

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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.

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Theile B. McVey
John D. Kassel
KASSEL McVEY ATTORNEYS AT LAW
1330 Laurel Street
Columbia, South Carolina 29202
(803) 256-4242
tmcvey@kassellaw.com
jkassel@kassellaw.com

Jonathan M. Holder
Ka'Leya Hardin
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Ste. 300
Dallas, Texas 75202
(214) 722-5990
jholder@dobslegal.com
khardin@dobslegal.com

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

Elbert Lin*
Counsel of Record
Hunton Andrews Kurth LLP
951 East Byrd Street, East Tower
Richmond, Virginia 23219
(804) 788-8200
Erica N. Peterson**
2200 Pennsylvania Avenue, NW, Suite 900
Washington, D.C. 20037
(202) 955-1500
elin@HuntonAK.com
epeterson@HuntonAK.com

*Admitted pro hac vice
**Not admitted in DC. Work supervised by
members of the DC bar. Admitted pro hac vice

Ashley K. Brathwaite
Ellis & Winters LLP
4131 Parklake Avenue, Suite 400
Raleigh, North Carolina 29612
(919) 573-1297
ashley.brathwaite@elliswinters.com

Counsel for Appellant Covil Corporation

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1 nobody from MAS that is putting them up or
2 authenticating them, that they are wholly unlike
3 any situation ever described by any of the
4 co-workers, that they are -- you've heard this
5 before.

6 But among the people who rely upon them
7 and used them, such as plaintiffs' medical expert,
8 Dr. Holstein, and we can -- we are still in the
9 process of reviewing plaintiffs', you know,
10 proposals for what sections of Holstein's dep will
11 be played. We'll have objections and counter those
12 sanctions. If they include the MAS video, we can
13 raise the issue --

14 THE COURT: Well, let me just explore
15 it briefly with Mr. Branham right here.

16 Mr. Branham.

17 MR. BRANHAM: Sure, Judge. I think
18 that these were played during the Howell case.

19 THE COURT: Yes, they were.

20 MR. BRANHAM: Yeah. And these were the
21 removal of the gaskets --

22 THE COURT: Yes. I mean, I thought
23 that was a very dramatic moment in the case. They
24 were talking about how they burn them, never do
25 this, never do that, and they're their people.

1 That's what the industry standard is, scraping them
2 and grinding them.

3 MR. BRANHAM: And so I showed
4 Dr. Holstein literally the exact same clip that was
5 played in the Howell case, and then asked him to
6 give certain opinions about it, which he did.

7 THE COURT: Mm-hmm.

8 MR. BRANHAM: And so that is how that
9 video would come into evidence.

10 THE COURT: Right. And I will allow
11 that as I did in the Howell case.

12 MR. MERIWETHER: All right. I just
13 would maintain my objection and rely on our brief.

14 THE COURT: Okay.

15 MR. ELLIOTT: If I can make one comment
16 on that, Your Honor. In that video there is
17 grinding. And, at least, at this time from the
18 deposition testimony of the co-workers, there is no
19 testimony that they ever did any such grinding. He
20 may fix that at trial, but there wasn't any
21 testimony in this case.

22 THE COURT: Well, looking in the light
23 most favorable to the plaintiffs at this point, my
24 recollection is that there is at least some
25 testimony by co-workers about grinding, but I could

1 be mistaken about that. I had to read a whole lot
2 of testimony, but we'll see if that turns out not
3 to be the case. But, quite honestly, I think that
4 video is going to come in.

5 All right. What is it?

6 MS. SHOFNER: I think the only other
7 thing that we have is we were going to -- I'm
8 sorry, Elaine Shofner for Aurora Pumps.

9 THE COURT: Thank you.

10 MS. SHOFNER: The only other issue that
11 we had was I think that the plaintiffs and all the
12 defendants are going to get together and agree upon
13 some questions that we would present to you to ask
14 to the jury.

15 THE COURT: Thank you for reminding me
16 of that. The way jury qualification is going to
17 work next Monday is Mark Hayes is going to
18 generally qualify the jury. And then I will come
19 in at the end of the general qualifications and
20 project the specific questions with respect to this
21 case.

22 And as you know, I'm not a big fan of
23 jury questionnaires or voir dire by counsel. I
24 don't think South Carolina currently allows that
25 except in death penalty cases.

1 I often receive agreed-upon questions
2 by both sides, but I don't want to ask them because
3 I think some of them go a little far and are more
4 geared towards conditioning the jury to a certain
5 point of view than they are to really gauge
6 information needed to discern whether we can get a
7 juror who can look at the evidence as it is
8 presented, and the law as I give it, and be
9 objective and put their own personal feelings to
10 the side, and render a fair and impartial verdict.

11 So I will look carefully at what you
12 send and it all may be okay, but I just want to
13 explain to you that some of you have not tried a
14 case with me before, but sometimes both sides will
15 agree, but I withdraw those questions because it's
16 a little outside of what the jury needs to be asked
17 in order to find a fair and impartial jury.

18 But that would be very helpful. Very
19 helpful.

20 What else?

21 MR. BRANHAM: Judge, in terms of
22 Whitmire, I have just a couple of housekeeping
23 things to advise the Court about. We took
24 Dr. Holstein's videotaped deposition; he's an
25 expert; he's on vacation. So he will coming by

1 video.

2 THE COURT: All right.

3 MR. Branham: I have given the
4 defendants the designations that I wish to play.
5 My understanding is they are working diligently to
6 get counter designations back.

7 That's the only deposition that I am in
8 dire need of getting rulings from the Court on
9 objections so that I can get that tape cut so that
10 I'm not short on evidence next week.

11 So I hope that we will get those
12 counters back from you guys.

13 MR. MERIWETHER: We --

14 THE COURT: What day do you plan to --
15 do you plan to play it on day one?

16 MR. Branham: No, Judge.

17 THE COURT: All right. Well, here's
18 what we'll do: Will you-all please try to get all
19 of these designations and counter designations and
20 objections in order, and I will try to deal with
21 them -- and I will try to deal with them at the
22 close of the case on Monday.

23 MR. ELLIOTT: Your Honor, just -- all
24 of the designations were due on Monday for
25 everything except Holstein. We've got -- all of

1 our replies and objections are due Friday. That's
2 not going to be a problem.

3 Holstein's, I think you got his
4 deposition, just by chance, a day before us. I
5 think you got it yesterday. I mean, it is a long
6 deposition.

7 THE COURT: I understand.

8 MR. ELLIOTT: That one's going to take
9 a while.

10 THE COURT: The goal would be -- let's
11 just put it in that context -- to try to get
12 together at the end of one of the days before this
13 deposition is played to the jury. What I don't
14 want to have happen is to send that jury out and be
15 sitting here talking about this.

16 I want it all decided and then tailored
17 so it can all be queued up and played with no
18 interruptions for rulings or anything of that
19 nature.

20 So are we in accord?

21 MR. BRANHAM: So literally as soon as
22 they get it back to us, you know, just highlight
23 and getting the page lines and objections done,
24 we'll get it to you.

25 THE COURT: I have Jamie Rutkoski, but

1 she's leaving me now and she's DQ'd on this case
2 because she's going to work for one of the law
3 firms in the case. So I've got Tyler McDonohue
4 here, and Tyler is an appellate law clerk with
5 Judge Honduras, which means he's brilliant and very
6 experienced in that realm, but he's not very
7 experienced in trial cases.

8 So what I used to do is send Jamie out
9 there and she would work these things out with you
10 all and narrow down the things that we were really
11 concerned about to a precious few.

12 Now, I can have Tyler interact with you
13 all about that, but keep in mind the limitations of
14 what I'm being provided for by way of resource and
15 try to whittle it down to what you're really
16 concerned about, as opposed to just kind of knowing
17 the objection for the record so you're protected.

18 The things I really need to rule on,
19 let's kind of focus like a laser on those. Okay.

20 All right. What else?

21 MR. MERIWETHER: In terms of
22 housekeeping, thinking about parts of the trial and
23 so forth, I will follow-up on what Trey was saying.
24 I know we had to take one of their experts by
25 video. I'm hoping that's not true for any of ours.

1 Trey, I think you're taking tomorrow
2 morning --

3 MR. BRANHAM: I don't know that he had
4 been tendered, but it doesn't mean that I didn't
5 forget.

6 MR. MERIWETHER: It's okay. We
7 tendered him, but, look, I'm not ever blaming
8 anybody for forgetting something.

9 THE COURT: All right.

10 MR. MERIWETHER: My point is, he's
11 going to take him tomorrow morning. We've got a
12 follow-up report that we said -- that he requested.
13 We are going to -- my only problem is we may have
14 to call him out of order.

15 And so by the tail end of next week, if
16 you all are -- if you all are agreeable, we might
17 have to put him up.

18 MR. BRANHAM: So the only thing I need
19 with that is the date, because if it conflicts with
20 my expert then --

21 MR. MERIWETHER: Right.

22 THE COURT: That's for the future.

23 Now, we still have this. We have
24 Crawford. So let me just say a word about
25 Crawford. Number one, I'm sure more information

1 will come from you about who is still in this case
2 by the time Monday rolls around.

3 In the meantime, we've got a motion for
4 summary judgment by Aurora pumps in the Crawford
5 case, and I'm going to deny that on the same basis
6 that I denied the motion for summary judgment in
7 Whitmire.

8 All right. Mr. Meriwether, you were
9 protected in all of the objections you made and so
10 forth.

11 MR. GLENN: For the record, we didn't
12 have a summary judgment motion --

13 THE COURT: I've got CNA and Daniel
14 out. I got Goodyear and Sarco. What's with Aurora
15 Pumps? No motions?

16 MR. MERIWETHER: Your Honor, we did not
17 waste the Court's time or plaintiff's time by
18 making an exposure motion for summary judgment in
19 Whitmire --

20 THE COURT: Okay.

21 MR. MERIWETHER: -- however, in
22 Crawford, where there is no testimony that he was
23 ever around a pump, we did make one.

24 THE COURT: Okay. Well, then it's
25 denied.

1 All right. Now, Goodyear and Sarco.
2 Is this going to be anything different from what
3 I've already heard?

4 MS. TECHMAN: Yes, Your Honor, it will
5 be for Sarco.

6 MR. BOGLE: On behalf of Goodyear, Your
7 Honor, it will be very different.

8 MS. TECHMAN: My motions will take less
9 than five minutes.

10 THE COURT: Well, I've heard that
11 before.

12 Let me hold things for a minute and go
13 on to a couple of other things. But motions in
14 limine I think I've dealt with in Whitmire, both
15 plaintiff and defense, so I don't need to hear
16 anything different with motions in limine.

17 With respect to the miscellaneous, we
18 have Covil's failure to attend the mediation and
19 Covil's spoliation.

20 Do we have anybody here for Covil?

21 MR. WALL: Yes, Your Honor, Mark Wall.
22 And, Your Honor, I'll get into it now. We were
23 served those motions yesterday. We have not -- I
24 have filed little stuff on them just to protect the
25 record, but I've not really filed anything on them.

1 THE COURT. Okay. Well --

2 MR. WALL: We filed an affidavit and I
3 filed a sort of a rolling memorandum.

4 THE COURT: All right. I want to hear
5 those today.

6 MS. MCVEY: Okay. And just for the
7 record, the reason why they were filed yesterday
8 was because they're 30(b)(6) deposition. We pushed
9 them at their request to Monday. So we weren't
10 delaying it; we just didn't know until Monday.

11 THE COURT: But you took it and what
12 you're saying -- number one, Covil did not attend
13 the mediation?

14 MS. MCVEY: Your Honor, Covil -- hold
15 on a second. Covil asked to have a separate
16 mediation apart from the one we did, that we agreed
17 to do in July.

18 THE COURT: Yeah.

19 MS. MCVEY: And then they cancelled
20 that.

21 THE COURT: Mm-hmm.

22 MS. MCVEY: And so they have not
23 mediated --

24 MR. WALL: We canceled that based upon
25 what they said to us, and then we went and made a

1 full offer as if we were in mediation, and this was
2 all Friday of last week.

3 THE COURT: All right. Well, I'm not
4 going to get into that then right now.

5 All right. With respect to defendants'
6 motion to -- joint motion to -- defendants' joint
7 motion to strike the case from the trial roster --
8 well, that's denied.

9 It's the backup case and it's going to
10 be the backup case and it has been the backup case
11 for a long time.

12 I am going to look at my watch, and I
13 don't want a long argument, Ms. Techman. The
14 chances of reaching your case are not high, but
15 they are a potential; so, therefore, come on up.

16 MS. TECHMAN: Thank you, Your Honor.

17 Jennifer Teckman for Spirax Sarco, who
18 for convenience I will refer to as Sarco,
19 S-A-R-C-O.

20 Your Honor, this motion is different
21 from any motion that you've heard today. At issue
22 is whether this Court can assume that the product
23 was at the job site. By that I mean it's
24 undisputed that there is no evidence of a Sarco
25 product at Mr. Crawford's job site. There is no

1 testimony from Mr. Crawford and there are no
2 witnesses who put the product at the site. There
3 are no documents that put the product at the site.

4 So in order for this Court to determine
5 that the product was even at the job site would
6 require complete speculation.

7 THE COURT: Who is -- what is the job
8 site?

9 MS. TECHMAN: Celanese plant in
10 Spartanburg.

11 It is also undisputed that there really
12 is not any circumstantial evidence that the product
13 is at the job site. The plaintiffs may ask you to
14 assume that the product could have been at the job
15 site because the product is a steam trap and steam
16 traps could have been on steam lines.

17 But what this Court cannot do is make a
18 wholly unsupported assumption that the product was
19 there, that the product had asbestos-containing
20 components, that the product was in the vicinity of
21 Mr. Crawford, who, by the way, worked in a
22 supervisory capacity.

23 The Court would have to further assume
24 that some disturbance of the asbestos component was
25 undertaken while Mr. Crawford was in the vicinity,

1 and the Court would have to further assume that
2 that happened on enough occasions to reach at least
3 a scintilla, but here, Your Honor, there's not even
4 a scintilla.

5 THE COURT: All right. Very good.

6 MR. CHAPMAN: Good afternoon, Your
7 Honor. Aaron Chapman for the plaintiffs. The
8 first time I'm appearing in front of you.

9 THE COURT: And your last name is?

10 MR. CHAPMAN: Chapman, Your Honor.

11 THE COURT: All right.

12 MR. CHAPMAN: Just for time, I'll
13 largely rest on our brief, but, briefly, I'll say
14 that the Celanese facility is part of a very large
15 facility with miles and miles of steam lines.

16 THE COURT: What evidence is there that
17 Sarco's product was there?

18 MR. CHAPMAN: Well, so, Your Honor, I
19 think what we have is that Sarco steam traps were
20 very prevalent in the area, and given their
21 prevalence in the area and the exact type of
22 application which Mr. Crawford would have been
23 around, I think it's a reasonable presumption or
24 inference that he would have --

25 THE COURT: What evidence in the record

1 is there about Sarco products being in the area or
2 sold in the area or used in the area?

3 MR. CHAPMAN: There is no document of
4 it, Judge.

5 THE COURT: Is there any testimony?

6 MR. CHAPMAN: No, Your Honor.

7 THE COURT: Well, then, on what basis
8 am I to conclude that Sarco's products were at
9 Celanese?

10 MR. CHAPMAN: I think, Your Honor, just
11 given the reasonable inferences that we could get
12 viewing the motion most favorable to us.

13 THE COURT: I know, but I've got to
14 have a scintilla.

15 MR. CHAPMAN: I understand, Your Honor.
16 I totally understand what you're getting at, but
17 there is no document.

18 THE COURT: Very good. The motion is
19 granted.

20 MS. TECHMAN: Thank you.

21 MR. CHAPMAN: Thank you, Your Honor.

22 THE COURT: All right. Now, Goodyear.

23 MR. BOGLE: Your Honor, Michael Bogle
24 with Womble, Bond, Dickinson, B-O-G-L-E, for
25 Goodyear. I understand the Court is pressed on

1 time, so I will be brief.

2 Our motion is a little similar to what
3 you just heard. We sat through discovery,
4 plaintiffs sat through all the depositions in this
5 case, we sat through them. There was no mention of
6 any Goodyear products. At the close of discovery,
7 we moved for summary judgment.

8 And the plaintiffs responded for the
9 first time that we ever heard, oh, we weren't
10 talking about a Goodyear labeled product. We were
11 talking about Goodyear making a component of
12 another company's product with whom we've already
13 settled in the case, one of the other
14 co-defendants.

15 So at the outset, I think what we're
16 asking for is partial summary judgment on the fact
17 that we can all agree there is no Goodyear Tire
18 labeled product here.

19 So moving on to the plaintiffs' new
20 theory of liability, what I would ask the Court to
21 do, and I will be very brief, but we've attached as
22 Tab 8 to our brief -- do you have -- does Your
23 Honor have a copy of that?

24 THE COURT: If I have --

25 MR. BOGLE: I brought one.

1 THE COURT: Here it is. It's in the
2 mélange. In fact, I think I know where it is back
3 on the desk, but it would be helpful --

4 MR. BOGLE: Here you go, Your Honor.

5 THE COURT: All right. Thanks.

6 MR. BOGLE: So tab 8 to that is a copy
7 of trial transcripts or a portion of trial
8 transcripts from the Muldoon case back in 2014.
9 And I think it's very similar to what we're seeing
10 here.

