

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-002126

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 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; and The William Powell Company, Defendants,

Of which, Covil Corporation is the Appellant.

RECORD ON APPEAL

Vol 2 of 8

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RECORD ON APPEAL INDEX

Orders

Order/Judgment/Verdict Form issued July 19, 2018.....	1
Order/Judgment granting new trial entered October 22, 2018.....	3
Order/Judgment on handling data tape issues August 22, 2019.....	12
Order granting relief under Rule 60(b) entered November 25, 2019.....	15

Pleadings

Summons and Complaint, filed on December 4, 2017	23
Answer of Covil Corporation to the Complaint, filed on January 5, 2018	72
Plaintiffs' Motion for Sanctions Against Covil Corporation for Spoliation of Evidence and Discovery Abuse filed on July 10, 2018.....	91
Covil Corporation's Reply to Plaintiff's Motion for Sanctions, filed on July 10, 2018.....	526
Plaintiff's Motion for Judgment Notwithstanding the Verdict and for New Trial Absolute filed on July 30, 2018	529
Plaintiffs' Memorandum in Support of Judgment Notwithstanding the Verdict and for New Trial Absolute filed on September 25, 2018	537
Plaintiff's Rule 60(b) Motion, filed on July 16, 2019	1597
Covil Corporation's Brief in Opposition to Rule 60(b) Motion filed on November 11, 2019	1603
Covil Corporation's Notice of Appeal, filed on December 31, 2019.....	1713

Transcripts

Transcript of Trial, July 16, 2018, through July 19, 2018.....	1730
Hearing Transcript October 10, 2018.....	2370
Hearing Transcript July 11, 2019.....	2384
Transcript of Rule 60(b) Motion Hearing on November 12, 2019.....	2522

Deposition of Palmer Covil taken July 14, 1977.....	2540
Deposition of Jerry Crawford taken February 6, 2018.....	2745
Deposition of Don Buck taken June 19, 2018.....	3176
Deposition of Bruce Bowyer taken June 27, 2018.....	3253
Deposition of Harley Neelands taken December 8, 2016	3307
Deposition of Dwayne Waters taken October 16, 2017	3638

1 Q. Do you believe there is a safe level
2 of exposure to am site?

3 MR. WALL: Objection outside the scope.

4 THE WITNESS: I'm not sure about am
5 site I'm not sure about the amphiboles.

6 BY MR. CHAPMAN:

7 Q. Okay so when you say safe level you're
8 talk about chrysotile?

9 A. Yes.

10 MR. CHAPMAN: All right, sir. I
11 probably have a hand full of other questions. I
12 want to go through and kind of consolidate them.
13 We might be getting close to the end here. So let
14 me take a break and look at my notes and might be
15 able to condense some of this.

16 THE WITNESS: Okay.

17 VIDEOGRAPHER: We'll now go off the
18 record the time on FEP monitor is 229 p.m.

19 (A recess was taken.)

20 VIDEOGRAPHER: We are now back on the
21 record. This is our immediate unit number 3 in
22 your deposition today T00EM r time on the monitor

23 is 235 p.m.

24 BY MR. CHAPMAN:

25 Q. All right, sir a hand full of

ROUGH DRAFT

191

1 questions for you we're getting close know end
2 now. Does Covil have a document retention policy?

3 A. They do not that I've seen a written
4 document retention policy, no.

5 Q. Do you know if documents are destroyed
6 after a certain number of years?

7 A. I do not know that. As I say I
8 haven't seen a policy and don't think they would
9 have had a policy.

10 Q. Do you know if Covil has done anything
11 to try to answer that question?

12 MR. WALL: Object to the form of the
13 question.

14 THE WITNESS: No I do not.

15 BY MR. CHAPMAN:

16 Q. Sir, do you know how many hours you
17 have spent so far working for Covil?

18 A. Let me see it's been two weeks.

19 Probably 40 to 50 I would say.

20 Q. Have you generated any invoices yet
21 for that work?

22 A. No I have not.

23 Q. IR if do you agree that a company
24 should be aware of the hazards associated with the
25 products it supplies?

ROUGH DRAFT

192

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

3 THE WITNESS: Should companies be
4 aware, no I -- again, it there's not a requirement
5 then they don't have to do it.

6 BY MR. CHAPMAN:

7 Q. And right now I'm not asking you about
8 providing any sort of warning or information I'm
9 just saying should they be aware of?

10 A. Oh should DPAENS be aware of the
11 hazards.

12 MR. WALL: Same objection.

13 THE WITNESS: Yes they should.

14 BY MR. CHAPMAN:

15 Q. Okay and if they are an aware of that
16 has a should they pass that they lodge to its
17 customers?

18 A. I don't see that as an obligation, no.

19 MR. WALL: Object to the form of the
20 question.

21 BY MR. CHAPMAN:

22 Q. So you don't believe it's else a legal
23 obligation more all of the reasons we got into
24 earlier?

25 A. Not just legal I don't belief it's a

ROUGH DRAFT

193

1 legal obligation that they have.

2 Q. What about a moral obligation?

3 MR. WALL: Object.

4 THE WITNESS: I don't know what the --
5 it's up to the person who is receiving the supply
6 of material to make sure that the safe and
7 workplace -- health for workplace is there. So
8 it's up to that person's employee.

9 BY MR. CHAPMAN:

10 Q. Do you agree sir, that a company
11 should never withhold information about the
12 hazards of a product it's supplying?

13 A. Yes I agree.

14 MR. WALL: Object to the form of the
15 question.

16 BY MR. CHAPMAN:

17 Q. Do you agreeeth that a company should
18 not destroy document that might be everyday in a
19 lawsuit?

20 MR. WALL: Object to the form of the
21 question.

22 THE WITNESS: Yes I believe that.

23 BY MR. CHAPMAN:

24 Q. Do you belief sir, that companies that
25 cover up the hazards associated with the products

ROUGH DRAFT

194

1 they sly should be held responsible?

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

4 THE WITNESS: Cover up, yes.

5 BY MR. CHAPMAN:

6 Q. WLOBT fail to disCLOEst close?

7 MR. WALL: Object to the form of the
8 question.

9 THE WITNESS: What do you mean failure
10 to disclose.

11 BY MR. CHAPMAN:

12 Q. So let me ask you do you believe sir,
13 that a company that fails to disclose known
14 hazards in their PRUBLGSZ to its customers should
15 be held responsible?

16 A. That they though about yes.

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

19 MR. CHAPMAN: Okay. I think that's all
20 the questions I have right now. Mark, just for
21 the record, I reached out to Justin destroy on the
22 break about the insurance documents. They said
23 they never got anything from you offering them
24 they said that never happened.

25 MR. WALL: Yes. We have actually sent

ROUGH DRAFT

1 to Sabrina some of the ones that actually came to
2 used as opposed to directly to you because it's
3 all supposed to do go you.

4 MR. CHAPMAN: You're talking about
5 documents pursuant to the subpoena.

6 MR. WALL: The subpoena.

7 MR. CHAPMAN: Okay. All right. Just
8 so I -- they're not other documents that you
9 offered to send to us.

10 MR. WALL: I offered to give her the
11 information about how much was in the policy,
12 which she then went to North Carolina and got he
13 order to do it through subpoenas.

14 MR. CHAPMAN: Okay. I'm not sure that
15 dynamic. What I can just tell you is Trey and
16 Justin received nothing from you on that.

17 MR. WALL: Correct I never sent the
18 literature because she went to North Carolina and
19 had as judge rule we had to produce that
20 information. So there was no point in
21 volunteering to produce it by way of a letter as
22 opposed to doing it by subpoena.

23 MR. CHAPMAN: Got it we're on the same
24 page then. I think that's all the questions I
25 have for you right now, sir, I'll just put on the

ROUGH DRAFT

196

1 record just by virtue of the witness only having
2 two weeks he was unprepared to talk about a
3 multitude of topics. I reserve our right to file
4 any motions to compel or sanctions for costs, any
5 that might be associated with that. And it's my
6 position today that I'm not ending the deposition
7 but suspending it pursuant to that.

8 MR. WALL: And prior to that you went
9 away way over the limits of your subpoena, excuse
10 me, not subpoena, your notice. You are well off.
11 The notice said it was Ceeleanese and Ceeleanese
12 only and Crawford and Crawford only. That's what
13 your notice says.

14 MR. CHAPMAN: Even those topics, even
15 if you're correct, even those topics the witness
16 was unprepared to talk about today.

17 MR. WALL: He was prepared to talk
18 about those issues had you asked the questions
19 properly. That's my opinion we can argue about it
20 later.

21 MR. CHAPMAN: Sure.

22 MR. RAINSFORD: I've got a hand full
23 of questions can you hear me from here sir,.

24 THE WITNESS: Yes.

25 EXAMINATION

ROUGH DRAFT

197

1 BY ^ ATTY1 ^ ATTY2:

2 BY MR. RAINSFORD:

3 Q. Mr. Glenn, good afternoon. My name is
4 Todd RANS. I represent C N A holdings as you
5 prepared for today's deposition you said you
6 reviewed a summary of both transcripts of JER
7 Crawford; is that correct?

8 A. I reviewed one transcript of JER
9 Crawford, summary.

10 Q. Yes, sir. Did you see any mention of
11 Covil in regard to Mr. Crawford's testimony about
12 his work at Ceeleese?

13 A. I don't recall that he ever sing LD
14 out Covil. He did mention Daniel.

15 Q. And Mr. Crawford as far as you know
16 was never employed by Covil, correct?

17 A. That's correct.

18 Q. Do you have any information that Mr.
19 Crawford ever actually worked in the vicinity of
20 any Covil employees at any time in his career at
21 Ceeleaneese?

22 MR. CHAPMAN: Object to form.

23 THE WITNESS: I do not. He only noted
24 that Daniel was Daniel workers were in his area.

25 BY MR. RAINSFORD:

ROUGH DRAFT

198

1 Q. And based on your review of the record
2 you don't know what kind of production if any that
3 Covil may have supplied for you at Ceeleaneese
4 Spartanburg, do you?

5 A. I do not.

6 MR. CHAPMAN: Object to the form.

7 BY MR. RAINSFORD:

8 Q. Earlier you were asked about a JM
9 named Dwayne waters. And you were asked about
10 testimony from Mr. Waters about Covil allegedly
11 putting asbestos insulation in boxes that were

12 marked nonasbestos there's no everyday that this
13 actually occurred is there?

14 MR. CHAPMAN: Object to the form of the
15 question.

16 THE WITNESS: There it's no everyday
17 that I've seen.

18 BY MR. RAINSFORD:

19 Q. And there's no evidence that this ever
20 occurred at the Ceeanese Spartanburg job site,
21 correct?

22 MR. CHAPMAN: Object to form.

23 THE WITNESS: That's correct.

24 MR. RAINSFORD: That's all I have for
25 you. Thank you, sir.

ROUGH DRAFT

199

1 MR. WALL: No questions? I've got
2 questions. You go ahead.

3 MR. CHAPMAN: I'll do it all in one.
4 It will be a lot quicker that way.

5 EXAMINATION

6 BY MR. WALL:

7 Q. All right Mr. Glenn.

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

200

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

202

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. TH00TS 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

203

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 TH00T or did
5 you read that?

6 A. I read that more KWLOESly.

7 Q. Okay went you say you red it more
8 CL0EGSly 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 Ceeleane
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 Ceeleane 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 Celeanese
22 Spartanburg MRANL?

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

25 THE WITNESS: I so have not.

ROUGH DRAFT

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 Ceeleese 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

207

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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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.

Attorneys and Law Firms

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[Patrick J. McDonald](#), Patrick J. McDonald Law Office,
Charleston, SC, for Defendants.

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

Not Reported in F.Supp.2d, 2012 WL 6044778

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)
)
)
) In re:
 v.) 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 Hoercst-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

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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
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

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 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

EXHIBIT A

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF SPARTANBURG

3

4 IN RE: SOUTH CAROLINA ASBESTOS LITIGATION
5 CRAWFORD v COVIL CORPORATION
6 CASE NUMBER: 2017-CP-4204429

7

8 TRIAL - VOLUME 1

9

10 HEARING BEFORE THE HONORABLE JEAN H. TOAL,
11 SENIOR ACTIVE CIRCUIT COURT JUDGE

12

13 R E A L T I M E D R A F T
14 (Unofficial & Not Certified Transcript)

15 Monday, July 16, 2018

16

17 Spartanburg, South Carolina

18

19 REPORTED BY: DEBORAH L. DUSSELJEE, RPR, CRC
20 Realtime Systems Administrator

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7/16/2018

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5 MARK J. BUHA, ESQUIRE

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7

8 KASSEL-McVEY PERSONAL INJURY LAWYERS

9 BY: THEILE B. McVEY, ESQUIRE

10

11 APPEARANCES FOR THE DEFENDANT COVIL:

12

13 WALL TEMPLETON & HALDRUP, P.A.

14 BY: THOMAS B. BOGER, ESQUIRE

15 MARK H. WALL, ESQUIRE

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7/16/2018

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1 REALTIME DRAFT DISCLAIMER

2 This draft transcript is a computer-aided
3 translation of the court reporter's notes at the time of
4 writing the assignment and is not a certified
5 transcript. The content of this realtime draft
6 transcript contains errors and notes of the
7 stenographer.

8 All errors will be corrected by the
9 stenographer and draft notes will be removed before the
10 final certified transcript is distributed, if any final
11 certified transcript is ordered.

12 * * * * *

13 11:29 A.M.

14 THE COURT: Please be seated.

15 Ladies and gentlemen, I have got a statement
16 of the case and voir dire from plaintiff and defendant.
17 Let me ask a couple of questions. At this point, this
18 thing says this case arises from Mr. Jerry Crawford's
19 exposure occupational exposure to asbestos. So far, so
20 good. Plaintiffs are Jerry Crawford and estate of his,
21 and I would say, wife, Evelyn Crawford and three
22 children: Patty Giles, Tessa Quinn, and Danny Crawford.
23 Plaintiffs allege that Mr. Crawford died from
24 mesothelioma.

25 MS. McVEY: Oh, my gosh.

7/16/2018

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1 THE COURT: I don't think so.

2 MS. McVEY: No. Thank you. He did not.

3 THE COURT: Contracted mesothelioma.

4 MS. McVEY: Yes.

5 THE COURT: Mesothelioma cancer as result of
6 exposure to asbestos while working at Celanese
7 Corporation. Let's just stop there for a minute. How
8 are we going to handle mentioning Celanese and why are
9 we mentioning Celanese?

10 MS. McVEY: The exposure to Covil occurred
11 while he was working at Celanese.

12 THE COURT: I get that.

13 MS. McVEY: So I think that will be all over
14 the case.

15 THE COURT: All right. I'm just checking.

16 MS. McVEY: I know it.

17 THE COURT: Defendant in this case is Covil
18 Corporation. I'm just looking down the questions. It
19 says: Is there any member of the jury who knows or has
20 any connection to the defendant in this matter, Covil
21 Corporation, who sold and installed insulation?

22 It doesn't say "in this case." We haven't
23 dealt with our sanctions yet. We are going to deal with
24 those in a minute. All right. Does any member of the
25 jury panel, any member of your immediate family -- by

7/16/2018

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1 that I mean your children -- ever been a plaintiff or a
2 defendant in a lawsuit? I have gone that far. All
3 right.

4 Anyone ever work around asbestos? I don't
5 know that I have gone that far.

6 How do you feel about that?

7 MR. CHAPMAN: Judge, I think it is important
8 for both parties to know whether or not anybody worked
9 believed that they worked around asbestos, but if
10 certainly the Court declined to do that, we would be
11 fine with that.

12 THE COURT: There is a question there. Now,
13 there are a number of people who testified in the trial
14 of this case. If you know of any problems with any,
15 please stand. Witnesses are as follows: Harley
16 Neelands, who's that?

17 MS. McVEY: He was a co-worker.

18 THE COURT: All right. And Arnold Brody I
19 know. John Maddox I know. Jerry Crawford, plaintiff.
20 Patty Giles, child. Tessa Quinn, child. Palmer Covil
21 and Jim Covil, I thought they weren't going to testify.

22 MS. McVEY: If they testify, it will be by
23 deposition, which they have already done.

24 THE COURT: Don Buck.

25 MS. McVEY: He's a Daniel representative by

7/16/2018

6

1 deposition.

2 THE COURT: I'm not planning to turn this into
3 a three-week trial now, ma'am.

4 MS. McVEY: Your Honor, you are going to be so
5 proud of us. We're going to be finished in a week.

6 THE COURT: That's good. That's what I want.

7 MR. WALL: We have very few designations for
8 you.

9 THE COURT: All right. Dwaine Waters, there's
10 some controversy there. We'll get to that about whether
11 that will be allowed. Mason (phonetic) Carpenter. Dr.
12 James Crapo. Tony Watts, certified industrial
13 hygienist. That's y'all. And it's Robert Glenn,
14 corporate representative. He's an industrial hygienist?

15 MR. CHAPMAN: He is by training.

16 THE COURT: Uh-huh. Okay.

17 MR. CHAPMAN: Tony Watson, who is an expert
18 retained by other defendants in this case who blames
19 Covil in the case. It is literally about a five-minute
20 read.

21 THE COURT: All right.

22 MR. WALL: Your Honor, you ready for me?

23 THE COURT: Not yet. I will get through with
24 theirs and go right to yours.

25 Any member related by blood or marriage?

7/16/2018

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1 That's okay. Do you know any of the lawyers? Tommy
2 Boger is name. Theile McVey. Aaron Chapman. Mark
3 Buha. Buha?

4 MS. McVEY: Buha, yes.

5 THE COURT: Craig Lambert, Mark Wall, Tommy
6 Boger.

7 MR. BOGER: Boger.

8 THE COURT: Boger.

9 Does any member of the jury panel have a
10 family member who has mesothelioma or any
11 asbestos-related disease? I can go that far.

12 Has anyone in the jury panel who has presently
13 formed any opinion? Anyone on the jury panel not
14 prepared to give a fair trial? Have you or anyone in
15 your family ever worked as an insulator, boiler maker,
16 rigger, millwright, machinist, pipefitter, valve
17 technician, engineer or work with boiler pumps, valves,
18 or packing? Ever served on a jury?

19 All right. Here are the defendants. Anyone
20 have a family member work at a fiber plant, including
21 Hoechst Celanese?

22 What is a fiber plant?

23 MS. McVEY: That's your question.

24 MR. WALL: It is a company plant that makes
25 fibers which have been woven, like Celanese.

7/16/2018

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1 THE COURT: How about if I just say if any
2 member of your family work for Hoechst Celanese?

3 MR. WALL: That's fine.

4 THE COURT: Any member of your family worked
5 with asbestos-containing thermal insulation? This is
6 the one that I get kind of antsy about. Do you believe
7 that you have been exposed to asbestos? Do you believe
8 a family member has been exposed to asbestos? I don't
9 like getting into what you believe and so forth and so
10 on. I'm not inclined to ask that.

11 Do you know any -- do you or anyone you know,
12 including family and close friends, presently have
13 cancer? I don't generally go that far. Cancer is all
14 over the place.

15 Anyone who would be unable to give all parties
16 a fair trial? Same thing as plaintiff. Who is so
17 sympathetic that you would not be able to try -- sett9jg
18 sympathy aside when evaluating the case when plaintiff
19 was injured or died from mesothelioma? I can do
20 something like that. It might need -- And who's got a
21 strong negative opinion of corporations? I don't ask
22 that.

23 Okay. Anything else?

24 MS. McVEY: Not as to voir dire.

25 THE COURT: As to voir dire. Any exceptions?

1 MR. BOGER: Well, Your Honor, the only thing I
2 want to point out is we've got some witnesses we haven't
3 gotten to as part of the pretrial is that may be added
4 or subtracted from that list. It is our understanding
5 the Celanese 36 -- Mr. Bowyer was going to be called,
6 and then upon receiving the voir dire last night, his
7 name was off their list.

8 So we would want his testimony to be included.

9 THE COURT: If I let you put up any witnesses.
10 What's his name?

11 MR. BOGER: Bruce Bowyer.

12 MS. McVEY: Not to argue this, but that goes
13 to our -- Your Honor, whether or not they designated
14 timely --

15 THE COURT: I have not at -- at this present
16 moment ever seen an exhibit list from the defendants.
17 Still, after I asked about it, I have no witness list.

18 MR. WALL: I'm getting it.

19 THE COURT: It hasn't been filed with the
20 Court and hasn't been filed with me. So we are going to
21 talk about that, but I'm going to ask about this guy
22 because I want to go and qualify them and let them go to
23 lunch so we can finish up our pretrial and not delay
24 them. So that's how I'm going to handle it.

25 MS. McVEY: Okay.

7/16/2018

10

1 THE COURT: Unless y'all --

2 MR. BOGER: Can I pass up our witness
3 designations?

4 THE COURT: No. We'll do that when we get
5 back to pretrial motions today. At the present time,
6 I'm going to -- and I'm going to ask about it.

7 MR. BOGER: Thank you, Your Honor.

8 THE COURT: My high-quality bet is that they
9 won't know any of these people, except the Crawfords and
10 their family.

11 MR. WALL: I have one question, Your Honor.

12 THE COURT: Yes.

13 MR. WALL: You talked about the estate.

14 THE COURT: Yeah, the estate of Evelyn
15 Crawford.

16 MR. WALL: She is now deceased. Her
17 consortium claim is now lost and over.

18 MS. McVEY: No, it is not.

19 MR. WALL: I think it is.

20 MS. McVEY: No, it's not. It survives her
21 death.

22 MR. WALL: I --

23 THE COURT: It survives her death.

24 MR. WALL: In --

25 THE COURT: Yes. She had it while she was

7/16/2018

11

1 still living and --

2 MR. WALL: I understand.

3 THE COURT: I -- yeah. That has been in other
4 cases I have tried until they say different.

5 Okay. I propose to bring the jury -- well, I
6 mean, how many of them are there?

7 MS. McVEY: I think they were picking the
8 first trial, Your Honor. The first -- there is another
9 wreck case going maybe or a personal injury case going.

10 THE COURT: Uh-huh. How close they are to
11 picking their jury, and if they still going to have a
12 little time left, we could take a little time and knock
13 out the rest of these motions or try to.

14 MS. McVEY: Thanks.

15 THE COURT: Let him find out about that and
16 then we will proceed.

17 (A recess transpired.)

18 THE COURT: Where are we with all these
19 motions? Except for Mr. Waters have been argued; am I
20 right?

21 MS. McVEY: The only thing that hasn't been
22 argued is the motion to strike their late deposition
23 designations.

24 THE COURT: Right. Okay. Let me get
25 something straight then. I want to see the exhibit

1 lists, the -- you're talking about for defendants. I
2 know the plaintiffs' exhibit lists and their exhibits
3 and their witnesses have been sent to the other side in
4 the compliance period of the rule. I certainly want
5 copies of those things.

6 With respect to defendants, I want to see your
7 exhibit list, your witness lists, and information about
8 when you designated your objections.

9 MR. BOGER: Can I pass the --

10 THE COURT: Sure, sure, come on up.

11 MR. BOGER: This is our the witnesses for Your
12 Honor.

13 THE COURT: What I'm looking at is this. I'm
14 looking at Judge Hill's standing order regarding
15 asbestos trials which was signed in 2015 that I have
16 lived with and not changed, and it says that 125 days
17 after filing of the complaint, counsel for the defendant
18 shall designate all fact witnesses expected to be called
19 to trial. Designations shall include a brief summary of
20 expected testimony, whether the witness is co-workers,
21 family member, treating physician, or other fact
22 witness. This list may be supplemented up to five days
23 before the deadline to depose defendant's fact
24 witnesses. Counsel for the defendant shall designate
25 all expert witnesses and any plaintiff's pre -- call for

1 trial. This designation shall include a brief summary
2 of anticipated -- it may be supplemented up to five days
3 before the deadline to depose all defendants. Filing
4 deadline is once a trial date has been signed.

5 I assigned the trial data long time ago.

6 Depositions are 70 days before trial.

7 Depositions of defendant's fact witnesses concluded with
8 the exception of 30(b)(6). So whether you call it 120
9 days after filing of the plaintiffs or 70 days before
10 trial, this is July 2nd, 2018. Designation of amended
11 disclosure of witnesses is way past any deadlines.

12 MS. McVEY: The only thing I will tell you is
13 that at the end -- the last page of that scheduling
14 order?

15 THE COURT: Yeah.

16 MS. McVEY: It says 14 days before trial,
17 parties to exchange final list of all witnesses to be
18 called at trial.

19 THE COURT: Right. This is an attempt to meet
20 that.

21 MS. McVEY: Yes, Your Honor.

22 THE COURT: But it has to be witnesses that
23 were disclosed before in accordance with the rest of the
24 order so that they can be deposed as I understand.

25 MS. McVEY: I think they did disclose those --

7/16/2018

14

1 did they even disclose it?

2 If they answered discovery, my assumption is
3 they put this in there. I don't have a -- necessarily
4 have a problem with their witness list. I do have a
5 major problem with the other deadlines that they have
6 missed.

7 THE COURT: Right. So the three that they
8 indicated are Palmer Covil, James Covil, and Brian P.
9 Harding, Ph.D.

10 MR. WALL: We're not calling him. He was my
11 expert.

12 THE COURT: But you are not calling him?

13 MR. WALL: He is the state-of-the-art expert.

14 THE COURT: So all you listed by way of
15 witnesses are the two Covils?

16 MR. WALL: And, Your Honor, the other
17 witnesses listed by any party for the defendant. The
18 only thing we have done is when all this was going on,
19 they took the deposition of Daniel and took the
20 deposition of Celanese, and those people are by
21 reference mentioned in that list, and they have now
22 designated -- had initially designated testimony, one.
23 Two, they were parties until just recently. Daniel did
24 not get into this case until Wednesday, last Wednesday.
25 So they were parties in the case.

7/16/2018

15

1 MS. McVEY: Your Honor, briefly, this is the
2 most important issue I want to talk to you about.
3 Everybody has an obligation to list the designations
4 seven days before trial. That would have been last
5 Monday.

6 THE COURT: Right.

7 MS. McVEY: All designations you plan to use,
8 that has to be done. Okay?

9 THE COURT: Right.

10 MS. McVEY: They didn't do that. In fact, not
11 only did they not do that. When they realized they were
12 the only ones left, they were going to counter our
13 designations on Friday. This is really important
14 because it is not just a matter of here is our
15 designations. We have to cut video. It is a long
16 process. They did not make any of their deadlines.
17 They didn't designate anything and then they didn't
18 counter ours until after the deadline.

19 MR. WALL: That's correct.

20 MS. McVEY: And in the end -- but that's the
21 rule. If there are no consequences to that, then we
22 can't function. I mean, this trial has been moved super
23 fast. Brody is going today. We have videos cut for
24 this afternoon today and starting tomorrow morning. We
25 are going to be finished pretty quickly in this trial,

1 so we have to be ready to go with these depositions and
2 they just didn't designate anything.

3 MR. WALL: We -- we were getting ready for the
4 Whitmire case.

5 THE COURT: You are the only defendant that
6 did not get ready for both. Every other defendant got
7 ready for both, and I have mountains of material from
8 all of them designating witnesses, designating parts of
9 transcripts, objecting to parts and all of that kind of
10 stuff.

11 MR. WALL: We anticipated that Daniel and
12 Celanese would still be defendants in this case, and
13 that as soon as they went out, we did the designations.
14 Until they went out, there was no point of doing the
15 designations.

16 MS. McVEY: That's actually not true, Your
17 Honor. They settled on Wednesday and we didn't get the
18 designations until Saturday, Sunday.

19 MR. WALL: It takes a while to designate.

20 THE COURT: I'm just -- I can't accept that,
21 with great respect, Mr. Wall. I don't think any
22 preparation was done of any meaningful nature by Covil
23 until this weekend. And that's what -- and I don't
24 think any preparation even started until after the
25 mediation took place and I fussed with your client in

1 the other case, Armstrong. That's what's gotten my
2 heartburn.

3 I am very much understanding of what it takes
4 to get these videos so that I don't keep a jury waiting
5 or anything like that and cut them and agree to them and
6 have my law clerk run interference, if necessary, to be
7 sure that it is all ready for the jury. That's what
8 these deadlines and standing order anticipate to be
9 done.

10 Now, what I want to know is, the witnesses
11 they want to use, these Daniel experts --

12 MR. WALL: As both fact witnesses, Your Honor,
13 whom they deposed.

14 THE COURT: Are you using those -- you are
15 putting those up?

16 MS. McVEY: So we had our designations of Don
17 Buck and Mr. Bowyer, two of the corporate
18 representatives of Celanese and Daniel, we have got
19 those ready to go, our designations.

20 THE COURT: When did you receive their
21 designations on those witnesses?

22 MS. McVEY: One was received Sunday and the
23 other was Saturday. Past the deadline.

24 THE COURT: Past the 7-day deadline for
25 submitting those.

1 MS. McVEY: That's right. Again -- right.

2 MR. BOGER: Your Honor, if I could, they
3 also -- they designated the entire transcript two weeks
4 ago and supplemental designations to reduce all of that
5 and these witnesses were deposed in late June. It is
6 not unreasonable that we were all working to try to get
7 the specific designations done. We have had our
8 paralegals in touch with the video person they provided
9 and we are trying to get the -- recut the videos that we
10 can add that in. It is not a large amount of testimony
11 that we are trying to --

12 MS. McVEY: Your Honor, it is so much bigger
13 than that. It takes so much time. They are going to
14 designate stuff. We object to it and you have to rule
15 it. We have to get this going. We have to play it
16 tomorrow, if not today. We can't do it. And they
17 shouldn't be rewarded for sandbagging. Everybody knows
18 what the rules are.

19 THE COURT: Well, I am going to deny Covil the
20 ability to designate more than what has been designated
21 on Saturday and Sunday. That is past the deadline, and
22 so I am not going to allow Covil to use that testimony.

23 MR. WALL: We didn't designate them Saturday
24 and Sunday, Your Honor.

25 THE COURT: Yes, sir, that's well past --

7/16/2018

19

1 MR. WALL: Even though they designated and
2 they designated the entire deposition. They came back
3 and cut it out.

4 THE COURT: I am going to allow them to --
5 when did you designate the specifics?

6 MS. McVEY: Thursday, Friday.

7 MR. WALL: Last week.

8 MS. McVEY: No, we designated.

9 THE COURT: Wait a minute. They designated
10 the whole deposition when.

11 MS. McVEY: During the appropriate deadlines
12 so that would have been Monday.

13 THE COURT: After the deadlines y'all cut it
14 down.

15 MS. McVEY: We just cut some out.

16 THE COURT: That disadvantages them because if
17 they count on everything being designated and don't
18 designate anything specific, then that's what's happened
19 here, Ms. McVey.

20 MS. McVEY: I understand that and for any
21 other defendant who had actually designated anything.
22 But they designated nothing. That's the difference, in
23 my view. And we cut it out simply to cut the Court time
24 out.

25 THE COURT: I understand that. I'm just

1 trying to be even handed. I'm very unhappy with Covil
2 and I think they are costing the State a lot of money to
3 try a case in which they have made no real attempt to
4 get ready, and I will stay with that. But what I want
5 to know now is what the -- I don't want to get into a
6 who shot John. What have they designated?

7 MALE VOICE: May I, please?

8 THE COURT: Yes.

9 MALE VOICE: Judge, I glanced briefly at the
10 designation. They are fairly substantial. Given the
11 lateness of them, I haven't had a chance to go through
12 them.

13 THE COURT: "Fairly substantial" meaning how
14 much more material?

15 MALE VOICE: My guess is that it's probably 45
16 minutes' worth of testimony. I haven't been able to go
17 through it, but we may have object -- the problem here
18 is that we may have objections to their testimony and we
19 will keep those to a minimum, if we can, but those will
20 have to be looked at and ruled on.

21 If Your Honor is inclined to allow them to
22 play certain excerpts from the Daniel depositions, my
23 suggestion in order to deal with Court time
24 appropriately would be that they play those in their
25 case-in-chief after we rest so that we are not in a

1 situation of having to get our people to cut in excerpts
2 into whatever else has already been cut.

3 THE COURT: That's what I'm going to do.

4 MR. WALL: We are already in the process of
5 doing that, I'm told.

6 THE COURT: What I will do, Mr. Wall, and I
7 think I'm bending over backwards to do it given what's
8 occurred, I will allow you to play what you have already
9 designated not by recutting their deposition but in your
10 case.

11 MR. WALL: Yes, Your Honor.

12 THE COURT: That's what I will do.

13 MR. WALL: Yes, Your Honor.

14 THE COURT: Does that resolve that particular
15 point?

16 MS. McVEY: Yes, ma'am.

17 THE COURT: Now, let's go back then for a
18 minute. We have got the --

19 MALE VOICE: Your Honor, while we're on the
20 subject of witnesses, we also filed a motion to --

21 THE COURT: I'm getting there.

22 MALE VOICE: Okay.

23 THE COURT: I'm getting there. That's Dwaine
24 Waters. As I understand Mr. Waters' deposition
25 testimony was designated in advance of the deadlines,

1 correct?

2 MS. McVEY: Yes, ma'am.

3 THE COURT: And the objection is that it --
4 all right. His deposition was taken in a different
5 case.

6 MS. McVEY: It was.

7 THE COURT: That's it.

8 MS. McVEY: It was and which Covil was a
9 defendant in the case.

10 THE COURT: Exactly. Had the right to
11 examination.

12 MS. McVEY: That's right.

13 THE COURT: I'm going to deny the motion in
14 limine with respect to the testimony of Dwaine Morris.

15 All right. Now, we then got sanctions for
16 spoliation, discovery abuse, and failing to participate
17 in mediation. With respect to the failure to
18 participate in mediation, I find that Covil -- and,
19 again, this is a decision that their corporate insurance
20 representatives made and the lawyers apparently let them
21 make, which I think is tough.

22 I understand that's who hired them, but our
23 mediation rules require participation in mediation, and
24 when they got the plaintiffs to agree to a separate
25 mediation and then unilaterally canceled that separate

1 mediation because the insurance lawyers were unhappy
2 about the demand made by the plaintiff, the rules don't
3 accommodate that. That was a deliberate failure to
4 participate in mediation, which is required by our rules
5 and by the standing order of the Court with respect to
6 asbestos trial.

7 And so I find that they have violated those
8 rules and their failure to participate in an agreed-upon
9 mediation and that as a sanction for the failure to
10 participate in mediation, I will award attorneys' fees
11 and costs amounts to be submitted by plaintiff for that
12 violation of the requirement of mediation.

13 And as a sanction for that violation, the
14 record is very complete that this was a deliberate
15 decision by counsel for the insurance companies that
16 insures Covil. Covil is a corporation no longer in
17 existence, and the appearance here is completely
18 controlled by several insurance companies which insure
19 Covil for the times in question in this lawsuit. And
20 those insurance counsel are insurance representatives
21 who made a deliberate decision to renege on their
22 agreement to mediate in a private mediation session.

23 I find that the sparse attempt that was made
24 to then discuss settlement with plaintiff at the close
25 of our very lengthy all-day hearing on various motions

1 related to Whitmire and to Crawford on July 11th, just
2 past, is not sufficient to make up for the clear
3 intentional refusal to mediate as required by the rules.
4 So that's the ruling with respect to sanctions on the
5 mediation violation.

6 With respect to spoliation and discovery
7 abuse, I find that the assertion that all records of
8 Covil were destroyed by fire is not supported by even
9 the information that Covil submitted in this case, which
10 included a letter from Palmer Covil, president of Covil
11 Insulation Company, addressed to our friends, customers
12 and employees. And this document was submitted as
13 Exhibit D to Covil's reply to plaintiff's motion for
14 discovery sanctions, dated July 14th, 2018, and supplied
15 to me today.

16 In that letter, Mr. Covil, which was written
17 shortly after the fire of May the 14th, 1973, Mr. Covil
18 says to his customers on Monday afternoon, May 14th, We
19 had a very disastrous fire which completely destroyed
20 our fabrication shop and warehouse and part of our
21 offices in the Berea Industrial Park. By Monday, May
22 the 28th, we expect to be back in fairly normal
23 operation except for our fabrication shop.

24 We have warehouse facilities located on
25 Rutherford Road, our general office, including

1 accounting, payroll, customer service, contracts, power,
2 and processes will be located in the basement floor of
3 home offices on -- We expect to be able to service our
4 many customers and friend from these locations on a
5 temporary basis and trust that you will bear with us
6 until we are able to be back at our old location.

7 Later in Mr. Palmer Covil's deposition,
8 attached as Exhibit A to defendant's supplemental reply
9 to a motion for discovery sanctions, Exhibit B --
10 correction -- Exhibit C, Mr. Palmer Covil says we had --
11 and this was at page 9.

12 Well, let me explain one thing. We had a fire
13 in May of 1973 and it burned up a lot our records, but
14 here is a copy of the complaint and plaintiff's name,
15 all of them, whether they worked for us or not and just
16 basic stuff that's come in in reference to this case and
17 some stuff we had and some copies of invoices and other
18 things we pulled out.

19 The question is, well, maybe we ought to start
20 out by you telling us what records were destroyed, what
21 types of things were destroyed in regard to these
22 plaintiffs that you've got a list of.

23 Well, some our personnel files and employment
24 records were destroyed. We just have a few of them. A
25 good many of them were destroyed and most all invoices

1 and things back prior to '73. The only thing we saved
2 out of the fire were vital records that we had in a
3 vault, like accounts payable and accounts receivable and
4 stuff like that. We had them in a vault and we saved
5 those, but our invoices and employment records and thing
6 like that were all destroyed.

7 How about your insurance records?

8 Well, I think we went back and found enough
9 records and we know who had insurance at different times
10 and things like what companies were involved with
11 insurance.

12 What types of records are now available in
13 your office?

14 Everything from 1972 forward.

15 And then a co-worker or a Covil employee from
16 2004, Mr. Mason (phonetic) Lee Carpenter, testified in
17 an asbestos suit that the fire did not destroy all Covil
18 documents. He said the front office complex did not
19 burn down. It was protected by a firewall. We kept all
20 our documentation in a vault.

21 Now where it is today? What is the limitation
22 on the time frame in which you had to keep it? I would
23 say would be seven years or less. So I would say it's
24 history. I conclude from the material that has been
25 submitted to me, much of the fiber defendant, that all

1 the records of Covil were not destroyed in the fire and
2 that Covil had those records at a certain point in time
3 as they were described by Mr. Carpenter and Mr. Palmer
4 Covil, and that now they contend that the records were
5 destroyed and no longer available.

6 This is at a time after lawsuits had been
7 filed, some of which were discussed by Mr. Palmer Covil
8 in the deposition excerpt that was presented to me by
9 defendants today. I conclude, therefore, that
10 spoliation has taken place by Covil of some of its
11 corporate records that are pertinent to these
12 proceedings, and I also conclude that there are
13 insurance records available that have not been available
14 to the defendants in this case but which Covil is now
15 making efforts in another lawsuit in federal court in
16 North Carolina to locate.

17 Either it is not clear what happened to the
18 records -- insurance records that Mr. Palmer Covil
19 definitely said were in existence at one time, but the
20 company now says it doesn't have them and I find that
21 spoliation has taken place with regard to its retained
22 copies of those records.

23 And as an -- in addition to that, I find that
24 grave abuse of discovery rules was made in the
25 designation of a corporate representative. The

1 defendant contends that the two Covils were not
2 designated as corporate representatives because one of
3 them is not able to recall things at this time, and that
4 is understandable, but that the other corporate
5 representative simply is not going to -- he is not going
6 to testify. He won't do it voluntarily. He and they
7 have not made any effort to subpoena him to testify or
8 tender him without his consent as a representative.

9 But instead they hired an industrial hygienist
10 that had no connection with Covil, and two weeks before
11 the 30(b)(6) deposition having been delayed many, many
12 times was finally scheduled for -- within the last short
13 period of time in this case, Mr. Glenn was given two
14 weeks to review 25,000 documents, Mr. Robert Glenn, the
15 designated corporate representative.

16 Mr. Glenn testifies in his deposition that he
17 might have reviewed about 100 pages of all the 25,000
18 pages of documents that were allegedly supplied to him
19 and he flipped through some of the depositions of two
20 Covils and Mr. Johnson, who was a safety representative
21 for -- safety manager for Covil, and that's how he
22 prepared.

23 He was unable to answer very basic questions
24 about the operations of Covil at the times pertinent to
25 this lawsuit. He was unable to answer anything in any

1 specificity of the safety practices of Covil or
2 knowledge of Covil about asbestos-containing products.
3 So he was completely unprepared as a 30(b)(6) witness in
4 any reasonable way.

5 I want to make sure that I make it clear that
6 this was a decision that Covil and its current
7 representatives and insurance people made about the way
8 they would supply 30(b)(6) information. This is not the
9 fault of Mr. Wall or Mr. Boger, who are the lawyers who
10 are representing Covil at this time. This is the
11 responsibility of the insurance representatives for
12 Covil and the Covils themselves, that no one was
13 properly prepared to be a 30(b)(6) representative in
14 this case.

15 That is a fundamental aspect of disclosure and
16 discovery by corporations in toxic tort cases such as
17 this, and the failure to provide any meaningful
18 representative of Covil to testify to the many factual
19 pieces of information that was important in the case is
20 a complete breakdown of compliance with Rule 30(b)(6) by
21 Covil.

22 And, therefore, as a sanction for that -- and,
23 therefore, as a sanction for the complete breakdown of
24 the integrity of this process in terms of compliance by
25 Covil and spoliation of evidence, I will grant the

1 plaintiff's request that it be allowed to introduce
2 Covil's -- introduce evidence of Covil's destruction of
3 documents and misrepresentation about the circumstances
4 of destruction, which I understand will primarily be by
5 Mr. Carpenter's designation as a witness; that, second,
6 I will instruct the jury that it can draw a negative
7 adverse influence, also known as an spoliation
8 presumption, from the defendant's acts and that the
9 negative adverse inference which may be drawn is that
10 plaintiff, Jerry Crawford, was exposed to
11 asbestos-containing insulation supplied and installed by
12 Covil at Hoechst Celanese between 1970 and 1974; third,
13 that -- those are the two sanctions that I will impose.
14 That evidence of destruction of documents, evidence of
15 the negative adverse inference, that is that
16 Mr. Crawford was exposed to asbestos insulation. That
17 will be what I will allow.

18 All right. A request had been made that Covil
19 also be prohibited from introducing expert testimony as
20 a sanction. I don't need to do that since by no expert
21 witness has been designated by Covil and could not be at
22 this point in time because it is so far beyond the
23 requirements of the standing orders with respect to the
24 conduct of asbestos trials.

25 Now, that is my ruling on these particular

1 matters. And I think I've covered everything in
2 pretrial.

3 All right. Mr. Boger.

4 MR. BOGER: Can I put something on the record?

5 THE COURT: Sure. Let me make sure those are
6 all the motions outstanding.

7 MS. McVEY: Those are all.

8 MR. BOGER: Yes, sir.

9 THE COURT: Mr. Boger, you need to preserve
10 your position for the record.

11 MR. BOGER: Thank you, Your Honor. With
12 respect to the ruling, we would submit that the position
13 taken by Covil in this matter is not that all records
14 were destroyed in the fire in 1973. There certainly has
15 been back and forth as to what was destroyed and what
16 was not by a few of the fact witnesses including Palmer
17 Covil, Jimmy Covil, and Mr. Carpenter.

18 As I mentioned in my argument earlier, we had
19 produced 25,000 pages worth of documents approximately
20 in this case. It has been 27 years since this business
21 ceased in 1991, and, frankly, we understand that the
22 records have been kept in prior counsel's office, and we
23 are -- understand everything has been produced that we
24 have.

25 In addition to that, there is no additional

1 testimony or evidence that portions of records were
2 destroyed by Covil at any point besides the fire, which
3 we contend was not a deliberate or intentional act on
4 behalf of Covil.

5 In addition, we believe the facts and
6 testimony in this case will show that representatives of
7 Daniel and Celanese cannot place Crawford as supplying
8 or installing insulation -- I sorry -- or Covil was
9 comply and installing the insulation at Celanese the
10 plant during the period of time that Mr. Crawford worked
11 at the plant from 1970 to 1974.

12 THE COURT: All right. Mr. Wall.

13 MR. WALL: My part of it. Your Honor,
14 Mr. Palmer Covil is dead. He cannot testify. He has
15 not refused. Jim Covil has refused to testify. Well,
16 we contacted his -- his prior lawyer said he can't
17 handle it. They have subpoenaed him personally. If he
18 comes, he can use him for whatever purpose they can.

19 Two, we have given them 900 pages of -- by CD
20 of insurance records, the same insurance records that
21 Palmer Covil said they gathered all together. These
22 form of counsel shipped them all to plaintiff's counsel
23 some time ago.

24 THE COURT: Thank you, sir. All that is noted
25 for the record. And from my ruling stands.

1 So now, where are we, Ms. McVey?

2 MS. McVEY: I think we're ready for jury
3 selection.

4 MR. WALL: I have -- I have another issue to
5 bring up.

6 MS. McVEY: All right. One question. That --
7 the inference you are going to give, will you give that
8 at the beginning before opening or when will that
9 happen? Will that be part of closing charges?

10 THE COURT: It ought to be done at the
11 beginning of trial. And my idea is going to be this. I
12 will voir dire the jury with these two questions I have
13 for them. We will have jury selection. I will send
14 them to lunch and y'all will present me with something
15 before opening takes place --

16 MS. McVEY: Okay.

17 THE COURT: -- that you share with the other
18 side.

19 MS. McVEY: Okay. We will get that -- yes.

20 The only other issue we take it up after lunch
21 is we had given Mr. Wall our PowerPoint slides for
22 opening.

23 THE COURT: Yes.

24 MS. McVEY: And I think he's got objections to
25 them, but we can take them up after lunch or after we

1 select the jury, I guess.

2 THE COURT: After we select the jury. I don't
3 want to delay the jury. Mr. Wall, are you wanting to
4 talk about the PowerPoint?

5 MR. WALL: Well, yes. But one other thing.
6 All right. I didn't fully understand. Are you giving a
7 negative inference that he actually worked with
8 property -- products of Covil or negative inference that
9 we destroyed product?

10 THE COURT: I will repeat this once again so
11 you understand what I have done. I have done two things
12 as a sanction for spoliation and for discovery abuse.
13 One, I am allowing them to introduce in their
14 case-in-chief evidence of Covil's destruction of
15 documents and misrepresentations about the
16 destruction -- the circumstances of destruction, and
17 that, as I understand it, will primarily be through the
18 sworn statements of Mr. Mason Carpenter.

19 So that's what I have done, number one. That
20 will be done during the case course of the case. I am
21 not giving any instruction about that. That will simply
22 be testimony that will be offered on destruction of
23 documents and misrepresentation.

24 And I am going to instruct the jury that it
25 may draw a negative adverse inference from defendants

1 acts that -- what I'm going to do is instruct them
2 simply this. I'm going to instruct them that plaintiff,
3 Jerry Crawford, was exposed to asbestos-containing
4 insulation supplied by and installed by Covil
5 Corporation at Hoechst Celanese between 1970 and 1974.
6 That's what I'm going to instruct the jury.

7 I'm not going to go into spoliation, negative
8 inference. I'm simply going to tell them at the
9 appropriate time, which will be right before opening
10 statements. I will say that to them.

11 MR. WALL: Your Honor, first of all, as I said
12 before last 11th, I need a written order so I can appeal
13 Rule 59.

14 THE COURT: No, sir. I examined that quite
15 closely. I can on the record recite my order. I am not
16 required to give you a separate written order.

17 MR. WALL: Then, Your Honor, then --

18 THE COURT: This is not a directly appealable
19 matter, so you can't stop the trial, Mark.

20 MR. WALL: I'm not asking to. I just want to
21 be well within my rights to timely file by Rule 59(e)
22 motion.

23 THE COURT: Right. And you can do that as a
24 result of my on-the-record recitation of my order.

25 MR. WALL: All right. You are agreeing that

1 that is in writing as -- because Rule 59 says as to when
2 you get a written order, you can apply.

3 THE COURT: Yes, sir.

4 MR. WALL: Rule 59.

5 THE COURT: Yes, sir. It is going to be a
6 transcript of the trial and it is going to be in writing
7 in two different ways. Number one, the official court
8 reporter is taking down everything I say and he will
9 transcribe that.

10 In addition to that, the plaintiffs -- and
11 perhaps y'all have collaborated on this -- have a
12 private court reporter, Deborah Dusseljee, who is also
13 taking down everything I'm saying and a written
14 transcript can be obtained from her.

15 So there are two different ways in which a
16 written transcription of my order on the record can be
17 gotten.

18 MR. WALL: Two, I suggest, Your Honor, that
19 the sanctions you issued as to the witness as saying
20 that he was, in fact, exposed to product from Covil is
21 that Covil -- to striking my answer because we have a
22 factual basis, and the factual basis is he was not
23 exposed to our product, and we have two witnesses who
24 are going to say that. So I suggest --

25 THE COURT: Your witnesses are going to say

1 that -- something very different from that. Your
2 witnesses are going to say that they don't know of any
3 exposure. That is very, very different from whether or
4 not he was exposed, and so I have not struck your
5 answer. I have not struck your defenses, but I have,
6 because of Covil's behavior and disregarding so
7 extremely the requirements of the standing order and the
8 rules of discovery, I have sanctioned Covil by allowing
9 the jury to be instructed that Mr. Crawford was exposed
10 to asbestos-containing insulation installed by and
11 supplied by Covil between 1970 and 1974.

12 MR. WALL: I understand, and I'm not arguing
13 with the court.

14 THE COURT: Sure.

15 MR. WALL: Finally, Your Honor, I find that
16 your sanctions -- not find.

17 THE COURT: Yes, sir.

18 MR. WALL: I believe that your sanctions are a
19 directed verdict against the defendant. So I suggest
20 that the case is now over because you already have
21 instructed the jury that they are to find that our only
22 defense is that we did not get materials there. They
23 were not exposed to our product is not the facts of
24 case. So, Your Honor, you have now directed a verdict
25 against us.

7/16/2018

38

1 THE COURT: Well, I do not find that I have
2 done that, but I will look again at how I word this
3 instruction to the jury as to whether I simply instruct
4 them, as I said just a moment ago, that he was exposed
5 or whether I say to them, you may infer or you shall
6 infer.

7 MS. McVEY: And, Your Honor, just briefly in
8 response, you clearly haven't directed a verdict because
9 we still have to prove causation.

10 THE COURT: Exactly.

11 MS. McVEY: We agree with that, exposure,
12 causes if mesothelioma. If Mr. Wall wants to stipulate
13 to that, we can have a damages hearing, I suppose --

14 MR. WALL: We are not contesting that he died
15 of mesothelioma.

16 THE COURT: Right. You are not contesting
17 that, but you are contesting whether the asbestos to
18 which he was exposed by Covil caused his mesothelioma.

19 MR. WALL: If he was exposed to asbestos
20 supplied by Covil, it -- okay.

21 THE COURT: If you want to embrace any and all
22 exposure and all the other things --

23 MR. WALL: No, I'm not. Not at all.

24 THE COURT: -- I advise you that you may not
25 want to go that far.

7/16/2018

39

1 MS. McVEY: If he wants to agree that they --
2 exposure to Covil insulation causes mesothelioma, then
3 we just -- we would agree and we could have a damages
4 hearing.

5 THE COURT: Yeah. If you want to do that,
6 that's fine. I don't think you want to do that you, but
7 I'm not going to --

8 MR. WALL: All right.

9 THE COURT: Okay. All are in understanding
10 now.

11 On these PowerPoints, let me see them and see
12 what you are fussing about.

13 MR. WALL: If says -- may I approach?

14 THE COURT: Sure. Absolutely.

15 MR. WALL: We just got this this morning.

16 THE COURT: Yes, sir. That's what generally
17 happens with these PowerPoints. These are the ones you
18 are going to use in your opening arguments?

19 MALE VOICE: Yes, I am, Your Honor.

20 MR. WALL: They knew.

21 THE COURT: All right. All right. And you
22 object to that why?

23 MR. WALL: Because they haven't put any
24 evidence up.

25 THE COURT: Opening arguments are a statement

1 of what plaintiff intends to prove. This first thing on
2 the PowerPoint, all right, they knew it, they did it,
3 they hid it, is appropriate opening argument.

4 If they don't prove it, I'm sure that you will
5 discuss that with the jury. But that's overruled.
6 That's okay.

7 What else?

8 MR. WALL: That the same thing all the way
9 through there.

10 THE COURT: All right.

11 MR. WALL: Undisputed facts.

12 THE COURT: If it turns out that the
13 undisputed facts end up being somehow not the real
14 facts, I'm sure we can deal with that. But so far Jerry
15 Crawford worked at Celanese Spartanburg from 1970 to
16 1947 around asbestos-containing pipe insulation. I'm
17 going to allow them to infer that, as we talked.

18 Jerry Crawford has cancer. I don't think
19 there is any doubt about that.

20 Covil sold asbestos-containing products,
21 specifically pipe insulation. There is not going to be
22 any doubt about that.

23 MR. WALL: We -- your Honor, that's our plan.

24 THE COURT: I understand you do, but they got
25 evidence to the contrary and they are going to put it

1 in. So it is going to be -- you know -- at most a
2 disputed fact. But if you end up putting evidence up
3 like you are talking about, why, we will bring that the
4 attention of the jury.

5 Jerry Crawford did nothing wrong. Nobody said
6 he did anything wrong.

7 MR. WALL: Your Honor, the first one is the
8 nature.

9 THE COURT: Okay. Overruled.

10 MR. WALL: Everything else is so the generic I
11 have no problem with that. They did it. They knew it
12 and hid it.

13 THE COURT: Well, I think that's appropriate
14 argument.

15 All right. Ms. McVey, I don't think we need
16 to put this in. It will be in evidence, Mr. Court
17 Reporter, when she shows the PowerPoint, and if you want
18 to mark it's demonstrative. It doesn't go back to the
19 jury. But if you want to mark it as demonstrative, I
20 think that would be well so that Mr. Wall will have that
21 in the record for his objection.

22 So the objection is overruled and an
23 exhibit -- a PowerPoint will be given to the court
24 reporter and, Mr. Reporter, you have to mark that as
25 Court's Exhibit 1. So it doesn't mess up y'all's

1 designation. And then Mr. Wall has got in the record
2 what he wants for his objection.

3 MR. WALL: Do I understand that the way the
4 judge has ruled that I do not need to renew my objection
5 during opening statement?

6 THE COURT: That is correct. That's exactly
7 why I did it in here and I made a complete record and
8 put it on the record so you are protected.

9 MS. McVEY: Thank you, Your Honor.

10 THE COURT: All right. What else?

11 MS. McVEY: I think we are good.

12 THE COURT: Very good. Is the jury just
13 sitting there wondering what in the world is happening?

14 THE BAILIFF: Yes, ma'am.

15 THE COURT: Bring them out. I suggest,
16 friends, it's 12:30. Let's go and get jury selection
17 out of way and we will figure out what we want to do for
18 lunch.

19 MS. McVEY: Perfect.

20 THE COURT: All right.

21 MS. McVEY: Your Honor, we have Dr. Brody
22 ready to go here today.

23 THE COURT: Good. Wonderful. All right. If
24 you will bring the jury, we will just stay here and let
25 the whole voir dire be brought in then.

1 (Jury selection.)

2 THE COURT: Do you or who will be speaking for
3 the plaintiff?

4 MR. CHAPMAN: I am.

5 THE COURT: Who will be opening -- Mr. Wall.
6 What y'all want? I will see what I will give.

7 MR. CHAPMAN: I think I can be done and
8 sitting down in less than 45 minutes.

9 THE COURT: Good. I will allow an hour for
10 each. All right. Just so you won't be stressed out.
11 And -- all right. If you want to reserve anything,
12 plaintiffs, you can do that. But it sounds to me like
13 we will move along rather rapidly.

14 MR. WALL: I'll probably be 15, 20 minutes.

15 THE COURT: That's fine. Y'all will be within
16 my range of what I think it is not going to wear the
17 jury out. So I will trust you to do your usual, capable
18 job.

