to lunch that we -- that Armstrong
20 saw the demand as being accepted and that they did
21 not want to respond to it.

22 And Mr. Wills instructed that -- he
23 encourage me to get back on the phone and talk to
24 Mr. Foley and encourage some response be made to
25 the demand.

1 After that, I instructed -- after
2 talking to Mr. Foley a second time -- that the
3 offer was that Armstrong would waive fees and
4 costs, assuming a nonsuit.

5 And Mr. Wills insisted that we all get
6 on the phone, which by this point it's 2:30 in the
7 afternoon, to discuss Armstrong's position and --
8 which we did. Mr. Wills, Mr. Foley, and I were on
9 the phone and we talked about the discrepancy in
10 this agreement between plaintiffs and Armstrong and
11 what the value of the case was.

12 And we talked about what offer could be
13 made, but, ultimately, at the end of the day, that
14 was the offer from Armstrong.

15 THE COURT: I see. All right. Is
16 there anything you want to offer about this?

17 MR. BOGER: The only thing I wanted to
18 point out is that it's my understanding that the
19 parties in these cases for years have proceeded
20 with attendance by phone. And we submitted an
21 affidavit, Mr. Wall, on that note.

22 And there was not anything, to my
23 knowledge, that was communicated from the
24 plaintiffs in this case that they were demanding
25 Mr. Foley or another representative be physically

1 present. And so I would add that.

2 I think reasonably phone attendance in
3 this matter was what the course of the parties have
4 done over the years in this litigation.

5 And then, two, I think ultimately
6 because, you know, yes, I'm not the lead counsel on
7 this case, and so if I take a step back and look at
8 it, Your Honor, reasonably, they made a demand that
9 was well beyond what my understanding of where the
10 value of these cases are in terms of Armstrong
11 International.

12 And so, you know, I think reasonably
13 Armstrong's position was it's a non-offer, it's a
14 nonstarter.

15 THE COURT: Let me ask you this: How
16 familiar were you with this case as you entered the
17 mediation at 9:00 in the morning?

18 MR. BOGER: Familiar enough. I read
19 through depositions, pleadings, things of that
20 nature to get an understanding of what the basic
21 facts were, what Armstrong's position was. I've
22 worked with Mr. Wall on prior Armstrong cases, so I
23 have a general understanding.

24 THE COURT: But had you worked on this
25 case prior to the mediation?

1 MR. BOGER: I would assist with some of
2 those pleadings that we have done and sat in on
3 some depositions.

4 THE COURT: In this case?

5 MR. BOGER: Yes, ma'am.

6 THE COURT: All right, sir. Very good.
7 All right. Thank you, sir.

8 MR. BOGER: Thank you, Your Honor.

9 THE COURT: Any reply, Mr. Branham, or,
10 Ms. McVey?

11 MR. BRANHAM: We communicated a demand
12 far in advance of the mediation. Best I can tell
13 you is what I understand from Mr. Wills. And he
14 said if we needed to make a phone call, that's what
15 we would. It was our understanding that no one
16 with any authority was there.

17 Now, if that's because they value the
18 case at 0 or whatever the number is, then I guess
19 so be it, but I don't think that's what the rules
20 require.

21 On the issue of attendance by phone, no
22 question, people often agree that people can attend
23 by phone. It happens, right? We're all busy and
24 we want to extend courtesies, but one of the things
25 that I think has to happen in order for that to

1 happen is for somebody to ask if they can attend by
2 phone. There has to be an agreement to that. We
3 were certainly never asked about that.

4 You know, I don't know how the Court
5 feels about that, but it certainly has gone on in
6 litigation in the past, but to assume it -- to
7 assume in particular, candidly, in light of the
8 demand, we were taking the case very seriously and
9 to not have anybody available -- I disagree on the
10 time line.

11 Whether it was 12 noon when they talked
12 to the national counsel or 3:00 after Your Honor
13 sent the response to our motion, you know, we can
14 quibble about the time, but at the end of the day,
15 you know, Mr. Boger said that the offer was, we'll
16 make the call. The case is frivolous.

17 And certainly they are entitled to look
18 at it that way. I think a jury probably won't, but
19 that's not what this is really about. This is
20 about a good faith attempt to resolve differences
21 pursuant to court order so we don't waste the
22 Court's time.

23 And we were successful with some of the
24 defendants and getting them resolved, and we made
25 significant process with others getting them

1 resolved. And the reason is because those people
2 showed up with authority. I didn't have to go get
3 somebody on the phone. And we were able to resolve
4 cases this morning because of the hard work done by
5 lawyers at that mediation on both sides and the
6 mediator.

7 And, candidly, you know, I think
8 Armstrong didn't take this very seriously, and I
9 think that's my concern at the end of the day. I
10 had lots of people saying we're not paying
11 anything. That's everybody's right to have a jury.

12 But I think at the end of the day, what
13 has to be sacrosanct is that the clients understand
14 that this has to be taken seriously.

15 I think it's really evident -- and it's
16 not just from one side. It's not just me with a
17 bias. I want to get the case resolved, if I can,
18 but it's the mediator here who indicated very
19 clearly to us that no one with any authority was
20 available.

21 And with all due respect, nobody who
22 knew the case was around to talk about the case.

23 THE COURT: I understand your position.
24 All right.

25 THE CLERK: I need to show you

1 something.

2 THE COURT: Yes.

3 MR. BRANHAM: Judge, one last thing
4 before I leave the podium. To the extent that the
5 Court wishes to enter a draft, an order on this
6 particular issue and believe it's appropriate --

7 THE COURT: I don't -- yeah. I
8 understand that. I'm going to get to the -- I'm
9 going to get to the issue of written orders in this
10 thing at the end, so I understand. But what I'm
11 trying to do is formulate what I'm going to do now.

12 Let me simply recite this into the
13 record by way of time line from my own records
14 about this matter.

15 E-mail from Ms. McVey to me on Friday,
16 June 29, 2:39, p.m., copied to my law clerk and
17 Tommy Boger, Mr. Wall, Mr. B-U-H-A, Mr. Branham,
18 Ms. Dean. Subject: Whitmire mediation motion for
19 sanctions. Please -- Chief Justice Toal, please
20 find attached a motion for sanctions that we just
21 filed. We are currently in the Whitmire mediation
22 in Charleston. Armstrong has sent a lawyer that
23 does not have any authority to settle the case.

24 Further, Armstrong did not bring an
25 adjustor or representative to the mediation with

1 any authority to settle the case.

2 Finally, although we have asked,
3 Armstrong does not have anyone with authority to
4 settle the case available by phone. Therefore, we
5 would request the Court to order Armstrong to make
6 available immediately someone with authority to
7 settle the case since we are currently in mediation
8 and the immediate consideration you would give to
9 this issue would be appreciated.

10 By copy of this e-mail, I am notifying
11 counsel for Armstrong my request for the Court.

12 And then there is an attachment motion
13 for sanctions that was filed with the Spartanburg
14 Clerk of Court.

15 Then there is June 29, 2018, at
16 3:29 p.m., about an hour later, from Mark Wall to
17 Thiele McVey, Tommy Boger, Jessica Dean, Mark Buha,
18 Trey Branham, my law clerk, and Ms. Castle.

19 Subject: Whitmire mediation motion for sanctions.
20 That is not proper service. Please properly serve
21 this motion in the proper notice. Mark Wall.

22 June 29, 2018, at 3:25. Mark, you were
23 copied on my original -- well, first, it's, Mark,
24 you were copied on my original email with Chief
25 Justice Toal that also had a motion attached. I am

1 forwarding that e-mail to you.

2 And then Mr. Wall responded three
3 minutes later: That is not proper service. Please
4 service the motion with proper notice.

5 And then: Mark, the motion was served
6 by electronic filing, which is proper service.
7 Best, Theile.

8 Mark Wall, 3:35, to the same
9 individuals. And the time to respond, question
10 mark.

11 And that's all that Mr. Wall says in
12 that one.

13 And then from my law clerk at 3:43:
14 I'm not sure if -- to all the parties we've been
15 talking about. I'm not sure if the e-mail below is
16 in response to me or Ms. McVey; however, if you
17 have specific objections to providing an attorney
18 with authority to settle the case by the end of
19 mediation today, it may be best to send a brief
20 response over as soon as possible.

21 If you are speaking to the proposed
22 sanctions of striking Armstrong's answer, I will
23 talk to Chief Justice Toal about a response time
24 and let you know as soon possible. We will not
25 file an order until that is fully addressed.

1 Please let me know if you have any
2 further questions or concerns. Signed by my law
3 clerk.

4 And then I have something that says at
5 12:46 p.m., Wall to Foley, Morgan Pendleton, see
6 below. But see below is simply all the material
7 I've just read to you.

8 Now -- so in my records, that's what I
9 have that -- my concluding information is about
10 quarter to 4. And I assume from this that the --
11 okay, here's the last one. At 3:48, I have
12 Patrick Foley to Mark Wall, Morgan Templeton. And
13 this was forwarded to me by Mark Wall with the, see
14 below from BCC Mark Wall. That's all his material
15 to me said.

16 Please let them know I have talked to
17 the mediator and was available all day by cell
18 phone and am in contact with the client and
19 carrier. As national counsel for this client, I am
20 the selected voice for the client and various
21 carriers to discuss settlement. Thus, we are
22 participating telephonically.

23 With regard to the deposition, we are
24 willing to make Rex available if need be.

25 I don't know who that is.

1 All right. That's what my records
2 disclose. So as of about quarter of 4 is when
3 Foley advises that he's available. That's what my
4 material shows.

5 MR. WALL: Your Honor, may I --
6 regarding your time line, I spoke to Mr. -- I was
7 at the Fourth Circuit judicial conference.

8 THE COURT: Sir?

9 MR. WALL: I was at the Fourth Circuit
10 judicial conference that day. We -- that's one of
11 the reasons Mr. Boger was there.

12 THE COURT: Yes.

13 MR. WALL: I called and talked to
14 Mr. Foley at about noon when they started talking
15 about needing to talk to people. And then I talked
16 to Tommy, and this is Tommy -- Foley. And then
17 Tommy gave you what happened when he took over.

18 THE COURT: Okay.

19 MR. WALL: And that's the time line.
20 Your time line is correct for your involvement, but
21 there was another set involved.

22 THE COURT: All right. Well, I
23 understand what your position is now.

24 The rule doesn't require that you
25 settle in mediation, but it does require that you

1 have people with authority. It's very clear at the
2 beginning of this mediation that Mr. Boger and
3 Mr. Wall and tried to tell me what happened from
4 their point of view just as the plaintiffs on
5 account of both people are telling me what they
6 think happened.

7 Again, this isn't something I lay upon
8 the lawyers. You just represent the client you
9 have and you do the very best you can. But I am
10 concerned about Armstrong's conduct. I don't think
11 their conduct is forthcoming in the 36(b)(6) matter
12 and I don't think it was -- or it met the
13 requirements of the rule in participation of this
14 mediation.

15 And it's clear to me that at the
16 beginning of the day when the Whitmire family was
17 there, when counsel for everybody else involved in
18 this matter was there and capable of participating
19 in mediation in good faith, Armstrong did not make
20 itself available to its own lawyer so that the
21 lawyer could in good faith actively participate in
22 this mediation as we anticipate.

23 That didn't occur until much later on
24 in the day after I became involved in this matter.
25 And that's not satisfactory with me. So that

1 conduct is sanctionable and will be sanctioned.
2 And the sanction will be -- just as the sanction
3 for the 30(b)(6).

4 The sanction will be that the requested
5 sanctions on page 4 and 5 of the plaintiffs' motion
6 to discovery sanctions will be applied and the
7 stipulations that are requested there will be made
8 and read to the jury.

9 In addition to that, my order will
10 direct that Armstrong provide the video that their
11 own corporate representative, Mr. Scare, indicates
12 he has seen to counsel by Friday this week or
13 provide me with a detailed discussion of where all
14 they have looked and searched to try to find this
15 matter.

16 If they cannot provide me the video,
17 then they need to provide a witness who has seen
18 the video and who can discuss what was on the video
19 in the trial of this case.

20 I will direct further that Mr. Scare
21 provide all copies of the Armstrong service trap
22 guides that he has in his office. Apparently they
23 are not sequential. They are not complete, but he
24 does have some. And anything that he does have,
25 and he has some things because he said that in his

1 deposition, are to be provided immediately to
2 counsel for the plaintiff.

3 MR. WALL: Your Honor, just to correct
4 the record, he does not have trap guides in his
5 office. What he has and what he's talked about was
6 the magazines. He has a couple Armstrong trap
7 magazines.

8 THE COURT: Very good. If that's what
9 he has, that's what he needs to provide.

10 MR. WALL: That's No. 10.

11 THE COURT: All right. Very good.

12 All right. Now, we are at 1:30. We
13 still have a long way to go. We have Aurora Pumps
14 sanctions and then we have all of these motions.
15 I'm going to try to make short work with a lot of
16 the motions and these sanctions. I think the
17 sanctions deserve a full discussion and I'm trying
18 to do that as best as one person can, but we will
19 take a break now.

20 Ms. McVey?

21 MS. MCVEY: Your Honor, I talked to
22 Mr. Elliott about this, but one thing might be to
23 shorten the day if we get to it, if we maybe defer
24 the motions in limine.

25 THE COURT: You all know the motions in

1 limine very well and I would hope and pray that you
2 could resolve those. You've done a good job. It
3 used to be I'd have about 30 of them. Now you have
4 them down to a much more reasonable number.

5 MS. MCVEY: I think we can either work
6 them out or reserve them until right before we need
7 them.

8 THE COURT: Right. And you all know
9 what I've ruled in the past on all of the things
10 and, you know, I would hope that you could work
11 them out in a way that's evenhanded and fair to
12 both sides.

13 MR. MERIWETHER: Your Honor, Robert
14 Meriwether for Aurora.

15 THE COURT: And I know if anybody can,
16 Mr. Meriwether can.

17 MR. MERIWETHER: I was going to say
18 that a number of the motions in limine from both
19 sides really only apply in certain evidentiary
20 situations. So to a large extent, we may be able
21 to agree that those would be raised, having
22 previously been briefed, at the moment that that
23 occurs in trial.

24 THE COURT: Well, I don't want to
25 interrupt the trial and send the jury out to do all

1 that. I mean, we can go down very quickly. If it
2 takes too much time, we won't do that,
3 Mr. Meriwether, but, you know, many of these
4 issues -- I mean, when we get down to issues, the
5 same old thing about wanting to put all the
6 defendants in front of a jury and fight the
7 facts of ^ -- the that Smith an amend juror or care
8 is V -- all of those kinds of things I have ruled
9 on a bunch of times.

10 So those things about which the
11 universe has known, I think you can reserve your
12 objections and reserve your positions because one
13 of these days the South Carolina Supreme Court will
14 visit some of these rulings. And if I'm wrong, I
15 think I certainly could be, then they will correct
16 that and that would be fine.

17 But at the present time, you all know
18 how I've tried these cases; and, therefore, it
19 seems to me that you could use that as a template
20 because I'm probably not going to change my mind on
21 those kind of routine things.

22 You all know how I don't do voir dire,
23 you know that I don't do jury questionnaires, but I
24 do ask questions and I think folks know what you
25 need to know about a jury before you try the case.

1 All of those kind of things I think we could very
2 safely just check right through and get done with.

3 You all know that I'm not going to let
4 the golden rule be violated or have those kind of
5 arguments made in front of a jury.

6 And so there are a lot of these things
7 that I think can be done. I'm not going to let the
8 plaintiff have a jury sit in the place of the
9 defendant. I'm not going to have any discussion
10 about how they left asbestos everyplace. Everybody
11 would agree with me on that, I think.

12 You all know, both sides, what I've
13 done with these cases in the past, so we could
14 preserve the positions very quickly and get these
15 things done and move on.

16 All right. It's 1:30. All right.
17 Let's be back here at -- do you think we could do
18 it in 45 minutes? Let's come back here at 2:15.

19 (A luncheon recess transpired.)

20 THE COURT: We are back on the record.

21 I believe we are to the motion with
22 sanctions regarding Aurora Pump. And before we do
23 that, let me just say this. It has nothing to do
24 with you, Mr. Meriwether.

25 Mr. Wall.

1 MR. WALL: Yes, sir -- ma'am.

2 THE COURT: I have looked at Rule 37
3 and I did not see a mandate for a separate written
4 order by myself with respect to these matters. I
5 will tell you what my normal practice is, which is
6 to rule from the bench and then get the prevailing
7 party to get an order for me and submit it to me
8 simultaneously as you send a copy to the opposing
9 side.

10 I don't want to ordinarily hold up for
11 comments, or when comments come in I consider them
12 before I look at your order. I can alter it as I
13 see fit and I enter it.

14 But I regard the requirement of an
15 order, even a written order, to be met by the
16 dictation of an order, of a recitation of the order
17 into the record. And for -- so that's my ruling on
18 your request.

19 MR. WALL: I only add for the record --
20 I'm not arguing with the Court.

21 THE COURT: Sure.

22 MR. WALL: -- that the Rule 37 is
23 failure to comply with an order. And it says you
24 can strike, fail, or obey any order as permitted
25 under this rule provided there's another order.

1 And it says, actions may make such orders in regard
2 to failures.

3 THE COURT: Right.

4 MR. WALL: And then ...

5 THE COURT: Yeah. And orders is the
6 operative word. Orders can be made on the record
7 by recitation rather than by separate written
8 order.

9 MR. WALL: And, Your Honor, there is
10 another rule that says that all oral orders need to
11 be reduced to writing.

12 THE COURT: Well, they are going to be
13 reduced to writing because the court reporter takes
14 them down and that is sufficient and has been ruled
15 such in cases with a lot more weight behind them
16 than this, including several criminal cases and
17 large civil disputes in which the orders were
18 simply recited by the judge into the record, and
19 the Supreme Court deemed that to be the written
20 order sufficient to satisfy their clients.

21 So I'm telling you, you have your
22 position on the record and I've made the ruling
23 that I've made in that regard.

24 MR. WALL: Thank you, Your Honor.

25 THE COURT: Now, Ms. McVey, Aurora --

1 or, Mr. --

2 MR. MERIWETHER: No, it is Thiele's
3 motion. I just was going to say we had a big
4 notebook that had both her stuff and my stuff in
5 it, if that would help.

6 THE COURT: Yes, it would help. What
7 I've got is plaintiffs' motion for discovery
8 sanctions against Aurora Pumps and then Aurora Pump
9 Company's response and opposition to plaintiffs'
10 motion. This thing right here.

11 MR. M: It's the same thing.

12 THE COURT: So I've got it.

13 MR. MERIWETHER: Lovely. Thank you.
14 Pardon me for interrupting the flow.

15 THE COURT: No. No, not a bit.

16 All right. Then, Ms. McVey.

17 MS. MCVEY: Good morning, Your Honor.
18 This issue is not a matter of a 30(b)(6) witness
19 not being prepared, but really it's an issue of
20 Aurora not producing documents that were requested
21 in the 30(b)(6), including documents that they
22 maintain are not electronically kept, et cetera, et
23 cetera.