11 Through discovery, no Abex Brakes --
12 this was Abex Brakes' motion for summary judgment.
13 It went through discovery. There was no
14 identification of an Abex Brakes product. No
15 witness ever testified that Mr. Muldoon was exposed
16 to Abex Brakes.

17 They moved for summary judgment and
18 plaintiffs responded for the first time that we
19 admit we have no evidence linking to an Abex Brakes
20 product, but we're going to try to connect the dots
21 that your company was a manufacturer of a component
22 part of another defendant's product.

23 THE COURT: Crane.

24 MR. BOGLE: Correct, Crane. Now, in
25 that case, it was Cadillac cars. The plaintiff

1 introduced evidence. They had evidence that -- the
2 co-worker's testimony was that the plaintiff worked
3 on Cadillac cars; and they had further evidence
4 that for a period of time that Abex was the
5 exclusive manufacturer of brakes for Cadillac cars.

6 And so they tried to piece together
7 this component liability theory. And Judge Hill
8 said that is not enough. And relying on the cases
9 we've cited in briefs, that you cannot sidestep
10 causation in South Carolina. The plaintiffs have
11 to prove the injury or damage was caused by the
12 actual conduct, but particularly defendants.

13 Let's look at Goodyear. We already
14 said they can't point to a Goodyear labeled product
15 or Goodyear products. So they tried to piece
16 together a three-part argument. They have to
17 connect three dots, and if they can't connect one
18 of those dots, they lose. They have to hit a
19 thousand on this.

20 So part one is they have to connect
21 plaintiff to a Crane Co. valve during this
22 four-year period where he worked at the Hoechst
23 Celanese plant, 1970 to 1974.

24 In Muldoon, that was easy. They had
25 co-worker testimony that he worked on the Crane Co.

1 valves on the Cadillac cars.

2 They don't have that here.

3 Mr. Crawford never worked on a Crane Co. valve. He
4 was a production line guy. He didn't identify
5 Crane Co. valves. He didn't identify any valves.

6 So to make this connection, they tried
7 to dig up some testimony from Dennis Day and Ronny
8 Thompson from five years ago. And neither of these
9 gentlemen were deposed in this case.

10 Neither were ever identified as
11 witnesses in this case. The first time anyone in
12 this room heard or saw their names was in response
13 to our motion for summary judgment.

14 And on that basis, we moved in our --
15 we move to strike that testimony. So if Your Honor
16 agrees with that, we get summary judgment. It's
17 over.

18 Let's look at what the testimony says.
19 Again, Crawford worked for Celanese, production
20 line guys. Day and Thompson worked for Daniel
21 Construction; they were maintenance folks. They
22 didn't know Mr. Crawford. They never mentioned
23 Mr. Crawford. Mr. Crawford didn't know either of
24 them.

25 So Day and Thompson said, yes, we

1 worked on Crane Co. valves. They also said this
2 plant was 100 acres big. That's ten William Brice
3 Stadiums. So they might have worked on valves in
4 the upper deck of stadium two and Mr. Crawford
5 might have been on the 50-yard line of stadium
6 eight. We have no idea. That's guess No. 1.

7 We know that the valves were in the
8 same 100-acre plant as Mr. Crawford. We don't know
9 whether he was ever within five football fields of
10 that work taking place. We know he never did any
11 of that work, much less -- and so I think there's a
12 big question of whether you can meet the proximity
13 requirements and it's enormous. That's guess No.
14 1.

15 What's the second one? The second leap
16 they have to make, they have to put a cranite
17 gasket inside that Crane Co. valve. And, again,
18 Mr. Crawford never said Crane Co. He never worked
19 a valve. He never said gaskets. He never
20 identified any gaskets. He identified one gasket
21 in connection with auto work. He never puts a
22 gasket in the Hoechst Celanese plant.

23 So we have to go back to Mr. Day and
24 Mr. Thompson. They say they changed gaskets and
25 Crane Co. valves, and they say they usually got

1 their replacement gaskets from kits at the plant
2 and that they thought those kits came from the
3 manufacturer.

4 Do they say the gaskets they changed
5 were cranite gaskets? No, they do not. Do they
6 say they were Goodyear gaskets? No, they do not.

7 So what Plaintiff has to do is they
8 bring in the testimony of a third previously
9 undisclosed, previously unknown witness brought
10 into this case for the first time in opposition to
11 our motion for summary judgment, Mr. Pandaleoni,
12 P-A-N-D-A-L-E-O-N-I.

13 And we've cited law in our brief so
14 that Your Honor can see in our motion to strike
15 this testimony that it is not proper to introduce
16 witnesses in a case for the first time and identify
17 witnesses for the first time in response to summary
18 judgment.

19 We also have a number of other grounds
20 to exclude those witnesses' testimony. We think
21 it's hearsay for a number of reasons.

22 Again, if Your Honor agrees, we win,
23 end of story, motion for summary judgment should be
24 granted. They have to hit all three of these
25 points, but let's talk about the testimony.

1 Mr. Pandaleoni says Crane Co. sold
2 gaskets called cranite. And he said that Crane Co.
3 recommended cranite gaskets to his customers. He
4 does not say that they were always used as
5 replacements for the Crane Co. valves. He does not
6 say they were most of the time used. He does not
7 know whether the valves in Mr. Crawford's plant
8 contained cranite gaskets.

9 He doesn't know Mr. Crawford or this
10 plant. He doesn't know whether Celanese bought
11 these replacement gaskets. He doesn't know whether
12 Daniel bought these cranite gaskets. He can't tell
13 us whether Celanese or Daniel bought cranite
14 gaskets or some other type of gaskets --

15 THE COURT: Yeah, but they have some
16 co-workers that say that there were boxes that said
17 made for Crane Co. or made for Crane with gaskets
18 in them.

19 All right. Why isn't that a scintilla?

20 MR. BOGLE: Your Honor, I think that --
21 well, there's testimony from Mr. Pandaleoni.
22 Mr. Pandaleoni says they sold -- there were all
23 kinds of different gaskets that Crane Co. sold.
24 There were cranite gaskets that he said Goodyear
25 made, but there were also a number of other gaskets

1 and the customers commonly bought other gaskets.

2 So we don't know what kind of gaskets they bought.

3 THE COURT: That's such a typical thing
4 that I hear a lot. You know, there's a scintilla
5 that cranite, which was a Crane Co. product made by
6 various suppliers, which Goodyear was one, and they
7 would supply these things in a little box that
8 said, supplied by or made for Crane.

9 And yours were some of the gaskets that
10 would be in there that you made for Crane, the
11 cranite. And so that's going to be enough for me.

12 MR. BOGLE: Well, I -- okay. I --

13 THE COURT: I mean, this is summary
14 judgment.

15 MR. BOGLE: I understand.

16 THE COURT: And, you know, you're
17 asking me to give you some affirmative relief. And
18 there is at least a scintilla of evidence that
19 Goodyear was one of the suppliers of gaskets for
20 Crane and that Crane would supply a little box that
21 would say, made for cranite; that as one of the
22 suppliers, its gaskets would have been included in
23 some of the boxes that would have been supplied by
24 Crane to be used with its product.

25 MR. BOGLE: I would submit that it's

1 the same situation that Abex was in where some of
2 their -- they were the exclusive provider for
3 Cadillac for a period of time and Judge Hill
4 ruled -- and, again, I'll urge the Court to read
5 through it. It's not a long brief, but Judge Hill
6 ruled that that was because you're taking
7 multiple -- you're looking at multiple dots that
8 have to be connected. And --

9 THE COURT: I understand the multiple
10 dots argument.

11 MR. BOGLE: Okay. Well, we believe
12 that it's insufficient. We believe there's a
13 part three they have to prove, whether Goodyear was
14 the exclusive manufacturer. We address that in our
15 brief.

16 THE COURT: Yeah, I know.

17 MR. BOGLE: I can go through it or I
18 can stop.

19 THE COURT: Denied. You're protected.

20 MR. BOGLE: Thank you.

21 THE COURT: All right. Now, what else?

22 MR. BRANHAM: I need to come back to
23 Whitmire for just a second. I was just handed
24 something, and I will brief it for you, but I just
25 need to raise the issue. This is -- I literally

1 just got handed a report from a company called the
2 R. J. Lee Group.

3 THE COURT: I'm familiar with R. J.
4 Lee.

5 MR. BRANHAM: With a report done by
6 Drew van Orden, who is not an expert designated in
7 this case, that he did what's called a tissue
8 digestion. Your Honor, I don't know if you are
9 familiar with --

10 THE COURT: I remember the tissue
11 digestion. Tim Moore says you can't tell anything
12 about anything unless you do a tissue digestion.

13 MR. BRANHAM: Okay. So they did one,
14 apparently, and nobody ever asked me. This is
15 literally the first time I'm ever hearing about a
16 tissue digestion actually being done.

17 Now, when I talked to Mr. Oury, we
18 talked about what he would want to see in tissue
19 digestion, those types of things.

20 THE COURT: This is a tissue digestion
21 on Mr. Whitmire's tissue?

22 MR. BRANHAM: That's right. And they
23 got results --

24 THE COURT: And who is supplying this
25 to you?

1 MR. BRANHAM: Aurora is supplying it
2 just now.

3 MR. MERIWETHER: We took over for
4 Dr. Oury -- we took that over for -- you know, as
5 sort of --

6 THE COURT: I got it. How long have
7 you had this?

8 MR. Glenn: I got the report -- it's
9 dated yesterday. I didn't receive it, Your Honor,
10 until today, when we were at this hearing.

11 THE COURT: When was it done?

12 MR. BRANHAM: When was the digestion
13 done?

14 THE COURT: Yes.

15 MR. BRANHAM: Sample received May 25th.
16 I can't tell exactly when the -- but clearly after
17 May 25th, right?

18 THE COURT: Uh-huh.

19 MR. BRANHAM: And so, I mean, here's
20 the thing, Judge, is they've got an expert doing
21 the digestion that they never asked me about. So
22 they've destroyed evidence without giving me notice
23 so that I can get somebody to split it up and have
24 everybody else do it.

25 THE COURT: Well, I don't know that.

1 MR. BRANHAM: Well, I mean, I don't
2 have it.

3 THE COURT: I'm not prepared to make
4 any ruling excluding that, Mr. Branham.

5 MR. BRANHAM: Fair enough.

6 THE COURT: I'm going to need to know a
7 lot more about whether there was any tissue left
8 for you to test, when they got it, how they got it,
9 and all that kind of thing.

10 MR. BRANHAM: We'll brief it, but I
11 just wanted to --

12 MR. MERIWETHER: Just for the sake of
13 the record, from my understanding, and please
14 forgive me if I miss say anything, but my
15 understanding is that Dr. Oury, who is the
16 defense --

17 THE COURT: I know Dr. Oury. I know
18 he -- tissue digestion.

19 MR. MERIWETHER: So when Dr. Oury was
20 put up for deposition, he had gotten the tissue
21 that morning. He did limited review. He said, you
22 know, I would still like to have the tissue
23 digestion and I still need to do some more staining
24 because I'm not convinced that this is an
25 asbestos-associated meso until I test this.

1 He did test that and he agreed to come
2 back for a further deposition. I have responded to
3 Trey that we have heard from Dr. Oury that he is no
4 longer asserting that it is not an
5 asbestos-associated meso based on his subsequent
6 staining that he did.

7 The other thing he did was they divided
8 the tissue in half and sent half to R. J. Lee to
9 get Drew to do a digestion so that he could tell
10 whether or not it was --

11 THE COURT: And what is R. J. Lee
12 saying?

13 MR. MERIWETHER: He's saying -- well,
14 I'll be honest with you, I haven't looked at it. I
15 got a copy and handed it to --

16 THE COURT: Mr. Branham, what's R. J.
17 Lee saying?

18 MR. BRANHAM: It's says that he found a
19 particular type of asbestos fiber, amosite, in the
20 material.

21 THE COURT: Uh-huh.

22 MR. BRANHAM: And, of course, what the
23 argument from these folks is going to be is that
24 our gaskets only contain chrysotile; so, therefore,
25 it couldn't have been our gaskets.

1 THE COURT: Right.

2 MR. BRANHAM: So, I mean, now, the
3 amosite insulation on the pumps and valves and all
4 the rest of that, that's a different issue. But
5 the point here is that I took Mr. Oury's
6 deposition. He told me he wanted to do the
7 staining, that he would be interested in seeing the
8 digestion and this kind of thing, but they didn't
9 tell me they were going to do one. And there
10 wasn't --

11 THE COURT: He might not have -- this
12 one might not have known. Apparently --

13 MR. GLENN: We learned about this, Your
14 Honor, on last Thursday. And we said if Dr. Oury
15 can get the tissue digestion in time for trial, we
16 would love to see it and love to offer you for a
17 deposition. And that has been over the last five
18 days. I received the report today.

19 THE COURT: Okay. Well, I'm simply
20 going to say this. All right. You will have to
21 look at this thing and decide what you're going to
22 do about it and what kind of motion you're going to
23 make. So far I have no motion in front of me about
24 this matter.

25 MR. BRANHAM: Fair enough.

1 THE COURT: But when I do, I will try
2 to do the best I can.

3 MR. BRANHAM: Thank you.

4 MS. MCVEY: Thank you, Your Honor.

5 THE COURT: Very good. Anything else?

6 MS. MCVEY: Just one thing. I know you
7 said you're not going to hear the Crawford, Covil
8 motions, but we would like to have it heard at some
9 point.

10 THE COURT: Oh, yeah. If this comes to
11 case that's going to be tried, we will hear it.

12 MR. BOGER: Your Honor, Tommy Boger on
13 Covil. We do have a separate specific motion in
14 lime regarding excluding the testimony of a witness
15 that the plaintiffs named just fairly recently by
16 the name of Wayne Waters.

17 THE COURT: I just -- you know, when
18 did they name him as a witness?

19 MR. BOGER: I'll defer to them on when
20 it was filed.

21 MS. MCVEY: I'm sorry. Oh, that's in
22 Crawford. Can we deal with that another --

23 THE COURT: Yeah. I understand. I
24 understand.

25 MR. BOGER: We'll hold off on that one

1 then, Your Honor?

2 THE COURT: Hold off on that.

3 MR. BOGER: Okay. Thank you.

4 MS. MCVEY: I'm sorry, Your Honor. The
5 last thing in Crawford is, Mr. Crawford is the one
6 that has mesothelioma and he's still alive. His
7 wife died earlier this year, and so we moved to
8 amend the complaint to add her estate as a party.

9 THE COURT: Right.

10 MS. MCVEY: There has not been an
11 objection to that, but I wanted to hand you up an
12 order.

13 THE COURT: Right. Okay.

14 MS. MCVEY: Thank you, Your Honor.

15 THE COURT: Mr. Meriwether.

16 MR. MERIWETHER: Your Honor, for the
17 sake of scheduling the next set of trials, are we
18 to understand that Mr. Waters is now first up
19 instead of second up?

20 THE COURT: Huh?

21 MR. MERIWETHER: In September for the
22 next set of --

23 THE COURT: I have made no decision
24 about September. You people have about driven me
25 crazy trying to get ready for this. And I have not

1 made a -- I don't have a law clerk yet for
2 September, so I'm not making any decisions about
3 September until I understand what my situation is
4 going to be.

5 MR. MERIWETHER: I totally understand,
6 but if you had, I needed to know.

7 THE COURT: I haven't.

8 MR. MERIWETHER: That's all I needed to
9 know.

10 THE COURT: Mr. McLeod.

11 MR. MCLEOD: Yes, Your Honor. I
12 just -- thanks for allowing me to be here today. I
13 just want to bring your attention --

14 THE COURT: Quiet. Now, wait a minute.
15 Wait a minute. Wait a minute. Be in order.

16 MR. MCLEOD: I apologize. I just
17 wanted to bring to the Court's attention again that
18 there are several of our cases we have outstanding
19 personal jurisdiction motions that we would like to
20 get heard.

21 I mentioned this to you in the Bostic
22 hearing. We really need to get them heard. I'm
23 really concerned because today I heard that the
24 plaintiffs were arguing that participating in
25 discovery is a reason for us waiving that defense.

1 You mentioned after the Bostick hearing
2 that that was not going to be grounds to say we
3 waived it, but my clients --

4 THE COURT: This is a different
5 situation now. I'm not going to go forward and
6 talk about your situation. I have ruled on
7 situations that were present in this case that
8 don't have one thing to do with your case.

9 So I'm not going to -- you know, don't
10 be trying to get me to make a ruling when I haven't
11 even heard what you're talking about.

12 MR. MCLEOD: We just want to get them
13 heard because it's clear --

14 THE COURT: I understand, but I can't
15 be in but one place at a time. And I will tell you
16 this, Mr. McLeod, I am going to try this case and
17 then I'm going to see what resources I'm going to
18 be provided with.

19 I have got two matters to hear in
20 August and I have my family on vacation at the
21 beach and that's where I'm going to be. And I will
22 try to get some information about what happens
23 after that, but I am not going to spend any of my
24 August scheduling things in Sizemore and all these
25 other cases. I'm not going to do it. All right.

1 You know, I'm just one so-called
2 part-time judge, and I am not going to be pressed
3 by all these motions for personal jurisdiction and
4 everything else. I just can't do all that, you
5 know.

6 MR. MCLEOD: Yes, I understand. My
7 clients --

8 THE COURT: I know your clients are
9 pressuring you. I'm not fussing at you. Please
10 understand that. You've got clients that are down
11 your throat, so you want to be down mine a little
12 bit. I get that.