19 MR. BRANHAM: Your Honor, after opening
20 statements, we're going to have Dr. Brody in here.

21 THE COURT: Yes.

22 MR. BRANHAM: The Court is very familiar --

23 THE COURT: I am.

24 MR. BRANHAM: Dr. Brody has a flight at 8:00
25 tonight.

7/16/2018

44

1 THE COURT: Yes.

2 MR. BRANHAM: I expect we can get him done in
3 two hours, but it sounds like -- but to the extent we
4 need an extra 30 minutes or so to work to get him
5 pulling off today --

6 THE COURT: Right. We're going to get -- no
7 problems there. No problems.

8 MR. CHAPMAN: Your Honor, may I clarify
9 something?

10 THE COURT: Yes.

11 MR. CHAPMAN: If I have some time remaining
12 underneath my hour, and I think I will, can I reserve
13 that time to rebut anything else he says?

14 MR. WALL: No, Your Honor. I object.

15 MR. CHAPMAN: I'm just trying to understand.

16 THE COURT: I generally allow plaintiffs to
17 reserve a little time since they have the burden of
18 proof, but if you object to it, let us stick with each
19 side giving their opening and going forward.

20 MR. WALL: Okay.

21 MR. CHAPMAN: Thank you, Your Honor.

22 THE COURT: All right. Anything else that I
23 need to do for you?

24 MS. McVEY: We need the strike sheets, and
25 that's it.

7/16/2018

45

1 THE COURT: Okay. She's got -- have I got the
2 strike sheets?

3 Marybell, you getting that out now?

4 MS. McVEY: Your Honor, can we leave the
5 courtroom open so that our tech guys can set up for
6 opening during lunch?

7 THE COURT: Certainly. All right. Y'all
8 leave the courtroom opened up to let their technical
9 people set up.

10 Y'all are going to get strike sheets from
11 Marybell, right?

12 MS. McVEY: And we will be ready to strike as
13 soon as --

14 THE COURT: Good. I'm good.
15 (Recess.)

16 2:14 P.M.

17 THE COURT: Be seated. We got about eight
18 more jurors than we need, so be at ease.

19 MS. McVEY: Your Honor, this doesn't have to
20 be on the record. We handed this to Mr. Wall. This is
21 the presumption.

22 THE COURT: Very good.
23 (A recess transpired.)

24 THE COURT: Before the jury comes in,
25 Mr. Wall, have you seen the stipulation? I know you

7/16/2018

46

1 don't like it.

2 MR. WALL: I object to it. I think it's too
3 severe. It doesn't match the crimes, as the law says.
4 You should have done what you said you were thinking
5 about doing was saying that the jury could cite an
6 inference that he was exposed to insulation supplied and
7 installed.

8 THE COURT: What it is going to be is a
9 presumption based on the fault of the defendant.
10 Remember, I decided early on that I wasn't going to tell
11 them about badness on y'all's part. Other rulings,
12 motion in limine, I ruled on at pretrial. So what I'm
13 going to do is charge it this way, and you object to it
14 and you say it's tantamount to a directed verdict,
15 et cetera, et cetera, and your position is reserved.

16 MR. WALL: Thank you, Your Honor.

17 THE COURT: Yes, sir.

18 MR. WALL: I won't say another word based upon
19 your representation.

20 THE COURT: Absolutely. Absolutely. And what
21 this will be done, it won't be done on that. You're
22 doing it right before the lawyers open.

23 MS. McVEY: That's what I wanted to clarify.

24 Thank you, Your Honor.

25 THE COURT: One other thing, I will just tell

1 y'all, I will allow note taking, and I instructed the
2 clerk's office to make tablets available for purpose of
3 note taking and I give them some instruction about that.
4 I think it keeps them a little more focused and --

5 MS. McVEY: We will just make sure it is a
6 clean note pad.

7 THE COURT: Ms. McVey knows I had to dismiss a
8 juror. I tried one case already and they gave one
9 notebook to the other and one fellow had sped read
10 through all of it and was ready to go.

11 (Laughter.)

12 (Jury pool enters.)

13 THE COURT: You may be seated, counsel.

14 The jury is present and the lawyers will now
15 select from a strike sheet. Let me explain to you
16 members of the jury what is going on with that.

17 (The jury selection process takes place.)

18 THE COURT: Thank you, ladies and gentlemen of
19 the jury, and I look very much forward to working with
20 you on this case that's so important to both sides.

21 What we will do now is ask you to go to your
22 jury room. At that time, please select one of the
23 jurors as foreperson of the jury. I will let y'all do
24 that rather than have me just arbitrarily pick someone.
25 So you tell me who you would like to have serve as the

7/16/2018

48

1 foreperson of the jury and that person will be seated
2 right here where the gentleman in the blue shirt is
3 seated.

4 Am I right or up one?

5 THE BAILIFF: No, that's --

6 THE COURT: He's a regular juror, not an
7 alternate. Right? End seat is where the foreperson of
8 the jury sits. Easier for that foreperson to pass me a
9 message if it needs to be passed or so forth. Of
10 course, it can come from any one of you.

11 You will find when you go to the jury room
12 that you have some tablets. I will allow you to take
13 notes. Let me just give you a little instruction about
14 taking notes. I will let you do it, because if you are
15 like I am, you hear all this technical testimony and,
16 frankly, you will be deer in the headlights hearing all
17 this usual terminology. I feel the same way and I have
18 heard these cases before, but I find I focus a little
19 better if I can scribble some notes to myself.

20 What you need to know about notes is that they
21 are just for your personal use. They don't become
22 another independent recollection and they shouldn't be
23 used in place of your own memory about things, but they
24 are just a little way you have to kind of keep up with
25 what's going on. You don't have to take notes. There's

1 nothing mandatory about it. It is simply there if
2 that's what you want to use.

3 Alternates you are an extremely important part
4 of this process and I don't just say that as something
5 glib that's said to every jury. I select so many jurors
6 because these types of tort cases like this one are
7 complicated and sometimes things can come up even if the
8 case doesn't last but a week and certainly if it lasts
9 longer than that. And I have had jurors that for one
10 reason or another had to be released because of
11 something came up, either because was their situation or
12 something that they figured out that they knew about the
13 case. It would be a shame to have all the time and
14 effort put into this case and then not have 12 jurors we
15 need and must have to decide a case.

16 So you are just as important, alternates, as
17 are the regular jurors and you will be right in there
18 with the regular jurors, and only when the case actually
19 goes to the jury verdict will you not be in there with
20 them. But I generally keep my alternates until the
21 case -- until a verdict is reached, and I do that
22 because even when you are deliberating, something may
23 occur and, therefore, an alternate might be needed and
24 you have to kind of redo some of the discussion you have
25 had.

7/16/2018

50

1 But in any event, that's how we operate. I
2 try to start court at 9:00, if I can, and I try to get
3 you out of here no later than 5:30. Sometimes it can be
4 shorter than that, depending on the testimony goes. A
5 lot of times it will be a little before 5:00.

6 I take two breaks, one in the morning and one
7 afternoon, and I take a lunch break. So there is plenty
8 of opportunity. Needless to say, if you need a break,
9 all you have to do is raise your hand, send a note to
10 the foreperson. Your comfort is paramount and I want to
11 make sure -- to be sure that you have what you need to
12 render a very impartial verdict in this matter.

13 So if you will go to your jury room, select
14 your foreperson, and we will be ready to start probably
15 in about five minutes or so. It generally takes you a
16 while to get in there, get your materials, get set. I
17 will call for you when your bailiff says you are ready
18 proceed. So everybody can get refreshed. That's
19 important. And then we will call you out and the
20 lawyers will present their opening statements to you as
21 jurors.

22 Thank you. You may go to the jury room.

23 (Jury dismissed to the jury room.)

24 THE COURT: All right. Be at ease and we will
25 have the bailiff advise us when the jury is ready to

1 proceed, but I would like to proceed no later than 10
2 till the hour.

3 MR. WALL: Your Honor, can we go?

4 THE COURT: What's that?

5 MR. WALL: Is there time for us to go?

6 THE COURT: Yes. Sit down so I can talk to
7 this group of people.

8 (Judge speaks to the jury pool and dismisses
9 the pool.)

10 THE COURT: I see you selected a foreperson
11 and your name is?

12 JUROR: Sarah.

13 THE COURT: Sarah Scott?

14 Berrick (phonetic). Got it.

15 Ms. Berrick is your foreperson. You may be
16 seated. And let me give you first of what will be many
17 instructions, if I can find it.

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

24 And with that, plaintiff, you may open.

25 MR. BRANHAM: Thank you, Your Honor. Let me

7/16/2018

52

1 get set up here.

2 THE COURT: I'm sorry. Ladies and gentlemen
3 of the jury, before it gets dark and kind of cocktail,
4 put the lights back up again, Clyde.

5 Bailiff, this doesn't want to do good.

6 THE COURT: Madam Clerk, you may give the
7 jurors their oath.

8 THE CLERK: Ladies and gentlemen.

9 THE COURT: Would you please stand, members of
10 the jury?

11 THE CLERK: You will raise your right hand?
12 Do you swear or affirm in the case about to be tried to
13 truly try the issues joined in the case and a true
14 verdict rendered according to the law and evidence, so
15 help you God?

16 JURORS: I do.

17 THE COURT: You may be seated.

18 MR. BRANHAM: May I?

19 THE COURT: Mr. Chapman, I think they can see
20 that without getting completely dark in here.

21 MR. CHAPMAN: I think so. I think so. Can
22 everyone see that okay?

23 Good afternoon. I woke up really excited to
24 talk to y'all. I hope you are excited to be here. I
25 know it's Monday and you have given up your time to do

1 it. I know this can be an especially tough time of year
2 when kids are out of school and people take vacation,
3 things like that. So before I get into any, I want to
4 thank you. Thank you for your time.

5 The judge said a second ago, one of the best
6 things about the United States is our jury system and
7 that doesn't work without you. So thank you for being
8 here and thank you for your time and thank you for your
9 efforts.

10 There will be a lot of evidence in this case,
11 a lot of testimony. As we really dig into the meat of
12 it, I want you to remember three things: That they knew
13 it, that they did it, and that they hid it.

14 Now, we kind of got introduced before. My
15 name is Eric Chapman and I, along with Theile McVey and
16 Mr. Mark Buha, we are proud to represent a man named
17 Jerry Crawford. This is Jerry. Unfortunately,
18 Mr. Crawford is not going to be able to be in the
19 courtroom with us for this trial. Mr. Crawford has
20 cancer. The cancer that he has is called mesothelioma
21 and because of that, he's just too sick to be here.

22 But we have got his family here. And could
23 y'all please stand up? We've got Patty and we've got
24 Tessa. These are his daughters. His daughters, along
25 with us, we are here to stand for him when he can't. We

1 are here to fight against the injustice which he has
2 endured, to fight for his pain, to fight for his
3 suffering. Okay?

4 You are going to hear from the defendant in
5 this case, Covil. Covil Insulation sold products like
6 insulation and gaskets from the 1940s for decades. You
7 are going to hear that they did this -- they are
8 throughout Spartanburg County, throughout the state of
9 South Carolina, and throughout the entire southeastern
10 United States.

11 You are going to hear that what they supplied
12 was asbestos-containing insulation. They did this at a
13 time when they knew it killed people and they failed to
14 provide any sort of warnings. So what I'm really trying
15 to say, ladies and gentlemen, is that they knew it, they
16 did it, and they hid it.

17 Now, you've already received one instruction
18 from the judge and I wrote it down so I wouldn't mess it
19 up. The judge told you already that Jerry Crawford was
20 exposed -- was exposed to asbestos insulation supplied
21 by and installed by Covil at Celanese between 1970 and
22 1974. That's already been instructed.

23 On top of that, ladies and gentlemen, you are
24 going to see that the evidence, the testimony and the
25 documents show this to be true. Okay? So I'm going to

1 get into what some of the undisputed facts are in this
2 case.

3 It is undisputed that Mr. Crawford worked at
4 Celanese Spartanburg just down the road from 1970 to
5 1974. When he did this work, he was working around
6 asbestos-containing insulation. Jerry Crawford has
7 cancer. No one is going to come here and tell you he
8 don't.

9 Covil sold asbestos-containing products,
10 specifically pipe insulation. I will get into what that
11 means in just a second, but that's undisputed. That's
12 what they sold. That was their business. And not a
13 single soul is going to stand up here and tell you
14 Mr. Crawford did anything wrong.

15 Now, when I say "pipe insulation," this is
16 what I'm talking about. This is the product at issue in
17 this case. This was the first asbestos-containing
18 product, ladies and gentlemen, that was ever studied and
19 understood to be dangerous. It was understood to be
20 deadly. It is effectively banned into the United States
21 today. In fact, ladies and gentlemen, you will hear
22 that if you see asbestos-containing insulation, or even
23 insulation that you believe to be asbestos, may be
24 asbestos, you have to take all sorts of precautions.
25 You have to hire professional company. They have got to

1 come in, use special filters, wear special suits, use
2 special sheathing. It's a known hazard.

3 And you are going to see, ladies and
4 gentlemen, that from the 1940s until -- for decades,
5 Covil chose to sell this. They made a choice. We all
6 got to take responsibility for the choices that we make:
7 Me, Mr. Crawford, and Covil. It's about making Covil
8 take responsibility for their choice.

9 All right? So let's get into the disputed
10 facts, and when it all boils down, there are really two
11 of them. We disagree -- we fundamentally disagree over
12 the value of a human life, and that's going to be the
13 toughest question.

14 MR. WALL: Objection, Your Honor. It is not
15 the issue of the value of a human life and I object.

16 THE COURT: Overruled.

17 MR. CHAPMAN: So, again, it boils down to --
18 the first one is we fundamentally disagree over the
19 value of a human life. That is going to be the toughest
20 question that you guys are going to be asked to answer,
21 okay?

22 And the second question is what amount is
23 Covil at fault here?

24 Now, there's this concept of a total loss.
25 I'm not going to spend a whole lot of time on it. But

1 at the end of this case, I'm going to ask you to find in
2 our favor, all right, based on all the evidence that you
3 are going to see. If you find in our favor, I'm going
4 to ask you for a -- if you decide to find in our favor
5 and if you decide to give us a number, I want you to
6 know right now that the number you give us will be based
7 on the whole loss suffered by Mr. and Mrs. Crawford, the
8 total value of that.

9 And if after you give that number and you
10 serve, the judge is going to decide what portion of that
11 Covil may have to pay, and you are not going to know
12 what that number is and that would drive me crazy -- and
13 I'm sorry -- but that's the way it works here. I want
14 you to understand that if you give us the number, that
15 represents the total loss suffered by Mr. and Mrs.
16 Crawford.

17 So I have got a lot to get through. I don't
18 have a whole lot of time to do it, but this is basically
19 where I'm going.

20 I want to talk to you about mesothelioma, what
21 it actually is. I want to talk to you about asbestos.
22 You may have heard about it, but what is asbestos
23 actually? And finally talk to you about Covil, what
24 they did, what they didn't do.

25 Mesothelioma. Now, we've all heard those

1 commercials on T.V. I'm sure most of us have about
2 mesothelioma. It's almost become kind of a joke, right?
3 But, ladies and gentlemen, for people like Jerry who
4 actually have mesothelioma, I can assure you it is
5 anything but a joke.

6 You are going to hear mesothelioma is cancer,
7 and you are going to hear direct testimony in this case
8 that around all of our major organs is this lining. It
9 is like a Saran Wrap-type lining. In fact, if you look
10 up here at the picture at the healthy human lung, it's
11 kind of shiny. That's because there is a lining around
12 it. You're going to see that within that lining are
13 these cells. They are called mesothelial cells.
14 Mesothelioma is the cancer of the lining around the
15 lung. Not the lung itself, but the lining around it.

16 In fact, we are going to bring an expert
17 molecular biologist to testify. His name is Dr. Arnold
18 Brody, and Dr. Brody probably knows more about this
19 stuff than anybody else on this planet and he's going to
20 explain to you how it works because I want you to
21 understand basically what mesothelioma is.

22 Like I said, mesothelioma is a cancer. I want
23 to be clear about this, ladies and gentlemen. There is
24 no cure to mesothelioma. We are going to hear
25 mesothelioma is fatal. Things like chemotherapy and

1 radiation can sometimes slow it down, but that's all it
2 does.

3 There are two things up here I want to spend
4 just a few minutes with you about. The first is the
5 concept called latency. It is well establish and you're
6 going to hear it is well established in the medical and
7 scientific literature going back decades that there is a
8 gap. There is a period of time between when a person is
9 exposed to asbestos and when that person gets sick, when
10 that person gets mesothelioma. It's a well-known time
11 period.

12 That time period is anywhere from 10 to 40 or
13 more years. So you are going to hear about
14 Mr. Crawford's work in the 1970s and his work around
15 asbestos-containing insulation, and that's going to make
16 a lot of sense because that's right in that known time
17 period of latency.

18 The second is individual susceptibility. That
19 means basically what it sounds like. Different people
20 react differently to asbestos. Now, these are extreme
21 examples, but it is possible that someone walks by
22 airborne asbestos and gets sick years later. It is also
23 possible that someone works with this stuff their entire
24 life and doesn't get sick. Everybody reacts differently
25 to it.

1 What's clear is that mesothelioma is only
2 caused by exposure to asbestos. And this link between
3 mesothelioma and asbestos is so clear that it's called a
4 signal tumor. What that means is that when a doctor
5 diagnoses a patient with mesothelioma or suspects that
6 the patient might have mesothelioma, the first question
7 they ask is: Where were you exposed to asbestos?

8 Oh, there goes our monitor. Technology is
9 supposed to make our lives easier, right?

10 Okay. So the first question that they ask is:
11 Where you were exposed to asbestos? And that's because
12 of this causal link, this known link in the scientific
13 and medical literature between asbestos exposure and
14 mesothelioma. Okay. That's mesothelioma.

15 Let me tell you about asbestos. You may have
16 actually heard about asbestos. You may know that it's
17 dangerous. What is it actually? If you are like me
18 before I started doing this work, I had no kind of idea.
19 Asbestos is a known hazard. It has been studied for
20 more than a hundred years. You will hear that the first
21 articles talking about asbestos, the hazards of asbestos
22 and asbestos diseases, go all the way back to 1898.

23 You are going to hear that Covil Corporation
24 started using asbestos-containing products 1948.
25 Asbestos is a mineral. It is mined from the ground and

1 has been for a long period of time. It is dangerous and
2 there is no known safe level. I will say that again.
3 There is no known safe level of exposure to asbestos.

4 I don't know what the defendants are going to
5 say. All right. But I think they may come up here and
6 tell you if Mr. Crawford was exposed, which we know he
7 was, then he was exposed at such a low level that it
8 couldn't have caused his disease. That's wrong for a
9 lot of reasons but primarily because there is no known
10 safe level and because the evidence is going to show you
11 that he was exposed to huge levels of asbestos in this
12 case.

13 Okay. So as far as asbestos is concerned, we
14 have three main types. The first is called chrysotile.
15 Sometimes it's called white asbestos. There is
16 something called amosite. That's brown asbestos. And
17 there is also called crocidolite and that's blue
18 asbestos. I want to be clear. What we are talking
19 about in this case is primarily amosite, brown asbestos.

20 All three are dangerous. All three cause
21 mesothelioma. All three are a known hazard. This is so
22 hazardous, in fact, ladies and gentlemen, before I get
23 there, asbestos is made up of very strong fibers.
24 That's what it is. These fibers work together. Used
25 primarily in heat and steam applications because they

1 were so good at insulation. It's virtually fireproof,
2 and it's really, really hard to destroy.

3 They were used in products -- thousands of
4 products for years and they did a lot of good for the
5 products that they were in. They worked. But it also
6 happens to be one of the most deadly substances known to
7 man. In fact, ladies and gentlemen, you are going to
8 hear that asbestos is responsible for out of every three
9 occupational cancer deaths. One out of every three.

10 There is one more concept I want to kind of
11 get to and that's dose response. Mesothelioma is known
12 as a dose response disease. What that means is that the
13 more asbestos that you are exposed to, the more likely
14 you are to get mesothelioma. That's what that means.
15 What this doesn't mean is that someone with a low dose
16 of exposure to asbestos won't get sick. And what that
17 doesn't mean is that someone with a high dose will
18 definitely get sick. But there is a correlation, and
19 this is known and studied between the amount of exposure
20 and likelihood of getting sick.

21 I keep talking about exposure. How does
22 exposure to asbestos actually happen? You are going to
23 hear, ladies and gentlemen, that if you are exposed to
24 asbestos in a hazardous way when you breathe in --
25 Dr. Brody will tell you that. You breathe in the fibers

1 and it gets to your lungs and get to the mesothelioma
2 cells.

3 When these fibers get the air -- let's talk
4 about pipe insulation specifically because that's what
5 Mr. Crawford worked on. With pipe insulation when you
6 rip off, when you cut, when you install pipe insulation
7 that contains these asbestos fibers, these fibers become
8 airborne. They get kicked into the air and you are
9 going to hear that once they get put into the air, they
10 stay in what's known as your breathing zone, literally
11 the zone around you in which you breathe air. They stay
12 there for hours. These tiny fibers float there and then
13 they eventually fall to the floor.

14 You're going to hear that walking over it or
15 sweeping up -- and you're going to hear Mr. Crawford did
16 a lot of sweeping up after installation. When you do
17 that, it kicks them back up into the air and they stay
18 there for hours. And so your exposure period, ladies
19 and gentlemen, you are going to hear, is long after when
20 the work actually occurred.

21 Here is what makes asbestos fibers so
22 dangerous. They are microscopic. You can't smell them.
23 You can't feel them. You can't touch them. You can't
24 taste them. With other potential hazards, if you touch
25 a poisonous plant, you get a rash. There is a reaction.

1 If you cut an onion, you cry. There is a reaction. If
2 you work with something like ammonia, there is a smell.
3 There is a reaction.

4 If you are working around asbestos, it doesn't
5 make you sneeze. It doesn't make you cough. You could
6 be working around and breathing literally millions of
7 fibers and never know it. Never see it.

8 There are three primary diseases in which
9 asbestos causes. I'm going to touch on them briefly.
10 The first is asbestosis, literally a disease named after
11 asbestos. There is lung cancer as we think of it, and
12 then there is mesothelioma, which we have already talked
13 about.

14 First, asbestosis was known by at least 1930
15 that asbestos can cause the disease asbestosis.
16 Asbestosis is where you breathe in the fibers and they
17 reach your lungs and cause scar tissue on your lungs.
18 That scar tissue doesn't allow you to breathe in. It
19 doesn't move with your lungs. So a person with
20 asbestosis can literally suffocate to death because they
21 can't breathe because of that scar tissue. This was
22 known by the 1930s.

23 There was a known link in science and industry
24 that asbestos can cause cancer in the 1950s, and,
25 importantly, 1960s mesothelioma is known and understood.

1 It was understood by science, understood by medicine,
2 understood by industry. And you are going to hear,
3 ladies and gentlemen, it was understood by Covil that
4 asbestos can cause disease, that asbestos can kill.
5 Literally hundreds of articles by this time.

6 Let's talk about Covil, their timeline. Covil
7 was founded -- before we get there, like I said,
8 asbestos is a known disease -- known hazard to cause
9 disease. People knew it could kill you by 1930. All
10 right, 1948, 18 years after that literature, 18 years
11 after science and industry knew asbestos could kill you,
12 a man named Palmer Covil founded an insulation company
13 selling asbestos-containing products. 1967, this is an
14 important year for a lot of reasons, 1967 Palmer Covil
15 flies up to New York City from Greenville, South
16 Carolina, attends a conference given by a man named
17 Irving Selikoff. Irving Selikoff is important because
18 you will hear he's a pioneer in understanding asbestos
19 and asbestos-related diseases. He wrote some of the
20 most important papers about this topic.

21 You are going to hear, ladies and gentlemen,
22 that the papers that he wrote and the products that he
23 first studied, Exposure to People Working on Pipe
24 Insulation, the very product at issue in this case. So
25 Mr. Covil goes up there and he goes to a talk. He sees

1 as memo by Irving Selikoff in 1967, learns this, learns
2 asbestos can kill. In that same time frame, 1966, 1967,
3 Mr. Covil goes back down to South Carolina where the
4 Celanese Spartanburg facility is being built. It's
5 being supplied by Covil's asbestos-containing
6 insulation.

7 What does Mr. Covil do when he learns about
8 these hazards from Mr. Selikoff in 1967? Does he go
9 back and say, Whoa, whoa, we got to stop putting this
10 in. We got to stop selling this"?

11 No. He keeps selling it. Keep selling it.

12 You're going to hear, ladies and gentlemen,
13 1970 to 1974, that's when Jerry Crawford was there.
14 That's when he was exposed. 1984, Palmer Covil, the
15 founder of Covil, passes away from mesothelioma, the
16 very cancer that Jerry Crawford has, the very cancer
17 that's caused by exposure to asbestos.

18 They did it. You are going to hear that Covil
19 supplied asbestos-containing insulation for the original
20 construction in Spartanburg, that they supplied
21 asbestos-containing insulation for continued
22 construction while Mr. Crawford was there, that they
23 failed to warn a soul about the hazards of asbestos in
24 their products, that they failed to warn that asbestos
25 can kill. They failed to tell anybody that asbestos was

1 even in their products. You are not just going to hear
2 it from me; you are going to hear it from their own
3 employees.

4 Now, I talked a little bit about pipe
5 insulation. Let's talk about it in the context of this
6 case. Covil supplied the asbestos-containing pipe
7 insulation to Celanese. Literally, literally miles of
8 it, miles of asbestos-containing pipe insulation to the
9 very facility where Jerry Crawford is working.

10 You are going to hear this is dusty to cut,
11 dusty to put on, dusty to take off. You are going to
12 hear, ladies and gentlemen, that if you are seeing dust
13 in asbestos-containing pipe insulation, that if you can
14 physically see that, your exposure levels to those
15 asbestos fibers are through the roof.

16 You are going to hear that Jerry Crawford was
17 physically there when they were being worked on. Now, I
18 know he can't be here, but we took his deposition and we
19 will be able to show that to you. He's going to tell
20 you that he saw dust. He swept up the dust after them.
21 That's where his exposure is going to come from. And
22 importantly, ladies and gentlemen, you are going to hear
23 that the type of asbestos being used was primarily
24 amosite insulation. That's the brown type of asbestos.

25 So they have this. They did it. They knew

7/16/2018

68

1 about it. What did they do? Nothing. The evidence
2 will be overwhelming, ladies and gentlemen. No verbal
3 warnings, no written warnings, nothing on the
4 insulation. They didn't tell anything to the Celanese
5 employees. No communication. Nothing that says
6 asbestos can cause cancer. Nothing that says it is
7 hazardous. Nothing that says that it is deadly. Never
8 told anybody that was actually working on or near the
9 product.

10 I want to talk about responsibility for a
11 second. I'm going to be the first one to tell you, we
12 don't believe Covil is the only one responsible. All
13 right? There was the plant. I think they bear some
14 responsibility. There was the general contractor. I
15 think they bear some responsibility. But I'm going to
16 take a second --

17 Chase, will you switch to the Elmo, please?

18 I'm going to show you, ladies and gentlemen,
19 why I think Covil bears the most responsibility.

20 Are we up? Good.

21 Okay. So in this particular case, we have a
22 supplier. Can you see that? Good. That's Covil. We
23 have an employer. That's Celanese, if I can spell. And
24 then we have the employee. That's Mr. Crawford. If we
25 are dealing, ladies and gentlemen, with a known hazard

7/16/2018

69

1 like asbestos, then you are going to hear it is up to
2 the supplier to warn the employer.

3 Then once the employer has been warned, it is
4 up to them to control the employee. Then once the
5 employee has been controlled through policy or whatever
6 it is, they are to follow. If you know about this and
7 you don't do anything about it, it's on you. But if
8 Covil doesn't warn, then the employer cannot effectively
9 control. And if the employer cannot effectively
10 control, Mr. Crawford can't follow.

11 It is particularly important when the hazard
12 is not obvious. For all the reasons we just talked
13 about, asbestos is not an obvious hazard. And this is
14 particularly important when the consequences are the
15 most severe. This is particularly important when the
16 consequences are the most severe, when death is on the
17 line.

18 Chase, we can switch back. Thank you.

19 Not an obvious hazard. Any sort of industrial
20 site you are going to have hazards. You are going to
21 have obvious hazards, sharp edges, tripping hazards,
22 something you can see. Common sense can tell you to
23 watch out for that. Common sense can't tell you to
24 watch out for asbestos unless you are warned.

25 Information is -- I want to repeat this

1 because it is so important. Information is the most
2 important when the consequences are the most severe.
3 Why didn't they warn? I had a chance -- just like we
4 deposed Mr. Crawford. I had a chance to go depose Covil
5 in this case. I asked them that question. Why didn't
6 you warn?

7 Their answer was they didn't think they
8 legally had to. That's their answer in this case. So I
9 followed up on that. I said, okay, if you don't --

10 MR. WALL: Your Honor, that's arguing now.
11 Objection.

12 THE COURT: Overruled.

13 MR. CHAPMAN: Thank you, Your Honor.

14 I told them even though you don't think you
15 have a legal obligation, hear this, I asked them, what
16 about ethically, morally? Don't you have an obligation
17 to warn? Covil's response was that it was a business
18 decision. That's what they said. That's what you are
19 going to hear.

20 Now, this next part, ladies and gentlemen, you
21 are going to be hearing as a jury for the first time
22 what it took us almost half a year to figure out. There
23 are three primary subjects to this. First is Covil's
24 documents. One of the things we did is we asked them,
25 Send me your invoices, right? Give me your sales

1 records. Let me see if you supplied to Celanese.

2 What they told me was that we had a fire in
3 our warehouse in 1973 and almost everything before that
4 was destroyed. Sorry. We got no documents.

5 So I did some digging, and what we found was
6 an old Covil employee. His deposition was about ten
7 years ago, maybe more. He said, Yeah, there was a fire,
8 but documents didn't get destroyed. Documents weren't
9 involved. They did not burn up. And he says they are
10 gone but because Covil destroyed them. At the end of
11 this case, the judge is going to tell you legally what
12 that means to you. But factually that's what the
13 evidence is going to show.

14 Now, at this same time when Covil says a fire
15 destroy the documents, they claim they went
16 asbestos-free. So all the documents that they have show
17 asbestos-free insulation. Turns out this claim wasn't
18 true, either. You are going to hear that. You are
19 going to hear that there are documents that show
20 asbestos-containing insulation being supplied to
21 facilities by Covil after 1973, literally after 1973.

22 The last thing on that list, boxes. You are
23 going to see the deposition by video of a man named
24 Dwaine Waters. Mr. Waters worked at Covil for a bit of
25 time. He's going to tell you -- you are going to hear

1 this from his mouth -- that Covil took
2 asbestos-containing insulation and put it into boxes
3 labeled "asbestos-free" and then they shipped them out.
4 You are going to have to decide what to do about a
5 company like that, but that's what the evidence is going
6 to show, ladies and gentlemen.

7 At the heart of this, this is a negligence
8 case, not so different from when a texting driver hits
9 another driver. Instead of a texting driver, we are
10 doing a corporation's actions. The evidence is going to
11 show that Covil knew asbestos can kill, they used it
12 anyway, and they failed to warn.

13 The evidence is going to show that they
14 supplied -- knowingly supplied a defective product, and
15 they hid that fact from people like Jerry Crawford.
16 They knew it. They did it. They hid it. What's the
17 result?

18 You are going to see it, ladies and gentlemen.
19 The result is Mr. Crawford's cancer, Mr. Crawford's
20 pain, Mr. Crawford's suffering, the suffering of his
21 family, and as sorry as I am to say, eventually
22 Mr. Crawford's death.

23 This didn't have to happen. Tragedies happen
24 to us every day. Family members get sick and die.
25 Those are tragedies. How is Mr. Crawford any different?

1 This is different because this didn't have to happen.
2 It should not have happened. Covil's actions, what they
3 did, were willful, wanton, and, frankly, reckless. And
4 throughout this case, ladies and gentlemen, the evidence
5 going to overwhelmingly show and overwhelmingly --

6 MR. WALL: He is arguing, Your Honor,
7 objection.

8 THE COURT: Overruled.

9 MR. CHAPMAN: Thank you. The evidence, ladies
10 and gentlemen, will overwhelmingly support and show that
11 Covil knew it. They knew it was hazardous. They did it
12 and they supplied it anyway and then they hid that fact
13 from people like Jerry.

14 Thank you so much for your time and attention.

15 THE COURT: Are you done?

16 MR. CHAPMAN: Yes, sir. Thank you.

17 THE COURT: Ladies and gentlemen, you will now
18 hear from Mr. Mark Wall on behalf of the defendant.

19 MR. WALL: May it please the Court.

20 Ladies and gentlemen, I'm Mark Wall. I'm with
21 the law firm of Wall, Templeton and here with me today
22 is Tommy Boger, a lawyer in our office, and we work with
23 Covil.

24 Covil is a defunct, out-of-business
25 corporation with no employees, no business, and no

7/16/2018

74

1 earnings. It has been out of business since 1991.
2 Covil was started in 1948 in Greenville, South Carolina,
3 by a man named Palmer Covil who's deceased. Covil was,
4 when in business, an industrial insulating contractor
5 and also distributed industrial materials, but it was
6 not a manufacturer. It did not manufacture the pipe
7 covering that we are hearing about talked about. It
8 bought it from manufacturers.

9 You will find out that Daniel Construction
10 Company bought its asbestos not from Covil but from
11 manufacturers. Covil, like all the industrial
12 insulators, did, in fact, sell asbestos materials, and
13 in the late '70s, it went, like everyone else did, to
14 asbestos-free asbestos materials.

15 In May of 1973, Covil had a fire at the plant
16 and it destroyed most, not all, most, not all, of the
17 sales records. We have some sales records. We have
18 some corporate files. We have some documents to show
19 doing business with different companies at different
20 times, but we have almost no sales records. We have
21 records from some of the '60s, but basically
22 everything's from the '70s and up.

23 These documents that were not destroyed and
24 accumulated after that, there are about 25,000 pages of
25 this these documents. That does not include some old

7/16/2018

75

1 employees files which were not burned.

2 Also which was not burned was some sales
3 records -- some business records of cash deposits and
4 other things that were actually in a safe. The sales
5 records were not in the safe. They were in the
6 warehouse that burned down. You may get a chance to see
7 a picture of the fire from the Greenville news. The
8 whole place burned down, bad.

9 In order to find out what Covil did, we had to
10 hire someone to read all the documents, read all the
11 depositions, and try object them so he could testify
12 what Covil did in the '70s and before because there are
13 no documents to establish what they did.

14 As I said, Mr. Covil is deceased. His son
15 Jimmy Covil never was on the industrial side and was not
16 -- is not interested in dealing with the company because
17 it's been out of business since 1991.

18 The person that we hired is the person you
19 will hear by the name of Bob Glenn. He will tell you
20 what he was able to gleam from looking at documents,
21 from reading Mr. Covil's deposition and reading the
22 son's deposition and a couple other depositions at
23 Covil.

24 As you all know this case is about the
25 Celanese plant here in Spartanburg from '70 to '74.

1 Mr. Glenn will tell you that he reviewed the records of
2 Covil that were not destroyed, and he could not find any
3 sales of any materials to Celanese. He could not find
4 any workers who worked at Celanese installing materials.
5 He found no records from the '70 to '74 period. Now to
6 be sure, there are records that we did work for Celanese
7 at later dates but not from the period of '70 to '74.

8 You will also hear from representative of
9 Celanese he will tell you that he has reviewed all their
10 records, and he has found no records of any sales of
11 asbestos products by Covil to Celanese. And you will
12 hear me later that the law of the country and South
13 Carolina is the plant owner is responsible for the
14 safety of all the workers in the plant.

15 You will also hear from representative of
16 Daniel Construction Company, whose now Fluor Daniel --
17 it's a very big national contractor that originally
18 started in Greenville. And they will tell you that
19 they, Daniel, built the Celanese plant in the 1960s.
20 They will also tell you that Daniel done all the
21 maintenance at the plant from the '60s and '70s. They
22 will also tell you that Daniel did all the improvements
23 and changes at the plant in 1970 to 1974. And he will
24 tell you, as he reviewed all the construction files held
25 by Daniel, reviewed them all, and he found no reference

1 to any products sold to Daniel by Covil. He will tell
2 you that Daniel bought their products from the
3 manufacturer directly from the manufacturer, not from
4 Covil.

5 He will tell you that in that time period, by
6 1973, Daniel had a program that they would not use
7 asbestos-containing insulation in pipe covering starting
8 in 1973. And he says, there was none there.

9 The Daniel representative looked through all
10 the 40 boxes and the only reference he could find to
11 Covil is that at one point Covil had three employees on
12 the job site putting fireproofing material on structured
13 steel. That's all. That's all Covil did.

14 He will also tell you that Daniel, all the
15 materials from manufacturers and was asbestos free in
16 1973.

17 Lastly, you will hear some testimony about the
18 fact that Mr. Crawford also changed asbestos brakes for
19 years and years, on his own car and with a friend, and
20 was exposed to asbestos brakes while he was working on
21 those.

22 After you hear all this evidence, and if you
23 believe it, at the end of the case, I will ask you to
24 return a verdict for Covil, a verdict for the defendant.
25 Thank you very much.

7/16/2018

78

1 THE COURT: Thank you Mr. Wall. Okay.

2 Ms. McVey, call your first witness.

3 MS. McVEY: We call Dr. Arnold Brody, please.

4 THE COURT: Come around here. Ms. Clerk, get
5 us ready to go.

6 (Witness sworn.)

7 THE COURT: Have a seat, Dr. Brody.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Just give me a second.

10 Dr. Brody, good to see you.

11 THE WITNESS: Thank you, Your Honor.

12 I'm trying to break down the system here.

13 MS. McVEY: Judge, do you want me to get
14 started qualifying him?

15 THE COURT: Just a second.

16 MS. McVEY: Okay.

17 THE WITNESS: You have to wait for the judge.

18 MS. McVEY: Okay.

19 THE COURT: Okay. I got it now. Ladies and
20 gentlemen of the jury, Dr. Around Brody is going to be
21 offered as an expert witness and let me just tell you a
22 little something about expert witnesses.

23 Experts are different kind of witnesses from a
24 the normal fact witnesses. Normally you can't testify
25 on your opinions about anything. You testify about

1 facts. But if a person by reason of their training,
2 education, and experience becomes an expert in the field
3 that is kind of beyond our common knowledge, where we
4 might need some assistance from someone who has an
5 expertise, if they have the proper training, education
6 and experience, they will be qualified as an expert and
7 they will then be able to give you opinions about their
8 field of expertise. But remember this.

9 You are the judges of the facts, the sole
10 judges of the facts. I am not the judge of the fact. I
11 am at judge of law. You and only you can determine the
12 facts. And with regard to expert witnesses, they may
13 give you opinions, but you are the sole judge of their
14 credibility. And you may accept what he says, you may
15 accept some of it, object to other parts of it. You may
16 give an opinion in whatever way you as the jury think
17 that opinion is going to enlighten you.

18 So that's kind of why a witness can give you a
19 expert opinion by reason of their education, training
20 and experience but you yourself are the judges of
21 whether you accept that opinion. March.

22 All right. You may proceed, Ms. McVey.

23 ARNOLD BRODY, Ph.D., being first
24 duly sworn, testified as follows:

25 EXAMINATION

1 BY MS. McVEY:

2 Q. Doctor Brody, introduce yourself.

3 A. My name is Arnold Brody, B-R-O-D-Y. I'm
4 professor emeritus of the pathology department at Tulane
5 university medical school in New Orleans. I was the
6 vice chairman of the pathology department there for
7 years. I'm trying to be retired. I'm an emeritus
8 professor and my field is lung injury and asbestos
9 disease.

10 Q. Are you a medical doctor?

11 A. No. I'm Ph.D. I'm a scientist and teaching
12 doctors about this field for a long time.

13 Q. What is it -- what is a cell biologist?

14 A. Biology is the study of life, a cell biologist
15 studies various kinds of cells. Everything is made of
16 cells. Every living things is made out of cells. We
17 need to learn how to cells function. My focus has been
18 on lung cells. Some scientists study liver cells and
19 kidney cells. My focus has been on lung cells.

20 Q. We talk about experimental pathologist. What
21 does that mean?

22 A. Pathology is the study of disease. Scientists
23 like myself do experiments to understand disease. So
24 that's the field of experimental pathology.

25 Q. And Dr. Brody, have you studied asbestos over

1 the courts of your career?

2 A. I have.

3 Q. Have you spent essentially your career
4 studying asbestos and its effect on the lung?

5 A. That's correct.

6 Q. Among other things.

7 I handed you your CV, exhibit 809. Is that a
8 current and up to date CV?

9 A. I can tell you in one second.

10 Yes.

11 Q. I think we are glad we are in here today with
12 the storm.

13 Can you give the jury the benefit of your
14 background?

15 A. Sure. After high school in New Hampshire, I
16 went out to Colorado to do a bachelor of science degree
17 in zoology. That's the study of animals. Then I went
18 to the University of Illinois where I received a master
19 of science degree in what's called anatomy, that's human
20 anatomy, animal anatomy. That's how we learn how all
21 our parts fit together: Muscles, bones, nerves, joints,
22 that sort of thing. Then I went back to Colorado to a
23 Ph.D. as a doctorate that we were just talking about,
24 cell biology. And then three years of post doctorate
25 study at Ohio State University, and then I started my

1 academic career after that.

2 Q. Dr. Brody, how did you become interested in
3 the study of asbestos disease?

4 A. So this takes us into my first academic
5 position which was as assistant professor. That's a
6 beginning professor. In the pathologist department in
7 the medical school at university of Vermont. And while
8 there, we had a visitor to the department. His name was
9 Dr. Wagner. Looked like Wagner, W-A-G-N-E-R.
10 Dr. Wagner established in 1960 that asbestos causes this
11 cancer you just heard about caused mesothelioma. Here
12 was Dr. Wagner in the department sitting down with a
13 young professor, me, seeing the work that was I was
14 doing with human lungs and he asked me to come and work
15 with him in Wales in the united kingdom. This was a
16 great opportunity for a young scientist to go work with
17 this very famous person in this field of asbestos
18 induced injury. And that's where I got started. There
19 were so many questions to be answered about how asbestos
20 causes disease. So when I worked with Dr. Wagner, it
21 was clear asbestos caused disease asbestosis, lung
22 cancer, mesothelioma but a lot of open questions on how
23 asbestos does that.

24 Q. Is that what you wanted to go study, how it
25 happened?

1 A. Exactly.

2 Q. I want to talk a little bit about research
3 that you have done over the course of your career, if we
4 could.

5 Do you get funding for your research?

6 A. Oh, sure. Yes, of course. Universities where
7 I have been a professor all these decades, they give you
8 an office and a place to do your work. But they don't
9 pay for the science. So we have to get funded from
10 outside sources.

11 Q. And who have been some of the outside sources
12 that have funded your research?

13 A. Well, my work has been funded by the national
14 institutes of health. So you probably heard maybe the
15 National Cancer Institute, National Heart, Blood, and
16 Lung Institute. National Institute of Allergy and
17 Infectious Disease. These are different institutes in
18 Washington, D.C., and they are set up to understand
19 human health so that effective treatments can be
20 developed where there are none.

21 What we have to do, what scientists have to do
22 is write proposals, applications. I have been competing
23 with the grade schools in South Carolina and Texas and
24 California and New York all my wife, writing
25 applications for a limited amount of dollars, and the

1 top 10 to 15 percent of the applications get funded. So
2 it's a very competitive environment. To answer your
3 question, my work has been funded without interruption
4 by the national institutes of health for my career.

5 Q. And the national institute of health doesn't
6 just fund the 90 percent. They fund the cutting edge.
7 Is that fair?

8 A. Well, yes. It is the research that's most
9 likely to teach us something about what's necessary to
10 be able to develop an effective treatment.

11 There are no effective treatments for any of
12 the asbestos-related diseases. So we are trying to move
13 the field ahead to be able to develop those kinds of
14 treatments.

15 Q. Dr. Brody, you have served on any government
16 panels or agencies related to asbestos?

17 A. Sure. I have been on panels from the
18 environmental protection agency. I have been on
19 congressional subcommittees where we are meeting to
20 understand where some of this funding should go, what
21 the priorities should be. I served on boards from the
22 national institutes of health, national science
23 foundation, et cetera.

24 Q. I ask a little about peer reviewed
25 publications. Would you describe the process for

1 getting a publication peer reviewed, having a peer
2 reviewed paper published?

3 A. Sure. If I do a series of experiments in my
4 laboratory and I want that information to be out in the
5 open medical literature so that if anybody is interested
6 in seeing that work, it can be found in a journal called
7 a peer reviewed journal. It is called that because when
8 I write this information up about the experiments that I
9 did, I write an introduction. I write a methods and
10 materials that I used. I write a discussion of the work
11 that was done. And I send it to a journal. It could be
12 one of 20 or so different journals. The editor takes
13 that paper and sends it to two or three or four of my
14 peers. Other scientists like myself who anonymously
15 review my work.

16 And they write a report back to the editor.
17 And they may say, well, this needs some clarification.
18 You need additional experiments to be done to complete
19 this work. It might be fine. It might be ready to go.
20 And so when the editors are satisfied and I'm satisfied,
21 I may have to do a series of experiments, rewrite the
22 paper and send it in again. It might be reviewed again.

23 When the editor is satisfied, I'm satisfied,
24 the reviewers are satisfied. The work then appears in
25 open literature as a peer reviewed paper.

1 Q. How many of your publications have been peer
2 reviewed or published?

3 A. This is my CV that you handed me, that shows
4 154 peer reviewed papers. I also have a series --
5 separate section called invited reviews where they might
6 be review articles about my work and other people's work
7 and also a book.

8 Q. Of those publications you just described how
9 many deal with asbestos?

10 A. So the 154 peer reviewed papers, about 120 or
11 so of them are directly related to asbestos. Others may
12 relate to some lung cell work that I've done. I've
13 published several papers on viral diseases, some papers
14 on asthma.

15 Of the reviews, the 55 book reviews and
16 chapters, all of those deal directly with asbestos. I'm
17 currently working on a review right now.

18 Q. And Dr. Brody, you have published any books?

19 A. I have published a book.

20 Q. What's the name of that book?

21 A. It is called the science class you wish you
22 had. It is subtitled the seven greatest scientific
23 discoveries in history and the people who made them.
24 It's in its fourth edition. It's in six different
25 languages and you can find it on Amazon.com.

1 Q. You spent your career studying asbestos. How
2 did you get involved in litigation doing what you are
3 doing here today?

4 A. Yeah, well, that's kind of an interesting
5 question. There is a law firm in South Carolina down in
6 Charleston with a gentleman down there who had been in
7 asbestos litigation for many years, and he had been --
8 he had a meeting with Dr. Irving Selikoff. Irving
9 Selikoff's name appeared on the screen up there as one
10 of the references that the gentleman who is open -- gave
11 the opening statement, he referred to Dr. Irving
12 Selikoff because Dr. Selikoff had studied these
13 insulators, these people who actually developed very
14 high rate of mesothelioma from their exposures.

15 And this attorney had visited Dr. Selikoff and
16 asked Dr. Selikoff to come into court and give the kind
17 of testimony that you have asked me to give here today
18 and Dr. Selikoff wasn't interested. He had --
19 Dr. Selikoff had this polio as a youngster and wasn't
20 very mobile. But Dr. Selikoff he said, you know, there
21 is this young guy down in North Carolina and he's been
22 studying how asbestos causes disease. I saw his papers.
23 I invited him to give a talk. Why don't you go see
24 Dr. Brody. So this attorney comes walking in my office,
25 and he said, Dr. Selikoff told me that you can explain

1 how asbestos causes disease. I said, well, that's what
2 I do. And Dr. -- and so then the attorney said, could
3 you do it for a jury like you do it for your medical
4 school classes that you teach. I said, I don't know.
5 He said would you like to find out. So I gave a seminar
6 to that group. And I have been doing this now for about
7 20 years or so. And so it's -- that's how it started.

8 Q. Since that time you testified as an expert
9 witness in many different states is that fair?

10 A. Many different states across the country, many
11 different settings. I have given talks in various
12 places around the world for a number of different
13 reasons.

14 Q. And do you typically testimony more for
15 plaintiffs or defendants?

16 A. Yeah, it's usually in cases like this for
17 plaintiffs, where somebody has been injured by an
18 asbestos product, but I have testified for a number of
19 different companies as well. If the company would like
20 the jury or the court to know how asbestos causes
21 disease, then I've testified exactly the same way for
22 them.

23 Q. I was going to ask you, have you recently
24 testified on behalf of a corporation?

25 A. Well, I was -- yes, last year, if that's

1 recent. Now it's -- last year is not so recent anymore.
2 But, yes, I testified last year for a defendant, and I
3 have just been retained by an asbestos manufacturer to
4 testify.

5 Q. And whether you are testifying for me on
6 behalf of the Crawford family or for a corporate
7 defendant, is your testimony any different?

8 A. Not at all.

9 Q. How much do you charge for your testimony?

10 A. \$575 per hour.

11 Q. How long -- you said 20 years you have been
12 testifying?

13 A. At least.

14 MS. McVEY: Your Honor, at this time I would
15 like to move to admit Dr. Brody's CV into evidence.

16 THE COURT: Any objection?

17 MR. WALL: Your Honor, it's my belief that's
18 hearsay. He testified about it, and it should not come
19 into evidence.

20 THE COURT: Very good. Overruled. It will be
21 accepted into evidence.

22 MS. McVEY: Your Honor, we would also like to
23 tender Dr. Brody as an expert in cell biologist and
24 experimental pathology as it relates to asbestos and the
25 diseases it causes.

7/16/2018

90

1 THE COURT: All right. Voir dire.

2 MR. WALL: No, Your Honor. No voir dire.

3 THE COURT: Very good.

4 Ladies and gentlemen, by reason of Dr. Brody's
5 education, training and experience, I find that he is
6 qualified as an expert in the field of cell biology and
7 experimental pathology. And is qualified to give
8 opinions about the disease of mesothelioma and its
9 causes and its progress in the system.

10 MS. McVEY: Thank you, Your Honor.

11 Q. Would it be -- Dr. Brody, you have prepared
12 slides that you can help explain the testimony?

13 A. Yeah, sure I have a series of slides that I
14 use when I talk to medical students. I gave a talk at
15 the case western reserve medical school a few months
16 ago. I have give an institute in Paris and medical
17 educator in bay distinct for several weeks. All of
18 these I use a series of slides from my work and
19 textbooks that help me explain. Of course I do the same
20 thing for jurors.

21 Q. The slide --

22 A. I use a different vocabulary for the jurors
23 than medical students, and I don't show them all the
24 slides that I show the medical students but you know,
25 they are a subset, shall we say.

1 Q. Would you like -- would it be okay if he comes
2 down?

3 THE COURT: Yes, you may come down, Dr. Brody,
4 if you would like to present at the slide. Be sure that
5 you are where the jury can see you. Are you going to
6 stand right here.

7 THE WITNESS: I think this will work.

8 THE COURT: I think it will, too. Let's see
9 if it works.

10 THE WITNESS: Yes.

11 THE COURT: Oh, yes. Proceed.

12 BY MS. McVEY:

13 Q. What is asbestos, Dr. Brody.

14 A. Okay. I had the opportunity to sit here and
15 listen to the opening statement just like you. So now I
16 know what asbestos is.

17 So asbestos is a -- as you saw a picture of
18 that huge mine. So it is a mineral that is mined from
19 the soil. It is mined in a lot of different places. It
20 is mined in Russia, Canada. It was mined in the U.S.

21 A lot of it in Australia. A lot of it came
22 from South America, Brazil, some from Italy. A lot of
23 places around the world.

24 The three different kinds that were up there,
25 chrysotile, crocidolite and amosite. Chrysotile is

1 about 90 percent of the world's use. Other types make
2 up about 5 percent of the world's use. But it really
3 depends on the product. In other words, if it was
4 insulating, if it was an insulating product it would be
5 mostly amosite. So the overriding point here is that
6 all the asbestos varieties cause all of the asbestos
7 diseases and with that...

8 Q. One question on that. Is the potency the same
9 for the different types of asbestos?

10 A. Well, yes, but if -- yeah. So for causing
11 mesothelioma, the amphiboles, amosite, crocidolite are
12 more potent in causing mesothelioma. But if you are
13 exposed to any of them, you have obviously a
14 dramatically increased risk.

15 Q. Can you talk about and explain to us what
16 diseases are caused by exposure to asbestos?

17 A. Sure. So the disease -- well, let me just go
18 to the first slide.

19 So this is an obviously a diagram that I have
20 that I took from a textbook and I know you know where
21 your lungs are but let me just make the point that when
22 you take a breath, the air comes down this tube that we
23 called. Trachea or wind pipe and you can feel that in
24 your Adam's apple. You take a breath and the air comes
25 down into the series of tubes called conducting airways

1 because they conduct air down into the lungs. So the
2 diseases you are asking me about, first one that you
3 would come to as you move down the airways is lung
4 cancer. Lung cancer developed in the walls of the
5 airways. Every one of these diseases has a target
6 source from which the disease developed and I will show
7 you the cells as we get deeper into the lung.

8 Lung cancer is built in the walls of these
9 tubes.

10 And then as the tubes descend into the lung we
11 get into what's called the gas exchange area of the lung
12 where we exchange oxygen and carbon dioxide. Room air
13 has about 20 percent oxygen in it. We need to extract
14 the oxygen from the room air and exchange it with and
15 make carbon dioxide in our body and expel it and that's
16 going on all the time. And that's done down here in the
17 gas exchange area and that's where the disease
18 asbestosis develops. Asbestosis is scar tissue in the
19 lung from inhaling asbestos. As you were told
20 correctly, that's the -- that was the first disease
21 discovered to be caused by asbestos.

22 The next one was lung cancer in the 50s, and
23 then in 1906s, Dr. Wagner established this cause of
24 asbestos causing mesothelioma.

25 Q. Dr. Brody I neglected to ask you this will you

1 promise that any opinions that you give will be to a
2 reasonable degree of scientific certainty?

3 A. Sure.

4 Q. Can you tell the jury how asbestos causes
5 disease?

6 A. We are on our way.

7 Q. All right.

8 A. So you see this black line that runs around
9 the outside of the lung, that black line represents the
10 pleura. P-L-E-U-R-A. The pleura is very thin, saran
11 wrap thin wraps around your lungs, makes your lungs
12 airtight like balloons. You take a breath and the
13 pleura expands and comes back down like a balloon.
14 There is a single layer of cells that runs around the
15 outside of the pleura. Those cells are called
16 mesothelial cells. If you have a cancer of the
17 mesothelial cells, it is called mesothelioma.

18 So concept today is explain how asbestos
19 that's floating around in the air from whatever source,
20 how that asbestos causes that cancer, mesothelioma.
21 That's what you asked me to do. That's my goal today.

22 Q. Thank you, Dr. Brody?

23 A. One of the ways that we do that is by using
24 different kinds microscopes because you cannot see
25 individual asbestos fibers. You cannot see the

1 individual cells without a very powerful microscope. So
2 this is called an electron microscope.

3 Q. Whose that guy?

4 A. Well, I had this microscope for a very long
5 time. In fact, this microscope was a victim of
6 hurricane Katrina when I was at Tulane university in New
7 Orleans.

8 And I can take a piece of tissue as small as a
9 period at the end of a sentence or as big as the device
10 in my hand and I put that tissue in this door in front
11 of me, and this column has a vacuum inside. So it's
12 evacuated. At the top of the column there is an
13 electron gun that produces trillions of electrons that
14 come down that column and strike that sample that I put
15 into the microscope.

16 And then the electrons that passed over that
17 tissue that I -- lung tissue that I put in there, or
18 asbestos, the electrons set up a secondary charge on the
19 surface of the sample and I collect those electrons and
20 produce an image that's a recreation of exactly what is
21 in the tissue actually looks like. That tissue image
22 then appears right in front of me. Just off of the
23 screen, there is a camera so I can take a permanent
24 image of whatever it is I'm looking at.

25 So for example, if I cut a piece of tissue out

1 of the lung here, and you see the pleura going over the
2 surface and you see these conducting airways going up,
3 and I cut this tissue out, and you can see now this
4 lung. You can see the airways going up here and you can
5 see the pleura running around the surface here.

6 Do you see how thin the cut edge of that is?
7 Because I told you it is sir ran wrap thin. The
8 mesothelial cells are out here on the surface of the
9 pleura, a sheet of hundreds of millions of mesothelial
10 cells covering the surface. There are the conducting
11 airways as you take a breath. Let's say there are
12 asbestos fibers floating around in the air. You take a
13 breath. Some proportion of those fibers get caught in
14 the nose. Moisture in the nose catches them nose hair
15 catches them. Some fibers get caught in the back of the
16 throat. Those don't go any further. You cough them out
17 or you blow them out or sneeze, whatever. Some of the
18 fibers go right past that and get down into the airways.