24 And if you'll allow me just a minute,
25 let me give you a little background because you

1 heard this very similar motion in the Howell case.
2 In the Howell case, we had a motion to compel and
3 you initially said, you know what, Aurora? You
4 have to do something with these documents. You
5 have to search them. You have to produce documents
6 to the plaintiff.

7 And then Aurora came back and gave an
8 affidavit of Mr. Franklin. And in that affidavit,
9 he said that the Aurora records comprised of
10 approximately 3 million pages of pump records of
11 sales, which approximately 1 million pages are on
12 reels of microfilm and roughly 2 million are in
13 paper format.

14 And what they said is, it's impossible
15 for us -- it would be too hard for us to
16 electronically scan these, OCR them, that we can't
17 search by job site. We can only search by serial
18 number.

19 And so as a result of that affidavit,
20 you granted their motion to reconsider and you sent
21 an order saying, no, that's too hard. You don't
22 have to do it in this case.

23 And so in this case, we sent a
24 deposition request, document request, just like we
25 did before. And Aurora said, Justice Toal already

1 ruled on this.

2 And we said, we understand that's your
3 position. Our position is we get to investigate
4 the underlying facts of this affidavit. And we
5 believe these documents are still relevant and they
6 still should be produced.

7 And so what we found out when we talked
8 to the 30(b)(6) witness is that only records prior
9 to 1987 are in this microfilm and paper format.
10 Records -- what happened, in 2009, Aurora went back
11 and electrically scanned, or whatever they did,
12 records from 1987 forward.

13 Now, why did they pick 1987 to 2009? I
14 don't know the answer to that question and Aurora
15 may have an answer, but I will tell you that Aurora
16 stopped selling asbestos-containing pumps in 1986.

17 What I'm telling you, the Court, is if
18 Aurora in 2009 went back and scanned records from
19 1987 forward, they had capability of doing that
20 with the older records.

21 We asked for that to be done in Howell,
22 and you didn't -- based on that affidavit, you said
23 no. Now, the affidavit doesn't address whether or
24 not they scanned some records and not others. It
25 just says that there are 3 million records that the

1 plaintiff wants.

2 We would argue, Your Honor, that we --
3 that Aurora should be ordered, because they can, to
4 electronically scan and OCR these records in a PDF
5 format so that we can go and search them.

6 We also offered to come to Aurora and
7 let us look at your 3 million pages of records.
8 Let us dig for you, because they say it's too
9 onerous on them.

10 Now, we have gotten very technical in
11 our briefs, which I know you've read, about how
12 many pages we're going to be talking about in this
13 case. I don't want to get into the weeds with that
14 with you, but I will tell you we believe it's less
15 than 40,000 pages of records that they would have
16 to review for this case in general.

17 But, Your Honor, they should produce
18 these records, because what it prevents us from
19 doing is knowing whether or not they're at the
20 South Carolina Piedmont facility and whether or not
21 they've got records showing them at DuPont. And we
22 think that's prejudicial.

23 They are allowed to not actively review
24 their documents. And as a result, we can't prove
25 that they were at Piedmont, South Carolina. That's

1 the first thing.

2 There are other issues of what they
3 didn't produce despite being asked, and those are
4 photographs from 1955 to 1985. These are
5 photographs of pumps, Aurora Pumps, in the field.

6 And what we want to do with those
7 photographs are, what do the pumps look like? Are
8 they insulated? What are they connected to? That
9 would help prove to us what Aurora knew was going
10 on with their pumps in that time period.

11 We also asked for other sales
12 bulletins, promotional materials, building
13 materials, and engineering docs in addition to the
14 sales records.

15 So that's what this motion is primarily
16 about, is the failure to produce those records they
17 say they can't produce because it's too onerous and
18 the other documents that I have requested.

19 I'm happy to go into what we've
20 requested here in the sanctions or you can hear
21 from Mr. Meriwether.

22 THE COURT: What you requested in
23 sanctions is --

24 MS. MCVEY: It's on page 12, 13, and
25 14.

1 THE COURT: Okay. You have six
2 requests for deemed evidence. Why don't you just
3 outline them briefly.

4 MS. MCVEY: Your Honor, the first one
5 would be that plaintiff would request that it be
6 deemed that numerous Aurora pumps were present at
7 both sites which the plaintiff requested Aurora
8 search, for the Piedmont plant and the die casting
9 facility in Pickens, South Carolina.

10 The second one would be that plaintiff
11 would respectfully request that it be deemed that
12 Aurora pumps to the DuPont plant were distributed
13 through its distributor -- distributors Mechanical
14 Equipment Company in Greenville, South Carolina
15 offices.

16 And that would address Aurora's failure
17 to contact the distributor and attempt to ascertain
18 how far back their own sales records go. And
19 that's something we didn't discuss.

20 The third one would be that plaintiff
21 respectfully request that it be deemed that the
22 Aurora pumps at both sites utilize
23 asbestos-containing internal gaskets and
24 asbestos-containing packing and specify the
25 replacement with asbestos-containing gasket and

1 packing. And that would address Aurora's failure
2 to search for the sales records.

3 The fourth requested sanction would be
4 that plaintiff respectfully requests that it be
5 deemed that Aurora pumps at two sites at issue were
6 insulated, and that Aurora knew they were insulated
7 at the time.

8 And that's because we believe that the
9 photographs that they've been produced would have
10 shown Aurora pumps being insulated.

11 No. 5, Plaintiff would respectfully
12 request that Aurora be put on notice that for
13 future cases Aurora must convert the microfiche
14 sales records to PDFs and OCR to a searchable
15 format since we know that Aurora has already done
16 that with records dated after 1987.

17 THE COURT: All right. Is that it?

18 MS. MCVEY: Yeah, I'm sorry.

19 THE COURT: Mr. Meriwether.

20 MR. MERIWETHER: Thank you, Your Honor.

21 Madame Court Reporter, Robert
22 Meriwether for the Aurora defense.

23 Your Honor, this is in many ways
24 similar to, but vastly different from the issue
25 that you have already addressed and issued a very

1 full and fair order on in the Howell case.

2 It is clear that Aurora cannot be and
3 should not be sanctioned for keeping its records
4 the way it does in the ordinary course of business.

5 What we have a problem with now -- and,
6 oh, by the way, it's also clear from Ms. McVey's
7 pleadings and her comments to the Court a moment
8 ago, that this is -- they're not complaining about
9 what Aurora's corporate representative did or said.
10 They're just talking about records.

11 Unfortunately, they are vastly mistaken
12 about much of what they assume underlies the
13 discussions that they had with Leroy Franklin.
14 They misunderstand the essence of how these records
15 are kept even to this day.

16 Here's -- let's back up for a moment
17 because I do believe the context is critical here,
18 particularly since plaintiffs wish to tie this
19 motion to the jurisdiction motion.

20 When we started off in this case, we
21 got a complaint. It said that he was exposed to
22 pumps and valves in various places and stuff like
23 that. Fine. There's not a great deal of detail in
24 the complaint, so we wait for the answers to
25 interrogatories.

1 The answers to interrogatories were
2 much more valuable. They said he was at the DuPont
3 film plant in Brevard, North Carolina from date X
4 to date Y, which I believe is '68 to -- I think, it
5 was '90 something. But anyway, it's a chunk of
6 time and it's defined in the answers to
7 interrogatories.

8 The answers to interrogatories said
9 that for some period in the late '60s he was at an
10 unknown die-casting facility or industrial facility
11 somewhere in Pickens, South Carolina. We never
12 knew the name of the location. I actually found it
13 out much, much later in the case because plaintiff
14 said, oh, we still want you to look for Piedmont
15 die casting.

16 And I said what the heck is Piedmont
17 die casting. Oh, that's that place in Pickens that
18 you didn't know the name of. Yeah, okay.

19 So things evolved. Meanwhile,
20 plaintiffs are looking for co-workers because
21 Mr. Whitmire can't testify about what he did
22 because he has, unfortunately, passed on.

23 So plaintiffs get co-workers. They
24 look for folks that can talk about what he did and
25 what he was assigned to do and what he was around.

1 They put up co-worker after co-worker. They all
2 have to do with DuPont.

3 Nothing is down in Pickens. So we're
4 wondering what the situation is and was there ever
5 any pumps or valves actually at the Pickens
6 facility.

7 The last fact witness that was put up
8 that had anything to say about this was
9 Mrs. Whitmire herself who said, you know, I don't
10 really know a bunch about that. He was there for a
11 month after the Army and he was pouring lead into
12 molds.

13 I don't see any pumps. I don't see any
14 valves. I don't see any anything. I don't know
15 what the facility did other than, I guess, die
16 casting.

17 I mean, I imagine it's much like when I
18 was little boy; we used to make lead soldiers, you
19 know, and we poured them in molds and you'd get the
20 little soldiers out. But I'm sure it was a little
21 bit more spiffy than that.

22 But we don't have any indication that
23 he was around a pump, or even that a pump existed
24 in there, other than the allegations in the
25 complaint. We certainly don't know there is any

1 Aurora pump there.

2 So as we go forward, we begin to
3 discover that this is all about DuPont in Brevard,
4 North Carolina, that they don't even have a witness
5 that would put him around a pump or a pump at the
6 place.

7 So even if it were determined that
8 Aurora had stocked pumps in the front office of the
9 Piedmont die-casting facility, we have no
10 indication whatsoever that he was ever around them.
11 I don't know --

12 THE COURT: Mr. Meriwether.

13 MR. MERIWETHER: Yes, sir -- yes,
14 ma'am.

15 THE COURT: This is not the time when
16 we are going to litigate that.

17 MR. MERIWETHER: Oh, I understand that,
18 Your Honor.

19 THE COURT: All right. What we're
20 about now is response to discovery.

21 MR. MERIWETHER: I completely agree,
22 and I apologize if I let my mouth run on with me.
23 I was trying to give a little context so that when
24 we can get to the point in their request for
25 production that are associated with our 30(b)(6)

1 witness, we get to some confusion about documents
2 that might relate to this Piedmont die casting. So
3 I needed you to understand kind of how this played
4 out.

5 I understand that. So please pardon
6 me. I tend to talk for a long time.

7 THE COURT: I understand that.
8 Essentially, it boils down to this: They say that,
9 first of all, you -- a very key date is 1986 and
10 1987, because you quit selling asbestos-containing
11 pumps in 1986. And voila, suddenly, 1987 forward,
12 these records have been automated in some way, but
13 before that, they were not automated.

14 They say that rather than what I relied
15 on in the Howell case, which was there were
16 millions of records, that there are only about
17 40,000 records that are really needed for the
18 discovery that they want to make.

19 MR. MERIWETHER: That is a very
20 critical point, Your Honor, and I appreciate your
21 bringing me back down to it.

22 The situation in which we find
23 ourselves is that based on, let's say, unfortunate
24 misunderstandings of Mr. Franklin's testimony,
25 which, frankly, could have been cleared up with a

1 follow-up question, but, nonetheless, based on
2 these unfortunate misinterpretations of his
3 testimony, they believe that the universe of
4 documents that needs to be searched and needs to be
5 converted is substantially smaller. It is not.

6 This is -- this is the -- the -- this
7 is the reality of what we have: We have about two
8 million pages of paper, which includes drawings,
9 schematics, engineering documents, the kind of
10 stuff that would relate to a run of pumps or a pump
11 style.

12 Then you have individual sales records
13 for individual pumps that are kept, some on paper
14 and some on microfiche.

15 What we discovered, literally, in the
16 course of investigation for this case for the first
17 time, is that some group within the -- some group
18 within the company that bought Aurora in the -- in
19 the early 2000s had -- so the distribution arm had
20 taken a chunk of records and then formed them into
21 PDFs.

22 That did not change the way that the
23 repair department and the records department
24 maintained, which is on microfilm. There's some --
25 there's some overlap between the terms microfiche

1 and microfilm in the pleadings. Just to be clear,
2 it's microfilm, the little rolls, not the
3 microfiche which looks like the cards. But that's
4 neither here nor there.

5 So we still have the millions of pages
6 on microfilm, the two million in paper form. The
7 paper form is, in some cases, kind of a fit with
8 the microfilm in the sense that you might have
9 engineering drawings or documents that relate to a
10 pump that would be reflected on the microfilm in
11 some cases.

12 But if you're looking for just sales
13 records, those were all microfilmed, except for, I
14 think, foreign sales records, which are irrelevant
15 here.

16 So what plaintiffs believe is -- or
17 what plaintiffs pointed to in the brief was that
18 somehow the fact that someone in the past had taken
19 some subset of records -- and this occurred
20 apparently in 2009 -- and they had -- the
21 distribution department apparently asked for a
22 chunk of records to be transformed into PDF format.

23 Those records, so far as we know, that
24 they selected in 1987 had nothing to do with input
25 from the legal department, had nothing to do with

1 input from the records department. It had nothing
2 to do with input from anybody other than the folks
3 who were manning the phones about pumps that were
4 in the distribution system.

5 So this situation now that we have, if
6 we relied on the previously OCR'd documents instead
7 of starting from scratch from the microfilm, they
8 would complain that we have no way of knowing
9 whether that was done as a complete package or just
10 selected ones.

11 THE COURT: Mr. Meriwether.

12 MR. MERIWETHER: Yes, Your Honor.

13 THE COURT: I was very sympathetic with
14 you on the Howell case because this motion to
15 compel came so late in the process. And I made
16 that clear in the ruling that I made, that it was
17 very late in the process for Aurora to do
18 differently.

19 This -- these requests for production
20 and these depositions of 30(b)(6) witnesses took
21 place some time ago at a time when Aurora was well
22 aware of what these folks wanted. And I am
23 concerned about the hide the ball.

24 Nothing has been done since that time
25 and Aurora is now in the midst of a lot of

1 litigation involved in these cases, some of which
2 is in front of me. And, you know, what is said by
3 way of bending over backwards to accommodate them
4 in Howell is something that I am very concerned
5 about in this case.

6 I'm not trying to lay blame. I'm just
7 talking to you personally.

8 MR. MERIWETHER: I understand.

9 THE COURT: And I realize that Aurora
10 is in a different situation in terms of having
11 purchased a company with ongoing business in this
12 disregard, but I don't feel like they were meeting
13 me halfway.

14 I think they just decided, hey, we've
15 got her to sign this big, broad order before, and
16 so she's never going to make us do anything other
17 than that. But this isn't responsive to reasonable
18 requests.

19 And here's what concerns me: There's a
20 way even with their serial number in front of it
21 and so forth on the records, from what I understand
22 from what a 30(b)(6) witness said, to make some
23 correlation at least to the distributor for which
24 these machines were sent.

25 And we know that the distributor was in

1 South Carolina. And certainly there would be some
2 way of getting him to it that way. They made no
3 effort to do that, and that bothers me.

4 MR. MERIWETHER: That is my mistake in
5 advancing the argument to Your Honor. Let me see
6 if I can help you out, because I think I'm the one
7 that dug the hole. Let me see if I can dig me out.
8 If I failed to give you the information in the
9 initial stages of this, I should have.

10 Following the Howell case, and as the
11 next Aurora case that they had came up, which is
12 Mr. Whitmire, they issued a 30(b)(6) notice with a
13 subpoena duces tecum along with it. And I had -- I
14 had as -- you have it in our brief. I had
15 extensive conversations with plaintiffs' counsel,
16 and I'm cutting to the chase.

17 I said, you know, Aurora wants to help
18 you out here. We can't search by serial, but we
19 can search by job site. What do you need? What
20 can we do to assist you?

21 They said, well, we don't have all of
22 those old depositions of Leroy Franklin from the
23 past.

24 I said, done. April 9th, over
25 700 pages of seven depositions of prior testimony

1 which were transmitted. Boom.

2 April 10th: On April 10th, we got the
3 DuPont documents that they had had since December.
4 And I was a little concerned about that, why it
5 took them five -- six months, however long it was,
6 to get them to us, but we immediately began
7 searching them. We searched all the DuPont
8 documents and the DuPont subpoena that they sent,
9 and you've got a copy.

10 THE COURT: Mr. Meriwether.
11 Mr. Meriwether. Mr. Meriwether, we've been at this
12 since 9:00 this morning and it's now ten minutes to
13 3, and we haven't discussed the motions for
14 sanctions yet.

15 Now, I have to have some closure on
16 this and get to these motions in limine and these
17 motions for summary judgment.

18 I don't feel like I am getting -- every
19 time we get to the point of asking about how we can
20 get more than what has been dribbled by Aurora, we
21 go back to what they have done in discovery and so
22 forth. That's not what we are on right now.

23 My bottom line, my very simple problem
24 is this: I'm either going to grant some sanctions
25 motions here or I'm going to find out -- get to the

1 bottom of why in the world we can't have some
2 cooperation. And not by getting old depositions
3 from Franklin where he said just one more time, I
4 don't know where they are, I can't do it and
5 there's too many records and we can't search and
6 that type of thing.

7 I want some kind of way in which
8 this -- some kind of meaningful document discovery
9 can be done about where these pumps went.

10 MR. MERIWETHER: I understand, Your
11 Honor. As we have told plaintiffs repeatedly and
12 as it has been part of our document production in
13 this case, we had only one distributor in North and
14 South Carolina. That was Mechanical Equipment
15 Company.

16 We also searched the DuPont documents
17 for Mechanical Equipment Company. Nothing came up.
18 Nothing came up from Aurora. We don't have any way
19 that we can find that an Aurora pump was there.

20 Nonetheless, we turned up and produced
21 337 pages of bulletins that would have gone to
22 distributors and given -- and we delivered that set
23 to plaintiffs' counsel and said, this is the kind
24 of stuff that we would have given to our
25 distributors like Mechanical Equipment Company, the

1 one in North and South Carolina.

2 And we -- this is what they would have.
3 It's a snapshot in time because it's the only stuff
4 we have left of these bulletins. This is all we
5 have. So that was turned over.

6 They asked us whether we had a sales
7 office, and they made much out of the fact that
8 we -- the sales office had a customer list. We
9 never had a sales office in South Carolina. The
10 only thing that we had was a distributor, which is
11 Mechanical Equipment Company.

12 So we gave them what we would have
13 given to them. They did -- I had this conversation
14 with Mr. Buha from plaintiffs' counsel, and he
15 asked -- I asked him. I said, look, you've got --
16 you know, you're doing six-inch pages of stuff that
17 you want. What do you really need now? We've
18 given you bulletins. We've given prior testimony.
19 You have the general knowledge documents and we
20 can't search for sales records. What do you need?

21 He said, you know, what I need is
22 exemplars. I would like examples of manuals,
23 drawings that would have been from the time period
24 at issue.

25 I said, fine. All right.

1 So we got tech manuals, repair manuals,
2 exploded-view drawings, and engineering drawings,
3 which are the hypertechnical drawings that show how
4 a pump works that happened to be included because
5 of when you do the Navy cases --

6 THE COURT: Right, I understand.

7 MR. MERIWETHER: So we produced all of
8 those.

9 So it's not that we simply stood on the
10 Howell order and said, we're not helping you
11 anymore. We have been fully forthcoming. We said,
12 look, this is what we have; this is what it looks
13 like; this is the universe; everything that we know
14 you now know.