13 MR. BOGLE: Your Honor, Michael Bogle
14 for Goodyear Tire and Crawford. There was one
15 other matter. We also separately moved an
16 alternative to our motion to strike to continue
17 trial because of the fact that the two -- three
18 witnesses that I mentioned were identified for the
19 first time a week and a half ago and were never
20 identified by the plaintiff in response to
21 discovery or anything.

22 And we have moved to continue trial
23 based on that. And then also an additional ground,
24 that may be because of the amendment of the
25 complaint and the addition of the new party. I

1 think, number one, we have 15 days to answer the
2 new complaint.

3 And I think the rules also state that
4 unless you have consent of all parties, the case
5 can't be tried for 180 days with the addition of
6 new parties --

7 THE COURT: Well, that doesn't apply to
8 this situation. I set this case way, way long ago.
9 And that the -- that -- and you've been a party in
10 it for a good long time now, correct?

11 MR. BOGLE: I understand. I
12 understand. I understand. But the fact that we've
13 been hearing a lot about defendants' discovery or
14 alleged discovery abuses and what the defendants
15 should do, and we feel that designating --
16 disclosing witnesses a week before trial, a week
17 and a half before trial for the first time --

18 MS. MCVEY: When were they --

19 MR. BOGLE: In another case, five years
20 ago.

21 THE COURT: Well, you know, you-all are
22 acting like children. Now, I'm not going to change
23 the order of these cases and I'm not going to delay
24 the trial at this point. One case is backed up to
25 the other.

1 You are concentrating most of your
2 efforts on Whitmire. A few of you who are in
3 Crawford have to understand it's a backup case, but
4 most of the material that I'm understanding has
5 been supplied to you, it's material that's been
6 around for years and years and years. It's old
7 depositions and things of that nature. So I don't
8 want to put that in the same category.

9 If we have to go to Crawford, I'm sure
10 we're going to have a lot of things that I will
11 have to deal with before we actually begin to
12 select a jury and try the case.

13 But I am not, as I stand here this
14 afternoon, going to move to grant any motion to
15 delay this trial because of attempts by the
16 plaintiffs to go on and supply you with as much
17 information as they can for the backup case while
18 they're still trying with all their might to get
19 ready for Whitmire. So now --

20 MR. BOGLE: Thank you, Your Honor.

21 THE COURT: Anything else? All right.
22 I look forward to seeing you Monday, unless by some
23 miracle you settle this case.

24 (These proceedings were concluded at
25 5:08 p.m.)

1 CERTIFICATE OF REPORTER

2
3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 8th day of August, 2018 at
13 Charleston, Charleston County, South Carolina.

14
15
16
17 /Carol Denise Lauder _____
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
21 My Commission expires
22 February 27, 2028
23
24
25

EXHIBIT I

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-42-1592

Beverly Dale Jolly and

General Electric Company, et al.

Brenda Rice Jolly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Theile B. McVey

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

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

Circuit Court Judge
SCRPC Form 4C (02/2017)

2758
Judge Code

12-15-17
Date

Page 1 of 4
1527

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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

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

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

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

I. The Evidence at Trial

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

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

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

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

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

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

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

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

#3
JBT
Both of Plaintiffs' medical experts, Dr. Arthur Frank and Dr. John Maddox, testified that Mr. Jolly's exposure to asbestos from Fisher and Crosby valves was a substantial factor in the development of his mesothelioma. (TT 7/26 at 72-73; TT 7/31 at 180-82). They testified that mesothelioma can be caused by brief or low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). Even Defense expert Dr. Crapo admitted that a "very low" level of exposure to crocidolite can cause mesothelioma. (TT 8/1 at 114).

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

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

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

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

A. Standard of Review

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

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

B. Additur

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

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

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

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

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

#6
JBT
Damages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million. *See, e.g., Keene v. CNA Holdings, LLC*, No. 2013-CP-42-03915 (S.C. Ct. Comm. Pleas Jan. 8, 2016) (upholding award of \$2 million in survival damages, \$5 million in loss of consortium damages, and \$5 million in wrongful death damages); *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas Nov. 14, 2014) (remitting the jury verdict to award \$1.5 million for the plaintiff's pain and suffering and upholding the loss of consortium award of \$1 million); *see also Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017) (affirming in relevant part the district court's award of \$3 million in pain and suffering damages for woman with asbestos-related mesothelioma); *Romano v. Metropolitan Life Ins. Co.*, --So.3d --, 2017 WL2265424 (La. Ct. App. 2017) (increasing pain and suffering award from \$500,000 to \$1.5 million in mesothelioma case where plaintiff had endured invasive surgery and was expected to die from his disease); *John Crane, Inc. v. Linkus*, 190 Md. App. 217, 988 A.2d 511 (Md. Ct. App. 2010) (upholding \$15,335,274 verdict for living shipyard worker diagnosed with mesothelioma at the age of 70, of which \$335,000 was medical expenses and \$15 million was noneconomic loss); *In re New York City Asbestos Litigation (Re D'Ulisse)*, 16 Misc.3d 945, 842 N.Y.S.2d 333 (N.Y. Sup. Ct. 2007) (denying motion to reduce award of \$20 million in past and future pain and suffering to mesothelioma victim and \$5 million to his wife of 51 years); *Williams v. CSX Transp., Inc.*, 176 N.C.App. 330, 626 S.E.2d 716 (N.C. Ct. App. 2006) (affirming verdict in which railroad worker with mesothelioma was awarded \$7.5 million in pain and suffering

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

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

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

#7
The jury was instructed that, “[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the accident or incident occurred. Actual damages would be the actual losses and expenses the Plaintiffs have incurred.” (TT 8/3 at 139). The jury was instructed on four categories of actual damages – medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. (TT 8/3 at 139-40). The jury was also instructed that future damages should be awarded for the duration of Mr. Jolly’s life expectancy, which is a little more than eleven (11) years given his age of 73. (TT 8/3 at 141-42).

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

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

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

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

#8
JST
Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, the Court will increase the medical expenses award to \$1,000,000.

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

B. Open and Obvious Danger.

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

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

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

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

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

#12
JST
Not only do Fisher and Crosby contend there was no health hazard from working with asbestos gaskets and packing, they did not always inform Duke that these materials contained asbestos. Some of Fisher's asbestos-containing packing specifications did not describe the material as containing asbestos, and instead referred to it as metallic or plastic. (TT 7/27 at 208-09). Mr. Duimstra agreed that a reference to a metal packing ring would not alert people that the product contained asbestos. (TT 7/27 at 210). Duke purchase orders to Fisher stated the Fisher part number and a brief description, but oftentimes in order to determine if the part contained asbestos one would have to reference Fisher's own material specification for that part number. (TT 7/27 at 215-16, 221-22, 225; Pl's Ex. 1012.5). Jolly's co-worker, David Taylor, testified that the only way to know if a gasket had asbestos was whether it was marked as asbestos-containing on the gasket packaging. (TT 7/27 at 115).

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

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

C. Sophisticated Intermediary Defense

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

#13
JST
The jury decided this issue in Plaintiffs' favor. The Court finds that their verdict is supported by the evidence and that Fisher and Crosby are not entitled to judgment as a matter of law on this defense. Fisher and Crosby did not show that they warned Duke; the evidence was that Fisher and Crosby provided no warnings to Duke. (TT 7/27 at 144; TT 7/31 at 64-65). Fisher and Crosby also failed to show that they knew Duke was aware or should have been aware of the danger from asbestos gaskets. The evidence was that Duke distinguished asbestos gaskets as non-hazardous because it was thought they did not release asbestos fibers when disturbed. (Pl's Ex. 136 at Script, p. 3; TT 7/27 at 126). There was no evidence that Fisher and Crosby were relying on Duke to inform its employees of those hazards. The record thus supports the jury's rejection of this defense.

D. Product in Same Condition.

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

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

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

#14
8/18
Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). Defendants’ engineers determined what materials the flange gaskets were made of to create the right seal under different conditions. (TT 7/27 at 189). Mr. Taylor recalled that the Fisher and Crosby valves present at Duke had flange connections that utilized asbestos flange gaskets. (TT 7/26 at 210-13).

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

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

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

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

#15
JH
E. Proximate Causation

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

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

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

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

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

#16
JTS
The record therefore supports the jury's conclusion that Mr. Jolly would have followed an adequate warning if one had been present on Fisher and Crosby products. Under *Allen*, the mere fact that an adequate warning was missing from the products was sufficient to create a jury question regarding whether an adequate warning would have changed Jolly's behavior. 332 S.C. at 432-33, 505 S.E.2d at 360. The evidence supports the jury's determination that Fisher and Crosby's failure to warn was a proximate cause of Jolly's mesothelioma.

F. Design Defect

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

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

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

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

#17
With regard to packing, Mr. Duimstra testified that Teflon had been available since the 1950s, and could have been sold instead of asbestos packing. (TT 7/28 at 100-01, 140-41). He acknowledged that there was no reason for Mr. Jolly to be exposed to asbestos gaskets and packing because of the availability of alternative materials. (TT 7/28 at 145-46).

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

G. Standard of Care

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 8/5
 Even though Fisher was supposed to behave with the knowledge of an expert, Fisher did not discontinue its sales of asbestos-containing gaskets and packing until its customers demanded it. (Pl.’s Ex. 1008.01).

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

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

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

H. Bare Metal Defense

1. Direct Sales to Duke

#22
JH
Fisher and Crosby contend that they are entitled to summary judgment because they did not manufacture or provide the asbestos materials to which Mr. Jolly was exposed. This assertion is contradicted by the evidence that they were selling asbestos gaskets and packing to Duke with some of their valves, and that they also supplied replacement internal gaskets, flange gaskets, and packing. Under South Carolina law, “[a] manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part.” *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). In fact, “[a] manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.” *Duncan*, 385 S.C. at 133, 682 S.E.2d at 884. “The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product.” *Baughman*, 780 F.2d at 1132.

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

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

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

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

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

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

2. Liability for Foreseeable Harm

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

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

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

#25
JH
In *Garvin*, Judge D. Garrison Hill ruled that when a “manufacturer recommends specifies, or requires that asbestos gaskets and packing be replaced with like materials,” liability may be imposed for replacement gaskets and packing because the product remains in essentially the same condition as when it was sold. *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, at 18 (S.C. Ct. Comm. Pleas Nov. 14, 2014). Judge Hill reasoned that, “Crane’s liability arises because its own valves caused injury as manufactured, supplied, and designed by Crane with asbestos gaskets and packing. When the asbestos gaskets and packing were replaced with the same materials that came with the valve, it was not a ‘substantial change’ in the condition of the product.” *Id.* at 16-17.

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

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

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

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

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

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

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

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

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

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

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

I. Expert Causation Testimony

1. Standard of Review.

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

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

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

2. Testimony of Dr. Frank and Dr. Maddox

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

#30
The Eleventh Circuit has recently held the same. In *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that “there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma,” and that “all ‘significant’ exposures to asbestos ‘contribute to cause mesothelioma,’” is not the same thing as saying that each and every exposure is causative. *Id.* The expert’s causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

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

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

#31
The specific causation opinions of Drs. Frank and Maddox were firmly grounded in the exposure evidence presented at trial. Dr. Frank testified that he had reviewed Jolly's medical records, the deposition transcripts of Jolly and his co-workers and other case-specific materials. (TT 7/26 at 58-60). He also described that, based on Jolly's testimony, the exposures he had from working with Fisher and Crosby valves were quite high. (TT 7/26 at 51). Mr. Jolly's exposures were many orders of magnitude above background levels. (TT 7/26 at 76-77). In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury. (TT 7/26 at 72-73).

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

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

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

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

J. *Henderson* Causation Standard

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

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

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

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

IV. Ruling on Defendants' Motion for Election of Remedies

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

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

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

V. Ruling on Defendants' Motion for Production of Settlements

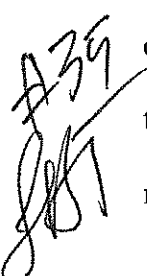
Defendants argue that they are entitled to disclosure of Plaintiffs' confidential settlement documents because they are "relevant" to set-off. The Court does not find a compelling reason to require disclosure of the confidential releases. The only matter of relevance is the amount of the settlements,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

VI. Ruling on Defendants' Motion for Setoff

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

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

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

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

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

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

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

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

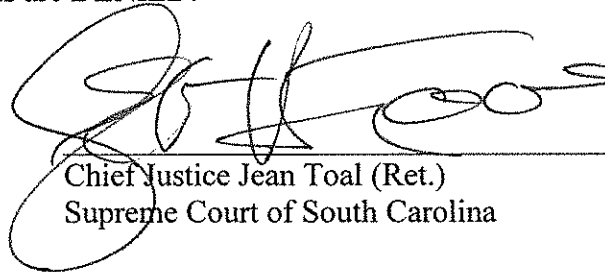
As set forth above, the total amount of the added verdict for Mr. Jolly's personal injury claims is \$1,580,000. Defendants are entitled to a setoff in the amount of Plaintiffs' pre-trial settlements allocated to the personal injury claim, which is \$756,666.67. Defendants owe the balance of \$823,333.33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

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

VII. Conclusion

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

IT IS SO ORDERED.



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

#37
December 15, 2017

EXHIBIT J

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
CASE NO. 99-CP-23-0588

Terry Douglas Jaynes,
et al.,

Plaintiffs,

vs.

ACandS, Inc., et al.,

Defendants.

DEPOSITION OF MACHEN LEE CARPENTER

DATE TAKEN: May 27, 2004

TIME BEGAN: 10:16 a.m.

TIME ENDED: 11:53 a.m.

LOCATION: Haynsworth Sinkler Boyd, P.A.
75 Beattie Place
Greenville, South Carolina

REPORTED BY: Sheila B. Smith, CVR-CM
Certified Verbatim Reporter
Certificate of Merit
Notary Public for South Carolina

COPY

GALLAGHER COURT REPORTING

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Greenville, South Carolina 29615
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APPEARANCES:**Christopher D. Mauriello, Esquire**

Mauriello Law Offices
19810 W. Catawba Avenue, Suite E
Cornelius, North Carolina 28031

.....On behalf of the Plaintiffs

Stephanie Flynn, Esquire

Gallivan, White & Boyd, P.A.
One Liberty Square
55 Beattie Place, Suite 1200
Greenville, South Carolina 29601

.....On behalf of Covil Corporation; Guard Line,
Inc.

STIPULATIONS: The within deposition was taken pursuant to
the South Carolina Rules of Civil Procedure.

WAIVER: Examination and reading of the deposition are
waived by the witness and by the parties.

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1 **MACHEN LEE CARPENTER**, being duly sworn, testified as
2 follows:

3 **EXAMINATION BY MS. FLYNN:**

4 **Q.** **Mr. Carpenter**, my name is Stephanie Flynn. And I
5 am an attorney representing some Defendants that
6 are being sued in some asbestos-related lawsuits.
7 Have you ever given a deposition before?

8 **A.** Yes, ma'am.

9 **Q.** Tell me about that. When was that?

10 **A.** In person it's been quite a while ago; several
11 years back. I've given depositions by telephone
12 quite often. I guess the word got out of who I
13 was and what my knowledge was, and I would even
14 get calls from the attorneys across the country.

15 **Q.** How many depositions have you given?

16 **A.** Oh, probably eight to ten.

17 **Q.** Were they all by telephone or were they --

18 **A.** Most were by telephone, yes.

19 **Q.** I know you've got a good idea of how this is going
20 work today then. If you ever don't understand
21 something that I've asked --

22 **A.** Okay.

23 **Q.** -- just let me know and I'll be happy to repeat
24 the question until you do understand.

25 **A.** Okay.

1 Q. If you do answer a question I'm going assume that
2 you understood that. Is that fair?

3 A. That's fair enough.

4 Q. And I don't know how long your deposition is going
5 take, but if at any time you need a break, please
6 just let me know and I'll be happy to stop.

7 A. Fair enough.

8 Q. And I'll try to let you finish your answer before
9 I start into my next question. And if you could
10 just try to let me finish my question, even if you
11 know where I'm going with it before you start your
12 answer, and we'll have a nice smooth record.

13 A. Okay.

14 Q. If you could go ahead and just state for me again
15 your full name for the record.

16 A. My full name is Machen Lee Carpenter.

17 Q. And we had talked a little bit about your prior
18 depositions. When was the last time you gave a
19 deposition?

20 A. Oh, man, I believe it was by phone and I want to
21 say it was about -- let's see, I've been gone from
22 Covil since '91; somewhere around '92, '93.

23 Q. So it's been quite some time ago?

24 A. Yes.

25 Q. Were all these depositions related to asbestos

1 cases?

2 A. No, ma'am. Some was related to poisoning of the
3 grounds, the party that was interested in buying
4 the facility. Some of it was related to railroad
5 right-of-ways in the interest of buying the
6 facilities. So no, it wasn't all asbestos-
7 related.