19 These conducting airways, we will take a look
20 at that in a second. Some of them go right past these
21 airways and get out into the gas exchange area, which we
22 will take a look at in the second. Once they get here,
23 there are pathways I will show you to the surface of the
24 pleura where the target cell, where the mesothelial
25 cells are. Peace that's what we will take a look at.

1 Q. What happens next?

2 A. So we will take a look at the cells that line
3 the airways. I saw the lights go down earlier. Is that
4 possible?

5 THE COURT: Yes.

6 THE WITNESS: Because the picture will show a
7 lot better. That's great. Perfect just like that.

8 So I'm going to focus the microscope right
9 down here on the surface of the airway. Could be
10 anywhere along the airway. Could be you, me, a rat,
11 cat, dog, giraffe, elephant, we all have these exact
12 same kinds of cells and structures. I will focus the
13 microscope and fill the screen with what's in that red
14 spot from anywhere along here. Let's focus right there,
15 take a picture. Now you can see this says human
16 bronchioles. Bronchioles are small airways. They are
17 lined by these hair-like structures. They are not hairs
18 at all. They are extensions of the cell surface called
19 cilia, C-I-L-I-A. They are constantly beating in a
20 synchronous wave-like fashion so that any particles that
21 get past your nose and your throat that land down on the
22 airway gets swept up to your mouth by these cilia and
23 you swallow them or spit it up, and that's going on all
24 the time.

25 You can see there are cells that don't have

1 cilia and those cells make mucous. You don't think much
2 about mucous unless you are a cigarette smoker or have a
3 cold. You can feel that mucks, it gets swept up or you
4 swallow it or spit it out. That's all normal clearance.
5 That's what's supposed to be happening all the time. We
6 are going to talk about what happens when you get too
7 much asbestos in your lungs. But that's what is suppose
8 much to be going on all the time.

9 So I'm sorry.

10 BY MS. McVEY:

11 Q. That's all right. What is the line, the
12 marker?

13 A. Sure. This is called a size marker because we
14 always want to know how big and small these things are.
15 When you see asbestos fibers, you want to know if they
16 are small enough to get down into these areas of the
17 lung. So this one here you see says 10 "U" or microns.
18 This line represents 10 microns. Can you obviously see
19 it. Let me explain how big a micron is. If you take
20 your thin and forefinger and make a little space, can
21 you just barely see it with the naked eye. You have
22 made just about a millimeter. That means make many eye
23 means no microscope, no magnifying glass. This is what
24 you can normally see with your naked eye. It is about a
25 mill low meter. It take that millimeter and divide it a

7/16/2018

99

1 thousand times. You have made a thousand microns. A
2 thousand microns is the same as a millimeter. And so
3 the human eye can see about 1,000 microns. You
4 obviously can't see 10. You can barely see 1,000,
5 right? But with the microscope it is easy to see 10
6 microns. And then if you take this bar and you line it
7 up against the cilia, you can see that these cilia are
8 just about 8 to 10 microns long, and that's the cilia
9 that line our airways.

10 We will back up because we will go past the
11 cilia and out to the gas exchange area because we want
12 to regress toward the target area, the pleura where the
13 mesothelial cells are. Let's take a look at this area
14 right here. Moving past the airway and here we are now
15 at the end of the airway and we are out where the small
16 air spaces of our lungs.

17 See we have hundreds of billions of these
18 microscopic air spaces in our lungs. And if you think
19 of each one of these as a room, maybe kind of like this
20 courtroom, you take the ceiling off, and if you look
21 down on the floor, there is a carpet and I don't if
22 there are carpets squares or not. But everyone knows
23 what carpet squares are. If you think of each carpet
24 square as a cell, you have an idea of what lines all of
25 our air spaces. We have a thin layer of cells that line

7/16/2018

100

1 the floor, go up over the wall into the next air space
2 and line all of our air spaces with a cell that's thin
3 enough so that when you take a breath the room air comes
4 running in and fills all these air spaces. And the
5 oxygen in the room air diffusions right through the
6 carpet because underneath the carpet there is blood
7 running and the blood goes to your brain and your
8 muscles and you send the oxygen there and you use it up
9 and you make carbon dioxide and send it back to your
10 lung and you go like that.

11 So that's what's going on in our lungs all the
12 time. So I'm going to take us into a single human air
13 space. It could be any one of these. So it's like
14 perching the microscope right over the room and looking
15 down on the carpet. Let's do that in a human air space.
16 There is a single human air space. I'm outlining one of
17 the cells for you. I called it a carpet square but
18 nature doesn't make squares very well. Nature makes
19 smooth surfaces. Look at all of us we have smooth
20 concurs, smooth squares, right. It is the same thing
21 with the cells that line our air spaces. They come in
22 oval spaces and round shapes and these smaller round
23 cells with little bumps all over them actually are a
24 kind of a stem cell.

25 In our big flat carpet cells get injured,

1 damaged by asbestos or infection, these smaller cells
2 start to divide and take their place. So we all have
3 this repair mechanism in all of our air spaces.

4 So we have one more line of defense.

5 Q. What's the next line of defense?

6 A. I will take us right down on the carpet down
7 here. Remember the cell with the bumps all over it
8 here. Let's focus there. I will go down so far that
9 you will actually be able to count the bumps on the
10 cell. We are right down on the carpet now and here is
11 the cell that, a stem cell and carpet cell. There are a
12 couple other actors. There is this one ruffled, not
13 going anywhere. Then there is this cell with a tail end
14 and what are called false feet out in front of it. I
15 caught it in the act as it was going this way going
16 after this pollen grain right here. What's going on
17 here is that this lung once belonged to someone who was
18 killed on a motorcycle accident I was on the autopsy
19 medical call and I got this person's lung within an hour
20 or so after death. We have a chemical fixative that stops
21 biological activity and freezes it essentially in a life
22 like situation condition. And I was using my electron
23 microscope going from air space to air space looking for
24 interesting things to show the medical students and I
25 came across these two cells, this one in a ruffle not

1 going anywhere but this one going after this pollen.
2 Now these cells are called may crow, these are big
3 eaters. These cells parole our air surface. As the
4 person was riding the motorcycle he was inhaling
5 probably a lot of things. One thing we know he inhaled
6 was the pollen grain. It went zipping right past his
7 cilia and mucous and landed on the carpet. We don't
8 want any kind of foreign particles sitting on our gas
9 exchange surface so we have these cells, these
10 macrophages that detect the presence of foreign
11 particles and they move to those particles, pick them
12 up, bring them into the substance of the cell, sort of
13 eat them in a cellular way, not with a mouth and teeth
14 but take it into the substance of the cell and digest
15 it. Not for nutritional purposes but to get rid of it,
16 and then they move on to the cilia. Actually, the big
17 word for the mucous in the cilia is called the
18 mucociliary escalators because it escalates things out
19 of our mouth.

20 So they get on the escalator. Every time you
21 swallow, there are a few of these microphages that are
22 constantly cleaning your air spaces of dust particles
23 and things that don't belong there. This is going on
24 all the time and these microphages, we found, go after
25 asbestos fibers because they are trying to remove the

1 asbestos from the lungs just like they are removing this
2 pollen. And we actually discovered the signal in my
3 laboratory. We discovered the chemical signal that
4 attracts the asbestos -- attracts the macrophages to the
5 asbestos. The problem is that asbestos is toxic. So
6 here the macrophages are coming into to clean the
7 asbestos off of the carpet but the asbestos kills the
8 microphage and they become part of the disease process.
9 I'm just telling you about some of the things we have
10 studied and discovered over the years.

11 Let me go on if I may and talk about asbestos.

12 Q. Please. Tell us about asbestos.

13 A. So this is one of the kinds of asbestos is
14 chrysotile. I have a picture of crocidolite I will show
15 you in a couple minutes which is basically the same
16 picture as amosite. And you notice I'm talking about
17 asbestos in general because all of the asbestos fibers
18 do all the same things. There is no reason to separate
19 out one kind versus another.

20 Notice that the fibers in this particular
21 group of fibers are in a bundle. That means they are a
22 group of fibers stuck together. Some of them are
23 fracturing off. You can see this is a 1 micron bar
24 right here. So that means can you hold this bar up and
25 find that this fiber is hundreds of microns long as it

1 goes off the screen. This fiber starts at about a
2 micron thick and fractures down and they can become
3 extremely thin, down to 10th of microns. If this whole
4 bundle were floating by and the light were just right,
5 it would look like a speck of dust. You know how you
6 walk in a room sometimes and it looks really dusty but
7 you can't really notice it unless the light is at a
8 certain angle. Well, if you can see a speck of asbestos
9 dust, that means you are looking at the thousands of
10 fibers. Because look at how small they are. Look at in
11 this bundle which you can just barely see, once they
12 fractured out you have thousands of fibers. They are
13 constantly breaking down and becoming thinner and
14 smaller. In fact that whole bundle, if you can see the
15 whole bundle, you can't inhale the bundle. It is too
16 thick. If you can see it with your naked eye. It is
17 the fibers that are constantly fracturing off of the
18 bundle. That's my point. If it is dusty in an
19 environment and you can see individual dust particles,
20 if it's asbestos, there are thousands of fibers coming
21 off of each speck of dust. Those are the ones that get
22 into the lung, the ones you can't see are the ones
23 that get into lung.

24 Q. The real danger is the asbestos you can't see?

25 A. Exactly. But seeing it as a dusty setting

1 means that those microscopic fibers that you cannot see
2 are there as well.

3 Q. Right?

4 A. Okay. So I want to show you a couple of
5 slides from some experiments that we did to understand
6 where the asbestos goes and how it goes what it does.

7 So in order to do that you have to use what
8 are called animal models.

9 Q. Why are animal models useful?

10 A. Right. Because if you think about how people
11 are typically exposed, they are exposed at work site,
12 work place, and then decades later they get sick. You
13 don't get to watch what goes on in that person during
14 those decades. And there are a lot of diseases like
15 that. So scientists have used animal models, typically
16 rats and mice. If you prove -- and that's what
17 Dr. Wagner did, he showed if you expose rats to
18 asbestos, they get asbestosis, lung cancer, and
19 mesothelioma.

20 So I showed and other scientists showed that
21 they get diseases from the same cells as people. Same
22 anatomic sites, same cells. Now we can use it as a
23 model to understand the human disease. That's what this
24 is all B. this isn't to cure rats. This is to help
25 understood what's happening in the lungs of people. You

1 can say that about any of the diseases that people go
2 that we have animal models. We use it to understand
3 tuberculosis, HIV disease, diabetes, kidney diseases, a
4 whole list of infectious diseases we use animal models
5 to understand infectious disease.

6 This slide is from a rat, lung of a rat that
7 was exposed to asbestos for a single hour. Well, why
8 would I do that? That's not going to bring the rat to
9 the clinic. You have to expose them for -- for almost
10 their lifespan to produce cancers in these animals. We
11 know you can do that. But if you want to ask the
12 question, well, where do the fibers actually land in the
13 lung, you have to expose them for a short time. And
14 then take them out of the chambers. We have these
15 chambers about 6 feet high and 4 feet wide. There is an
16 asbestos generator on top of this chamber. It makes it
17 dusty in the chamber, just like in some work sites,
18 dusty. The animals inhale the dust and then immediately
19 after exposure, take them out, give the animals an
20 overdose of anesthetic, and then I can study any
21 asbestos I see in the lung must have landed there during
22 that first hour. The only way the asbestos is going to
23 get there.

24 Then if I want to know where the asbestos
25 goes, I run another group of animals, go back to their

1 food and water for a couple of hours and give those
2 animals an overdose, and then I may let some go for
3 days, others weeks, others months, others years. Some
4 you expose for an hour. Some you expose for days,
5 weeks, or months. So these are experiments that take
6 years to sort out and literally hundreds of different
7 publications to explain all the findings, and I will
8 show you just a couple snippets of these.

9 This is one from a rat that was exposed to
10 asbestos for a single hour. You recognize now these
11 different -- these air spaces. These rooms that I was
12 telling you about. Here is an airway. Here are the
13 individual air spaces. So let's -- I will focus on this
14 spot right here. Immediately after exposure. This
15 black hole right here -- you see the air can come in
16 here, go down this hole or go up here, here, can go this
17 way and split again. So there are a number of different
18 splits it can take. So the air is coming here. This
19 black hole here is this one right here. So that means
20 we are going to study this area right here. So let's
21 look at it. There is that black hole. Now you see this
22 is a 10 micron bar. 10 microns, remember, you can
23 barely see 1,000, this is one is 10 microns long. That
24 means this asbestos fiber is about 10 microns long, a
25 little longer. It is kind of a long fiber here. And

1 then there are some short fibers, you see. Now the
2 asbestos is distributed across the carpet.

3 So now for the first time there is a
4 publication in the literature that shows that asbestos
5 lands on the carpet. And not only does it just land on
6 the carpet but it turns out, we discovered these carpet
7 cells actually come up over the fibers, a portion of the
8 fibers, about 20 percent of the fibers get shoved under
9 the carpet. You can actually see that happening right
10 here. See the fibers here but you can't see them here.
11 Can you see them here but you can't see them here. It
12 turns out -- I'm just showing you one picture of
13 thousands that are taken of this. Cut secretaries
14 through them and proved to my colleagues what I'm tell
15 you is true. I'm just showing you a snip it of this.

16 What happens is these fibers land on the
17 carpet. The carpet cells respond to these toxic fibers
18 by covering them and shoveling them under the carpet.
19 We don't want any kind of toxic particles sitting on our
20 gas exchange surface. I know you haven't heard about
21 background asbestos yet because I was in the courtroom
22 and I heard the opening.

23 We all have asbestos in our lung. Small
24 amounts of asbestos that we get from the background as
25 we walk around.

7/16/2018

109

1 There are products that have been release from
2 car break brakes and building material. Everywhere you
3 go there is a small amount of asbestos in the air called
4 background. It is not enough to cause disease.

5 But it is enough that you can measure it in
6 the lungs of the average person and I published papers
7 showing that. And I ask rhetorically where are those
8 fibers? They are under the carpet in our lungs. That's
9 storage space. And they are not -- it is not enough to
10 cause disease. It is when you get above this background
11 level, like in occupational setting, that's when --
12 that's when asbestos causes disease. So here are these
13 fibers are. Sitting under the carpet and I will show
14 you that there is a pathway to the pleura from
15 underneath the carpet.

16 Q. What is the --

17 A. The next experiment again one picture shows
18 that. Here is an air space up here, another one here.
19 Here is the carpet here. You see these characters here
20 look like doughnuts. This is what our red blood cells
21 look like. You can see that these are individual cells,
22 red blood cells and they have a shape -- it's -- it
23 looks like a doughnut but there is no hole there,
24 actually. It is just a depression, not a hole. They
25 line up in single file as they flow through these

1 vessels called capillaries. There is an asbestos fiber
2 bundle right here and there's a single asbestos fiber
3 right here on its way into the flow of the blood. And
4 then there is a group of fibers here, and there's
5 actually one here that's completely covered by the
6 carpet.

7 So this is a dynamic situation. This group of
8 fibers just landed there and it hasn't been taken up
9 yet. This one landed probably an hour earlier and it is
10 already covered. Some of them are already entering the
11 flow. Now that's the way fibers get to the pleura, to
12 the target cell. There is a fluid flow of the lung.
13 The fluid flow of the lung has two compartments. One is
14 blood, which is easy to see. There is another one
15 that's more important than blood and it's called lymph,
16 L-Y-M-P-H. Lymph is a clear blue fluid that flows in
17 our bodies head to toe, and the lymph flow starts under
18 the carpet. If I were to pull the carpet back, I would
19 show you that it is moist there because we have this a
20 clear fluid called lymph. And the lymph flows toward
21 the pleura. So any fibers that get that flow collect in
22 small vessels that go to the pleura.

23 I just want to mention, I said this is what
24 our red blood cells look like. This belonged to a rat,
25 but that is exactly what our red blood cells look like.

1 Same size, same shape.

2 Okay. So we were talking about fluid flow.

3 And you can see -- here now, this is diagram. It's
4 called a Netter diagram because this is from Dr. Netter
5 who has given us atlases of the human body and disease.
6 Dr. Netter here is showing us the pattern of lymph flow
7 in the lung, and the pattern of lymph flow in the lung
8 goes to the pleura. You see these small vessels, many
9 of which end at the pleura? If you look at the surface
10 of the pleura, you will see a network of small vessels
11 out there, and this flow started under the carpet and
12 collected in these small vessels that go to the pleura.

13 So what is the proof, again I ask
14 rhetorically, what is the proof that the fibers that are
15 in the lymph system get flow in the liquid? What's the
16 evidence that they actually flow in there. We all have
17 structures called lymph node. Lymph nodes are small
18 bundles of tissue that are found wherever lymph flows.
19 That's head to toe. You know about some lymph nodes
20 around in your armpits or in your neck. Sometimes they
21 swell if you are getting a cold because -- of if you're
22 getting the flu or something because the lymph system
23 carries cells of the immune system. You are feeling the
24 inflammation and the effect of developing a cold or
25 something like that. But we have lymph nodes in ankles

1 and in our wrists.

2 We also have lymph nodes around the lung, and
3 that's what the artist, Dr. Netter, has given us here.
4 You see these green blobs? These are lymph nodes around
5 the lung. They are called thoracic nodes because they
6 are in the thorax, in the chest.

7 There is another set of very important nodes
8 in the peritoneal cavity. So the lung, this surface --
9 these surfaces out here, these mesothelial surfaces are
10 the most likely place to get a mesothelioma, in those
11 mesothelial cells.

12 The second most likely place is peritoneal
13 cavity, which holds your stomach and your intestines.
14 There are a lot of lymph down here, a lot of lymph nodes
15 down there. So some scientists -- this is not my work
16 now -- but some scientists studied the content of the
17 lymph nodes around the lung and in the peritoneal cavity
18 and they found asbestos and particularly concentrated in
19 people occupationally exposed.

20 There is only one way for an asbestos product
21 to get into lymph node, and that's to be inhaled, travel
22 into the lymph system through the surfaces of the air
23 spaces and get trapped in these lymph nodes. Because
24 lymph is a circulation. It circulates all around the
25 body. If there are lymph nodes around the lung and in

1 the peritoneal cavity, that means the asbestos fibers at
2 one time in a person's life were inhaled.

3 Okay. So we now have the fibers at the target
4 site. That's where the mesothelia cells are. So we can
5 talk -- I can spend the rest of the time talking about
6 how asbestos causes these mesothelioma cells to become
7 cancer cells.

8 Q. How does that occur?

9 A. Okay. So let's talk about that.

10 So here is a normal pleura. You see how thin
11 and shiny it is. It is shiny because it is moist from
12 lymph, and compare that to a pleura of a -- with a
13 person with mesothelioma. Dramatically thickened with
14 tumor cells. So let's talk about how asbestos causes
15 cancer.

16 So this is the proceedings of a meeting I was
17 at a few years ago. I gave a talk at this conference
18 and the concept, the focus of the conference was how
19 fibers cause cancer. There is the big word
20 carcinogenesis, how do fibers cause cancer. I've talked
21 to you today about cells. I showed you some cells. I
22 showed you how some cells pick up asbestos. I talked
23 about some of the cells. But you cannot talk about
24 carcinogenesis, cancer formation, unless you talk about
25 the molecular aspects.

1 Q. Can you talk to us a little bit about the
2 molecular aspects?

3 A. Yes. Molecular aspects means your genes.
4 Molecular biology is the study of genes and genetics.
5 Cancer is a genetic disease. I'm going to give you the
6 simplest definition of cancer and then I will explain
7 what that is.

8 So cancer is the loss of control of cell
9 growth. Let me say that again. Cancer is the loss of
10 control of cell growth.

11 Every one of our cells has a rate at which it
12 is supposed to divide and multiple. Your skin for
13 example we are always losing skin off the surface. We
14 have to keep replacing our skin cells and we do that at
15 a rate of about 10 percent. So if I cut a piece of your
16 skin and put it under the microscope I can show you that
17 about 10 percent of your skin cells are dividing and
18 making new cells. Your lung and liver, about 1 percent.
19 Shouldn't have to be making a lot of new on your liver
20 cells and mesothelial cells about half a percent. Very
21 low background of division. You shouldn't have to be
22 making new mesothelial cells.

23 Now, humans have about 20,000 or so genes. If
24 you look around you see different hair color, skin
25 color, different sized people, different metabolic

1 rates, these are all things that you can see that are
2 20,000 or so genes control. Most of the things that our
3 genes do, you don't get to see. Of about 100 -- for
4 example the genes that make the enzymes that digest, you
5 don't see those genes working but we know they are
6 there. I mean, of those 20,000 or so genes, about 100
7 or so might be up to 200 but somewhere between 100 to
8 200 of these are called growth control genes. They keep
9 a set pattern of growth in our different cells. Cancer
10 is the loss of control of that growth. That means that
11 there are errors or mistakes, mutations in genes that
12 control cell growth. That is as simple as it can
13 possibly make the description of cancer.

14 Cancer is a very complex process. Because in
15 all those sets of genes that we have, we don't yet know
16 just which genes are required to be damaged to
17 cause the cancer but let me show you what we do know
18 about how asbestos acts as a carcinogen, that is a
19 cancer causing agent. One of the ways we do that is by
20 taking cells out of the body, out of humans, out of
21 animals, put those cells in a dish and give the cells
22 the right nutrients and they will grow, they will
23 divide. You can study the genes and study the DNA, DNA
24 meaning just genetic material. You can add to those
25 cells things that you are interested in studying, like

1 asbestos. We have produced cancer cells right into
2 these dishes and that's a way to study how these
3 different carcinogens function, how they work. So we
4 and other laboratories have been doing those kinds of
5 experiments for a long time. Here is an example of
6 that. On the cover of these proceedings there are two
7 cells. Here is one I'm outlining for you and here is
8 another one over here. Some fibers were added to these
9 cells. Cells were sitting in a special medium, fluid
10 that gives them the right nutrients so they live and
11 grow. Some cells live like that overnight and some for
12 months. Depends on the kind of cell. You can see some
13 fibers have been added. There is a kind of long fiber
14 and then there's some short fibers.

15 See how those fibers have collected around the
16 center circle in the cell? But they are excluded from
17 that center circle. The center circle in our cells is
18 called the nucleus. The nucleus contains all of our
19 DNA. All of our genetic material is cramp into the
20 nucleus of our cells. Take mesothelial cell, a skin
21 cell, a lung cell, it's the same story that I'm telling
22 you now.

23 Okay? The DNA is cramped into the nucleus.
24 We have this membrane that protects the DNA. See how
25 the fibers have been excluded from the DNA. That's a

1 good thing. That's what is supposed to happen. One
2 thing scientists have known for a long time is that when
3 a cell divides, when we make new cells, we lose that
4 protective membrane around the DNA. That makes the cell
5 more vulnerable and we know that a dividing cell is more
6 likely to become a cancer cell. That's why this process
7 of cell division in us and in rats and mice and worms
8 and insects is very fast. It goes very quickly because
9 we don't want to leave the DNA vulnerable. Okay? But
10 when it's vulnerable, the cell is more likely to become
11 a cancer cell. So we asked them in our laboratory -- we
12 are collaborating laboratory -- what would happen when
13 we added asbestos and other agents when the cell is
14 dividing and more vulnerable. Let me just show you that
15 a little bit.

16 Q. Do you have a picture of that?

17 A. I do. Because that's how you learn how
18 asbestos acts as a cancer-causing agent by doing those
19 kinds of experiments. Here is what's supposed to happen
20 in normal cell division. Here are three cells, one,
21 two, three cells. The two cells on the outside are not
22 dividing. There is no asbestos here. This is just
23 normal -- this is what's going on in all of us all the
24 time right now. Okay.

25 The nucleus is intact. The DNA is stained

1 blue so you can see where it is. The cell in the center
2 is dividing. I know that because all the DNA is
3 condensed into these white threads called chromosome
4 zones. Chromosome zones are bands of condensed DNA.
5 This is what happens -- this is normal. This is what
6 happens in all of our cells. As the cells divide, the
7 DNA condenses and forms chromosomes. Now the idea is to
8 make another set. The chromosomes duplicate. They
9 replicate. They make another set.

10 And then you get two new cells just like the
11 original. That's what's supposed to happen every time.
12 Let me show you what our chromosomes look like. So if
13 you take this kind of cell and spread out the
14 chromosomes you can see that humans have 23 pairs of
15 chromosomes. You probably heard ads from the company
16 23 and me, that comes from this 23 pairs of chromosomes
17 that humans have.

18 On these chromosomes can you see these light
19 and dark bands and the light and dark bands are where
20 you find all of the 20,000 or so genes distributed
21 across the chromosome. The important point here is that
22 every one of our genes must be on the right chromosome
23 and in the correct place on the chromosome. There is no
24 mixing and matching allowed when it comes to where our
25 genes are located. It is the same for you and me and

1 rats and mice and grasshoppers and all that. Okay? We
2 all have the same concept of chromosome and genes in the
3 right place and the right chromosome. So when we say
4 faithful replication -- so let's see what happens here
5 when it goes correctly. Here is a normal cell, the
6 chromosomes stained purple this time so you can see
7 them. Now they are going through what's called faithful
8 replication with each gene in the right place in the
9 right chromosome and you get two what are called
10 daughter cells. Two new daughter cells just like the
11 original. Now, I told you that we have of these
12 thousand of these 20,000 or so genes that we have, about
13 100 of them are called growth control genes.

14 Let me tell you about one of them. Just as an
15 example. One of them is called P -- how are we doing?
16 We are good. I'm almost finished.

17 So we have this gene called P53. P53 has been
18 called the guardian of the gene only. It is a tumor
19 suppressing gene. That gives you a concept of how
20 important it is. And this tumor suppresser gene is
21 damaged in about 50 percent of all human cancer. It is
22 central to the development of many human cancers. What
23 happens is, if you have a carcinogen like asbestos or
24 cigarette smoke effect your cells the P53 gene gets
25 activated, turns and shuts the cell down. It stops the

1 cell from dividing. That means it can't make the new
2 daughter cells and send these mistakes off into the new
3 cell. It suppresses the tumor, the potential tumor. It
4 is a very important gene. Not only that, it controls
5 what's called a death pathway. We have a whole series
6 of genes that protect us. We have what are called
7 molecular defenses. Most of us are not going to get
8 cancer. Most people no matter how much asbestos they
9 are exposed to don't get cancer. Even as dangerous as
10 smoking cigarettes is, most cigarette smokers don't get
11 cancer because we have these very effective genetic
12 defenses. Like P53, I'm not going to tell you about the
13 hundreds of others that we have, but they are all
14 distributed and we know where many of them are. Like
15 P53, for example, is at tip of human chromosome 17.
16 Now, if it's not at the tip of human chromosome 17, it's
17 not going to function and it can't protect us.

18 So let's go on. You will see why I'm telling
19 you this because here is now an experiment that was done
20 with asbestos where we -- here is a normal cell. This
21 is one of millions of cells in this experiment. There
22 is no asbestos over here. Half of the chromosomes go to
23 one side half to the other. That's going to be produced
24 two normal daughter cells.

25 Over here there is asbestos. This happens to

1 be crocidolite asbestos, which is basically the same as
2 amosite asbestos. You can see the long fiber here and
3 little shorter one, little shorter one. Most of the DNA
4 is supposed to be but some of the DNA is bound to the
5 surface of the asbestos fibers. That results in this
6 condition called aneuploidy, and I will tell you about
7 that in just a second. I will tell you one more example
8 of where we have another exam causing aneuploidy. Here
9 is mesothelioma cell. No asbestos. Half the
10 chromosomes go here, half go here, and now you have
11 normal cell division.

12 Over here the daughter cells that essentially
13 formed but there is some DNA bound to the surface of the
14 fiber, producing this condition, aneuploidy. It means
15 abnormal chromosome separation.

16 These are not cancer cells, but the door has
17 been opened, and if you have been listening to anything
18 I say, you will know the reason is because in this DNA
19 that's not where it is supposed to be could be a gene
20 like P53 or any of the molecular defenses. We have
21 genes that produce enzymes that can repair DNA. They
22 are called DNA repairance (phonetic) cells and they can
23 actually bind together DNA that's been damaged.

24 Now, I will tell you about one more thing
25 related to this event, to these events. Aneuploidy --

1 let me finish this, aneuploidy means abnormal
2 chromosomal distribution. They are not cancer cells but
3 the door has been opened because the DNA has been
4 displaced. In this DNA could be a set of genes that
5 protects us and now the gene is not where it is supposed
6 to be so it is not going to work. That's one way
7 asbestos causes cancer.

8 The second way is because asbestos generates
9 what are called reactive oxygen species. High energy
10 short lived chemical compounds that have been known for
11 many generations of scientists to damage DNA. That's
12 the way cigarette smoke causes genetic defects in the
13 airway linings. So that's the way radiation causes
14 cancer. By generating objection again draft asbestos,
15 all the asbestos varieties, the individual fibers
16 generate oxygen routes. So here now are these asbestos
17 fibers in the same compartment as DNA generating oxygen.
18 So asbestos can produce a double whammy as a carcinogen.
19 It binds DNA and generates oxygen rapidly.

20 I have one more slide.

21 Q. What is that slide showing us?

22 A. This is a summary of what I just told you that
23 will take just a second. I want you to understand what
24 was going on during those decades of latency. All
25 right. So what happens between the time the individual

1 was exposed to asbestos, whether it was one year or four
2 years, it's typically decades after exposure that person
3 comes to the clinic with cancer. What was going on?
4 That's what I want you to know and then I will be
5 finished.

6 Here the artist has give us a layer of
7 mesothelial cells, single cell layer right, hundreds of
8 millions of cells lining the surface of the lung. He's
9 got a couple of lightning bulbs coming in here saying
10 DNA damage. I know lightning does not cause cell
11 damage. The point is this is mesothelioma, something
12 from the environment, mainly asbestos has reached the
13 car are target cell. The target cell is the one from
14 which the disease develops. Mesothelial cells lining
15 the lung, the DNA has reached that site and I showed you
16 how that happened. So now the cell has -- the
17 carcinogen, the asbestos has reached the cell and the
18 cell is dividing and the artist has one of the daughter
19 cells going off into the upper left-hand corner. The
20 DNA is clumped up and cell is dying and this daughter
21 cell is going to die. Because the artist knows very
22 well that's what happens to most cells with DNA damage.
23 They die. You go out and you get a sunburn, you have
24 DNA damage in certain cells, and they -- you get an
25 aneuploidy and DNA damage but you typically don't get

1 skin cancer because those cells die.

2 The aneuploidy cells that you find in the
3 lungs of cigarette smokers, they typically die because
4 of these genetic defenses that drive the cells down the
5 death pathway. Okay. And that's what this cell
6 represents, this death pathway.

7 But we have cancer. We have a tumor. The
8 artist has given us a tumor right here, and I will tell
9 you about that funny color that the tumor has in just a
10 second. But that means that one of the daughter cells
11 with that genetic error, that DNA damage, must survive.
12 There that cell is.

13 Now, between that surviving daughter cell and
14 the development of this tumor, you got to give me about
15 50 years. Okay? The artist didn't help much with that
16 space right here, but you have to give me about 50 years
17 between that first daughter cell and the tumor.

18 So what's going on? So think about the
19 hundreds of millions of mesothelial cells and now you
20 have one with an error in a gene that controls cell
21 growth, the gene that protects us, and that cell sits
22 there now looking and acting like a normal mesothelial
23 cell. You'd never know it was there. No one is going
24 to be going in there and start collecting mesothelial
25 cells from somebody. That cell then can sit there, like

1 I say, for months, but eventually it has to divide. I
2 told you half of one percent, very low background rate,
3 but eventually it has to divide, two cells, four cells,
4 8 cells, 16, 32, 64, making what's called a field of
5 similar cells, all with that one error.

6 Now, one or more of those might die, but in
7 order to get a cancer, several -- more than one has to
8 persist and then the person gets hit again. Another one
9 of those cells gets hit again. Another error. One
10 error in a gene is not enough. Two is not enough.
11 Three is not enough. Four is not enough. Five is
12 probably not enough.

13 When you look at the cells from mesothelial
14 tumors, people with mesotheliomas, there is a whole
15 array of different genetic errors. I think I told you
16 this earlier. We can't tell you just which ones yet
17 were necessary and required for that cancer, but we do
18 know that you have to have a series of them.

19 So now we are up to two. Okay? So now there
20 is a cell with two genetic errors and it sits there
21 looking and acting like a normal mesothelial cell, and
22 it sits there like that for months. And then it starts
23 to divide, 2, 4, 8, 16, 32, 64, making another field, a
24 separate field of cells with those errors. Now think
25 about that process for decades, going on with the

1 addition of errors over the decades.

2 Finally, near the end of that latency, a
3 single cell with sufficient errors and in the right
4 combination for that person, very rare cancer, a single
5 cell grows out and that's why the artist made this all
6 the same color, this tumor all the same color because it
7 all came from a single cell. It is a clone that grew
8 out into this cancer, which is now going to keep growing
9 by definition. It is not now just a -- just a field.
10 It is not now just a field of similar cells. It is a
11 cancer that is going to keep growing until it takes that
12 person's life.

13 Q. Thank you, Dr. Brody. Can we turn the lights
14 back on.

15 I have just a few more questions. Dr. Brody
16 is smoke can cause mesothelioma?

17 A. No, smoke can has nothing to do with
18 mesothelioma. We know this because some scientists --
19 these are now called epidemiologists, epidemiologists
20 are scientists who studied populations and they asked
21 what causes disease in a population and they found that
22 people who smoke cigarettes don't have an increased risk
23 of mesothelioma. Then they looked at people who are
24 exposed to asbestos, where there is a clear risk of
25 mesothelioma, and if they smoked it didn't increase the

1 risk. So the answer is, no, smoking has nothing to do
2 with mesothelioma.

3 Q. And how well established in the scientific
4 community is the causal relationship between exposure to
5 asbestos and the development of mesothelioma?

6 A. Well, there really -- I mean, it's really if
7 you ask me that same question about smoking and lung
8 cancer. I mean, it's called -- and I know you saw this.
9 It is called a signal tumor. Somebody walks in with a
10 mesothelioma, it signals the doctor that it was very
11 likely and probably an asbestos exposure.

12 Q. And you talked a little bit about this but in
13 terms of dose response, I will talk to you about that
14 for a moment. Is it the case that some circumstances a
15 person who is actually doing the hands on work with the
16 asbestos would not develop the disease but a person who
17 is a bystander to that person doing the work would
18 develop the disease?

19 A. Of course. It is all related to
20 susceptibility. It is called a bystander. And there
21 are a number of cases where workers, asbestos workers
22 come home and the person who is taking care of the
23 clothes, is washing the clothes and shaking things out,
24 that's the person that gets the mesothelioma, not the
25 worker. There are a lot of cases like that.

1 Q. That would not be unusual?

2 A. That's correct. Not at all.

3 Q. And can you talk to the jury a little bit
4 about cumulative dose, when you have different kinds of
5 exposures, can you pull one out?

6 A. Okay sure.

7 So whatever a person is exposed to, whenever a
8 person is exposed, a certain proportion of that asbestos
9 accumulates in the person's lung. The lung does not
10 discriminate among the various sources of exposure. It
11 just accumulates the material from wherever it came.

12 So if a person is exposed that is an
13 insulator, and works on car breaks and works another
14 place where there is asbestos, all of those contribute
15 to the dose that that person gets and it is that
16 person's dose that caused their disease.

17 Q. Is there a level of exposure to asbestos
18 that's known to be safe, that won't cause mesothelioma?

19 A. Well, not above background. In other words, I
20 told you about this level that we all have in our lungs,
21 we published papers shoeing that we all have it, and
22 it's there, but typically not enough to cause disease.
23 So if you say back ground typically does not cause
24 disease, fine. But there is no level that we know
25 that's published above that, above that background that

1 we all have that's known to be safe.

2 Q. And Dr. Brody have government agencies looked
3 at that son kept and come to the saint conclusion?

4 A. Well, sure that's where I get my information.
5 This is not something that I deduce myself. This is
6 what the epidemiologists have told us.

7 Q. What are some of the government agencies that
8 have agreed with that?

9 A. Well, the national institutes of health,
10 American cancer society, the world health organization,
11 the environmental protection agency, national institute
12 of occupation and safety health. Every agency that ever
13 asked that question comes to that conclusion.

14 Q. Dr. Brody, I would like to give you a
15 hypothetical. Would you assume for me an exposure to a
16 person on a regular basis as a bystander to workers
17 installing and cutting asbestos insulation in the same
18 building where he was close enough to see dust over a
19 period from 1970 to 1974, and would you further assume
20 for me exposure from sweeping up avid (phonetic)
21 insulation and cutting asbestos insulation over that
22 same four-year period, from 1970 to 1974. Would these
23 exposures be a significant contributing cause in the
24 development of mesothelioma?

25 MR. WALL: Object to the form, the question

7/16/2018

130

1 calls for speculation.

2 THE COURT: Overruled. It is a proper
3 hypothetical question.

4 THE WITNESS: No question, absolutely. That
5 is the kind of exposure that has caused many cases of
6 mesothelioma.

7 MS. McVEY: Thank you, Dr. Brody.

8 THE WITNESS: You are welcome.

9 MS. McVEY: Pass the witness.

10 THE COURT: Your witness, Mr. Wall.

11 MR. WALL: No questions.

12 THE COURT: Very good. Dr. Brody, thank you
13 so much. You may come down.

14 THE WITNESS: Thank you, Your Honor.

15 MS. McVEY: May Dr. Brody be excused?

16 THE COURT: Yes, indeed. He may be excused.
17 Thank you, Dr. Brody. Good to see you, sir.

18 Ms. McVey?

19 MS. McVEY: Your Honor, we have a video that
20 we can play or we can start again tomorrow.

21 THE COURT: All right. This jury has been at
22 it a long time and I did not want to give a midafternoon
23 break in order to get Dr. Brody through. So what I am
24 going to do for you ladies and gentlemen of the jury, I
25 will let you go for the day. We will start at 9:00

1 tomorrow morning.

2 And, again, I thank you for the attention you
3 have given. This is not easy, jury duty. This is tough
4 jury duty, but I want to remind you please don't read
5 anything about this case. Don't go to the internet and
6 start doing research on mesothelioma, try to figure out
7 what you want to know. Your evidence comes from this
8 witness stand. And one of the things I always have to
9 caution jurors about, we are so lucky in this day and
10 age with social media and internet we have access to all
11 kinds of information. And I want you to please refrain
12 from trying to do independent research about the case.
13 It is so important to have how cases are presented that
14 we have what information you receive about the case from
15 the witnesses who testify to that information here or
16 show you documents or exhibits and allowed to go back to
17 the jury room. So if you would please help me out by
18 trying this case fairly and not doing research. Another
19 thing I will ask you to do is post on the internet. It
20 is awful easy sometimes to throw something on social
21 media, post something about what kind of day you have
22 had particularly when you you are doing something you
23 don't normally do. This is certainly outside of your
24 every day work experience or live can experiment hearing
25 a complicated case like this. But if you post

1 something, it might interfere for you to be perceived as
2 a fair and objective juror. So if you will please
3 cooperate with me by don't post anything on social
4 media, don't do any personal research, don't read
5 anything about the case, then have a wonderful evening
6 and I will see you tomorrow morning.

7 We will try to start at 9. If you will be
8 here just a little bit before 9, we will try to hit the
9 ground running at 9:00. Thank you so much. You may --
10 madam foreperson, do you have a question or have I
11 answered it?

12 JUROR: Do you have a restroom, or is there a
13 restroom?

14 THE COURT: This is your jury room. You go to
15 this jury room. There is a restroom in there.

16 Thank you so much, ladies and gentlemen.

17 (Jury dismissed.)

18 THE COURT: All right. Do we have any issues
19 that I need to deal with?

20 MS. McVEY: I don't think so, Your Honor.

21 MR. WALL: Not yet.

22 THE COURT: What I will do, as per usual for
23 those of you who have tried cases with me, I will try to
24 be here about, 8:30 or so. And so if you have some
25 dilemmas that develop that you think I need to assist

1 you with or hear, I will be here for you and you just
2 let me know, and I promise I will bring my cell phone
3 and my laptop tomorrow -- I mean my iPad tomorrow so I
4 will be more accessible. But if things come up during
5 the evening that either side feels that you need any
6 activity on my part, all you have to do is e-mail me or
7 text me. My cell phone number is 803-530-0457. And my
8 e-mail address which I think y'all know well but I just
9 have it so you have this note is jtoal@SCcourts.org.
10 Have a good evening.

11 MS. McVEY: Just before we go just to confirm
12 tomorrow we are have Dr. Maddox in the morning and then
13 I understand that Covil is going to bring their
14 corporate representative.

15 MR. WALL: In the afternoon, not the morning.

16 THE COURT: Very good. Thank you very much.
17 See you tomorrow morning.

18 4:55 P.M.

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EXHIBIT B

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF SPARTANBURG

3

4 IN RE: SOUTH CAROLINA ASBESTOS LITIGATION
5 CRAWFORD v COVIL CORPORATION
6 CASE NUMBER: 2017-CP-4204429

7

8 TRIAL - VOLUME 2

9

10 HEARING BEFORE THE HONORABLE JEAN H. TOAL,
11 SENIOR ACTIVE CIRCUIT COURT JUDGE

12

13 R E A L T I M E D R A F T
14 (Unofficial & Not Certified Transcript)

15 Tuesday, July 17, 2018

16

17 Spartanburg, South Carolina

18

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7/17/2018

136

1 REALTIME DRAFT DISCLAIMER

2 This draft transcript is a computer-aided
3 translation of the court reporter's notes at the time of
4 writing the assignment and is not a certified
5 transcript. The content of this realtime draft
6 transcript contains errors and notes of the
7 stenographer.

8 All errors will be corrected by the
9 stenographer and draft notes will be removed before the
10 final certified transcript is distributed, if any final
11 certified transcript is ordered.

12 * * * * *

13 9:04 A.M.

14 THE COURT: Please be seated. Ladies and
15 gentlemen, let me take up something with the lawyers
16 before -- and this is on the record -- before we bring
17 in the jury. One of our jurors, Juror No. 168 has had a
18 domestic situation develop. She's very recently
19 divorced and her husband, who is an ex-deputy sheriff
20 and, therefore, well knows how these proceedings work,
21 has taken advantage of the fact that she is here on the
22 jury and does not have access to her cell phone to
23 threaten their 16-year-old son, and the result of that
24 is that 911 was called. She was still here and gets out
25 and has all these calls on her cell phone and so forth.

7/17/2018

137

1 Very ugly situation. And she has come to me this
2 morning and placed it before me, and I have made the
3 decision to allow Ms. Lynch to be excused from jury
4 service for her own safety, and I have instructed the
5 sheriff's department to accompany her and to be sure
6 that her safety and the safety of her son is assured.

7 I certainly will invite your comments, if you
8 have any, or if you have any dilemmas about that, but I
9 just felt that her safety required it.

10 MR. WALL: No objection, Your Honor.

11 MS. McVEY: No objection from us.

12 THE COURT: That will mean that the first
13 alternate will now be on the jury, and I don't have my
14 jury list right here.

15 THE BAILIFF: Juror 62, Your Honor.

16 MS. McVEY: No. 62?

17 THE BAILIFF: Yes, ma'am.

18 MS. McVEY: Okay. Thank you. What's her
19 name?

20 THE COURT: Casey L. Mckinney, Juror
21 No. 62 --

22 MS. McVEY: Thank you.

23 THE COURT: -- will move up to be the -- a
24 member of the jury, and as -- if you can see, this
25 illustrates the advisability in these kind of cases of

7/17/2018

138

1 having a sufficient number of alternates to meet the
2 challenges that we face, but I appreciate your
3 understanding.

4 Now, are there anything I need to help you
5 with before we bring our jury in?

6 MS. McVEY: Your Honor, just one thing.
7 First, let me just give you the schedule of the day and
8 tell you one issue we will have to argue, I think, this
9 afternoon.

10 THE COURT: Right.

11 MS. McVEY: We have a medical stipulation that
12 we agreed to that I would like to publish to the jury
13 this morning.

14 THE COURT: Right.

15 MS. McVEY: Then Dr. John Maddox is here and
16 he will go up.

17 THE COURT: Very good. Hey, Dr. Maddox, good
18 to see you again, sir.

19 MS. McVEY: We have some video to play of
20 Mr. Crawford and others.

21 THE COURT: Yes.

22 MS. McVEY: And then Mr. Glenn, the corporate
23 representative for Covil, is coming this afternoon.

24 THE COURT: All right.

25 MS. McVEY: And depending on how the day goes,

7/17/2018

139

1 we will either put a family member up or not.

2 THE COURT: Right.

3 MS. McVEY: Just depending on how much time we
4 have.

5 THE COURT: So that's kind of a broad outline
6 of what we can expect today.

7 MS. McVEY: That's right.

8 Before Mr. Glenn testifies, we filed a brief
9 on corporate representative hearsay. We filed it in
10 circuit earlier this week. We don't need to argue it
11 now, but just before Mr. Glenn testifies. I will pass
12 the brief up. It will probably be after lunch.

13 THE COURT: Very good. I'll take that and
14 keep that here. All right.

15 Mr. Wall, I will certainly hear anything you
16 and Mr. Boger would like to argue about it.

17 MR. WALL: Yes, Your Honor. If he's a
18 corporate representative, how can it be hearsay?

19 THE COURT: I understand that, but we will
20 argue that at the appropriate time. But you will be
21 fully heard on it, and, preliminarily, I think plaintiff
22 may be protecting the record, but I understand what you
23 say.

24 All right. Now, anything else by way of
25 anything preliminary? Mr. Boger.

7/17/2018

140

1 MR. BOGER: Yes, Your Honor. I failed
2 yesterday to put some objections on the record as to
3 witness at some point they are going to play a video of,
4 Mr. Waters. If you want to take it up now, we can get
5 it on the record or we can do that prior to the witness
6 being presented by the video.

7 MS. McVEY: I thought we did argue that.
8 Didn't you file the motion?

9 THE COURT: You filed the motion and we argued
10 and I ruled on the matter. Is this just some more
11 argument?

12 MR. BOGER: There's -- I didn't get my
13 argument before the ruling, Your Honor.

14 MR. WALL: You ruled on the briefs.

15 THE COURT: Well, true. But I had your
16 position in front of me, but you did not have a chance
17 to orally argue it?

18 MR. BOGER: Yes, ma'am.

19 THE COURT: Why don't we just do that before
20 he gets up and let you place anything else you want to
21 place before us for that time so that we can kind of --

22 MS. McVEY: That will be fine, Your Honor. We
23 plan to play Mr. Waters' deposition, which is a short
24 deposition.

25 THE COURT: When?

7/17/2018

141

1 MS. McVEY: Before Mr. Glenn testifies this
2 afternoon.

3 THE COURT: Okay. Well, we will have some
4 breaks before then where we will accommodate what you
5 want to do, Mr. Boger.

6 MR. BOGER: Thank you, Your Honor.

7 THE COURT: Very good.

8 MS. McVEY: Thank you.

9 THE COURT: All right. Bring in the jury,
10 please.

11 (Jury brought in.)

12 THE COURT: Illustrating the wisdom of
13 alternates, one of your numbers has had to be excused
14 from jury service because of a serious personal interest
15 that has arisen. She is sorry about it and so are we.
16 It is Juror No. 168, and she will now be replaced by
17 Juror No. 62.

18 Raise your hand, please. Juror 62 is now a
19 full member of the jury.

20 All right. And I thank you all for this and,
21 again, as you can see, that illustrates the reason for
22 having alternates because you can become a part of this
23 jury at any moment in time.

24 So our day will go like this. Plaintiff is in
25 the midst of presentation and will begin with a video --

7/17/2018

142

1 MS. McVEY: A quick stipulation.

2 THE COURT: She will begin with some
3 stipulations that both sides have agreed to. Then
4 Dr. John Maddox will testify. There will be some videos
5 played of Mr. Crawford and perhaps other witnesses.
6 There will be some other witnesses presented, all right,
7 and we will kind of see how this day goes, but my target
8 is sometime between 5:00 and 5:30 for completion of this
9 day's activities. So that's kind of what you are
10 looking at.

11 All right. You may proceed, Ms. McVey.

12 MS. McVEY: Thank you, Your Honor.

13 Good morning. A stipulation: The plaintiffs
14 in Covil Corporation stipulate that Jerry Crawford's
15 reasonable and necessary medical bills related to his
16 treatment of mesothelioma total \$567,937.64,
17 \$567,937.64. Thank you.

18 Okay. Your Honor, I would like to admit that
19 into evidence. We marked it as Plaintiff's 804.

20 THE COURT: Admitted without objection.

21 MS. McVEY: Thank you.

22 MR. CHAPMAN: Your Honor, plaintiffs would
23 like to call Dr. John Maddox.

24 THE COURT: Very good. Dr. Maddox come around
25 here, sir, and be sworn in by the clerk.

7/17/2018

143

1 THE CLERK: Raise your right hand. Do you
2 swear or affirm that the testimony you are about to give
3 will be the truth, the whole truth, and nothing but the
4 truth so help you God?

5 THE WITNESS: Yes, ma'am, I swear.

6 THE COURT: Dr. Maddox, you may be seated.

7 Ladies and gentlemen of the jury, Dr. Maddox
8 is an expert witness, and as I have explained to you
9 yesterday, we will hear his education, training, and
10 experience, and unless I'm gravely mistaken, I will
11 qualify him as an expert witness, which means he may
12 give you opinions about his areas of expertise.

13 You are the judges of the fact and you will
14 examine this evidence and give it the credibility you
15 think it deserves. You are the sole judges of facts,
16 not me, not anyone else in this room. Thank you.

17 And you may proceed, Mr. Chapman.

18 MR. CHAPMAN: Thank you, Your Honor.

19 JOHN C. MADDUX, M.D., being first
20 duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. CHAPMAN:

23 Q. Good morning, Dr. Maddox.

24 A. Good morning.

25 Q. How are you doing?

7/17/2018

144

1 A. Very well, thanks.

2 Q. Please introduce yourself.

3 A. John Colter Maddox, M.D. I am a pathologist
4 practicing at a community hospital called Riverside
5 Regional Medical Center located in Newport News,
6 Virginia.

7 Q. You said M.D. What kind of physician are you?

8 A. I'm a good one.

9 (Laughter.)

10 My degree is medical doctor, M.D., and I
11 practice laboratory medicine.

12 Now, I also practice hematology, which
13 involves seeing a few patients for hematologic problems.
14 I perform some biopsies myself. I spend a lot of time
15 at my microscope reading biopsies and helping to
16 interpret other types of laboratory work.

17 Q. Doctor, for how many decades have you been
18 analyzing or examining tumors in order to diagnose what
19 condition a person is suffering from?

20 A. Well, for 42 years, the same year I was
21 married, I started a pathology internship and residency
22 program after medical school.

23 Q. Doctor, where did you go to school?

24 A. Well, I grew up in Charlottesville, Virginia,
25 where I attended the public schools and the Baptist

1 church. I then went to college at the University of
2 Virginia, again in Charlottesville, and took a B.A. in
3 biology. Then I went to medical school, again in
4 Charlottesville, and took the M.D. degree in 1976.

5 MR. CHAPMAN: Your Honor, may I approach the
6 witness?

7 THE COURT: You may.

8 BY MR. CHAPMAN:

9 Q. Dr. Maddox, I'm going to hand you what I have
10 premarked as Exhibit 806.1.

11 MR. CHAPMAN: And, Your Honor, I have a fresh
12 copy for the bench.

13 THE COURT: Thank you, sir.

14 BY MR. CHAPMAN:

15 Q. Dr. Maddox, what are we looking at?

16 A. This is a copy of my curriculum vitae.

17 Q. Is that a fair and accurate summary of your
18 education, experience, and publications?

19 A. Yes, sir, it is.

20 MR. CHAPMAN: Your Honor, I move to admit.

21 THE COURT: Without objection?

22 MR. WALL: No, your Honor. As I said earlier,
23 I was -- hearsay. I understand the Court is going to
24 allow it.

25 THE COURT: Very good. Fine. Overruled. It

1 will be admitted.

2 MR. CHAPMAN: Thank you, Your Honor.

3 BY MR. CHAPMAN:

4 Q. Doctor, have you provided me with a set of
5 slides that we can get some background explanation on
6 these topics?

7 A. Yes, sir, PowerPoint slides.

8 Q. Are these these slides?

9 A. Yes, sir.

10 THE WITNESS: May I stand while we are going
11 through these or --

12 THE COURT: Certainly, whatever is most
13 convenient, Dr. Maddox. Just be sure the jury can see
14 you and see your presentation.

15 THE WITNESS: Yes, ma'am. Thank you very
16 much. I just can't really see anything sitting in the
17 chair.

18 BY MR. CHAPMAN:

19 Q. Dr. Maddox, you started to talk about your
20 education. Can you give this jury sort of a thumbnail
21 of your background and training?

22 A. Sure. After college and medical school, I did
23 what's called post-graduate training. That includes an
24 internship, a residency, and a fellowship at Stanford
25 University, which is an university located in Palo Alto,

1 California. Nowadays they call that Silicon Valley, but
2 this was so long ago that they called it the Farm back
3 then.

4 At any rate, I took this training in anatomic
5 pathology. Anatomic pathology essentially is where a
6 surgeon takes a biopsy. The pathologist then examines
7 that biopsy and looks at cells under a microscope to
8 figure out what it is, whether it's a malignant tumor or
9 whether it's an infectious disease or what.

10 And while I was there, I had an opportunity to
11 work with Dr. Charles Carrington. At the time
12 Dr. Carrington was the chairman of the U.S. and Canadian
13 Mesothelioma Panel, which was an expert group that was
14 formed to help other physicians figure out whether they
15 were dealing with mesothelioma or lung cancer or some
16 other type of tumor. And through Dr. Carrington, I
17 learned the essential facts of asbestos-related
18 medicine.

19 So I finished my training period there at
20 Stanford and I went and took a fellowship at MD Anderson
21 Hospital and Tumor Institute located in Houston, Texas.
22 It is one of the big regional cancer centers around the
23 United States like Memorial Sloan Kettering, Mayo
24 Clinic, places like that.

25 While I was there, I had the opportunity to

1 work with Dr. David Dail, who was a lung pathologist and
2 who was the co-author of the standard textbook of lung
3 pathology called Pulmonary Pathology, which is now in
4 its third edition.

5 At any rate, the point is that I saw some
6 additional cases of lung tumors, including
7 mesotheliomas, while I was at MD Anderson. Then in 1980
8 I moved from Houston, Texas, to Richmond, Virginia,
9 where I spent two years studying hematology and clinical
10 pathology.

11 In 1982, I took my board examinations in
12 anatomic and clinical pathology and I was certified in
13 both of those subspecialty fields. Then in 1998, I
14 finally went ahead and took the board examination in
15 hematology because I had already done hematology
16 training. I just never bothered to take the exam. So I
17 took it in 1998. I passed that exam and I was certified
18 as a subspecialist in hematology as So well. That's the
19 basis of the post-graduate education.

20 Q. Doctor, throughout your career have you
21 actually treated or reviewed mesothelioma?

22 A. Oh, yes, sir. Since we started keeping
23 computerized records in 1985, we have had at our
24 hospital over 500 patients that were treated -- either
25 diagnosed or diagnosed and treated -- for mesothelioma

1 at our hospital.

2 Back in the 1980s, there were a couple of
3 years where we were seeing 30 new mesotheliomas per year
4 at one hospital, which is fantastic. That is like
5 1 percent of all the mesotheliomas in the country at
6 that one hospital. So I have had a lot of hands-on
7 practical experience with the diagnosis of malignant
8 mesothelioma.

9 Q. Is there a reason for that?

10 A. There is. Newport News, Virginia, is home of
11 the Newport News Shipbuilding and Drydock Company, and
12 that's the place where they built battleships, aircraft
13 carriers, submarines. You know, much of the Navy's
14 fleet during the World War II came from Newport News
15 shipyards. So they built a lot of war ships. War ships
16 during the Second World War and up until about 1970 were
17 built with a lot of asbestos insulation in them.