15 And, you know, at this point, they are
16 looking for sanctions -- for instance, they want a
17 sanction that has a deemed inference that our pumps
18 were insulated. This runs fully contrary to the
19 testimony of their own witnesses, one of whom said,
20 no, Aurora pumps were never insulated.

21 They want a deemed inference that we
22 would have known that they would be insulated. In
23 fact, it's quite to the contrary. We have no such
24 knowledge. Most of our pumps would have never been
25 insulated, if any of them would have been. So --

1 THE COURT: Why? What do they carry?

2 MR. MERIWETHER: Most often Aurora is
3 known for high-capacity water pumps, and just --
4 there is no need to insulate a water pump.

5 They're not specialty pumps that you
6 would think of that would use -- that would be
7 pumping hot materials like the DOWTHERM or even the
8 process pumps that actually pump the sludge that
9 becomes the film. That's not Aurora's job. That's
10 not what they're known for.

11 So what we have here is really a set of
12 sanctions that bear no relation to the inability
13 that Aurora has to search its documents by anything
14 other than a pump serial number. What we have is a
15 serious of sanctions which appear to fill in holes
16 in the proof of their case in derogation of the
17 testimony of their own witnesses.

18 We have turned stuff over repeatedly.
19 Anything they asked for --

20 THE COURT: We don't need to plow the
21 ground ten times now.

22 MR. MERIWETHER: And I think to the
23 extent that they misunderstood the testimony of
24 Mr. Franklin, we have provided an additional
25 affidavit in order to explain what I think could

1 have been cleared up with a simple, why is that
2 kind of question, but those weren't asked. But
3 we've provided that.

4 I think Your Honor will see that we
5 have truly been forthcoming, that the sanctions
6 that are requested bear no relationship either to
7 the supposed errors of and omissions on Aurora's
8 part and, certainly, not to the act of fact of the
9 way that we conducted ourselves.

10 So thank you.

11 THE COURT: Any reply, Ms. McVey?

12 MS. MCVEY: I'll be super brief, Your
13 Honor.

14 With all due respect to Mr. Meriwether,
15 who is an honorable man, I disagree that Aurora has
16 been forthcoming. Aurora was not forthcoming when
17 they had the capability and, in fact, did archive
18 electronically search -- documents that could be
19 electronically searched from 1987 to 2009. They
20 haven't explained that. They didn't tell us that
21 in the Howell case.

22 It's not that big of a deal to do
23 3 million documents, even if that's what we're
24 asking them to do, right? There's equipment now;
25 it can be done. They don't get to use the fact

1 that they haven't done this in a time period we
2 want to use as a shield.

3 Well, sorry, plaintiffs, you can't
4 prove your case that we were at the Piedmont thing.
5 We haven't electronically scanned our documents.
6 That's not fair. That's not what this is about.
7 They didn't just learn this or didn't just learn
8 they had scanned some documents post '87. They
9 learned it in 2009 when they started doing it. I
10 don't think that's fair.

11 The other thing is, these are not some
12 really broad sanctions. Why didn't they produce
13 the photographs to us that would show what their
14 pump looks like in the field? Because they do have
15 high-temperature pumps that go up to 375 degrees.
16 Those pumps would be insulated. That's important
17 to us.

18 We're not trying to be overly broad,
19 but I do think that Aurora misled us in the Howell
20 case, and so we're entitled to push that a little
21 bit.

22 And the thing is, Judge, with Aurora,
23 they're in lots of litigation. This issue is going
24 to keep coming up, and that's one of the reasons
25 why we asked for them to be ordered to

1 electronically store and OCR the documents.

2 THE COURT: That -- the No. 5 request
3 is a future request and that -- anticipated use in
4 another litigation. I don't know that I have the
5 authority in this case to do that.

6 MS. MCVEY: Well, I would love to order
7 them to do it in this case. I just don't think
8 it's going to be done in the time that this trial
9 is going to start, which is the need for the
10 sanctions. That's what our concern is.

11 MR. MERIWETHER: Your Honor, I would be
12 remiss if I did not correct just a very brief
13 couple of misstatements. Ms. McVey suggested that
14 when we discovered the 2009 selected transposition
15 of some records from --

16 THE COURT: You automated records from
17 1987 to 2000 and whatever. And what she's arguing
18 is that if you can do it for that, it's not any big
19 deal to automate the rest of them.

20 MR. MERIWETHER: And my point is, A, I
21 don't know that all of those were done, you know,
22 straight through. That is an estimate from
23 Mr. Franklin. As to the extent he does confirm
24 that the transposed records and the ones made into
25 PDF are not -- OCR are not word searchable.

1 It's simply -- it's as though you
2 printed out the microfilm and it just is a long
3 sheet, you know, page after page after page. So it
4 is just simply transposing it in paper. It doesn't
5 make it searchable.

6 THE COURT: Well, my observation is
7 this: I routinely get mountains of papers that are
8 searchable and everything else. And it's not any
9 big deal to do that. And it's not any big deal to
10 do it in a format that makes it searchable, and to
11 organize it in some formal fashion that lets you be
12 able to look at it by year or the like.

13 They suggested one methodology that is
14 the source of their 40,000-pages claim which is
15 look at the cover page of each thing, and at least
16 look through that to see whether you get any sense
17 of whether it contains any information that would
18 relate to sales in South Carolina through the
19 Greenville office or sales in North Carolina.

20 But it's just, no, to everything. And
21 that concerns me. This is a big company that ought
22 to have the ability from a technological standpoint
23 of their current owner, Pentair.

24 MR. MERIWETHER: Yes, Your Honor.

25 THE COURT: That's a big enough company

1 to be able to deal with this ongoing litigation
2 thing by digitizing these records. I can't help
3 but feel that more is at play here than simply a
4 mountain of records as I was led to believe.

5 They have made some attempt to automate
6 them, and it must have been for some purpose. I
7 suspect it was for the purpose of having some kind
8 of information that would give them the ability to
9 do some kind of marketing or sales to inform
10 clients and so forth, but they didn't want to
11 digitize the asbestos records.

12 That's an assumption that I'm making
13 based on the way this litigation has gone. I feel
14 like I was taken advantage of and how. I'm not
15 blaming you for that. You only transmitted what
16 you know from them, but I think they're playing
17 hide the ball, and that concerns me greatly.

18 And just to hire you to put up the
19 stone wall without making any real effort to see
20 whether these records can be put into a format
21 where they can be searched is concerning to me.

22 MR. MERIWETHER: Well, Your Honor, I
23 truly understand your concern and I have -- you
24 know, I have no question but that we need to
25 demonstrate that we are the kind of open and

1 above-board folks that I know that we are and
2 Aurora is.

3 The fact of the matter is that the
4 business about just being able to look at the cover
5 page and that you have some idea, that's a falsity
6 as --

7 THE COURT: Well, we don't know if it's
8 a falsity or not because Mr. Franklin hasn't done
9 that and nobody has done that at Aurora. They just
10 simply said, that's not going to give you the
11 information you want. But Mr. Franklin has not
12 investigated that at all from what I understand.

13 MR. MERIWETHER: Well, I can see why
14 you would draw that conclusion, but I think I can
15 make you understand pretty quickly.

16 When you're looking at a wheel of
17 microfilm or when you're looking at a set of pages
18 that are drawn from a reel of microfilm, the
19 initial page does contain some information, but
20 there may be dozens and dozens of other pumps and
21 other --

22 THE COURT: That's fine, but there has
23 been no attempt to even do what they suggest as a
24 means -- and I know about microfilm. I go up to
25 the South Carolina Supreme Court all the time and

1 have to go back to those microfiches and pull up
2 briefs. And sometimes it's a little laborious
3 process.

4 But, you know, one of these days, those
5 will be digitized in a way that makes it a little
6 easier to do. And if I were a big business that
7 had those kind of records, I would have done that a
8 long time ago because it's so useful for a variety
9 of reasons.

10 MR. MERIWETHER: If we could only get
11 the funding --

12 THE COURT: I don't feel like they were
13 making any kind of effort to do that, in my view.

14 MR. MERIWETHER: Well, I understand
15 that, Your Honor. Might I also -- and without
16 disturbing any of what your concerns are on that
17 issue, I would note that both in their brief and in
18 their argument today, they essentially said that
19 all we need to do is to look for records from 1962
20 to 1963.

21 That's the -- that's exactly what they
22 said; that's all they need. It's 1962 to 1963, and
23 that's why they think it is so doable, so to speak.

24 Well, what that means is, number one,
25 it has nothing to do with Piedmont die casting

1 because it's 1962 to 1963. It has nothing to do
2 with that company at all.

3 What they say in their briefs and what
4 they have said in person is that 1962 to 1963 is
5 the likely time period that any pumps would have
6 been sold to DuPont for use in that facility
7 because that's when it was being built.

8 So they are asking now for 30 years
9 worth of documents. What they had said before in
10 their --

11 THE COURT: I get your argument, but
12 you-all have not made my attempt to even get to
13 those for years, Mr. Meriwether, so that rings a
14 little hollow to me.

15 MR. MERIWETHER: Well, Your Honor, we
16 didn't know that that was all they wanted until
17 they did the brief.

18 THE COURT: Well, all right.
19 Ms. McVey.

20 All right. Let me ask you this: Is
21 there any information about whether DuPont had
22 Aurora pumps or not?

23 MS. MCVEY: There are witnesses.

24 MR. BUHA: Yeah, there have been --
25 Your Honor, Mark Buha on behalf of the plaintiffs.

1 There have been four witnesses, co-workers at
2 DuPont, who identified the presence of Aurora pumps
3 at the DuPont facility.

4 THE COURT: And with respect to the
5 Piedmont facility, there is no information about
6 what kind of pumps were there, if any, correct?

7 MS. MCVEY: That's correct.

8 THE COURT: All right. The first thing
9 that I will do with respect to Aurora is direct
10 that between now and Friday they search their
11 records for '62 and '63, and any information about
12 Aurora pumps in the die-casting facility in
13 Pickens.

14 The second thing is, I'm going to grant
15 the request that it be deemed that numerous Aurora
16 pumps were present at the DuPont plant during the
17 years in question.

18 Next, I'm going to grant the request
19 that it be deemed that Aurora pumps at the DuPont
20 plant were distributed through Mechanical Equipment
21 Company in Greenville, South Carolina.

22 Next, I'm going to grant the request
23 that it be deemed that the Aurora pumps at DuPont
24 utilized asbestos-containing internal gaskets and
25 asbestos-containing packing and that they specified

1 their replacement was asbestos-containing gaskets
2 and packing.

3 And next, I'm going to grant the
4 request that it be deemed that Aurora pumps at
5 DuPont were in some cases insulated, and I am going
6 to direct that Aurora search its records again for
7 photographs of pumps in the field, photographs that
8 would reflect Aurora pumps in the field that were,
9 in fact, insulated.

10 And, finally -- and that's it. I'm not
11 going to make any direction about the conversion of
12 all its record to a searchable format and that kind
13 of thing.

14 And that's what I'm doing with respect
15 to the sanctions with respect to Aurora.

16 MR. MERIWETHER: Thank you, Your Honor.
17 To make sure that I transmit everything properly
18 back to my client.

19 THE COURT: Yes, sir. Well, I'm not
20 going to read that right now. What I did was to go
21 down the list of things that was specified in the
22 motion for sanctions request by Ms. McVey. I began
23 with her -- on page 12, I limited the -- I directed
24 before I started that you search again for the
25 records '62 -- '61 to '63, or whatever it was, with

1 respect to supplying pumps to the die-casting
2 facility in Pickens.

3 MR. MERIWETHER: Yes, ma'am.

4 THE COURT: And you have the name of
5 it.

6 MR. MERIWETHER: Piedmont Die Casting.

7 THE COURT: Piedmont Die Casting, and
8 that -- and I granted the request that it be deemed
9 that Aurora pumps were present at DuPont. I did
10 not deem that they were present at the Pickens
11 facility.

12 MR. MERIWETHER: I wholly understand
13 that.

14 THE COURT: Okay. And then with
15 respect to request No. 2, 3, and 4, I granted
16 requests to deem the facts that were stated therein
17 with respect to DuPont. And that's in the second
18 one and the third one.

19 I did not address the -- no, I -- the
20 rest of them, as I said, I -- I made an order of --
21 deeming with respect to the second, third, and
22 fourth request, and not with respect to the fifth.

23 MR. MERIWETHER: Thank you, Your Honor,
24 but as the --

25 THE COURT: But Ms. McVey will draw up

1 something in that regard which she will send to you
2 and we will be sure it adequately reflects what
3 I've ordered.

4 But in terms of telling your clients
5 what needs to be done right now, there is one thing
6 they definitely need to be told about, which is to
7 search again for records with respect to Piedmont
8 Die Casting facility, '62 to '63.

9 MR. MERIWETHER: That's right. I will
10 get them on that right away. But as a point of
11 just brief clarification so I understand what we're
12 dealing with, I know that we -- that one of the --
13 No. 4, I think, of your findings there that it be
14 deemed that the gaskets were asbestos containing
15 and we specified asbestos-containing replacements,
16 that's what runs counter to some of the testimony
17 in the case from the co-workers.

18 Would that prevent me from putting on
19 the co-owner testimony that says that the casing
20 gaskets were Piper?

21 THE COURT: I don't know. You all get
22 together and see what the deposition says. I
23 haven't seen depositions in that regard.

24 MR. MERIWETHER: Oh, I'm just asking if
25 this is a preliminary ruling that evidentiarily

1 would bar me from doing that?

2 THE COURT: I don't know until I see
3 what is said, but I will visit that again if I
4 receive information that would support what you're
5 asking. At the present time, yeah, it would
6 preclude -- it would deem certain facts as the
7 facts, but if you can show me some visual
8 information that I don't have in front of me right
9 now, that may change.

10 MR. MERIWETHER: Thank you, Your Honor.
11 We look forward to it.

12 THE COURT: All right. Now, motions
13 for summary judgment. Well, under Miscellaneous.
14 Motion for default as to Eriks NA, LLC. Is there
15 anybody here for Eriks? I will sign that order.

16 MS. MCVEY: Thank you, Your Honor.

17 THE COURT: All right. With respect to
18 Lawrence's motion to quash trial Subpoena?

19 MS. GOLDHABER: Your Honor, Catherine
20 Goldhaber on behalf of Lawrence. We're withdrawing
21 that motion.

22 THE COURT: Very good.

23 With respect to the motion to apply
24 North Carolina law?

25 Elaine Shofner for Lawrence Pumps. We

1 would like to be heard on that.

2 THE COURT: All right.

3 MS. SHOFNER: Elaine Shofner on behalf
4 of Lawrence Pumps. I think as Your Honor has said
5 this morning that choice of law in South Carolina
6 is governed by the lex loci delecti doctrine, which
7 means that the law is the place where the injury
8 occurred or where the injury was occasioned or
9 inflicted, not where the injury manifested itself.

10 THE COURT: Well, and not where the
11 cause of action arose. That's the lynchpin of this
12 thing. Lex loci is where the injury occurred.
13 Now, jurisdiction we dealt with in a different
14 matter. We're not talking jurisdiction. We're not
15 talking general or special jurisdiction or specific
16 jurisdiction. What we're talking about right now
17 is the choice of law.

18 MS. SHOFNER: Correct.

19 THE COURT: And the choice of law is
20 governed by where the injury was suffered, and the
21 injury was suffered in South Carolina. He died
22 here.

23 MS. SHOFNER: I went through the case
24 law. I would disagree that the case law says that
25 where the -- where he died or where he was

1 diagnosed. I think where the injury occurred would
2 be where he was exposed to asbestos.

3 THE COURT: No, sir -- no, ma'am. You
4 can -- you can have all kinds of -- you can have a
5 cause of action arise because of a particular set
6 of events, but the injury may be suffered
7 elsewhere.

8 MS. SHOFNER: Right. And I think you
9 held that in the Murphy case --

10 THE COURT: That's right.

11 MS. SHOFNER: -- because she was
12 diagnosed in Virginia, but you said that the injury
13 occurred and arose when she was exposed in South
14 Carolina through her father's work. So it accrued
15 in Virginia where she was diagnosed. It arose
16 where she was exposed to asbestos in South
17 Carolina.

18 So the way that I was reading the case
19 law *Rogers vs. Lee* and the Murphy case is that when
20 an injury arises is where the injury occurred,
21 which would be the exposure in North Carolina for
22 Mr. Whitmire as opposed to where he was diagnosed
23 when Mr. Whitmire moved to South Carolina and was
24 diagnosed and then, ultimately, died from --

25 THE COURT: What practical difference

1 does this make?

2 MS. SHOFNER: Pardon me?

3 THE COURT: What practical difference
4 does this make?

5 MS. SHOFNER: The North Carolina
6 statute that we would like for you to take judicial
7 notice of is the statute of -- this is North
8 Carolina -- it's the North Carolina -- sorry about
9 that -- it's North Carolina General Statute
10 Annotated 99B-3, and the cases that follow that
11 statute under North Carolina law, which
12 basically -- which is a bare metal defense in North
13 Carolina.

14 THE COURT: All right.

15 MS. SHOFNER: That's the applicable --
16 and that is the -- that is the major difference
17 between North Carolina and South Carolina law.
18 Both of them follow Lohrmann. Their causation
19 standards are similar, but if North Carolina
20 applies, then --

21 THE COURT: What is the language of the
22 statute that you say mandates a bare metal -- that
23 allows bare metal defense?

24 MS. SHOFNER: The statute, it says in a
25 similar motion that no manufacturer or seller of

1 product shall be held liable in any product
2 liability action where proximate cause of the
3 personal injury, death, or damage to property was
4 either an alteration or modification of the product
5 by a party other than the manufacturer or seller,
6 which alteration or modification occurred after the
7 product left the control --

8 THE COURT: Same -- same -- same law as
9 in South Carolina. There is no difference between
10 the two. We have similar law in our products
11 liability, but the bare metal defense is not an
12 alteration.

13 The bare metal defense is we design a
14 product in a certain way. In fact, that design
15 requires in order for the use of the product as it
16 leaves our manufacturer. The use of a gasket; then
17 they don't escape liability for the use of
18 something to make their product work in the first
19 instance, as sold, by the fact that they didn't
20 sell the gasket.

21 MS. SHOFNER: And that's the way South
22 Carolina has addressed that issue; however, the way
23 that North Carolina has addressed it, they have a
24 specific statute, which South Carolina does not
25 have a specific statute that addresses this issue.

1 And the case law that follows it
2 indicates that in North Carolina you are not
3 responsible for insulation that was put on that you
4 didn't supply or manufacture, even though you knew
5 that your product would be insulated, or for any
6 gasket that's not part of the original equipment.

7 And so those are the -- that's the
8 difference, is that North Carolina has a specific
9 statute that addresses it. And then the way that
10 they apply that statute from their case law
11 indicates that we're not -- that a manufacturer is
12 not liable for products that they did not
13 manufacture or sell or put into the stream of
14 commerce.