8 Q. How many asbestos-related cases have you testified
9 in by deposition?

10 A. Six to seven probably.

11 Q. Have you ever given testimony in court?

12 A. No, ma'am.

13 Q. Were these depositions in Workers' Compensation
14 cases or were they other type of cases?

15 A. They were mostly in personal related lawsuits of
16 fellow workers.

17 Q. Fellow workers?

18 A. Uh-huh (affirmative).

19 Q. Other Covil employees?

20 A. That's correct.

21 Q. Did you go by any nicknames on the job site?

22 A. No, ma'am.

23 Q. What is your present address?

24 A. 14 South Fairfield Road, Greenville, South
25 Carolina, 29605.

- 1 Q. What is your date of birth?
- 2 A. 7/15/44.
- 3 Q. How old would that make you today?
- 4 A. Fifty-nine.
- 5 Q. What is your Social Security Number?
- 6 A. 251-72-2965.
- 7 Q. Where were you born?
- 8 A. Greenville, South Carolina.
- 9 Q. Have you lived here your entire life?
- 10 A. Yes, ma'am.
- 11 Q. Are you married?
- 12 A. Yes, ma'am.
- 13 Q. What is your wife's name?
- 14 A. Paulette, P-A-U-L-E-T-T-E.
- 15 Q. What was her maiden name?
- 16 A. Rodgers, R-O-D-G-E-R-S.
- 17 Q. Where is she from?
- 18 A. She's from Greenville.
- 19 Q. How long have you been married to Paulette?
- 20 A. Six years.
- 21 Q. Were you married before?
- 22 A. Yes, ma'am.
- 23 Q. How many times?
- 24 A. Once.
- 25 Q. What was your first wife's name?

- 1 A. Not to my knowledge, no.
- 2 Q. Have you ever been arrested for any reason?
- 3 A. No, ma'am.
- 4 Q. Have you ever personally filed an asbestos-related
- 5 lawsuit?
- 6 A. No, ma'am.
- 7 Q. Have you ever filed a Workers' Compensation suit?
- 8 A. No, ma'am.
- 9 Q. Do you currently attend church?
- 10 A. No.
- 11 Q. Are you a member of any social clubs or
- 12 organizations in Greenville County?
- 13 A. No, ma'am.
- 14 Q. I understand that you are here today, and you've
- 15 not been identified to testify as to any
- 16 particular person that I'm aware of; is that
- 17 correct, any particular plaintiff's case?
- 18 A. No, ma'am. I'm strictly Covil.
- 19 Q. Well, then let's go through your work history a
- 20 little bit. I guess I'll start with your
- 21 educational background. Where did you go to high
- 22 school?
- 23 A. Carolina High School.
- 24 Q. Is that here in Greenville?
- 25 A. Uh-huh (affirmative). It's now called Carolina

1 Academy.

2 Q. What year did you graduate?

3 A. '62.

4 Q. Did you receive any education following high
5 school?

6 A. Yes, I did. I went in the Marine Corps for four
7 years and attained quite a bit of electronic
8 information in various parts of the Marine Corps.

9 Q. You had some electronic training?

10 A. Yes, ma'am. I was in combat helicopters and I
11 basically did all the -- I did the electronic
12 maintenance and upkeep of combat choppers.

13 Q. When did you get out of the Marine Corps?

14 A. I went in on Valentine's Day and got out on
15 Valentine's Day.

16 Q. Valentine's Day of 1963?

17 A. Yes, ma'am.

18 Q. Then you stayed in for four years?

19 A. Yes, ma'am.

20 Q. Did you have an honorable discharge?

21 A. Yes, ma'am.

22 Q. What did you do after getting out of the Marine
23 Corps?

24 A. I went to work at Covil Insulation, a/k/a Covil,
25 within about a week.

1 Q. So that would have still been February of 1967?

2 A. Seven, yes, ma'am.

3 Q. And when you were hired by Covil, what did you
4 hire on as, what position?

5 A. Well, I had a friend there that I grew up with.
6 He was the warehouse foreman and he was wanting me
7 to come to work there and more or less train me to
8 take his place because he wanted to move on up
9 into the estimating department of Covil. So
10 that's basically why I wound up there. And as it
11 turned out, that's exactly what happened. I
12 basically took his place and he moved on.

13 Q. What was your friend's name?

14 A. Tony Junkin.

15 Q. How long did you work for Covil?

16 A. From '67 to '91.

17 Q. Did you retire?

18 A. No, ma'am. The company went bankrupt.

19 Q. Where did you go after you left Covil?

20 A. I spent ten months looking for a job. It was --
21 they were very, very, very bad times for jobs;
22 took me ten months to find a job.

23 Q. And where did you go?

24 A. I went to work for a company called American
25 Woodworks here in Greenville who are now owned by

1 Leggett and Platt.

2 Q. How long did you work for them?

3 A. Still employed by them. I think I've been there a
4 little over eleven years.

5 Q. And what do you do for them?

6 A. I've done a lot of things, but right now I'm
7 inventory control manager.

8 Q. Going back to Covil -- we'll start there. You
9 said when you hired on you had a friend who was
10 the warehouse foreman and he wanted to move you
11 into that position?

12 A. He wanted to train me to -- he wanted to see if I
13 could be trained to eventually go into that
14 position. I was really hired on -- the day I was
15 hired on was as a warehouse helper. And then I
16 moved from a warehouse helper to assistant
17 warehouse foreman. And then, of course, from
18 assistant warehouse foreman to warehouse foreman
19 and that's when he moved.

20 Q. How long did you work as a warehouse helper?

21 A. As a warehouse helper?

22 Q. Yes.

23 A. I'd say all of this took place in way less than a
24 year.

25 Q. So you moved up from warehouse helper to assistant

1 foreman to foreman in about a year's time?

2 A. Yes, ma'am, or even less, to be honest with you.

3 Q. Tell me what you did during this year period.

4 A. I'll give you an example. The first job -- the
5 first day I reported to work at Covil, the first
6 job I was put on, along with others, is -- there
7 was a railroad car sitting at one of the railroad
8 doors that had a thousand 100-pound bags of raw
9 asbestos cement out of Canada. And we unloaded
10 those thousand hundred-pound bags and put them in
11 our warehouse. Of course, in the process we
12 busted 30, 40, which we would have to clean up,
13 re-bag. Outside of that, I did receiving and
14 shipping, loaded trucks, filled orders. When I
15 was initially hired, it was predominantly on the
16 receiving end. I worked more in receiving than I
17 did in shipping, but I eventually moved into
18 shipping as well because I was gaining the
19 experience necessary to be a warehouse foreman.

20 Q. Did you remain in the position of warehouse
21 foreman the entire time you were there or did you
22 change positions?

23 A. No. I went from there to warehouse and shop
24 foreman. We had a rather large fabrication shop.
25 You want me to go on?

1 Q. Yes, please.

2 A. I went from there to purchasing manager where I
3 was over customer service. I was responsible for
4 doing all the purchasing and I also still had the
5 warehouse and fabrication shop, as well as
6 buildings and grounds, tools and equipment
7 underneath me. We later got into centralized
8 purchasing where I would do the buying for all of
9 our branches as well. From there, new owners took
10 over Covil, and I eventually made my way back to
11 warehouse manager. At some point in time after
12 that, the company had to borrow a significant
13 amount of money and I became a bonded security
14 agent for two different companies. Technically I
15 was no longer an employee of Covil Corporation at
16 that time, technically, legally. But it was my
17 warehouse, and my warehouse alone. I had the key.
18 They couldn't get in. They couldn't get nothing
19 out unless I signed for it. I did that for about
20 two and a half years. Then the family, the kids
21 of Palmer Covil, the founder, and an in-law, they
22 got control of the company back and I moved into
23 the position of vice president of operations,
24 which involved all of our branches. The last year
25 and a half or so that I spent at Covil, I was a

1 board of director member. I never owned any stock
2 whatsoever. And that's it.

3 Q. That's it; all right. I'm going to walk back
4 through these just a little bit so I can get the
5 years clear in my head. I know that you became a
6 warehouse foreman less than a year after you got
7 there in 1967. At some point you moved to
8 warehouse and shop foreman. When did that take
9 place?

10 A. You know, Wallace and Graham has got all of this
11 documentation. The years -- I don't remember
12 exactly what those years were, but it is
13 documented. I don't know. You could get access
14 to them through them I'm sure. It's got the
15 exact years that I was in what positions. I'd
16 just be afraid that I'd -- I'd lead you astray
17 from memory. I mean that's a lot to -- that's a
18 lot of different positions to look at and remember
19 dates.

20 Q. Are you represented by Wallace and Graham?

21 A. Indirectly.

22 Q. Are they representing you in connection with any
23 lawsuits?

24 A. Lawsuits, no, ma'am. Wallace and Graham and I go
25 back about ten years. They contacted me first and

1 they called me quite frequently and asked me did
2 work for this person or did I ever work with that
3 person, do I know this person, do I know that
4 person, do I know this company, do I know this
5 brand, or whatever. I filled out questionnaires
6 for them as far as asbestos companies. They keep
7 a real, real close check on me physically because
8 I've had a lot of physical problems, in the last
9 year especially. They're not representing me in
10 any way, shape, or form in a present lawsuit
11 primarily because no one -- they'll dance around
12 the subject, but no one has -- no one is willing
13 to say I have asbestosis. The only way they will
14 say that is if I have a full-blown -- what do you
15 call it -- biopsy which is about a six-day stay in
16 ICU. And I've refused to do that because of my
17 other medical reasons. I've had a bronchoscopy,
18 which is another procedure, of course, where a
19 small sample was taken.

20 Q. What were the results of that bronchoscopy?

21 A. I have non-transmittable TB predominantly was the
22 result. That was the predominant result.

23 Q. So you've not been diagnosed with any asbestos-
24 related diseases that you're aware of?

25 A. Not that anybody is willing to say. I have been

1 told that I have asbestos particles on the
2 exterior of my lungs, but not able to make a
3 determination without a biopsy of the interior of
4 my lungs. My lungs are quite scarred from the

5 TB. I also have advanced -- what's the smoking
6 disease?

7 Q. Emphysema?

8 A. Emphysema. My right lung is about a third as long
9 as my left lung. I've been told by my surgeon
10 that that is asbestos-related.

11 Q. That your emphysema is asbestos-related or your
12 lung size?

13 A. No, my lung size.

14 Q. Who was the doctor that told you that?

15 A. Dr. Cochran. I finally had to give up on the lung
16 business. I had gone through -- let's see, one,
17 two, three -- I had gone through three CT scans.
18 I was scheduled for my fourth CT scan in January.
19 And unfortunately, I was already in the hospital
20 and a CT scan for my lungs were the least of my
21 problems. In September I developed severe --
22 what's the word -- vascular problems. And I spent
23 from September through the first part of January
24 in various trips to the hospital fighting that
25 problem. And so I basically give up on my lungs

1 since then. There were conflicts, major conflicts
2 in the medications. I had to stop the medications
3 for my lungs which I was to take for two and a
4 half years. I couldn't handle it and all the
5 other medications for my vascular system.

6 Q. What doctors have you seen for lung-related
7 problems?

8 A. My family doctor and Dr. Cochran.

9 Q. Who is your family doctor?

10 A. Dr. McCarroll, Jr. He referred me to Dr. Cochran.

11 Q. Have you seen any doctors that you were sent to by
12 Wallace and Graham?

13 A. No, ma'am. I've had offers. And they wanted me
14 to go here and wanted me to go there, but I never
15 did.

16 Q. Have you ever worked on a job site for Covil for
17 Covil or has your work been primarily at the Covil
18 place of business, the Covil warehouse?

19 A. That is a very, very tough question. I can
20 explain it best, I think, in the fact that as a
21 "Worker," quote-unquote, no. I haven't been a
22 worker at a Covil job site. Have I been on Covil
23 job sites? Many, many, many.

24 Q. So you have not been an actual insulator on a job
25 site for Covil?

1 A. No, ma'am.

2 Q. What would be the reason that you would go to job
3 sites where Covil was working?

4 A. Various reasons. We would be running behind
5 schedule, facing thousands and thousands of
6 dollars of fines. We were -- we would go to
7 trouble-shoot the problem, see what we needed to
8 do, how much manpower we needed to add, what --
9 you know, exactly what we needed to do to get out
10 of the jam. We would go when there was conflict
11 that we didn't structurally -- we didn't buy off
12 on. We would go simply as a visitor to check the
13 status of our insulators, quality of work and so
14 forth and so on.

15 Q. How frequently would you go to various job sites?

16 A. Quite frequently in the later years, very seldom
17 in the early years. In the early years, I might
18 would go with a truck driver in a truck to a job
19 site to help unload, and that job site could be
20 anywhere. I've done -- you know, I've done my
21 share of that, but as far as visiting job sites,
22 on the basis of which I just explained, for
23 legitimate logistical reasons it was the latter
24 years.

25 Q. I am going to step back just for a second. We

1 Q. What was the purpose of touring the plant?

2 A. An invite.

3 Q. Same for the others that you named, the Southern
4 Asbestos --

5 A. Yes.

6 Q. -- and the Childers Products?

7 A. Yes.

8 Q. Do you know when the tour of the Owens-Corning
9 plant took place?

10 A. In the latter years. I'd say two to three years
11 before '91. It wasn't during the asbestos days.
12 Southern Asbestos, I would say, was five years
13 before '91, big time asbestos.

14 Q. What about Childers Products?

15 A. Childers Products, Houston, Texas. I've been
16 there many, many times. Probably the last time
17 was a year and a half to a year before '91.

18 Q. As to Southern Asbestos, when you said it was big
19 time asbestos, five years before 1991, were they
20 still manufacturing asbestos products?

21 A. Absolutely.

22 Q. When did you first become aware that asbestos
23 could be harmful?

24 A. I figured you was going to ask that question. I
25 really truthfully can't answer that question. I

1 don't remember when. I remember how serious it
2 was. I remember a moratorium being put out on
3 it. I remember special ways that we had to handle
4 it. I remember the changes in the industry,
5 especially in the calcium silicate products that
6 all the manufacturers made to be able to identify
7 asbestos-free products of theirs and it was always
8 a red stripe or a green stripe or a blue stripe --
9 dye -- it was a dye stripe on the outside of the
10 insulation product. So if it was on pipe and
11 somebody -- an inspector wanted to inspect it, if
12 he saw a blue stripe, he knew -- he knows
13 automatically it's a non-asbestos product. I
14 remember all that, but exactly when I don't
15 recall.

16 Q. Can you remember what decades this was in, whether
17 it was the 1970's or the 1980's?

18 A. Oh, it would have had to have been in the early
19 seventies. Now as I was speaking to him earlier,
20 a major event happened in the early seventies.
21 And I can't recall the years, but Covil
22 Corporation, per se, burnt to the ground. I want
23 to say that that took all the remaining asbestos
24 products obviously from -- at some point in time
25 from our grounds, you might call it. Up until

1 impressive operation using negative air enclosed
2 -- completely 360 degrees enclosed. It was quite
3 expensive, too, by the way.

4 Q. So this was a team of Covil employees that were
5 going in and taking all the precautions and
6 removing asbestos?

7 A. Absolutely. For example, in a school, the only
8 way you could -- you had to be asbestos removal-
9 certified before you could remove asbestos in any
10 South Carolina school. We had insulated quite a
11 few South Carolina schools. It was kind of ironic
12 in a way in hindsight, not just schools but mega
13 plants. What we put on one day, we started taking
14 off another day because this stuff had to be taken
15 off and asbestos-free products put in unless --
16 and there was only one unless -- unless it could
17 have been -- it could be unequivocally
18 encapsulated. If it could be unequivocally
19 encapsulated, it did not have to be removed.

20 Q. Do you remember about when that fire occurred? I
21 know you said early seventies. I just --

22 A. I want to say '74 or '75. I had a lot of fun at
23 Covil over all those years.

24 Q. Where was the warehouse that burned? Where was
25 that located?

1 A. In Berea, Sulphur Springs Road.

2 Q. Was this the warehouse that supplied all products
3 used by Covil or were there other warehouses?

4 A. Oh, we had ten to 12 other branches throughout the
5 southeastern United States. I could try to name
6 them if I could -- if you need it.

7 Q. Please.

8 A. We had one in Charlotte, North Carolina for a
9 short period of time. We had a big one in
10 Greensboro, North Carolina. We had a rather large
11 one in Black Creek, North Carolina, which is right
12 outside of Wilson. We had a -- for a short period
13 of time, we had one in Knoxville, Tennessee. Of
14 course, we had one in Greenville, South -- really,
15 we had two in Greenville, South Carolina. We had
16 corporate headquarters in Greenville and the
17 Greenville branch located in Greenville, South
18 Carolina. We had one in Columbia, South Carolina.
19 We had one in Albany, Georgia. We had one in
20 Montgomery, Alabama. We had one in Jacksonville,
21 Florida. We had one in Columbia, South Carolina.
22 I believe that's it.

23 Q. As a warehouse foreman and in your other
24 positions, did you only have responsibility over
25 one warehouse or multiple warehouses?

1 A. When I was operations manager, I was responsible
2 for all those warehouses to the degree I would
3 tour each one of them at least once a month. I
4 was also responsible for all clerical functions,
5 all warehousing, all trucking, all shipping, all
6 receiving, buildings and grounds, equipment,
7 scheduling, purchasing. And like I say, I would
8 generally visit each one of them at least once a
9 month.

10 Q. What years were you operations manager?

11 A. Operations manager the last -- operations manager
12 I'd say the last two and a half years prior to
13 '91. I later became vice president of operations.

14 Q. Was that about the last two years or so?

15 A. Yes. I was operations manager for a short period
16 of time and then became vice president of
17 operations really for a short period of time, and
18 then became a board of director as vice president
19 of operations.

20 Q. As a member of the board of directors, you
21 continued to maintain your position as vice
22 president of operations for the company?

23 A. Absolutely, yes.

24 Q. You just served on the board as well?

25 A. That's correct, a board of five. There was two of

1 us on the board who had no stock whatsoever in the
2 company. The other three were family.