18 We have a fairly stable population base in
19 Newport News. We have a lot of people that are retired
20 now but they worked at the shipyard when they were
21 younger and they had heavy exposure to asbestos during
22 the construction of those ships. Consequently, we see a
23 lot of asbestos-related disease at our hospital.

24 Q. Doctor, can you tell me a little bit more
25 about what your role has been specifically at the

1 hospital?

2 A. Sure. Well, currently I'm the senior partner
3 of the pathology group at the hospital, which includes
4 six doctors and some technical assistants and some
5 clerical people.

6 So over the years, I have gone from the
7 youngest guy there to now I'm the old guy there. What I
8 do on a daily basis is examine tissue slides to see if
9 there's malignant tumor or infectious disease or what.
10 I also review a lot of blood samples, blood smears. I
11 look at them under a microscope to see whether those
12 cells represent anemia or leukemia or something else.
13 As a matter of fact, last week we even diagnosed a case
14 of malaria.

15 So that's the kind of work I do on a daily
16 basis. Also, I consult on asbestos-related disease
17 cases because now I've had years and decades of
18 experience and I can help to guide people when they are
19 trying to make decisions on that.

20 Q. Doctor, have you been published in
21 peer-reviewed literature about asbestos disease?

22 A. Yes, sir, I have. I'm not an academician.
23 I'm not an university professor. There is nothing in my
24 job description that says that I have to write any
25 papers at all. My job is basically to take care of sick

1 people.

2 But, nonetheless, I have managed to publish
3 about four papers on asbestos-related disease and also
4 about the same number of papers on hematology. So
5 that's what I have done. It's not as much as a
6 university professor who may have 300 articles on a
7 bibliography, but it's my contribution.

8 Q. Is mesothelioma is rare type of cancer?

9 A. Yes, sir, it is pretty rare. There is about
10 3,000 cases -- or 3,000 new cases of mesothelioma in the
11 United States every year. Compare that to about 180 to
12 200,000 cases of lung cancer per year in the United
13 States. So not real common.

14 Q. Doctor, you mentioned that now you do some
15 consulting work. Let me ask you: Does that include
16 consulting work for other doctors and other hospitals?

17 A. Yes. For other doctors, for other hospitals,
18 and also for legal groups, and I have been doing that
19 for years. Now, also during the period from 1985
20 through 2000, we had an electron microscope unit at our
21 hospital and we would use the electron microscope as a
22 higher magnification type of machine that would allow
23 us -- that would help us in making diagnosis of tumors,
24 particularly undifferentiated tumors where you couldn't
25 tell just using an optical microscope.

1 So during that period of time, I used the
2 electron microscope to do approximately 1,200 samples of
3 lung tissue to look at the particles that were contained
4 within the lung tissue. And that was a procedure that I
5 performed at the request of other doctors' groups,
6 plaintiffs' attorneys' firms, and defense attorneys'
7 firms accounted for approximately one-third of that
8 work.

9 Q. Doctor, whether you are doing this kind of
10 work for a hospital, another doctor, or someone like me,
11 was is your process of examination any different?

12 A. No. There is no difference in the process of
13 examination or the way I come to conclusions. I try to
14 use published criteria as my guide for how to make a
15 decision.

16 Q. You said you try to review published criteria.
17 Have you reviewed medical and scientific literature
18 about asbestos and asbestos-related diseases?

19 A. Oh, surely I have. In fact, I submitted a
20 reliance list of medical articles and books that I have
21 depended upon or reviewed, and that's about 60 pages
22 long. I know because I typed it myself.

23 Q. Is diagnosing and determining the cause of
24 disease something that you do as a pathologist?

25 A. Yes, sir. It is the type of thing I do every

1 day.

2 Q. Doctor, are you, as a pathologist who looks at
3 the diagnosis of asbestos diseases for your education,
4 experience, and training, able to evaluate the causes of
5 those asbestos-related diseases?

6 A. Yes, sir. In many cases, I am. I would use
7 the published criteria, specifically a publication
8 called Helsinki Criteria because it is from a conference
9 that was held in Helsinki, Finland, not the one that
10 President Trump and President Putin. This was one that
11 was held back in 1997.

12 Q. Is this something that you have done
13 throughout your career?

14 A. Yes, sir, it is.

15 MR. CHAPMAN: At this time, Your Honor,
16 plaintiffs would tender Dr. Maddox as an expert in the
17 diagnosis and causation of asbestos-related diseases
18 from various asbestos-containing products.

19 THE COURT: By reason of Dr. Maddox's -- well,
20 let me stop. Voir dire?

21 MR. WALL: No, Your Honor.

22 THE COURT: Any objection to his
23 qualifications?

24 MR. WALL: No, Your Honor.

25 THE COURT: Very good.

1 By reason of Dr. Maddox's education, training,
2 and experience, he is recognized and qualified as an
3 expert in the fields just recited by Mr. Chapman that
4 deal with the pathology and treatment and diagnosis of
5 mesothelioma.

6 You may proceed, Mr. Chapman. And,
7 Dr. Maddox, you can either stand or be seated as you
8 please. I stand often when I address the jury because
9 I'm so short I can't see them and I can look at you this
10 way. But at your pleasure.

11 THE WITNESS: Thank you, ma'am. I certainly
12 appreciate it. I think I will probably stand because I
13 really can't see the screen very good from the chair.

14 THE COURT: That's perfectly okay.

15 BY MR. CHAPMAN:

16 Q. Dr. Maddox, will you agree that the opinions
17 that you give in this case will be to be a reasonable
18 degree of medical and scientific certainty?

19 A. Yes, sir, they will.

20 Q. Now, you mentioned that, in addition to
21 consulting for doctors and hospitals, you do this kind
22 of work for attorneys?

23 A. Yes, sir, I do.

24 Q. How did this happen?

25 A. Well, it started with the patients that we had

1 at the hospital in the early 1980s. Many of them went
2 to local attorneys looking for compensation for their
3 lethal malignant disease and I was contacted by those
4 local attorneys.

5 And then gradually, by word of mouth, not by
6 any kind of advertising that I did, my experience or the
7 fact that I could help spread and I started being
8 contacted by more and more firms over the years.

9 Q. And, Doctor, whether you are doing this kind
10 of work for a hospital or a doctor or someone like me,
11 what do you charge for your time?

12 A. I personally don't charge, but the company
13 that I work for called Peninsula Pathology Associates,
14 Incorporated, charges \$500 an hour for my time. As a
15 partner that group, I receive approximately \$112 an hour
16 for my time after it's split with all of the rest of the
17 people, the partners of the group.

18 Q. And, Doctor, you and my law firm have worked
19 together in the past doing the same kind of thing.

20 A. Yes, sir, I have done previous cases with your
21 law firm.

22 Q. In this particular case, have you had a chance
23 to review Mr. Crawford's pathology?

24 A. Yes, sir, I have.

25 Q. And do you have any opinions about what

1 diseases he may have?

2 A. Yes, sir. In my opinion, Mr. Jerry Crawford
3 has a malignant mesothelioma of the biphasic type of his
4 right pleura.

5 Q. Okay. So we are going to get into more of
6 that more specifically, but let me ask you just
7 generally, Doctor, what causes mesothelioma?

8 A. Well, the main cause of malignant mesothelioma
9 is asbestos. There is various estimates on the
10 percentage of cases that are caused by asbestos. Some
11 people would say 90 percent of cases are caused by
12 asbestos. Some people would say more.

13 The German Mesothelioma Registry says 94
14 percent of their cases have a definite history of
15 asbestos exposure. The Helsinki Criteria say that 80
16 percent of the people with mesothelioma have
17 occupational asbestos exposure that's the cause of the
18 tumor. But there's other causes besides occupational.
19 There can be domestic take-home exposure as well. So I
20 would say that at least 90 percent of mesotheliomas are
21 caused by asbestos exposure.

22 There are rare cases of mesothelioma that can
23 be caused by a relatively high level of radiation
24 exposure. Like, for example, people with Hodgkin's
25 disease who have received mantle radiation for Hodgkin's

1 disease or ladies with breast cancer who have had
2 external beam radiation to the breast cancer, high level
3 of radiation, there is an increased rate of malignant
4 mesothelioma in those patients. Now, radiation can act
5 hand in hand synergistically with asbestos exposure. So
6 you can have multiple causes for one tumor.

7 Q. Okay. So we will get more into the details of
8 it later on, but let me just ask you: Do you believe
9 that Mr. Crawford's mesothelioma was asbestos-related?

10 A. Yes, sir, I certainly do believe that it was
11 and I did not see any other factor, any other type of
12 exposure that had contributed to his mesothelioma.

13 Q. And, Doctor, in your examination of his slides
14 to make your determination that he had malignant
15 mesothelioma, were you able to determine whether or not
16 that was consistent with what his treating physician
17 said?

18 A. Well, yes, it was, as far as I could
19 determine. It was certainly consistent.

20 Q. Okay, Doctor. So just to kind of firm footing
21 and let everybody know where we are going, here are the
22 things that I would like to cover with you today. I
23 just want to make sure that you are prepared to talk to
24 me about all of these things.

25 First is when it was understood that asbestos

1 can cause disease; second, what the literature says
2 about exposure to pipe insulation in asbestos products;
3 third, what exposure to a direct or substantial
4 contributing -- what exposures -- excuse me -- what
5 exposures were a direct or substantial contributing
6 cause to Mr. Crawford's mesothelioma based on a set of
7 facts I will ask you to assume; and, lastly, about his
8 treatment and diagnosis.

9 Are you prepared to talk to me about all those
10 things?

11 A. Yes, sir, I am.

12 Q. We talked about the literature you relied on,
13 Doctor. I also want to get idea of some of the
14 literature you have reviewed. Can you talk to me about
15 what it is that doctors like you consider in making
16 these sort of causation diagnoses?

17 A. Well, there is a whole variety of types of
18 medical literature that doctors would consider. There
19 are things like case reports of people who have had
20 similar types of exposures. There is series of cases,
21 like, for example, one of the very first papers -- and
22 we will mention it again soon, I bet you -- was a paper
23 from 1960 where there was about 30 people that were
24 asbestos miners in a mine in South Africa and they got
25 malignant mesothelioma. There weren't that many people

1 that worked in the mine, but a large number of them did.
2 That was not an epidemiologic report, but it was a case
3 series that carried a lot of weight.

4 At any rate, in addition to case reports and
5 case series, there is also epidemiologic studies. There
6 are several different types of epidemiologic studies.
7 One type is called a cohort study. A cohort study is
8 where you start with a defined group of people that are
9 doing a similar job or have some similar type of
10 exposure and then you follow the development of those
11 people over a period of time. You would call that a
12 prospective study.

13 There is also a different type of study called
14 a retrospective study or a case control study. A case
15 control study is where you start with a group of people
16 who have malignant mesothelioma and then you look
17 backwards and look retrospectively and try to determine
18 what type of occupation or type of exposure, what type
19 of asbestos were they exposed to, how. So you see, you
20 can look in either direction.

21 There are other types of epidemiologic studies
22 called registries and that would be something like a
23 government unit that tracks the development of
24 mesothelioma and then records occupational exposures to
25 people they have had.

1 There are animal studies that should be
2 considered, like where you have a test animal that's
3 either given inhalation of asbestos dust or an injection
4 of asbestos fibers into the peritoneal cavity.

5 In addition to that, there is in vitro
6 studies; in other words, studies in test tubes where
7 cell cultures are dosed with asbestos fibers to see what
8 kind of harmful effects those fibers will have on the
9 cultured cells.

10 So there is all this body of information out
11 there. What it says is basically asbestos causes
12 mesothelioma. Not only that, but all types of
13 asbestos-caused mesothelioma. It doesn't take much to
14 do it.

15 Q. Doctor, you told us about a list that you
16 typed up of articles that you reviewed. Do you recall
17 that?

18 A. Yes, sir.

19 Q. Doctor, I'm going to hand you what I have
20 marked for identification as 806.2.

21 A. Yes, sir.

22 MR. CHAPMAN: Your Honor, I have a copy for
23 you as well.

24 THE COURT: All right, sir.

25

1 BY MR. CHAPMAN:

2 Q. Doctor, can you tell the jury what we are
3 looking at?

4 A. Well, this is the reliance list that I have
5 typed. This particular copy of it is dated May of this
6 year.

7 Q. Doctor, I know you may not agree with every
8 single word and every single study on there, but do you
9 find the studies in that report authoritative and
10 reliable?

11 A. Generally speaking, yes. In one section, the
12 section on brake dusts, I have included some articles
13 that I do not agree with simply for the sake of
14 completion. But most of the other articles on the list
15 are ones that I have general agreement with.

16 Q. Okay. Now, we talked to Dr. Brody yesterday,
17 Dr. Maddox.

18 A. Yes, sir.

19 Q. Dr. Brody told us all types of asbestos cause
20 mesothelioma. Do you agree with that?

21 A. Yes, sir, I do.

22 Q. Can you tell us a little bit about that?

23 A. Sure. I guess I need to define first that the
24 types of asbestos. There are two general types of
25 asbestos. One type is called serpentine asbestos and

1 that type is represented by one type of fiber that's
2 called chrysotile asbestos. Chrysotile asbestos is the
3 type of asbestos that was most commonly used in the
4 United States during the 20th century.

5 There is a second family of asbestos called
6 amphibole asbestos. In the amphibole family there are
7 three types of commercially used asbestos; namely,
8 amosite, crocidolite, and anthophyllite. Of those
9 three, amosite was the one that was most commonly used
10 with only a few places or a few products in the United
11 States that ever used crocidolite or anthophyllite.

12 Now, in addition to that, there are also
13 amphibole types of asbestos that are not used
14 commercially but instead they are found as impurities in
15 chrysotile asbestos, the first type that we discussed.
16 Those impurity types include tremolite and actinolite
17 asbestos.

18 There are also some other lesser varieties of
19 asbestos that are found as impurities. For example, in
20 Libby, Montana, there was a big vermiculite mine that
21 had a number of amphibole asbestos types included in
22 that.

23 In some other mineral deposits you can find
24 slight variations on the theme of anthophyllite --
25 excuse me -- on the theme of amphibole asbestos. But

1 that's a whole catalog for you. In this particular
2 case, I think you need to think about chrysotile
3 asbestos, the serpentine form, and then the amphibole
4 asbestos that's pertinent in this particular case will
5 be the amosite asbestos.

6 Q. Doctor, what are we looking at up on the
7 screen?

8 A. This is a diagram, a picture of human lungs.
9 Now, what you see here -- did you want me to use a laser
10 pointer or something to illustrate this?

11 Q. I think the clicker has one, if you can figure
12 out how to get it to work. Yes. The little button
13 there, Doctor.

14 A. Thank you much.

15 These are the human lungs. Now, this is the
16 trachea here in the mid-line, the big pipe that you feel
17 in your neck. It comes down and splits into the right
18 and left main stem bronchi. This is the right lung,
19 which has three lobes. This is the left lung that has
20 two lobes. Once you get down into the smaller and
21 smaller bronchi from the main stem down into the
22 segmental and sub-segmental, you eventually get to the
23 respiratory bronchioles empty into the alveolar air
24 sacs. The alveolar air sacs is where respiration
25 actually takes place.

1 Now, around those alveolar air sacs there is a
2 system of capillaries, arteries, veins, and capillaries.
3 That's where the exchange of gases actually takes place.
4 That's where fibers will start to enter the systemic
5 circulation. Also, that's where fibers can penetrate
6 the walls of the air sacs, getting into the interstitium
7 of the lung, and entering another type of vascular
8 channel that's in there called the lymphatic channels.

9 Lymphatics are like a low-pressure drainage
10 system that drains off excess tissue fluids from the
11 lungs or other organs. In the lungs, the lymphatics run
12 in two directions. In one direction they run to the
13 pleura. They open to the pleura through the -- they
14 open to the pleural space through the pleura covering
15 the surface of the lung.

16 They also run into the middle part of the
17 chest where lymph nodes are. Lymph nodes are like
18 filters that help clean the fluid that's draining out of
19 lung. They try to fight against bacteria, viruses, or
20 other types of particulate material that may be coming
21 out of the lungs.

22 So the point is, that's how asbestos fibers
23 get into the lung. They come down the trachea. They
24 get out into the air sacs and then they slip into the
25 interstitium where they get into some of these vessels.

1 That's how they get into the pleural space.

2 Sometimes you can find them later on. You can
3 find some of them later on still lodged in the lung
4 tissue or even -- even sometimes you can find them in
5 these lymph node structures that are up here in the
6 center portion of the chest.

7 Q. Doctor, can you tell us some of the diseases
8 that asbestos can cause? You can hang onto the clicker.

9 A. Okay. So the diseases that asbestos can
10 cause: There are four main diseases that can be caused
11 by asbestos. First of all, there is a scarring injury
12 that asbestos fibers can have on the lung tissue itself.
13 That's called asbestosis. Asbestosis is when these
14 fibers that remain in the lung are so numerous that they
15 cause an inflammatory reaction and cause scar tissue
16 development. The scar tissue is generally first located
17 in the respiratory bronchioles; that is to say, the
18 smallest tubes just before they open into the alveolar
19 air sacs.

20 But as asbestosis progresses, the fibrosis
21 goes from just the respiratory bronchioles into the
22 walls of the alveolar air sacs. As those alveolar walls
23 become denser and denser, thicker and thicker, it
24 becomes harder to exchange air back and forth across
25 them from the air sacs into the capillaries is where

1 oxygen and carbon dioxide are exchanged. At that point
2 the person starts to develop respiratory failure. In
3 severe cases, asbestosis can actually kill a person.

4 Another -- another process is called pleural
5 plaques. Now, pleural plaques are benign. They are not
6 a malignant disease, but they are also accumulations of
7 scar tissue that are found on the inside of the chest
8 wall. Sometimes they run parallel to the ribs.
9 Sometimes they calcify. Generally, they are a hard,
10 pearly material. They form in a human being on the
11 chest wall the way that a grain of sand will cause a
12 pearl in an oyster.

13 Q. Let me ask you something, Doctor. Does an
14 individual have to have pleural plaques or asbestosis
15 before you can make a diagnosis of mesothelioma?

16 A. No. Many people with mesothelioma do not have
17 pleural plaques and do not have pulmonary parenchymal
18 asbestosis either. It depends upon the level of
19 exposure. The more heavily exposed you are to
20 asbestos, the more likely you are to have asbestos --
21 excuse me -- asbestosis, the more likely you are to have
22 pleural plaques, and the more likely you are to develop
23 a malignant pleural mesothelioma.

24 But this is not a linear sequence that's
25 dependent upon each other. It's different outcomes of

1 that original asbestos exposure, either to form
2 asbestosis or plaques or mesothelioma or any combination
3 of the three depending upon the level of exposure.

4 Q. Dr. Maddox, with your own eyes have you seen
5 people with mesothelioma who do not have asbestosis?

6 A. Yes, sir, I certainly have. I estimate about
7 half the people with malignant mesothelioma do not
8 develop pleural plaques. You know, it is a question of
9 individual susceptibility. People react different to
10 various stimuli or trauma.

11 Have you ever seen people who develop
12 hypertrophic scars when they cut their hand or when they
13 pierce their ears? Sometimes they will develop a nodule
14 at the site of that scar, called a hypertrophic scar.
15 Some people do that; other people don't. Likewise, some
16 people will form pleural plaques; some people won't.

17 Q. Let me ask you asbestosis. Can a person die
18 from asbestosis?

19 A. Yes, sir. It can be so severe that in some
20 cases people will die from respiratory failure, and
21 that's a pretty tough death.

22 Q. Let me ask you, Doctor. What levels of
23 exposure does a person need in order to pass away from
24 asbestosis?

25 A. It needs to be pretty high. It needs to be

1 pretty high. It needs to be on the order of 10,000 or
2 more times higher than the normal background
3 environmental level.

4 Q. Okay. And we will get to background later.

5 But let me ask you, Doctor, what are we
6 looking at here?

7 A. This is an example of lung cancer and an
8 example of mesothelioma. These are two different
9 diseases. The lung cancer is a cancer, a malignancy
10 that develops either from one of those bronchial tubes
11 that brings air into the lungs or from the spongy
12 air-filled portion of the lung itself, the lung
13 parenchyma.

14 You know, lung cancers can be caused by
15 asbestos, but they can also have other causes as well.
16 They can be caused by cigarette smoking. They can be
17 caused by uranium dust inhalation. They can be caused
18 by other chemical agents or a combination of all of
19 those. They can even be caused by radon gas exposures
20 like, for example, in the foundation of some houses.

21 Well, mesothelioma, on the other hand, does
22 not develop in the lung itself, but it develops in the
23 pleural space. The pleura is the covering of the lung
24 and the lining of the chest wall. There is a space
25 called the pleural space, which in a normal person is a

1 potential space, but in mesothelioma patients there
2 tends to initially be an accumulation of fluid called a
3 pleural effusion.

4 That pleural effusion develops large numbers
5 of malignant cells and groups of malignant cells within
6 it. Some of those will implant on the pleural surfaces
7 and they will start to grow as a malignant and
8 eventually invasive malignancy. That's what you've got
9 here.

10 Now, this is a fairly late stage of this
11 particular mesothelioma where the pleural effusion has
12 been drained away and, essentially, the tumor has
13 started to grow into the lung and also grow into the
14 chest wall, and also some of the tumor has metastasized
15 to the lymph nodes in the center portion of the chest.

16 Q. Doctor, would you be able to give this jury an
17 idea of how early in the medical community it was
18 accepted that asbestos can be lethal?

19 A. Well, there first started being case reports
20 about the lethality of asbestos back in the late 1890s,
21 around the turn of century then. There were textile
22 workers, asbestos textile workers in Britain who had
23 asbestos exposure and they died of respiratory failure
24 and they had very high levels of exposure.

25 In 1930 there was a study done by the British

1 Commissioner of Factories, I think the title was. The
2 surveyors were Merewether and Price in 1930 determined
3 that there was a significant hazard to asbestos textile
4 workers, and at that time they also warned about
5 exposures to asbestos in other types of material,
6 including things like woven brake linings or jointings.
7 "Jointings" is the British word for gaskets that are
8 used between pipe flanges.

9 They warned about this in 1930. They warned
10 about it in the context of asbestosis, however, because
11 at that time it really wasn't appreciated the risk of
12 developing mesothelioma because it was such a rare
13 disease.

14 Q. What about the 1940s and '50s, Doctor?

15 A. In the 1940s and '50s, people became more
16 gradually aware of the fact that malignant diseases
17 could result from asbestos exposure. At first, this was
18 in terms of lung cancer, carcinoma of the lung. Back in
19 the '30s, there were very heavy exposures in shipyards
20 and mines, in other industrial applications of asbestos.

21 So those were the levels that were sufficient
22 to cause asbestosis. Those were the levels that were
23 sufficient to cause -- particularly in conjunction with
24 cigarette smoking -- a significant risk of developing
25 lung cancer.

1 So finally by 1950, there came out a big
2 editorial in the Journal of the American Medical
3 Association. It said that asbestos clearly causes lung
4 cancer. There should be no further question or doubt of
5 that fact. A big epidemiologic study came out in 1955
6 that showed statistical proof for that determination.

7 Q. What about the 1960s, Doctor?

8 A. Well, in 1960s there were several articles
9 that dealt with malignant mesothelioma. The most
10 important or the most well known of these landmark
11 articles was one by Dr. J.C. Wagner. That's a South
12 African pronunciation of what we might call "Wagner."
13 But he called himself J.C. Wagner.

14 He studied a group of asbestos miners,
15 crocidolite mines in South Africa. 20 or 30 people in
16 the study group, all of them -- well, most of them were
17 miners. Some of them were family members. Some of them
18 lived nearby the mines, near the tailings that were
19 taken from the asbestos mines. Now, all of them had
20 very high levels of exposure to crocidolite asbestos.
21 They developed mesothelioma.

22 It wasn't an epidemiologic paper. It was a
23 case series, but it was such a significant case series
24 that it's formed people's opinion to realize asbestos
25 definitely causes malignant mesothelioma.

1 That same year there was another paper by
2 Dr. Eisenstadt from Texas, from outside Houston, Texas,
3 in what's called the oil patch where they have a lot of
4 refineries, chemical refineries and petroleum
5 refineries, and the workers in the refineries which were
6 insulated with chrysotile asbestos, were also developing
7 malignant mesothelioma. Again, not a statistical
8 series, but a case series that pointed this out.

9 MR. CHAPMAN: Your Honor, may I approach?

10 THE COURT: You may.

11 BY MR. CHAPMAN:

12 Q. All right. Dr. Maddox, what did I just hand
13 you?

14 A. This is a graph that shows the recognition of
15 the association with asbestos exposure in terms of lung
16 cancer, mesothelioma, and possibly cancers in other
17 organs.

18 MR. CHAPMAN: Your Honor, before we continue,
19 may I publish this graph to the jury?

20 THE COURT: Any objection?

21 MR. WALL: Not in evidence, Your Honor, just
22 publication, correct?

23 MR. CHAPMAN: Yes.

24 MR. WALL: Not in evidence, just publishing to
25 the jury?

7/17/2018

173

1 MR. CHAPMAN: That's right.

2 THE COURT: All right. Right, not in
3 evidence. He's just publishing the demonstrative piece
4 of evidence to the jury.

5 MR. CHAPMAN: That's right.

6 THE COURT: All right. You may do so.

7 MR. CHAPMAN: Thank you.

8 THE WITNESS: Yes, sir. This graph came from
9 an original peer-reviewed medical article by
10 Dr. Becklake and it comes from a reproduction in the
11 textbook, the Dail and Hammar textbook that I already
12 alluded to a couple of times.

13 BY MR. CHAPMAN:

14 Q. Is this graphic on the screen, is that the
15 same thing in your hand?

16 A. Yes, it is.

17 Q. Okay. Can you tell us a little bit about
18 that, please?

19 A. Sure.

20 This shows the year from 1980 -- excuse me --
21 from 1880 through 1980, and this "Y" axis of the graph
22 talks about the world's commercial production of
23 asbestos, the commercial usage of asbestos.

24 Chrysotile was used at the start. It was used
25 primarily in textiles.

1 Crocidolite started to be used soon after that
2 in textiles and other applications.

3 Amosite was used after that and got used as a
4 thermal system insulation; in other words, pipe
5 insulation, boiler insulation, things of that sort.

6 Anthophyllite asbestos was used after that but
7 only in certain specialty goods. It was used in
8 Scandinavia a lot more than in the United States. To my
9 knowledge, there was only maybe two places in the United
10 States that used anthophyllite.

11 Other uses multiply. It started being used in
12 brakes. It started being used in gaskets, in a whole
13 variety of different products. I think it's been
14 estimated that over 3,000 products contained asbestos by
15 the 1960s.

16 The use went up and up. Particularly, it
17 accelerated during World War II when it was used for
18 insulation in war ships, and along that time people
19 started realizing the various diseases that it was
20 related to. The first to be recognized was asbestosis,
21 which is really just seen in really, really high-dose
22 exposures. But then lung cancer, malignant
23 mesothelioma, other cancers as well.

24 Now, this mesothelioma bar graph should
25 basically turn from probable association to definite

1 association right at 1960. That's when it really became
2 indisputable. There had been case reports or small
3 series of mesothelioma cases even back into the 1940s.
4 So there was a suspicion. But in 1960 it really became
5 crystal clear that there was a very significant
6 association then.

7 Q. Doctor, this jury has heard the name Irving
8 Selikoff. Do you know who that is?

9 A. Yes, sir. Irving Selikoff was a physician who
10 practiced at Mount Sinai Hospital in New York City.
11 Dr. Sinai [sic] came to the United States during the
12 1930s from Europe. He was a specialist in pulmonary
13 medicine and he began studying this question of what
14 diseases are caused by -- excuse me -- what diseases are
15 caused by asbestos -- chrysotile asbestos, amosite
16 asbestos, whatever the type, what diseases are caused by
17 them.

18 In order to study this, he selected a group of
19 people for a cohort study; that is to say, a prospective
20 study. The people that he began to study were asbestos
21 workers. I think it was called the Heat and Frost Union
22 of New York. He registered these people, looked at how
23 long they were exposed, what type of asbestos they used,
24 and whether they developed any kind of disease from it,
25 asbestosis, lung cancer, mesothelioma.

1 Some of the people in the group were studied
2 with radiology to see if they developed pleural plaques
3 or any evidence of pulmonary asbestosis, and he
4 collected these figures and published them during the
5 1960s. He held a large conference in 1964 at which not
6 only other physicians but also representatives from the
7 asbestos industries were invited to discuss this, to
8 talk about whether they had seen people in their
9 industries with asbestos-related diseases to find out
10 how widespread this problem really was.

11 Q. So you talked about the conferences that
12 Dr. Selikoff held. Talk about this. I think you
13 mentioned that members of industry would attend those as
14 well?

15 A. Yes, sir. Members of industry were invited to
16 the conferences and many did attend.

17 Q. And, Doctor, if someone attended a Selikoff
18 conference in 1967, would you be able to tell this jury
19 what they would have learned about the hazards of
20 asbestos at that conference?

21 A. Well, they would have learned many things that
22 we know today. Number one, that it causes these four
23 different diseases that I have spoken about. They would
24 have seen evidence that some people could develop
25 malignant tumors, including mesothelioma, at relatively

1 low exposure levels. There were some cases that were
2 presented in the conference where the exposures were
3 exceedingly brief, but the people went on to develop
4 malignant mesothelioma.

5 They began to understand that this was a dose
6 response disease. In other words, if you had a high
7 level of exposure, you had a high level of risk for
8 developing mesothelioma. If you had a lower level of
9 exposure, you had a lower level of risk for developing
10 mesothelioma. And, of course, we know today also that
11 if you have no exposure to asbestos above normal
12 background environmental ambient air levels, then you
13 have no increased risk of developing malignant
14 mesothelioma.

15 Q. Doctor, let me ask you: If an individual
16 attended a Selikoff conference in 1967, what, if
17 anything, would they have learned about
18 asbestos-containing pipe insulation?

19 A. Well, they would have learned that some
20 asbestos -- some pipe insulation does contain asbestos,
21 first of all. Some of it contains chrysotile asbestos.
22 Some of it contains amosite asbestos. Some of it
23 contains a mixture of both types. There is also
24 asbestos-free pipe insulation that's sometimes referred
25 to as calcium silicate. But, you know, if you have got

1 one of the types that contains either a single type of
2 asbestos or mixed asbestos content, then that material
3 is hazardous.

4 Also by the '60s, some of the initial studies
5 had been done on pipe insulation, boiler insulation,
6 showing the levels of exposure that could be encountered
7 if one was doing that type of work. In other words,
8 when you bring in a half round piece of pipe insulation,
9 you may have to cut it with a knife or saw to the right
10 length. It's somewhat friable. In other words, it can
11 crumble or release fibers fairly easily.

12 You bring in a second piece of half round, you
13 then may have to wire them together or wrap them in
14 cloth to keep them to stay together. Okay. So the
15 asbestos is in place. And then years later you come in
16 and you have to revise something, add in a joint
17 wherever or extra feed pipe or something of some sort,
18 you're going to have to pull that stuff off and it is
19 not usually pulled off as gently as it is when it's
20 applied.

21 When you pull off or tear down friable
22 asbestos insulation, you can have very high levels of
23 exposure. You can have levels of exposure -- or I
24 should say -- levels of exposure have been measured
25 during the job of greater than 100 fibers per cc of air

1 during that type of work.

2 During that type of work, there is so much
3 asbestos in the air that there is a misty cloud of dust
4 that surrounds the work site. That's a cloud of dust
5 that remains in the air for a period of time, and a
6 cloud of dust can be carried into adjacent spaces.
7 There are studies in the literature that even show that
8 that dust can be measured in the next room, depending
9 upon the ventilation.

10 So, yeah, that's the type of stuff that you
11 might have been starting to hear even during the 1960s
12 at the Selikoff conferences.

13 Q. Doctor, you said something a second ago that
14 the exposures from pipe insulation could be up to 100
15 fibers per cc. What does that mean?

16 A. Well, that means that you have enough fibers
17 suspended in the air to create a cloud of dust that's
18 easily visualized in normal light without any kind of
19 special equipment or microscopes or anything. I mean,
20 that's -- if you've gone down a country road following
21 too close to another car, you get a cloud of dust that
22 comes up on the car. That's the type of cloud of dust
23 that I'm referring to, except it's not just clay. It's
24 asbestos fibers and whatever other type of binder is
25 mixed in, like calcium silicate.

7/17/2018

180

1 Q. Is that a high exposure or low exposure?

2 A. That would be a very high exposure.

3 Q. Doctor, what is signature disease? What does
4 that mean?

5 A. Well, it means that this is a type of
6 malignant disease that is usually caused only by one
7 thing, and that's by asbestos exposure. We have already
8 talked about how there are a few cases, a handful of
9 cases, where there may be high-dose radiation involved
10 that can cause mesothelioma, but almost all cases of
11 mesothelioma are caused by asbestos exposure.

12 There are some other tumor types, like
13 angiosarcoma of the liver that can be caused by vinyl
14 chloride exposure, and that's about the only agent that
15 will cause angiosarcoma of the liver.

16 Well, even more frequently we see cases of
17 drowning. What causes drowning? It is usually water.
18 I mean, it's possible that you could drown in olive oil,
19 but you don't see much of that. So I guess a signature
20 disease, drowning in water, could be the association
21 there.

22 Q. Doctor, Dr. Brody talked to us about this
23 yesterday. Could you just kind of briefly give us a
24 definition of latency?

25 A. Sure. Latency is an important concept. The

1 point is it takes a while for the asbestos fibers to
2 sink in, interact with cells, and have their effect of
3 causing malignancy. It doesn't happen overnight. I
4 mean, you can't just have the tumor and then, you know,
5 get some asbestos out of a salt shaker and breathe it in
6 and blame that the next day if you die of a tumor.

7 It takes years for those asbestos fibers to
8 sink in and have their effect before they can be
9 considered to be a cause of the malignant mesothelioma.
10 The Helsinki Criteria required at least a ten-year
11 latency period. In fact, most cases of mesothelioma
12 have a 30- to 40-year period of latency period. Latency
13 period is defined as that period of time from the first
14 exposure to asbestos until the time of diagnosis of
15 mesothelioma. Like I say, minimum of ten years, more
16 commonly 30 or 40 years.

17 Q. Doctor, would you tell us about individual
18 susceptibility briefly?

19 A. I think I already mentioned that concept
20 earlier with people with hypertrophic scars, ear lobes,
21 their skin somewhere. Some people develop that type of
22 response; other people don't. Likewise, some people are
23 exposed to asbestos and never develop a malignant
24 mesothelioma.

25 In fact, the most highly exposed groups of

1 people, like, for example, Selikoff's insulation workers
2 or some of the factory workers that worked with amosite
3 asbestos to incorporate that type of asbestos fiber into
4 products or some of the miners that worked with
5 extremely high levels of asbestos, even in those most
6 highly exposed groups, only 10 to 15 percent of the
7 workers developed malignant mesothelioma.

8 On the other hand, some of them died of
9 asbestosis or lung cancer as well, but there are some
10 other people who never develop a malignancy. Because of
11 their genetic makeup perhaps, they have better tumor
12 suppresser genes that helps them avoid developing a
13 malignant disease.

14 So what you will see then is at lower levels
15 of exposure instead of having 10 to 15 percent of people
16 developing malignant mesothelioma, it may only be
17 1 percent or a 10th of 1 percent. Normally, malignant
18 mesothelioma is not found in people that are not exposed
19 to asbestos.

20 There have been historical studies that look
21 back at the lung tumors, the chest tumors that were
22 found in people from the 1800s in places like the Mayo
23 Clinic or at Harvard University where they have
24 maintained samples that go back over a century.

25 They just didn't see mesothelioma back in

1 those days before -- before it started being used
2 commercially. They just didn't see it. It wasn't
3 there.

4 Q. Doctor, in this particular case, did we ask
5 you to look at Mr. Crawford's pathology report in
6 accompanying yours?

7 A. Yes, sir. You asked me to look at that so I
8 could confirm the diagnosis and I did, in fact, confirm
9 the diagnosis: Malignant mesothelioma, biphasic type.

10 Q. Okay. What I will do, Doctor, is hand you
11 what I have premarked as Plaintiff's Exhibit 803.1.

12 This is for Your Honor.

13 Doctor, what are we looking at there?

14 A. You are looking at the pathology report from
15 the original hospital where he was treated for or where
16 the diagnosis of the mesothelioma was made.

17 MR. CHAPMAN: Your Honor, move to admit.

18 THE COURT: Any objection, Mr. Wall?

19 MR. WALL: No objection, Your Honor.

20 THE COURT: Without objection.

21 MR. CHAPMAN: May I publish to the jury?

22 THE COURT: You may.

23 BY MR. CHAPMAN:

24 Q. Doctor, what we have on the screen, is it the
25 same thing that you have in your hand?

1 A. Pretty much. They called it epithelioid type.
2 I called it biphasic type because I found that there
3 were approximately 10 percent of the tumor that was
4 composed of spindle cells and that's just a very, very
5 minor difference. I agree that predominantly it was a
6 epithelioid mesothelioma.

7 Q. This pathology report, who is it done by?

8 A. It is done by Dr. Alfred Campbell, who is a
9 pathologist at the Spartanburg Regional Healthcare
10 System.

11 Q. And this pathology report, Doctor, what does
12 it indicate to you?

13 A. I believe that it is a correct report. They
14 observed that it was this type of a malignant neoplasm,
15 which I agree. They did certain types of immunostains
16 that helped them identify the type of tumor, and the
17 results given by those immunostains is indicative of
18 this being mesothelioma and not lung cancer, not cancer
19 of the stomach or somewhere else. This is mesothelioma.

20 Q. Okay. Doctor, you looked at the slides
21 yourself; is that right?

22 A. I did. I was sent a stack of the original
23 microscope slides that I looked at with my own optical
24 microscope in my office and I confirmed their findings.

25 Q. And for Mr. Crawford did you personally author

1 a report?

2 A. I did.

3 Q. Doctor, I will approach. I will hand you a
4 report in this case.

5 A. Yes, sir.

6 MR. CHAPMAN: Your Honor.

7 BY MR. CHAPMAN:

8 Q. What are we looking at, Doctor?

9 A. This is a copy of my surgical pathology
10 report. The entire report is 17 pages long. The first
11 four pages have to do with the tumor and then the last
12 13 pages are photographs of what the tumor looked like.

13 Q. And what was your conclusion, Doctor?

14 A. My conclusion was malignant mesothelioma,
15 biphasic type.

16 Q. In order to come to that conclusion, you said
17 you looked at stain slides. What does that mean?

18 A. Well, I looked at original slides. I looked
19 at the original microscope slides, the very same ones
20 that they used at Spartanburg Medical Center.

21 Q. All right. Doctor, I'm going to hand you what
22 has been premarked as Plaintiff's Exhibit 807.1 through
23 807.7.

24 A. Yes, sir.

25 Q. What are we looking at here, Doctor?

1 A. These are some representative photographs of
2 what the tumor cells looked like. It was a solid tumor.
3 It formed sheets of cells without obvious glands, the
4 papillae or other tertiary structures within it. The
5 cells were relatively large. They had a big nucleus in
6 their center. They had a prominent nucleus in the
7 center of the nucleus. That's an organizing region
8 where RNA transcribes proteins that are used in cellular
9 proliferation. In other words, if you have a big
10 nucleus, that means that you are probably a very active
11 cell.

12 Q. Doctor, let me ask you. These slides, are
13 these a fair and accurate representation of the slides
14 you reviewed of Mr. Crawford?

15 A. Yes, sir. I photographed them myself and I
16 tried to make them representation of what the tumor
17 looked like.

18 MR. CHAPMAN: Your Honor, I move to admit.

19 THE COURT: Mr. Wall?

20 MR. WALL: No, Your Honor. No objection.

21 THE COURT: Okay. They are admitted.

22 MR. CHAPMAN: May I publish?

23 THE COURT: You may.

24 MR. CHAPMAN: Can we bring the lights down
25 just a bit, please?

1 BY MR. CHAPMAN:

2 Q. Okay. Is what's on the screen the same thing
3 that's in your hand, Doctor?

4 A. Yes, it is. This is from patient Crawford.
5 This is my surgical pathology consultation report on
6 this case. And what I have here is an H&E slide at 20X
7 magnification. H&E, that means hematoxylin and eosin.
8 That is the routine stain that we put on every slide
9 that comes out of our histology, our slide making
10 laboratory section.

11 The nucleus of a cell is usually going to be
12 darker blue. The cytoplasm lighter blue or sometimes
13 blue/pink or blue/gray. So these are solid sheets of
14 cells without any glandular structures, tubules,
15 papillae or any other tertiary structure. Next slide.

16 MR. CHAPMAN: For the record, we are now
17 looking at Exhibit 807.2.

18 BY MR. CHAPMAN:

19 Q. What are we looking at here, Doctor?

20 A. Here is an area in which the slide -- the
21 architecture becomes a little bit more complex. You can
22 start to see sort of a swirling pattern in it. There
23 are also these small dark cells that represent
24 lymphocytes, a lymphocytic infiltrate in the tumor.

25 Lymphocytes are cells of the immune system,

1 and sometimes tumors will have variable numbers of
2 lymphocytes in them and they represent a host response
3 to the tumor. The host, the patient, is trying to mount
4 something of an immunologic response to tamp down the
5 tumor. Unsuccessful but nonetheless that's what the
6 body is trying to do. Next slide.

7 MR. CHAPMAN: This is 807.3.

8 BY MR. CHAPMAN:

9 Q. What are we looking at here, Doctor?

10 A. This is part of the tumor where there is a
11 spindle cell component. Instead of just being coarsely
12 clumped islands or nests of epithelioid tumor cells, now
13 we have spindle or sarcomatoid tumor cells here.

14 Q. And what are we looking at here, Doctor?

15 A. Again, a variant pattern in the tumor, the
16 so-called trabecular pattern, where the tumor cells
17 start to line up in parallel strands with collections of
18 fibrous connective tissue in between them. This is kind
19 of halfway between an epithelioid and a sarcomatoid
20 morphology. That doesn't really mean much as far as the
21 aggressiveness of the tumor. It just says that
22 sometimes part of a tumor looks different than another
23 part of the tumor.

24 Q. That was the next exhibit. And now we are on
25 to the next one.

1 A. So then we got into staining of the tumor
2 cells with a variety of immunologic stains. Let me
3 explain what an immunostain is. Earlier I said with
4 hematoxylin we can stain a cell red or blue, but that's
5 not enough these days to figure out what a tumor is.

6 What you have to do is you have to look at
7 structural proteins that the tumor is made up of. In
8 order to do that, you generate in an experimental animal
9 an antibody. You put some of that structural protein
10 into the animal. The animal has an immunologic
11 response. The animal starts to produce an antibody
12 against that protein.

13 You then take the animal's spleen, which is
14 where these immune cells are. You put it into long-term
15 culture, and you turn those cells into a factory that
16 will produce more and more of this very specific
17 antibody against a very specific structural protein.
18 That then is called an immunostain. That's done
19 commercially at -- at various drug companies throughout
20 the United States.

21 These antibody reagents are commercially
22 available. You buy a reagent against calretinin, an
23 antibody agent against calretinin and, and then you
24 stain your tissue to see if you get reactivity to the
25 presence of calretinin.

1 Calretinin is a structural protein that is
2 found in most mesotheliomas but very few lung cancers.
3 So finding it positive is helpful in discriminating
4 mesothelioma from lung cancer. That's what we did. And
5 although the preproduction on this little Elmo machine
6 is kind of poor, there are clumps and clusters of
7 positive staining tumor cells here and there within
8 this. I'd estimate that a percentage of maybe 10, 15
9 percent of the tumor cells were positive up to
10 moderately positive for this particular immunostain.

11 To continue, there are other immunostains that
12 we have done.

13 MR. CHAPMAN: This is the next exhibit.

14 THE WITNESS: This is called WT1. This is a
15 structural protein that's present in the nucleus of
16 mesothelial cells or mesothelioma cells, and you can see
17 that that's even more strongly positive in various
18 clumps and clusters of these tumor cells.

19 Again, this is an antigen, WT1, that can be
20 found in a few other types of tumors, mostly pediatric
21 tumors of the kidney or soft tissues. But if the
22 differential diagnosis is between lung cancer and
23 mesothelioma, this is a clear pointer, pointing to the
24 diagnosis of mesothelioma.

25 MR. CHAPMAN: Next exhibit.

1 BY MR. CHAPMAN:

2 Q. What are we looking at here, Doctor?

3 A. Before -- first of all, let me just say that
4 we did additional immunostains besides the two that we
5 just illustrated. We did a whole list, as a matter of
6 fact. I think it was like -- the list -- the list of
7 special stains went from here to here. That's six on
8 this page and then about ten more on this page.

9 So that's 16 different immunostains to develop
10 a panel or a pattern. And the panel -- the results of
11 the panel pointed towards it being mesothelioma, not
12 lung cancer. It's not just two stains. It's about 16
13 different stains. But for the sake of brevity, we
14 didn't try to show all of them to you.

15 Now, what this is, this is a cytology
16 specimen. Remember, I said earlier that when a person
17 first presents with malignant mesothelioma, usually they
18 have a chest full of fluid. That fluid contains
19 numerous individual and small clumps of tumor cells
20 suspended within it.

21 All that fluid makes it difficult for a
22 patient to breathe because the fluid is displacing
23 oxygen from the lungs, displacing air from the lungs.
24 The patient can't get a full breath. His lung doesn't
25 inflate all the way. It only inflates a small way. So

1 the person becomes short of breath.

2 You drain that fluid off to make it easier for
3 the patient to breathe. Also, once you have that fluid,
4 you send it to the laboratory so they can do a
5 microscopic exam of that fluid to see if they can pick
6 up the small clumps and clusters of tumor cells.

7 That's exactly what this is right here. There
8 are about maybe 10 or 15 cells in that particular
9 cluster. There weren't very many of these clusters, and
10 by themselves are not quite enough to say this is
11 definitely a malignant tumor. But now in retrospect
12 because we had that biopsy that I showed you a moment
13 ago, it is clear that these fragments were little
14 fragments of tumor breaking off and getting suspended in
15 that pleural effusion.

16 MR. CHAPMAN: The last exhibit here.

17 THE WITNESS: This goes back to the biopsy and
18 this shows a -- an antibody -- an immunostain called
19 cytokeratin 5/6. This refers to a particular molecular
20 weight, cytokeratin, that was very, very characteristic
21 of malignant mesothelioma cells.

22 Sure enough, these malignant mesothelioma
23 cells are pretty strongly positive with it. Not only
24 the epithelioid cells, which are those round or cuboidal
25 cells, but also the spindle cells that you can see

1 pretty easily along in here.

2 That's a little bit out of order, but it
3 confirms what I was saying about that panel of stains
4 that point towards mesothelioma, not toward lung cancer.

5 BY MR. CHAPMAN:

6 Q. Just to follow up on all of this, Doctor, your
7 review of this pathology and staining, what are you able
8 to conclude from that?

9 A. From that I can conclude that this is
10 definitely a malignant mesothelioma. No question about
11 it.

12 MR. CHAPMAN: Okay. Thank you.

13 Can we get the lights back up?

14 BY MR. CHAPMAN:

15 Q. All right, Doctor. Doctor, I want to talk
16 next about how doctors like you determine the cause of
17 mesothelioma, okay?

18 A. Well, simply put, I refer to the Helsinki
19 Criteria because they give a clear road map of the
20 criteria that should be used for that determination.

21 Q. I will hand you this.

22 Dr. Maddox, what did I just hand you?

23 A. You handed me a copy of the Helsinki Criteria,
24 the formal title of this is Consensus Report: Asbestos,
25 Asbestosis, and Cancer, the Helsinki Criteria for

1 Diagnosis and Attribution, published in the Scandinavian
2 Journal of Workers Environmental Health, 1997.

3 MR. CHAPMAN: Your Honor, may I publish to the
4 jury?

5 THE COURT: Mr. Wall?

6 MR. WALL: No objection, Your Honor.

7 THE COURT: Without objection, you may
8 publish.

9 MR. CHAPMAN: Thank you.

10 BY MR. CHAPMAN:

11 Q. Doctor, can you tell us about the importance
12 of the Helsinki Criteria?

13 A. Yes, sir. This is a report of a conference
14 that was attended by 19 participants from all over the
15 world, from Australia, the United States, from Finland,
16 from several European countries. All of these were
17 countries that were not producing asbestos exports.

18 This group included pathologists. It included
19 pulmonary medicine specialists. It included
20 oncologists. It also included other scientists who were
21 not physicians who were interested in research on
22 asbestos-related disease. And what they had between
23 them was collectively they had already published over
24 1,000 papers on asbestos-related disease.

25 So they held this conference to try to

1 determine, general -- what you might call -- rules of
2 the road for studying, diagnosing, and attributing
3 asbestos-related disease.

4 Q. Okay. So I want to go through some of that
5 with you, Doctor. First, up there it says Consensus
6 Report. Can you tell me about that?

7 A. Yes, sir. I tried to already explain that,
8 that this was a multi-disciplinary gathering of
9 pathologists, radiologists, physicians of various types,
10 epidemiologists, toxicologists, industrial hygienists,
11 and clinical and laboratory scientists specializing in
12 tissue fiber analysis.

13 Q. Okay. And then more specifically what I'm
14 trying to get at is, it says "diagnosis" and I think we
15 all understand what "diagnosis" means. What does it
16 mean by attribute, attribution here?

17 A. Cause.

18 Q. All right. And I think you said, Doctor, that
19 this group has studied or published a thousand articles,
20 looked at a thousand articles?

21 A. Prior to this conference, they had published
22 over a thousand articles.

23 Q. And, Doctor, so do they evaluate how you then
24 as appropriate say that mesothelioma is attributable to
25 asbestos exposure?

1 A. Yes, sir, they do.

2 Q. Can you tell me about that?

3 A. Yes, sir. They make several statements
4 throughout the paper. They make, first of all, a
5 general statement, "In general, reliable work histories
6 provide the most practical and useful measure of
7 occupational asbestos exposure."

8 Then they dig down a little deeper in the next
9 slide. They talk about some specific features of these
10 mesotheliomas. They state that all types of malignant
11 mesothelioma can be induced by asbestos, with the
12 amphiboles showing greater carcinogenic potency than
13 chrysotile.

14 In other words, on a fiber-per-fiber basis --
15 excuse me -- on a fiber-per-fiber basis, amosite fibers
16 are stronger than chrysotile fibers.

17 Q. And that's because amosite is considered an
18 amphibole?

19 A. Yes, amosite is the amphibole that we are
20 really dealing with in this particular case.

21 Q. Okay. So let's look at the criteria. Can you
22 explain this to us?

23 A. Sure. These are the types of things that, as
24 we dig deeper into these criteria, that would be
25 accepted each by itself as an indicator of asbestos

1 attribution of malignant mesothelioma.

2 Number one, if you have a sample of lung
3 tissue that you can look at under the microscope, if you
4 do an asbestos fiber count in that lung tissue and there
5 is an elevation in the amount of asbestos in that lung
6 tissue, then that would suffice for causation, for
7 attribution.

8 That's the type of thing that I did for 15
9 years when I had the electron microscope lab. I don't
10 have that anymore. The other problem is that we really
11 didn't have any lung tissue in the biopsy sample of
12 Mr. Crawford to do that type of analysis on. So we
13 can't really consider that particular one.

14 Q. Doctor, if I'm understanding you correctly, is
15 occupational exposure history by itself sufficient to
16 attribute mesothelioma to asbestos?

17 A. Yes, it is. The history of asbestos exposure,
18 including brief or low-dose exposures, as long as there
19 is at least a ten-year latency period, that would be
20 sufficient just by itself according to the Helsinki
21 Criteria.

22 We don't have pleural plaques in this
23 gentleman, but like I said, that's not easily -- that's
24 not always found in malignant mesotheliomas. We don't
25 have asbestosis either, not in this particular patient,

1 but we do have a positive exposure history.

2 Q. Now we have said the phrase "occupational
3 exposure history" a couple times. Can you kind of
4 explain what that actually means, what all that entails?

5 A. Yes, sir. There are several different
6 situations of exposure. There is occupational exposure.
7 That's when you are working with asbestos at arm's
8 length. It's within maybe 2, 3 feet of your face. You
9 are breathing it in directly from the product, the
10 material that you are manipulating.

11 If you are -- for example, if you've got pipe
12 insulation and you are cutting it with a saw, that saw
13 could be kicking back dust right in front of your face.
14 If you are tearing stuff down, boiler insulation, pipe
15 insulation, then you are going to have it sort of
16 swirling up right in front of your face. That's
17 occupational exposure.

18 If you are working on a gasket, you are
19 scraping it off or if you are using a power brush to
20 scrape off that gasket, that's kicking up dust and
21 particles. Again, that could be right in your face.
22 That's direct occupational exposure.

23 But what if that gentleman over there is the
24 one doing the work and I'm sitting over here doing my
25 work which is something different? Then that's not

1 direct occupational exposure, but exposure within a few
2 feet of where the work is actively being done. So that
3 would be indirect occupational exposure or you could say
4 that's bystander exposure.

5 Let's say that I have to deliver papers
6 throughout the job site and there were several people
7 down there doing insulation work or doing some sort of
8 asbestos dust generation and I have to walk back and
9 forth through there every half hour. Then that would be
10 indirect exposure, secondary exposure.

11 What if I had to push a broom along the floor
12 to sweep stuff up at the end of the day? That would
13 probably be direct occupational exposure because it's
14 arm's length, even though the dust was originally
15 generated by somebody else.

16 So there is that. There are other types of
17 second-hand exposure, including take-home exposure. So
18 you work all day and maybe you have work clothes,
19 special work clothes. Maybe you don't. Maybe you're
20 just wearing street clothes and they get covered with
21 dust. You take them home and before you wash them, they
22 have to be shaken out to get the dust out of the cuffs.
23 People still wear pants sometimes with cuffs, although
24 that was something in the past.

25 But, you know, out of the pockets, get that

1 dust out, shake the clothes to get some of the dust off
2 before it goes into the washing machine, and that's
3 going to cause take-home exposure. That exposure will
4 be to the family member that's doing the laundry.

5 But also it can contaminate the entire house.
6 It can get into the rugs. It can get into the sofas.
7 It can get into the car when you drive back and forth to
8 work. That's domestic exposure, a type of second-hand
9 exposure.

10 Okay. What if you live downwind from an
11 asbestos factory? There are reports where there have
12 been long-term asbestos factories and they have tracked
13 out where people have lived, like the concentric circles
14 on a bull's eye. You can see an increase as people get
15 closer to the factory of the asbestos-related disease
16 they are talking about. It might be pleural plaques.
17 Might be pleural mesothelioma, whatever. That would be
18 a type of environmental exposure that would be
19 sufficient in some cases to cause malignant
20 mesothelioma.

21 The rate of mesothelioma from that type of an
22 environmental exposure is not as high as the rate of
23 mesothelioma from a direct occupational exposure,
24 certainly, certainly not. But still there is no
25 threshold. There is no bottom limit that you have to

1 exceed before you can get mesothelioma. As long as
2 you've got exposures that are significantly above normal
3 background environmental levels, you will start to
4 develop or acquire an increasing risk of developing
5 malignant mesothelioma.

6 MR. CHAPMAN: Your Honor, I'm about to switch
7 to a different topic here. So if you wanted to take a
8 break, now would be a good time to do that.

9 THE COURT: That would be good. Let's take a
10 break at this time, members of the jury. Be refreshed,
11 and we are now at about 23 of. So why don't we come
12 back about 10 of or around that period of time. Let the
13 bailiff know, Madam Foreperson, when all are refreshed
14 and ready to go. You may go to the jury room.

15 (Jury dismissed.)

16 THE COURT: Dr. Maddox, you may be at ease.
17 Don't discuss your testimony, as you know.

18 THE WITNESS: Yes, ma'am. Thank you much.

19 (A recess transpired and the jury was brought
20 back into the courtroom.)

21 THE COURT: Before you proceed, listen up.
22 Before you proceed, Dr. Maddox, if you will have a seat
23 for a minute.

24 Members of the jury, I am advised by our
25 bailiff that several of you indicate that you are

1 familiar with the name of the pathologist at the
2 Spartanburg Hospital, and so I would like first to ask
3 all who are familiar with the -- I think it's -- was it
4 Dr. Wynn?