15 THE COURT: All right.

16 MS. SHOFNER: And so it does not
17 address the foreseeability issue like South
18 Carolina does.

19 THE COURT: All right.

20 MS. SHOFNER: So -- but that's why it
21 matters whether North Carolina law applies or not.

22 THE COURT: Okay.

23 MS. SHOFNER: And that's why I believe
24 that it's not where the injury occurred or the
25 death that accrued, it's where the actual exposure

1 happened, which was in Brevard, North Carolina at
2 the DuPont plant.

3 THE COURT: All right.

4 MS. SHOFNER: Because that's where all
5 the exposure to asbestos was.

6 THE COURT: Thank you.

7 MR. BUHA: Very briefly, Your Honor.
8 This is Mark Buha on behalf of the plaintiffs.
9 First, we object to this motion as untimely as it
10 was filed on Friday of last week.

11 And, secondly, it's our position that
12 there is no conflict in the law between South
13 Carolina and North Carolina. The statute which
14 she's referring to is a reflection of comment H in
15 the second statement, comment P in the third
16 statement, which is the same law that -- from which
17 South Carolina's law on the bare metal defense
18 arises from.

19 And, third, we don't even have to get
20 to what the North Carolina statute is because what
21 all parties agree and what is said in both motions
22 is that this is a state that is governed by lex
23 loci delecti.

24 First, her statement, choice of law
25 regime. And under that regime, it's the state

1 where the last event necessary for a cause of
2 action to arise. And so the last event necessary
3 for all the elements of a claim to arise, there has
4 to be damages and there has to be the diagnosis to
5 occur.

6 And so in this particular case, there's
7 no dispute that the diagnosis occurred in South
8 Carolina. That's the last of the necessary.

9 We cite to Logan, which is a decision
10 also under *lex loci delicti* regime by Catherine
11 Angles that analyzes the exact same issue of
12 someone exposed in Delaware and is diagnosed in
13 North Carolina. And the court held the diagnosis
14 is the last event necessary and that that -- .

15 THE COURT: How about the South
16 Carolina case of *Murphy vs. Owens Corning*?

17 MR. BUHA: I'm sorry, excuse me?

18 THE COURT: How about the South
19 Carolina case of *Murphy vs. Owens Corning*?

20 MR. BUHA: As I understand it, that is
21 a decision that addresses the door-closing statute,
22 and it's a different mode of analysis than what we
23 have here in this case. This is about a choice of
24 law rather than --

25 THE COURT: That's what we're talking

1 about here is choice of law.

2 MR. BUHA: I'm sorry. That was about
3 personal jurisdiction and this is about choice of
4 law, and so it's our position that that is
5 irrelevant.

6 Yeah. Either way, as we cited in our
7 brief, the Logan decision, if this were decided
8 under -- if this were in North Carolina and North
9 Carolina decided that South Carolina law applies.
10 If we analyze this under *lex loci delicti*, the rule
11 of law in South Carolina since 1937 has been under
12 the First Restatement. And under the First
13 Restatement it is the last event necessary to bring
14 the cause of action.

15 And I want to address one thing because
16 they cite the First Restatement in their brief, and
17 I want to read to you just very briefly a passage
18 from the First Restatement, and this is Note 2.

19 When a person causes another
20 voluntarily to take a deleterious substance which
21 takes effect within the body, the place of wrong is
22 where the deleterious substance takes effect and
23 not where it is administered.

24 And so what this passage says and what
25 the regime at South Carolina has followed since

1 1937 has been that the issue is where the substance
2 takes effect and that's where it -- and not where
3 it is administered, not where it is ingested, and
4 not where it is inhaled.

5 And so what is the applicable law under
6 the First Restatement, and what has been under --
7 the only decision that we have squarely on point
8 under the same choice of law rules is where the
9 disease was diagnosed and manifested.

10 And, Your Honor, if you have any
11 questions about the Murphy decision, we'll note
12 that this was not cited in their brief. We
13 weren't -- in the brief we received on Friday. And
14 if the Court has additional questions, we could --

15 THE COURT: We're not going to get into
16 a briefing thing about that.

17 MR. BUHA: Okay.

18 THE COURT: If you read Murphy, what
19 you would find out is that their attempt to put me
20 into this thing is because of a concurring opinion.
21 I was concurred by Justice Moore only. And the
22 majority opinion is -- affirmed the court of
23 appeals result in this case.

24 And so I don't think the Murphy case
25 precludes lex loci delicti as traditionally used to

1 allow application of South Carolina law. And I
2 agree with your argument that North Carolina would
3 have probably ruled the same way.

4 Although, I'm not familiar with North
5 Carolina juris prudence on this issue, and I'm
6 trusting Ms. Shofner and her excellent argument
7 that she probably knows more than I do about how
8 North Carolina treats this.

9 But I know that in South Carolina,
10 which would be the law I would apply here, the
11 distribution by the manufacturer and sale by the
12 manufacturer of a product which can only be
13 operated by the use of a component, such as the
14 gasket in this case, is enough to hold that
15 manufacturer responsible.

16 So the bare metal defense is not a
17 defense that I think is a viable one in South
18 Carolina and I intend to apply that law in the
19 trial of this case.

20 So the motion is denied.

21 MR. BUHA: Thank you, Judge.

22 THE COURT: Now we come to --

23 MR. BOGER: Your Honor, I have one
24 motion under the Miscellaneous --

25 THE COURT: Just one moment. I will

1 say that I have made a ruling on this motion in
2 substance, but it was very untimely, and we still
3 have a lot of things that we are going to consider
4 in a minute that were extremely untimely. It's
5 just not fair to the Court to wait until the 11th
6 hour and send me motions like this.

7 So having said that, I reserve my right
8 with regard to some of these other motions and the
9 timeliness that they are projecting in this case.

10 Now, what is that you have, Mr. Boger?

11 MR. BOGER: Your Honor, Tommy Boger on
12 behalf of Armstrong International. We also filed a
13 motion to quash the trial subpoena issued by
14 plaintiffs on counsel and would just ask that you
15 rule on that motion. There's no need to --

16 THE COURT: Well, now, Lawrence
17 withdrew this -- withdrew its motion in that
18 regard.

19 Did you not?

20 MS. GOLDBABER: Catherine Goldhaber for
21 Lawrence. Yes, we did.

22 THE COURT: I don't even have your
23 motion. When did you file it?

24 MR. BOGER: July 5th, Your Honor. I
25 have a copy of here. I would just ask that you

1 rule. We don't need to hash through all of it.

2 THE COURT: That's five days ago, and
3 that's way too late for me to consider something
4 like that. You can hand it up if you want to, but
5 I'm not about to quash trial subpoenas.

6 Which trial subpoena are you trying to
7 quash?

8 MR. BOGER: Of the Armstrong 30(b)(6).

9 THE COURT: Of the corporate
10 representative? You're saying that you're trying
11 to quash the subpoena of the corporate
12 representative? Why?

13 MR. BOGER: Well, Your Honor, he's an
14 out-of-state witness, which was -- the subpoena was
15 issued on --

16 THE COURT: Let me just short-circuit
17 this for you.

18 MR. BOGER: That's where I was going.

19 THE COURT: That's come up many times
20 before. A corporate representative is not the same
21 as some witness that's out of state. You don't get
22 to escape the process of this Court when you submit
23 yourself to the Court and participate in the
24 litigation here. You don't get to not have your
25 corporate representative appeal by saying he's from

1 out of state.

2 If you are properly in this suit, you
3 have to have the corporate representative here. I
4 assume that you're trying to pursue something like
5 that. That just takes up the time of the Court
6 unnecessarily.

7 MR. BOGER: And, Your Honor, that's why
8 I wanted you to rule on it and then we could move
9 on quickly. So I was just going to say I wasn't
10 going to argue about it. I just want to --

11 THE COURT: Well, I regard it as
12 untimely, and, therefore, I deny it.

13 MR. BOGER: Okay.

14 THE COURT: Okay. Now we have motions
15 for summary judgment. First motion for summary
16 judgment is Armstrong.

17 All right, Mr. Boger.

18 MR. BOGER: Again, Tommy Boger for
19 Armstrong International.

20 Your Honor, we filed a motion for
21 summary judgment in this matter, and I'm going to
22 make my arguments brief for the Court on this.

23 THE COURT: Don't speak too quickly.

24 MR. BOGER: We are -- we're moving on
25 behalf of *Henderson vs. Allied Signal*, in

1 particular, the frequency, regularity, and
2 proximity test. And what that court stated
3 specifically as to the exposure to a specific
4 product on a regular basis over an extended period
5 of time must be shown.

6 And it is our position that has not
7 been accomplished through the testimony of the
8 co-workers identified by the plaintiffs.

9 In my -- our reply brief in support of
10 the motion, we outlined the testimony of four of
11 his co-workers and summarized the site of where
12 those co-workers discussed, if they did, working
13 with Armstrong steam traps.

14 The first witness was Mr. Bobby Joe
15 Tucker, who did not testify as to steam traps at
16 the DuPont facility and did not mention or identify
17 Armstrong steam traps as a product that he worked
18 with.

19 Second, Mr. George Wiley Bingham
20 testified that he worked on the steam traps at the
21 DuPont plant, but only recalled Sarco steam traps,
22 not Armstrong, and he also testified that the steam
23 traps were not insulated.

24 Next, Mr. Jimmy Whitmire, similar to
25 Mr. Bingham, testified that he recalled that he

1 worked on steam traps at the DuPont plants, but
2 only remembered Sarco steam traps, not Armstrong.
3 And again, he stated that those steam traps were
4 not insulated.

5 The one co-worker that did at least ID
6 Armstrong steam traps at the plant was Mr. Roland
7 Blanton. Mr. Blanton also testified that the steam
8 traps weren't insulated. He also testified that
9 more often than not, he, Mr. Blanton, would replace
10 the entire trap rather than repair it.

11 And he was additionally asked if he had
12 occasion to witness Mr. Whitmire working on those
13 Armstrong steam traps, and he could not definitely
14 testify that he did.

15 And so based on that testimony, we
16 believe it's insufficient to show there was
17 exposure to an Armstrong steam trap on a regular
18 basis over an extended period of time.

19 THE COURT: All right, sir. Thank you.

20 MR. BUHA: Thank you, Your Honor. This
21 is Mark Buha on behalf of plaintiff. Briefly, we
22 just have two arguments. First is that Armstrong
23 failed to meet its initial burden, and second, that
24 the plaintiffs' evidence has connected the dots and
25 proven that Mr. Whitmire was exposed to asbestos

1 from repairing Armstrong steam traps on a frequent,
2 regular, and proximate basis.

3 I don't normally make the burden
4 argument, but in this particular case, Armstrong
5 did not submit -- they did submit a motion, but no
6 brief attached to that motion.

7 THE COURT: Yeah. I got a two-page
8 here motion and no brief.

9 MR. BUHA: Correct. And it has no
10 affidavits, depositions, or documents attached to
11 it. So in the absence of any evidence that they
12 submitted, they have not proven that there is an
13 absence of material fact, and so it's our position
14 that they have not met their initial burden.

15 As far as connecting the dots, the
16 testimony we have from the four co-workers is that
17 Mr. Whitmire worked at DuPont from 1968 to 1999.
18 He was trained as a mechanic, and one of the things
19 that he was trained to do between 1969 and 1973 was
20 how to repair steam traps, among other things.

21 He worked as a mechanic in the casting
22 and CP area from 1973 to 1979. In addition, he
23 would be called upon to go to the powerhouse for a
24 little bit of training and during shutdowns as a
25 mechanic.

1 There is testimony from all four
2 witnesses that there are hundreds of steam and
3 DOWTHERM lines. All of them are insulated. And on
4 all of these steam and DOWTHERM lines, there are
5 steam traps. And what we have from both Rex Scare,
6 the representative for Armstrong, and multiple
7 witnesses is that these traps needed to be repaired
8 periodically.

9 And Mr. Whitmire and the other
10 mechanics, their job was to repair these things.
11 Mr. Whitmire had the same job duties as the other
12 mechanics who were in that group and were assigned
13 to the casting and CP area and the powerhouse.

14 Jimmy Whitmire and others testified
15 that they would have to repair these things almost
16 as often as they would valves. Their testimony was
17 they would do valves at least once or twice a week.

18 And so when you look at a six- to
19 ten-year period where they're working on steam
20 traps that frequently, this amounts to them having
21 to work on hundreds of steam traps over a six- to
22 ten-year period.

23 Armstrong is one of two brands that
24 have been identified as being present at the DuPont
25 facility. And Roland Blanton identified them as

1 being present in the casting and CP area, and he
2 identified them as being present in the powerhouse.

3 Armstrong steam traps were there and I
4 think that the motion earlier today is that they
5 were deemed to be there with asbestos-containing
6 gaskets and insulation and they have replacement
7 asbestos-containing gaskets there. So the repairs
8 required them to scrape and wire brush the
9 asbestos-containing gasket material on the flanges
10 and internally.

11 And so we have connected the dots. We
12 have shown that this is one of two steam traps and
13 this -- a regular part of Mr. Whitmire's personal
14 job duties was to repair the steam traps.

15 THE COURT: Very good.

16 MR. BUHA: Thank you, Your Honor.

17 THE COURT: Mr. Boger, reply?

18 MR. BOGER: Yes, Your Honor. I
19 apologize for not handing up our reply brief. We
20 did the original for our motion and then
21 supplemented it. Is it --

22 And then this is just in response, Your
23 Honor. I hear what plaintiffs' counsel is arguing
24 and I think what I hear is steam traps, steam
25 traps, steam traps. There is no testimony from

1 these witnesses about Armstrong steam traps in this
2 testimony that Mr. Whitmire worked with those
3 Armstrong steam traps.

4 These other folks, maybe they did, but
5 there's not specific testimony about Mr. Whitmire
6 working with Armstrong steam traps.

7 That's all I have.

8 THE COURT: All right, sir.

9 Well, your -- beginning on page 4 of
10 this memo, you say you reviewed the testimony of
11 co-workers Tucker, Bingham, and Blanton and the
12 testimony of Mr. Whitmire.

13 MR. BOGER: Jimmy Whitmire, Your Honor.

14 THE COURT: The decedent. All right.

15 And you say that Mr. Blanton testified
16 that he worked at the DuPont facility where the
17 decedent worked from '67 to '92. Mr. Blanton
18 recalled working on steam traps at the plant that
19 were either Sarco or Armstrong.

20 Blanton testified that the steam traps
21 were not insulated. Mr. Blanton stated that more
22 often than not, he would replace the entire steam
23 trap rather than repair it.

24 Moreover, Mr. Blanton could not
25 definitively testify that the decedent worked on

1 Armstrong traps.

2 Now, what is argued by plaintiff is
3 that Mr. Blanton testified -- and you agree that he
4 testified that Armstrong steam traps were used when
5 he worked there. So there is that testimony, even
6 by your own admission, right?

7 MR. BOGER: Certainly. And I guess my
8 point would be, is that enough to reach exposure to
9 a specific product, the Armstrong steam traps, over
10 a regular -- on a regular basis for an extended
11 period of time where the only testimony is from
12 Mr. Blanton that he cannot definitively say that
13 Mr. -- the decedent, Mr. Whitmire, worked with
14 those Armstrong traps.

15 THE COURT: At this point, there is a
16 scintilla of evidence at least, and maybe more, to
17 establish that steam traps from Armstrong were one
18 of the two brands used at the DuPont plant.

19 And so based on that and the
20 description as recited by plaintiff of
21 Mr. Blanton's discussion of the methodology for
22 cleaning the traps, I'm going to deny the motion
23 for summary judgment.

24 MR. BOGER: Thank you, Your Honor.

25 THE COURT: All right.

1 MS. SHOFNER: I think -- Your Honor, I
2 think I have the next motion, Your Honor, with --

3 THE COURT: Just one second. Let me
4 get straight here for a minute. Just let me be
5 sure I have -- all right.

6 And please remember, state your name
7 for the record. This is Lawrence Pumps' motion for
8 summary judgment.

9 MS. SHOFNER: Your Honor, based on your
10 recent ruling with --

11 THE COURT: I know you're going to
12 restate your name for the record.

13 MS. SHOFNER: And I am. Certainly, I
14 am. I was just thinking that. Elaine Shofner for
15 Lawrence Pumps.

16 THE COURT: All right. Ms. Shofner.

17 MS. SHOFNER: Based on your recent
18 ruling on applying South Carolina law as opposed to
19 North Carolina law, I -- our issues for a motion
20 for summary judgment are the bare metal defense or
21 that we're responsible or not responsible for the
22 external insulation and gasket material, and then,
23 also, under the Lohrmann standard that they have
24 not met.

25 We are happy -- I know that you've

1 ruled on this many times before and ruled on it
2 today. So we're happy to rest on our brief and
3 have you rule on that to -- so we are able to
4 preserve our issues for appeal, but I'm happy to
5 argue if you'd like to hear our argument.

6 THE COURT: Thank you, ma'am. You have
7 very adequately and eloquently covered your
8 Lohrmann. I see no argument about frequency,
9 regularity, and proximity, and your argument is
10 that there is no evidence to support a finding of
11 frequency, regularity, and proximity of exposure to
12 your Lawrence Pumps by Mr. Whitmire.

13 MS. SHOFNER: Correct.

14 THE COURT: And I find that viewing the
15 evidence in the light most favorable to the
16 nonmoving part, which I must do, is that there is
17 at least a scintilla of evidence on the Lohrmann
18 Henderson issue.

19 And with respect to the bare metal
20 issue, I do not regard the bare metal defense as a
21 viable defense under South Carolina law, which is
22 what I will apply in this case. You are completely
23 protected in terms of your arguments in that
24 regard.

25 MS. SHOFNER: Thank you very much, Your

1 Honor.

2 THE COURT: Thank you.

3 All right. Now, motion in limine. All
4 right. Have you got some respite here?

5 MS. MCVEY: I think we can take a break
6 from motions in limine and not talk about them
7 today. I think we can agree on most of them.

8 THE COURT: Let me just -- one of the
9 things that is at issue is that Mark Hayes is going
10 to qualify this jury. And, therefore, I will be
11 available, but, of course, you know, you also have
12 the issue of you-all wanting to be there for jury
13 qualifications. So I don't know exactly how that
14 will work, but --

15 MS. MCVEY: Your Honor, we also divided
16 and conquered --

17 THE COURT: Okay. I'm looking at
18 plaintiffs' motions in limine for a minute. Okay?

19 All right. Plaintiffs' motions in
20 limine -- do you have those, Whitmire?

21 What I'm going to try to do is whittle
22 these down just a little bit by rattling through
23 and telling you what I will do and then we can kind
24 of be oriented towards the ones about which there
25 will be any discussion.

1 MS. MCVEY: Thank you, Your Honor.

2 THE COURT: Do you follow my
3 methodology, Mr. Meriwether and --

4 MS. MERIWETHER: I believe so, Your
5 Honor.

6 MS. GOLDHABER: Yes, Your Honor.

7 THE COURT: All right. The omnibus
8 motion in limine by plaintiff. The first thing is
9 collateral source. This is a request that no
10 mention be made of collateral source, nor should
11 collateral source be used with respect to any
12 benefits by way of Social Security benefits,
13 disability benefits, and the like.