3 Q. Who was the other person on the board who didn't
4 have any stock?

5 A. Her name now is Yvonne Ward. At that time it was
6 Yvonne Wells. She lives here in Greenville.

7 Q. Prior to the time that you became operations
8 manager and were in charge and responsible for all
9 of these warehouses, in other positions did you
10 have responsibility for just one warehouse or how
11 did that work?

12 A. As purchasing manager, I had the responsibility of
13 supplying all branches because we had centralized
14 purchasing.

15 Q. And I know I asked you this before. You don't
16 remember what years you were purchasing manager?

17 A. I'd say '85, '86. Matter of fact, I was
18 purchasing manager twice.

19 Q. Were you purchasing manager first in 1985 or 1986?

20 A. When Palmer Covil died, two people took over the
21 company. Shortly thereafter, I was moved from
22 purchasing back into warehouse management. I
23 remained there for probably four years of hell,
24 and that's the only way to put it. So this would
25 have had to have been close to the mid-eighties

1 because the family got it back after about four
2 years.

3 Q. Who owned it or was running it during the four
4 years when the family was not in control?

5 A. Travis Cash, Russell Johnson, and probably Jim
6 Gilreath, who is an attorney -- was an attorney.
7 He's dead now.

8 Q. And after the four years when the family got back
9 in control, you went back to purchasing manager
10 for a period?

11 A. Yes. And then very shortly thereafter I went into
12 operations manager and then vice president of
13 operations, then a board of director member.

14 Q. When you were the purchasing manager and were
15 responsible to supply all branches, at that time
16 were you purchasing any products that contained
17 asbestos?

18 A. I would say no, because this was after the
19 asbestos era that I was in this position. That's
20 not to say -- now let me clarify that. There's a
21 lot of misnomer out there of what still contains
22 asbestos. And I'm sure there were some products
23 that I was buying that contained some asbestos,
24 for example, Southern Asbestos. If it come from
25 Southern Asbestos, you can take it to the bank it

1 had asbestos in it. Some of the coatings, like in
2 Childers Products in Houston, Texas -- some of the
3 coatings would have asbestos fibers in them. So I
4 could not unequivocally say that I was not
5 purchasing any products that contained zero
6 asbestos because I'm sure there's probably some
7 products still out there that I don't know about
8 now. They may have cleaned up their act. I don't
9 know.

10 Q. These companies weren't supposed to have asbestos
11 in their products, were they?

12 A. I would say not.

13 Q. Why do you think that the products that Southern
14 Asbestos was manufacturing still contained
15 asbestos during this time?

16 A. It was the nature of the product. It was like
17 brake shoes. You don't re-invent the wheel over
18 night. It was a very, very demanding, super
19 important product. It was a gasket type material
20 for super high temperature pipe or boilers. I
21 mean you just couldn't quit.

22 Q. You've named specifically a gasket material for
23 super high temperature pipe and boilers.

24 A. Yes, ma'am.

25 Q. And you believed that that still contained

1 asbestos at the time that you were purchasing
2 manager?

3 A. I would think it did, yes.

4 Q. Are there any other products during that time that
5 you think still contained asbestos?

6 A. Yes, ma'am.

7 Q. What were those products?

8 A. The coatings. That would be -- that's the
9 predominant thing that I can think of is the pipe
10 coating itself.

11 Q. Are we talking about a hard material or a powder
12 material?

13 A. No. We're talking about a product with the
14 consistency I'd say of mixed cement. And you
15 generally put it on with your bare hands or
16 troweled it. And when it was cured, it was
17 basically like plaster of Paris.

18 Q. Did it come in --

19 A. Five gallon pails, 55-gallon pails.

20 Q. So it was already a pre-mixed type of product?

21 A. Oh, yes. And there again, it came to a argument
22 of encapsulation. You'd had a hard time getting
23 asbestos fibers out of the mixture of this
24 product, believe me. And then, of course, once it
25 hardened, it was definitely encapsulated.

1 supposedly it was one of the insulation wonders of
2 the world.

3 Q. Do you know if Covil supplied any products or
4 personnel to the Jocassee site?

5 A. Yes, ma'am.

6 Q. Do you know what time period that would have been?

7 A. Mid-eighties.

8 Q. This was after the asbestos era?

9 A. Oh, yes.

10 Q. So it should have been asbestos-free at that time?

11 A. Oh, yes.

12 Q. What about Keowee?

13 A. Keowee? Keowee was done about the same time, to
14 be honest with you.

15 Q. Therefore, it should not have had products that
16 contained asbestos?

17 A. Absolutely not.

18 Q. Do you know whether Covil ever supplied or
19 installed products to Lee Steam Station?

20 A. Yes, ma'am, fossil fuel plant.

21 Q. Do you know what period of time that would have
22 been?

23 A. It would have been an ongoing proposition. It
24 goes back to what I said. Once we were there, we
25 were basically always there, either in insulators,

1 installing, or in selling and placing the
2 insulation product there. What happened -- I was
3 telling him earlier, a lot of people's got -- in
4 talking to others, questionnaires, I don't think
5 anybody until today in my conversation with him,
6 has really understood the insulation industry in
7 the southeastern United States during a certain
8 period of time, during Covil's era, during
9 Daniel's era. And even Fluor Daniel has changed
10 drastically as we sit here today. Covil was the
11 largest insulation contractor in the southeastern
12 United States. Covil and Daniel was like that
13 (indicating). That's why I say, if Daniels did a
14 job, Covil insulated it. However, when the jobs
15 were getting close to being finished, Daniels
16 realized that they were going to have to maintain
17 those plants forever. So they started training
18 their own insulation crews which eventually hurt
19 us bad because they basically took our place.
20 We'd finish the original job and didn't have much
21 opportunity for retrofit, add-on, new work. And
22 that was pretty true throughout the insulation
23 industry, not just with Daniel.

24 Q. Do you know when Daniel started training their own
25 insulation crews?

CERTIFICATE

I, the undersigned, Sheila B. Smith, Notary Public in and for the State of South Carolina, do hereby certify that the foregoing deposition was taken on the aforementioned date;

That the within deponent was sworn to tell the truth and that the foregoing is an accurate transcription of the testimony taken under oath;

That all exhibits entered herein are attached hereto (if requested by counsel) and made a part of this deposition.

I further certify that I am neither counsel nor solicitor to any of the parties in said suit, nor interested in the event of the cause.

In witness whereof, I have hereunto set my hand and seal this 14th day of June, 2004.

COPY

Sheila B. Smith, CVR-CM
Notary Public for South Carolina
My Commission Expires: 3/9/2014

(Seal)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
JERRY HOWARD CRAWFORD,	)	C/A NO. 2017-CP-42-04429
Individually and as Personal	)	
Representative of the Estate of	)	
EVELYN KAY CRAWFORD	)	
	)	In re:
Plaintiff,	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
CELANESE CORPORATION,	)	
et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT UNDER SCRPC 60(B)

Plaintiff Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, by and through his undersigned counsel, moves the Court for relief from judgment pursuant to Rule 60(b)(2) and (3) of the South Carolina Rules of Civil Procedure.

INTRODUCTION AND BACKGROUND

Plaintiff commenced this lawsuit on December 4, 2017, via a Summons and Complaint filed in the Spartanburg County Court of Common Pleas. Therein, Plaintiff sought recovery for the losses suffered as the result of Jerry Crawford's repeated exposures to asbestos while working at the Hoechst Celanese facility in Spartanburg, South Carolina from 1970 to 1974. As a result of his exposure to asbestos, Jerry Crawford was diagnosed with mesothelioma in or about November of 2017. At the time of trial, Covil Corporation was the only remaining defendant in this matter, and, against Covil, Plaintiff had three discrete causes of action: negligence, strict liability, and breach of implied warranty.

The trial of this matter began on July 16, 2018. Despite the overwhelming evidence that Jerry Crawford was exposed to asbestos insulation supplied and installed by Covil when he worked at the Celanese plant in Spartanburg in the 1970s, that this exposure was a substantial factor in causing his mesothelioma, and that Covil had knowingly sold asbestos products without a warning, the jury returned a defense verdict. (TT 7/19, at 553:6-554:2; Verdict Form.)

At trial, Covil did not deny that it generally sold and installed asbestos insulation, but maintained that it lost its sales invoices in a fire in 1973. (TT 7/17, at 307:11-14.) In addition, Covil's corporate representative, Robert Glenn, testified that he had reviewed available records and found no documents reflecting that Covil supplied to Celanese from 1970 to 1974 or did work at that facility during that time frame, or that Covil and Daniel Construction worked together between 1970 and 1974. (TT 7/17, at 305:23-306:12.)

This was contradicted by the testimony of Harley Neelands, a former employee of Daniel Construction, that while he was working at the Celanese Spartanburg plant, Daniel was installing insulation that it had purchased from Covil Corporation. (Neelands Dep., p. 49, ¶ 57.)

After trial, on October 19, 2018, this Court granted Plaintiff's motion for new trial pursuant to the Thirteenth Juror Doctrine but denied Plaintiff's motion for judgment notwithstanding the verdict. Covil subsequently appealed the Court's decision. The appeal has been briefed and is pending before the South Carolina Court of Appeals.

New evidence has now come to light that Covil has a data tape in its possession, possibly containing documents relevant to this case, that it never disclosed to Plaintiff in this litigation. The existence of this new evidence was revealed at a hearing against Covil in other asbestos cases pending before this Court. At the hearing on July 11, 2019, Covil's counsel informed the Court and the parties that it has a data tape dating back to the 1990s. The Court ordered disclosure of the

tape, but Plaintiff's counsel has not yet received it. In anticipation that the data tape will contain evidence favorable to Mr. Crawford's case, Plaintiff asks the Court to grant this motion for relief from judgment and consider this evidence as an additional basis for granting a new trial against Covil. Plaintiff will supplement this motion with the relevant new evidence when it is received from Covil.

ARGUMENT

I. Relief is warranted under Rule 60(b)(2)

Rule 60(b)(2), SCRCF, states that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The term "newly discovered evidence" is a term of art and refers to evidence which existed at the time of the final judgment, order, or proceeding but which had not been discovered by the proponent of the Rule 60(b)(2) motion. *E.g.*, 11 Charles Alan Wright et al., Federal Practice and Procedure § 2859 (Supp. 2007) ("Under [Rule 60(b)(2)], the evidence must have been in existence at the time of the trial...."). "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004).

The Covil data tape constitutes newly discovered evidence under Rule 60(b)(2). According to the information provided by Covil's counsel at the July 11 hearing, this data tape has been in existence since the 1990s and has been passed among the various counsel that have represented Covil in asbestos litigation. This evidence was thus in existence at the time of the jury's verdict in this case and the Court's order for new trial.

Further, Plaintiff could not have discovered this evidence with due diligence before filing its motion for new trial under Rule 59(b). Plaintiff sought to discover all Covil documents relevant to its sales and installation of asbestos insulation at Celanese Spartanburg, but Covil withheld the data tape and the documents on the tape. Plaintiff could not possibly have discovered information and documents that were intentionally withheld by Covil in violation of its discovery obligations.

While Plaintiff is still waiting for Covil to produce the data tape and to discover its contents, this Court should re-open post-trial proceedings against Covil to consider this evidence as additional grounds for granting a new trial.

II. Relief is warranted under Rule 60(b)(3)

Rule 60(b) also provides that the Court may relieve a party from a final judgment, order, or proceeding for “fraud, misrepresentation, or other misconduct of an adverse party.” SCRCP 60(b)(3). Relief under 60(b)(3) can generally be granted only for extrinsic fraud that prevents a party from presenting its case. *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). Extrinsic fraud is “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” *Hilton Head Ctr. of South Carolina v. Public Serv. Comm’n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

The Supreme Court has held that concealment of documents by an attorney is extrinsic fraud in that “the attorney, being an officer of the court, prevents the opposing party from presenting his case.” *Chewning*, 354 S.C. at 82 (citing *In the Matter of Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983); *Bankers Trust Co. v. Braten*, 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995)).

Concealment of documents is also fraud upon the court. *Chewning*, 354 S.C. at 83. “[F]raud upon the court is a narrow and invidious species of fraud that ‘subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.’” *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003). In order to show fraud upon the court, a plaintiff must show “that one has acted with an intent to deceive or defraud the court.” *Chewning*, 354. S.C. at 78. “Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs.” *Id.* at 83–84.

Here, Covil represented to counsel, this Court, and to the jury that its sales records had been lost in a fire. In finding in Covil’s favor, the jury apparently credited this assertion and faulted Plaintiff for the lack of documentary evidence showing Covil’s presence at Celanese Spartanburg. Covil’s concealment of the data tape, which may very well contain the very documents that Covil claimed were destroyed, constitutes fraud against Plaintiff and fraud on this Court. This gross misconduct is an additional ground for relief from the jury’s verdict and granting a new trial.

CONCLUSION

For the reasons set forth herein, the Court should grant Plaintiff’s motion for relief from judgment under SCRCP 60(b)(2) and (3) and consider the concealed data tape as an additional basis for granting a new trial.

[Signature appears on the following page.]

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

tmcvey@kassellaw.com

John D. Kassel (SC Bar No. 3286)

jkassel@kassellaw.com

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202-1476

T: 803-256-4242

F: 803-256-1952

Other email: emoultrie@kassellaw.com

and

Charles W. Branham, III (*Admitted Pro Hac Vice*)

Aaron D. Chapman (*Admitted Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

F: 214-722-5991

tbranham@dobslegal.com

achapman@dobslegal.com

Other email: tgilliland@dobslegal.com

ATTORNEYS FOR PLAINTIFF

July 16, 2019

Columbia, South Carolina.

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
Representative of the Estate of
EVELYN KAY CRAWFORD,

Plaintiff,

C/A NO. 2017-CP-42-04429

In re:

Asbestos Personal Injury Litigation
Coordinated Docket

v.

CELANESE CORPORATION,
et al.,

Defendants.

**DEFENDANT COVIL CORPORATION'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT UNDER SCRCP 60(b)**

Defendant Covil Corporation (Covil), by and through its undersigned counsel, hereby responds in opposition to Plaintiff's Motion for Relief from Judgment (Motion) pursuant to Rules 60(b)(2) and 60(b)(3) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

Plaintiff's Motion should be denied for the following reasons.

First, relief is not warranted under Rule 60(b)(2) based on newly discovered evidence because Plaintiff cannot prove that the contents of the data tape (1) are relevant to this case and probably would change the result if a new trial is granted, (2) could not have been discovered by Plaintiff before trial, (3) are material to any issue, and (4) are not merely cumulative or impeaching.

Second, relief is not warranted under Rule 60(b)(3) based on extrinsic fraud because Plaintiff cannot prove that Covil concealed the tape with the intent to defraud or mislead the Court.

In the alternative, relief is not warranted under either Rule 60(b)(2) or Rule 60(b)(3) because it would be premature for the Court to rule on this Motion before the contents of the data tape are recovered to determine whether the data is even relevant.

BACKGROUND

Plaintiff filed this lawsuit against Covil on December 4, 2017, for losses allegedly suffered as the result of Jerry Crawford's exposure to asbestos at the Hoechst Celanese facility in Spartanburg, South Carolina. Discovery resulted in testimony that Mr. Crawford worked at the Celanese facility in Spartanburg between 1970 and 1974. *See* Crawford Dep. 12:25-13:5 (attached as Exhibit A).¹ No documents identified in Covil's historical records placed Covil products or operations at the Celanese facility in Spartanburg during that time. Trial Tr. vol. 2, 374:16-24 (attached as Exhibit B).

Covil initially was represented in this case by the law firm of Gallivan, White & Boyd, PA (Gallivan White). White Aff. ¶ 2 (attached as Exhibit C). On April 4, 2018, Covil transitioned to Wall, Templeton & Haldrup, PA (Wall Templeton) as its counsel. *Id.* ¶ 9.

On July 10, 2018, Plaintiff filed a motion for sanctions against Covil for spoliation of evidence and discovery abuse, alleging that Covil misrepresented the extent of its documents that were destroyed in a 1973 warehouse fire. *See* Pl.'s Mot. Sanctions Against Def. Covil Corp. Spoliation Evid. and Disc. Abuse 1 (attached as Exhibit D). According to Plaintiff, some documents survived this fire but were later intentionally destroyed by Covil. *Id.* Plaintiff requested that he be allowed to introduce evidence of Covil's alleged destruction of documents and misrepresentations about the circumstances of the destruction. *Id.* at 2. He also asked that the Court instruct the jury that it could draw a negative adverse inference that Plaintiff was

¹ This deposition testimony was played at trial in this matter.

exposed to asbestos-containing insulation supplied and installed by Covil at the Celanese facility in Spartanburg between 1970 and 1974. *Id.*

Plaintiff's motion for sanctions was not heard until the trial began on July 16, 2018. The Court sanctioned Covil and instructed the jury as follows: "I am instructing you now that Jerry Crawford, the plaintiff in this matter, was exposed to asbestos and insulation supplied by and installed by Covil Corporation at Celanese between 1970 and 1974." Trial Tr. vol. 1, 117:8–12 (Ex. B). The Court also permitted Plaintiff to introduce evidence regarding Covil's alleged destruction of documents. Trial Tr. vol. 1, 75:23–76:7 (Ex. B).

During the trial, Covil introduced exhibits produced by other parties and deposition testimony suggesting that there was no connection between Covil and the supply or installation of asbestos-containing insulation at the Celanese facility in Spartanburg during the years in question. Covil relied on deposition testimony from Palmer Covil (Covil's founder and president), Bruce Bowyer (Celanese Corporation's corporate representative), and Don Buck (Daniel Construction's corporate representative). Trial Tr. vol. 3, 456:9–22 (Ex. B). On July 19, 2018, the jury returned a defense verdict. Trial Tr. vol. 4, 629:18–630:12 (Ex. B).