5 THE WITNESS: The pathologist was Al Campbell.

6 THE COURT: Excuse me. Alfred Campbell, M.D.

7 All right. All right. Each juror that is
8 familiar with Dr. Alfred Campbell, M.D., raise your hand
9 and give me your number.

10 (Jurors raising hands.)

11 THE COURT: Yes, ma'am?

12 JUROR: 117.

13 THE COURT: 117.

14 JUROR: I also am professionally affiliated
15 with Dr. Woollen.

16 THE COURT: Dr. who?

17 JUROR: Dr. Woollen.

18 THE COURT: Dr. Woollen?

19 JUROR: Yes.

20 THE COURT: All right. And anybody else
21 familiar with anyone associated with Dr. Campbell or
22 others at Spartanburg Medical? All right.

23 Would the fact that you are familiar with
24 Dr. Campbell and Dr. Woollen in any way interfere with
25 your ability to render a fair and impartial verdict in

7/17/2018

203

1 this matter?

2 JUROR: No.

3 THE COURT: Very good.

4 Any other discussion by any of y'all?

5 MS. McVEY: No, Your Honor.

6 MR. WALL: No.

7 THE COURT: Very good. All right. Thank you
8 very much for disclosing that, and we will now proceed.

9 Mr. Chapman.

10 MR. CHAPMAN: Yes, Your Honor.

11 THE COURT: Very good.

12 BY MR. CHAPMAN:

13 Q. Dr. Maddox, when you left off -- and I think
14 we are near the end here. Still have a little bit more
15 to go.

16 When we left off, we were talking about
17 bystander exposure. Can you briefly explain to this
18 jury what bystander exposure is?

19 A. It is the type of exposure where you are not
20 actually working directly with the product or at least
21 you are not actually generating dust from the product,
22 but you come in contact with that dust either
23 simultaneously in a different part of the room or
24 subsequently in the case of, for example, cleanup where
25 you would be sweeping that dust up, re-suspending it in

1 the air, or sweeping up bits of scrap that can be broken
2 up and generate dust at that time. That would be a --
3 an example of secondary exposure.

4 Q. Doctor, in the literature or textbooks, are
5 there any discussions of workers working around
6 asbestos-containing insulators doing their job and those
7 bystanders contracting mesothelioma?

8 A. Yes, there are. The literature including
9 textbooks has examples of that.

10 Q. How well is that understood?

11 A. It's very well understood. I mean, that's --
12 it is not what you are doing that causes the
13 mesothelioma. It is the asbestos that causes the
14 mesothelioma. And whatever route that you get it into
15 your lungs, into your body is -- I mean, it's important,
16 but it's the asbestos itself that's even more important.

17 Q. So if there is an individual who is working
18 around insulators doing work on asbestos-containing
19 insulation, is that considered to be an occupational
20 exposure?

21 A. Yes, an indirect occupational exposure, which
22 overlaps with a type of secondary exposure.

23 Q. What about an individual, Doctor, who is
24 sweeping up after work was done on asbestos-containing
25 insulation? Is that an occupational exposure?

1 A. Yes. I would consider that to be a type of
2 direct occupational exposure.

3 Q. Can you take just a second, Doctor, and
4 briefly tell this jury about the levels of exposure a
5 person may receive from sweeping up asbestos-containing
6 dust?

7 A. Well, I can. You know, I'm sure that it's
8 going to vary from time to time depending on what you
9 are sweeping up, what part of the plant you are working
10 in, how much dust there is in that part of the plant.

11 However, let me just say that at the Newport
12 News shipyard, I had an opportunity to do lung fiber
13 counts on some cleanup workers that would clean up the
14 scrap and the dust that was on the floor at the end of
15 the day, and those unfortunate workers had the highest
16 levels of fiber counts that I studied in my laboratory
17 during those days.

18 Like I say, it's going to vary from time to
19 time, from place to place. It's going to vary with how
20 long you did that type of work, obviously. But what I'm
21 trying to say is that exposure does have the potential
22 of being very intense.

23 Q. Let's clean up for a second.

24 Doctor, just so I understood and make sure the
25 jury understood, are you telling me that exposures from

1 sweeping up have some of the highest fiber counts that
2 you saw?

3 A. In some of -- they have some of the highest
4 fiber counts, lung burden fiber analysis that I've
5 studied in my laboratory back when I was doing that type
6 of examination.

7 Q. Okay.

8 A. You know, I would -- I would estimate that
9 you'd probably be able to generate fiber count levels of
10 at least 1 fiber per cc air concentration, at least
11 intermittently, doing that type of work depending upon
12 the type of asbestos content of the stuff that you are
13 sweeping up off the floor.

14 Q. Okay. And that 1 fiber per cc, what's the
15 significance of that?

16 A. That's 10 points higher than the current
17 permissible exposure limit.

18 Q. Is there a safe threshold to asbestos, Doctor?

19 A. Well, not really. I mean, there is a normal
20 background environmental ambient air level, which is
21 very low. But when you significantly exceed that normal
22 background environmental level, then you are going to
23 start to have a gradual increase in your risk of
24 developing malignant mesothelioma.

25 It's not a threshold. It is not like an

1 on/off switch. It is like a rheostat, like a gradual
2 increase in the risk.

3 Q. Doctor, are there government agencies that say
4 that there is no safe level of exposure to any type of
5 asbestos?

6 A. Every government agency that has ever
7 considered that question of "Is there a threshold level
8 or not?" has said there is no threshold level. The
9 American Society of Epidemiology, which has considered
10 that in a position paper a couple of years ago, there is
11 no threshold.

12 Regulatory agencies, there is no threshold.
13 Even though there is a permissible exposure limit, at
14 the same time people have -- the Congressional Record
15 had a discussion of the PEL in which it was clearly
16 stated that this is probably going to be sufficient to
17 prevent any future cases of asbestosis, but there are
18 still going to be cases of mesothelioma that come
19 through even under the PEL, permissible exposure limit,
20 that we are going to put in place.

21 Q. Okay. Have you heard of OSHA?

22 A. The Occupational Safety and Health
23 Administration.

24 Q. What is OSHA?

25 A. It is a regulatory body of the U.S.

1 government, the aim of which is to make the workplace
2 safer for workers.

3 Q. Does OSHA say anything about asbestos?

4 A. Yes, sir. Some of the first considerations
5 that it had when it was first created back in the 1970s
6 was for creating exposure limits having to do with
7 asbestos exposure.

8 Q. Just to skip ahead here for time purposes, we
9 talked about ambient air levels, Doctor, and background
10 levels.

11 A. Yes, sir.

12 Q. Can you briefly explain what that actually
13 means, what that is?

14 A. Okay. Well, the normal background ambient air
15 level, according to Roggli's textbook, third edition, on
16 page 26 is defined as an average concentration of
17 0.00005 fibers per cc. A cc is about the size of a
18 sugar cube, so you don't really have that fraction of a
19 single fiber in a sugar cube. What you have is a larger
20 space, and if you do the math, it works out to 0.00005
21 fibers per cc. That's the average normal level.

22 The PEL, the permissible exposure limit, is
23 0.1 fiber per cc. So that is approximately 2,000 times
24 higher than average background, according to the figures
25 given in Roggli's textbook.

1 Occupational levels, well, it depends on the
2 occupation. It depends on what you are doing. If you
3 are an asbestos miner or if you are doing tear-out on
4 friable insulation, you can achieve an exposure level of
5 100 fibers per cc, which would be 1,000 times higher
6 than the PEL, which would then be -- I'm not sure of the
7 math here, but I think that would be 5 million times
8 higher than the normal background environmental level,
9 or at least if that's not the precise number, it is
10 somewhere in that range.

11 Q. So, Doctor, you talked about 100 fibers per cc
12 potential levels. Let's scale it down to just one fiber
13 per cubic centimeter, okay?

14 A. Yes, sir.

15 Q. Have you done the math to try to figure out
16 how many fibers you might breathe in a 8-hour day?

17 A. Yes, sir. I prepared a slide that would
18 show -- that would show what you would get in an 8-hour
19 day, and I also attempted to compare that to what you'd
20 have in a normal day just from normal background
21 environmental air.

22 So these are the calculations. If you are
23 working, you're going to be breathing harder than if you
24 were sleeping or just sitting in a chair. So if you are
25 sleeping, sitting in a chair, maybe 10 or 12 breaths per

1 minute, but if you are working, doing some sort of
2 physical work, maybe 16 breaths per minute.

3 One breath has about 500 cc's of air. So 16
4 times 500 would mean every minute you'd breathe in about
5 8,000 fibers. This is at a level of 1 fiber per cubic
6 centimeter, which is about 10 times higher than the PEL.

7 So continuing the math, you'd eventually in
8 one 8-hour working day at a continuous level of 1 fiber
9 per cc, you could breathe in 3.8 million fibers in one
10 8-hour working day.

11 Q. Doctor, this is -- if I understand you
12 correctly, this is at the level of 1 fiber per cc?

13 A. Correct. Which is ten times higher than the
14 PEL, which is 10,000 times higher than the normal
15 background average ambient air level.

16 Q. So 3.8 million, approximately, in a setting of
17 1 fiber cc, are you telling me the exposures we are
18 talking about in this case could be up to 100 fibers per
19 cc?

20 A. Well, intermittently that would be possible.

21 Q. Have you done this same math for background
22 ambient exposure?

23 A. I have.

24 Q. Can you tell us about this, please?

25 A. At a normal average level of 0.00005 fibers

1 per cc, in a 24-hour day you might breathe in about 430
2 asbestos fibers. So there is a big difference between
3 430 and -- what did we say -- 3.8 million asbestos
4 fibers.

5 Q. Okay, Doctor. I want to talk about
6 Mr. Crawford specifically for a moment.

7 A. Yes, sir.

8 Q. We did not ask you to read Mr. Crawford's
9 deposition; is that true?

10 A. Yes, sir, that's correct.

11 Q. You have not read it?

12 A. I have not read his deposition.

13 Q. Okay. We've talked about how the literature
14 and history was the kind of exposures that can cause
15 mesothelioma. Now I want to talk to you about the
16 exposures specific to Mr. Crawford.

17 I want to provide you, Doctor, with a set of
18 facts and ask you some opinions about the facts that I
19 give you.

20 Can I do that?

21 A. Yes, sir.

22 Q. Will you please assume for me, Doctor, that
23 Mr. Crawford is a 72-year-old man who worked at the
24 Celanese Spartanburg facility from 1970 to 1974.

25 I further want you to assume that in this time

1 period, thermal systems insulation was being worked on
2 and installed.

3 I further want you to assume that the existing
4 thermal systems insulation and the newly installed
5 thermal systems insulation were asbestos-containing and
6 that fiber type was amosite.

7 I further want you to assume that Mr. Crawford
8 was close enough to the dust from the thermal systems
9 insulation as a bystander that he said he breathed the
10 dust from the thermal systems insulation.

11 Further, he said that he swept up work that
12 was being done on that thermal systems insulation.

13 And I further want you to assume, Doctor, that
14 this work happened regularly throughout his time at
15 Spartanburg in 1970 to 1974 and that the sweeping
16 occurred after every shift.

17 I'd lastly like you to assume for me that
18 Mr. Crawford was diagnosed with mesothelioma.

19 Do you have those facts in mind?

20 A. Yes, sir, I do.

21 Q. Based on the set of facts that I just
22 described to you, was that exposure a substantial
23 contributing cause to the development of his
24 mesothelioma?

25 A. Yes, sir, it was. And I say that with medical

1 certainty.

2 Q. Do you have an opinion, Doctor, as to whether
3 or not that mesothelioma will cause his death?

4 A. Yes, sir. Unless there was some other
5 extenuating circumstance, he will surely die from this
6 malignant mesothelioma.

7 Q. Okay. I want to talk to you for just a moment
8 about the effects that mesothelioma will have on a
9 person. What kind of things does a person with
10 mesothelioma experience?

11 A. Well, it depends on what -- what stage of the
12 disease. When the person first comes in to see the
13 doctor, he usually comes in because of shortness of
14 breath and that's because of an accumulation of fluid
15 inside the chest.

16 Sometimes the patient will have other symptoms
17 at presentation. There could be chest wall pain if
18 there is early invasion of the chest wall by the tumor.
19 Very commonly, there is anorexia or weight loss.
20 "Anorexia" means a loss of appetite because you are
21 sick. You don't feel like eating. And because you
22 don't eat, you lose weight.

23 Now, as the disease progresses, the symptom
24 pattern changes somewhat. At presentation, they
25 probably drain away the pleural effusion. So for at

1 least a little while it becomes easier to breathe
2 because you don't have that fluid there blocking air
3 going in and out of the lung.

4 Q. Now, you said pleural effusion. I don't think
5 we have talked about that. Can you briefly describe
6 what that is, please?

7 A. Sure.

8 When a mesothelioma first develops, you start
9 to get the accumulation of fluid in the chest because
10 that's one of the things that these tumor cells do.
11 They cause fluid to be released from the soft tissues
12 and the chest fills up with fluid.

13 Now, other things can cause pleural effusions.
14 You can have a pleural effusion because you have
15 pneumonia on one side of your chest. You can have a
16 pleural effusion because you are going into heart
17 failure and fluid seeps out into the pleural spaces.
18 Usually, however, that will be on both sides.

19 When it is just on one side, it is usually due
20 to a more localized cause, like a tumor. It is not
21 specific to mesothelioma tumors. It could be due to
22 lung cancer tumors or to metastatic tumors or other
23 chest wall tumors even. But approximately 90 percent of
24 mesotheliomas at the time they present -- pleural
25 mesotheliomas at the time that they present will have an

1 accompanying pleural effusion.

2 Q. What, if anything, can doctors do about a
3 patient who has pleural effusion?

4 A. They can drain it away. They put a needle in
5 between the ribs, usually in the lateral or posterior
6 lateral portion of the chest, and either let gravity
7 draw fluid or sometimes they will use a syringe to pull
8 off fluid, and then they study that fluid to see if they
9 can see why the effusion developed.

10 Sometimes you can see bacteria or pus from
11 pneumonia that's in that fluid. That says, oh, this is
12 reactive due to this inflammatory thing. Or sometimes
13 they will see clumps and clusters of tumor cells. They
14 saw those in this case, but, you know, there weren't
15 very many of them at that time and they weren't sure
16 whether they were actually tumor or reactive. But later
17 on, when the biopsy was done, it became obvious.

18 Q. Now, you described doctors pulling off this
19 pleural effusion. Is this painful for the patient?

20 A. Usually it is somewhat painful. Sometimes
21 there is a sharp stabbing pain. They use a local
22 anesthetic to numb up that area as best they can, but
23 very often at the time that they were pulling it off,
24 there is a sharp stabbing pain.

25 Sometimes there is something called a

1 vasovagal reflex, which is a reflex down the vagal nerve
2 that slows the beating of the heart and causes a
3 temporary feeling of nausea, and sometimes you can pass
4 out from it.

5 But I did not see in the medical records that
6 our patient actually had that, but it could happen.

7 Q. Let me ask you, Doctor, if Mr. Crawford had
8 this procedure and there was one and a half to two
9 liters of fluid taken off, would that be unusual?

10 A. No, that's pretty much par for the course. In
11 fact, some people will undergo repeated thoracentesis,
12 sometimes three or four times with a liter or a liter
13 and a half of fluid taken off each time. A liter is
14 approximately the size of a quart. So a gallon is 3.7
15 liters.

16 Q. Now, you -- I know I think we are talking
17 about the same thing, but you said thoracentesis. Is
18 that the procedure where the fluid is drawn off?

19 A. Yes, sir. Yes, sir. That is the Greek name,
20 I guess, for drawing off fluid from the chest. If you
21 draw it off from the abdomen, it is called
22 pleurocentesis.

23 Q. Doctor, I think you said mesothelioma is
24 fatal.

25 A. Yes, sir, it is pretty much uniformly fatal.

1 Either the mesothelioma itself or one of the
2 complications of it will kill 99 percent of the people
3 with malignant mesothelioma.

4 Q. Okay. We will get to that in just a second.
5 But let me ask you: Is chemotherapy a
6 treatment?

7 A. Yes. Chemotherapy is very useful and it will
8 usually extend the life of patients as long as they
9 are -- as long as the tumor is sensitive to that type of
10 chemotherapy. It is generally used in most patients
11 unless they are very elderly or if they personally
12 refused to take chemotherapy or if they have such
13 far-advanced disease at the time of presentation that
14 it's not much use.

15 Q. Doctor, can you -- hopefully none of us have
16 had to go through this -- but can you briefly explain to
17 the jury what it is like to go through chemotherapy?

18 A. Well, it depends on the type of chemotherapy
19 that you get. Now, let me start and get more intense.
20 If you start with single-agent chemotherapy used just
21 for the purpose of palliation, you'd generally be given
22 a dose every three weeks. The drug that would be used
23 is called Alimta. You can usually tolerate single-agent
24 chemotherapy with Alimta fairly well. It doesn't cause
25 a lot of toxicity. It doesn't cause a lot of nausea,

1 vomiting, gastrointestinal symptoms. It will produce a
2 gradually increasing state of fatigue or tiredness.

3 A second level of chemotherapy would be a
4 combination of chemotherapy with Alimta and cisplatin,
5 again given just about every three weeks. That will
6 cause the development of more nausea, possible vomiting,
7 possible diarrhea depending upon the person's reaction
8 to it. That's because the addition of cisplatin causes
9 injury to cells in the gastrointestinal tract and that's
10 where those symptoms come from. The patient will also
11 have fatigue, tiredness, probably some loss of appetite
12 as another type of side effect to that level of
13 chemotherapy.

14 There are certain types of drugs that can be
15 added to that. One is called Avastin. What that drug
16 does is it helps to prevent the growth of new blood
17 vessels into the tumor tissue. In other words, it tries
18 to deprive growing tumor of a blood supply, therefore
19 aiding it to die.

20 There are other types of chemotherapy, the
21 so-called immune check point inhibitors, things like
22 PD-L1, which sometimes is extremely effective with lung
23 cancer even. I believe that former President Jimmy
24 Carter had a malignant melanoma, which is a different
25 type of tumor, in his brain and it was PD-L1 sensitive.

1 He was given that chemotherapy and he had a complete
2 response, regression of that tumor.

3 I have seen just a handful of patients that
4 have received PD-L1 that have had at least partial
5 remissions as a result of the use of that drug.

6 However, it's -- it's pretty new. It's only in the last
7 year or so that people have been starting to use that.
8 That type of chemotherapy does not induce a lot of
9 toxicity.

10 Q. Let's back up a second, Doctor. We know the
11 mesothelioma is fatal.

12 A. Yes, sir.

13 Q. How do patients that have mesothelioma, what
14 causes them to actually pass away?

15 A. Well, it depends, and also the spectrum of
16 symptoms will change in the later stages of the disease.
17 Most mesotheliomas continue to proliferate, eventually
18 are no longer inhibited by chemotherapy of any sort.
19 They will invade local structures first. They may
20 invade the heart. They may go right through the
21 pericardium and invade the surface of the heart. If
22 that happens, that can cause an irregular heart beat, a
23 so-called cardiac arrhythmia, and they can die from
24 that. That can be the mechanism of death. It's the
25 tumor that's killing them, but it's the mechanism that

1 is used is cardiac arrhythmia.

2 Other times the tumor can invade the chest
3 wall and the lung. Lung invasion can cause another set
4 of episodes of shortness of breath, but this time it is
5 not because of the lung is compressed. It is because
6 the lung is invaded.

7 That invasion of the lung can also lead to
8 pneumonia. So the patient then can die of pneumonia or
9 of sepsis from a blood-borne infection due to the
10 pneumonia that was caused by the invasive tumor. That's
11 also a tumor death.

12 Sometimes the mesothelioma terminally will
13 metastasize to other parts of the body. Sometimes it
14 will metastasize to the brain. The percentage of
15 mesotheliomas with brain metastasis at the time of
16 original presentation is very low, but by the time that
17 you are in terminal stages of the disease it's much
18 higher.

19 Other causes of death. Well, sometimes people
20 can become very depressed. Sometimes people are
21 suffering so much from the air hunger that's due to the
22 shortness of breath, that they could commit suicide.
23 It's that -- that bad of a disease.

24 MR. WALL: Objection. Objection, Your Honor.
25 That's way speculative.

7/17/2018

221

1 THE COURT: What's that?

2 MR. WALL: He says they can commit suicide. I
3 said that's way speculative for this case.

4 THE COURT: All right. Overruled.

5 BY MR. CHAPMAN:

6 Q. Please continue, Doctor.

7 A. Yes, sir. What I'm trying to say is in the
8 end stages, whatever the cause of death may be, it's
9 going to be extremely unpleasant. Air hunger is usually
10 very prominent. Air hunger is when you are smothering.
11 You are unable to catch a breath because you don't have
12 lung tissue sufficient to breathe anymore.

13 That's generally treated by morphine.
14 Morphine reduces air hunger, but then it also reduces
15 the -- the impulse to breathe. So it becomes then a
16 downward spiral.

17 Q. Doctor, will Mr. Crawford have to incur future
18 medical expenses as a result of his mesothelioma?

19 A. I'm sure that he will, and the medical
20 expenses will mount depending upon his response to
21 chemotherapy. The longer he goes, the more imaging
22 studies that he'll need to document the progression of
23 his disease.

24 If he enters hospice care eventually, there
25 will be costs for that. So they will continue to mount,

1 and the better that he responds to treatment, the longer
2 they will continue to mount.

3 Q. Doctor, what's the life expectancy for
4 Mr. Crawford?

5 A. Well, with a diagnosis at age 72, the
6 actuarial tables that you can look up, they are produced
7 by the Department of Social Security, shows that he
8 would have an expectancy of living to about 87 and a
9 half years. At age 72, about 13 years or a little bit
10 more than 13 years. But, you know, that's an average.

11 There are some people that have other things
12 wrong that are serious that may shorten that. There are
13 other people that might not have things wrong, that that
14 would be extended to an even later age. So that would
15 be if he did not have the mesothelioma.

16 With the mesothelioma, his life expectancy is
17 significantly shortened. On the average -- and this is
18 not specific to Mr. Crawford -- but on the average, most
19 people presenting with a pleural mesothelioma of this
20 cell type, their average survival is about 14 months.

21 By two years, usually 90 percent of them have
22 died of disease, and then there will be a small tail to
23 that survival curve that goes out up to several years if
24 they happen to be one of the people that is responsive
25 to the type of chemotherapy.

1 If it is somebody that's had a good surgical
2 approach that removed the bulk of the tumor to start
3 with, if they presented early, if they are in otherwise
4 pretty good health without too many other things wrong
5 to them, there is the possibility of maybe having
6 several years survival. But the average is 14 months.

7 Q. Doctor, lastly, was Mr. Crawford's
8 mesothelioma preventable?

9 A. Probably so. I mean, it probably could have
10 been prevented by not having asbestos exposure in the
11 first place. As I said before, studies have been done
12 looking back into the previous century to see how many
13 mesotheliomas there were at Harvard Medical School and
14 at the Mayo Clinic. They didn't find any.

15 Q. And it is your opinion, Doctor, that
16 Mr. Crawford's mesothelioma was caused by asbestos?

17 A. Yes, sir. With medical certainty, it was a
18 result of his cumulative asbestos exposure.

19 MR. CHAPMAN: Thank you, Doctor. I pass the
20 witness, Your Honor.

21 THE WITNESS: Thank you, sir.

22 THE COURT: Mr. Wall, cross-examination.

23 MR. WALL: Thank you, Your Honor.

24 CROSS-EXAMINATION

25

1 BY MR. WALL:

2 Q. Dr. Maddox, how are you doing today?

3 A. Very well, sir. Thank you very much.

4 Q. We met face to face the first time a little
5 earlier?

6 A. Yes, sir. We exchanged greetings this morning
7 when we came into court.

8 Q. All right. And I have been on the phone on
9 several occasions listening to you testify.

10 A. Yes, sir, I believe so. Some of the
11 depositions are given with -- some or all -- on occasion
12 all of the people present by telephone rather than in
13 person.

14 Q. Now, you mentioned OSHA.

15 A. Yes, sir.

16 Q. Are you familiar with OSHA?

17 A. Yes, sir. OSHA was this regulatory commission
18 that was started by Richard Nixon during his first
19 presidency period.

20 Q. When did it become the law of -- it became the
21 law of the United States about 1970?

22 A. '70, '71, something like that.

23 Q. Isn't it true that OSHA said that it's the
24 employer's duty to provide a safe workplace for the
25 employee?

1 A. Well, sir, I think that's probably correct;
2 however, I am not an industrial hygienist and I really
3 don't feel that I'm personally qualified to give
4 testimony about the medicolegal aspects of OSHA.

5 Q. Are you aware that OSHA says it is the
6 employer's duty to warn the employee of any hazards on
7 the work site?

8 A. Well, sir, I think that's correct, but I
9 really couldn't quote that chapter and verse for you.

10 Q. Now, you have in front of you your report?

11 A. Yes, sir, I have a copy here.

12 Q. Can you pull it out?

13 A. Yes, sir. (Complying.)

14 Q. Now, in the report there is a clinical
15 history, correct?

16 A. Yes, sir. That clinical history was provided
17 to me by the law firm. It is a concise,
18 preliminary-type thing subject to subsequent
19 modification by exposure witnesses in the case. I'm
20 personally not an exposure witness.

21 Q. That's correct.

22 But they sent this to you for purposes of you
23 making your diagnosis that Mr. Crawford had
24 mesothelioma, correct?

25 A. Well, sir, not so much the diagnosis of

1 mesothelioma -- because that's really based on other
2 criteria -- but as far as the attribution or causation,
3 yes, sir, this would give a basis for attribution.

4 Q. And because of the Helsinki Criteria, you had
5 to get Items 1, 2, and 3, which is fiber counts,
6 asbestosis, or pleural plaques, correct?

7 A. Well, yes, sir, that's right because there
8 wasn't any lung tissue to study in this case. It was
9 like pleural tissue alone that was biopsied.

10 Q. And so as far as your diagnosis, you had to
11 rely on the clinical history that was given to you?

12 A. Yes, sir, just like it says on the first page,
13 that that is the single-most practical and reliable
14 aspect of basing attribution.

15 Q. Would you review the record for the
16 information sent to you by the plaintiff's lawyers in
17 this case for the purposes of helping you make a
18 diagnosis?

19 A. Yes, sir. This will be a quotation.

20 Q. Yes, sir.

21 A. "For your reference, we are" --

22 MR. CHAPMAN: Your Honor, may I place an
23 objection on the record as to hearsay?

24 THE COURT: What is that?

25 MR. CHAPMAN: May I place an objection on the

1 record as to hearsay? This is Dr. Maddox's report and I
2 think Mr. --

3 THE COURT: Overruled. You introduced it, and
4 he can use it.

5 THE WITNESS: Yes, ma'am.

6 Here is what I received. Quote, "For your
7 reference, we are investigating Mr. Crawford's work
8 history and believe he was exposed to asbestos at
9 different times throughout his life. Mr. Crawford
10 worked at Celanese in Spartanburg, South Carolina, for
11 several years in the early 1970s. He worked in areas
12 containing insulated steam pipes. Mr. Crawford
13 repeatedly worked in close proximity to the removal,
14 repair, and replacement of asbestos-containing
15 insulation. This work created visible dust.

16 "Later in his career for a few years in the
17 late 1970s, he worked at Collins & Aikman in
18 Spartanburg, South Carolina. There were times that he
19 worked with and around insulated pipes. The work
20 cleaning asbestos from the pipes created visible dust.

21 "Additionally, for several years during the
22 late to mid-1960s, Mr. Crawford spent most weekends and
23 some evenings at an auto repair shop that his
24 brother-in-law built behind his house. Mr. Crawford
25 assisted with some of the brake work performed there,

1 but he mainly observed it while standing 2 to 3 feet
2 away. His brother-in-law used compressed air to clean
3 the brake drums he worked on which dispersed visible
4 dust into the air."

5 BY MR. WALL:

6 Q. Thank you.

7 A. It continues. "While we are not providing you
8 with the case-specific testimony for Mr. Crawford at
9 this time, please assume that at the time of trial or
10 deposition, we will ask you hypothetical questions
11 regarding certain exposures and whether or not such
12 exposures would have been a substantial contributing
13 factor to Mr. Crawford's development of asbestos-related
14 disease," end quote.

15 Q. Thank you. Then on page 3 of the report, you
16 listed your opinions to a reasonable degree of medical
17 certainty, correct?

18 A. Yes, sir, correct.

19 Q. And you say based upon that exposure history
20 that you just read, patient's cumulative asbestos
21 exposure caused the mesothelioma, correct?

22 A. Yes, sir, correct, his cumulative exposures to
23 asbestos.

24 Q. And "cumulative exposure" means every
25 exposure?

1 A. Well, every significant exposure. There are
2 possible such things as trivial exposures, but what was
3 described today, in my opinion, was not a trivial
4 exposure. It was a relatively high-dose exposure. So
5 there can be multiple components to a person's
6 cumulative exposure.

7 Q. And I want you to further assume that in
8 addition to working with the brother-in-law, that
9 Mr. Crawford worked on his own personal vehicles and
10 changed brakes, asbestos-containing brakes.

11 Based upon the information you gave about
12 brake work and the additional information I gave to you
13 about brake work, do you have an opinion to a reasonable
14 medical certainty whether his brake work was a
15 substantial contributing factor for his involvement in
16 mesothelioma?

17 A. I'm going to have to start off by answering
18 "maybe." May I explain that answer?

19 Q. Sure.

20 A. Okay. If you look at people who are career
21 brake mechanics that perform multiple brake jobs every
22 single day and do that work for years, then you are
23 going to find that those individuals in some recent
24 reports do have a measurable increase in their risk of
25 developing malignant mesothelioma.

1 However, for the shade tree mechanic who may
2 do his own brake job or his friend's or his family's
3 brake jobs a few times, there is probably some exposure
4 and that may constitute a minor contributory component
5 of the overall exposure, but you have to look at the
6 amount. I mean, I personally have done two brake jobs
7 in my lifetime that I can remember.

8 I suppose that I probably had a little bit of
9 asbestos exposure during the time that I did that, but
10 relative to the occupational level exposures that he had
11 elsewhere, it's just not as much.

12 Q. I understand that. But it is exposure,
13 correct?

14 A. Depending upon the techniques that he used and
15 the things that I just mentioned a moment ago, there may
16 be some exposure there.

17 Q. And it is cumulative, correct?

18 A. Sir?

19 Q. It accumulates. It is cumulative exposure?

20 A. Well, yeah. I mean the exposure doing that
21 type of work is additive to whatever other component
22 exposures that he would have had, including his
23 occupational exposure.

24 Q. I want you to go back in your mind and
25 remember the hypothetical question Mr. Chapman gave you.

1 A. Yes, sir.

2 Q. And I want to make a few additions to it. I
3 want you to assume that Mr. Crawford was exposed to
4 asbestos materials that were being removed by Daniel
5 Corporation at Celanese and that materials that were
6 removed were placed there in 1960s and were sold and
7 manufactured by JM -- Johns Manville, Owens-Corning,
8 Unibestos between 1970. The removal was between 1970
9 and 1974 on a regular basis.

10 Do you have opinion with a reasonable degree
11 of medical certainty of whether or not that exposure was
12 significant?

13 A. I would say that the asbestos that was
14 involved in the exposures that you just described was
15 probably significant, yes, sir.

16 Q. And would that exposure contribute to the
17 development of mesothelioma?

18 A. I would say that asbestos exposure probably
19 would contribute. Now, as far as the legal
20 responsibilities for that -- that aspect of the
21 question, I have to bounce back to you because I'm not a
22 legal expert.

23 Q. I understand.

24 Now, I want you to assume again further that
25 Mr. Crawford was exposed to asbestos pipe insulation at

1 Celanese from 1970 to 1974 that was installed by Daniel
2 Corporation and manufactured and sold by Johns Manville,
3 Owens-Corning, and UNARCO from 1970 to 1974 on a daily
4 basis.

5 Was that exposure significant, in your
6 opinion?

7 A. In my opinion, the asbestos involved in those
8 exposure contributed to his cumulative dose which caused
9 his tumor. So that would be a yes. Again, I have to
10 bounce back the aspect that deals with legal
11 responsibility because I just don't know.

12 Q. And that's up to the jury.

13 A. Well, yes, sir, certainly.

14 MR. WALL: Thank you. That's all I have.

15 THE WITNESS: Yes, sir. Thank you, sir.

16 MR. CHAPMAN: Nothing further, Your Honor.
17 We ask that Dr. Maddox be excused.

18 THE COURT: Yes.

19 Thank you so much, Dr. Maddox, for your
20 testimony in this matter, and you may be excused.

21 THE WITNESS: Yes, ma'am. Thank you.

22 THE COURT: Yes, sir.

23 All right. Ms. McVey.

24 MS. McVEY: Your Honor, we would call Jerry
25 Crawford by video.

7/17/2018

233

1 THE COURT: All right. The plaintiff, Jerry
2 Crawford, is called by video.

3 You may proceed.

4 MS. McVEY: Thank you, Your Honor.

5 (Video playback of Jerry Crawford, and then a
6 lunch recess transpires.)

7 1:53 P.M.

8 THE COURT: Okay. Ms. McVey.

9 MS. McVEY: I will give it to Mr. Branham.

10 THE COURT: Mr. Branham.

11 MR. BRANHAM: Judge, if Mr. Crawford had come
12 into this courtroom and attempted to say that one of his
13 co-workers had told him that Covil was the insulator and
14 working around him and he was exposed to Covil's
15 insulation and he tried to say that from the stand,
16 that's 602. It's hearsay. It's not from personal
17 knowledge. He can't say that from the stand. And the
18 same thing is true of 602, which is the rule of evidence
19 in South Carolina, says very, very clearly that a
20 witness may not testify to a matter unless the evidence
21 is introduced sufficient to support a finding that a
22 witness has personal knowledge of the matter. Personal
23 knowledge is what -- as defined in Black's means that
24 they personally perceived it.

25 And there is no exception under Rule 602, the

1 hearsay rule, for a corporate representative. It
2 doesn't exist. It is not there anyplace. A 30(b)(6)
3 witness is designed to allow the plaintiffs to take a
4 single deposition rather than having to take depositions
5 seriatim of corporate witnesses to get the answer.

6 And this isn't just me saying that. This is
7 the Fifth Circuit Court of Appeals and any other number
8 of courts around the country. And the central case in
9 602 in South Carolina is identical to -- this is not
10 South Carolina 602. The federal rule 602 and South
11 Carolina 602 are --

12 What the Union Pump Centrifugal Technology
13 case says from the U.S. Fifth Circuit Court of Appeals
14 in 2010 is that it allows a corporate representative to
15 testify and that 32(A) allows an adverse part to use
16 that testimony at trial. However -- so an adverse
17 party. That's me. I could use the testimony against
18 them because there is an exception to the hearsay rule
19 that's admission by party opponent.

20 On the other hand, they can't. However, a
21 corporate representative may not testify to matters
22 outside his own personal knowledge to the extent that
23 the information is hearsay not falling within the one of
24 the exceptions, and they cite the Brazos River case,
25 which is the predecessor to the Union Pump case.

1 And then there are cases all over the country
2 that say the exact same thing, and that's exactly what
3 we have here. Mr. Glenn first heard about Covil
4 Corporation four weeks ago. He has zero personal
5 knowledge of anything that Covil ever did, said, acted
6 upon.

7 You heard Mr. Wall say in opening they have
8 been defunct since 1991. He can't know anything of his
9 own personal knowledge. So they have a corporate
10 representative and I'm entitled to take his deposition,
11 and those are admissions. We all know that that's an
12 exceptions to the hearsay.

13 On the other hand, he has no personal
14 knowledge of what Covil knew or did. The only thing he
15 knows is what he's read -- that's hearsay statement --
16 or what he heard from Jim Palmer -- or Jim Covil or
17 Palmer Covil. Those are hearsay statements. So if it
18 is good for them, candidly, they can't come in and put
19 that up any more than Jerry Crawford could. It's
20 hearsay, without exception, and that's just the simple
21 truth of it.

22 And, again, it's not just me. It's lots of
23 courts interpreting the exact same evidentiary rule that
24 South Carolina has here. I will tell you that Judge
25 Norton from the District of South Carolina in a case

7/17/2018

236

1 called Morris -- 2013 Westlaw 212587 from 2013 has cited
2 the Brazos River case, which is cited in the middle of
3 the block post approvingly, albeit, for a different
4 issue.

5 THE COURT: All right. Mr. Wall.

6 MR. WALL: Yes, Your Honor.

7 Your Honor, as we recall, we -- not this
8 witness, but in Whitmire we tried to quash the
9 deposition -- I mean, the trial subpoena notice that
10 they served on our corporate representative or served on
11 me as corporate representative.

12 And we said you can't make them come more than
13 100 miles, blah, blah, blah, blah, and we filed a motion
14 for -- to quash that subpoena. And the court denied
15 that subpoena. Yes, the subpoena. Said that a
16 corporate witness can be required to come to trial. And
17 because of that, we have brought our corporate witness
18 in, Your Honor.

19 And since they have subpoenaed him here,
20 because he's more than 100 miles from Charleston where
21 he lives, they have him. He's here. If they put him
22 up, they are at risk of anything he says.

23 In that same motion, we argued that they are
24 correct. The rules say you can use a 30(b)(6)
25 deposition for any purpose, but it doesn't say you can

1 bring the witness here. It's against the rules. So
2 that's why we filed the motion. We did not file in this
3 case. You already turned us down in the other case.

4 Second, the rule says unless there's an
5 exception to hearsay, and the things we would have this
6 man testify about are records regularly kept in the
7 conduct of business, which is exception number 6, and
8 number 16, which are ancient documents. The documents
9 are more than 20 years old that he will be testifying
10 about.

11 And, again, once they put him up, I think he's
12 open to examination by me.

13 MR. BRANHAM: Judge, briefly in response.

14 THE COURT: All right, sir.

15 MR. BRANHAM: We are conflating two different
16 issues. Covil is a party, just like Mr. Crawford is.
17 Parties can be subpoenaed. So that's that issue.

18 The issue of the business records and ancient
19 documents, those are exceptions to the hearsay rule for
20 those documents. In other words, if they want to take a
21 document, put it on the Elmo and publish it as a
22 business record, by all means. Those documents are
23 excepted from the hearsay rule.

24 That is very different than handing Mr. Glenn
25 a document and asking him about that document.

1 Mr. Glenn has no idea how that document was created. He
2 has no idea what the thought process was going on with
3 the document. The only thing they can do is publish
4 those documents to the jury because those documents will
5 transmit whatever information is within them.

6 It is when he begins to get into, well, this
7 is what it meant, this is why it was written, this is
8 what was going on, that you get into a problem with the
9 hearsay rule.

10 So we are conflating two different issues. I
11 have no problem with business records being published to
12 the jury, you know, or ancient documents being published
13 to the jury which would otherwise be exception to the
14 hearsay. But that's different than putting him on the
15 stand and asking him to parrot information about which
16 he has no personal knowledge. Under 602, he has to have
17 personal knowledge and there is no exception to the
18 hearsay rule, and that's what those cases say.

19 MR. WALL: We are not putting him up for any
20 knowledge that he has or gained from. We can publish
21 the documents to the jury any way we want to, and we
22 prefer to have Mr. Glenn publish the documents and say,
23 this is what I found or this is what I didn't find. I
24 went through all the records and couldn't find anything,
25 and that's what he's going to say.

1 He is going to say, I went through all the
2 records we have. He said it in his deposition, if they
3 read his deposition. I went through all the documents I
4 have. There is no document of Celanese -- and, yes, we
5 have documents from Celanese -- that says Covil worked
6 at Celanese.

7 We have the documents from DuPont -- excuse
8 me -- from Daniel, and there is no document that says
9 Daniel hired Covil on this project. That's what he's
10 going to say, that basically those are the things he's
11 going to say, either I have it or I don't have it, and
12 this is what I have and this is -- I'm not going to
13 interpret them at all. These are the documents.

14 MR. BRANHAM: I have no objection to that at
15 all. If what he wants to say is I looked --

16 MR. WALL: Right. So he can't say this.

17 MR. BRANHAM: But so here is the thing, right?
18 We are going to ask him when Covil first learned about
19 mesothelioma, which is 1966 at the Selikoff conference.
20 That's admission by argument, right? We know that's
21 been said, and he's going to testify that that's true.

22 On the other hand, if Mr. Wall wanted to
23 elicit, well, Covil didn't really learn about
24 mesothelioma, they only learned about asbestosis.
25 That's hearsay without exception.

1 And so we are permitted -- because his
2 statements are admission by party opponent, which isn't
3 excepted by the hearsay rule -- to elicit things that go
4 beyond his personal knowledge; whereas, they are not,
5 and that's the issue. And as long as I'm hearing that
6 they are not going to do that, then we don't have any
7 argument.

8 MR. WALL: No. That's one of the reasons they
9 are saying that he was not prepared because they wanted
10 him to do all of that. What does this document mean? I
11 don't know. Palmer Covil never wrote it down.

12 That's why they made sanctions against us.
13 Because he can't do that. He can't get in Palmer
14 Covil's mind. He cannot think about what Palmer --
15 Palmer Covil thought about 30, 40 years ago. All he can
16 say is, this is all I have. That's is what it is.
17 That's all he's doing.

18 MR. BRANHAM: If that's all he's doing, Judge,
19 I'm fine with it. Just we're getting into historical
20 knowledge and they are getting to elicit what that means
21 from --

22 THE COURT: Y'all have said the same thing
23 several times. I don't want to hear it a fourth time.

24 MR. BRANHAM: Sorry.

25 MR. WALL: Your Honor, in turning it around,

1 he should not be allowed to ask Mr. Glenn, well, why
2 don't you know what this means? Why don't you know what
3 they did? Why don't you know what they didn't do? Why
4 don't you know what went on there? All he can do is
5 talk about the documents.

6 THE COURT: Mr. Wall, the rules put you in a
7 different position than Mr. Branham with respect to this
8 witness, in my view. He is a -- Covil is required to
9 designate a corporate representative, and I have
10 sanctioned Covil for their failure to designate someone
11 who could adequately respond to reasonable questions
12 about Covil, as well as sanction them for spoliation of
13 evidence. What I don't want to do is open the door to
14 Mr. Glenn talking about things of which he has no
15 knowledge.

16 I agree completely that the rule is that a
17 30(b)(6) witness cannot be offered by someone in your
18 position to testify as to hearsay. The 30(b)(6) is
19 discovery. If in discovery they find out things that
20 can be entered as admissions of a party opponent, which
21 is another exception to the hearsay rule, but I want to
22 be darn sure that you can, of course, except to the
23 ruling, that if you ask your questions, they are going
24 to be strictly limited to asking him questions about
25 documents that you want admitted.

1 He's going beyond his brief when you ask him
2 about documents he can't find. I don't know what the
3 reason is he can't find them. All right. That is one
4 of the things that is the subject of a good deal of
5 conversation in connection with the sanctions against
6 Covil for not doing a proper job of finding and
7 maintaining these records. They obviously were in
8 existence at one time, and that's going to be testified
9 to.

10 So I -- you started out by saying all we want
11 to do is deal with two exceptions to the hearsay rule
12 that we think pertain to his testimony, which is records
13 and ancient documents. And if that's what you are
14 asking him about, he can proffer the records and ancient
15 documents you want to put into evidence. In fact, you
16 can put those in without him.

17 But if you want to put those in, you say I
18 want to have him put them in, that's fine. But if you
19 get into the business of asking about things he can't
20 find, he doesn't have enough knowledge to know what
21 happened to those things and I'm not going to permit
22 that testimony.

23 MR. WALL: Your Honor, I was going to ask him
24 if he looked at every record that he's --

25 THE COURT: We already know that that's not

7/17/2018

243

1 so. He was furnished with 25,000 pages of material and
2 he examined about 100 pages of that material, according
3 to his 30(b)(6) deposition, and then he flipped through
4 the depositions of the two Covils and that's -- and
5 Mr. Crawford, and that is it, from what I understand he
6 said in his 30(b)(6).

7 Am I wrong about that?

8 MR. WALL: You are close enough. I'm not
9 going to argue with you.

10 THE COURT: That is why I'm not going to
11 permit him to say that he could not find. He has no
12 basis for saying that because he didn't even examine all
13 of the records that were given to him by Covil.

14 MR. WALL: He word searched them, and under
15 "Celanese" and under "Daniel" he word searched all the
16 documents, and those are the only ones that stood out.

17 THE COURT: Well, that's not good enough for
18 me. What he is wanting to testify to is that he didn't
19 find any records of Covil supplying these folks. There
20 might be many different ways that could be done, but he
21 is going to make a blanket statement about that without
22 having looked at all those documents, and I am not going
23 to permit it.

24 So that's my ruling, and I know you except to
25 it and I respect that.

7/17/2018

244

1 Very good. Bring the jury in, please.

2 MR. WALL: Your Honor, at this point I think I
3 need to make a motion for a mistrial.

4 THE COURT: Denied.

5 MR. WALL: This ruling is cumulative on the
6 other rulings about the evidence.

7 THE COURT: All right, sir. You are
8 protected, and it is denied.

9 MR. WALL: Thank you.

10 (Off-the-record discussion.)

11 MS. McVEY: We are going to have two
12 relatively short videos and then --

13 I don't think they need that right now. The
14 T.V., y'all don't need that.

15 MR. BOGER: We don't need it until tomorrow.

16 MS. McVEY: Ours are ready to go.

17 MR. BOGER: Your Honor, just to put a bug in
18 your ear, I still want to put something on the record
19 about one of the witnesses that they are showing
20 today --

21 THE COURT: Waters? I have noticed more
22 filings than a show dog can jump over in the Waters case
23 in Richland County. I'm not going to try that case on
24 the side here.

25 MR. BOGER: We will give some food for

1 thought, but maybe if we take a break --

2 THE COURT: I haven't read any of it. I just
3 got to the notification of electronic filings like about
4 this.

5 MR. BOGER: Yes, ma'am. If we could maybe at
6 a break, if I could put something on the record before
7 they play the video and not before the jury.

8 MS. McVEY: We are going to play the video.
9 We are going to play Harley Neelands, who is really
10 quick, and then we are going to play Mr. Waters.

11 MR. BOGER: And then I need to say what I need
12 to say.

13 THE COURT: I can't bring the jury in here and
14 have that go on.

15 MS. McVEY: I agree. I think we've already
16 argued it. You had a filing on it. You ruled on it,
17 and I think he's protected without making an argument.

18 THE COURT: Ben, all right, two things.
19 Number one, they have something else they want to put on
20 the record. So I've got to keep the jury from coming
21 back.

22 Second thing is they don't need the T.V. until
23 tomorrow.

24 THE BAILIFF: Thank you.

25 THE COURT: You are cool.

7/17/2018

246

1 All right. Let's put this on the record,
2 Mr. Boger. Let me just say this: After a judge has
3 ruled, our rules say that only if the judge invites
4 further comment is that comment needed, and I thought we
5 had a complete discussion of that. And you submitted a
6 brief. All right. The rules don't entitle you to
7 submit a brief and put additional material on the record
8 unless I invite it.

9 So I don't want this to be lengthy. I
10 promised the jury I wouldn't do this and here I am doing
11 it. You were right there and you could have insisted on
12 that but you didn't.

13 MR. BOGER: I apologize, Your Honor. I would
14 agree. I appreciate the Court's indulgence.

15 As you know, we had filed a motion and
16 objected to the presentation of Mr. Waters in this
17 matter. Mr. Waters filed his own case that is ongoing,
18 as the Court is aware. Just generally, what we suspect
19 Mr. Waters' video is going to show and what he's going
20 to testify to, which we object to, Mr. Waters was a
21 Covil employee beginning in 1972. He's identified in
22 his deposition several different plants and locations
23 around the south that he worked in.

24 There is no mention of Mr. Crawford in his
25 deposition or being a co-worker of Mr. Crawford. And

1 the -- Mr. Waters identified that at some point he
2 worked at a Celanese plant in Greenville. There is no
3 timeline of when he worked in the Celanese Greenville
4 plant and there is no mention of a Spartanburg plant
5 that he worked in.

6 And there are two pieces of testimony that we
7 believe are irrelevant to this case and prejudicial in
8 that, one, Mr. Waters alleges that Covil employees
9 committed theft of materials from a plant owned by Duke
10 Power, the McGuire plant, in the late '70s and early
11 '80s.

12 Clearly, Mr. Crawford did not work at that
13 plant. It was after what we all agreed upon was the
14 period of exposure, and we think that is highly
15 prejudicial more so and probative in this matter.

16 Additionally, Mr. Waters has testified that
17 that Covil at one point was placing asbestos products in
18 boxes that were labeled asbestos-free. The plaintiffs
19 designated testimony as such but did not include
20 testimony from Mr. Waters that essentially says that
21 that occurred when he was at the BASF plant in 1974 and
22 1975.

23 There is no mention of that occurring at the
24 Celanese Spartanburg plant during the time frame of
25 relevant exposure to Mr. Crawford in this case. And,

7/17/2018

248

1 again, there is no testimony about any theft occurring
2 by Covil employees at the Spartanburg Celanese plant
3 and, then again, nothing about Covil placing asbestos
4 products in asbestos-free boxes at the Spartanburg plant
5 from 1970 to 1947. Therefore, it is irrelevant to this
6 case, Your Honor.

7 Thank you.

8 THE COURT: All right. Anything further?

9 MS. McVEY: Do you need to hear any argument?

10 THE COURT: I don't think so.

11 MS. McVEY: Okay. Then I'm good.

12 THE COURT: I made the ruling on that he will
13 be able to testify, and the ruling stands.

14 All right. You may bring in the jury.

15 (Jury enters.)

16 THE COURT: Ladies and gentlemen of the jury,
17 I'm sorry I'm tardy. Put that on me, but we had to take
18 up some matters that required some rulings, and they had
19 to be done before I could bring you back. But don't
20 blame these very fine lawyers, but blame this judge if
21 you want to blame somebody.

22 I hope you had a pleasant lunch, and we will
23 continue now, Ms. McVey.

24 MS. McVEY: The plaintiffs would call Harvey
25 Neelands by video.

7/17/2018

249

1 THE COURT: Very good.

2 MS. McVEY: If anybody can't hear, if they
3 will just wave and I can turn it up or down.

4 THE COURT: How are y'all hearing these
5 things? Are you good?

6 (Jurors nodding heads.)

7 (Video played of Harley Neelands.)

8 MS. McVEY: Your Honor, we have one more short
9 video.

10 THE COURT: Very good.

11 MS. McVEY: We will call Dwaine Waters.

12 THE COURT: Dwaine Waters has been called.
13 All objections preserved.

14 MR. WALL: Thank you, Your Honor.

15 (Video played of Dwaine Waters)

16 MS. McVEY: Your Honor, that's conclude the
17 video deposition. We have Mr. Glenn, but I didn't know
18 if you wanted to take a break in between.

19 THE COURT: All right. Well, let's put the
20 lights back up.

21 Yeah. Why don't we take our afternoon break?
22 We will take a break for the afternoon. It is about 12
23 after, so why don't you be back here by 25 after and
24 make sure that everyone is refreshed and ready to go,
25 Madam Forelady.

7/17/2018

250

1 Very good.

2 (Jury dismissed.)

3 THE COURT: All right. Anything further? If
4 not, we will start back up in 10 to 12 minutes.

5 (A recess transpired.)

6 MR. WALL: Your Honor, I would like to put, I
7 guess, a statement of objection in the record.

8 THE COURT: All right. Yes, sir.

9 MR. WALL: I have no idea what the plaintiffs
10 plan to do, but it is my position that they are limited
11 to the examination of Mr. Glenn to the matters that were
12 brought up in his 30(b)(6) deposition and they cannot go
13 far afield from that because this is not just a -- this
14 is not magistrate's court witness. This is a special
15 30(b)(6) witness, and they should not be allowed to go
16 anywhere they want. You need to limit it to the notice
17 of 30 --

18 THE COURT: 30(b)(6).

19 MR. WALL: 30(b)(6) witness.

20 THE COURT: Right. I understand what you are
21 saying, Mr. Wall. I have taken the position in all of
22 these trials that 30(b)(6) witnesses are corporate
23 witnesses. They are the representative of the
24 corporation. They may be subpoenaed and may be asked
25 questions about anything.

1 30(b)(6) is a discovery tool. It does not
2 limit the role of the witness. The limitations that I
3 have placed on your use of the witness proceed from the
4 hearsay rule is exceptions in part being admissions of a
5 party opponent, and because this witness is the designee
6 of the corporation as its corporate representative, he
7 is not only someone who had to respond to the 30(b)(6)s,
8 but he's also present in this courtroom as the voice of
9 the corporation.

10 And as the voice of the corporation, his
11 30(b)(6)s are admissible as admissions of a party
12 opponent and his presence can be required by them to
13 answer questions that they propound to him about this
14 matter if he knows because he is a representative of the
15 corporation.

16 MR. WALL: But he's not required to know under
17 Rule 30(b)(6) everything in the world. He's only
18 required to know about those issues that were set forth
19 in the notice.

20 THE COURT: Well, the 30(b)(6) contains its
21 own requirements and responsibilities for a witness. I
22 already gisted that subject and found that he was not
23 responsibly prepared by Covil Corporation to be his
24 corporate representative and responses to 30(b)(6) and
25 sanctions have been issued for that. That topic is

1 beyond us and I ruled.

2 With respect to this matter, you are raising
3 something different. You are saying for reasons that I
4 am not quite sure I understand, that he should be
5 confined to those matters he was asked about at his
6 30(b)(6) deposition.

7 What I'm saying to you is I view the matter
8 differently. I view the corporation as an entity that
9 speaks only through its representatives. Covil has
10 chosen to make this man the voice of the corporation.
11 He's -- Covil has already been sanctioned because he
12 didn't prepare him well enough, but he is still the
13 voice of the corporation. He's the designated corporate
14 representative of Covil and, in fact, the only other
15 person I know of that might have any knowledge
16 sufficient to be the corporation representative has
17 refused to testify, and that's Mr. Jim Covil because
18 it's been represented he's not capable of testifying.

19 So the only individual that has been
20 identified by the corporation as its corporate
21 representative is this gentleman, Mr. Glenn. Now, I am
22 not going to limit the questions plaintiff may ask him
23 in that capacity. I am limiting your questions because
24 of the cases under 30(b)(6) that say that you are so
25 limited by the hearsay rule, and I placed those

1 limitations on you.

2 So that's the ruling I have made. I think I
3 have done everything I can do.

4 MR. WALL: Under the rules, the corporate
5 representative who is going to testify only has to do --
6 have knowledge that they tell us in advance they want
7 him to be knowledgeable about.

8 THE COURT: That is in his role as 30(b)(6)
9 witness. He is now here in his role as a corporate
10 representative, and they have subpoenaed him in that
11 capacity. He's just a regular old normal witness in
12 that capacity. If he knows, he can say he knows, and if
13 he doesn't know, he says he doesn't know.

14 That's different from the requirement that you
15 make available an individual that you prepare to be --
16 to give discovery information about the corporation.

17 MR. WALL: Your Honor, I don't want to get
18 back into it, but he's traveled more than 100 miles and
19 so he's only here as the corporate representative under
20 30(b)(6).

21 THE COURT: No, sir. He is here because he's
22 a subpoenaed witness and the corporations who are
23 subject to lawsuits in the state of South Carolina
24 cannot escape responsibility to have their
25 representative here by the 100-mile limitation.

1 They are able to be subpoenaed because they
2 are defendants in this lawsuit, and y'all have chosen to
3 make him your representative in that regard. Therefore,
4 his attendance is not constrained by the 100-mile
5 limitation.

6 I'm still not sure how you are relating that
7 to 30(b)(6), but I have ruled on that matter. I ruled
8 on it about three times now, and I will leave your
9 objections in the record and my ruling is in the record.
10 So we are going to go forward.

11 MR. WALL: I don't -- I put the Court on
12 notice I have a feeling they are going to go all over
13 the world in this, things we have never talked about,
14 things he never considered, and I know I can't do it in
15 advance, but I am going to make another motion for a --
16 assuming a --

17 THE COURT: Mistrial.

18 MR. WALL: Mistrial. Thank you, Your Honor.

19 A mistrial if, in fact, they go as far as --

20 THE COURT: I don't want you -- I'm not going
21 to inhibit you from making a motion, but I don't want to
22 have us get into all that of colloquy in front of the
23 jury.