14 I've granted this numerous times. Does
15 anybody have any real heartburn about that?

16 MR. MERIWETHER: Yes, Your Honor, only
17 in one small situation. Their economist found that
18 the amount of retirement and Social Security in
19 terms of calculating what would not -- the loss,
20 the loss of income in this -- in, you know, what
21 Mr. Whitmire wouldn't get anymore because he's
22 died, but she still got half of it.

23 So the point is, you can't say -- you
24 can't count it as a loss, but she still gets
25 50 percent of it after he dies. So --

1 THE COURT: Ms. McVey?

2 MS. MCVEY: Well, there's two issues
3 there. One is that there is a pension from DuPont.

4 THE COURT: Right.

5 MR. MERIWETHER: That's what I meant by
6 retirement.

7 THE COURT: Right.

8 MS. MCVEY: Okay. And the issue is, is
9 it a collateral source wholly independent of the
10 tort features, right? That's what the collateral
11 source rule says. And what I'm arguing to you is
12 that the fact that she gets the pension from her
13 husband is wholly independent of them, and they
14 don't get the benefit of that.

15 MR. MERIWETHER: But, Your Honor, the
16 economist said, calculating, she gets this much and
17 then at death she doesn't get any more, so it's a
18 loss, but that's not true. She still gets half of
19 it.

20 MS. MCVEY: But it doesn't matter.
21 And, I'm sorry, my notes are missing right this
22 second.

23 THE COURT: You don't get the
24 benefit -- whatever she loses as a result of his
25 death is the question here. And, you know, her

1 pension, if his pension -- if she gets half of his
2 pension after he dies, then in my view, Ms. McVey,
3 if that's one of the requests that the economist is
4 going to make, then that half comes off of what
5 you're asking for as damages for loss of pension,
6 because she's still going to get half of it. I
7 think that's what he's arguing.

8 MR. MERIWETHER: That's right.

9 MS. MCVEY: And I understand your
10 ruling, but for the record -- and we can put it up
11 to Dr. Wood. What I would argue to you is that
12 they shouldn't get the benefit of the fact that
13 there is --

14 THE COURT: Well, she can't ask for it
15 yourself and then not have them get a true figure
16 on what she's lost. That's what he's arguing.

17 MS. MCVEY: Right. But there's a case,
18 and I'm sorry I don't have it with me, but I'll
19 provide it to you shortly, and it's a case that
20 involves a lady who's in a car wreck who has a
21 cruise booked and she spent \$3,000 on the cruise,
22 but she also had trip insurance.

23 And so she got the damage -- she got --
24 the defendants wanted to put in the fact that
25 insurance paid her for part of that trip.

1 THE COURT: But this isn't like that.
2 You are saying that part of your loss when Whitmire
3 dies is his pension. That they both were receiving
4 that pension and now they're not receiving that
5 pension because he's died, but she's still
6 receiving half that pension.

7 And so the receipt of the -- and she
8 wouldn't have been receiving that pension while he
9 was alive, so that's something a little bit
10 different from trip insurance in my view. It's a
11 death benefit that is offset by how much she gets.

12 You're saying that it's just like
13 insurance and that whatever she lost because of his
14 death is something that you can recover without an
15 offset like that.

16 My current feeling is that I would
17 agree that it would be offset, but show me some
18 more stuff.

19 MS. MCVEY: Yes, ma'am.

20 THE COURT: But we don't need to go on
21 with this.

22 MR. MERIWETHER: No, Your Honor,
23 there's just a second piece of it. The same thing
24 applies here to Social Security.

25 THE COURT: No. Now, I disagree with

1 that. And that -- we've got plenty of rulings from
2 all over the country about Social Security. I
3 disagree with Social Security. That's a very
4 different category.

5 And I think I'd be going against what
6 my own Court has done about Social Security if I do
7 that. I don't know what we've done about pension
8 as I stand here, so I may change my mind about that
9 as well. I know Social Security is something you
10 can't credit for.

11 MS. MCVEY: Thank you, Your Honor.

12 THE COURT: Settlements with other
13 defendants. Of course we're going to exclude any
14 meaning of settlements with other defendants.

15 MR. GLENN: Your Honor, I'm not going
16 to argue that. I know you said it many times. I
17 would just like to protect the record that we do
18 believe that we should have the right to publish
19 the pleadings under the case law that we've cited
20 to you many times.

21 I'm not going to argue it. I
22 understand your ruling. I just want to make sure
23 the record is clear.

24 THE COURT: I understand, Jase. All
25 right. And again, I feel that I'm constrained by

1 the court's directions in *Smith vs. Tiffany* with
2 respect to other defendants.

3 And then there's an even more specific
4 subset of that, and that's a comp situation
5 discussed in *Machin v. Carus* -- or *Carus v. Machin*.
6 I can't recall what it is.

7 MR. GLENN: I think you were right the
8 first time.

9 THE COURT: But those two cases, I
10 think, constrain me with respect to allowing those
11 pleadings to go to the jury, because the Court has
12 made it so clear that settling the defendants don't
13 get mentioned, and that the only thing that is
14 dealt with, with respect to alleged responsible
15 parties who are not present in the case, is the
16 empty chair which relates to liability only, and
17 can be argued as it's a demonstrated fault of
18 someone else.

19 But with respect to the pleadings that
20 talk about defendants who are not there and
21 indicate to the jury to draw from that, I believe
22 that my hands are tied by *Smith vs. Tiffany*.

23 MR. GLENN: And, Your Honor, we would
24 just rest on our brief on that.

25 THE COURT: Very good. Which was an

1 excellent brief.

2 MR. ELLIOTT: Jim Elliott for William
3 Powell. Just one step further, we can put up
4 evidence that is sufficient to show that some other
5 product manufacturer had materials in the plant and
6 it was Mr. --

7 THE COURT: Oh, yes, that's done all
8 the time. You know, and not -- again, empty chair
9 is a liability doctrine. And with respect to
10 liability, if you can show that other people were
11 responsible for the injuries he claims he has
12 suffered, then that's something that you can do.

13 That would then be at the close of the
14 plaintiffs' case and defendants' case in terms of
15 whether that is viable based on whatever evidence
16 has or has not been put forward.

17 But, yes, that's a potential for you in
18 the case, Mr. Elliott, not precluded by this
19 ruling, just to be clear.

20 All right. American tort systems, no.
21 Nobody is going to start talking about tort reform
22 campaign, but this never happens. Defense never
23 does that. So, frankly, plaintiff, you-all don't
24 need to keep making that motion.

25 Effect of claims on insurance premiums,

1 certainly, I'll grant that, but, again I've never
2 seen any of these fine lawyers make that kind of
3 argument; therefore, it's really not necessary.

4 That any of the corporations which once
5 made or manufactured or mined asbestos products in
6 bankruptcy, certainly, that's granted. I've never
7 seen it done.

8 Any reference to any ruling by another
9 court on the scope or admissibility of testimony,
10 that's not pertinent, but that doesn't preclude
11 arguing precedent. And it's argued to me all the
12 time about admissibility, but it's certainly not
13 something we can put before the jury in terms of
14 trying to enhance the respectability of evidence by
15 saying -- being in other states and admitted into
16 evidence.

17 But, again, I've never seen that
18 happen, so -- but arguing authority from other
19 states is done all the time by both sides and this
20 doesn't preclude that.

21 MR. MERIWETHER: You Honor, I note
22 that -- this is Robert Meriwether again. I note
23 that that is generally raised by plaintiffs to
24 prevent us from commenting on the number of times
25 that their experts have been included in the

1 other --

2 THE COURT: That's correct.

3 MR. MERIWETHER: But I would ask, just
4 on the basis of forecasting, that if they open the
5 door, we would be permitted to go through it.
6 Because they, frankly, sometimes have used the
7 number of times that this guy has been admitted to
8 testify across the country to bolster his own
9 credibility. And we have to go in and say, no...

10 THE COURT: Well, I've not seen that be
11 a problem.

12 MR. MERIWETHER: And it may not be.

13 THE COURT: I would say from both sides
14 that your curriculum vitae are -- often talk about
15 your past experience and so forth and so on. You
16 often ask each other's witnesses about their
17 experience in testifying, but it's not proper to
18 talk about testimony in other cases as some kind of
19 bolstering of your authority now.

20 Having said that, I will tell you that
21 if this case goes like other cases, depositions are
22 often played or information is often put forward
23 that is from a background of other testimony in
24 other cases.

25 Often people are asked how much money

1 they have made and what they've made in other cases
2 and this kind of thing. I'm not going to regard
3 that as opening the door. And it's done by both
4 sides rather freely and I'm not going to preclude
5 that.

6 MR. BRANHAM: Judge, Mr. Meriwether and
7 I had an extended conversation about this when we
8 were talking through the motion in limine earlier
9 last week, and I just want to make sure because I'm
10 going to be going first, and I don't want to trip
11 over something I shouldn't trip over.

12 So just real quick, they're going to
13 cross my expert by saying you've testified in 27
14 states.

15 THE COURT: And it's always been for
16 the plaintiff, never for the defendant.

17 MR. BRANHAM: And so before they do
18 that, I'm going to say, and we've done this in a
19 bunch of states before, right? Because I want to
20 inoculate against what that cross is going to be,
21 right?

22 And what I don't want to have happen is
23 me saying, and you've testified in 15 states around
24 the country for me, and him say that opens the door
25 to anyplace where he's been excluded.

1 THE COURT: I'm not going to do it that
2 way and I'm not -- I just do not think it's
3 appropriate to put in front of jury when you've
4 been excluded. I don't care which side of the
5 fence we're talking about.

6 But your experience and your bias,
7 because you only testify for Mr. Branham and never
8 for a defense, I think you can show the
9 predilections or bias of the experts in that way.

10 And I won't regard that as opening the
11 door to talking about whether they've been
12 precluded in a case.

13 MR. MERIWETHER: Understood. My only
14 point in raising all of this is that I have been in
15 trials before where I felt like they were stepping
16 over the edge, and I just wanted to --

17 THE COURT: I understand. And if they
18 trip over the line, I know you will let me know and
19 we will deal with it at that time.

20 MR. MERIWETHER: I fully intend to.

21 THE COURT: All right. Any questions
22 to experts define causation? I'm going to deny
23 this. The expert -- and the plaintiffs know this;
24 they always make this motion and I always deny it.

25 The experts are going to be asked a lot

1 of questions within the realm of their expertise
2 about what causes mesothelioma, and I don't think
3 that is going to preclude the instructions that I
4 will give a jury on the law in that regard.

5 Their discussion of consequences and
6 causation is a matter of their expert experience
7 with the disease or with the epidemiology or
8 whatever their sphere of expertise happens to be.

9 And I will allow both sides to fully
10 explore that with their experts, but I don't regard
11 that as moving over the line to tell the jury what
12 the law is regarding causation, and I've never had
13 an expert violate that by trying to lecture to the
14 jury about what the law is.

15 And I tell the jury constantly when I
16 qualify an expert, I always qualify them and say,
17 but these are opinions which you are free to accept
18 some of them, or all of, or none of. It's your
19 judgment as a jury as to whether you accept the
20 opinions. And that always, I think, inoculates
21 from an expert that would be seen as moving over
22 into instruction of the law.

23 So I will deny the motion.

24 Any mention or reference that other
25 defendants were not present or sued; the Court will

1 grant that motion for the reasons expressed. And
2 Mr. Meriwether and Mr. Glenn and Mr. Elliott and
3 Ms. Shofner and Ms. Goldhaber are all protected --
4 and Mr. Boger and Mr. Wall are all protected in
5 terms of your feelings that you think you ought to
6 be able to talk about the other defendants. I
7 think *Smith vs. Tiffany* precludes that.

8 Past alcohol or drug use: Is this
9 really a big deal in this case?

10 MR. Branham: No.

11 THE COURT: I didn't see it is, but
12 I'll certainly grant that, but I don't think
13 anybody will be getting into alcohol or drug use.

14 Tobacco use or smoking: Is there any
15 issue there?

16 I don't think there is in Whitmire.

17 MR. MERIWETHER: There's some crazy
18 stuff, but --

19 THE COURT: Yeah, I would grant -- you
20 know, the experts will all tell you that I don't
21 care how much you smoke, mesothelioma comes from
22 asbestos and industrial cases.

23 So other nonlife threatening medical
24 conditions: His diagnosis is uncontested. He did
25 have other unrelated medical conditions. No expert

1 is going to testify that any of his
2 non-mesothelioma caused his death. So they ask
3 that he be -- that defendants be precluded from
4 saying that these other medical conditions caused
5 his death.

6 I generally grant that, but I don't
7 think I will be saying that anyway.

8 MR. GLENN: Your Honor, I would just
9 point -- I thought you actually typically denied
10 this. I don't even know if this is going to end up
11 being a big issue, but my -- they're going to point
12 to the life-expectancy tables, obviously --

13 THE COURT: I'm not going to preclude
14 you from doing anything with respect to the
15 shortening of life expectancy or anything. If you
16 have somebody that can discuss that and talk about
17 that, you're going to be permitted to do that.

18 All they're talking about is whether
19 the death was caused by something else. The death
20 was caused by mesothelioma.

21 MR. GLENN: Absolutely. I'm sorry. I
22 misunderstood what you were saying.

23 THE COURT: There is going to be plenty
24 of evidence about other medical conditions.

25 MR. GLENN: Okay.

1 THE COURT: But the only thing they're
2 trying to address is, did the death result from
3 something other than asbestos? And that's all
4 they're worried about. The other materials are
5 fair game.

6 All right. Asbestos generally as a
7 cause of Mr. Whitmire's mesothelioma: Again, I
8 think I would certainly grant that. I don't think
9 there's any real quarrel that he died of
10 mesothelioma. It didn't come from me.

11 MR. MERIWETHER: Your Honor, there's no
12 question about that. Just to keep the Court
13 apprised of where we are on that and the reason
14 that I feel like I had to raise that is the defense
15 medical witness, Dr. Oury, opined at his
16 deposition, he -- long story short.

17 He got the path that morning because it
18 was late getting to us. So we -- he took a look at
19 it and he said, I can't be absolutely sure. I
20 think it's an asbestos caused meso. I can't be
21 sure. I need to do some more work, and he's going
22 to --

23 THE COURT: That's typical Oury. I've
24 heard Oury before. Nobody is going to be -- I'm
25 not going to let anybody get up here and say he

1 didn't die of mesothelioma.

2 MR. MERIWETHER: I'm just -- not only
3 that, he was just saying he wasn't sure it was an
4 asbestos specific meso death. He is sure now.
5 We've heard from him. We're not going to
6 contest --

7 THE COURT: That's all that needs to be
8 said.

9 MR. MERIWETHER: We might contest where
10 the source of the asbestos came from --

11 THE COURT: I understand.

12 MR. MERIWETHER: -- and that sort of
13 stuff, you know, the fiber type, because I think he
14 has a --

15 THE COURT: He has a very unusual
16 theory about that, and I've heard it many times.

17 MR. MERIWETHER: We rather like it,
18 but...

19 THE COURT: I understand.

20 All right. No. 2, is the lack of
21 knowledge -- motion in limine to exclude evidence.
22 The defense lacks knowledge that asbestos caused
23 mesothelioma. I never -- I mean, that's a big
24 debate, but I can tell you this: I allow all kinds
25 of records to come in to indicate that the world

1 knew that mesothelioma -- that asbestos caused
2 cancers, and post Dr. Wagner, asbestos caused
3 mesothelioma.

4 So as a practical matter, defendants
5 are going to have to face the information that I
6 will certainly allow to go before the jury that
7 asbestos causes mesothelioma. And you have
8 witnesses that will try to slice that and dice that
9 in certain ways, and that's fine.

10 Well, I think I've said what I need to
11 say on that motion.

12 MR. ELLIOTT: I think it's denied,
13 correct?

14 THE COURT: That's correct.

15 All right. Plaintiffs' motion in
16 limine to exclude any evidence of entity compliance
17 with government standards. I deny that. I mean,
18 you are going to be able to go both ways. The
19 plaintiffs are going to be able to freely show that
20 OSHA had certain standards, and that they did or
21 did not abide by them, but I'm not going to exclude
22 any evidence of the defendants' contention that
23 they complied with the government standards at the
24 time.

25 The plaintiffs usually argue that those

1 standards weren't enough given what people knew, et
2 cetera, et cetera.

3 All right. Four, excluding proper
4 comments and questions by the defendants of their
5 witnesses: I don't let any of this you and I are
6 breathing asbestos, there's asbestos in the
7 courtroom, you have asbestos in your lungs, there
8 are millions of fibers in your lungs. I generally
9 grant that.

10 So I would exclude those comments. I
11 think that gets very close to the golden rule
12 myself. It makes the -- it puts the jury -- it's
13 an attempt to put the jury in the defendants'
14 shoes, and I don't allow that.

15 Now, you can talk about -- you can
16 place evidence in the record about what the
17 situation is, but you can't just comment to the
18 jury in a fashion that this motion addresses. And
19 so I grant that motion.

20 No. 5 --

21 MR. ELLIOTT: Jim Elliott, I'm sorry.
22 Real quick. One clarification on the expert
23 testimony to establish background levels --

24 THE COURT: That's correct. And that's
25 perfectly okay. But this thing of just getting up

1 in front of the jury and doing golden rule type of
2 activity, no.

3 No. 5, other asbestos exposure --

4 MR. BRANHAM: Judge, if I could just
5 briefly in two seconds, let me tell you what my
6 concern on this is. Ms. Elliott did a great job in
7 Mr. Holstein's deposition, which we preserved on
8 videotape -- we'll talk about that before we
9 leave -- of going through with a list of
10 defendants, and I'm asking Dr. Holstein
11 hypotheticals.

12 That's perfectly fine as long as there
13 is some evidence that supports the hypothetical.
14 My concern is, and my recollection is, that some of
15 the hypotheticals that Mr. Elliott asked, there's
16 no support anyplace in the record for the
17 hypotheticals.

18 And so I'm afraid that we're going to
19 have a laundry list of hypotheticals where there's
20 no real support for it --

21 THE COURT: Well, I don't know until --
22 I won't know until he makes those arguments.

23 MR. BRANHAM: So just raising it for
24 the Court.

25 THE COURT: Well, I understand, but I

1 just finished granting your motion in limine. I
2 don't know what you're arguing about.

3 MR. BRANHAM: I'm sitting down.

4 THE COURT: All right. No. 5.

5 MR. BRANHAM: Five is what I'm talking
6 about.

7 THE COURT: Oh, you're talking about 5
8 regarding other asbestos exposure?

9 MR. BRANHAM: Yes, Judge.

10 THE COURT: I rule on these things as
11 they come up. And if Mr. Elliott starts with a
12 laundry list of things that don't have any support
13 or foundation in the record when he starts asking,
14 then I will sustain your objection.