On July 30, 2018, Plaintiff filed a motion for judgment notwithstanding the verdict and for a new trial absolute. On October 22, 2018, the Court granted Plaintiff's request for a new trial pursuant to the Thirteenth Juror Doctrine. On October 31, 2018, Covil filed a notice of appeal.

On July 11, 2019, the Court held a hearing on Covil's Receiver's motion to show cause against Wall Templeton in two other matters. During this hearing, Wall Templeton stated that it was in possession of a "data tape" that it had obtained from Covil's previous counsel, Gallivan White. Hr'g Tr. 70:18–71:6, *Falls v. CBS Corp.*, No. 2015-CP-46-02155 (S.C. Ct. C.P., York

Cty. July 11, 2019) (attached as Exhibit E). The Court denied the show-cause motion, but the data tape became the subject of an order regarding custody and instructions for analysis of its contents. Order on Handling of Data Tape Produced by Mark Wall, *Hopper v. Air & Liquid Sys. Corp.*, No. 2019-CP-40-00076 (S.C. Ct. C.P., Richland Cty., Aug. 22, 2019) (attached as Exhibit F). The data tape is currently in the possession of a third-party vendor, TransPerfect Legal Solutions (TLS), which is attempting to procure the software needed to recover the contents of the tape. As reported by Covil's Receiver during the Court's October 2019 session, TLS has confirmed that the tape contains data and does not appear to have been damaged.

While TLS is still performing a forensic analysis of the data tape, the information presently available indicates that the tape's contents are probably irrelevant to Mr. Crawford's injuries, which allegedly resulted from exposures between 1970 and 1974. The tape's case has a label indicating that the information on the tape is from 1990 and 1991, with a "final back up" date of October 18, 1991. Hr'g Tr. 95:1–4, July 11, 2019 (Ex. E). Covil's records, attached at Exhibit G, show that Covil purchased accounts-payable software in August 1988 that was referred to as an NCR System.

TLS has identified NCR as the first of two types of software that it needs to extract the data and make the data relatable for review. The company that made the identified software is still in business. Thus, TLS has made a request to that company to obtain a copy of the software.

Regardless of the data tape's contents, Plaintiff's allegation that Covil intentionally hid the data tape is false. In fact, between 1999 and 2018, Covil made at least three attempts to disclose its available documents, including the tape, to various counsel for asbestos plaintiffs in South Carolina and North Carolina. Gallivan White took possession of Covil's documents when Covil went out of business in 1991. White Aff. ¶ 3. These records were maintained by Gallivan

White. *Id.* In 1999 or 2000, Rick Lutsell and a colleague from the law firm of Wallace & Graham visited Gallivan White's office over the course of a week to review these Covil documents. *Id.* ¶ 5. Notably, Wallace & Graham serves as local counsel to Dean Omar Branham & Shirley, LLP (Dean Omar) in many cases. Mr. Lutsell and his colleague scanned or copied the materials that they deemed relevant and later provided Mr. White with a CD of the materials that were taken. Mr. Lutsell did not make any requests to analyze or copy the data tape. *Id.* ¶ 6.

In fall 2017, Sabrina Stone of Dean Omar—the same firm that represents Plaintiff in the instant case—contacted Mr. White seeking to review the Covil documents. *Id.* ¶ 7. These documents were previously stored offsite, but Mr. White transferred the file cabinets back to his office for Ms. Stone's review. Despite Mr. White's efforts, Ms. Stone never visited Gallivan White's office to look at the documents. *Id.* Then, James Covil was deposed as Covil's corporate representative on February 7–8, 2018, in *Finch v. BASF Catalysts, LLC*, No. 1:16-cv-1077 (M.D.N.C.), and again on March 27, 2018, in *Howe v. Air & Liquid Systems Corp.*, No. 2015-CP-46-03456 (S.C. Ct. C.P., York Cty.) at Gallivan White's office. During one of these depositions, Dean Omar attorney Jessica Dean was shown where the file cabinets were being stored and given the opportunity to review them. *Id.* ¶ 8. Ms. Dean chose not to review these files. *Id.* The data tape remained in the cabinets and available for review by Plaintiff's counsel throughout all of this. *Id.* ¶ 4.

In April 2018, Covil transitioned from Gallivan White to Wall Templeton as its counsel. *Id.* ¶ 9. About the same time, the historical Covil records were produced to Dean Omar in *Finch*. See Def. Covil Corp.'s Suppl. Resps. Pl.'s Req. Produc. 6, *Finch*, No. 1:16-cv-1077 (Mar. 14, 2018) (attached as Exhibit H) (stating that Covil “will make available to the Plaintiff all

documents that remain of Covil,” and noting that “Covil also recently produced 24,000 pages of documents to Plaintiff’s counsel in South Carolina litigation”); Def. Covil Corp.’s Answer to Pl.’s Interrogs. 1–2, *Finch*, No. 1:16-cv-1077 (Aug. 29, 2017) (attached as Exhibit I) (noting that in the 1990s, Covil’s records were made available for inspection to the law firm of Wallace & Graham, and offering to make the records available again). Because of logistical difficulties, the file cabinets with the original documents and the data tape were not transferred to Wall Templeton before the trial in this matter. Wall Aff. ¶ 4 (attached as Exhibit J). Thus, Wall Templeton did not know about the data tape stored with Covil’s paper records until after the *Crawford* trial had concluded. *Id.* ¶ 5. There is no record that counsel for Mr. Crawford sought to inspect the contents of the Covil files.

On July 16, 2019, Plaintiff filed the Motion for Relief from Judgment under Rule 60(b) and requested a new trial based on the discovery of the data tape. On the same date, Plaintiff also filed a motion for leave from the South Carolina Court of Appeals to file this Motion. On September 20, 2019, the Court of Appeals allowed for the filing of this Motion.

ARGUMENT

Plaintiff seeks relief from judgment under Rule 60(b)(2) of the South Carolina Rules of Civil Procedure based on newly discovered evidence, and under Rule 60(b)(3) based on allegations of fraud. The granting of a new trial based on a Rule 60(b) motion is disfavored. *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978); *see also Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979) (holding that the remedy of a new trial under Federal Rule 60(b), which mirrors the South Carolina Rule, “is extraordinary and is only to be invoked upon a showing of exceptional circumstances”). Thus, courts have set a high bar for affording relief under Rule 60(b).

For the reasons discussed below, Plaintiff cannot prove the facts necessary to meet the stringent standard for relief under Rule 60(b), especially before the contents of the tape have been recovered to assess whether they are even relevant to this case.

I. Relief is not warranted under Rule 60(b)(2).

Rule 60(b)(2) permits relief in the form of a new trial only for consideration of “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” S.C. R. Civ. P. 60(b)(2). The decision to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial judge. *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004).

“To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.” *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005). Plaintiff has the burden of proving the facts essential to justify relief. *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

Plaintiff argues that because the data tape in question is newly discovered evidence, the Court should grant a new trial. Plaintiff, however, fails to prove the elements necessary for such relief, as Plaintiff has offered no evidence indicating that the contents of the tape (1) will probably change the result if a new trial is granted, (2) could not have been discovered by Plaintiff before trial, (3) are material to any issue, and (4) are not merely cumulative or impeaching.

A. Plaintiff has not shown that the contents of the data tape will probably change the result if a new trial is granted.

Plaintiff seeks relief from judgment “[i]n anticipation that the data tape will contain evidence favorable to Mr. Crawford’s case.” Pl.’s 60(b) Mot. 3. Plaintiff’s Motion refers to the data tape as “possibly containing documents relevant to this case.” *Id.* at 2. Such premature speculation that the tape *might* contain relevant information is not sufficient to justify the extraordinary remedy of a new trial.

Plaintiff bears the burden of proving that the newly discovered evidence is relevant and probably would change the result if a new trial were granted. *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459. Yet he has presented no evidence that the tape contains data relevant to this case. Rather, Plaintiff admits in his Motion that he does not know whether the data tape contains any information, let alone admissible evidence, relevant to this case that will probably change the result if a new trial is granted. Pl.’s 60(b) Mot. 2–3. More than sheer speculation is required to meet the high standard for relief under Rule 60(b). *See Plisco v. Union R.R. Co.*, 379 F.2d 15, 16 (3d Cir. 1967) (“[M]ore than a showing of the potential significance of the new evidence is necessary to justify the granting of a new trial after judgment has become final.”). This is especially true under the circumstances here, where currently available information actually suggests that the tape is unlikely to contain relevant information.

As explained above, the tape’s case contains a description indicating that the information on the tape is from 1990 and 1991, with a “final back up” date of October 18, 1991. *See* Hr’g Tr. 95:1–4, July 11, 2019 (Ex. E). The historical documents presently available also indicate that Covil purchased the software used to create the tape in August 1988, long after the relevant time period of 1970–1974. *See* Ex. G (including a compilation of Covil historical records). Based on this information, the tape likely contains information regarding accounts payable from the late

1980s, at the earliest. Plaintiff has not, and cannot, presently show that the contents of the tape “will probably change the result if a new trial is granted,” as required for relief under Rule 60(b)(2). *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459.

B. Plaintiff has not shown that the contents of the data tape could not have been discovered by Plaintiff before trial.

When considering a Rule 60(b) motion for a new trial, “South Carolina’s strong policy towards finality of judgments trumps a party’s ability to set aside a judgment where . . . the party could have discovered the evidence prior to trial.” *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004). Courts consider whether a party acted with due diligence in discovery. For example, in *Raby Construction L.L.P. v. Orr*, a party identified a witness in its discovery responses as a potential source of information. 358 S.C. at 22, 594 S.E.2d at 484. The opposing party chose not to depose this witness. *Id.* At the later Rule 60(b) hearing, the witness stated that had she been deposed, she would have testified about the existence of relevant records that had not been produced. *Id.* The Supreme Court held that relief under Rule 60(b) was inappropriate because the evidence in question could have been discovered by the opposing party by due diligence. *Id.*

In this case, Covil made multiple attempts between 1999 and 2018 to disclose its filing cabinets of documents to counsel who represents a large majority of plaintiffs in asbestos litigation in North Carolina and South Carolina. These efforts included (1) granting a Wallace & Graham attorney and paralegal—Dean Omar’s local counsel—access for a week in 1999 or 2000 to the filing cabinets containing Covil’s documents and the data tape, and permitting them to scan or copy all of the materials that they deemed relevant, White Aff. ¶¶ 5–6; (2) transferring all of these files back to Gallivan White’s office in 2017 for a Dean Omar attorney to review, *id.*

¶ 7; and (3) taking a Dean Omar attorney to where the filing cabinets were being stored in 2018 and giving her the opportunity to review them, *id.* ¶ 8.

These efforts by Covil to disclose the contents of its files are relevant for two reasons. First, no counsel who presumably had seen the tape, including those from Wallace & Graham who inspected the file cabinets, identified the tape as worth investigating as a source of potentially relevant evidence. Plaintiff has offered no evidence on why this information would be more relevant today than it was in 1999 or 2000 when Wallace & Graham reviewed the files.

Second, Covil offered to disclose all of these documents again in both 2017 and 2018, this time to counsel at Dean Omar. Covil is not responsible for the lack of investigation into the contents of the data tape when it was physically present among the paper records of Covil made available for review. Since Plaintiff could have discovered the contents of the tape before trial, Plaintiff cannot show that a new trial based on newly discovered evidence is an appropriate remedy.

C. Plaintiff has not shown that the contents of the data tape are material to any issue in this case.

As explained above, Plaintiff has not shown that the contents of the data tape will probably change the result if a new trial is granted, as all of the available evidence regarding the tape indicates that it does not contain relevant evidence. The dates on the tape's case indicate that the tape reflects only accounting data for transactions roughly fifteen years after the time period relevant in this case. TLS has not yet prepared a report on their analysis of the data on the tape.

Plaintiff cannot show that the tape contains anything relevant to this case by the applicable standard of clear and convincing evidence. The allegation that Covil did not produce

this tape until after the trial is beside the point if the tape does not contain relevant information. A party does not have a duty to turn over irrelevant data, as the scope of discovery is limited to information “which is relevant to the subject matter involved in the pending action,” and information sought in discovery must be “reasonably calculated to lead to the discovery of admissible evidence.” S.C. R. Civ. P. 26(b)(1). Thus, if the tape does not contain any relevant information, or any information reasonably calculated to lead to the discovery of admissible evidence, then Covil was under no duty to disclose it in the first place.

Because a party has no duty to disclose documents that are not reasonably calculated to lead to the discovery of admissible evidence, Plaintiff cannot rely upon “newly discovered,” immaterial evidence to justify a new trial under Rule 60(b)(2). Plaintiff’s argument would negate the relevancy requirement of Rule 26(b)(1) and the materiality requirement of Rule 60(b)(2), and would allow any losing party to request relief from judgment whenever a new document, no matter how irrelevant, is discovered after trial. As the contents of the data tape are not yet known, the parties must look to the available evidence to determine the relevancy of the tape, or alternatively, continue this motion until more information is available. As discussed above, all presently available evidence suggests that the data on the tape are immaterial.

D. Plaintiff has not shown that the contents of the data tape are not merely cumulative or impeaching.

Even if the tape does contain relevant evidence that is material to an issue in this case, Plaintiff must show that the newly discovered evidence provides new information not accounted for by other evidence introduced at trial, and that the evidence is not just being used for impeachment purposes. It is possible that the contents of this data tape already have been disclosed to Plaintiff in this case by providing access to the historical Covil paper files. Further,

given that Plaintiff admits that he does not even know the contents of the data tape, he cannot prove any purpose for its use at trial. Thus, Plaintiff is unable to meet the burden of proof on this element.

As Plaintiff is currently unable to prove that the contents of the data tape (1) will probably change the result if a new trial is granted, (2) could not have been discovered by Plaintiff before trial, (3) are material to any issue, and (4) are not merely cumulative or impeaching, the Court should deny Plaintiff's request for relief from the judgment under Rule 60(b)(2) or, in the alternative, continue the Motion until after the ongoing forensic investigation is complete.

II. Relief is not warranted under Rule 60(b)(3).

Plaintiff next argues that relief in the form of a new trial is warranted under Rule 60(b)(3) for Covil's intentional concealment of the data tape. Relief under Rule 60(b)(3) is available only in instances of extrinsic, but not intrinsic, fraud. *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605, 610.

To show extrinsic fraud related to nondisclosure of a document, a movant must show intentional concealment of the document as part of a deliberate scheme to defraud the other party and the court. A mere failure by a party to disclose a document is intrinsic fraud that does not warrant relief. Plaintiff has not made the requisite showings here.

To obtain relief from judgment under Rule 60(b)(3), a party must prove extrinsic fraud. *Raby Constr.*, 358 S.C. at 19–21, 594 S.E.2d at 482–83. “Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.” *Gainey v. Gainey*, 382 S.C. 414, 425, 675 S.E.2d 792, 798 (Ct. App. 2009). Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his

case, there has never been a real contest before the court on the subject matter of the action.” *Id.* at 425–26, 675 S.E.2d at 798.

A party proves extrinsic fraud by showing fraud upon the court. “The subornation of perjury by an attorney and/or the *intentional* concealment of documents by an attorney are actions which constitute extrinsic fraud.” *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610 (emphasis added). Although a party, as opposed to an attorney, also can commit such extrinsic fraud, this likewise requires proof of fraudulent intent and not merely proof of a failure to produce. *See Ray v. Ray*, 374 S.C. 79, 86, 647 S.E.2d 237, 241 (2007) (“[C]oncealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud.”).

Proving fraud upon the court is very difficult under South Carolina law. “Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court.” *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608 (emphasis added) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). “Less egregious misconduct, *such as nondisclosure to the court of facts allegedly pertinent to the matter before it*, will not ordinarily rise to the level of fraud on the court.” *Id.*; *see also Ray*, 374 S.C. at 86, 647 S.E.2d at 241 (citing *Rozier*, 573 F.2d at 1338 (“In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.”)). For relief under Rule 60(b)(3), the movant must prove entitlement by clear and convincing evidence. *Gainey*, 382 S.C. at 427, 675 S.E.2d at 799.

“[F]raud upon the court is a narrow and invidious species of fraud that subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504–05 (Ct. App. 2003). “Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud.” *Id.*

Fraud upon the court therefore depends on whether a party had the intent to deceive the court. As the South Carolina Supreme Court has explained,

A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing—what can properly be characterized as a deliberate scheme to defraud—before relief from a final judgment is appropriate Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for fraud on the court.

Chewning, 354 S.C. at 78–79, 579 S.E.2d at 608–09 (quoting *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002)).

Affidavits of counsel from each of the firms who represented Covil have demonstrated a complete lack of intent to conceal, to the extent that the existence of the data tape was even known to counsel at the time of discovery and trial in this case. Plaintiff’s failure to show that Covil’s attorneys intentionally withheld relevant documents with fraudulent intent demonstrates that Plaintiff is alleging only that Covil, at worst, committed intrinsic fraud such that relief is not warranted under Rule 60(b)(3). Likewise, to the extent that Plaintiff is alleging that Covil failed to separately identify the existence of the data tape within the paper files made available to Plaintiff’s counsel, this constitutes intrinsic fraud that does not justify relief. The fact that

counsel made the data tape available for review by leaders of the asbestos plaintiffs' bar with other Covil records on at least three occasions disproves any intent to conceal and also proves that Plaintiff actually had access to the data—both of which make relief under Rule 60(b)(3) unavailable.