24 MR. WALL: That's what I'm saying, Your Honor.

25 THE COURT: All right. You made your motion

7/17/2018

255

1 for a mistrial. If you want to repeat that notation,
2 what I'm just trying to avoid is having the jury sit
3 through a whole bunch of objections and me having to
4 send them back out again and all that kind of thing.

5 But I'm not going to constrain you. You are
6 going to do what you are going to do, I'm sure. So
7 let's go get at it and let's see how it goes.

8 MR. WALL: Yes, Your Honor.

9 THE COURT: Bring the jury in, please, sir.
10 Y'all have sent me a draft by e-mail,
11 Ms. McVey, of your jury charges. Do you also have a
12 hard copy?

13 MS. McVEY: Yes.

14 MR. BRANHAM: I can have one very shortly,
15 Your Honor.

16 MR. CHAPMAN: May I also have a copy?

17 MR. BRANHAM: Sure, of course.

18 (Jury enters.)

19 THE COURT: All right. Ladies and gentlemen
20 of the jury, the plaintiff's case continues. Ms. McVey?

21 MS. McVEY: Mr. Buha.

22 MR. BUHA: The plaintiff calls the Covil
23 Corporation.

24 THE COURT: All right. You are calling by
25 Covil Corporation in the person of the corporate

1 representative, Mr. Robert Glenn; is that correct.

2 MR. BUHA: That's correct.

3 THE CLERK: Please raise your right hand. Do
4 you swear or affirm that the testimony you are about to
5 give will be the truth, the whole truth, and nothing but
6 the truth, so help you God?

7 THE WITNESS: I do.

8 MR. BUHA: Mr. Glenn, we met briefly.

9 THE COURT: Mr. Buha, I will ask you to speak
10 up.

11 ROBERT GLENN, being first duly sworn,
12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. BUHA:

15 Q. Mr. Glenn, I am Mark Buha and I represent the
16 plaintiff.

17 Would you please state your name for the
18 record?

19 A. Yes. It's Robert Glenn.

20 Q. Mr. Glenn, where do you currently reside?

21 A. I live outside of Charleston, South Carolina,
22 on Johns Island.

23 Q. Okay. Mr. Glenn, you are the person that
24 Covil Corporation designated as its representative,
25 correct?

1 A. That is correct.

2 Q. And the Covil Corporation selected you to
3 speak on behalf of the company in matters relevant to
4 the Covil Corporation in this case, correct?

5 A. That's correct.

6 Q. And you understand that today you are the
7 voice of Covil Corporation as it relates to the matters
8 in this case, correct?

9 A. Yes.

10 Q. Okay. And in preparing to become the
11 representative for Covil Corporation, you have learned
12 that you are not the first person to be its
13 representative in an asbestos case, correct?

14 A. That is correct.

15 Q. And first someone named Palmer Covil gave a
16 deposition in 1977 as a representative of Covil,
17 correct?

18 A. I'm aware of that, yes.

19 Q. And Palmer Covil was the founder of Covil
20 Corporation, right?

21 A. I'm aware of that, yes.

22 Q. And he founded Covil in about 1947, 1948,
23 right?

24 A. I have seen both of those dates, yes.

25 Q. Okay. And he gave a deposition over about

1 three day in 1977, correct?

2 A. Yes, three volumes of his deposition.

3 Q. And by that time in the 1970s, Covil employed
4 several hundred employees; is that right?

5 A. Yes, yes.

6 Q. And Palmer Covil, he's no longer with us; is
7 that correct?

8 A. No, he passed away in 1984.

9 Q. And then someone named James Covil has given a
10 few depositions as a representative for Covil in
11 asbestos cases; is that corrects?

12 A. He's given two that I've seen.

13 Q. And James Covil, he's the son of Mr. Palmer
14 Covil, correct?

15 A. That is correct.

16 Q. And James Covil began working full-time for
17 Covil Corporation in about 1974, correct?

18 A. That is correct.

19 Q. And he continued to work there until about
20 1991, correct?

21 A. Yeah, that's correct.

22 Q. And -- and you read the depositions of
23 Mr. James Covil, correct?

24 A. Yes, I did.

25 Q. And, of course, you read that he gave these

1 depositions as a representative of Covil Corporation in
2 February and March of this year, correct?

3 A. Yes, that's correct.

4 Q. Of course, you understand that James Covil
5 lives in Greenville, South Carolina, correct?

6 A. That is my understanding.

7 Q. Have you never worked for Covil at any point
8 in your life, right?

9 A. I have never been employed, per se.

10 Q. Okay. And you were asked to be a
11 representative for Covil Corporation less than a month
12 ago, correct?

13 A. Yes, about three weeks.

14 Q. And prior to that time about three weeks ago
15 you said, you had never even heard of Covil Corporation;
16 is that correct?

17 A. That is correct.

18 Q. And you've never been in the thermal
19 insulation contracting business; is that correct?

20 A. I have not.

21 Q. Now, Mr. Glenn, you personally, you are a
22 certified industrial hygienist; is that right?

23 A. That is correct, yes.

24 Q. And are you currently a principal at the Glenn
25 Consulting Group, right?

1 A. Yes, I am.

2 Q. And you are the only principal there?

3 A. That's correct.

4 Q. That's operated since about 2010; is that
5 right?

6 A. Yes.

7 Q. And among other things, you testify as an
8 expert witness in litigation, correct?

9 A. I do.

10 Q. And you spend about 20 to 25 percent of your
11 time as a consultant and expert in litigation, correct?

12 A. That is correct.

13 Q. And you've been testifying as --

14 MR. WALL: Objection, Your Honor. This has
15 nothing to do with the corporate history of Covil
16 Corporation.

17 MR. BUHA: It goes to bias, Your Honor.

18 THE COURT: Overruled.

19 BY MR. BUHA:

20 Q. And you've testified as an expert witness by
21 companies defending themselves in litigation for about
22 four, five years now, right?

23 A. That's correct.

24 Q. And you've given about four depositions as an
25 expert witness by companies defending themselves in

1 asbestos litigation; is that right?

2 MR. WALL: Your Honor, can I have a continuing
3 objection?

4 THE COURT: Yes, sir. Your continuing
5 objection is noted. Overruled.

6 THE WITNESS: I think they're two depositions
7 in asbestos and the other two were related to other
8 agents.

9 BY MR. BUHA:

10 Q. Do you do that for free or are you compensated
11 for your time?

12 A. I'm compensated.

13 Q. And I understand for your time as a consultant
14 as an expert and an expert you are compensated at about
15 \$450 an hour?

16 A. That is correct.

17 Q. And in 2002 you started working in D.C. for a
18 law firm called Crowell & Moring; is that correct?

19 A. That was actually in 2004.

20 Q. 2004, okay. Crowell & Moring is an
21 international law firm, fair?

22 A. They are.

23 Q. From about 2004 to 2010 you worked out of D.C.
24 in the litigation group of Crowell & Moring as an
25 in-house consulting scientist, correct?

1 A. Yes.

2 Q. You read depositions, provided summaries, made
3 reports on different medical aspects in cases, things of
4 that nature, correct?

5 A. That's right.

6 Q. And Crowell & Moring has defended companies in
7 asbestos litigation, right?

8 A. Yes.

9 Q. And you participated in that, among other
10 things, during your time while employed at this firm,
11 Crowell & Moring?

12 A. As a non-testifying expert, yes.

13 Q. And although it is not a substantial amount of
14 your time, Crowell & Moring still engages you to do work
15 to this day, correct?

16 A. I haven't done anything for them lately.

17 Q. Okay.

18 A. We separated in 2015.

19 Q. I see.

20 And you are familiar with an entity called the
21 National Mining Association, correct?

22 A. Yes, I am.

23 Q. And the National Mining Association represents
24 corporations in the coal and metals industry in the
25 United States, fair?

1 A. That is correct.

2 Q. And you have served as a lobbyist for the
3 National Mining Association, correct?

4 A. No.

5 Q. Has that always been your testimony, sir?

6 A. I'm not a lobbyist. I'm not a registered
7 lobbyist.

8 Q. Okay. In what capacity have you served the
9 National Mining Association, sir?

10 A. I provided opinions on public policy.

11 Q. Okay. It's always been your testimony that
12 you are -- that you are not a lobbyist for the National
13 Mining Association; is that right?

14 A. I have never been registered as a lobbyist and
15 I don't consider myself to be a lobbyist and never have.

16 Q. Okay. And you worked for the National Mining
17 Association during a period where -- when the Mine
18 Safety and Health Administration wanted to lower the
19 permissible exposure limit for coal mine dust; is that
20 correct?

21 A. I was consulted to the National Mining
22 Association. I worked for Glenn Consulting Group.

23 Q. You worked for them during this time when the
24 Mine Safety and Health Administration wanted to lower
25 the permissible exposure limit, correct?

1 A. Yes, I consulted at that time.

2 Q. Just so the jury understands, permissible
3 exposure limit is the legal limit for exposure to a
4 chemical substance or physical agent that a regulatory
5 body allows a person to be exposed to in a workplace,
6 correct?

7 A. Yes, that's pretty much the definition.

8 Q. And when the Mine Safety and Health
9 Administration wanted to lower the amount of coal dust
10 someone could be exposed to in the workplace, the coal
11 mining companies for the National Mining Association
12 hired you as a consultant in that, correct?

13 A. Yes, because of my experience and research on
14 coal mine dust.

15 Q. And you have testified on behalf of companies
16 that sell mineral dust in the public policy arenas,
17 correct?

18 A. Industrial minerals.

19 Q. Industrial minerals, okay.

20 A. Yes.

21 Q. And you testified on behalf of companies that
22 might be affected by regulations concerning exposure to
23 industrial minerals in front of state legislative
24 bodies; is that right?

25 A. Yes, I've done that.

1 Q. And you've testified before the Missouri
2 Legislature on proposed legislation related to silica
3 dust; is that right?

4 A. That is correct.

5 Q. And you have testified before the Maryland
6 Legislature, correct?

7 A. Yes.

8 Q. And you also submitted comments to an entity
9 called the National Institute of Occupational Safety and
10 Health, correct?

11 A. The Maryland testimony was not related to any
12 agents. They are occupational agents. I was testifying
13 on recreational fishing.

14 Q. Okay.

15 A. I was on the executive board of the Coastal
16 Conservation Association of Maryland.

17 Q. Okay. My question following that was: You
18 submitted comments to the National Institute of
19 Occupational Safety and Health on behalf of the
20 Coalition for Litigation Justice, correct?

21 A. National Institute for Occupational Safety and
22 Health. I was formerly employed by them for ten years.

23 Q. Okay. And -- but you submitted comments to
24 that institution, the National Institution for
25 Occupational Safety and Health on behalf of the

1 Coalition for Litigation Justice, correct?

2 A. That is correct.

3 Q. And Crowell & Moring, the D.C. law firm that
4 you worked with for a number of years, formed that
5 coalition for the litigation of justice; is that
6 correct?

7 A. They did.

8 Q. And without getting too much into the weeds
9 here, your comments were about how to define asbestos
10 versus non-asbestos in minerals such as talc; is that
11 right?

12 A. That is actually in asbestos minerals, not
13 talc minerals in that specific case. It dealt with
14 both, talc and asbestos.

15 Q. It dealt with talc and asbestos?

16 A. Yes, and it also dealt with health.

17 Q. Okay. You have been retained by, as an expert
18 witness, a company called Pfizer, correct?

19 A. Yes, I have.

20 Q. And you were retained by Pfizer in asbestos
21 litigation, correct?

22 A. Talc potentially contaminated with asbestos.

23 Q. Now, Mr. Glenn, you gave a deposition in this
24 case last week; is that right?

25 A. That is correct.

1 Q. And at that time you were aware that there
2 have been about 24,000 pages of documents that have been
3 produced by Covil in this case; is that correct?

4 A. Yes, I am aware of that.

5 Q. And prior to that deposition, in your
6 preparation as the role -- for your role as a corporate
7 representative, you read about 100 pages of those
8 documents; is that correct?

9 A. That's probably right at that time. I've
10 searched more of them since then.

11 Q. And to be sure, you also read some depositions
12 prior to your -- your deposition last week, right?

13 A. Yes, I did.

14 Q. And you read the deposition of Palmer Covil
15 that took place in 1977?

16 A. I did.

17 Q. And you read the depositions of James Covil
18 that took place earlier this year, right?

19 A. Yes.

20 Q. Now, you or your consulting group has charged
21 Covil for your time in preparing and testifying as a
22 representative of Covil; is that correct?

23 A. Yes. We will be. We haven't yet.

24 Q. I see. And you testified in your deposition
25 last week that up until that time a week ago, you had

1 spent about 40 or 50 hours preparing for your role as a
2 representative; is that right?

3 A. Yes.

4 Q. And you charged Covil -- is that also at the
5 rate of \$415 per hour?

6 A. That is.

7 Q. Did you charge Covil for the drive up from the
8 Charleston area up to here?

9 A. In my -- my fee structure is I charge door to
10 door.

11 Q. That's about a three-hour drive, something
12 like that?

13 A. Yes.

14 Q. And do you charge for your time in the
15 courtroom today?

16 A. Yes.

17 Q. And that's also at the same rate of \$415 per
18 hour?

19 A. That is.

20 Q. Now, between your deposition last week and
21 when you came to the courtroom today, have you done any
22 additional work to prepare to testify as a
23 representative for Covil Corporation?

24 A. Yes. I've had some limitation of the time I
25 could spend, but I have spent time, more time. But

1 there is a limitation to it.

2 Q. Could you estimate for us how much time you've
3 spent since your deposition last week?

4 A. It's probably up to 40 hours.

5 Q. 40 hours in the last week?

6 A. 40, 45, yes.

7 Q. It was at least 40 hours before your
8 deposition last week?

9 A. Yeah.

10 Q. And then another 40 hours in the last week,
11 correct?

12 A. Approximately.

13 Q. And then at least three hours for your drive
14 from the Charleston area to here, correct?

15 A. Correct.

16 Q. And you are going to bill Covil Corporation
17 \$415 per hour for all of that?

18 A. Correct.

19 Q. And so we are looking, at the least, 83 hours
20 in which you are going to bill at \$415 per hour; is that
21 right?

22 A. Yes.

23 Q. Now, I'm not the best mathematician, but that
24 comes out to a little bit over \$34,000; is that right?

25 A. Sounds about right. I don't count. I'm not

1 great at mathematics in my head either. So...

2 Q. Now, I'm going to switch gears -- switch gears
3 real quick and not talk so much about you, but I'm going
4 to start asking you questions about Covil.

5 A. Okay.

6 Q. Now, Covil formed sometime around 1947 or
7 1948; am I correct?

8 A. That's correct.

9 Q. And Covil shut down or ceased operating in
10 about 1991, correct?

11 A. Yes.

12 Q. And I want to go over briefly what Covil did
13 as a business during that time. Do you understand that?

14 A. Yes.

15 Q. And Covil sometimes acted as a distributor to
16 industrial sites in which it would purchase materials
17 manufactured by others, hold it in stock, and then sell
18 it to an industrial site.

19 Is that one of the things that Covil did?

20 A. Yes, they did. They sold it to industrial
21 insulators.

22 Q. And other times Covil acted more as a broker
23 than distributor. It would arrange for a sale between a
24 manufacturer of a product and industrial site, and the
25 manufacturer would then sell it directly from its

1 manufacturing sites to the industrial -- the industrial
2 site, correct?

3 A. Yes, they would sometimes have it shipped from
4 the manufacturer to the site where the work was going to
5 be done.

6 Q. And for brokering that deal, Covil would
7 receive a commission for that work; is that fair?

8 A. Yes, I expect so.

9 Q. And among other products that Covil would
10 distribute between about 1948 and 1991 was
11 asbestos-containing thermal insulation during at least
12 some of those years, right?

13 A. They did supply that, yes.

14 Q. And although Covil never manufactured any
15 thermal insulation products, Covil has put its brand
16 name "Covilite" on products manufactured by others; is
17 that right?

18 A. There are two, yes.

19 Q. Okay. And in addition to acting as a
20 distributor or selling products, Covil sometimes would
21 act as a contractor or a subcontractor in which it was
22 hired to do the labor of installing thermal insulation
23 at an industrial site; is that right?

24 A. Yes, I did.

25 Q. And in those cases, Covil's employees were on

1 a job site installing thermal insulation; is that right?

2 A. Yes.

3 Q. And sometimes in addition to installing
4 insulation in a site, Covil had maintenance contracts at
5 a facility, right?

6 A. Yes.

7 Q. And the -- Covil had to maintain the
8 insulation in a facility and the maintenance contract
9 would define how long Covil would be there; is that
10 fair?

11 A. Yes.

12 Q. And Covil agrees that the contract business in
13 which it would install or maintain insulation
14 represented about 60 percent of Covil's business and the
15 distributor aspect was about 40 percent; is that a fair
16 estimate?

17 A. Yeah, I understand that's 60 percent and 40
18 percent of the revenue stream.

19 Q. And I think you said this earlier, but in the
20 1970s, by the 1970s, Covil had a couple hundred
21 employees; is that right?

22 A. Yes, 250 or so.

23 Q. Okay. And Covil agrees that it was the second
24 largest insulation contractor in the Southeast United
25 States in the 1960s and 1970s; is that right?

1 A. Yes.

2 Q. Covil would sometimes have multi-million
3 dollar insulation contracts; is that right?

4 A. They did some large contracts, yes.

5 Q. And we mentioned that Covil sold at some times
6 asbestos-containing insulation products; is that right?

7 A. They did.

8 Q. Prior to about 1974 or so, Covil sold a number
9 of different brands of asbestos-containing thermal
10 insulation products, right?

11 A. They did.

12 Q. And Covil sold asbestos-containing products
13 made by a company called Owens-Corning, correct?

14 A. Yes, they did.

15 Q. And have you ever heard a product called
16 Kaylo?

17 A. Yes, I have.

18 Q. And Owens-Corning made this product called
19 Kaylo; is that right?

20 A. That's right.

21 Q. And during certain years, at least until about
22 1972 or 1973, Kaylo was an asbestos-containing calcium
23 silicate insulation, correct?

24 A. Yes.

25 Q. And Covil sold asbestos-containing Kaylo

1 during certain years; is that right?

2 A. I'm sorry. Repeat that.

3 Q. Okay. Covil sold asbestos-containing Kaylo
4 during certain years, correct?

5 A. Yes, yes.

6 Q. And Covil didn't just sell asbestos-containing
7 thermal insulation products from Owens Corning; it also
8 sold asbestos-containing insulation products from Johns
9 Manville, correct?

10 A. Yes, yes, they did.

11 Q. And have you ever heard of a product called
12 Thermobestos?

13 A. Yes.

14 Q. And the name itself, Thermobestos, it sort of
15 indicates it was an asbestos-containing product; is that
16 fair?

17 A. It is. It does.

18 Q. And Covil agrees that sometimes Thermobestos
19 contained asbestos, right?

20 A. I have not seen where -- what Thermobestos
21 contained in their records and I'm not that familiar
22 with the term. I have heard the term.

23 Q. Okay. And Covil also sold asbestos-containing
24 insulation products made by Armstrong cork; is that
25 right?

7/17/2018

275

1 A. Yes.

2 Q. And when Covil acted as a contractor, at
3 contracting sites, Covil sometimes used raw asbestos,
4 right?

5 A. They did.

6 Q. And Covil used the raw asbestos to mix cement
7 or mud?

8 A. It was a mud, yes, sir.

9 Q. And employees would mix the raw asbestos fiber
10 with water to make kind of a paste or mud and then apply
11 that mixture to curbs or joints in the pipes, correct?

12 A. Elbows, around valves, Ts, and things of that
13 nature, yes.

14 Q. Covil agrees that from 1948 to 1973 not all of
15 the thermal insulation products that Covil sold were
16 asbestos-containing, correct?

17 A. That's right. They sold fiberglass, for one.

18 Q. Covil sold some insulation products that could
19 insulate pipes and other machinery that was
20 asbestos-free, correct?

21 A. Yes.

22 Q. And one of those examples would be fiberglass,
23 right?

24 A. Yes.

25 Q. And I'm going to briefly switch gears here for

1 a moment. Now, Covil had a warehouse and an office
2 located in Greenville, South Carolina; is that right?

3 A. They did.

4 Q. And to be here in the 1907s Covil had a number
5 of other branches, right?

6 A. Yes, they did. They had a lot of offices.

7 Q. Those other branches also had warehouses,
8 correct?

9 A. The Greensboro operation did and I believe the
10 Wilson did. I'm not sure about the Albany, but it
11 probably did. I'm not sure.

12 Q. Okay. And Covil eventually or also had a
13 branch in Columbia, South Carolina, correct?

14 A. They bought a small insulation company in
15 Columbia, yes, and they had an office there.

16 Q. Okay. And so Covil had branches and
17 warehouses in Albany, Georgia, correct?

18 A. Yes.

19 Q. Columbia, South Carolina?

20 A. Yes.

21 Q. Greensboro, North Carolina?

22 A. Yes.

23 Q. And I believe you said Wilson, North Carolina?

24 A. Yes.

25 Q. Correct?

1 A. And Greenville, South Carolina.

2 Q. And the headquarters are kind of a main
3 office, though, in 1970s, that was nearby here in
4 Greenville, correct?

5 A. Greenville in the Berea Industrial Park.

6 Q. And a fire occurred at that warehouse in May
7 of 1973; is that right?

8 A. It did.

9 Q. And the fire did not destroy all of the
10 warehouse but part of the warehouse; is that right?

11 A. From what I've learned, it's a pretty drastic
12 fire. I have seen photographs from the Greenville News
13 where they described it as an atomic fireball. And the
14 pictures in the newspaper, it is pretty devastating. So
15 I don't know exactly how much it destroyed, but it
16 looked pretty bad from the photos I have seen.

17 Q. Okay. And at the Greenville, South Carolina,
18 headquarters, at that warehouse there was also a vault;
19 is that correct?

20 A. It was described in Mr. Covil's deposition as
21 a vault. I think now it was actually a safe.

22 Q. Okay. And now it has been Covil's position
23 that all of its sales invoices prior to May of 1973 were
24 destroyed in that fire; is that correct, sir?

25 A. All of their invoices, yes.

1 Q. I'm going to ask you some general questions
2 about Covil and a company that the jury has heard a
3 little bit about. It's called Daniel Construction and
4 I'm going to ask these about Covil and Daniel generally
5 and not with respect to the Celanese plant in
6 Spartanburg. Do you understand that?

7 A. Yes.

8 Q. Now --

9 A. And I might say in preparing for today, I
10 thought we were going to talk about Celanese
11 Spartanburg, so I -- I have read some about the other
12 operation with Daniel, but I'm not as familiar.

13 Q. Okay. Now, Covil agrees that throughout the
14 years Covil had contracts as a subcontractor for Daniel
15 Construction; is that fair?

16 A. Yes, they did.

17 Q. And Covil agrees that Daniel Construction was
18 one of Covil's biggest customers, correct?

19 A. They were one of the largest, yes.

20 Q. And Covil agrees that this relationship with
21 Daniel in which Covil did work with Daniel Construction,
22 this relationship began by at least the early 1960s,
23 correct?

24 A. Yes.

25 Q. And Covil has agreed or Covil agrees that

1 Daniel Construction, the contractor, was present at the
2 Spartanburg Celanese plant; is that correct?

3 A. Daniel was at that plant, yes. They built the
4 original plant.

5 Q. Now, this plant that we have been calling
6 Celanese in Spartanburg, it also went by the name
7 Hoechst Celanese, correct?

8 A. It did.

9 Q. If somebody identifies it as Hoechst in
10 Spartanburg, they are talking about this plant, Hoechst
11 Celanese in Spartanburg, correct?

12 A. I would expect so, yes.

13 Q. Now, Covil claims that Covil's pipe insulation
14 started going asbestos-free in about 1973 or 1974; is
15 that right, sir?

16 A. '72, '73, '74, that time frame, yes.

17 Q. And as I understand it, it's Covil's
18 contention that Covil received a letter from
19 Owens-Corning that Owens-Corning -- Owens-Corning was
20 going to stop manufacturing asbestos-containing pipe
21 insulation in November of 1972; is that correct?

22 A. Yes.

23 Q. And Covil agrees that that same letter that
24 Covil got from Owens-Corning said that all of their
25 inventory would be depleted in another year; is that

1 right?

2 A. I'm sorry. Repeat that.

3 Q. Sure.

4 Covil agrees that over the next year all of
5 Owens-Corning's inventory will be depleted over that
6 period, correct?

7 A. Yes. Yes, it would take a year to cycle out
8 what was in the warehouse.

9 Q. So if Owens-Corning -- well, I will step this
10 back for a moment. Owens-Corning was probably the
11 biggest supplier of insulation that Covil used and sold;
12 is that correct?

13 A. Yes.

14 Q. Owens-Corning, that's the company that made
15 that stuff, Kaylo, correct?

16 A. That's correct.

17 Q. And if Owens-Corning stopped manufacturing
18 this asbestos-containing Kaylo insulation in November of
19 1972 and it took a full year for them to get rid of
20 their inventory, that could mean they were selling
21 asbestos-containing Kaylo until about November of 1973;
22 is that right?

23 A. Up until that time, yes.

24 Q. Up until --

25 A. It could have been shorter. It could have

1 been a little longer.

2 Q. It could have been up until November of 1973
3 that Owens-Corning was selling asbestos-containing
4 thermal insulation, correct?

5 A. That's not my understanding.

6 Q. What's your understanding, sir?

7 A. My understanding is they stopped manufacturing
8 it in -- and Covil's warehouse took a year for it to get
9 their stock out. It was not my understanding that --
10 that Owens-Corning continued to manufacture or sell
11 asbestos in '73.

12 Q. We will circle back on that.

13 So your understand is that it would take Covil
14 a year for it to get rid of its inventory; is that
15 correct?

16 A. That's correct.

17 Q. And that would take us to about November of
18 1973, correct?

19 A. Yes.

20 Q. And the fire that occurred, that was only at
21 Greenville's branch, correct?

22 A. Yes.

23 Q. And Covil had warehouses in which they stocked
24 inventory of asbestos-containing material at places
25 besides Greenville, right?

1 A. None of them were as large as the Greenville
2 warehouse, I guess.

3 Q. Okay. And regarding the last day that Covil
4 sold asbestos-containing pipe insulation, in reviewing
5 all the documents that you reviewed in preparation for
6 your role as a representative for Covil, are you aware
7 of any verbal or written communication to any of these
8 other branches that said, hey, we are going to stop
9 selling asbestos at this particular date?

10 A. I did not find that in my records, no.

11 Q. And Covil has not found a written asbestos
12 policy that references the last date that they are going
13 to sell an asbestos-containing product; is that fair?

14 A. I have not seen that, no, in the records.

15 Q. Now, we talked earlier about a product called
16 Thermobestos, right?

17 A. Yes.

18 Q. And Thermobestos, the name it sounds like
19 something that might be asbestos-containing?

20 A. Yeah, I'm not sure, but is that a Johns
21 Manville product?

22 Q. Yes, it is.

23 A. Okay.

24 Q. And Covil agrees that Covil sold Thermobestos
25 to a Firestone plant in Wilson, North Carolina, in 1974,

1 correct?

2 A. I'm not -- I haven't studied up on the Wilson
3 operation. I'm sorry. I thought this was going to be
4 Spartanburg Celanese.

5 Q. Sir, I want to talk to you about the last date
6 that Covil was selling asbestos-containing thermal
7 insulation. And you read the deposition of James Covil,
8 correct?

9 A. Yes.

10 Q. And you read his deposition on March 27th of
11 2018, this year, correct?

12 A. Yes, that was -- there were two, one in
13 February and one in March.

14 MR. BUHA: Your Honor, may I approach?

15 THE COURT: You may.

16 BY MR. BUHA:

17 Q. And you said when you reviewed these
18 depositions in preparation for your role as a
19 representative for Covil, you also looked at the
20 exhibits that were attached to those depositions,
21 correct?

22 A. I looked at many of them, yes.

23 Q. And you would agree that this is a Covil
24 invoice, correct?

25 A. Yes.

1 Q. And you can see "Covil Insulation Company"
2 there on the top left-hand corner, correct?

3 A. I do.

4 Q. Hold on. I have to figure out how to do this.
5 And can you see there, it says -- you can see
6 a stamp, "Received, February 9th, 1974," correct?

7 A. Yes.

8 Q. And you can see a sale of 710 or 711 feet of
9 Thermobestos; is that correct?

10 A. Yes.

11 Q. And this is in 1974, right?

12 A. Yes. I cannot make out who stamped "received
13 by." There is a received by stamp.

14 Q. And Covil agrees that it continues to sell
15 asbestos-containing products after OSHA was implemented,
16 correct?

17 A. OSHA rule came out in '72. So they would have
18 sold some after that, yes.

19 Q. And Covil sold a product that was about
20 three-quarters of 1 percent asbestos that was called One
21 Shot or Covilite, correct?

22 A. Yes.

23 Q. And you read the deposition of Palmer Covil,
24 right?

25 A. Yes.

1 Q. And that deposition took place in 1977?

2 A. Yes.

3 Q. And you, of course, saw that Palmer Covil
4 stated that Covil was continuing to sell that product in
5 1977, correct?

6 A. Yes, that was the three-quarter 1 percent
7 asbestos, yes.

8 Q. And Covil also sold asbestos-containing cloth
9 until the time of that deposition in 1977, correct?

10 A. Yeah, it's my understanding that they were
11 using the cloth to make thermal blankets in their
12 fabricating shop in Greensboro and the material was
13 fiberglass inside the blanket but the cloth was asbestos
14 cloth.

15 Q. And Covil was continuing to sell that
16 asbestos-containing product until at least 1977,
17 correct?

18 A. Yeah. Palmer Covil, it was his understanding
19 that that material would not be released in -- in
20 manufacturing or using that cloth.

21 Q. And you would agree, sir, that Covil never
22 tested any of its asbestos-containing products, though,
23 true?

24 A. Yes, they never tested them.

25 Q. So how did Covil know that -- at that time

1 that the asbestos-containing blanket material wouldn't
2 release any asbestos dust, right? They didn't know
3 that?

4 A. I can answer as an industrial hygienist.

5 Q. Okay. And I'm asking you, Covil Corporation.

6 At that time, given that it hadn't done any
7 testing, Covil wouldn't know whether that product
8 released any asbestos dust, correct?

9 A. They would not.

10 Q. Now, today in 2018, Covil understands or Covil
11 agrees that exposure to asbestos can cause lung cancer,
12 correct?

13 A. Today?

14 Q. Yes.

15 A. Yes, they do.

16 Q. And today Covil agrees that based on the
17 science, there is a relationship between asbestos
18 exposure and the disease, mesothelioma, correct?

19 A. Yes.

20 Q. And Covil agrees that asbestosis is also an
21 asbestos-related disease, correct?

22 A. That's correct. All three of those.

23 Q. And Covil agrees that asbestosis can be a
24 fatal disease, correct?

25 A. Yes, yes.

1 Q. And Covil knew that ever since it found out
2 about asbestosis, correct?

3 A. About asbestosis, yes. They did in the '60s,
4 mid-'60s.

5 Q. And, sir, you understand that Mr. Palmer
6 Covil, he passed away in 1984; is that correct?

7 A. Correct.

8 Q. And it's true that he also died of an
9 asbestos-related disease; is that correct?

10 A. He did die of what could have been an
11 asbestos-related disease. His son thought it was lung
12 cancer. His attorney thought it was mesothelioma.

13 Q. And he gave -- I'm sorry. Family members gave
14 a deposition in a case he had regarding that
15 asbestos-related disease; is that correct?

16 A. I'm not sure of that.

17 Q. Now, we talked about how Covil started its
18 business in about 1947, 1948, right around there, right?

19 A. Yes.

20 Q. And Covil was a member of a few trade
21 organizations, correct?

22 A. Yes.

23 Q. And Covil was a member of those trade
24 organizations going back into at least the 1960s,
25 correct?

1 A. Yes.

2 Q. Covil was a member of the Southeast Insulation
3 Contractors Association, right?

4 A. That is correct.

5 Q. In fact, at one point Palmer Covil had been
6 the president and a board of director of that
7 organization?

8 A. He served as a director and as president of
9 that organization.

10 Q. And Covil was also a member of the National
11 Insulation Contractors Association, correct?

12 A. Yes, he was.

13 Q. Okay. And that's abbreviated NICA, correct?

14 A. That's my abbreviation for it.

15 Q. Okay. And Mr. Palmer Covil, he was the
16 president of Covil Corporation in the 1960s, correct?

17 A. Yes.

18 Q. And during that time in the 1960s, Mr. Palmer
19 Covil went to conferences and conventions hosted by
20 these trade organizations of the insulating trade
21 industry, right?

22 A. Yes, he did.

23 Q. And Mr. Palmer Covil subscribed to the
24 National Insulation Contractor Association, the NICA's
25 magazine, and that magazine was called NICA Output?

1 A. Yeah, the trade publication.

2 Q. And from reading the deposition, you saw that
3 Mr. Covil made it his practice to read those magazines,
4 correct?

5 A. He did read them.

6 Q. Mr. Covil kind of knew and understood what was
7 going on generally in the industry in the 1960s; is that
8 fair?

9 A. In the mid-'60s, by then, yes.

10 Q. Covil had an apprentice training program for
11 its employees that began in the 1950s, correct?

12 A. Yes.

13 Q. And Covil claims that it provided respirators
14 to its own employees in the fabrication shop since the
15 1950s, correct?

16 A. Yes.

17 Q. And as I understand it, a gentleman by the
18 name of Russell Johnson eventually took on as the leader
19 of apprentice training program?

20 A. He was in charge of that and in charge of the
21 field operations.

22 Q. And I think we alluded to this, but I just
23 want to be clear for the jury. Covil learned that
24 asbestos can cause asbestosis by about 1965, correct?

25 A. That is correct.

1 Q. Okay. And Covil agrees and understood that in
2 1965 that asbestosis can be a fatal disease, right?

3 A. Yes.

4 Q. And Covil also heard from the asbestos
5 insulation unions that they were starting to make noises
6 about asbestos in about the mid-1960s as well, correct?

7 A. Yes, he did. He had been a union member
8 himself back in his early career. And he heard from,
9 from some people in the industry about concerns that the
10 insulators -- Association of Insulators and Frost --
11 Heating and Frost Insulators were having.

12 Q. And Covil agrees that Mr. Palmer Covil, the
13 president of Covil Corporation in the mid-1960s, heard
14 about a gentleman by the name of Irving Selikoff; is
15 that correct?

16 A. Yes, Dr. Irving Selikoff. He did.

17 Q. And Mr. Palmer Covil heard him speak at the
18 conference, one of these industry conferences in about
19 1966, correct?

20 A. Yes. He didn't -- he was unable to sit for
21 the entire presentation because he had to go to a board
22 meeting, but he did hear Dr. Selikoff at that meeting.

23 Q. And this was a meeting held by the National
24 Insulation Contractors Association, correct?

25 A. Yes.

7/17/2018

291

1 Q. And now Covil agrees that Dr. Selikoff is a
2 reliable source about asbestos hazards, correct?

3 A. It appears from what I have seen that
4 Mr. Covil certainly felt that way, yes.

5 Q. Okay. And Covil -- now Covil started
6 receiving warnings from other companies at a certain
7 point in time, correct?

8 A. Yes.

9 Q. And Covil first saw warning labels on
10 asbestos-containing products in about 1968, correct?

11 A. That's when the industry started putting
12 labels on voluntarily.

13 Q. Okay. And now at Covil, the first employee to
14 file a claim for asbestosis against Covil, that occurred
15 in about 1972, correct?

16 A. There is one in 1972 and one in 1975. Those
17 were Workers' Compensation claims.

18 Q. And Covil agrees that in 1972 when OSHA was
19 implemented, that Covil had actual knowledge of the
20 contents of the OSHA regulations pertaining to asbestos
21 at that time in 1972, correct?

22 A. Yeah. Well, OSHA came about in 1971, April of
23 '71, but they published the first asbestos regulation in
24 1972, June 7th.

25 Q. And, in fact, Mr. Palmer Covil ordered a

1 Federal Register when that was enacted, correct?

2 A. He did.

3 Q. He read the contents of that?

4 A. I assume he read the contents related to the
5 asbestos regulation, yes.

6 Q. And Covil agrees that OSHA is a reliable
7 source on the hazards of asbestos, correct?

8 A. Yes.

9 Q. After OSHA was enacted in 1972, Covil put its
10 own employees under medical surveillance or x-ray
11 analysis programs, correct?

12 A. Yes, he did. The North Carolina workers had
13 been under an x-ray program prior to that because the
14 state required that people working in dusty trades in
15 South Carolina have annual x-rays to get a permit to
16 work.

17 Q. And with Covil's own employees after OSHA
18 became enacted in 1972, one of the things that Covil did
19 was it began mixing asbestos-containing cement in
20 plastic bags, correct?

21 A. They made several changes because of what was
22 in the regulation, and they also -- they had a more
23 sophisticated, more protective respirators. They
24 started buying some industrial vacuums for cleaning the
25 work site and started putting local exhaust ventilation

1 on the saws that they were sawing the asbestos with to
2 reduce the dust exposure.

3 Q. And Covil contends -- it was Covil's position
4 that they started providing these respirators or more of
5 them after 1972, correct?

6 A. That's correct.

7 Q. And Covil's position that they started giving
8 respirators to their own employees when they were using
9 a saw since the 1950s, right?

10 A. Yes, power saws.

11 Q. Now, sir, Covil agrees that a company that
12 fails to disclose hazards that they know about in their
13 product to its customers, that company should be held
14 responsibility, right?

15 A. I did not see that in their documentation, any
16 of the records. Mr. Palmer Covil in his deposition said
17 that it was his opinion that it was up the companies
18 manufacturing the products to pass that information
19 downstream to the users. And he did not put warnings or
20 modify what the companies were sending out.

21 Q. Okay. Let me break that down, sir. First, we
22 talked about a lot of things that Covil knew about
23 asbestos in the '50s, '60s and '70s, and despite all
24 that, Covil continued to sell asbestos-containing
25 products until at least 1973, correct?

1 A. Yes. And that's when industry generally
2 started taking asbestos out of products.

3 Q. We saw the invoice of them selling
4 Thermobestos in 1974, right?

5 A. Yes. And I don't know whether -- I'm not
6 familiar with the Manville products, but I don't know
7 whether they had removed asbestos from their
8 Thermobestos by that time or not.

9 Q. Okay. And Covil continued to sell other
10 asbestos-containing products like asbestos cloth that we
11 talked about until at least 1977, true?

12 A. Yes.

13 Q. And Covil never had a research department?

14 A. No, they did not. It was a small insulator
15 company and distributor. They did not have a medical
16 department for research.

17 Q. It was the second-largest insulator contractor
18 in the southeast as we told the jury earlier, right?

19 A. It was small compared to other organizations
20 at that time that were dealing with asbestos.

21 Q. Covil never had a medical director?

22 A. No, they hired -- they had agreements with --
23 with doctors in the local areas to treat their people,
24 take care of things that might happen on the job,
25 work-related job injuries or any illness.

7/17/2018

295

1 Q. Covil never hired someone to investigate the
2 extent of the hazards of exposure to asbestos at any
3 time in which it was selling asbestos-containing
4 products; is that fair?

5 A. I'm sorry.

6 Q. Covil never hired any sort of doctor or
7 industrial hygienist to investigate the hazards of
8 asbestos for Covil during any point in time in which
9 Covil was selling asbestos-containing products; is that
10 right?

11 A. They never hired industrial hygienists. I
12 didn't find anything related to dust exposures or
13 asbestos fiber exposures in their records.

14 Q. Okay. Covil had multi-million dollar
15 insulation contracts in some instances; is that right?

16 A. They did.

17 Q. And now Covil agrees that supplying
18 asbestos-containing insulation in asbestos-free boxes,
19 now that would be a hazard, correct?

20 A. Yes, yes, that would be.

21 Q. If a box were labeled as asbestos-free, Covil
22 agrees that a person coming towards that box would
23 expect it to be asbestos-free, right?

24 A. Yes. I found no records to indicate that they
25 were putting asbestos products in asbestos-free boxes,

1 though.

2 Q. And prior to your deposition last week, you
3 read about 100 pages of the 24,000 pages of documents
4 that had been produced in this case, right, sir?

5 A. In a word search. I've done 24,000 since
6 then.

7 Q. Okay. Covil cannot say that post-OSHA or
8 after 1972 that every piece of asbestos insulation that
9 Covil sent had a warning on it, correct?

10 A. I'm sorry. After '72 there was not yet to
11 distribute that information downstream. That came in
12 1983.

13 Q. And so Covil agrees that in 1972 it was
14 sending out -- it would sell asbestos-containing
15 insulation that would not have a warning on it -- on
16 its --

17 A. In '72?

18 Q. Yes.

19 A. Yes. They sold it in boxes in the containers
20 that came from the manufactures such as OC,
21 Owens-Corning, Johns Manville, Forty-Eight Insulations,
22 any of the other manufacturers.

23 Q. And at no point in time in this time of
24 selling asbestos-containing products between 1948 and
25 1973, at no point in time did Covil ever place a warning

1 on its asbestos-containing products that it sold,
2 correct?

3 A. That's right. It wasn't a legal requirement.

4 Q. And Covil agrees that it knew that asbestos
5 exposure can cause asbestosis by about 1965, correct?

6 A. Yes.

7 Q. And Covil knew that asbestosis is a fatal
8 disease, correct?

9 A. They did, yes.

10 Q. And the warnings that the manufacturers put on
11 in 1968 --

12 A. Right.

13 Q. -- did any of those warnings say that inhaling
14 asbestos could cause death?

15 A. They started off very general description,
16 contains asbestos, do not breathe, may be a health
17 hazard. And they got more -- more detailed, more
18 specific later.

19 Q. But Covil knew in 1965 that exposure to
20 asbestos can cause death, correct?

21 A. Yes.

22 Q. And at no point in time when Covil learned
23 that in 1965 did Covil ever take it upon itself to place
24 a warning on one of those boxes of asbestos-containing
25 insulation that it sold, right?

1 A. They did not.

2 Q. And you said earlier that Covil had its own
3 employees wear respirators when they would use a power
4 saw on insulation products, correct?

5 A. And later it became more mandatory.

6 Q. But it got started in the 1950s. That's what
7 you told the jury a little while ago?

8 A. Yeah. They had them wear in the 1950s using
9 power saws.

10 Q. And between the 1950s and when Covil was
11 continuing to sell insulation all the way through 1973
12 at least, Covil never placed on any of those boxes of
13 insulation it sold that people working with that stuff
14 should wear a respirator; fair?

15 A. They did not.

16 Q. And Covil has not seen any documentation that
17 when Covil was on a job site and it was working with the
18 asbestos-containing products, that it warned others
19 around them about the hazards of asbestos, correct?

20 A. They did not.

21 Q. So if I understand you correctly, it's Covil's
22 position that it did not have any responsibility to put
23 warnings on the insulations that it shipped to its
24 customers; is that right?

25 A. No legal requirement, yes.

7/17/2018

299

1 Q. In Covil's view, it doesn't have a duty to
2 pass on the information that it knew to people
3 downstream that were using those asbestos-containing
4 products that it was selling, right?

5 A. That was Covil's position.

6 Q. And you gave a deposition a week ago, correct?

7 A. Just over a week ago.

8 Q. And now you said that Covil had no obligation
9 to do so because it was a business decision that Covil
10 made; is that right?

11 A. Evidently, that's what Mr. Covil based it on.

12 Q. Does Covil have a moral obligation to pass on
13 the information that it knows about the hazards of the
14 products that it sold to people that might use the
15 products that they sold?

16 MR. WALL: Objection to no standard nor morals
17 in the courtroom. It is law. And I object.

18 THE COURT: All right. Overruled.

19 THE WITNESS: Do you want to ask that again,
20 please?

21 BY MR. BUHA:

22 Q. Does Covil had a moral obligation to pass on
23 the information that it knew about the products that it
24 sold to the people that were using those products?

25 A. During what time period?

1 Q. During the time period of which Covil sold
2 asbestos-containing products all the way up through at
3 least 1973 and thereafter.

4 A. I don't know. In my position as the corporate
5 representative, I don't know really what was in their
6 minds and, morally speaking, what they could have been
7 thinking at that time. I only know what I have read.

8 MR. BUHA: That's all the questions that I
9 have. I think they asked me to put the exhibit that we
10 talked about earlier as entered into Plaintiff's Exhibit
11 825.1.

12 THE COURT: Now, that's good. Invoice?

13 MR. BUHA: Yes.

14 THE COURT: Objection?

15 MR. WALL: Yes, Your Honor.

16 THE COURT: All right.

17 MR. WALL: The objection is they are trying to
18 imply that Thermobestos included asbestos in it and
19 there is no testimony that it did.

20 THE COURT: I overrule it on that basis.
21 Invoice says what it says and the witness has testified
22 as he has testified and the jury may evaluate it on that
23 basis. So it's admitted.

24 MR. WALL: Yes, Your Honor.

25 THE COURT: Mr. Wall.

7/17/2018

301

1 MR. WALL: Your Honor, at this point I would
2 like to put a proffer on the record.

3 THE COURT: What's that, sir?

4 MR. WALL: I would like to make a proffer.

5 THE COURT: All right. Ladies and gentlemen
6 of the jury, please retire to your jury room for a
7 minute. We have a matter I have to take up with him.

8 (Jury leaves).

9 THE COURT: All right. Mr. Wall desires to
10 make a proffer with regard to Mr. Glenn's testimony.
11 Mr. Glenn is testifying on direct in person. Mr. Glenn
12 testified on his 30(b)(6) and the -- all right. I can't
13 talk with y'all --

14 MS. McVEY: So sorry, Your Honor.

15 THE COURT: Glenn testified on his 30(b)(6).
16 All right. The plaintiff made its designations and
17 defendant did not timely make its objections to
18 designations and it did not timely make its own
19 designations and, therefore, my ruling was that the
20 defendant could not proffer its designations in the
21 plaintiff's case.

22 Now, we have a different situation now.
23 The -- Mr. Glenn is on the stand. He's been offered
24 live by the plaintiff. And I will hear y'all now on
25 why -- the question of whether Mr. Wall is making an

1 assumption that I prevented him from cross-examining
2 Mr. Glenn. I have not made any ruling on that nor has
3 the plaintiff asked me to make a ruling on that.

4 MS. McVEY: That's not our position.

5 THE COURT: I understand that. And so I guess
6 I'm a little confused, Mr. Wall, as to why you would
7 make a proffer because this witness is on the stand and
8 he is -- they have now put him in their case and you can
9 cross-examine him if you want to.

10 MR. WALL: You told me I on the couldn't go
11 into the records -- as to Covil and Celanese and Daniel.

12 THE COURT: Ms. McVey?

13 MS. McVEY: Your Honor, that is not our
14 position. Our position was he could go into the
15 records, but he could not just testify to hearsay
16 statements.

17 THE COURT: That's correct. All I restricted
18 you to -- and let's be clear about this, Mr. Wall,
19 because this thing, we have been back and forth about
20 this several times.

21 I made the ruling that you cannot ask him
22 questions that will require him to speak about hearsay.
23 You said, I don't want to do that. All I want to do is
24 ask him about records, ancient records and ancient
25 documents.

1 And the plaintiffs said, We don't object to
2 that. So if what you are going to do is to ask him
3 about those records, then you may ask him without
4 objection.

5 It was the question of your putting him up to
6 ask his questions that would involve hearsay that is
7 covered by the rulings that have already been made.

8 MR. WALL: I'm not arguing with the Court, but
9 I wanted to put him up. I asked the Court if I could
10 put him up and ask him --

11 THE COURT: What is it you want to ask him,
12 Mr. Wall?

13 MR. WALL: Will they check on the Daniel on
14 the phone records concerning Celanese and Daniel? Did
15 he find anything in those records which indicated that
16 Covil did work at Celanese during '70 to '74 or that
17 Covil did any work for Daniel from '77 forward.

18 THE COURT: All right.

19 MS. McVEY: I'm sorry. I apologize. One more
20 time. Can you tell me the last three things that you
21 said?

22 MR. WALL: Whether he checked all the records
23 at Covil and in the records, did he find anything that
24 established that Covil did work for -- at Celanese, find
25 anything in those records that said that Covil did work

1 for Daniel at Celanese.

2 MS. McVEY: I think the fact that whether he
3 searched -- that he searched for records and didn't find
4 anything I think is fair game -- or did find stuff,
5 whatever that is.

6 MR. WALL: You said earlier I couldn't.

7 THE COURT: Those questions you can ask. It's
8 asking further questions that calls for hearsay or call
9 for him to talk about things that are in the many
10 thousands of pages he didn't look at that we would have
11 heartburn with. But if what you are directing his
12 attention to is some word search he made, you may ask
13 him about that.

14 MR. WALL: Thank you, Your Honor. I wrote
15 down that I couldn't do that, so that's why I just
16 wanted to do a proffer.

17 THE COURT: Are we straight?

18 MS. McVEY: I think we are good.

19 THE COURT: Bring me the jury, please, sir.

20 (Jury enters.)

21 THE COURT: Thank you. Mr. Wall on
22 cross-examination.

23 MR. WALL: Thank you, Your Honor.

24 CROSS-EXAMINATION

25

1 BY MR. WALL:

2 Q. Mr. Glenn.

3 A. Yes, sir.

4 Q. As you know, I represent Covil.

5 A. Yes.

6 Q. In fact, I'm the person who hired you to act
7 as Covil's representative, correct?

8 A. That is correct, yes, sir.

9 Q. And did I ask you to go through the records of
10 Covil and find out certain things?

11 A. You did, yes, sir.

12 Q. And did I ask you to word search all 25,000
13 documents?

14 A. Yes.

15 Q. Did you actually physically look at some of
16 the written pages?

17 A. Yes. I did word searches and would look at
18 pages that were responsive to the word search.

19 Q. Did you look at the documents involving
20 Celanese Spartanburg?

21 A. Yes. I would hold out all of the documents
22 with the search term "Celanese" broadly.

23 Q. All right. Did you hold out any of the
24 documents that said that Covil worked at Celanese from
25 1970 to 1974?

1 A. No, there were none.

2 Q. Did you do the same thing with Daniel
3 Corporation?

4 A. I searched. That was another term I searched,
5 "Daniel."

6 Q. Did you physically look at some of those
7 documents?

8 A. I did. It brought up a much larger stack.

9 Q. In your review of those documents, did you
10 find any documents that established that Covil did any
11 work for Daniel in 1970 to 1974?

12 A. Not in those documents, no, sir.

13 Q. Did you also review the deposition of the
14 corporate representative of Daniel, Mr. Buck?

15 A. I did.

16 Q. Did you look in there for any connection of
17 Covil with the project that Mr. Buck was discussing,
18 which is the Celanese plant?

19 A. I didn't have the exhibits to his deposition,
20 but he referred to a document that seemed to say that
21 Covil was listed possibly as a vendor but not as a
22 contractor on the site. And I think there was a -- he
23 may have mentioned that there was a Southern Insulation
24 company that was on that site.

25 Q. Did you see the portion of the deposition

1 where Mr. Buck said his review of that file only showed
2 three employees of Covil onsite?

3 MR. BUHA: I will object on the basis of
4 hearsay now.

5 THE COURT: Sustained.

6 MR. WALL: Nothing further. Thank you.

7 THE COURT: Any further on redirect?

8 MR. BUHA: Yes, very briefly.

9 REDIRECT EXAMINATION

10 BY MR. BUHA:

11 Q. You told the jury about an hour ago that it's
12 Covil's position that all of its sales invoices were
13 burned and lost in a fire in 1973, right?

14 A. Yes.

15 MR. BUHA: All right. That's all I got.

16 THE COURT: Anything further?

17 MR. WALL: Nothing from us, Your Honor.

18 THE COURT: Very good. Thank you, Mr. Glenn.
19 You may come down.

20 MR. WALL: May he be excused, Your Honor?

21 THE COURT: He may be excused. You are
22 released from your subpoena, Mr. Glenn.

23 THE WITNESS: Thank you.

24 MS. McVEY: Your Honor, at this time we would
25 Machen Lee Carpenter by deposition.

7/17/2018

308

1 THE COURT: All right. If you take the stand.
2 We are going to read portions of the
3 deposition, ladies and gentlemen of a man, Mr. Machen
4 carpenter, and Mr. Chapman will be reading the answers
5 and Ms. McVey will be reading questions in that
6 deposition. I don't think there is anything super
7 lengthy, but it is a piece of testimony that you may
8 consider in the same way as if Mr. Machen Carpenter was
9 sitting here or appearing before you on a video.

10 You may take the stand Mr. Carpenter -- I mean
11 Mr. Chapman.

12 MR. CHAPMAN: Okay, Your Honor. I have a
13 document for you, Your Honor.

14 THE COURT: Yes, sir.

15 MR. CHAPMAN: This will go along with
16 Mr. Carpenter's testimony.

17 THE COURT: Very good. Thank you.

18 (Machen Lee Carpenter's testimony is read.)

19 MR. CHAPMAN: Your Honor, that concludes the
20 deposition testimony of Mr. Carpenter.

21 THE COURT: Very good. You may come down.

22 MS. McVEY: We are about 5:00.

23 THE COURT: Where are you in the case?

24 MS. McVEY: Can we approach for a few seconds?

25 THE COURT: Yes.

7/17/2018

309

1 (Bench conference off the record.)

2 THE COURT: Ladies and gentlemen of the jury,
3 I was just trying to get a picture of where the
4 plaintiffs are. They are fairly close to closing their
5 case. They have two videos that together will take
6 about 30 minutes and then they've got some other short
7 depositions to read in and family members. They think
8 the whole thing, if they started all of this tomorrow
9 morning at 9:00, could be finished by noon.

10 We would have some motions that have to be put
11 on the record as they always do after plaintiff closes a
12 case. Then we would start the defense case, which is
13 likely to be very short, which means we could go to the
14 jury by tomorrow. Or at least do our closing arguments
15 tomorrow.

16 So my question to you is this: Do you want to
17 go now and come back tomorrow morning at 9:00 to do all
18 of what I have described or do you want to hear some of
19 the 30 minutes of video deposition before you leave
20 today?

21 JUROR CHAIRPERSON: I think, start tomorrow.

22 THE COURT: All right. The jury prefers to
23 start fresh tomorrow and that suits me fine. Jury
24 members, let's try not to have me be dilly-dallying
25 around and not let us start at the promised 9:00. I

7/17/2018

310

1 hope that I can adhere to 9.

2 Have a good evening. Remember, don't do any
3 research, don't talk to anybody about the case, and all
4 of those things I previously instructed you, and do have
5 a nice evening.

6 (Jury dismissed).

7 THE COURT: Now, here is what we have got to
8 do and let's talk about how we want to make it happen.

9 We have got the jury charges. Ms. McVey has
10 transmitted an e-mail of jury charges and, Ms. McVey, do
11 you have a hard copy for me?

12 MR. BRANHAM: We are stapling them right now,
13 Your Honor.

14 THE COURT: And I'm sure one will be given to
15 Mr. Wall and Mr. Boger. My thought is that we might
16 come back a little earlier tomorrow and get these jury
17 charges settled.

18 Y'all are familiar with them and you have got
19 yours and I have what I have in the Howe case and I'm
20 sure that's pretty well known to everybody that
21 practices asbestos what I have been charging before.

22 MS. McVEY: Just for your information and for
23 Mr. Wall, we took that Howe charges for this case so
24 they are pretty similar to what you have recently
25 charged with a few differences.

7/17/2018

311

1 THE COURT: Right.

2 MS. McVEY: So --

3 THE COURT: Of course, we would want to
4 also -- did you send me a form of the verdict?

5 MS. McVEY: I think there was a verdict form.

6 MR. BRANHAM: Do we have that coming?

7 MS. McVEY: Yes.

8 THE COURT: Good.

9 All right. Which I am sure it was similar to
10 the jury form in Howe. It was one-defendant case as
11 well with three causes of action: Negligence, implied
12 warranty, and strict liability, and I presented those as
13 the charge --

14 MS. McVEY: It is the same exact form. The
15 damages are different because Mr. Howe was deceased. So
16 we have Mr. Crawford's damages, the estate of his wife's
17 damages, and as well as a charge on -- I mean a question
18 on --

19 THE COURT: The question on punitive.

20 MS. McVEY: Just recklessness.

21 THE COURT: Right. Just to explain, this
22 verdict form, it is what I have been using before. It
23 has the questions about negligence, strict liability,
24 and implied warranty, and then it asks for actual
25 damages for Jerry Crawford and actual damages for

1 Ms. Crawford's loss of consortium, and then if any award
2 is made and pursuant to a liability finding in any of
3 the first three, then Question 5 needs to be answered.
4 That is the predicate for punitive damages. That's all
5 we say about it at this time.