15 MR. BRANHAM: Very good.

16 THE COURT: But I'm not going to do it
17 by means of just a blanket motion in limine.
18 That's denied.

19 Number 6, exclude speculative and
20 unreliable opinion testimony --

21 MR. BRANHAM: Judge, I will withdraw
22 it. I'll make the objection --

23 THE COURT: Very good.

24 No. 7, preclude testimony from Mr.
25 Blake that there are possibly elevated asbestos

1 levels in Rosman, North Carolina.

2 MR. BRANHAM: Judge, in two seconds,
3 here's the issue: One of the experts says there is
4 some asbestos mines someplace close to someplace
5 that Mr. Whitmire might have been sometime
6 somewhere. And as a result of that, there's all
7 these elevated asbestos levels and that that would
8 have increased his exposure to asbestos.

9 Now, when you ask him which mines,
10 where was it, when did it happen, he doesn't have
11 any answers for it.

12 And so my concern is that Mr. Blake is
13 going to come in here and just try and say, well,
14 there's some asbestos mines in North Carolina and
15 Mr. Whitmire walked by one once one time and,
16 therefore, that's a contributing cause of
17 mesothelioma.

18 So maybe this is something that you can
19 take up before he testifies.

20 MR. MERIWETHER: Your Honor, in
21 response, Robert Meriwether for Aurora. Mr. Blake,
22 when his deposition was taken by the plaintiffs in
23 this case, was discussing background levels of
24 asbestos. And he said, you know, you need to be
25 aware that North Carolina had 27 active asbestos

1 mines, some of which produced asbestos up until the
2 1970s.

3 And, you know, he cited to a United
4 States government and North Carolina government
5 report on the asbestos mines in the region. You
6 know, Dr. Holstein was cross-examined about that.
7 All the experts have had access to it.

8 The issue is not whether it created an
9 elevated level of asbestos in Mr. Whitmire. The
10 issue is whether or not under plaintiffs' theory of
11 causation, which is that everything above
12 background -- above general background contributes,
13 that if you're living for ten years next to an
14 asbestos mine, isn't that -- doesn't that
15 contribute too?

16 And one of the things that --

17 THE COURT: Well, wait a minute. I'm
18 just not going to get into a filibuster about each
19 of these things.

20 Cumulative exposure is what the
21 plaintiffs rest their analysis on. Each and every
22 exposure is kind of the buzzword, but really what
23 it is is cumulative exposure. And I'm not going to
24 let a witness simply speculate that there are mines
25 and, therefore, Mr. Whitmire might have been

1 exposed.

2 If there are specific pieces of
3 testimony about some exposure he had to air around
4 an asbestos mine, then they can talk about that,
5 but the ambient air of North Carolina is not what
6 is at issue here. His exposure is what is at
7 issue. And there's going to have to be some
8 platform on which the ambient air would contribute.

9 I mean, ambient air all over the world
10 has asbestos in it. And none of the cases I have
11 ever tried have ambient air used to talk about the
12 cumulative nature of exposure. The cumulative
13 nature of exposure, plaintiff and defendant, has
14 always been with respect to the industrial setting
15 and what happened therein.

16 So, you know, I think this is
17 potentially an attempt to put a red herring in the
18 case, and I will pay very close attention to what
19 has been asked. I can't make this judgment at this
20 moment.

21 MR. MERIWETHER. And I understand.

22 THE COURT: That is why I'm not going
23 to grant this motion at this moment, but I can tell
24 you that -- so you don't need to be arguing anymore
25 because I'm not granting the motion.

1 MR. MERIWETHER: Then I will hush.

2 THE COURT: That's what I was
3 suggesting.

4 But I can tell you I will be looking
5 very closely at Mr. Blake's testimony and the other
6 experts because a good deal of foundation has to be
7 laid before they start scaring this jury with
8 respect to, hey, there are all these asbestos mines
9 around. You know, I didn't even allow that to be
10 done in the case I recently tried, so I'm not going
11 to let it be done here.

12 MR. BRANHAM: Judge, Nos. 8 and 9 can
13 be withdrawn unless and until Mr. Bevis comes to
14 testify.

15 THE COURT: Okay. Well, I'll just
16 simply say I wouldn't let anybody's previous
17 bankruptcy come in and I wouldn't let anybody's
18 previous mental health come in. So that's just not
19 going to happen.

20 MR. BRANHAM: And then the collateral
21 source we've already talked about.

22 THE COURT: That's correct. All right.
23 And there aren't going to be any comments about
24 collateral source.

25 That completes the plaintiffs' motions

1 in limine. Now we have the defendants' motions in
2 limine.

3 All right. Defendants' motions in
4 limine. I don't have the -- all right. Okay. I
5 think I've got at least one defendants' listing
6 here, but it's probably the same for all of them.
7 It begins with -- and this is under the omnibus,
8 use of the term asbestos, victims, or similar
9 references.

10 Am I right? Am I in the right place?

11 MR. ELLIOTT: That was in ours.

12 THE COURT: All right. Denied.

13 MR. ELLIOTT: Well, you said -- you
14 didn't say, though, that with the caveat that I
15 couldn't say murderers and that sort of thing.

16 THE COURT: That's correct.

17 The plaintiffs' lack of insurance:
18 Denied.

19 Oh, excuse me. Mentioning or
20 referencing that plaintiff does not and did not
21 have insurance compensating plaintiff for any
22 injuries, plaintiffs --

23 MR. BRANHAM: I agree.

24 MR. GLENN: We agree to that.

25 THE COURT: Defendants' attorneys'

1 amount spent defending this, all right. That's not
2 going to be mentioned.

3 Other cases involving counsel, not
4 going to be mentioned.

5 Lack of a corporate representative, now
6 what is this? All right. The presence of a
7 corporate -- I've never seen the plaintiffs say,
8 hey, why don't they have that guy here the whole
9 time, but --

10 MR. BRANHAM: I'm not going to do that.

11 MR. ELLIOTT: We agree.

12 THE COURT: They're not going to do
13 that. All right.

14 All right. 6, preclude the writings,
15 actions, or knowledge of a trade association from
16 being imputed: I would deny that. I allow them to
17 put in evidence of what trade associations have to
18 say about matters and have in every one of these
19 cases I've tried.

20 Trading places, suggest, or asking the
21 jurors to place themselves -- that's the golden
22 rule, I would grant. I'm not going to put the
23 burden on the jury.

24 If I see this reptile thing one more
25 time --

1 MR. BRANHAM: Still haven't read the
2 book.

3 THE COURT: All right. I don't want to
4 allow any golden rule or reptile or anything like
5 that. So, of course, that's going to be granted.

6 Illnesses; mentioning the alleged
7 exposure of family members to asbestos-containing
8 matter -- they're not going to do that.

9 MR. ELLIOTT: We have an agreement too
10 on that.

11 THE COURT: Nonparty witnesses;
12 exclusion of all nonparty witnesses from the
13 courtroom except for experts. That's fairly
14 routinely done except with respect to the
15 plaintiffs and family members of the Whitmire -- of
16 the decedent, Mr. Whitmire.

17 MR. BRANHAM: Agreed. Agreed.

18 THE COURT: 11, absent witnesses;
19 failure to call a witness. I've never seen that be
20 a problem.

21 MR. ELLIOTT: We agree to it.

22 THE COURT: Granted. Probable
23 testimony; mentioning or stating to the jury the
24 probable testimony of a witness who was unavailable
25 to the defendant. Well, I would certainly grant

1 that. That's not going to -- they don't do it.

2 Depositions at which the defendant was
3 not present. Now, I don't grant that. You-all put
4 in these things all the time that were in all these
5 other asbestos trials, and I allow you to prove
6 things that way. So I'm not granting that motion.

7 Personal beliefs of counsel for the
8 plaintiff. I certainly won't allow any of that and
9 I know you won't do it.

10 Asbestos industry; referring to the
11 defendant as an asbestos company as part of the
12 asbestos industry. I will deny that.

13 Improper or prejudicial comparisons;
14 referring to any amount of prejudicial comparisons
15 between the contact of the defendant and other
16 corporate entities like a Pinto and the cigarettes
17 and everything. I will grant that.

18 Concert of action among the defendants.
19 Any concert of action among the defendants?

20 MR. ELLIOTT: We agreed to that, Your
21 Honor.

22 THE COURT: Stipulations?

23 MR. ELLIOTT: We agreed.

24 THE COURT: Improper or prejudicial
25 references to the media. Granted.

1 Inflammatory photographs and
2 videotapes. Do we have any inflammatory stuff
3 that's going to come in here?

4 Okay. If it's an end of life or a day
5 in the life of, I allow that. And sometimes I can
6 hardly keep from crying myself in some of these
7 cases, but I think they -- most of the time, the
8 parties agree between each other as to what is
9 going to be put in.

10 And I certainly understand the
11 defendants' desire to have it be -- to prove it to
12 me that it is to be put on without being so overly
13 emotional. And you-all generally work those things
14 out pretty well, in my view.

15 MR. ELLIOTT: Right. I leave that in
16 because of a bad experience in another trial, not
17 with these folks over here. I'm sure they'll let
18 me hear any audio of anybody --

19 THE COURT: Absolutely. We'll be sure
20 that we have something that is appropriate for the
21 jury to view but not over the top.

22 All right. Pain and suffering. Well,
23 I'm going to tell you, this hearsay business with
24 respect to somebody that is dying, you-all do it,
25 they do it, I'm not -- I'm going to deny that.

1 Religious beliefs. Certainly I'm not
2 going to have any -- I mean, these folks, it's been
3 my experience, on all sides of this thing come from
4 a background of faith. And in portraying the
5 picture of the family and the loss, they talk about
6 their -- what they do and what a day is like and
7 what their church habits are and so forth.

8 But I've never seen anything go beyond
9 that to say, the Lord is looking over your shoulder
10 and you should do this for this reason. I wouldn't
11 allow anything like that, so nothing like that will
12 happen.

13 MR. ELLIOTT: Thank you.

14 I'll take out 23.

15 THE COURT: Take out 23?

16 MR. ELLIOTT: Mm-hmm.

17 THE COURT: All right. Evidence of
18 workers' comp claims. Of course, you know I'm not
19 going to let that in, *Machin v. Carus, Inc.*

20 Evidence of or exhibits not included
21 within plaintiffs' produced discovery -- I
22 generally require that both sides explain --
23 exchange exhibits. So I would grant that, but I
24 don't think anybody's going to violate that.

25 MR. ELLIOTT: We agree to that.

1 THE COURT: And I hope you all comply.

2 MR. ELLIOTT: Except for impeachment.

3 THE COURT: Impeachment is a different
4 matter, but you-all both know the rules about that.

5 Pretrial matters; mentioning any action
6 or ruling on pretrial matters. I grant that.

7 Post-trial matters; don't lighten their
8 load by saying the appellate court can look at it
9 again. I'll grant that.

10 Mentioning this motion in limine;
11 granted.

12 Material data sheets, I deny that. In
13 an appropriate case, allowing MDSs in, I don't know
14 if that is -- I haven't seen it in a while in an
15 asbestos case, to be honest with you. So I don't
16 think it's really going to be a problem here.

17 Any reference to wealth, assets, so
18 forth and so on. All right. I certainly would
19 grant that, but it does not preclude the
20 appropriate information in the punitive damages
21 closing.

22 And I will say to you here, and I don't
23 know where it is in this melange of material, but I
24 always bifurcate, and I will bifurcate here.

25 And the one thing I do is ask the jury

1 to make a determination -- if they award a
2 plaintiff's claim a verdict of any size, I ask them
3 to make a determination of whether the conduct of
4 the defendant, any defendant against whom a verdict
5 was rendered, was willful, wanton, or reckless.

6 And if they then answer that question
7 in the affirmative, the Court can go to the penalty
8 stage of the trial. So that's how that's handled,
9 but no other activity as mentioned with respect to
10 punitives.

11 Mr. Branham?

12 MR. BRANHAM: Judge, the only thing I
13 want to make clear is, that when I'm on cross, one
14 of the things I am going to ask about is, you know,
15 how many employees did they have, did they have
16 offices all over the world, that sort of thing,
17 because it goes to the issue of what they could
18 have gone at and known. Right? Did they have a
19 research department?

20 THE COURT: Anything that's related to
21 knowledge about a big company's knowledge -- I
22 mean, we've had plenty of companies that, you know,
23 are here and they're in England and they're in
24 other places and that kind of thing -- you can ask
25 if it's pertinent, but if it gets into just bigness

1 for the sake of bigness, then I'm not going to let
2 you do that.

3 MR. BRANHAM: Got it.

4 MS. GOLDHABER: Your Honor, Catherine
5 Goldhaber for Lawrence. Would that question then
6 need to be directed at the time period of exposure
7 at issue versus now? How big is the company now?

8 THE COURT: Yeah. I mean, the
9 knowledge is all going to be directed towards the
10 time periods involved here. So, yes.

11 MR. BRANHAM: So until the mid '90s or
12 so?

13 THE COURT: Yeah.. Mm-hmm. During the
14 period of this potential exposure.

15 MS. GOLDHABER: Thank you, Your Honor.

16 MR. BRANHAM: Judge, just one more
17 clarification, as the Court's --

18 THE COURT REPORTER: I don't understand
19 what you're saying.

20 THE COURT: Mr. Branham. Mr. Branham,
21 you've got to slow way down. What he said was that
22 he wants to make a sauce for the goose and a sauce
23 for the gander argument.

24 THE COURT REPORTER: Oh, he said it too
25 fast for me to understand.

1 MR. BRANHAM: What I don't want to
2 hear, because I heard it a couple of times today
3 is, we're a small company. We only have a few
4 folks, right, just for the sake of being a small
5 company and having a few folks.

6 I mean, if it's relevant to their
7 knowledge, if they want to talk about it as it
8 relates to knowledge --

9 THE COURT: Well, that's the only basis
10 upon which it's going to be relevant at all, big or
11 small. So if they want to say small means they
12 didn't know as much, they can try to see if they
13 can sway the jury to that.

14 I don't know that they can in light of
15 all the industry knowledge, but they can talk about
16 who they are and what they are --

17 MR. BRANHAM: Very good.

18 THE COURT: -- if it relates to what
19 kind of knowledge they have, but frankly, the
20 smallest ones of them have trade information and
21 all kinds of other information. So if they want to
22 make that projection on direct, I'm sure it would
23 be dealt with appropriately on cross-examination.

24 MR. BRANHAM: Fair enough, Judge.

25 THE COURT: Any references or

1 statements or argument that juries should attempt
2 to send a message to the defendant. I would grant
3 that. No sending message argument is going to be
4 allowed to the defendant, or the community, or any
5 other messages that people are talking about. We
6 don't do that.

7 Now, I think that's the motions in
8 limine.

9 MR. ELLIOTT: Your Honor.

10 THE COURT: Yes, sir.

11 MR. ELLIOTT: William Powell filed one
12 other on the insulation issue. I understand it's
13 denied. I don't want to go into it.

14 THE COURT: Remind me one more time
15 what you're saying.

16 MR. ELLIOTT: That it's not responsible
17 for equipment, like insulation and --

18 THE COURT: Yeah, that's that bare
19 metal thing and so forth and so on. If you design
20 it with the knowledge that it's going to be used to
21 carry terribly hot things, or terribly cold things,
22 or other things that may need some insulation, you
23 would be responsible for it under South Carolina
24 law.

25 MR. ELLIOTT: Motion denied.

1 THE COURT: I'm going to be studying
2 North Carolina law very closely because I
3 understand the effort and argument with Ms.
4 Shofner, but I'm going to try to get educated.

5 MS. GOLDHABER: Your Honor, Catherine
6 Goldhaber. Just for the record, we had a similar
7 motion as William Powell that we understand was
8 denied.

9 THE COURT: Yes.

10 All right. And let me just say
11 generally, all are protected. These motions in
12 limine I am going to regard, and I think your
13 papers reflect this, you all embrace each other's
14 motions in limine. So the rulings that I am making
15 with respect to these apply to all of the
16 defendants, that being Armstrong, Aurora, Lawrence
17 Pumps, and William Powell.

18 Any disagreement there?

19 MR. Elliott: No, Your Honor.

20 THE COURT: All right. What else have
21 we got?

22 MR. MERIWETHER: Your Honor, I noticed
23 that amongst the materials that Aurora has put in
24 is an argument that the material analytics client
25 has MAS video to be excluded because there is

1 nobody from MAS that is putting them up or
2 authenticating them, that they are wholly unlike
3 any situation ever described by any of the
4 co-workers, that they are -- you've heard this
5 before.

6 But among the people who rely upon them
7 and used them, such as plaintiffs' medical expert,
8 Dr. Holstein, and we can -- we are still in the
9 process of reviewing plaintiffs', you know,
10 proposals for what sections of Holstein's dep will
11 be played. We'll have objections and counter those
12 sanctions. If they include the MAS video, we can
13 raise the issue --

14 THE COURT: Well, let me just explore
15 it briefly with Mr. Branham right here.

16 Mr. Branham.

17 MR. BRANHAM: Sure, Judge. I think
18 that these were played during the Howell case.

19 THE COURT: Yes, they were.

20 MR. BRANHAM: Yeah. And these were the
21 removal of the gaskets --

22 THE COURT: Yes. I mean, I thought
23 that was a very dramatic moment in the case. They
24 were talking about how they burn them, never do
25 this, never do that, and they're their people.

1 That's what the industry standard is, scraping them
2 and grinding them.

3 MR. BRANHAM: And so I showed
4 Dr. Holstein literally the exact same clip that was
5 played in the Howell case, and then asked him to
6 give certain opinions about it, which he did.

7 THE COURT: Mm-hmm.

8 MR. BRANHAM: And so that is how that
9 video would come into evidence.

10 THE COURT: Right. And I will allow
11 that as I did in the Howell case.

12 MR. MERIWETHER: All right. I just
13 would maintain my objection and rely on our brief.

14 THE COURT: Okay.

15 MR. ELLIOTT: If I can make one comment
16 on that, Your Honor. In that video there is
17 grinding. And, at least, at this time from the
18 deposition testimony of the co-workers, there is no
19 testimony that they ever did any such grinding. He
20 may fix that at trial, but there wasn't any
21 testimony in this case.

22 THE COURT: Well, looking in the light
23 most favorable to the plaintiffs at this point, my
24 recollection is that there is at least some
25 testimony by co-workers about grinding, but I could

1 be mistaken about that. I had to read a whole lot
2 of testimony, but we'll see if that turns out not
3 to be the case. But, quite honestly, I think that
4 video is going to come in.

5 All right. What is it?

6 MS. SHOFNER: I think the only other
7 thing that we have is we were going to -- I'm
8 sorry, Elaine Shofner for Aurora Pumps.

9 THE COURT: Thank you.

10 MS. SHOFNER: The only other issue that
11 we had was I think that the plaintiffs and all the
12 defendants are going to get together and agree upon
13 some questions that we would present to you to ask
14 to the jury.

15 THE COURT: Thank you for reminding me
16 of that. The way jury qualification is going to
17 work next Monday is Mark Hayes is going to
18 generally qualify the jury. And then I will come
19 in at the end of the general qualifications and
20 project the specific questions with respect to this
21 case.