Additionally, “a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information.” *Raby Constr.*, 358 S.C. at 21, 594 S.E.2d at 484; *see also Robinson v. Estate of Harris*, 388 S.C. 630, 640, 698 S.E.2d 222, 227 (2010) (“If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment.”).

In sum, the conduct alleged by Plaintiff is not the type of egregious misconduct that fraud upon the court is designed to prevent. The conduct at issue does not concern the bribery of a judge or juror, the fabrication of evidence, or some other action which threatens to subvert the integrity of the court. Instead, Plaintiff is merely alleging that the data tape may contain facts allegedly pertinent to the matter before the Court. Even if this allegation were true, “[l]ess egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.” *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608. Thus, Plaintiff has not proven fraud upon the court, and relief under Rule 60(b)(3) is unwarranted.

III. It would be premature and prejudicial for the Court to grant a new trial on these additional grounds until the tape's contents have been determined.

Plaintiff asks the Court to grant the extraordinary remedy of a new trial based on newly discovered evidence and allegations of fraud against Covil. However, to make either of these showings, Plaintiff has the burden of proving that the data tape at issue contains relevant and material information. Plaintiff admits in his Motion that he does not know what information, if any, the tape contains, nor whether such information is relevant to this case. Until the contents of the tape are determined, Plaintiff will be unable to meet these burdens. Nonetheless, Plaintiff requests that the Court grant this extraordinary remedy before the contents of the tape have been determined. This request is premature.

Further, the granting of Plaintiff's motion would be highly prejudicial to Covil if examination of the tape later determines that the tape contains no relevant information. If the Court grants Plaintiff's request for a new trial and it is then determined that the tape contains no relevant information, the entire reason for granting the new trial would be moot. The interests of justice and finality will not be served by holding a new trial based on evidence that is later proven not to be relevant to the case. This result is easily avoided. The Court instead could await completion of the ongoing forensic analysis of the tape before making a decision on Plaintiff's motion. Therefore, the Court should refrain from making any judgment until TLS has been afforded a reasonable time to recover the data on the tape. Only then would it make sense for the Court to address the tests for determining whether Plaintiff's claims of newly discovered evidence or fraud are valid reasons for granting a new trial in this case. Until the contents of this tape are determined, Plaintiff cannot meet these burdens.

CONCLUSION

For the reasons set forth herein, the Court should deny Plaintiff's Motion for Relief from Judgment under Rules 60(b)(2) and 60(b)(3) of the South Carolina Rules of Civil Procedure or, in the alternative, continue any hearing on the Motion until after completion of the ongoing forensic analysis of the data tape.

This, the 11th day of November, 2019.

/s/ Ashley K. Brathwaite
Ashley K. Brathwaite
S.C. Bar 76952
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
Telephone: (919) 573-1297
ashley.brathwaite@elliswinters.com

Counsel for Covil Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all counsel of record via the South Carolina E-Flex e-filing system on the 11th day of November, 2019.

ELLIS & WINTERS LLP

/s/ Ashley K. Brathwaite
Ashley K. Brathwaite
SC Bar No. 76952
E-mail: ashley.brathwaite@elliswinters.com
P.O. Box 33550
Raleigh, NC 27636
Telephone: (919) 865-7000

Attorney for Defendant Covil Corporation

IN THE COURT OF COMMON PLEAS

FOR THE SEVENTH JUDICIAL CIRCUIT

[illegible]

V.

$$\begin{pmatrix} \cdot \\ \cdot \\ \cdot \\ \cdot \end{pmatrix}$$

C/A NO. 2017-CP-42-04429

In re:
Asbestos Personal Injury Litigation
Coordinated Docket

**INDEX OF EXHIBITS TO DEFENDANT COVIL CORPORATION'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT UNDER
SCRPC 60(b)**

- A. Excerpt of Jerry Crawford deposition testimony used at trial in *Crawford v. Celanese Corp.*
- B. Excerpts from trial transcripts of *Crawford v. Celanese Corp.*, July 16-19, 2018
- C. Affidavit of Daniel B. White
- D. Plaintiffs' Motion for Sanctions Against Defendant Covil Corporation for Spoliation of Evidence and Discovery Abuse (July 10, 2018)
- E. Excerpts from July 11, 2019 hearing before the Honorable Joan H. Toal in *Falls v. CBS Corp.*, No. 2015-CP-46-02155 (S.C. Ct. C.P., York Cty.)
- F. Order on Handling of Data Tape Produced by Mark Wall, *Hopper v. Air & Liquid Sys. Corp.*, No. 2019-CP-40-00076 (S.C. Ct. C.P., Richland Cty. Aug. 22, 2019)
- G. Selected Covil receipts and invoices
- H. Def. Covil Corp.'s Suppl. Resps. Pl.'s Req. Produc., *Finch v. BASF Catalysts, LLC*, No. 1:16-cv-1077 (M.D.N.C. Mar. 14, 2018)
- I. Def. Covil Corp.'s Answer to Pl.'s Interrogs., *Finch v. BASF Catalysts, LLC*, No. 1:16-cv-1077 (M.D.N.C. Aug. 29, 2017)
- J. Affidavit of Mark Wall

EXHIBIT A

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF SPARTANBURG SEVENTH JUDICIAL CIRCUIT
3 JERRY HOWARD CRAWFORD and EVELYN KAY CRAWFORD,
4 Plaintiffs,
5 vs. CASE NO. 2017-CP-42-04429
6 CELEANESE CORPORATION, et al.,
7 Defendants.
8

9 DEPOSITION OF: JERRY HOWARD CRAWFORD, Vol. I

10 DATE: February 6, 2018

11 TIME: 10:16 a.m.

12 LOCATION: The Sleep Inn
13 834 Windslow Avenue
Gaffney, SC

14 TAKEN BY: Counsel for the Plaintiff

15 REPORTED BY: JENNA B. PARSONS, Court Reporter
16
17
18
19
20
21
22
23
24
25

1 Q. Why does it mean something to you?

2 A. That's the kind of cancer that is
3 caused by asbestos.

4 Q. Have you had -- I'm asking a yes or no
5 question now, okay?

6 A. Okay.

7 Q. Have you had conversations with your
8 doctors about what causes the type of cancer that
9 you have?

10 A. Yes, I have.

11 MR. PHILLIPS: Object to the form.

12 MR. HENDERSON:

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

16 MR. PHILLIPS: Object to the form.

17 THE WITNESS: My doctor told me that
18 asbestos is the only thing I can get it from.

19 BY MR. HENDERSON:

20 Q. Is there a time in your life when you
21 were exposed to asbestos?

22 A. Yes, sir.

23 Q. When was that?

24 A. In the year between 1970 and 1974.

25 Q. What was going on in your life between

1 1970 and 1974 that exposed you to asbestos?

2 A. That's the time I worked at Hoechst
3 fiber in Spartanburg.

4 Q. Here in Spartanburg, South Carolina?

5 A. Yes. Yes.

6 Q. Now, how were you exposed to asbestos
7 while you were working in the Spartanburg -- at
8 Hoechst in Spartanburg?

9 MS. SHOFNER: Object to the form.

10 THE WITNESS: McDaniels Construction
11 [sic] was installing new poly lines, and they had
12 to put -- it's got to have hot water pipes -- and
13 when it was putting the insulation -- cutting
14 insulation down, they put a good bit of dust in the
15 air.

16 MR. HENDERSON:

17 Q. Now, let's take a step back. You
18 mentioned something called poly lines.

19 A. Oh yeah.

20 Q. What kind of business was Hoechst in
21 Spartanburg?

22 A. It was a -- it was a fiber line.
23 They -- they had -- they made poly and it changed
24 it over to fiber.

25 Q. And what is poly?

EXHIBIT B

1 STATE OF SOUTH CAROLINA)
 2) IN THE COURT OF COMMON PLEAS
 3 COUNTY OF SPARTANBURG)
 4
 5 JERRY HOWARD CRAWFORD)
 6 AND THE ESTATE OF)
 7 EVELYN KAY CRAWFORD,) TRANSCRIPT OF RECORD
 8) 2017-CP-42-04429
 9 PLAINTIFFS,)
 10) JULY 16, 2018
 11 -vs-) SPARTANBURG, SOUTH CAROLINA
 12)
 13 COVIL CORPORATION,)
 14)
 15) (VOLUME I)
 16 DEFENDANT.

11 B E F O R E:

12 THE HONORABLE JEAN HOEFER TOAL, JUDGE. ; and a jury.
 13

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

15 THEILE B. MCVEY, ATTORNEY AT LAW
 16 KASSELL MCVEY, ATTORNEYS AT LAW
 17 1330 LAUREL STREET
 18 COLUMBIA, SOUTH CAROLINA 29202
 19 ATTORNEY FOR THE PLAINTIFFS

20 CHARLES W. BRANHAM, III, ESQUIRE
 21 DEAN, OMAR & BRANHAM, LLP
 22 302 N. MARKET STREET, SUITE 302
 23 DALLAS, TEXAS 75202
 24 ATTORNEY FOR THE PLAINTIFFS

25 AARON D. CHAPMAN, ESQUIRE
 DEAN, OMAR & BRANHAM, LLP
 302 N. MARKET STREET, SUITE 302
 DALLAS, TEXAS 75202
 ATTORNEY FOR THE PLAINTIFFS

1 The only other issue, and we can take it up after
2 lunch, is we have given Mr. Wall our power point slides for
3 opening --

4 THE COURT: Yes.

5 MS. MCVEY: -- and I think he's got objections to
6 those, but we can take them up after lunch, or after we
7 select the jury, I guess.

8 THE COURT: After we select the jury. I don't
9 want to delay the jury.

10 Mr. Wall, you got -- are you wanting to talk about
11 the power point?

12 MR. WALL: Well, yes, but one other thing. Your
13 Honor, I didn't fully understand. Are you giving a negative
14 inference that he actually worked with the property --
15 products of Covil, or a negative inference that we destroyed
16 product?

17 THE COURT: I'm going to repeat this once again --

18 MR. WALL: Thank you.

19 THE COURT: -- so you understand what I have done.

20 MR. WALL: Thank you.

21 THE COURT: I have done two things as a sanction
22 for spoliation and for discovery abuse.

23 One, I am allowing them to introduce in their case
24 in chief evidence of Covil's destruction of documents and
25 misrepresentations about the destruction -- the

1 circumstances of destruction, and that, as I understand it,
2 will primarily be through the sworn statements of Mr. Machen
3 Carpenter. So that's what I have done, number one. That
4 will be done during the course of their case. I'm not
5 giving any instructions about that. That is simply going to
6 be testimony that is going to be offered on destruction of
7 documents and misrepresentations.

8 And I am going to instruct the jury that it may
9 draw a negative adverse inference from defendant's acts
10 that --

11 What I'm going to do is instruct them simply this.

12 I'm going to instruct them that plaintiff Jerry
13 Crawford was exposed to asbestos-containing insulation
14 supplied by and installed by Covil Corporation at Hoechst
15 Celanese between 1970 and 1974. That's what I'm going to
16 instruct the jury. I'm not going to go into it was
17 spoliation, negative inference. I'm simply going to tell
18 them at the appropriate time, which would be right before
19 opening statements, I will say that to them.

20 MR. WALL: Your Honor, first of all, as I said
21 before last on the 11th, I need a written order so I can --

22 THE COURT: No, sir, I have examined -- I have
23 examined that quite closely. I can on the record recite my
24 order. I'm not required to give you a separate written
25 order.

1 JURY FOREPERSON: Burdick.

2 THE COURT: Burdick.

3 Yes, I got you, Sarah.

4 All right. Ms. Burdick is your foreperson.

5 Lawyers, you may be seated, and let me give you
6 your first what would be many instructions, if I can find
7 it.

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

13 And with that, plaintiff, you may open.

14 MR. CHAPMAN: Thank you, Your Honor.

15 I'll get set up here.

16 THE COURT: I'm sorry, ladies and gentlemen of the
17 jury, before it gets dark, we have to put the light back up
18 again, friend.

19 Madam Clerk, you may give the jurors their oath.

20 THE CLERK: Ladies and gentlemen --

21 THE COURT: Will you please stand, members of the
22 jury?

23 THE CLERK: If you will, raise your right hand.

24 Do you swear or affirm in the case about to be
25 tried to truly try the issues joined in the case and a true

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS

3

4 JERRY HOWARD CRAWFORD)
5 AND THE ESTATE OF)
6 EVELYN KAY CRAWFORD,) TRANSCRIPT OF RECORD
7 PLAINTIFFS,) 2017-CP-42-04429
8 -vs-) JULY 17, 2018
9 COVIL CORPORATION,) SPARTANBURG, SOUTH CAROLINA
10
11 (VOLUME II)
12 DEFENDANT.

10

11

12 B E F O R E:

12

13

THE HONORABLE JEAN HOEFER TOAL, JUDGE. ; and a jury.

14

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

15

16

THEILE B. MCVEY, ATTORNEY AT LAW
KASSELL MCVEY, ATTORNEYS AT LAW
1330 LAUREL STREET
COLUMBIA, SOUTH CAROLINA 29202
ATTORNEY FOR THE PLAINTIFFS

18

19

CHARLES W. BRANHAM, III, ESQUIRE
DEAN, OMAR & BRANHAM, LLP
302 N. MARKET STREET, SUITE 302
DALLAS, TEXAS 75202
ATTORNEY FOR THE PLAINTIFFS

20

21

22

23

AARON D. CHAPMAN, ESQUIRE
DEAN, OMAR & BRANHAM, LLP
302 N. MARKET STREET, SUITE 302
DALLAS, TEXAS 75202
ATTORNEY FOR THE PLAINTIFFS

24

25

1 A. Yes, sir.

2 Q. As you know, I represent Covil.

3 A. Yes.

4 Q. In fact, I'm the person that hired you to act as
5 Covil's representative, correct?

6 A. That is correct, yes, sir.

7 Q. And did I ask you to go through the records of Covil
8 and find out certain things?

9 A. You did, yes, sir.

10 Q. And did I ask you to word search all 25,000 documents?

11 A. Yes, sir.

12 Q. Did you actually physically look at some of the written
13 pages?

14 A. Yes, I did word searches and I was looking at pages
15 that were responsive to the word search.

16 Q. Did you look at the documents involving Celanese
17 Spartanburg?

18 A. Yes, we pulled out all of the documents with the search
19 term Celanese broadly.

20 Q. All right.

21 A. All.

22 Q. In review of those documents did you find any documents
23 that said that Covil worked at Celanese from 1970 to 1974?

24 A. No, there were none.

25 Q. Did you do the same thing with Daniel Corporation?

1 STATE OF SOUTH CAROLINA)
 2) IN THE COURT OF COMMON PLEAS
 3 COUNTY OF SPARTANBURG)
 4
 5 JERRY HOWARD CRAWFORD)
 6 AND THE ESTATE OF)
 7 EVELYN KAY CRAWFORD,) TRANSCRIPT OF RECORD
 8) 2017-CP-42-04429
 9 PLAINTIFFS,)
 10) JULY 18, 2018
 11 -vs-) SPARTANBURG, SOUTH CAROLINA
 12)
 13 COVIL CORPORATION,)
 14)
 15) (VOLUME III)
 16 DEFENDANT.

17 B E F O R E:

18 THE HONORABLE JEAN HOEFER TOAL, JUDGE. ; and a jury.

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

20 THEILE B. MCVEY, ATTORNEY AT LAW
 21 KASSELL MCVEY, ATTORNEYS AT LAW
 22 1330 LAUREL STREET
 23 COLUMBIA, SOUTH CAROLINA 29202
 24 ATTORNEY FOR THE PLAINTIFFS

25 CHARLES W. BRANHAM, III, ESQUIRE
 DEAN, OMAR & BRANHAM, LLP
 302 N. MARKET STREET, SUITE 302
 DALLAS, TEXAS 75202
 ATTORNEY FOR THE PLAINTIFFS

AARON D. CHAPMAN, ESQUIRE
 DEAN, OMAR & BRANHAM, LLP
 302 N. MARKET STREET, SUITE 302
 DALLAS, TEXAS 75202
 ATTORNEY FOR THE PLAINTIFFS

1 MR. BOGER: Thank you, Your Honor.

2 (Whereupon, the Deposition of Palmer Covil was
3 read to the jury panel)

4 MR. BOGER: This will conclude Mr. Covil.

5 THE COURT: All right. Thank you Mr. Buha.

6 Mr. Wall, call your next witness.

7 MR. WALL: Mr. Boger is doing it, Your Honor.

8 THE COURT: All right. Mr. Boger?

9 MR. BOGER: Your Honor, defense calls Bruce Boyer,
10 CNA Celanese by video.

11 (Whereupon, the videotape of Bruce Boyer was
12 played to the jury panel).

13 (Off the record).

14 (Back on the record)

15 MR. BOGER: Your Honor, I apologize. I'm having a
16 little technical difficulty here.

17 (Whereupon, the Videotape of Bruce Boyer was
18 continued to be played to the jury panel)

19 MR. BOGER: Your Honor, defense would like to call
20 Mr. Dan Buck of Daniel by video.

21 (Whereupon, the videotape of Dan Buck was played
22 to the jury panel)

23 MR. BOGER: No further witnesses, Your Honor.

24 THE COURT: All right.

25 Bring the lights up, please.

1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF COMMON PLEAS
3 COUNTY OF SPARTANBURG)

4 JERRY HOWARD CRAWFORD)
5 AND THE ESTATE OF)
6 EVELYN KAY CRAWFORD,) TRANSCRIPT OF RECORD
7) 2017-CP-42-04429
8 PLAINTIFFS,)
9) JULY 19, 2018
10 -vs-) SPARTANBURG, SOUTH CAROLINA
11)
12 COVIL CORPORATION,)
13)
14 (VOLUME IV)
15 DEFENDANT.