6 If we had that, we would, of course, bifurcate
7 and go to a -- that phase of the trial. So that's what
8 we have got.

9 Yes, ma'am.

10 MS. McVEY: So two things. And we can be
11 ready to close tomorrow. If we don't get to it
12 tomorrow, we can push it to Thursday morning, I suppose.

13 THE COURT: Right.

14 MS. McVEY: One thing I did when I asked the
15 Court just to -- in Mr. Wall's opening, he talked about
16 how Covil is no longer in business, which I think is
17 fine, but he also said it doesn't have any assets.

18 MR. WALL: No, I did not. I stayed away from
19 no assets because that was going to bring in insurance.

20 MS. McVEY: That was my point. If we're going
21 to argue about they are poor, they're defunct, then it
22 goes to ability to pay and we can talk about insurance.
23 I want to make sure --

24 MR. WALL: No, I was very clear to say no --
25 no question of assets. I didn't talk about assets.

7/17/2018

313

1 THE COURT: Very good. Let's make sure we
2 stay away from that unless you want to open the door,
3 and I know you don't want to do that. Let's just be
4 careful about that.

5 MS. McVEY: Okay.

6 MR. WALL: I have it written down.

7 THE COURT: Sure, sure.

8 MS. McVEY: I read it last night. I may have
9 just missed it. I thought that's what he said.

10 THE COURT: I'll check that and if there is
11 some question about it, we can review that. I think it
12 would be this --

13 MR. WALL: I said no business. Right here:
14 Out of business, no employees, no business, no owner.

15 THE COURT: All right. I would like to get
16 together about those charges sometime tomorrow, and we
17 could do it at 8:30 tomorrow or we could do it on the
18 lunch break.

19 MS. McVEY: Sure. When we rest, they will
20 make a directed verdict motion. When they rest, we're
21 going to have to move on some affirmative defenses,
22 assuming they will pursue any affirmative defenses.

23 And then jury charges we could do first thing
24 in the morning depending on --

25 THE COURT: What we will plan to do is this:

1 Tentatively, our idea would be to get the rest of the
2 case tried tomorrow and then stay afterwards, after I
3 dismiss the jury, and go over these jury charges. That
4 will give y'all plenty of chance to see exactly how the
5 case developed and we go into the jury charges and get
6 those set so that I can finalize them and have Kyle or
7 have one of y'all finalize them so I can have my copy
8 and jury's copy.

9 MS. McVEY: Does that mean we would close
10 Thursday morning?

11 THE COURT: Then we close Thursday morning.
12 Is that acceptable?

13 MR. WALL: That's fine with me.

14 MS. McVEY: Absolutely.

15 THE COURT: Very good. That's how we move.
16 Tomorrow we may have -- either tomorrow or Thursday --
17 new Judge McLeod with us. He's been training with Judge
18 Hayes and Judge Hayes' trial docket is finished for the
19 week and he may want to sit with me. He may preside
20 with me. If you see someone else in a black robe,
21 that's Tab and he's doing the new judge's training.

22 MS. McVEY: That would be great.

23 THE COURT: Other than that, I don't know.

24 MS. McVEY: Just for the record, I'm going to
25 hand the court reporter what was read from

1 Mr. Carpenter's deposition since it is part of the
2 court's record as an exhibit. We will mark that.

3 THE COURT: Excellent. All right.

4 Excellent. Have a good evening and we will
5 see you tomorrow morning.

6 MS. McVEY: Thank you, Judge.

7 Mr. Wall and Mr. Boger will share any jury
8 charges they want to share with us.

9 MR. WALL: The only ones we will want are the
10 ones from the other case.

11 MS. McVEY: All right.

12 THE COURT: Very good.

13 5:06 P.M.

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EXHIBIT C

1 STATE OF SOUTH CAROLINA
2 COUNTY OF SPARTANBURG
3

COURT OF COMMON PLEAS

4 IN RE: SOUTH CAROLINA ASBESTOS LITIGATION
5 CRAWFORD v COVIL CORPORATION
6 CASE NUMBER: 2017-CP-4204429
7

8 TRIAL - VOLUME 3
9

10 HEARING BEFORE THE HONORABLE JEAN H. TOAL,
11 SENIOR ACTIVE CIRCUIT COURT JUDGE
12

13 R E A L T I M E D R A F T
14 (Unofficial & Not Certified Transcript)

15 Wednesday, July 18, 2018
16 Spartanburg, South Carolina
17

18 REPORTED BY: DEBORAH L. DUSSELJEE, RPR, CRC
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7/18/2018

317

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3 translation of the court reporter's notes at the time of
4 writing the assignment and is not a certified
5 transcript. The content of this realtime draft
6 transcript contains errors and notes of the
7 stenographer.

8 All errors will be corrected by the
9 stenographer and draft notes will be removed before the
10 final certified transcript is distributed, if any final
11 certified transcript is ordered.

12 * * * * *

13 9:03 A.M.

14 THE BAILIFF: Court will come to order.

15 THE COURT: Morning.

16 THE BAILIFF: Be seated, please.

17 THE COURT: Good morning, ladies and
18 gentlemen. I have your charges, both plaintiff and
19 defense. I have looked at them and I'm prepared to
20 discuss them when we have an appropriate break. I have
21 got your spoliation charge and form of the verdict, and
22 so we are ready to go and hopefully we can do that on a
23 break.

24 MS. McVEY: Your Honor, I think -- I think
25 that even after the jury goes for the day, we can argue

7/18/2018

319

1 that and be good to go.

2 THE COURT: I'm going to try to press as hard
3 as I can to see how far we get and where we are. We've
4 got motions at the end of the plaintiff's case, and I
5 will tell you, I'm going to be paying some attention to
6 those given, what has and has not come in about this
7 case.

8 All right. So I want to move to get as close
9 as we can get to being ready to go to the jury as
10 possible.

11 MS. McVEY: Are we still planning on closing
12 tomorrow because that was our plan, tomorrow morning?

13 THE COURT: I understand that, but I want to
14 see how far we get. Because if we have a big chunk of
15 time we can do it, then we may do it today.

16 MR. WALL: Your Honor, I didn't plan because I
17 thought it was pretty clear we were going to argue
18 tomorrow morning.

19 THE COURT: Let's see how far we get,
20 Mr. Wall.

21 MR. WALL: Yes, Your Honor, but I feel that
22 the decision was made yesterday where the charge --

23 THE COURT: I understand that. But, again, we
24 will see how far we get. You know, I'm not about to
25 close down court at 12:00 for the whole day. I can tell

7/18/2018

320

1 you that. I don't think people need that long to
2 prepare to go to the jury in a case like this, but we
3 will see how we go.

4 Now, tell me what we got for the balance of
5 the day.

6 MS. McVEY: Your Honor, this morning we plan
7 to call Mr. Bowyer by video. That's relatively short.
8 We have Mr. Buck by video, again short. We have a small
9 read-in of Mr. Buck, continuation of a different
10 deposition, and then we are going to call Ms. Giles and
11 Ms. Quinn, the daughters.

12 THE COURT: Yes.

13 MS. McVEY: And then we will be prepared to
14 rest.

15 THE COURT: All right.

16 MS. McVEY: Your Honor, I'm sorry. We want to
17 publish some verified interrogatories about the
18 Thermobestos, which was brought up yesterday.

19 THE COURT: Yep.

20 MS. McVEY: But that will take all of five
21 minutes.

22 THE COURT: All right. So you anticipate that
23 your case will be ready to rest before lunch?

24 MS. McVEY: Yes.

25 THE COURT: All right. Then we have got to

7/18/2018

321

1 argue motions for directed verdict, and those will be
2 done right after lunch. I will take a lunch break, and
3 we will be prepared to argue those right after lunch.

4 MS. McVEY: Right.

5 THE COURT: As I said say, I'm not going to
6 waste a whole afternoon on this thing. If we are ready
7 to go to the jury, we are ready to go to the jury.

8 MS. McVEY: They're going to have a little bit
9 of evidence in their case, and then we will have
10 directed verdict on their affirmative defenses.

11 THE COURT: Right. And that will take up the
12 balance of the day, you'll see.

13 MS. McVEY: It could. And then we have to
14 argue the jury charges. So that's -- that's really why
15 it seems both sides were thinking by the time we get all
16 that done today, it makes sense to open -- I'm sorry --
17 close and charge the jury first thing in the morning.

18 THE COURT: All right. Now, tell me something
19 about the defense case, Mr. Wall. What have you got in
20 the way of witnesses, Mr. Boger?

21 MR. BOGER: Yes, Your Honor. We are going to
22 read in some designations of Palmer Covil.

23 THE COURT: Yes.

24 MR. BOGER: We have counter video for
25 Mr. Bowyer and Mr. Buck.

7/18/2018

322

1 THE COURT: All right.

2 MR. BOGER: That will be it. Our case will be
3 short.

4 THE COURT: Okay. And so, all right, your --
5 I mean just kind of -- all right. I'm not holding you
6 to anything, but I just want to get some sense of it.

7 So we would be prepared to argue motions for
8 directed verdict at the close of defense case. We will
9 have arguments and motions for directed verdict at the
10 close of the plaintiff's case, but we would be able to
11 argue all of the directed verdict motions that would be
12 appropriate at that point at the close of your case.
13 And that sounds like that would -- your case would be
14 ready to close and argue those things by, what? About
15 3:00?

16 MR. BOGER: Yes, Your Honor, I would think so.

17 THE COURT: We would argue those directed
18 verdict motions, and then the only thing -- and then we
19 would deal with the charges. We have a charge
20 conference.

21 MR. BOGER: Yes, Your Honor.

22 THE COURT: So that's how you see the balance
23 of the afternoon.

24 MR. BOGER: Yes, Your Honor.

25 THE COURT: Don't be frightened, Mr. Wall,

7/18/2018

323

1 then. You will have some time to prepare.

2 MR. WALL: Your Honor, I'm always frightened.
3 Don't worry about it.

4 THE COURT: Don't be frightened.

5 MR. WALL: I have been doing this for too
6 long.

7 THE COURT: I understand. I did it many, many
8 years before I got on the Supreme Court and most of it
9 spent in the courtroom like you, a lot on the defense
10 side and a lot on the plaintiff side. We did a lot of
11 everything in my little firm.

12 MS. McVEY: Your Honor, I don't know that we
13 are going to get to lunch with our case. So, two points
14 on that. I think we will be through by 11:00, so I know
15 they need to make directed verdict. I don't know if
16 they want to make -- put a footnote for a directed
17 verdict motion, put on their defense case, let the jury
18 go for lunch, and then we could argue directed verdict
19 on both cases so the jurors are not waiting. I just
20 wanted to throw that out there for you.

21 THE COURT: I'll put some thought into that.

22 MS. McVEY: Okay.

23 THE COURT: Let's just see how it works.

24 All right. All right. Everything said that
25 needs to be said?

7/18/2018

324

1 MR. BOGER: Your Honor, we were going to
2 object to the introduction of the reading of the
3 interrogatories.

4 THE COURT: All right.

5 MR. BOGER: And also the reading of the
6 witness from the Howe case.

7 THE COURT: All right. How about put that on
8 the record right now?

9 MR. BOGER: That's what I was thinking, Your
10 Honor.

11 So plaintiffs are introducing interrogatories
12 from Johns Manville related to Thermobestos products.
13 We would object to that as untimely, Your Honor. This
14 was something that we were notified of this morning and
15 think it should be excluded from the case.

16 THE COURT: All right. This is a timeliness
17 objection on your part, not an objection on any other
18 basis, correct?

19 MR. BOGER: Yes, Your Honor.

20 THE COURT: I would regard it as proper reply
21 testimony to something that was brought up yesterday
22 about Mr. Glenn, by the corporate representative. The
23 corporate representative professed to know not know that
24 Thermobestos had asbestos in it and, therefore, they are
25 claiming surprise and claiming that they have the right

7/18/2018

325

1 to define Thermobestos, which is a product he admitted
2 was sold during the time we are talking about.

3 So I will permit that over your objection.
4 Your objection is fully preserved, of course.

5 MR. BOGER: Thank you, Your Honor.

6 The second, they are proposing to introduce
7 testimony of Mr. Bowyer, the Celanese 30(b)(6) rep from
8 the Howe case -- And we would object -- Buck. I'm
9 sorry. Let me start over.

10 They are proposing to introduce 30(b)(6)
11 testimony through Mr. Buck from the Howe case. Mr. Buck
12 was also deposed in this case. They had plenty of
13 opportunity to ask him relevant questions on this case,
14 and we think the testimony from another case is
15 irrelevant where we have actual video and testimony from
16 Mr. Buck in this case.

17 THE COURT: Was Covil in the other case?

18 MS. McVEY: Yes, Your Honor.

19 MR. WALL: Well, it was until the pleadings
20 was struck, Your Honor.

21 THE COURT: In other words, the portion of the
22 rule that talks about your being able to yourself
23 exercise confrontation rights and examination rights
24 would be complied with in that case given the presence
25 of Covil in the case; am I right?

7/18/2018

326

1 MS. McVEY: Yes, ma'am.

2 MR. WALL: Yes.

3 THE COURT: Well, over your objections, I will
4 allow the admission of these further statements by
5 Mr. Buck.

6 Anything you want to put on about it,
7 Ms. McVey?

8 MS. McVEY: No.

9 THE COURT: Why you are doing it and why you
10 are not satisfied with what you got on it?

11 MS. McVEY: No.

12 THE COURT: This case by way of 30(b)(6).

13 MS. McVEY: Your Honor, in a lot of these
14 cases we try to streamline the depositions, knowing that
15 we can use prior depositions of corporate
16 representatives. That's what we did in this case.
17 Covil was present at the Howe/Buck deposition. They had
18 opportunity to cross-examine them. I think it's fair
19 game.

20 THE COURT: My ruling stands.

21 You are fully protected by your objections,
22 Mr. Boger.

23 MR. BOGER: Thank you.

24 THE COURT: All right. Now --

25 MS. McVEY: Ready for the jury.

7/18/2018

327

1 THE COURT: Ready for the jury.

2 Bring in the jury.

3 (Jury enters the courtroom.)

4 THE COURT: Good morning, ladies and gentlemen
5 of the jury. I hope you had a pleasant evening. I
6 blame myself for the loss of -- we lost our game because
7 I wasn't impressed enough to stay up for all of it.

8 (Laughter)

9 All right. A little outline of what you are
10 looking at today: The plaintiff has a few more things
11 to show you by way of short videos or publication of one
12 deposition excerpt that involved company quotes or
13 co-workers. Then the two children of Mr. Crawford will
14 testify, and we should be finished with the plaintiff's
15 case this morning.

16 All right. The rules of the road require that
17 I then hear certain motions by the parties about the
18 case. When those motions are heard and dealt with, then
19 the defendant will put up his case. The defendant
20 advises that, based on what they know now, their case
21 will be rather short and probably conclude about
22 mid-afternoon.

23 I then have the requirement to hear certain
24 other motions and to deal with the parties about the
25 charges to the jury.

1 As you know, you are the complete and sole
2 judges of the fact. I cannot be the judge of the facts,
3 only you. But I am the judge of the law. And in a case
4 like this, I have to give you a rather lengthy charge.
5 It's not something I love to do, but the rules of the
6 road that govern how we try cases require that I give
7 you a rather lengthy charge about the law and I always
8 print it out and give it to you for you to have in the
9 jury room.

10 Now, you don't have to scrutinize it, try to
11 be your own lawyer, but I have it in there in case
12 something comes up in your deliberations. And if you
13 want to take a look at it, you are going to have it.
14 But it takes awhile for me to deal with the lawyers
15 about what is going to be in the charge and the wording
16 of it.

17 I will do that for the balance of the
18 afternoon, which means that when the defendant rests, I
19 will let you go for the day, which will probably be
20 about mid-afternoon. Then we will come back together
21 tomorrow morning. I will give you the charge, the
22 parties will make closing arguments to you, and you will
23 have the case to deliberate.

24 So that's kind of what is in prospect for
25 today and for tomorrow, and I think we are very much on

1 target to complete our work tomorrow, which means Friday
2 is all yours.

3 So, with that, Ms. McVey.

4 Mr. Chapman.

5 MR. CHAPMAN: Your Honor, we would like to
6 publish some interrogatories to the jury.

7 THE COURT: Very well. Are you simply going
8 to read out the interrogatories to the jury,
9 Mr. Chapman?

10 MR. CHAPMAN: And I would like to place them
11 on the Elmo here.

12 THE COURT: Very good. Before you do that,
13 there have been objections lodged. They are noted.
14 They are noted here in this record at this time and
15 preserved.

16 MR. WALL: Thank you, Your Honor.

17 THE COURT: Mr. Chapman.

18 MR. CHAPMAN: Can everybody see that okay?
19 (Jurors indicating.)

20 MR. CHAPMAN: In the United States District
21 Court for the Southern District of West Virginia at
22 Parkersburg in the case of Robert W. Patterson.

23 Question Number 7: Describe in detail any --

24 MR. WALL: Your Honor, I think we need to
25 publish the date of the interrogatories.

7/18/2018

330

1 THE COURT: Yes, sir.

2 Let me tell you what you are looking at.

3 There are interrogatories, which is one of the tools
4 that is used by both sides to ask questions to the other
5 side before you hear this case and get certain factual
6 information from the other side in the case.

7 Now, in this instance, one of the
8 principals -- whose deposition is this? Whose
9 interrogatory is this? Is this an interrogatory
10 propounded to Covil?

11 MR. CHAPMAN: Johns Manville.

12 THE COURT: Johns Manville. Johns Manville,
13 you have heard that name mentioned. It was a supplier
14 in this case of asbestos material. This is an
15 interrogatory to that corporate organization in another
16 case in which it was sued, and it is proposed to read
17 into the record certain things Johns Manville said
18 factually, I guess, about its product.

19 All right. Mr. Chapman, when was this
20 interrogatory propounded? Or answered?

21 MR. CHAPMAN: Give me one second. It is on
22 the verification.

23 It was November 2nd of 1989.

24 THE COURT: All right. And the caption -- and
25 the party in the case?

7/18/2018

331

1 MR. CHAPMAN: The chief party was Robert W.
2 Patterson.

3 THE COURT: All right. And among the
4 defendants was Johns Manville -- Johns Manville?

5 MR. CHAPMAN: Yes, Your Honor.

6 MR. WALL: Your Honor, Covil was not a party.

7 THE COURT: Covil was not a party to this
8 matter. This is about a supplier of Covil's.

9 All right. You may proceed.

10 MR. CHAPMAN: Thank you, Your Honor.

11 Interrogatory Number 7: "Describe in detail
12 any asbestos-containing products and/or product lines
13 which was mined, milled, manufactured, produced,
14 processed, compounded, converted, sold, marketed,
15 supplied, franchised, distributed, and/or otherwise
16 placed in the stream of commerce by any of the
17 predecessors and/or affiliated business entities
18 identified in the preceding interrogatories.

19 "Answer: See attached Exhibit A for a list of
20 Manville asbestos-containing thermal insulation or
21 shipyard products, as well as certain information
22 relating to those products."

23 Here is Exhibit A: "Manville
24 Asbestos-Containing Thermal Insulation or Shipyard
25 Products.

7/18/2018

332

1 "Product name: Silicated Thermobestos.

2 "Product type: Sheet/block, pipe covering.

3 "Fiber type: Chrysotile and/or amosite.

4 "Percent fiber by weight: 7.0 to 14.3.

5 "Date manufactured: 1966.

6 "Date discontinued: 1974.

7 "Date labeled: 1966."

8 Finally, Your Honor, verification page for
9 November 2nd, 1989.

10 THE COURT: Very good. Thank you,
11 Mr. Chapman.

12 MR. CHAPMAN: Thank you.

13 THE COURT: All right. Ms. McVey, you may
14 proceed.

15 MS. McVEY: At this time we call Mr. Bowyer by
16 video.

17 THE COURT: Very good. Mr. Bowyer is called,
18 and all objections to Mr. Bowyer's testimony have been
19 made and noted and are preserved.

20 MR. WALL: Thank you, Your Honor.

21 (Bruce Bowyer's video played.)

22 MS. McVEY: Your Honor, that concludes the
23 video of Mr. Bowyer.

24 THE COURT: Very good.

25 MS. McVEY: Your Honor, we would like to move

1 into evidence three documents that Mr. Bowyer discussed
2 in his video. We have shown this to Mr. Wall, and I
3 don't believe there is any objection to those.

4 MR. WALL: No objection.

5 THE COURT: No objection.

6 All right. Are you going to display them?

7 MS. McVEY: Yes.

8 THE COURT: Very good. You have the --

9 MS. McVEY: This is the -- just the unmarked
10 map of Celanese that Mr. Bowyer was describing.

11 THE COURT: All right.

12 MS. McVEY: That's 822.2.

13 And this is the annotated survey that
14 Mr. Bowyer marked showing one, two, three, four, and
15 five.

16 THE COURT: All right.

17 MS. McVEY: That's marked as 822.1.

18 Your Honor, I will highlight on this one, but
19 I will put a clean exhibit in for evidence.

20 But here is Batch: Poly, linear feet, 17,353.
21 Square feet, 12,763. Showing asbestos, 60 percent
22 asbestos.

23 And the Conti Poly, we have 77,349 square
24 feet, 24,134 --

25 THE COURT: It is linear feet on the first of

7/18/2018

334

1 77,749 linear feet.

2 MS. McVEY: Yes, ma'am.

3 THE COURT: And 24,130 square feet.

4 MS. McVEY: Yes, ma'am. I'm sorry.

5 And 90 percent asbestos. And that's marked as
6 228.3.

7 Your Honor, at this time we would call Don
8 Buck by video.

9 THE COURT: Very good.

10 (Don Buck video played.)

11 MS. McVEY: Your Honor, at this time, we would
12 like to move in two exhibits that Mr. Buck discussed,
13 822.15 and 822.16. And we don't need to publish those.

14 I don't believe there is an objection to
15 these.

16 THE COURT: Admitted without objection.

17 MS. McVEY: Your Honor, at this time we call
18 Don Buck by deposition read-in.

19 THE COURT: Very good.

20 Turn the lights up, please.

21 Ladies and gentlemen of the jury, what will be
22 done now. Mr. Buck you have just seen on the video, and
23 there are a few more things from his sworn testimony
24 that will now be read to you out of one of his
25 depositions; am I correct, Ms. McVey?

7/18/2018

335

1 MS. McVEY: Yes, ma'am.

2 THE COURT: Will you be reading the deposition
3 answers, Mr. Chapman?

4 MR. CHAPMAN: Yes, Your Honor.

5 THE COURT: Very good. You may come and sit
6 in the witness chair.

7 MR. CHAPMAN: Thank you.

8 THE COURT: You may proceed, Ms. McVey.

9 MS. McVEY: Thank you, Your Honor.

10 (Read-in of Don Buck deposition.)

11 MS. McVEY: That concludes the deposition.

12 THE COURT: Very good.

13 MS. McVEY: Your Honor, there are a few
14 exhibits we want to move in.

15 THE COURT: Very good.

16 MS. McVEY: Exhibits that we want to move in
17 are the contracts discussed in the Mr. Buck's
18 deposition, those are Bates marked 822.5, 822.6, 822.7,
19 822.8, 822.9, 822.10, 822.12, 822.13, 822.14. Those are
20 all admitted, I believe, without objection.

21 MR. WALL: Yes.

22 THE COURT: Without objection, they will be
23 admitted.

24 MR. WALL: But you are missing one, that one.

25 MS. McVEY: Yes. I am going to publish this

1 one. We are also moving in 822.4. And that is
2 subcontractors/vendors at Hoechst Celanese Spartanburg
3 job site, November 1971 through January 1975.

4 Here we have Covil Insulation. And that's it,
5 Your Honor.

6 THE COURT: All right. The exhibits are
7 admitted.

8 MS. McVEY: Your Honor, we have two live
9 witnesses now, but it may be a good time to take a
10 break, if that suits.

11 THE COURT: How are we doing? Good? Or we
12 want a break?

13 JURY FOREPERSON: They are good.

14 MS. McVEY: They are good?

15 THE COURT: Yeah.

16 MS. McVEY: Your Honor, we would call Patty
17 Giles to the stand.

18 THE COURT: Come around here and please be
19 seated.

20 (Witness sworn.)

21 THE COURT: Please be seated.

22 PATTY GILES, being first duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25

1 BY MS. McVEY:

2 Q. Patty, can you introduce yourself to the jury?

3 A. Yes, I'm Patty Giles. I'm Jerry Crawford's
4 oldest daughter. I'm his oldest child. I'm one of his
5 daughters.

6 Q. Are you nervous?

7 A. A little bit.

8 Q. Okay. You never testified before the jury
9 before?

10 A. No.

11 Q. Are you married?

12 A. I am.

13 Q. And who is your husband?

14 A. Mark Giles.

15 Q. And do you have kids?

16 A. Two daughters.

17 Q. How old are your girls?

18 A. My oldest one is 28. My youngest one is 26.

19 Q. And do you have any grandkids?

20 A. I do.

21 Q. How many?

22 A. Three daughters -- three granddaughters.

23 Q. Two daughters and three granddaughters?

24 A. Right. We can't buy a boy.

25 Q. Where do you live?

- 1 A. We live in Gaffney but kind of close to
2 Cowpens. It's actually Gaffney, but it's closer to
3 Cowpens.
- 4 Q. Where did you grow up?
- 5 A. In Gaffney.
- 6 Q. And who are your parents?
- 7 A. Jerry and Evelyn Crawford.
- 8 Q. Can you see that?
- 9 A. That's my dad.
- 10 Q. Okay. Big and silly face?
- 11 A. Yeah. He didn't want me to take his picture.
12 He just made that face and I took the picture.
- 13 Q. So you are the oldest daughter?
- 14 A. I am.
- 15 Q. All right. And then Tessa is the next?
- 16 A. Yeah, she's the middle child.
- 17 Q. She's the middle child. I'm the middle child.
18 And then you have a younger brother?
- 19 A. I do.
- 20 Q. What is -- what's your brother's name?
- 21 A. Danny.
- 22 Q. Where does Danny live?
- 23 A. He lives in Amarillo, Texas.
- 24 Q. So you are not close?
- 25 A. No.

7/18/2018

339

1 Q. But you are all very close?

2 A. We are, very close.

3 Q. How long were your parents married?

4 A. They married the year before I was born. I
5 don't want to tell you that because then I have to tell
6 you how old I am. They were married for like 48 years.

7 Q. Okay. And devoted to each other?

8 A. Uh-huh.

9 Q. Tell me -- I understand your dad liked to work
10 in his yard. He told us that in his deposition.

11 A. Yeah, yeah. He -- well, my mom did, too. She
12 had flower beds everywhere and she would be out there
13 messing with the flowers and he would be out there
14 raking leaves or cutting the grass or, you know, doing
15 the hedges. And that's just something they did
16 together. They did pretty much every day of the summer
17 they would be out there doing something in the yard.

18 Q. She took good care of the flower beds?

19 A. Uh-huh.

20 Q. And your dad took care of the grass?

21 A. Right.

22 Q. Could your mom drive?

23 A. No.

24 Q. How did she get around?

25 A. My dad. My mom never learned to drive.

7/18/2018

340

1 Q. Never did?

2 A. Huh-uh.

3 Q. I want to talk a little bit about -- well, who
4 is that? Can you see it?

5 A. That's -- that's me a long time ago at the
6 beach.

7 Q. Yeah. They like to travel a little bit?

8 A. Yeah. Well, they took some -- they were day
9 trippers more than -- more than beach trippers. Like,
10 they would go to the beach and maybe to the mountains,
11 but they were like big fans on like Sunday driving up to
12 Chimney Rock or something like that, Lake Lure.

13 Q. Right.

14 A. They used -- they used to pile up in a car,
15 and they would get my grandmother on Sundays. We'd just
16 drive around in circles for no apparent reason, which
17 I -- and they still do that up until -- I mean, up
18 until, you know, my mom passed away, they would still
19 like -- and I have no -- you know, no idea why you get
20 in a car and just ride around in a circle. I have never
21 done that since I have been grown, but --

22 Q. But they like the Sunday drive.

23 A. Uh-huh.

24 Q. Your dad likes the grandbabies?

25 A. Oh, Lord, yes. Loves them. Loves them.

7/18/2018

341

1 Q. Let me ask you a little bit about your dad.
2 Was he a hard worker?

3 A. Yes.

4 Q. You told me a story about a car breaking down
5 and he still got to work. Can you tell the jury that
6 story?

7 A. Yes. This is when he worked at Wise Potato
8 Chip place, which is in the Whitney area of Gaffney,
9 Spartanburg. Dad's car had broke down. He lived in
10 Gaffney. Rather than miss work, he walked from Gaffney
11 to Whitney to work for like several days. And like the
12 days we were off, we didn't work, we would go get him
13 and bring him home as much as we could, but like we
14 couldn't always do it, you know.

15 So I mean, he would just walk, you know, all
16 the way -- I mean, it's a long way. It was like 16, 17,
17 18 miles.

18 Q. And he would walk it every day?

19 A. It would seem like he would walk home and it
20 would seem like, by the time he got home, it was time to
21 go back, walk back. And so you know -- until he got his
22 car fixed, it was probably a week and a half, two weeks
23 maybe.

24 Q. But he didn't want to miss a day of work?

25 A. Uh-uh. He never missed work.

1 Q. I want to talk to you a little bit about your
2 dad and the cancer for a little bit. Can you do that
3 for me?

4 A. Uh-huh.

5 Q. The jury heard your dad talk about it, but can
6 you talk about that first ER visit and what occurred at
7 the E.R.

8 A. Well, he had been -- all that summer he had
9 been like getting more and more short of breath, and
10 finally he couldn't -- really couldn't breathe at all
11 and he had went to the emergency room and they did an
12 x-ray on him and admitted him to ICU because he had
13 fluid on the lungs.

14 And my mom called me and said, you know, "They
15 got your daddy in the hospital." So, of course,
16 everybody rushed to the hospital. You know, that's just
17 the way we are. We all rushed to the hospital, and they
18 kept him in ICU for a couple days and they drained the
19 fluid off of him. They didn't know what was going on,
20 and after that they referred him to the lung doctor,
21 lung specialist.

22 Q. So said that first time in the hospital he had
23 the fluid drained off?

24 A. Uh-huh.

25 Q. Did he have to go back several more times to

1 have more fluid drained off?

2 A. After he got referred to the lung doctor, the
3 lung doctor did it -- I want to say -- once or twice in
4 his office and then twice he went to Regional and the
5 lung doctor went there and did it.

6 Because for some reason they -- when they did
7 it in the office, they could take less out, but when he
8 did it in the E.R. -- not the E.R., but at the place,
9 the Regional, they could take more out for some reason.

10 Q. As far as the --

11 A. Yeah. Because it was so dangerous to take --
12 because he had so much they would take like 2 liters out
13 at a time, and that was kind of dangerous. But they
14 would do that at Regional, but in his office they were
15 only maybe take half a liter or so.

16 Q. So in order to get the vast majority of fluid
17 out, he had to go to the hospital?

18 A. Right, right, right.

19 Q. When he had that done, was that painful?

20 A. Uh-huh.

21 Q. And when would he know he needed to go back to
22 the hospital and have fluid taken off?

23 A. Because I mean it was like -- it got to be
24 like every couple of weeks, I mean, or every three
25 weeks, but he just -- he couldn't breathe. He was more

1 and more out of breath and it would, you know, be
2 painful, tight, like he would say his chest was tight.

3 Q. And that's how he knew he needed to go?

4 A. Yes.

5 Q. And at some point your dad talked about
6 getting a catheter in.

7 A. Yeah, because we were going so often to have
8 the fluid drained out. Doctor -- we call him Dr. A, but
9 I can't even pronounce his name. It is a really long
10 name. Because it was the lung doctor. He referred us
11 to another doctor to have a -- like a catheter, which is
12 likes a tube going into, you know, his lung and coming
13 out that where we could like hook it up to bags at home
14 and drain it ourselves at home like draining the fluid
15 so we didn't have to take him back.

16 Q. Were you are helping him? Were you and your
17 mom helping him drain it?

18 A. I went over there every three days and drained
19 it. And, you know, because you had to put on sterile
20 gloves, take the sterile dressing off and clean it, hook
21 it up to the little bag to make sure it was in the right
22 position where the gravity helped drain it. You could
23 only drain it for a certain amount much time and you
24 took it off, resterilize everything, and bandaged it.
25 So I did that.

1 Q. Okay. And when he would have the catheter
2 placed, did they also do a biopsy?

3 A. They did. When doctor -- actually, the doctor
4 they sent us to do get the catheter was Dr. Nguyen at
5 Spartanburg Regional. He turned out to be in the
6 oncology department, but at that time they had sent his
7 boxes off a couple times with the fluid. They were just
8 saying it was like inconclusive. They never said the
9 word "cancer."

10 When we went to see Dr. Nguyen and before, you
11 know, talked to him before, you know, the couple days
12 before he put the thing in, he told us, he said, "Well,
13 we are going to do a biopsy, too." He just kept
14 dropping the word "cancer." Like during the
15 conversation, he was just saying the word. I kept
16 trying to like say, oh, so, maybe -- you know, because I
17 didn't want to think my daddy had cancer, but he kept
18 saying that.

19 When I got home that evening, I called my
20 little brother in Texas because I was -- you know, I
21 always try to keep him informed. And I told him, I
22 said, "Danny," I said, "I really think that" -- I -- I
23 said, "Danny, I really think that doctor thinks that he
24 has cancer," I said, "because he just kept saying that
25 word. I mean, I feel like he was trying to get us used

1 to the word. I really think that he thinks that Daddy
2 has cancer."

3 And I -- so -- so a few days later we did
4 the -- they put the thing -- they went to put him in the
5 hospital to put the drain in. He was going to stay
6 overnight and they were going to teach us how to clean
7 it, you know.

8 And I guess I didn't realize that's what they
9 were going to do, but they send the biopsy while the
10 patient is in -- you know, in the operating room. They
11 send it to be tested. And we had been sitting there
12 forever and it was taking longer than we thought it was
13 going to take, and my mom had been sitting there waiting
14 for the doctor to come out.

15 She was like really hungry. So I said, "Mom,
16 let's just run down and get you something to eat in the
17 cafeteria." So we went just down to the cafe downstairs
18 at Regional and the doctor came out while we were there.

19 Well, my sister came to the cafe to tell us.
20 I saw her walking down the hall and I saw her walk in.
21 I saw her face. She got to the table and she was like
22 kind of grabbing for the table like she was -- you know,
23 like she was about to fall down or something. She could
24 hardly get up. She said, "Daddy's got cancer."

25 And then my mom, oh, my goodness, she went

1 hysterical. In the Tower Café, I mean, she was just
2 hysterical. So I tried to calm them down and get them
3 out of there and take them back to the surgery waiting
4 room.

5 And then Dr. Nguyen came back out and talked
6 to us because -- and for a little bit before that, he
7 was saying he was going to come, but Daddy was still in
8 recovery and asleep and he was going to come back the
9 next day and talk to Dad and we were trying to decide --
10 because we knew we wanted to be there when Daddy woke up
11 and we trying to decide what we were going to tell Daddy
12 when he woke up. Were we going to tell him or wait
13 until the doctors tell him or, you know, we didn't want
14 to like bust out crying and stuff.

15 Q. In front of your dad?

16 A. Right, exactly.

17 And so we finally just -- Let's play it by
18 ear. I told them, I said -- we got in there, and Dad
19 woke up, and, sure enough, he was like first thing he
20 said, you know, "What did they say?"

21 And I was really -- I said, "Well, they just
22 found a little bit of cancer, Daddy. Don't worry about
23 it. They will take care of it," you know, and that's
24 all I could say, you know.

25 And he just -- he just kind of took it in

1 stride. He said, "Okay." You know, I guess he was
2 trying to be strong for us, you know. We were trying to
3 be strong for him, you know.

4 Q. So after that diagnosis, did you find out it
5 was mesothelioma cancer?

6 A. That day they didn't tell us. That day they
7 told us it was cancer and they -- when we went back the
8 next week for the follow-up with Dr. Nguyen, that's when
9 he told us they had sent off for other tests to see what
10 kind of cancer it was, and that's what it was.

11 Q. Shortly after he was diagnosed with
12 mesothelioma, did he start chemotherapy?

13 A. He did.

14 Q. And what is that right there?

15 A. That's at the Gibbs Cancer Center. They had
16 those butterfly benches, and one day my granddaughter
17 had went with us to -- to the -- one of the appointments
18 at Dr. Nguyen's office, and she loved the butterflies.
19 So she insisted that everybody take pictures on those
20 butterfly benches.

21 Q. And your dad is on the butterfly bench at the
22 cancer center.

23 A. Yes, and he put his wings out like he had --
24 like he was -- put his arms out like he was flying.

25 Q. So your dad started chemotherapy.

7/18/2018

349

1 A. He did.

2 Q. So he still had his catheter in to keep the
3 drainage out.

4 A. Right.

5 Q. And then he had a port in place?

6 A. He did. On the other side, he went and had to
7 go -- after Dr. Nguyen actually told us it was
8 mesothelioma, he referred us to the oncologist,
9 Dr. Khomani. And we went to talk to Dr. Khomani. He
10 said, "I will send you back to Dr. Nguyen, and y'all
11 can" -- you know, they kind of like get together. They
12 have a like cancer board where all the doctors kind of
13 talk.

14 He said Dr. Nguyen is going to put the port
15 in. You know, we discussed what we were doing. And so
16 he went back, put the port in. All that happened really
17 fast. We saw Dr. Khomani, you know, a couple days
18 later. Went back to Dr. Nguyen. Went back to the
19 hospital, put the port in. Came back out. Maybe a day
20 later, we'd went back, he had the chemo.

21 Q. And then the port allowed the cancer
22 chemotherapy nurse to put in chemotherapy, right?

23 A. Right, right, right.

24 Q. And so how was your dad doing during the
25 chemotherapy? How did he react?

1 A. Well, it made him really, really like sick.
2 At first he kind of did okay. The very first one they
3 did was -- the way the nurse explained to us, it makes
4 your immune system go down. About a week after you take
5 it, your immune system starts going down. Then for a
6 couple weeks your immune system goes down and it starts
7 going up. That means it's responding to the chemo.

8 Q. Yeah.

9 A. And the very first one he did was a week
10 before Christmas. So they said, you know, during that
11 time when his immune system was down, he had to wear a
12 mask when he was around people. We try to keep him
13 away, right?

14 But we always, always, always do holidays at
15 my parents' house. So that Christmas my dad had to wear
16 a mask. So I said we will all wear a mask. We will
17 decorate them. We'll like put like Christmas trees on
18 them and, you know, Santa Clauses or whatever.

19 Q. So everybody had a mask on?

20 A. Everybody had a mask on. We didn't keep them
21 on. The children did. They children loved them. The
22 adults, those are really hard to breathe. I don't know
23 how Dad does it, but...

24 Q. I understand your dad every three weeks had
25 chemotherapy?

1 A. Every three weeks.

2 Q. And the idea was to reduce the size of the
3 tumor?

4 A. Uh-huh. So that doctor -- possibly Dr. Nguyen
5 could do surgery.

6 Q. Okay. We will get to the surgery in a minute.
7 But I understand -- tell me -- I understand
8 February as your dad was undergoing chemotherapy, your
9 mom got sick?

10 A. She did.

11 Q. Can you discuss a little bit how your mom was
12 caring for your dad that time period between his
13 diagnosis and when she got sick?

14 A. My mom, it started out like she had a little
15 cough, like February she had a little cough. She went
16 to the doctor and he said it was bronchitis, but she
17 kept coughing. She really didn't tell anybody how bad
18 she was. I mean, she didn't make a big deal out of it.

19 You know, we knew that she was sick and
20 feeling bad, you know, coughing or whatever, but like
21 you never think when you try -- you have one parent
22 that's dying, you don't think another parent is going
23 to, you know, die because when you are trying to save
24 the first one.

25 So you go -- anyway, I feel like she didn't --

1 she was so worried about my dad, that she was -- didn't
2 want to like make, you know, make a big deal about how
3 she felt. Because she is like Daddy -- you know, my dad
4 has cancer. What am I going to -- what about my cough?

5 But, anyway, her bronchitis got worse.

6 Finally, Daddy drug her -- made her go to the Early Care
7 in Gaffney, and they -- her heart beat was beating
8 really, really fast and her oxygen was really low. So
9 they sent her by ambulance to Regional. And this was on
10 Valentine's Day.

11 My daddy called me, and I rushed up to the
12 emergency room. And I told her -- I was just joking
13 with her. I said, "Mama, leave it up to you to go on
14 Valentine's Day with a heart problem to the emergency
15 room."

16 They even put her in the ICU. She was there
17 until March the 6th. She was off and on the ventilator.
18 They kept trying to get her off, and then she would --
19 her oxygen would get low again, and they would have to
20 put her on. She -- at this point, she had even gotten
21 pneumonia. And she was so bad off, you know, they were
22 doing all they could, but I mean --

23 Q. Let me ask you: When she was on the
24 ventilator, could she communicate with you?

25 A. Yeah. We had a white board.

1 Q. What she was worried about?

2 A. She was worried about my daddy. "Make your
3 daddy go home. Make your daddy eat." The whole time
4 she was worried about my dad.

5 Q. Did she write it down on the white board?

6 A. She was. You know, a couple times she was
7 able to talk. They did get her ventilator off -- they
8 would only -- like for maybe a day. We'd go home --
9 we'd be -- the ventilator would be off. And then they
10 would call us that night, and we would have to go right
11 back in.

12 Q. I know your mom died on March the 6th.

13 A. Yes, she did.

14 Q. How did your dad -- is he still going through
15 chemotherapy while she was in the hospital?

16 A. He was. We actually -- his chemo was at Gibbs
17 in Gaffney, and we had him transferred to the Gibbs in
18 Spartanburg so that he could get it in the same -- while
19 we were there with mom.

20 Q. What happened on March 7th? Your mom died on
21 March 6th. What happened on March 7th?

22 A. Where my mom was in the ICU, we had to -- we
23 always went through the heart center to get up to where
24 she was at.

25 On March 7th, the day after my mom died, we

1 had to go to the funeral home to kind of make
2 arrangements. And then I was -- I left with my dad from
3 the funeral home. We had to go back to Gibbs, to the
4 heart center, that same door where we always went in
5 with my mom, where we walked out the night before after
6 my mom died, because my dad had to get a PET scan. And
7 they couldn't -- they couldn't postpone. You know, you
8 had to get it then. So I had to take my poor daddy
9 right back to that place the next day after we left the
10 funeral home.

11 Q. That's the PET scan to see if the cancer had
12 spread?

13 A. Uh-huh.

14 Q. After your mom died, I understand that your
15 daughter took over and moved in with your dad?

16 A. Well, actually, when my dad -- my daughter
17 lives in Simpsonville. When my dad first got chemo,
18 started getting chemo, my daughter decided to move in
19 with my dad because, you know, Dad was on the pain
20 medicine and he was throwing up and stuff and my mom
21 couldn't drive.

22 So it was just to, you know, be able to drive
23 to places and run errands. She actually had gotten a
24 job in Gaffney. When Mama got sick, she went on leave
25 because, you know, Mama was in the hospital and all that

1 stuff. Then Mom passed away and, like, my sister and I,
2 like all the family discussed it and decided that it
3 would be better for Pamela to not go back to work and
4 just stay and take care of Dad and, like, we help her
5 out, you know, if she needed any help.

6 That's what she did. She just didn't go back
7 to work. She lives with my dad now. She cleans, does
8 the shopping, makes sure his prescriptions are filled,
9 and like the days when he comes and takes pain medicine,
10 she don't let him drive. You know, if he needs to go
11 anywhere, she will take him or she'll go for him.

12 Q. Right. So Pamela moved in to take care and
13 then did your dad ultimately undergo the surgery that he
14 needed?

15 A. He finally did, yeah.

16 Q. And who did that surgery?

17 A. Dr. Nguyen.

18 Q. That's in Spartanburg?

19 A. Uh-huh. He is my hero.

20 Q. You --

21 A. Dr. Nguyen is great.

22 Q. In the surgery, did they remove the lining of
23 your dad's lung?

24 A. They removed, they said, 95 percent of the
25 lining. They just left the part that was near the

1 heart.

2 Q. The lining is where the tumor was?

3 A. Uh-huh. Yeah. And he -- he said it was
4 pretty thick because the lining is supposed to be like
5 really, really thin, like a couple pieces of paper, and
6 he said it was pretty thick where the tumor was -- the
7 tumor was pretty, I guess, thick. You know, but it was
8 like -- in different places. It wasn't like one tumor.
9 It was like different spots of his lung.

10 Q. Right. Did they take out part of his right
11 lung?

12 A. They did, like a part of the bottom lobe.

13 Q. And can you tell the jury a little bit about
14 what that recovery -- what that surgery recovery was
15 like for your dad?

16 A. He was in the ICU for a while. They said he
17 might be in the ICU for a month, and Dad was actually
18 out and probably awake probably because he was so
19 stubborn. He actually ended up going back to the
20 hospital. Because when he got home, he ended back in
21 the hospital. So he went home earlier than he should
22 have.

23 But Dr. Nguyen had told us before -- even
24 before like he even would knew they were going to do the
25 surgery, that it was a horrible, horrible surgery. He

1 said it's like one of the worst surgeries you can have.

2 He had described it like if you rode a
3 motorcycle and had a wreck and then you were going down
4 the road and you got a road rash. It's all like -- and
5 you know how like it will be bigger and, you know,
6 pieces of skin off. And he said that's what entire part
7 of his lung would be like.

8 They basically like just had to just like --
9 like they did for open heart surgery or something like
10 that. They had to spread you here -- crack you and
11 spread your ribs to get through it. They said it was a
12 horrible, horrible surgery. And Daddy was really -- you
13 know, it's been a lot, lot of pain.

14 Q. That's what I was going to ask you. Since his
15 surgery, has his pain -- is he still in pain?

16 A. Oh, yes.

17 Q. Is it worse?

18 A. Yes. We are hoping, you know, that it wasn't
19 for nothing. But, yeah, it's worse.

20 Q. What about his breathing? Is he still having
21 trouble breathing?

22 A. Uh-huh. He's still having trouble breathing.
23 He coughs. He coughs. He keeps coughing now, for some
24 reason.

25 Q. Is it hard for him to talk?

1 A. It is, and he gets really tired easy. Since
2 my mom died, we have been going to their house ever
3 since -- my sister cooks every Sunday dinner. My dad,
4 he wants us to be there all the time. He will get so
5 tired, he will have to go lie down. He will like beg
6 us. He'll say, "I'm just going to lay down for an hour.
7 Please don't leave. Please stay here until I get up."
8 You know? So, of course, we stay there.

9 Q. He lets the grandchildren torture him --

10 A. Yeah. I don't even know what she was doing.
11 I don't know what she's gotten him in.

12 Q. This is my favorite.

13 (Laughter.)

14 A. I don't know. He does not tell those kids
15 "no."

16 Q. So I understand that your mom was the one who
17 cooked Sunday dinner every Sunday.

18 A. She did.

19 Q. And everyone came?

20 A. Uh-huh.

21 Q. And now Tessa has taken over?

22 A. Yeah, Tessa cooks.

23 Q. You don't cook?

24 A. I don't cook. I microwave.

25 Q. Your dad talked a little bit about, in his

1 deposition, how even though the doctor said 20 percent
2 chance of survival, that that really gave him a hope.

3 A. Yeah. He said he was glad for the 20 percent,
4 you know, because the guy before him might not have had
5 20 percent. I mean, he -- I don't know.

6 Q. So even though he's in pain and has trouble
7 breathing, he still has hope?

8 A. Yes.

9 Q. Thank you, Patty.

10 MS. McVEY: I pass the witness, Your Honor.

11 THE COURT: All right. Mr. Wall? Mr. Boger?

12 MR. BOGER: No questions.

13 THE COURT: Thank you, ma'am. You may come
14 down.

15 Ms. McVey?

16 MS. McVEY: Your Honor, we would call Tessa
17 Quinn.

18 THE COURT: Tessa Quinn, if you would come
19 around, please, ma'am.

20 Ms. Quinn, you come right on up here and the
21 clerk will give you the oath.

22 (Witness sworn.)

23 TESSA QUINN, being first duly sworn,
24 testified as follows:

25 DIRECT EXAMINATION

1 BY MS. McVEY:

2 Q. Hello, Tessa. How are you doing?

3 A. Good.

4 Q. Are you nervous?

5 A. I'm all right.

6 Q. You never testified in front of a jury before?

7 THE REPORTER: Speak up, please.

8 THE COURT: We are going -- Ms. Quinn, I know
9 this is tough. But if you could try to speak up a
10 little bit for two reasons. Number one, the jury has to
11 hear you. And, number two, I have to hear you and the
12 attorneys. So do the best you can.

13 BY MS. McVEY:

14 Q. I'm going to ask you some really easy
15 questions. Are you ready? Okay.

16 You are the middle child, just like me?

17 A. (Nodding head.)

18 Q. And I understand you are the only one that can
19 cook Sunday dinner?

20 A. Yes, ma'am.

21 Q. Would you please tell the jury whether or not
22 Patty does the dishes after you cook?

23 A. She does.

24 Q. She does?

25 A. She does sometimes.

7/18/2018

361

1 MS. GILES: She is under oath now, she can't
2 lie.

3 THE COURT: Just like the older sister would
4 do. I'm the oldest of the five, and I always do the
5 dishes.

6 MS. McVEY: You always do the dishes?

7 THE COURT: Yes.

8 BY MS. McVEY:

9 Q. I just have a few questions for you. I will
10 not go through all of it, but did you grow up in
11 Gaffney?

12 A. Yes, ma'am.

13 Q. How many kid do you have?

14 A. Three.

15 Q. How many grandkids do you have?

16 A. One.

17 Q. Okay. We know you have a brother, Danny.

18 A. Yes, ma'am.

19 Q. I know that you, as you said, kind of took
20 over that family dinner so you could be together; is
21 that right?

22 A. Yes, ma'am.

23 Q. Is that important for your dad for y'all to be
24 together?

25 A. Oh, extremely.

1 Q. I just want to ask you one question about the
2 time that your mom was in the hospital and she -- right
3 before she had the last trache put in.

4 Can you tell the jury what she said to you?

5 A. Yep. I was the only person in the room. She
6 looked at me and she said -- she said, "I'm scared."

7 I said, "What you scared of, Mom? You don't
8 need to be scared."

9 She said, "I know I'm really sick." She said,
10 "I'm not scared of going. I'm scared of going, knowing
11 your daddy's sick and leaving him here by himself and
12 knowing he needs me."

13 MS. McVEY: Thank you, Tessa.

14 No more questions.

15 Do you have any questions of her?

16 MR. BOGER: No questions.

17 MS. McVEY: Your Honor, just briefly I would
18 like to move into evidence the photographs that were
19 displayed to the jury.

20 THE COURT: Thank you, ma'am.

21 MS. McVEY: That would be Bates Number 805.1,
22 805.2, 3, 4, 5, 6, 7, and 8.

23 THE COURT: Without objection?

24 MR. BOGER: No objection.

25 THE COURT: Very good. Turn the lights up,

1 please, sir.

2 MS. McVEY: Your Honor, the plaintiff rests.

3 THE COURT: Very good.

4 All right. Ladies and gentlemen, I think we
5 are about on target with the 11:00 I predicted, a little
6 bit earlier. The plaintiff has rested the plaintiff's
7 case and that means that I will, as I explained to you,
8 have some things that I have to communicate with the
9 lawyers about, and then they need to go to lunch.

10 So I am going to let you go now, and I would
11 like you back -- let's kind of interact for a minute,
12 attorneys. How about -- is 1:30 enough time, do you
13 think?

14 MS. McVEY: Yes, ma'am.

15 THE COURT: Members of the jury, be back here
16 at 1:30, if you will.

17 Thank you. You may go to the jury room.

18 (Jury dismissed.)

19 THE COURT: All right. Mr. Wall.

20 MR. WALL: Yes, Your Honor. On behalf of
21 Covil, I would like to move for directed verdict first
22 on the issue of negligence.

23 Your Honor, in my opinion the evidence clearly
24 shows, one, that Covil was not present at the job site;
25 two, that Covil did not install any insulation, Daniel

7/18/2018

364

1 put the insulation in; three, there is no evidence that
2 Covil sold any product to Daniel and, as such, there was
3 no sale.

4 The product, when it was put in there, it was
5 done by specs required by Celanese and Daniel, and the
6 plaintiff in this case did not work with any product
7 sold or installed by Covil, and thus Covil is not
8 negligent in this case.

9 I assume you would want to --

10 THE COURT: Yes. What we will do for each of
11 your motions, your first motion is a motion for directed
12 verdict on the first count, which is the negligence
13 count, and I will turn now to Ms. McVey.

14 MS. McVEY: Your Honor, the evidence in this
15 case has been that Covil did it. They supplied the
16 insulation. That came from Harley Neelands.
17 Mr. Carpenter -- Machen Lee Carpenter said that Covil
18 and Daniel did these projects together. Covil said that
19 Daniel was its biggest customers. Don Buck of Daniel
20 said it was Covil and Daniel.

21 There is a record from 1971, a list of
22 contractors from 1971 to 1975, that showed that Covil
23 was the insulating contract at Hoechst Celanese in
24 Spartanburg.

25 MR. WALL: Prior to that, Your Honor, looking

1 at the document -- and it's in evidence as 822.4 -- and
2 it was displayed. It's got the names of several
3 companies, and over on the other side of that it said
4 "description of work." And under "Covil," there is
5 nothing. Mr. Buck said that means to him that Covil did
6 not do anything on the job site.

7 If you go to the bottom, it says "Southern
8 Insulation" and it says "AC installation." So I think
9 the -- any inference is -- because you know Daniel
10 actually installed this asbestos, according to their
11 witness, Mr. Neelands, and the only question is: Did
12 Covil sell any asbestos?

13 And there is no record of any sale by Covil to
14 Daniel for this project.

15 MS. McVEY: Your Honor, two things just
16 briefly if I can respond. The first is that Harley
17 Neelands said Covil supplied the insulation.

18 MR. WALL: He says he thinks.

19 THE COURT: Let's not do it that way. Let's
20 have each person --

21 MR. WALL: I apologize, Your Honor.

22 MS. McVEY: Harley Neelands says they supplied
23 the insulation from Covil. There is also a spoliation
24 charge that if Covil had kept their records like they
25 should have, that they were available to them, that it

1 would show sales for that project. That's the second
2 thing.

3 The HVAC contractor -- I'm sorry -- the other
4 insulation contractor that he talks about, the evidence
5 in this case was that they were just doing HVAC work.
6 They were not insulating the pipes. That was Covil's
7 job.

8 Your Honor, just in terms of -- I don't know
9 if we want to get to exposure yet. That's part of the
10 negligence claim.

11 THE COURT: Why don't we stick on negligence?

12 I will deny the -- I will deny the motion for
13 summary -- the motion for a directed verdict by
14 defendant for a couple of reasons.

15 The first of all, there is abundant evidence
16 in the record that Covil was the insulation
17 subcontractor at Celanese at the time frame that is in
18 issue here, which is '70 to '74, when it is claimed
19 Mr. Crawford was exposed to this product.

20 There is abundant evidence that Covil knew at
21 the time it performed this insulation work that asbestos
22 was a dangerous product which could cause not only
23 asbestosis but mesothelioma if exposure was had to it.

24 There is abundant information to establish
25 that there were other products available during this

1 time that could have been used to insulate these very
2 hot pipes other than Kaylo and related
3 asbestos-containing insulation materials.

4 There is a good deal of evidence that this
5 asbestos-containing material was also used with the mud
6 that was used to apply the insulation to the pipes, and
7 that that mud was mixed in a way that caused the release
8 of dust in the atmosphere.

9 There is abundant testimony from Mr. Crawford
10 and others that they worked around the release of Kaylo
11 dust into the air as it was removed from pipes, as it
12 was applied to pipes, and there is abundant evidence
13 that Covil was either "a" or "the" insulating
14 contractor. We don't have the invoices from this
15 particular period because it is claimed that Covil --
16 that these materials were destroyed.