22 And as you know, I'm not a big fan of
23 jury questionnaires or voir dire by counsel. I
24 don't think South Carolina currently allows that
25 except in death penalty cases.

1 I often receive agreed-upon questions
2 by both sides, but I don't want to ask them because
3 I think some of them go a little far and are more
4 geared towards conditioning the jury to a certain
5 point of view than they are to really gauge
6 information needed to discern whether we can get a
7 juror who can look at the evidence as it is
8 presented, and the law as I give it, and be
9 objective and put their own personal feelings to
10 the side, and render a fair and impartial verdict.

11 So I will look carefully at what you
12 send and it all may be okay, but I just want to
13 explain to you that some of you have not tried a
14 case with me before, but sometimes both sides will
15 agree, but I withdraw those questions because it's
16 a little outside of what the jury needs to be asked
17 in order to find a fair and impartial jury.

18 But that would be very helpful. Very
19 helpful.

20 What else?

21 MR. BRANHAM: Judge, in terms of
22 Whitmire, I have just a couple of housekeeping
23 things to advise the Court about. We took
24 Dr. Holstein's videotaped deposition; he's an
25 expert; he's on vacation. So he will coming by

1 video.

2 THE COURT: All right.

3 MR. Branham: I have given the
4 defendants the designations that I wish to play.
5 My understanding is they are working diligently to
6 get counter designations back.

7 That's the only deposition that I am in
8 dire need of getting rulings from the Court on
9 objections so that I can get that tape cut so that
10 I'm not short on evidence next week.

11 So I hope that we will get those
12 counters back from you guys.

13 MR. MERIWETHER: We --

14 THE COURT: What day do you plan to --
15 do you plan to play it on day one?

16 MR. Branham: No, Judge.

17 THE COURT: All right. Well, here's
18 what we'll do: Will you-all please try to get all
19 of these designations and counter designations and
20 objections in order, and I will try to deal with
21 them -- and I will try to deal with them at the
22 close of the case on Monday.

23 MR. ELLIOTT: Your Honor, just -- all
24 of the designations were due on Monday for
25 everything except Holstein. We've got -- all of

1 our replies and objections are due Friday. That's
2 not going to be a problem.

3 Holstein's, I think you got his
4 deposition, just by chance, a day before us. I
5 think you got it yesterday. I mean, it is a long
6 deposition.

7 THE COURT: I understand.

8 MR. ELLIOTT: That one's going to take
9 a while.

10 THE COURT: The goal would be -- let's
11 just put it in that context -- to try to get
12 together at the end of one of the days before this
13 deposition is played to the jury. What I don't
14 want to have happen is to send that jury out and be
15 sitting here talking about this.

16 I want it all decided and then tailored
17 so it can all be queued up and played with no
18 interruptions for rulings or anything of that
19 nature.

20 So are we in accord?

21 MR. BRANHAM: So literally as soon as
22 they get it back to us, you know, just highlight
23 and getting the page lines and objections done,
24 we'll get it to you.

25 THE COURT: I have Jamie Rutkoski, but

1 she's leaving me now and she's DQ'd on this case
2 because she's going to work for one of the law
3 firms in the case. So I've got Tyler McDonohue
4 here, and Tyler is an appellate law clerk with
5 Judge Honduras, which means he's brilliant and very
6 experienced in that realm, but he's not very
7 experienced in trial cases.

8 So what I used to do is send Jamie out
9 there and she would work these things out with you
10 all and narrow down the things that we were really
11 concerned about to a precious few.

12 Now, I can have Tyler interact with you
13 all about that, but keep in mind the limitations of
14 what I'm being provided for by way of resource and
15 try to whittle it down to what you're really
16 concerned about, as opposed to just kind of knowing
17 the objection for the record so you're protected.

18 The things I really need to rule on,
19 let's kind of focus like a laser on those. Okay.

20 All right. What else?

21 MR. MERIWETHER: In terms of
22 housekeeping, thinking about parts of the trial and
23 so forth, I will follow-up on what Trey was saying.
24 I know we had to take one of their experts by
25 video. I'm hoping that's not true for any of ours.

1 Trey, I think you're taking tomorrow
2 morning --

3 MR. BRANHAM: I don't know that he had
4 been tendered, but it doesn't mean that I didn't
5 forget.

6 MR. MERIWETHER: It's okay. We
7 tendered him, but, look, I'm not ever blaming
8 anybody for forgetting something.

9 THE COURT: All right.

10 MR. MERIWETHER: My point is, he's
11 going to take him tomorrow morning. We've got a
12 follow-up report that we said -- that he requested.
13 We are going to -- my only problem is we may have
14 to call him out of order.

15 And so by the tail end of next week, if
16 you all are -- if you all are agreeable, we might
17 have to put him up.

18 MR. BRANHAM: So the only thing I need
19 with that is the date, because if it conflicts with
20 my expert then --

21 MR. MERIWETHER: Right.

22 THE COURT: That's for the future.

23 Now, we still have this. We have
24 Crawford. So let me just say a word about
25 Crawford. Number one, I'm sure more information

1 will come from you about who is still in this case
2 by the time Monday rolls around.

3 In the meantime, we've got a motion for
4 summary judgment by Aurora pumps in the Crawford
5 case, and I'm going to deny that on the same basis
6 that I denied the motion for summary judgment in
7 Whitmire.

8 All right. Mr. Meriwether, you were
9 protected in all of the objections you made and so
10 forth.

11 MR. GLENN: For the record, we didn't
12 have a summary judgment motion --

13 THE COURT: I've got CNA and Daniel
14 out. I got Goodyear and Sarco. What's with Aurora
15 Pumps? No motions?

16 MR. MERIWETHER: Your Honor, we did not
17 waste the Court's time or plaintiff's time by
18 making an exposure motion for summary judgment in
19 Whitmire --

20 THE COURT: Okay.

21 MR. MERIWETHER: -- however, in
22 Crawford, where there is no testimony that he was
23 ever around a pump, we did make one.

24 THE COURT: Okay. Well, then it's
25 denied.

1 All right. Now, Goodyear and Sarco.
2 Is this going to be anything different from what
3 I've already heard?

4 MS. TECHMAN: Yes, Your Honor, it will
5 be for Sarco.

6 MR. BOGLE: On behalf of Goodyear, Your
7 Honor, it will be very different.

8 MS. TECHMAN: My motions will take less
9 than five minutes.

10 THE COURT: Well, I've heard that
11 before.

12 Let me hold things for a minute and go
13 on to a couple of other things. But motions in
14 limine I think I've dealt with in Whitmire, both
15 plaintiff and defense, so I don't need to hear
16 anything different with motions in limine.

17 With respect to the miscellaneous, we
18 have Covil's failure to attend the mediation and
19 Covil's spoliation.

20 Do we have anybody here for Covil?

21 MR. WALL: Yes, Your Honor, Mark Wall.
22 And, Your Honor, I'll get into it now. We were
23 served those motions yesterday. We have not -- I
24 have filed little stuff on them just to protect the
25 record, but I've not really filed anything on them.

1 THE COURT: Okay. Well --

2 MR. WALL: We filed an affidavit and I
3 filed a sort of a rolling memorandum.

4 THE COURT: All right. I want to hear
5 those today.

6 MS. MCVEY: Okay. And just for the
7 record, the reason why they were filed yesterday
8 was because they're 30(b)(6) deposition. We pushed
9 them at their request to Monday. So we weren't
10 delaying it; we just didn't know until Monday.

11 THE COURT: But you took it and what
12 you're saying -- number one, Covil did not attend
13 the mediation?

14 MS. MCVEY: Your Honor, Covil -- hold
15 on a second. Covil asked to have a separate
16 mediation apart from the one we did, that we agreed
17 to do in July.

18 THE COURT: Yeah.

19 MS. MCVEY: And then they cancelled
20 that.

21 THE COURT: Mm-hmm.

22 MS. MCVEY: And so they have not
23 mediated --

24 MR. WALL: We canceled that based upon
25 what they said to us, and then we went and made a

1 full offer as if we were in mediation, and this was
2 all Friday of last week.

3 THE COURT: All right. Well, I'm not
4 going to get into that then right now.

5 All right. With respect to defendants'
6 motion to -- joint motion to -- defendants' joint
7 motion to strike the case from the trial roster --
8 well, that's denied.

9 It's the backup case and it's going to
10 be the backup case and it has been the backup case
11 for a long time.

12 I am going to look at my watch, and I
13 don't want a long argument, Ms. Techman. The
14 chances of reaching your case are not high, but
15 they are a potential; so, therefore, come on up.

16 MS. TECHMAN: Thank you, Your Honor.

17 Jennifer Teckman for Spirax Sarco, who
18 for convenience I will refer to as Sarco,
19 S-A-R-C-O.

20 Your Honor, this motion is different
21 from any motion that you've heard today. At issue
22 is whether this Court can assume that the product
23 was at the job site. By that I mean it's
24 undisputed that there is no evidence of a Sarco
25 product at Mr. Crawford's job site. There is no

1 testimony from Mr. Crawford and there are no
2 witnesses who put the product at the site. There
3 are no documents that put the product at the site.

4 So in order for this Court to determine
5 that the product was even at the job site would
6 require complete speculation.

7 THE COURT: Who is -- what is the job
8 site?

9 MS. TECHMAN: Celanese plant in
10 Spartanburg.

11 It is also undisputed that there really
12 is not any circumstantial evidence that the product
13 is at the job site. The plaintiffs may ask you to
14 assume that the product could have been at the job
15 site because the product is a steam trap and steam
16 traps could have been on steam lines.

17 But what this Court cannot do is make a
18 wholly unsupported assumption that the product was
19 there, that the product had asbestos-containing
20 components, that the product was in the vicinity of
21 Mr. Crawford, who, by the way, worked in a
22 supervisory capacity.

23 The Court would have to further assume
24 that some disturbance of the asbestos component was
25 undertaken while Mr. Crawford was in the vicinity,

1 and the Court would have to further assume that
2 that happened on enough occasions to reach at least
3 a scintilla, but here, Your Honor, there's not even
4 a scintilla.

5 THE COURT: All right. Very good.

6 MR. CHAPMAN: Good afternoon, Your
7 Honor. Aaron Chapman for the plaintiffs. The
8 first time I'm appearing in front of you.

9 THE COURT: And your last name is?

10 MR. CHAPMAN: Chapman, Your Honor.

11 THE COURT: All right.

12 MR. CHAPMAN: Just for time, I'll
13 largely rest on our brief, but, briefly, I'll say
14 that the Celanese facility is part of a very large
15 facility with miles and miles of steam lines.

16 THE COURT: What evidence is there that
17 Sarco's product was there?

18 MR. CHAPMAN: Well, so, Your Honor, I
19 think what we have is that Sarco steam traps were
20 very prevalent in the area, and given their
21 prevalence in the area and the exact type of
22 application which Mr. Crawford would have been
23 around, I think it's a reasonable presumption or
24 inference that he would have --

25 THE COURT: What evidence in the record

1 is there about Sarco products being in the area or
2 sold in the area or used in the area?

3 MR. CHAPMAN: There is no document of
4 it, Judge.

5 THE COURT: Is there any testimony?

6 MR. CHAPMAN: No, Your Honor.

7 THE COURT: Well, then, on what basis
8 am I to conclude that Sarco's products were at
9 Celanese?

10 MR. CHAPMAN: I think, Your Honor, just
11 given the reasonable inferences that we could get
12 viewing the motion most favorable to us.

13 THE COURT: I know, but I've got to
14 have a scintilla.

15 MR. CHAPMAN: I understand, Your Honor.
16 I totally understand what you're getting at, but
17 there is no document.

18 THE COURT: Very good. The motion is
19 granted.

20 MS. TECHMAN: Thank you.

21 MR. CHAPMAN: Thank you, Your Honor.

22 THE COURT: All right. Now, Goodyear.

23 MR. BOGLE: Your Honor, Michael Bogle
24 with Womble, Bond, Dickinson, B-O-G-L-E, for
25 Goodyear. I understand the Court is pressed on

1 time, so I will be brief.

2 Our motion is a little similar to what
3 you just heard. We sat through discovery,
4 plaintiffs sat through all the depositions in this
5 case, we sat through them. There was no mention of
6 any Goodyear products. At the close of discovery,
7 we moved for summary judgment.

8 And the plaintiffs responded for the
9 first time that we ever heard, oh, we weren't
10 talking about a Goodyear labeled product. We were
11 talking about Goodyear making a component of
12 another company's product with whom we've already
13 settled in the case, one of the other
14 co-defendants.

15 So at the outset, I think what we're
16 asking for is partial summary judgment on the fact
17 that we can all agree there is no Goodyear Tire
18 labeled product here.

19 So moving on to the plaintiffs' new
20 theory of liability, what I would ask the Court to
21 do, and I will be very brief, but we've attached as
22 Tab 8 to our brief -- do you have -- does Your
23 Honor have a copy of that?

24 THE COURT: If I have --

25 MR. BOGLE: I brought one.

1 THE COURT: Here it is. It's in the
2 mélange. In fact, I think I know where it is back
3 on the desk, but it would be helpful --

4 MR. BOGLE: Here you go, Your Honor.

5 THE COURT: All right. Thanks.

6 MR. BOGLE: So tab 8 to that is a copy
7 of trial transcripts or a portion of trial
8 transcripts from the Muldoon case back in 2014.
9 And I think it's very similar to what we're seeing
10 here.

11 Through discovery, no Abex Brakes --
12 this was Abex Brakes' motion for summary judgment.
13 It went through discovery. There was no
14 identification of an Abex Brakes product. No
15 witness ever testified that Mr. Muldoon was exposed
16 to Abex Brakes.

17 They moved for summary judgment and
18 plaintiffs responded for the first time that we
19 admit we have no evidence linking to an Abex Brakes
20 product, but we're going to try to connect the dots
21 that your company was a manufacturer of a component
22 part of another defendant's product.

23 THE COURT: Crane.

24 MR. BOGLE: Correct, Crane. Now, in
25 that case, it was Cadillac cars. The plaintiff

1 introduced evidence. They had evidence that -- the
2 co-worker's testimony was that the plaintiff worked
3 on Cadillac cars; and they had further evidence
4 that for a period of time that Abex was the
5 exclusive manufacturer of brakes for Cadillac cars.

6 And so they tried to piece together
7 this component liability theory. And Judge Hill
8 said that is not enough. And relying on the cases
9 we've cited in briefs, that you cannot sidestep
10 causation in South Carolina. The plaintiffs have
11 to prove the injury or damage was caused by the
12 actual conduct, but particularly defendants.

13 Let's look at Goodyear. We already
14 said they can't point to a Goodyear labeled product
15 or Goodyear products. So they tried to piece
16 together a three-part argument. They have to
17 connect three dots, and if they can't connect one
18 of those dots, they lose. They have to hit a
19 thousand on this.

20 So part one is they have to connect
21 plaintiff to a Crane Co. valve during this
22 four-year period where he worked at the Hoechst
23 Celanese plant, 1970 to 1974.

24 In Muldoon, that was easy. They had
25 co-worker testimony that he worked on the Crane Co.

1 valves on the Cadillac cars.

2 They don't have that here.

3 Mr. Crawford never worked on a Crane Co. valve. He
4 was a production line guy. He didn't identify
5 Crane Co. valves. He didn't identify any valves.

6 So to make this connection, they tried
7 to dig up some testimony from Dennis Day and Ronny
8 Thompson from five years ago. And neither of these
9 gentlemen were deposed in this case.

10 Neither were ever identified as
11 witnesses in this case. The first time anyone in
12 this room heard or saw their names was in response
13 to our motion for summary judgment.

14 And on that basis, we moved in our --
15 we move to strike that testimony. So if Your Honor
16 agrees with that, we get summary judgment. It's
17 over.

18 Let's look at what the testimony says.
19 Again, Crawford worked for Celanese, production
20 line guys. Day and Thompson worked for Daniel
21 Construction; they were maintenance folks. They
22 didn't know Mr. Crawford. They never mentioned
23 Mr. Crawford. Mr. Crawford didn't know either of
24 them.

25 So Day and Thompson said, yes, we

1 worked on Crane Co. valves. They also said this
2 plant was 100 acres big. That's ten William Brice
3 Stadiums. So they might have worked on valves in
4 the upper deck of stadium two and Mr. Crawford
5 might have been on the 50-yard line of stadium
6 eight. We have no idea. That's guess No. 1.

7 We know that the valves were in the
8 same 100-acre plant as Mr. Crawford. We don't know
9 whether he was ever within five football fields of
10 that work taking place. We know he never did any
11 of that work, much less -- and so I think there's a
12 big question of whether you can meet the proximity
13 requirements and it's enormous. That's guess No.
14 1.

15 What's the second one? The second leap
16 they have to make, they have to put a cranite
17 gasket inside that Crane Co. valve. And, again,
18 Mr. Crawford never said Crane Co. He never worked
19 a valve. He never said gaskets. He never
20 identified any gaskets. He identified one gasket
21 in connection with auto work. He never puts a
22 gasket in the Hoechst Celanese plant.

23 So we have to go back to Mr. Day and
24 Mr. Thompson. They say they changed gaskets and
25 Crane Co. valves, and they say they usually got

1 their replacement gaskets from kits at the plant
2 and that they thought those kits came from the
3 manufacturer.

4 Do they say the gaskets they changed
5 were cranite gaskets? No, they do not. Do they
6 say they were Goodyear gaskets? No, they do not.

7 So what Plaintiff has to do is they
8 bring in the testimony of a third previously
9 undisclosed, previously unknown witness brought
10 into this case for the first time in opposition to
11 our motion for summary judgment, Mr. Pandaleoni,
12 P-A-N-D-A-L-E-O-N-I.

13 And we've cited law in our brief so
14 that Your Honor can see in our motion to strike
15 this testimony that it is not proper to introduce
16 witnesses in a case for the first time and identify
17 witnesses for the first time in response to summary
18 judgment.

19 We also have a number of other grounds
20 to exclude those witnesses' testimony. We think
21 it's hearsay for a number of reasons.

22 Again, if Your Honor agrees, we win,
23 end of story, motion for summary judgment should be
24 granted. They have to hit all three of these
25 points; but let's talk about the testimony.

1 Mr. Pandaleoni says Crane Co. sold
2 gaskets called cranite. And he said that Crane Co.
3 recommended cranite gaskets to his customers. He
4 does not say that they were always used as
5 replacements for the Crane Co. valves. He does not
6 say they were most of the time used. He does not
7 know whether the valves in Mr. Crawford's plant
8 contained cranite gaskets.

9 He doesn't know Mr. Crawford or this
10 plant. He doesn't know whether Celanese bought
11 these replacement gaskets.. He doesn't know whether
12 Daniel bought these cranite gaskets. He can't tell
13 us whether Celanese or Daniel bought cranite
14 gaskets or some other type of gaskets --

15 THE COURT: Yeah, but they have some
16 co-workers that say that there were boxes that said
17 made for Crane Co. or made for Crane with gaskets
18 in them.