17 There is information from Mr. Carpenter and
18 others that this material was not destroyed by the fire
19 because it was kept in the vault in the office part of
20 the Covil factory where it was protected by the vault
21 itself and by a firewall.

22 But that material is no longer available and I
23 have found that spoliation took place with respect to
24 that material and, therefore, I have read to the jury an
25 instruction that Jerry Crawford was exposed to asbestos

1 insulation supplied and installed by Covil Corporation
2 at Celanese between 1970 and 1974.

3 In addition, one of the exhibits that has been
4 placed into evidence in this matter during the testimony
5 of Mr. Glenn, the corporate representative for Covil, is
6 an invoice from Covil Insulating Company dated 2-7-74 to
7 Firestone Tire and Rubber in Wilson, North Carolina, and
8 it is an example of invoices that Covil would send in
9 connection with the supply of Kaylo and Thermobestos on
10 jobs in which it was the insulating contractor.

11 And this invoice form that Covil uses shows
12 the areas from where the job was shipped, and it has six
13 blocks, and the areas are Greenville, Greensboro, North
14 Carolina, Wilson, North Carolina, Augusta, Georgia, and
15 Auburn, Georgia. And this particular invoice that was
16 sold to Firestone Tire and Rubber, Wilson, North
17 Carolina, in care of Gergen (phonetic) Construction
18 Company, Wilson, North Carolina, the invoice which was
19 dated 2-7-74 on a particular customer purchase order for
20 a shipment dated 2-5-74 shows shipped from, and it says
21 number 1 on here. And number 1 is the Covil plant at
22 Greenville, South Carolina, where the fire in Berea
23 Industrial, where the plant was located, allegedly took
24 place.

25 This is a shipment after that time from the

1 location that we are talking about with an invoice that
2 had it and it is a shipment of Kaylo, PC, \$1460 worth
3 and Thermobestos, \$1663 on this particular invoice.
4 These two materials, the testimony has shown, are
5 asbestos-containing insulation materials.

6 If we had the Covil invoices from the period
7 we are talking about where Covil was the identified
8 insulation contractor for Daniel, those invoices would
9 identify from where the insulation was shipped, what
10 kind of insulation was shipped, and how it was shipped
11 to the ultimate plant, and the contractor to whom it was
12 shipped in care of.

13 All right. And that evidence of plan and
14 practice by Covil indicates to me that had their
15 information been preserved and not spoliated, it would
16 clearly show the shipments to Celanese in care of Daniel
17 Construction Company, and it indicates that plan and
18 practice of Covil was to itself supply this
19 asbestos-containing information on jobs on which it was
20 the insulating contractor.

21 So I think there is -- that the evidence is,
22 of course, on this point viewed in the light most
23 favorable to the nonmoving party and the nonmoving party
24 is, of course, the plaintiff in this matter.

25 I think there is plenty of information in the

1 record from which a jury could find that Covil supplied
2 the asbestos-containing material and sold it for use on
3 the job and participated in the installation of this
4 material on the job, according to the testimony of
5 several of the co-workers, including Covil co-workers.

6 So that's my ruling on the negligence cause.

7 All right.

8 Mr. Wall, you may proceed.

9 MR. WALL: Yes, Your Honor.

10 Defendant now moves for directed verdict on
11 strict liability charges.

12 THE COURT: On what?

13 MR. WALL: Strict liability.

14 THE COURT: Strict liability.

15 MR. WALL: I will incorporate my comments from
16 the negligence count and only add again that there was
17 no proof of any sale of any product by Covil to either
18 Celanese or to Daniel. That, again, Daniel, by their
19 own -- by their own witness -- plaintiff's own witness
20 installed the insulation on this project.

21 And so, therefore, again, I believe that there
22 is no proof that we are negligent -- excuse me -- we are
23 strictly liable in selling these products. Again, this
24 project was built by specification, and there is no
25 evidence that the plaintiffs ever were with any products

1 sold or installed by Covil.

2 THE COURT: Okay. Ms. McVey.

3 MS. McVEY: Your Honor, for all the reasons
4 that you articulated so well, the negligence claim would
5 apply to the strict liability claim. There is abundance
6 evidence that Covil either supplied or installed
7 insulation at the Celanese plant, that Daniel used them
8 as their insulation subcontractor, and that it is clear
9 that Mr. Crawford had significant causative exposure to
10 asbestos insulation, Kaylo, and other products described
11 by the witnesses in this case and, therefore, they would
12 be strictly liable.

13 THE COURT: Very good. All right. I will
14 deny the motion for a directed verdict on strict
15 liability for the reasons stated previously with
16 analysis of negligence cause and, in addition, there is
17 certainly information from the deposition, from the live
18 testimony of the corporate representative before us for
19 Covil, all right, that verifies the relationship between
20 Daniel and Covil as Covil's -- as Daniel being its
21 largest customer for the supply of insulation and for
22 subcontracting work on insulation during the time we are
23 talking about.

24 And there is plenty of information from Covil
25 workers as well as from Mr. Crawford's co-workers at

1 Celanese to indicate that Daniel was involved in the
2 contracting of new work as well as repetitive
3 maintenance work, and that in that connection it used
4 materials supplied by its insulator.

5 And when you connect those dots, there is more
6 than a scintilla of evidence to suggest for the jury to
7 find strict liability for the sale of these
8 asbestos-containing products by Covil. So I will deny
9 the motion.

10 All right. Mr. Wall.

11 MR. WALL: Covil now moves for a directed
12 verdict on implied warranty claim, and then I will
13 reincorporate all my arguments for the negligence and
14 the strict liability claim in for warranty and, again,
15 add there is no proof of any warranty, either implied or
16 otherwise, by Covil as to any product. There is no
17 evidence of any product used by Covil or sold by Covil
18 or sold by Covil that Mr. Crawford worked with.

19 Again, the -- the Covil sales record that you
20 are referring to was post-'73, post-fire. It was not
21 pre-fire. And the arguments we have in this case are
22 that documents pre-fire are the ones that were
23 destroyed, not post-fire.

24 And, again, we didn't search for that
25 particular sales invoice because it was not involved in

1 this case in any form or manner. And, again, there is
2 no evidence that the -- that the plaintiff worked the
3 product and the property and was built according to
4 specifications. So whatever we did, we were required to
5 by contract.

6 THE COURT: All right. Ms. McVey.

7 MS. McVEY: Your Honor, I won't reincorporate
8 all our other argument -- I mean, I will reincorporate
9 all our other arguments without going through them
10 again. But just in terms of whether or not Mr. Crawford
11 worked with their defective product, it is undisputed
12 that Mr. Crawford was around insulation contractors
13 installing, sawing, removing insulation.

14 It is undisputed that every day he swept up
15 that asbestos insulation. That would make it direct
16 exposure, significant direct exposure as articulated by
17 Dr. Brody and Maddox. In fact, there is no expert
18 testimony on the other side disputing the causation of
19 his mesothelioma as a result of his exposure to asbestos
20 containing insulation. That's actually undisputed in
21 this case.

22 THE COURT: All right. I will incorporate the
23 analysis I have made in the denial of directed verdict
24 in the other two causes, but I will say with respect to
25 implied warranty, implied warranty does not depend on

1 the exhibition to the jury of a written contract.

2 Implied warranty is implied by the law as I
3 will instruct the jury. And those placed into the
4 stream of commerce, materials that are dangerous and
5 provide no warning have particular responsibilities
6 based on strict liability. But they also have
7 responsibilities because they imply -- implied a warrant
8 to the fitness of the product for the purpose for which
9 it will be used.

10 And here the evidence is abundant. This
11 product was not fit for the purposes for which it was
12 used because of the severe danger involved in its
13 application and removal to not only those who install it
14 but those who are around it.

15 The -- both the expert testimony and the
16 testimony of workers and the testimony of the corporate
17 representative is that these materials are dangerous and
18 that they can cause death and that they can cause severe
19 illness and that they can cause mesothelioma.

20 And based on that, the implied warranty count
21 is supported by more than a scintilla of evidence
22 sufficient that the jury would be entitled to find that
23 there was an implied warranty with respect to use of
24 this material supplied by Covil and that there was a
25 breach of that warranty due to the supply -- knowing

1 supply by Covil of material that it knew was not fit for
2 the purpose for which it was supplied because of its
3 dangerous propensity, and, therefore, I will deny the
4 motion of directed verdict on the issue of implied
5 warranty.

6 Does that complete your motions, Mr. Wall?

7 MR. WALL: No, Your Honor. I will move for a
8 directed verdict on Question Number 5 as to punitive
9 damages.

10 I will incorporate all my other arguments and
11 add in the standard of proof on punitive damages is
12 clear and convincing evidence, and I suggest to the
13 Court that there is no evidence in this record of clear
14 and convincing evidence that Covil did anything willful,
15 wanton, or reckless in this case.

16 They complied with requests of the owner,
17 requests of the contractor, and the only testimony that
18 they have that may go to the issue that Mr. Waters --
19 and Mr. Waters did not work at Celanese, did not work
20 with Mr. Crawford, and I would suggest to the Court, as
21 such, his testimony is, one, irrelevant and, two, does
22 not meet the standard anyway.

23 THE COURT: Very good.

24 Ms. McVey.

25 MS. McVEY: Your Honor, I think in this case

7/18/2018

376

1 there is more than almost any other I have been involved
2 in in terms of recklessness. The first is that they
3 never tested their product to see if it was dangerous.

4 The second is even when they knew beyond any
5 doubt in 1965 that asbestos could not only hurt people,
6 it could kill people, they never warned about it.

7 In fact, in the '50s they gave their own
8 employees respirators but never told anybody else who
9 would be using their products about the dangers of that.
10 They didn't warn. They didn't test.

11 They also, the testimony is, in the '70s when
12 everybody wanted to go asbestos-free, what they did is
13 they used asbestos-free boxes but they wanted to get rid
14 of their asbestos supply. So they put
15 asbestos-containing insulation in asbestos-free boxes
16 and shipped it out to workers. Not only did they not
17 know they were working with asbestos, they couldn't
18 protect themselves. That's recklessness.

19 THE COURT: All right.

20 I find that the directed verdict motion on
21 punitive damages should be denied. The standard is
22 clear and convincing, and in addition to the evidence of
23 recklessness, willfulness and wantonness that has been
24 discussed by Ms. McVey, an additional piece of evidence
25 that is important, in my view, is the evidence given by

1 the corporate representative himself who says that
2 Mr. Palmer Covil, who was the head of the company at
3 that time, well knew the dangers of asbestos, had
4 attended conferences in which the dangers of asbestos
5 had been discussed, was a high-level official with the
6 National Insulators Trade Group, its president as well
7 as on its board of directors, and was well aware of
8 industry knowledge about the danger of asbestos.

9 In addition to that, the corporate
10 representative testified under oath that despite
11 Mr. Covil's knowledge of the dangers of asbestos, that
12 he allowed the use and continued the use of asbestos in
13 the products his company sold as a business decision.

14 That indicates a very conscious decision to
15 distribute material that he knew. So that there is
16 evidence of recklessness and there is evidence of
17 willfulness and wantonness sufficient to constitute more
18 than a scintilla and more than a clear and convincing
19 standard, though, the degree of the standard does not
20 have to be determined at this time. It is simply the
21 existence of evidence and not the weight of it.

22 But I will find on this record that there is
23 enough evidence on which a jury could find by clear and
24 convincing evidence that in this particular case the
25 Covil Corporation made a deliberate decision and a

1 reckless and wanton decision to distribute this product.

2 All right. That's the rulings on the directed
3 verdict motions.

4 Now, does the plaintiff have directed verdict
5 motions?

6 MS. McVEY: Your Honor, they have not finished
7 their evidence, obviously, but we can go ahead and argue
8 our directed verdict on a couple of issues if that would
9 suit the Court. I know they haven't finished their
10 testimony --

11 THE COURT: Well, I'm simply protecting you in
12 the record in this regard because I believe you would
13 want to make whatever motions you want to make of the
14 directed verdict status in order to be able to make any
15 kind of motions that you would want to make at the close
16 of defendant's case and then at the close of the --
17 after we receive a verdict.

18 MS. McVEY: Your Honor, I don't think we have
19 any directed verdict motions at this time.

20 THE COURT: I will tell you that both sides
21 that I will be listening very carefully to defendant's
22 case. I have not had a case -- and I have tried a bunch
23 of these and I certainly tried a number of cases when I
24 was in trial work and heard a number of appeals in the
25 long period of time I served on the Supreme Court.

7/18/2018

379

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

7 I'm not saying I will do it. I simply want to
8 be fair to everyone and say that I am concerned about
9 this. It is not Mr. Wall's fault. He can deal with
10 only what he is given by the client to deal with, but
11 quite apart from the direction of finding that I made as
12 a response to the discovery violations of this
13 defendant, the evidence that has been presented in the
14 case quite separately from that is -- is -- at this
15 point almost uncontroverted evidence of liability. And
16 so I'm concerned about that and I just want to let you
17 know that.

18 All right. Now, we dealt with our motions.
19 It's quarter after 11:00. We have got the defendant's
20 case to put up.

21 And I take it y'all want to do your charges
22 after that?

23 MS. McVEY: Yes, ma'am.

24 THE COURT: That's fine. That's fine. I just
25 want to be sure we are all on the same page.

1 MS. McVEY: I think so just to be -- make sure
2 we understand what evidence they put in.

3 THE COURT: I think that's fair to both sides
4 to see exactly what the submission of evidence is going
5 to look like before we make a final decision.

6 If you have anything else you want to me to
7 look at, y'all let me know, but otherwise I will take an
8 early lunch and I guess you will. We told the jury to
9 be back here at 1:30. So we will look forward to the
10 presentation of the case, and after that, we will go
11 into the charges.

12 But I will tell you, if I had to do it from
13 scratch, I would try this case and send it to the jury
14 today because we have plenty of time to do that and I'm
15 all about trying to get the thing moving along. But I'm
16 sympathetic to the fact that I told you I would let you
17 close tomorrow.

18 MS. McVEY: I think we are just not quite as
19 organized as we would like to be for closing.

20 THE COURT: I understand that. Lawyers work
21 mighty hard. They don't need to be surprised by a judge
22 who promises one thing and reneges on it, so I will not
23 do that. But, hopefully, we can move with a -- this
24 afternoon on the tasks that we can perform.

25 MS. McVEY: Absolutely.

7/18/2018

381

1 THE COURT: Very good. All right. We will
2 see you at 1:30.

3 MR. WALL: Thank you, Your Honor.

4 1:37 P.M.

5 THE BAILIFF: All rise and come to order.

6 THE COURT: Please be seated.

7 All right. Ms. McVey.

8 MS. McVEY: Just briefly, I know they are
9 going to play two videos and read in a deposition. They
10 had told us that they are not countering with Harley
11 Neelands or not planning their portion of Harley
12 Neelands.

13 I expect that we -- depending on what is
14 played, we may have a 45-second rebuttal, but I didn't
15 want to mess you up with the jury.

16 After they rest, we may have 45 seconds of
17 video to play to rebut some of the stuff --

18 THE COURT: Then we dismiss the jury?

19 MS. McVEY: That's right, but I don't want to
20 waive my directed verdict motion in between if that
21 makes any sense.

22 THE COURT: Yes, it does. You know, if we can
23 all proceed at that, follow along those lines, then that
24 will be the way --

25 MS. McVEY: Okay.

7/18/2018

382

1 THE COURT: Okay. Bring in the jury.

2 (Jury enters courtroom.)

3 THE COURT: All right. Please be seated.

4 All right. The defendant will begin the
5 presentation of defense's case.

6 Mr. Wall? Mr. Boger?

7 MR. BOGER: Yes, Your Honor. The defense
8 calls, by deposition, Mr. Palmer Covil. We will read
9 into the record. Mr. Buha has agreed to assist.

10 THE COURT: Mr. Buha, if you would come to the
11 witness box. I trust you have the transcript with you.

12 MR. BUHA: I do.

13 THE COURT: All right.

14 Ladies and gentlemen of the jury, portions of
15 the deposition of Mr. Palmer Covil, who was founder and
16 chief executive officer of Covil Corporation for many
17 years, is going to be read. This particular deposition
18 was begun on July the 14th, 1977.

19 And, Mr. Boger, you may proceed.

20 MR. BOGER: Thank you, Your Honor.

21 (Palmer Covil deposition read.)

22 MR. BOGER: That's all for Mr. Palmer Covil,
23 Your Honor.

24 MR. BUHA: Volume 2?

25 MR. BOGER: I take that back.

7/18/2018

383

1 THE COURT: I have got Volume 2's excerpts
2 right here, if that's what y'all need.

3 MR. BOGER: All right.

4 (Palmer Covil deposition continues to be
5 read.)

6 MR. BOGER: And this will conclude Mr. Covil.

7 THE COURT: All right. Thank you.

8 Mr. Wall, call your next witness.

9 MR. WALL: Mr. Boger is doing it.

10 THE COURT: All right. Mr. Boger.

11 MR. BOGER: Your Honor, defense calls Bruce
12 Bowyer for Celanese, by video.

13 (Bruce Bowyer video plays.)

14 MR. BOGER: Your Honor, I apologize. I have a
15 little technical difficulty here. The sound cut...

16 (Technical issue is resolved as Bruce Bowyer
17 video continues to play.)

18 MR. BOGER: Your Honor, the defense will call
19 Mr. Theo Buck for Daniel by video.

20 (Theo Buck video plays.)

21 MR. BOGER: No further witnesses, Your Honor.

22 THE COURT: All right. Turn the lights up,
23 please.

24 Mr. Boger, does the defendant rest?

25 MR. BOGER: Yes, Your Honor, defendants rest.

7/18/2018

384

1 THE COURT: All right. Motions are noted, but
2 I understand you have a slight piece of reply evidence,
3 Ms. McVey, for the plaintiff.

4 MS. McVEY: Yes, Your Honor. Not to waiving
5 our motion we discussed earlier, we have about a minute
6 and 11-second rebuttal witness, Harley Neelands, by
7 video.

8 THE COURT: All right. Harley Neelands by
9 video.

10 (Harley Neelands video plays.)

11 MS. McVEY: That concludes our rebuttal, Your
12 Honor.

13 THE COURT: All right. Rebuttal has been
14 concluded.

15 Anything further from either side?

16 MS. McVEY: No, Your Honor.

17 MR. BOGER: No, Your Honor.

18 MR. WALL: Just the motions.

19 THE COURT: Ladies and gentlemen, you will be
20 dismissed for the day. We will continue with matters I
21 have to take up with them and we will prepare the
22 charges to the jury and we will begin tomorrow morning
23 at 9:00 with closing arguments to the jury which will be
24 presented to you as soon as you are seated.

25 After that, I will give you your charge and

1 then you will get this case.

2 Please have a pleasant afternoon and evening.

3 Don't discuss the case. Don't do any research on social
4 media. Don't post on social media or do any research on
5 the internet. And other than that, please do have a
6 fruitful afternoon and evening and I will see you at
7 9:00 tomorrow morning.

8 (Jury dismissed.)

9 THE COURT: All right. Be seated. And,
10 Ms. McVey, are you prepared?

11 MS. McVEY: I am.

12 THE COURT: Very good.

13 MS. McVEY: Your Honor, we would like to make
14 directed verdict motions at this time. As you know,
15 directed verdicts should be granted when the evidence as
16 a whole is susceptible to only one reasonable inference.
17 When no jury issue is created, a directed verdict is
18 appropriate. We would argue that there is no genuine
19 issue of material fact in this case other than the
20 decision of damages.

21 First, Your Honor, let me go over the
22 testimony with you that Covil was, in fact, the supplier
23 of -- supplier, installer in certain circumstances, at
24 of asbestos insulation at the Celanese Spartanburg
25 plant.

1 There is a lot of testimony to that. First,
2 there was Harley Neelands. He was working as a Daniel
3 employee at the Celanese Spartanburg plant. He said
4 Covil supplied the insulation that they put on. He said
5 he saw a Covil truck driving up to the Celanese plant
6 with a Covil logo on it, supplying insulation at
7 Celanese Spartanburg.

8 Mr. Carpenter, Machen Lee Carpenter, as you
9 know, he was a warehouse manager, and he was the vice
10 president of operations at certain times. He testified
11 that Daniel and Covil were like this, meaning very tight
12 together.

13 And, Your Honor, before -- let me pause and
14 add -- let me just say this at the beginning. I would
15 like you to consider this directed verdict motion
16 without any consideration of either the spoliation
17 charge or the presumption that you gave. I think we are
18 entitled to a directed verdict without either of those
19 things.

20 And I don't want to waive our ability to get
21 that if we need it, but for your purposes today, I would
22 like you to consider the directed verdict without either
23 spoliation or the presumption that was stated.

24 We talked about Harley Neelands. We talked
25 about Mr. Carpenter saying that Daniel and Covil worked

1 together all the time. Covil, Mr. Glenn, Covil's
2 representative, says that Daniel was Covil's biggest
3 customer.

4 Mr. Buck in other depositions testified that
5 Covil and Daniel always did work together. In other
6 words, when Daniel was insulating something, they got
7 their insulation from Covil. Sometimes Covil did the
8 insulation themselves. Sometimes they just supplied the
9 insulation.

10 Your Honor, the vendor list shows Covil on the
11 list at the facility between 1971 and 1975, and there is
12 no other insulation contractor on that vendor list.
13 There is one, but it is clear they were only doing
14 HVAC-type insulation.

15 That's the information we have that Covil was
16 there. We don't have any information from Covil that
17 they weren't there. The only thing they are saying is,
18 we don't know because we don't have any documents.
19 That's the only thing -- that's not enough. That's not
20 enough for them. So when there is only one reasonable
21 inference, you have to believe that Covil was there.

22 So, one, Covil was there.

23 Two, the insulation that they provided was
24 asbestos-containing and we know that from Bruce Bowyer.
25 He did a survey and he showed in the very buildings

7/18/2018

388

1 where Mr. Crawford was working that there was 15 miles
2 of asbestos insulation, 90 percent of which was
3 asbestos-containing.

4 Harley Neelands testified when they were
5 putting all that insulation in, it was Kaylo. We know
6 from Covil that the Kaylo that they were using was
7 asbestos-containing, and we know from the Celanese
8 specifications that they called for the use of amosite
9 asbestos insulation.

10 There is no other information other than that
11 asbestos-containing insulation in the very areas in the
12 poly line and continuous poly building where
13 Mr. Crawford was working. So we have that Covil was
14 there. We have that they were selling
15 asbestos-containing insulation.

16 So now we have -- is Covil liable on strict
17 liability, breach of warranty, and negligence? And what
18 we have to show when there is no other reasonable
19 inference is that the product they sold, the asbestos
20 was defective and unreasonably dangerous.

21 Every witness who has come in here has said
22 that the asbestos-containing insulation was defective
23 and unnecessarily dangerous. The product was
24 essentially in essentially the same condition as when it
25 went into the next hands. Clearly it was -- came in

1 boxes, and they put it on machines as Covil knew they
2 would on the piping.

3 It just showed that plaintiff was injured by
4 the product, and other than a failure to warn, we can
5 show that there was a feasible alternative product to
6 design.

7 Your Honor, let me tell you how we can do all
8 of those things. Not only can we do it, but there is no
9 other reasonable inference that we have. Let me discuss
10 Mr. Crawford's exposure. First, in direct exposure.
11 There is testimony that for every day that Mr. Crawford
12 worked there, four years from 1970 to 1974, he was
13 sweeping up work done by the insulators and those
14 working around the insulating pipes. He was cleaning
15 up, including sweeping up insulation.

16 Dr. Maddox came and testified that his
17 exposure when he was sweeping up at peak times could be
18 as high as 100 fibers per cc. That is 1,000 times
19 higher than the PEL allowed of .1 fibers per cc. That's
20 an incredible exposure, and that happened daily,
21 multiple times a day over a four-year period.

22 He also had bystander exposure. Mr. Crawford
23 testified that several times a day he would walk through
24 the poly building where construction was going on to use
25 the bathroom or go to the locker room. He saw people

1 doing insulation work, and that including installing and
2 cutting.

3 Harley Neelands testified that they would beat
4 in the chicken wire, that they were mixing mud, and when
5 you would mix the powder and the water, it created dust
6 in the air. They were applying mud and smoothing out
7 that mud. Mr. Crawford testified you could see the dust
8 when that was going on. Harley Neelands described it as
9 a very dusty process. Dr. Maddox said that type of
10 exposure is significant.

11 The only evidence in this case is that that
12 direct exposure as well as the bystander exposure were
13 the substantial contributing causes of Mr. Crawford's
14 mesothelioma. That's the only testimony. And an, in
15 fact, there is no other testimony that any other
16 exposure caused Mr. Crawford's mesothelioma, only the
17 asbestos insulation. That came from Dr. Maddox and
18 Dr. Brody. The defendants put up no expert witness to
19 contest that.

20 So, Your Honor, we would move for those
21 reasons -- I'm sorry. We are also going to talk about
22 in terms of the negligence case, we need to talk about
23 Covil's knowledge. Covil knew at least by 1965 or 1966
24 that asbestos could kill workers. In 1965 or 1966, they
25 knew that asbestos could kill workers. They were

1 getting that information from the Selikoff conference.
2 They were getting that information from unions. They
3 were getting that information from magazines. And
4 Mr. Palmer Covil testified that he knew in 1965 asbestos
5 could kill people, and yet they continued to sell
6 asbestos through at least 1974, if not later. I'm
7 sorry. They continued to sell asbestos insulation until
8 at least 1974. They sold other asbestos-containing
9 products for longer than that. They had knowledge
10 asbestos was dangerous and they continued to sell it.

11 Your Honor, we believe we are entitled to a
12 directed verdict on strict liability, on implied
13 warranty, as well as negligence.

14 Finally, Your Honor, I'm not sure exactly
15 what, if any, affirmative defenses that Covil will be
16 pursuing, but as to their jury charges, it looked like
17 they were pursuing two affirmative defenses. The first
18 one is comparative negligence. The second one is
19 intervening cause.

20 First as comparative negligence, there is not
21 a single piece of testimony that Mr. Crawford did
22 anything wrong, let alone anything wrong that
23 contributed to his mesothelioma. No factual testimony,
24 no expert testimony, no inference of that. We should be
25 given directed verdict on the matter of law on that.

7/18/2018

392

1 Finally, Your Honor, they move on intervening
2 cause, and I don't know exactly what they think
3 intervening cause is, but my assumption is it would be
4 Daniel. Daniel is installing the pipe. And the law in
5 South Carolina talks about intervening cause, and it
6 says a chain of causation between defendant's negligence
7 and the injury may be broken by the independent and
8 intervening acts or omissions of another over who the
9 defendant has no control and where the actions were not
10 foreseeable.

11 In this case, Daniel was using the Covil --
12 insulation supplied by Covil and using it exactly how
13 Covil knew it was going to be used. They were
14 insulating pipes and equipment with it, as Covil knew
15 they would.

16 Therefore, Your Honor, we believe that the
17 intervening charges should be given directed verdict on
18 intervening cause as well.

19 THE COURT: All right. Thank you.

20 Mr. Wall or Mr. Boger?

21 MR. WALL: Yes, Your Honor.

22 First of all, the evidence is contested as to
23 what caused his problems and --

24 THE COURT: Mr. Boger, why don't you come up
25 here and help Mr. Wall find what he needs to find?

7/18/2018

393

1 MR. WALL: I'm good, Your Honor.

2 THE COURT: Well, see if he can help.

3 MR. WALL: I'm looking for the number of this
4 exhibit. This is the February month end report in '73.

5 THE COURT: What exhibit are you on?

6 MR. WALL: I'm on Exhibit 822.15 and 822.4.

7 THE COURT: All right.

8 MR. WALL: These were introduced without
9 objection by the plaintiff.

10 THE COURT: All right.

11 MR. WALL: All right. Also, let me start by
12 saying Dr. Maddox did testify that the brakes that
13 Mr. Crawford were exposed to was a sufficient contact
14 with asbestos to be a proximate cause of his
15 mesothelioma. And he said that directly.

16 Two, Mr. Buck, the representative of Covil --
17 excuse me -- of Daniel, looked through all the records
18 and he said, point blank, Daniel installed all the
19 asbestos-containing products, all the pipe coverings.

20 He also said Daniel purchased material
21 directly from the manufacturer, not from Covil. He
22 said, I looked in the files. The only mention of Covil
23 is that they had three people on the job at some point
24 who were fireproofing the structural steel. Again, no
25 testimony that Covil installed any insulation or

1 purchased any insulation.

2 Finally, Mr. Buck says because Covil isn't
3 listed on Exhibit 822.4 of doing work, Covil was not
4 doing any work at the time.

5 And, lastly, the February report -- here it
6 is -- which is the monthly report done by Daniel -- says
7 on page -- Exhibit Bates stamped Crawford 020128862, and
8 the caption reads: "Number of employees on payroll."
9 Number of employees on the Daniel payroll. And it lists
10 insulators, 39 insulators on the payroll of Daniel
11 during this period of time.

12 Next, on page -- page number 24, it lists the
13 subcontractors. There is a whole section. It says,
14 "Subcontractors." Covil is not listed as a
15 subcontractor on this job.

16 So clearly directed verdict is not
17 appropriate. In fact, this supports my motion for
18 directed verdict.

19 Thank you, Your Honor.

20 THE COURT: All right. Hand up the materials
21 you referred to, if you don't mind, Mr. Wall.

22 MR. WALL: Yes.

23 I will turn to you in a minute, Ms. McVey.

24 Let me just look at this for a second.

25 (Mr. Boger tenders document.)

7/18/2018

395

1 THE COURT: All right. Ms. McVey.

2 MS. McVEY: Your Honor, I'm looking at the '73
3 document that I think is the right one, and the one I'm
4 looking at doesn't list the names of subcontractors.

5 THE COURT: That's true.

6 MR. WALL: Your Honor --

7 THE COURT: I'm looking at February of 1973,
8 822.15, and it does contain on page --

9 MR. WALL: -- 14.

10 THE COURT: -- 14 for the February 1973
11 subcontractors, Southern Contractors, Gainwell
12 Mechanical, Stewart Grandeur, Freeman Mechanical,
13 Thomason Engineering.

14 MS. McVEY: Okay. I just wanted to make sure
15 I'm looking at the right one. I'm not, so that helps.

16 THE COURT: Which one are you looking at?

17 MS. McVEY: I don't believe we even admitted
18 this one. It's a '73.

19 THE COURT: Okay. This is a monthly report.

20 MS. McVEY: That's correct.

21 MR. WALL: And two pages later it says there
22 were that many insulators on the job at that time. They
23 are on the same line.

24 MS. McVEY: Are you ready for me?

25 THE COURT: Yes.

1 MS. McVEY: Your Honor, so a monthly report
2 means that he has one month. This contract obviously
3 started in 1970. And the bigger issue is Harley
4 Neelands, who was an Daniel employee, talks about Daniel
5 doing the insulating using Covil insulation. They are
6 the subcontractor. They are a supplier of it and a
7 broker of insulation and that is undisputed.

8 Further, Your Honor, in terms of whether or
9 not there was any testimony about was the brakes source
10 a substantial contributing cause. In fact, it is the
11 exact opposite. Dr. Maddox testified there was probably
12 some exposure, and that may constitute a minor
13 contributory component. That does not meet the
14 standard. The standard is substantial contributing
15 factor.

16 They have no evidence to say that the brake --
17 any brake work Mr. Crawford did was a substantial
18 contributing factor. Therefore, we are only entitled to
19 one reasonable inference in that case.

20 THE COURT: All right.

21 MR. WALL: Your Honor, I have to say, we have
22 now put the evidence the Court has in front of it which
23 goes to the question of fact.

24 THE COURT: All right. With regard to -- from
25 the directed verdict motions, as to whether there is a

1 genuine issue of material fact, setting aside spoliation
2 and presumptions for a moment, in terms of whether Covil
3 was the or a supplier, at best what defense argues, as I
4 see it, is the negative inference from the absence of
5 information about Covil in the memory of certain
6 witnesses and in certain documents.

7 I heard no witness say Covil was not a
8 supplier. I heard no witness say Covil never performed
9 any insulation services. What I did hear was, We've
10 searched the records we have and Covil's name does not
11 appear or Daniel did the insulation work with its own
12 forces. That's an argument Mr. Wall makes.

13 But I see no testimony that says that Daniel
14 was the exclusive insulator, nor do I see any evidence
15 that some manufacturer was the exclusive supplier. In
16 fact, to the contrary, most of the evidence is that
17 Covil was the exclusive supplier. Daniel was its
18 largest customer.

19 There are any number of witnesses that testify
20 that Covil supplied asbestos-containing material to
21 Celanese, to the Hoechst Celanese plant during this
22 period of time. And Daniel's own corporate
23 representative, Harley Neelands, confirms that, says
24 that Daniel and Covil was the supplier. Daniel and
25 Covil worked together and Covil was an installer.

7/18/2018

398

1 Now, the vendor list. This vendor list, what
2 it does is this: It contains subcontractor vendors for
3 '71 through '75, and that clearly means to me that
4 everyone listed on the left is a subcontractor and/or
5 vendor on the Hoechst Spartanburg job site.

6 I notice that there are some suppliers who
7 are -- or some companies, because it lists company and
8 description of work, and it contains a number of
9 listings about work -- floor painting, AC duct, roofing,
10 lab equipment, prefab buildings, exhaust ducts, AC
11 ducts, AC ducts, concrete curb, install lockers, ship
12 silos, sprinkler system, building, compressor, breaker
13 testing, painting, fireproofing, cooling tower, erecting
14 building, sheet metal, AC ducts, roofing, roofing, steel
15 insulation and AC steel erection, AC insulation, air
16 washers, AC duct, ceiling, and chillers.

17 Well, we know that there is no dispute, but
18 what in addition to AC insulation, there was a heavy use
19 of piping insulation throughout more than 15 miles of
20 piping in this plant, which is quite typical of all
21 plants that carried these high levels of heat, whether
22 they are power plants or paper plants or in this case
23 fiber plants.

24 I noticed also that when it says "description
25 of work," many of these companies you can't tell from

1 the name what that work would be. And in those cases,
2 their work is specified. But I do not interpret this as
3 some kind of use of the name of "Covil" without Covil
4 having any connection to this project.

5 I conclude that Exhibit 822.5 puts Covil
6 directly in the picture as a subcontractor/vendor
7 Hoechst Spartanburg job site, November '71 to November
8 '75. I find Mr. Buck's testimony to the contrary not
9 believable in the light of what everyone else has said
10 about this. He bases it and then kind of equivocates
11 when asked more questions about what this list means.

12 Now, with respect to whether the insulation
13 that was provided was -- was asbestos, there is no real
14 disagreement about that. That was the standard during
15 that time. There is direct testimony that 90 percent of
16 the insulation used was asbestos and that the specs
17 spec'd amosite, which is a form of asbestos.

18 Now, with respect to the defective nature of
19 the material, the expert witnesses and even the
20 corporate representatives, including Mr. Palmer Covil
21 himself, agree that asbestos is unreasonably dangerous
22 and that they learned about that early on. So there is
23 no question that it is defective and no question that
24 there are other insulations that were
25 non-asbestos-containing that could have been used and

7/18/2018

400

1 it's been around for years and ultimately were used.

2 All right. There is no question about what
3 Mr. Crawford has been injured by this
4 asbestos-containing product. There is no disagreement
5 that he's been diagnosed with mesothelioma, and the
6 uncontroverted evidence is that it is caused by
7 asbestos, and the evidence is very clear that that
8 asbestos was at least in part Covil-supplied asbestos
9 and that there was an alternative design that could have
10 been used in those years that was not used.

11 In terms of his exposure, he was exposed daily
12 to many different kinds of areas of asbestos dust, both
13 direct exposure as he swept it up and indirect exposure
14 as he passed through various parts of the Celanese plant
15 that contained piping that was being actively worked on
16 as he passed through with mudding, insulations, beating
17 in chicken wire, and other activities around the piping
18 and insulation which discharged Kaylo and other forms of
19 asbestos surrounding the piping and mudding which
20 discharged raw asbestos as it was being mixed with
21 fluids and used as mudding to complete the insulation.

22 The doctors testified that -- both Dr. Brody
23 and Dr. Maddox -- that this exposure was substantial and
24 significant and both testified that it would have caused
25 his mesothelioma.

1 With respect to comparative negligence, there
2 is not one piece of testimony of any negligence on
3 Mr. Crawford's part. There is no testimony or
4 information that he knew this material was dangerous and
5 deliberately did not protect himself. There is no
6 testimony that Covil or anyone else provided any
7 protection.

8 Mr. Palmer Covil testifies that it was a
9 business decision to continue to have asbestos in the
10 product they sold even though they knew it was dangerous
11 and could kill people.

12 In terms of the intervening cause, I will
13 charge the jury, as you know, that the negligence does
14 not have to be "the cause" but rather it can be a cause.
15 Intervening cause is a cause which is independent and
16 intervening of the negligent act and in effect
17 supersedes the effect of the negligent act with an
18 intervening cause and that the act was not foreseeable.
19 There is no testimony to support either of those
20 contentions in my view.

21 I do not read Dr. Maddox's testimony on brake
22 exposure as saying this is an intervening cause, but
23 rather, at most, it was a contributing cause to
24 Mr. Crawford's development of mesothelioma, which is not
25 enough to establish a defense of intervening cause.

1 With respect to citation of Mr. Buck's
2 testimony that Daniel installed all asbestos-containing
3 products, I do not read all of what has been shown with
4 Mr. Buck to say that. And I do not read Mr. Buck's
5 testimony to say that Daniel only purchased directly
6 from a manufacturer. He did not say that. He did cite
7 some purchases he thought had been made directly from
8 manufacturers, but he does not say that that was the
9 exclusive means of Daniel getting the asbestos
10 insulation that was used to insulate the plant where
11 they had the contract and Covil had a subcontract. He
12 says that he only saw Covil work with three men
13 fireproofing structural steel, but many other witnesses
14 testify to a much larger workforce by Covil and a
15 workforce that directly worked on insulating, including
16 Covil employees themselves.

17 I do not regard a one-month example of a
18 progress report by Daniel as establishing exclusively
19 that Daniel and only Daniel insulated, nor do I regard
20 the listing of workforce as a listing of Daniel's
21 employees only. I think the workforce is composed of
22 both Daniel's direct employees and those subcontractors
23 who were working on the job and that is how the listing
24 in that document reads. It reads, "Workforce."

25 In short, there has been no testimony, expert

1 or direct factual testimony that contravenes the
2 testimony that has been offered even by the defendant
3 which establishes that Covil knew at the time they sold
4 asbestos-containing materials that it could cause death,
5 that there were alternatives, and that, as Mr. Covil
6 said, they made a business decision to continue to sell
7 asbestos-containing material.

8 There is no contest with that in anything
9 that's been offered on behalf of the defendant, and that
10 alone, if not contested, would establish strict
11 liability claim as well as the implied warranty claim.

12 With respect to the negligence claim, again
13 about Mr. Wall says that on the negligence claim the
14 uncontroverted evidence is that Covil was not present on
15 the work site. I don't read anything that any witnesses
16 testified to exclude Covil's presence. Some don't know.
17 Some say, The ones I saw were not doing any insulation.

18 Mr. Wall says that he is entitled to a
19 directed verdict because the uncontroverted evidence is
20 that Daniel put the insulation in. All right. I don't
21 think that's at all uncontroverted. I think the other,
22 that the only evidence we've got is that Daniel hired
23 subcontractors to put the insulation in.

24 But without regard to who put the insulation
25 in, the key factor in negligence, strict liability, and

1 implied warranty to begin with is that it is not
2 successfully controverted in any respect that Covil did
3 not supply insulation material to this job. That has
4 not been countered.

5 The evidence that has been offered that Covil
6 was a supplier has not been controverted. At best, it
7 is either we don't have any records to show that. We
8 did word searches and couldn't find that, but there is
9 plenty of direct evidence from others that Covil, in
10 fact, was a major player in insulating in the time frame
11 projected at the Celanese Spartanburg plant.

12 MR. WALL: Your Honor, may --

13 THE COURT: Just a second. I will certainly
14 hear from you. I just want to see if I completed
15 everything that I need to place into the record.

16 MR. WALL: Okay.

17 THE COURT: And, again, it is not controverted
18 that Crawford experienced both bystander exposure and
19 direct exposure. About the best that can be said on the
20 other side is we don't know or we don't have any
21 knowledge, but he was an employee who was in daily
22 contact with this material for those years and no one
23 has disputed Mr. Crawford's testimony in that regard.
24 So I -- what I'm left with is this.

25 I don't think there is any genuine issue of

1 material fact as to liability on the three causes of
2 action nor do I think there is any credible evidence to
3 support comparative negligence or intervening cause
4 under our law. So I think I would be justified in
5 granting a directed verdict to the plaintiff on all
6 three causes of action and simply submitting this case
7 to the jury on liability.

8 And I also think that the two defenses, I
9 shouldn't grant directed verdict on those because they
10 don't meet the requirements of South Carolina law to
11 even be asserted.

12 I will listen to anything you got to say one
13 more time, Mr. Wall, before I make my rulings.

14 MR. WALL: Yes, Your Honor. I was just going
15 to point out, again, Mr. Buck testified that they bought
16 the insulation from the manufacturers. He didn't say
17 suppliers. He didn't say anyone else. He said, We
18 bought it from the manufacturers. I'm not going to
19 argue with the Court, but that's what the record says.

20 THE COURT: All right. Well, I -- I have
21 really struggled with this, and I will direct the
22 verdict with respect to your affirmative defenses. I
23 think that's beyond any -- of doubt.

24 I -- the strict liability, implied warranty
25 causes deal with questions of law that are occasioned by

1 the sale of this product. The negligence cause of
2 action deals with the knowledge that a purveyor of the
3 product has. Again, I am just -- if the only thing that
4 can be said is that one witness said we bought from the
5 manufacturer, that is not a definitive enough statement
6 given his other testimony to exclude the purchase from
7 Covil as a subcontractor and just doesn't provide
8 anything definitive.

9 I ask you this, Mr. Wall. Other than
10 Mr. Buck's statement, We bought from the manufacturer,
11 what else is there in the record that excludes or even
12 contests the multitude of other testimony that Covil was
13 the supplier?

14 MR. WALL: No one testified that Covil was the
15 supplier in this case.

16 THE COURT: Oh, yes, many people testified to
17 that.

18 MR. WALL: No, Your Honor. Anyway, my opinion
19 is no. I'm not going to argue with the Court.

20 There is -- the only testimony we have is
21 Mr. Buck looked at all the files on this case and said
22 Covil was not there.

23 THE COURT: Now, Mr. Buck was looking in whose
24 files?

25 MR. WALL: Daniel's. He said, I went through

1 40 boxes and, you know, reels of video -- not video,
2 film and could find nothing about Covil anywhere near
3 that project.

4 THE COURT: Uh-huh.

5 MR. WALL: Except the three men, and he did
6 have that record. He did have the record that three men
7 from Covil were there doing fireproofing. That's the
8 only document in the entire Daniel file on construction.

9 THE COURT: He's excluding from that that the
10 Daniel document 822.4 that contains the name of Covil.

11 MR. WALL: He says they weren't there. I know
12 you disagree with him, but that become as question of
13 fact for the jury.

14 MS. McVEY: Your Honor, briefly in response to
15 that. A Daniel employee is Harley Neelands. A Daniel
16 employee is Harley Neelands.

17 THE COURT: Who said they were there?

18 MS. McVEY: He said that not only were they
19 there, they were bringing it in their big Covil truck.
20 Mr. Buck was not at the Celanese plant, the Spartanburg
21 Celanese plant. Whether or not he found it in his
22 records is a different beast than whether or not they
23 were there. The uncontroverted testimony is that Harvey
24 Neelands who was there as a Daniel employee saw Covil
25 there supplying insulation.

1 MR. WALL: Supplying something.

2 MS. McVEY: No, supplying insulation. That's
3 what he says.

4 THE COURT: He does say that.

5 MS. McVEY: Your Honor, in response to
6 Mr. Buck, when he was talking about buying from other
7 manufacturers, he is talking about buying asbestos-free
8 insulation from manufacturers, and it's on page 70 --
9 okay. I'm sorry. Hold on.

10 MR. WALL: It is page 36.

11 MS. McVEY: Page 36. I can bring it up to you
12 if that would be helpful.

13 THE COURT: All right. That would be helpful.

14 "I know our clients went asbestos-free in '73,
15 '73 and '74.

16 "Okay. You seen there are 40 boxes of
17 documents there. There are specifications to
18 Spartanburg Celanese post-'73 will show asbestos-free
19 insulation.

20 "Answer: I didn't see any documents. Oh,
21 yes, I did. I saw a specification document generated by
22 Daniel engineers that said our -- all of our insulation
23 is asbestos-free.

24 "And where were you getting that insulation
25 from?

1 "The insulation manufacturers, whoever they
2 were, Johns Manville, CertainTeed, I don't know who they
3 bought them from."

4 Okay. And that's the asbestos-free
5 insulation. I think that's pretty clear that's what
6 they are talking about.

7 MS. McVEY: And that was from '73 and '74.

8 THE COURT: Right, right. I mean, most of the
9 time what judges do is take the easy road and say, hey,
10 hey, hey, we will let it go to the jury. This case is
11 very different because it is very clear that this
12 case -- not that Mr. Wall is very candid about this --
13 this case is not being controlled by Covil, the
14 defendant. It is being controlled by the insurance
15 companies that insure Covil, and we are going to have
16 some discussion about them, who they are, and what needs
17 to be disclosed about them in this case in just a few
18 minutes.

19 But they have apparently directed the defense
20 of this case and, therefore, Mr. Wall has really been
21 pretty hamstrung about what has been done. He has
22 submitted thing from the records that have been
23 disclosed in discovery and the depositions that have
24 been disclosed in discovery and that's it.

25 There has been no offering of any expert

1 witness. The only live witness that's been offered is
2 Mr. Glenn, who was asked a few questions in the
3 plaintiff's case by defense, and that's it.

4 So there is no real attempt to meet the issues
5 of fact that are present in this case about the
6 manufacturer of this material, exposure to it, its
7 presence in Celanese, and there is this thin reliance of
8 one statement of many by Mr. Buck as the foundation for
9 the assertion that there was no Covil insulation in this
10 plant.

11 I don't find that the statement that was just
12 read supports that. It is talking about asbestos-free
13 insulation and not the asbestos insulation that we have
14 been talking about. So I am in a dilemma. I think my
15 duty is to grant all of these directed verdict motions
16 and submit this matter to the jury on liability. And
17 that's what I'm pondering.

18 What I would like to do is take about a
19 ten-minute break to ponder all of that and then I will
20 come back and make my ruling.

21 MS. McVEY: Yes, Your Honor.

22 THE COURT: Ms. McVey, what you could be doing
23 in the meantime, I need the entire opening statement of
24 Mr. Wall.

25 MS. McVEY: Okay. We will get that ready.

1 (A recess transpired.)

2 3:28 P.M.

3 THE COURT: All right. As I indicated in my
4 discussion before we took the break, I am convinced that
5 there are no genuine issues of material fact, setting
6 aside spoliation and presumption. You put those things
7 into the picture, I think the picture is even stronger,
8 but I wonder if I do the plaintiff any real favors if I
9 grant these motions, because I would certainly have the
10 opportunity at the judgment non obstante veredicto stage
11 to deal with this, if in the unlikely event the jury did
12 not return a verdict of liability in this matter.

13 So taking that into consideration I have
14 decided that the best course of action, and the least
15 expensive to both sides in this equation, is to deny the
16 directed verdict motions for negligence, implied
17 warranty, and strict liability at this time, but I will
18 grant the motions to directed verdict with respect to
19 the affirmative defenses of intervening act and
20 comparative negligence.

21 I find no supporting evidence at all for the
22 notion that there is any negligence of Mr. Crawford's
23 that could be compared as to negligence of the
24 defendant. Likewise, I find that there is absolutely no
25 evidence in the record of any independent intervening

7/18/2018

412

1 act of another and that such an act is not foreseeable.

2 And, therefore, I will direct those
3 affirmative defenses not be presented to the jury nor
4 will they be asked to render a verdict on those motions,
5 the verdict having been directed for the plaintiff in
6 regard to those two defenses.

7 All right.

8 MR. WALL: Your Honor, for the record, I need
9 to make my motions for directed verdict.

10 THE COURT: Yes, you do and you are certainly
11 permitted to do that, Mr. Wall.

12 MR. WALL: Your Honor, first of all, I renew
13 my motion for directed verdict as stated at the end of
14 the plaintiff's case.

15 THE COURT: Certainly.

16 MR. WALL: Plus I add to that, I consider the
17 record that we put in in the defense case that all of
18 the insulation was purchased from manufacturers, not
19 from Covil, that all the insulation was installed by
20 Daniel. Their own witnesses say that they did all the
21 work, and Mr. Buck says that, and then for Celanese they
22 have no record of any work being done by Covil.

23 And then we now have the two documents that
24 were discussing over their directed verdict motion which
25 clearly shows that Daniel did all the construction

7/18/2018

413

1 themselves, and they had all the insulators onsite.

2 So we move for directed verdict as to
3 negligence, as to strict liability, and as to implied
4 warranty, and also as to punitive damages.

5 THE COURT: All right, sir.

6 And Ms. McVey.

7 MS. McVEY: I'm happy to respond to all of
8 these issues.

9 THE COURT: I think your response to the
10 directed -- your response in the form of your own
11 directed verdict is an adequate coverage of the
12 information, and so I will simply say that I deny the
13 motions for directed verdict, and simply observe with
14 respect to the assertion that the uncontradicted
15 evidence is that all insulation was installed by Daniel.
16 I don't think that is the case at all, and even Daniel's
17 own corporate representative, Mr. Harley Neelands, says
18 that Covil and Daniel worked together, that Covil -- he
19 was asked whether Covil supplied insulation on the
20 Celanese jobs in the time frames we are talking about.

21 He said, yes. And he was asked how he knew
22 that. He said that he saw Covil trucks coming and
23 delivering the insulation to the Celanese plant. That's
24 from Daniel's representative.

25 MR. WALL: Your Honor, Mr. Neelands was not

1 the Daniel's representative. Mr. Buck was the
2 representative.

3 MS. McVEY: He was a Daniel employee.

4 MR. WALL: Yes, employee.

5 THE COURT: They are corporate
6 representatives. They don't have to have direct
7 knowledge. This gentleman was a worker bee in the
8 Celanese plant and he had direct observation of what was
9 going on in there and said that Covil and Daniel were
10 very much involved with each other and that Covil
11 supplied the insulation -- was a big supplier.

12 And in addition to that, the portion of
13 Mr. Buck's testimony that was read does not say that all
14 insulation was purchased from manufacturers. What it
15 simply says is that all asbestos-free insulation was
16 purchased directly from manufacturers. So neither of
17 those two assertions in any way would support the motion
18 for directed verdict by defendant and, in fact, supports
19 the opposite.

20 These are also asserted as reasons why the
21 affirmative defenses should be considered, but I hear
22 nothing by way of any further argument contradicting
23 what I have said with respect to those defenses, which
24 is, A, no evidence that Mr. Crawford did anything
25 negligent and, B, no -- in respect to the intervening

7/18/2018

415

1 cause, absolutely no evidence that the legal
2 requirements to intervening cause are met.

3 So on that basis, I deny the motions to direct
4 the verdict. Now we are at charges.

5 MS. McVEY: Yes, ma'am.

6 THE COURT: Now, all right. First of all,
7 let's take up the verdict form.

8 MR. WALL: No objection, Your Honor.

9 THE COURT: No objection.

10 MR. WALL: I assume she will take off the word
11 proposed, plaintiff's proposed.

12 THE COURT: She's put "verdict form" up where
13 "jury charge" is. Strike the jury charge out. Strike
14 plaintiff's proposed and the verdict form will be as has
15 been proposed and that's great.

16 All right. Now, I put aside spoliation charge
17 for a minute.

18 My approach to this will be to go down the
19 plaintiff's jury charge, and here is my how, and then go
20 to defendant's and go down here by number to make sure I
21 haven't missed anything or there is not some alternate
22 wording that I would be preferred.

23 Is that satisfactory?

24 MS. McVEY: Yes, Your Honor. Just briefly, I
25 know I e-mailed everything this, but plaintiff's

7/18/2018

416

1 proposed charge is Number 19 --

2 THE COURT: Yes, the intervening thing, all
3 right.

4 MS. McVEY: The premises.

5 THE COURT: The --

6 MS. McVEY: Duty of a premises owner.

7 THE COURT: Duty of premises -- neither the
8 defendants have not asked for that charge. It's
9 certainly not applicable here, so I have notes to strike
10 it when we come to it.

11 MS. McVEY: That would be great.

12 THE COURT: So we now start with Number 1, the
13 role of the jury. All right. The only thing I may have
14 a typo in here and I will give my copy to plaintiff.
15 All right. It's on page number 3. This thing is
16 awkwardly worded, but anything I may have said or done
17 during the trial -- well, don't worry about it. Keep it
18 how it is kind of awkwardly worded.

19 MS. McVEY: I'm happy to change it if you want
20 to make it --

21 THE COURT: Page 5 is charge 2, burden of
22 proof. I told you at the beginning I would strike that.
23 I didn't give them an opening charge.

24 MS. McVEY: That's right.

25 THE COURT: I think they heard enough from

1 Mark Hays about how things generally work, so I did
2 not --

3 MS. McVEY: So we start with the burden of
4 proof in a civil case.

5 THE COURT: The plaintiffs have the burden of
6 proof, have the burden of proving their case.

7 MS. McVEY: Okay.

8 THE COURT: And burden of proof in a civil
9 case is, so that's how it starts.

10 MS. McVEY: Okay.

11 THE COURT: Stop me anytime you got a problem.
12 Mr. Boger, stop me anytime you have a problem.

13 MR. BOGER: Yes, Your Honor. Thank you.

14 THE COURT: All right. Number 3, the charge
15 on evidence. General charge on evidence.

16 Number 4, direct and circumstantial evidence.
17 And the only thing I would change is on page 7, second
18 paragraph that starts "by way of example." Put that in,
19 raining outside. That will parallel 7.

20 MS. McVEY: Say it one more time? I'm sorry.
21 By way of example, if a witness testified --

22 THE COURT: You could conclude that it was
23 raining.

24 MS. McVEY: Okay.

25 THE COURT: Just put "outside," period.

7/18/2018

418

1 MS. McVEY: Okay.

2 THE COURT: Add the word "outside."

3 MS. McVEY: Okay. I'm so sorry. I just don't
4 understand. Can I --

5 THE COURT: The paragraph that starts, "By way
6 of example, if a witness testified that a witness saw it
7 was raining," you see that paragraph?

8 MS. McVEY: Uh-huh.

9 THE COURT: "That would be circumstantial
10 evidence from which you could conclude that it was
11 raining outside. They brought into the room the
12 circumstantial evidence of the outside rain by water on
13 their cloaks and all that kind of thing."

14 MS. McVEY: Okay. May I look at what you have
15 done? I just don't understand what you are telling me
16 to take out.

17 MR. WALL: Add.

18 THE COURT: Add.

19 MS. McVEY: Add. Do you understand what she's
20 saying?

21 MR. CHAPMAN: Yes.

22 MS. McVEY: Can you fix it?

23 THE COURT: Yes. Charge of the fact evidence,
24 evaluating witnesses' testimony. Evaluating witnesses'
25 testimony.

7/18/2018

419

1 MS. McVEY: I'm fine with that.

2 THE COURT: Number 6, expert testimony.

3 Number 7, expert witness and causation.

4 Number 8, deposition testimony.

5 Number 9, taking notes.

6 Number 10, summary of plaintiff's claims.

7 Now, let me say this. Here is what I would do
8 to parallel this thing. It says, "Plaintiff's claims
9 this case is based on three theories. First was
10 negligence, which includes product liability negligence
11 and premises liability negligence."

12 MS. McVEY: We should take that out.

13 THE COURT: And the second is -- I would take
14 that premises liability negligence...

15 And, frankly, I would just say, first theory
16 is negligence.

17 MS. McVEY: Uh-huh.

18 THE COURT: Strike that. The second is strict
19 liability. The third is called breach of implied
20 warranty.

21 MS. McVEY: Agreed.

22 THE COURT: Plaintiff is not required to prove
23 all of them.

24 Now, what I would do is say Charge Number 11
25 is -- where have we gotten negligence? We have strict