19 All right. Why isn't that a scintilla?

20 MR. BOGLE: Your Honor, I think that --
21 well, there's testimony from Mr. Pandaleoni.
22 Mr. Pandaleoni says they sold -- there were all
23 kinds of different gaskets that Crane Co. sold.
24 There were cranite gaskets that he said Goodyear
25 made, but there were also a number of other gaskets

1 and the customers commonly bought other gaskets.

2 So we don't know what kind of gaskets they bought.

3 THE COURT: That's such a typical thing
4 that I hear a lot. You know, there's a scintilla
5 that cranite, which was a Crane Co. product made by
6 various suppliers, which Goodyear was one, and they
7 would supply these things in a little box that
8 said, supplied by or made for Crane.

9 And yours were some of the gaskets that
10 would be in there that you made for Crane, the
11 cranite. And so that's going to be enough for me.

12 MR. BOGLE: Well, I -- okay. I --

13 THE COURT: I mean, this is summary
14 judgment.

15 MR. BOGLE: I understand.

16 THE COURT: And, you know, you're
17 asking me to give you some affirmative relief. And
18 there is at least a scintilla of evidence that
19 Goodyear was one of the suppliers of gaskets for
20 Crane and that Crane would supply a little box that
21 would say, made for cranite; that as one of the
22 suppliers, its gaskets would have been included in
23 some of the boxes that would have been supplied by
24 Crane to be used with its product.

25 MR. BOGLE: I would submit that it's

1 the same situation that Abex was in where some of
2 their -- they were the exclusive provider for
3 Cadillac for a period of time and Judge Hill
4 ruled -- and, again, I'll urge the Court to read
5 through it. It's not a long brief, but Judge Hill
6 ruled that that was because you're taking
7 multiple -- you're looking at multiple dots that
8 have to be connected. And --

9 THE COURT: I understand the multiple
10 dots argument.

11 MR. BOGLE: Okay. Well, we believe
12 that it's insufficient. We believe there's a
13 part three they have to prove, whether Goodyear was
14 the exclusive manufacturer. We address that in our
15 brief.

16 THE COURT: Yeah, I know.

17 MR. BOGLE: I can go through it or I
18 can stop.

19 THE COURT: Denied. You're protected.

20 MR. BOGLE: Thank you.

21 THE COURT: All right. Now, what else?

22 MR. BRANHAM: I need to come back to
23 Whitmire for just a second. I was just handed
24 something, and I will brief it for you, but I just
25 need to raise the issue. This is -- I literally

1 just got handed a report from a company called the
2 R. J. Lee Group.

3 THE COURT: I'm familiar with R. J.
4 Lee.

5 MR. BRANHAM: With a report done by
6 Drew van Orden, who is not an expert designated in
7 this case, that he did what's called a tissue
8 digestion. Your Honor, I don't know if you are
9 familiar with --

10 THE COURT: I remember the tissue
11 digestion. Tim Moore says you can't tell anything
12 about anything unless you do a tissue digestion.

13 MR. BRANHAM: Okay. So they did one,
14 apparently, and nobody ever asked me. This is
15 literally the first time I'm ever hearing about a
16 tissue digestion actually being done.

17 Now, when I talked to Mr. Oury, we
18 talked about what he would want to see in tissue
19 digestion, those types of things.

20 THE COURT: This is a tissue digestion
21 on Mr. Whitmire's tissue?

22 MR. BRANHAM: That's right. And they
23 got results --

24 THE COURT: And who is supplying this
25 to you?

1 MR. BRANHAM: Aurora is supplying it
2 just now.

3 MR. MERIWETHER: We took over for
4 Dr. Oury -- we took that over for -- you know, as
5 sort of --

6 THE COURT: I got it. How long have
7 you had this?

8 MR. Glenn: I got the report -- it's
9 dated yesterday. I didn't receive it, Your Honor,
10 until today, when we were at this hearing.

11 THE COURT: When was it done?

12 MR. BRANHAM: When was the digestion
13 done?

14 THE COURT: Yes.

15 MR. BRANHAM: Sample received May 25th.
16 I can't tell exactly when the -- but clearly after
17 May 25th, right?

18 THE COURT: Uh-huh.

19 MR. BRANHAM: And so, I mean, here's
20 the thing, Judge, is they've got an expert doing
21 the digestion that they never asked me about. So
22 they've destroyed evidence without giving me notice
23 so that I can get somebody to split it up and have
24 everybody else do it.

25 THE COURT: Well, I don't know that.

1 MR. BRANHAM: Well, I mean, I don't
2 have it.

3 THE COURT: I'm not prepared to make
4 any ruling excluding that, Mr. Branham.

5 MR. BRANHAM: Fair enough.

6 THE COURT: I'm going to need to know a
7 lot more about whether there was any tissue left
8 for you to test, when they got it, how they got it,
9 and all that kind of thing.

10 MR. BRANHAM: We'll brief it, but I
11 just wanted to --

12 MR. MERIWETHER: Just for the sake of
13 the record, from my understanding, and please
14 forgive me if I miss say anything, but my
15 understanding is that Dr. Oury, who is the
16 defense --

17 THE COURT: I know Dr. Oury. I know
18 he -- tissue digestion.

19 MR. MERIWETHER: So when Dr. Oury was
20 put up for deposition, he had gotten the tissue
21 that morning. He did limited review. He said, you
22 know, I would still like to have the tissue
23 digestion and I still need to do some more staining
24 because I'm not convinced that this is an
25 asbestos-associated meso until I test this.

1 He did test that and he agreed to come
2 back for a further deposition. I have responded to
3 Trey that we have heard from Dr. Oury that he is no
4 longer asserting that it is not an
5 asbestos-associated meso based on his subsequent
6 staining that he did.

7 The other thing he did was they divided
8 the tissue in half and sent half to R. J. Lee to
9 get Drew to do a digestion so that he could tell
10 whether or not it was --

11 THE COURT: And what is R. J. Lee
12 saying?

13 MR. MERIWETHER: He's saying -- well,
14 I'll be honest with you, I haven't looked at it. I
15 got a copy and handed it to --

16 THE COURT: Mr. Branham, what's R. J.
17 Lee saying?

18 MR. BRANHAM: It's says that he found a
19 particular type of asbestos fiber, amosite, in the
20 material.

21 THE COURT: Uh-huh.

22 MR. BRANHAM: And, of course, what the
23 argument from these folks is going to be is that
24 our gaskets only contain chrysotile; so, therefore,
25 it couldn't have been our gaskets.

1 THE COURT: Right.

2 MR. BRANHAM: So, I mean, now, the
3 amosite insulation on the pumps and valves and all
4 the rest of that, that's a different issue. But
5 the point here is that I took Mr. Oury's
6 deposition. He told me he wanted to do the
7 staining, that he would be interested in seeing the
8 digestion and this kind of thing, but they didn't
9 tell me they were going to do one. And there
10 wasn't --

11 THE COURT: He might not have -- this
12 one might not have known. Apparently --

13 MR. GLENN: We learned about this, Your
14 Honor, on last Thursday. And we said if Dr. Oury
15 can get the tissue digestion in time for trial, we
16 would love to see it and love to offer you for a
17 deposition. And that has been over the last five
18 days. I received the report today.

19 THE COURT: Okay. Well, I'm simply
20 going to say this. All right. You will have to
21 look at this thing and decide what you're going to
22 do about it and what kind of motion you're going to
23 make. So far I have no motion in front of me about
24 this matter.

25 MR. BRANHAM: Fair enough.

1 THE COURT: But when I do, I will try
2 to do the best I can.

3 MR. BRANHAM: Thank you.

4 MS. MCVEY: Thank you, Your Honor.

5 THE COURT: Very good. Anything else?

6 MS. MCVEY: Just one thing. I know you
7 said you're not going to hear the Crawford, Covil
8 motions, but we would like to have it heard at some
9 point.

10 THE COURT: Oh, yeah. If this comes to
11 case that's going to be tried, we will hear it.

12 MR. BOGER: Your Honor, Tommy Boger on
13 Covil. We do have a separate specific motion in
14 lime regarding excluding the testimony of a witness
15 that the plaintiffs named just fairly recently by
16 the name of Wayne Waters.

17 THE COURT: I just -- you know, when
18 did they name him as a witness?

19 MR. BOGER: I'll defer to them on when
20 it was filed.

21 MS. MCVEY: I'm sorry. Oh, that's in
22 Crawford. Can we deal with that another --

23 THE COURT: Yeah. I understand. I
24 understand.

25 MR. BOGER: We'll hold off on that one.

1 then, Your Honor?

2 THE COURT: Hold off on that.

3 MR. BOGER: Okay. Thank you.

4 MS. MCVEY: I'm sorry, Your Honor. The
5 last thing in Crawford is, Mr. Crawford is the one
6 that has mesothelioma and he's still alive. His
7 wife died earlier this year, and so we moved to
8 amend the complaint to add her estate as a party.

9 THE COURT: Right.

10 MS. MCVEY: There has not been an
11 objection to that, but I wanted to hand you up an
12 order..

13 THE COURT: Right. Okay.

14 MS. MCVEY: Thank you, Your Honor.

15 THE COURT: Mr. Meriwether.

16 MR. MERIWETHER: Your Honor, for the
17 sake of scheduling the next set of trials, are we
18 to understand that Mr. Waters is now first up
19 instead of second up?

20 THE COURT: Huh?

21 MR. MERIWETHER: In September for the
22 next set of --

23 THE COURT: I have made no decision
24 about September. You people have about driven me
25 crazy trying to get ready for this. And I have not

1 made a -- I don't have a law clerk yet for
2 September, so I'm not making any decisions about
3 September until I understand what my situation is
4 going to be.

5 MR. MERIWETHER: I totally understand,
6 but if you had, I needed to know.

7 THE COURT: I haven't.

8 MR. MERIWETHER: That's all I needed to
9 know.

10 THE COURT: Mr. McLeod.

11 MR. MCLEOD: Yes, Your Honor. I
12 just -- thanks for allowing me to be here today. I
13 just want to bring your attention --

14 THE COURT: Quiet. Now, wait a minute.
15 Wait a minute. Wait a minute. Be in order.

16 MR. MCLEOD: I apologize. I just
17 wanted to bring to the Court's attention again that
18 there are several of our cases we have outstanding
19 personal jurisdiction motions that we would like to
20 get heard.

21 I mentioned this to you in the Bostic
22 hearing. We really need to get them heard. I'm
23 really concerned because today I heard that the
24 plaintiffs were arguing that participating in
25 discovery is a reason for us waiving that defense.

1 You mentioned after the Bostick hearing
2 that that was not going to be grounds to say we
3 waived it, but my clients --

4 THE COURT: This is a different
5 situation now. I'm not going to go forward and
6 talk about your situation. I have ruled on
7 situations that were present in this case that
8 don't have one thing to do with your case.

9 So I'm not going to -- you know, don't
10 be trying to get me to make a ruling when I haven't
11 even heard what you're talking about.

12 MR. MCLEOD: We just want to get them
13 heard because it's clear --

14 THE COURT: I understand, but I can't
15 be in but one place at a time. And I will tell you
16 this, Mr. McLeod, I am going to try this case and
17 then I'm going to see what resources I'm going to
18 be provided with.

19 I have got two matters to hear in
20 August and I have my family on vacation at the
21 beach and that's where I'm going to be. And I will
22 try to get some information about what happens
23 after that, but I am not going to spend any of my
24 August scheduling things in Sizemore and all these
25 other cases. I'm not going to do it. All right.

1 You know, I'm just one so-called
2 part-time judge, and I am not going to be pressed
3 by all these motions for personal jurisdiction and
4 everything else. I just can't do all that, you
5 know.

6 MR. MCLEOD: Yes, I understand. My
7 clients --

8 THE COURT: I know your clients are
9 pressuring you. I'm not fussing at you. Please
10 understand that. You've got clients that are down
11 your throat, so you want to be down mine a little
12 bit. I get that.

13 MR. BOGLE: Your Honor, Michael Bogle
14 for Goodyear Tire and Crawford. There was one
15 other matter. We also separately moved an
16 alternative to our motion to strike to continue
17 trial because of the fact that the two -- three
18 witnesses that I mentioned were identified for the
19 first time a week and a half ago and were never
20 identified by the plaintiff in response to
21 discovery or anything.

22 And we have moved to continue trial
23 based on that. And then also an additional ground,
24 that may be because of the amendment of the
25 complaint and the addition of the new party. I

1 think, number one, we have 15 days to answer the
2 new complaint.

3 And I think the rules also state that
4 unless you have consent of all parties, the case
5 can't be tried for 180 days with the addition of
6 new parties --

7 THE COURT: Well, that doesn't apply to
8 this situation. I set this case way, way long ago.
9 And that the -- that -- and you've been a party in
10 it for a good long time now, correct?

11 MR. BOGLE: I understand. I
12 understand. I understand. But the fact that we've
13 been hearing a lot about defendants' discovery or
14 alleged discovery abuses and what the defendants
15 should do, and we feel that designating --
16 disclosing witnesses a week before trial, a week
17 and a half before trial for the first time --

18 MS. MCVEY: When were they --

19 MR. BOGLE: In another case, five years
20 ago.

21 THE COURT: Well, you know, you-all are
22 acting like children. Now, I'm not going to change
23 the order of these cases and I'm not going to delay
24 the trial at this point. One case is backed up to
25 the other.

1 You are concentrating most of your
2 efforts on Whitmire. A few of you who are in
3 Crawford have to understand it's a backup case, but
4 most of the material that I'm understanding has
5 been supplied to you, it's material that's been
6 around for years and years and years. It's old
7 depositions and things of that nature. So I don't
8 want to put that in the same category.

9 If we have to go to Crawford, I'm sure
10 we're going to have a lot of things that I will
11 have to deal with before we actually begin to
12 select a jury and try the case.

13 But I am not, as I stand here this
14 afternoon, going to move to grant any motion to
15 delay this trial because of attempts by the
16 plaintiffs to go on and supply you with as much
17 information as they can for the backup case while
18 they're still trying with all their might to get
19 ready for Whitmire. So now --

20 MR. BOGLE: Thank you, Your Honor.

21 THE COURT: Anything else? All right.
22 I look forward to seeing you Monday, unless by some
23 miracle you settle this case.

24 (These proceedings were concluded at
25 5:08 p.m.)

1 CERTIFICATE OF REPORTER

2
3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 8th day of August, 2018 at
13 Charleston, Charleston County, South Carolina.

14
15
16
17 /Carol Denise Lauder _____
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP.
21 My Commission expires
22 February 27, 2028
23
24
25

EXHIBIT I

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-42-1592

Beverly Dale Jolly and

General Electric Company, et al.

Brenda Rice Jolly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Theile B. McVey

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

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

Circuit Court Judge

SCRPC Form 4C(02/2017)

2758
Judge Code

12-15-17
Date

Page 1 of 4

964

ELECTRONICALLY FILED - 2017 Dec 15 10:10 AM - SPARTANBURG - COMMON PLEAS - CASE#2016CP4201592
ELECTRONICALLY FILED - 2018 Sep 25 4:06 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4204429

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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

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

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

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

I. The Evidence at Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

B. Additur

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

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

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

827.

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

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

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

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

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

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

#7
The jury was instructed that, “[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the accident or incident occurred. Actual damages would be the actual losses and expenses the Plaintiffs have incurred.” (TT 8/3 at 139). The jury was instructed on four categories of actual damages – medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. (TT 8/3 at 139-40). The jury was also instructed that future damages should be awarded for the duration of Mr. Jolly’s life expectancy, which is a little more than eleven (11) years given his age of 73. (TT 8/3 at 141-42).

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

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

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

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

#8
 8/17
 Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, the Court will increase the medical expenses award to \$1,000,000.

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

B. Open and Obvious Danger.

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

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

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

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

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

#12
 JST
 Not only do Fisher and Crosby contend there was no health hazard from working with asbestos gaskets and packing, they did not always inform Duke that these materials contained asbestos. Some of Fisher's asbestos-containing packing specifications did not describe the material as containing asbestos, and instead referred to it as metallic or plastic. (TT 7/27 at 208-09). Mr. Duimstra agreed that a reference to a metal packing ring would not alert people that the product contained asbestos. (TT 7/27 at 210). Duke purchase orders to Fisher stated the Fisher part number and a brief description, but oftentimes in order to determine if the part contained asbestos one would have to reference Fisher's own material specification for that part number. (TT 7/27 at 215-16, 221-22, 225; Pl's Ex. 1012.5). Jolly's co-worker, David Taylor, testified that the only way to know if a gasket had asbestos was whether it was marked as asbestos-containing on the gasket packaging. (TT 7/27 at 115).

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

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

C. Sophisticated Intermediary Defense

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

#13
 The jury decided this issue in Plaintiffs' favor. The Court finds that their verdict is supported by the evidence and that Fisher and Crosby are not entitled to judgment as a matter of law on this defense. Fisher and Crosby did not show that they warned Duke; the evidence was that Fisher and Crosby provided no warnings to Duke. (TT 7/27 at 144; TT 7/31 at 64-65). Fisher and Crosby also failed to show that they knew Duke was aware or should have been aware of the danger from asbestos gaskets. The evidence was that Duke distinguished asbestos gaskets as non-hazardous because it was thought they did not release asbestos fibers when disturbed. (Pl's Ex. 136 at Script, p. 3; TT 7/27 at 126). There was no evidence that Fisher and Crosby were relying on Duke to inform its employees of those hazards. The record thus supports the jury's rejection of this defense.

D. Product in Same Condition.

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

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

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

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

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

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

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

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

E. Proximate Causation

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

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

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

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

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

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

F. Design Defect

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

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

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

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

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

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

G. Standard of Care

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#21
 Even though Fisher was supposed to behave with the knowledge of an expert, Fisher did not discontinue its sales of asbestos-containing gaskets and packing until its customers demanded it. (Pl.'s Ex. 1008.01).

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

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

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

H. Bare Metal Defense

1. Direct Sales to Duke

#22
 JHJ
 Fisher and Crosby contend that they are entitled to summary judgment because they did not manufacture or provide the asbestos materials to which Mr. Jolly was exposed. This assertion is contradicted by the evidence that they were selling asbestos gaskets and packing to Duke with some of their valves, and that they also supplied replacement internal gaskets, flange gaskets, and packing. Under South Carolina law, “[a] manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part.” *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). In fact, “[a] manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.” *Duncan*, 385 S.C. at 133, 682 S.E.2d at 884. “The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product.” *Baughman*, 780 F.2d at 1132.

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

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

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

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

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

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

2. Liability for Foreseeable Harm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Expert Causation Testimony

1. Standard of Review.

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

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

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

2. Testimony of Dr. Frank and Dr. Maddox

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

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

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

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

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

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

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

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

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

J. Henderson Causation Standard

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

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

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

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

IV. Ruling on Defendants' Motion for Election of Remedies

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

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

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

V. Ruling on Defendants' Motion for Production of Settlements

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

VI. Ruling on Defendants' Motion for Setoff

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

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

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

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

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