16 B E F O R E:

17 THE HONORABLE JEAN HOEFER TOAL, JUDGE. ; and a jury.

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

19 THEILE B. MCVEY, ATTORNEY AT LAW
20 KASSELL MCVEY, ATTORNEYS AT LAW
21 1330 LAUREL STREET
22 COLUMBIA, SOUTH CAROLINA 29202
23 ATTORNEY FOR THE PLAINTIFFS

24 CHARLES W. BRANHAM, III, ESQUIRE
25 DEAN, OMAR & BRANHAM, LLP
302 N. MARKET STREET, SUITE 302
DALLAS, TEXAS 75202
ATTORNEY FOR THE PLAINTIFFS

AARON D. CHAPMAN, ESQUIRE
DEAN, OMAR & BRANHAM, LLP
302 N. MARKET STREET, SUITE 302
CALLAS, TEXAS 75202
ATTORNEY FOR THE PLAINTIFFS

1 (Back on the record).

2 THE COURT: Maribell, the jury has a verdict, I'm
3 advised. Of course, I know nothing about what it is, but --
4 all right.

5 Where is Ben?

6 THE BAILIFF: I have got the evidence here.

7 THE COURT: Very good.

8 You may bring in the jury.

9 (Whereupon, at 1:55 p.m., the jury panel returned
10 to open court to report its verdict)

11 THE COURT: Ladies and gentlemen of the jury, I
12 understand that you have a verdict. Am I correct?

13 JURY FOREPERSON: Yes.

14 THE COURT: Madam Forelady, if you will give the
15 verdict to Mr. James.

16 Very good.

17 Madam Clerk, you may read the verdict.

18 THE CLERK: In the State of South Carolina, in the
19 Court of Common Pleas for the Seventh Judicial Court, County
20 of Spartanburg, Civil Action No. 2017-CP-42-04429, in the
21 matter of Jerry Howard Crawford and the Estate of Evelyn Kay
22 Crawford, plaintiffs, versus Covil Corporation, defendant.

23 "Negligence. We, the jury, find that Covil
24 Corporation was negligent and its negligence was a proximate
25 cause of Jerry Crawford's injury and damages?

1 "No.

2 "Strict liability. We, the jury, find Covil
3 Corporation is strictly liable for selling products that
4 were a proximate cause of Jerry Crawford's injury and
5 damages?

6 "No.

7 "Implied warranty. We, the jury, find Covil
8 Corporation breached the implied warranty in selling this
9 product and its breach was a proximate cause of Jerry
10 Crawford's injury and damages?

11 "No."

12 Signed by the foreperson on July 19th, 2018.

13 THE COURT: Thank you, Madam Clerk.

14 All right. Plaintiff, do you wish to poll the
15 jury?

16 MS. MCVEY: Yes, Your Honor.

17 THE COURT: Very good.

18 All right. Maribell, you may poll the jury.

19 THE CLERK: Ladies and gentlemen of the jury, I'm
20 about to ask you a question and that question being is this
21 your verdict and still your verdict. As I call your name
22 and juror number, please answer by saying yes or no.

23 Juror number 34, Sarah M. Burdick?

24 JUROR NUMBER 34: Yes.

25 THE COURT: Juror number 92, Stacy A. Gillen?

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	C.A. No.: 2017-CP-42-04429
JERRY HOWARD CRAWFORD,	)	
Individually and as Personal	)	
Representative of the Estate of	)	
EVELYN KAY CRAWFORD,	)	In re:
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	
CELANESE CORPORATION,	)	
et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF DANIEL B. WHITE

PERSONALLY APPEARED BEFORE ME, Daniel B. White, who first being duly sworn deposes and states as follows:

1. I am a member of the South Carolina Bar and an attorney in the law firm of Gallivan White & Boyd, P.A. (Gallivan White) who represented Covil Corporation (Covil).
2. That Gallivan White represented Covil from approximately the mid-1970s until April 2018.
3. That Gallivan White took possession of various of Covil's documents and materials, which presumably included the data tape, when it went out of business in 1991.
4. That all those materials and documents received from Covil were maintained in the same boxes and eventually the file cabinets that held Covil's records throughout the time Gallivan White had possession of them.
5. That Rick Lutsell and a colleague from the law firm of Wallace & Graham visited Gallivan White's office in 1999 or 2000 to review these Covil files.

6. That years later Wallace & Graham provided Gallivan White with a CD of the materials that were scanned.

7. That Gallivan White prepared to allow Sabrina Stone of the law firm of Dean Omar Branham & Shirley, LLP (Dean Omar) to review these files in the Fall of 2017, but there is no record that she came to the Gallivan White office to review these files.

8. That I am informed and believe that in February 2018, my partner Ron Tate, spoke with Jessica Dean of the law firm of Dean Omar during the two day 30(b)(6) Deposition of Jim Covil, and physically showed Ms. Dean where the filing cabinets and boxes containing Covil's files were being stored in Gallivan White's offices at Liberty Square, Greenville, SC and offered for her to come review those files. There is no record that Ms. Dean ever came to Gallivan White to review those files.

9. That on April 4, 2018, the Covil representation transitioned from Gallivan White to Wall Templeton & Haldrup, P.A. (Wall Templeton) as its counsel.

10. That Gallivan White did not intentionally conceal the data tape from Plaintiff or the Court.

FURTHER DEPONENT SAITH NOT.


Daniel B. White

SWORN TO before me this 11th day of November, 2019.

 (SEAL)
Notary Public for South Carolina

My Commission Expires: 7-19-2021

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all counsel of record via the South Carolina E-Flex e-filing system on the 11th day of November, 2019.

ELLIS & WINTERS LLP

/s/ Ashley K. Brathwaite
Ashley K. Brathwaite
SC Bar No. 76952
E-mail: ashley.brathwaite@elliswinters.com
P.O. Box 33550
Raleigh, NC 27636
Telephone: (919) 865-7000

Attorney for Defendant Covil Corporation

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
JERRY HOWARD CRAWFORD	)	
and EVELYN KAY CRAWFORD	)	C/A NO. 2017-CP-42-04429
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' MOTION FOR
v.	)	SANCTIONS AGAINST
	)	DEFENDANT COVIL
CELANESE CORPORATION, et	)	CORPORATION FOR SPOILIATION
al.,	)	OF EVIDENCE AND DISCOVERY
	)	ABUSE
Defendants.	)	

Plaintiffs, Jerry Howard Crawford and Evelyn Kay Crawford, by and through their undersigned counsel, hereby move the Court to sanction Defendant Covil Corporation for spoliation of evidence and for its abuse of the discovery process. In support, Plaintiffs would show the Court as follows:

INTRODUCTION

Covil has engaged in a pattern of misconduct that warrants sanctions. First, it has misrepresented to South Carolina plaintiffs and their counsel that all documents relevant to insulation business were destroyed in a fire at Covil's headquarters in 1973. Plaintiffs have learned that this is untrue and that all documents were not burned in the fire. Some documents survived the fire but were thereafter intentionally destroyed. This willful destruction was in the face of pending litigation from those injured by Covil's supply and installation of asbestos insulation. Because Covil has spoliated crucial evidence vital to the Plaintiffs' ability to prove their case against Covil, Plaintiffs are seeking evidentiary sanctions.

Plaintiffs request the following relief for Covil's spoliation of evidence: (1) that Plaintiffs be allowed to introduce evidence of Covil's destruction of documents and misrepresentations about the circumstances of the destruction; (2) that the Court instruct the jury that it can draw a negative adverse inference (*i.e.*, spoliation presumption) from Defendant's acts that Plaintiff Jerry Crawford was exposed to asbestos insulation supplied and installed by Covil at Celanese between 1970-74; (3) that Covil not be allowed to introduce expert testimony at trial regarding either the missing or destroyed evidence as a sanction; and (4) that the Court impose additional and other sanctions as the Court may deem necessary in order to ensure Plaintiffs receive a fair trial in this case.

Sanctions are also warranted under Rule 37, SCRPC. Covil has abused the discovery process in deliberately failing to respond to Plaintiffs' discovery requests and failing to properly prepare its corporate representative for deposition. In addition to sanctions, Plaintiff requests that the Court issue an Order compelling Covil to produce the prior testimony list of Covil's 30(b)(6) witness, Robert Glenn, CIH, MPH, as well as a witness who is properly prepared to testify.

FACTUAL BACKGROUND

I. Covil's Spoliation of Evidence

In February 2018, Covil's corporate representative, James Covil, was deposed in *Howe v. Air and Liquid Systems Corporation, et al.* Mr. Covil testified that all relevant records to Covil's insulation business were destroyed in May 1973 in a fire at the warehouse where Covil's offices were located. **Ex. 1**, Covil Depo., 2/7/18, at 21:23-22:14. This was reiterated several times during the deposition: "Before '73, when we had the fire, there would be no files, no paperwork at all." *Id.* at 120:24-25. Again, "[w]e found no records pertaining to that back in the '60s, because if they were, they were all burned up in the fire." *Id.* at 203:11-13. Mr. Covil claimed that after the fire,

“they had to rebuild the whole warehouse from the front offices, which were brick and mortar, all the way back.” *Id.* at 124:13-25. Significantly, Mr. Covil, who is the founder’s son, was not employed by the company full time until 1974 and has no substantive information about the company’s business before that time. *Id.* at 12:25-14:4, 22:7-19.

Mr. Covil’s claims about the fire were obviously exaggerated, even at the time of his deposition in *Howe*. While he claimed that the fire “wiped out every bit of our inventory in our warehouse,” *id.* at 124:5-6, a contemporaneous memorandum stated that it was just the “bulk” of Covil’s insulation inventory that was destroyed. *Id.* at 124:13-25; **Ex. 2**. And while Mr. Covil claimed that the company never sold asbestos insulation after the fire because it had all been incinerated, at least some records that survived the fire indicated that Covil did, in fact, continue to sell and install asbestos insulation even after May 1973. *Id.* at 127:10-18; **Ex. 3**. Records maintained by companies utilizing Covil also evidence of the continued use of asbestos insulation after the claim that they stopped. *See, e.g., Ex. 4*, Covil Depo., 3/27/18, at 107:1-108:1; **Ex. 5**, Invoices for Sale of Thermobestos to Firestone in 1974.

Plaintiffs have become aware of testimony that completely contradicts Mr. Covil’s claims about the fire. In 2004, Covil employee Machen Lee Carpenter testified as a co-worker in an asbestos lawsuit. **Ex. 6**, Carpenter Depo., 5/27/04. Mr. Carpenter went to work for Covil in February 1967, straight out of his four-year service in the U.S. Marine Corp. *Id.* at 10:22-11:2. He worked for Covil from 1967 to 1991 in a variety of positions, including warehouse foreman, foreman of the fabrication shop, purchaser, operations manager, and vice president of operations. *Id.* at 11:3-16, 13:20-14:11, 30:23-31:23. He verified that there was a fire in the early 1970s at Covil’s corporate headquarters. *Id.* at 29:20-22, 65:18-20. The fire did not destroy all Covil documents, however:

Q. Because of the fire or some other fire? I'm trying to find out there's any -- is there a repository of the information that --

A. No, that's not right. It wasn't -- **the front office complex did not burn down. It was protected by a fire wall. We kept all of our documentation in a vault.** Now where is it today? What is the limitation on the time frame in which you have to keep it? And I would say it would be seven years or less, so I'd say it's history.

Id. at 103:16-25 (emphasis added). Rather than being destroyed by a fire, at least some of the documents were destroyed pursuant to a document retention policy. *Id.*

Covil first received notice of an asbestos-related claim against it in 1972. **Ex. 7**, Covil Responses to Interrogatories, 2/5/18, *Howe v. Air & Liquid Systems, et al.*, at 22. As of 1977, Covil already had dozens of lawsuits and workers' compensation claims pending against it for asbestos-related diseases. Covil Depo., at 42:20-43:16; **Ex. 8**.

II. Covil's Discovery Misconduct

Plaintiffs first served Covil with notice of Plaintiff's intention to depose its corporate representative on April 18, 2018. **Ex. 9**, Plaintiff's 30(B)(6) Notice of Videotaped Deposition of Defendant Covil Corporation. Attached to the original notice, Plaintiff identified a variety of topics to be discussed at the deposition.

At the request of Covil's counsel, Plaintiffs agreed to postpone the deposition until Monday July 9, 2018. After issues that Covil had with their prior representative, James Covil, Covil hired new counsel and offered a new witness as their 30(b)(6) representative. In order to properly educate their witness, Covil asked Plaintiffs to push back the deposition. Plaintiffs in good faith believed Covil was attempting to comply with their 30(b)(6) requirement and agreed to give them the time requested to do that. As a result, the deposition took place 48 hours before this hearing.

Covil's new corporate representative, Robert Glenn, was deposed on July 9, 2018. **Ex. 10**, Videotaped Deposition Under Oral Examination of Robert Glenn, CIH, MPH (Deposition of Covil

Corporation, by Aaron Chapman), 7/9/18, ROUGH DRAFT. It became immediately clear that Mr. Glenn was unprepared for the deposition and that he and/or Covil had done little to no follow up on the requested information since the *Howe* case. Although Plaintiffs agreed to give Covil more time in anticipation of their compliance, Mr. Glenn did not start preparing for his role as corporate representative until two weeks ago. *Id.* at 20. In fact, until two weeks ago Mr. Glenn had never even heard of Covil Insulation. *Id.* When asked the basic question of if he was familiar with Covil and its history, Mr. Glenn replied, “I’ve been getting more familiar with them in the last two weeks, yes.” *Id.* at 21. In order to prepare for this deposition and his role at Covil’s 30(b)(6) representative Mr. Glenn: 1) reviewed the depositions of Palmer and James Covil and exhibits,¹ 2) looked at about 100 pages of Covil documents out of 25,000 which he did not personally find,² 3) flipped through the deposition testimony of Russell Johnson,³ 4) read the testimony of Daniel’s corporate representative taken in this case,⁴ and 5) reviewed a summary of Mr. Crawford’s testimony.⁵ He did not review the other 24,900 pages of Covil documents, nor could he say what was contained within them. *See e.g., id.* at 23, 51-52, 71. He was even unable to describe the 100 pages that he did review. *Id.* at 51. He wasn’t even sure if “Celanese Spartanburg” was used as a search term in trying to locate documents that would educate him about Covil’s work or supply to Celanese Spartanburg. *Id.* at 24. At one-point Mr. Glenn described a second set of documents in the possession of Covil’s counsel but was unable to say if they are the same or different than the 25,000 documents that he didn’t review. *Id.* at 166-169. Further, he did not even attempt to speak to James

¹ *Id.* at 22.

² *Id.* at 22 -23.

³ *Id.* at 203.

⁴ *Id.* at 204.

⁵ *Id.* at 22-23.

Covil, the prior 30(B)(6) representative and former Vice President of Covil Insulation, in attempting to learn about Covil. *Id.* at 57.

During the deposition, it was revealed that Mr. Glenn was not prepared to discuss a variety of topics. Mr. Glenn said he “did not know” or was otherwise unprepared to testify at least 103 times. It was also clear that Covil made **no** attempt, let alone a reasonable attempt, to find out the answers to these questions. Some of those include:

- What percentage of their products were asbestos containing versus non-asbestos containing;
- Safety procedures Covil used;
- Why Mr. Glenn was chosen as the corporate representative;
- What documents would’ve been saved from the fire in 1973;
- If accounting records would’ve been saved from the fire;
- Why he didn’t speak with Jim Covil;
- Efforts to locate other individuals with knowledge about Covil;
- If Covil was ever purchased by another entity;
- What warnings manufactures Covil bought from would provide related to asbestos on their products;
- Whether Covil returned insulation products to the manufacturers that did not have the proper warnings on it;
- Whether Covil had any asbestos warning pre-OSHA on its asbestos containing products
- Whether Covil had any asbestos warning post-OSHA on its asbestos containing products
- If Covil has sales documents from 1973-1974 post its warehouse fire;
- Whether training of Covil employees about the hazards of asbestos took place;
- When training on asbestos hazards started;
- How long or how in-depth training relating to asbestos hazards was;
- How asbestos containing insulation was treated such that it did not allegedly release dust;
- The last year Covil sold an asbestos containing product;
- How Covil determined it was not their responsibility to warn about the hazards of asbestos on the asbestos containing products it supplied;
- If a lawyer was consulted pre-OSHA to determine whether or not Covil had a responsibility to warn about asbestos
- If a lawyer was consulted post-OSHA to determine whether or not Covil had a responsibility to warn about asbestos
- Palmer Covil’s basis for his testimony, which Mr. Glenn relied heavily;
- Whether documents destroyed by fire had information relevant to this lawsuit;
- Whether documents destroyed by the fire had information related to who Covil sold asbestos containing insulation to;
- Whether documents that survived the fire had information related to who Covil sold asbestos containing insulation to;

- What documents survived the fire;
- Where the documents that survived the fire are located;
- Whether or not the documents that survived the fire were destroyed at some later point;
- If Covil has any documents that survived the fire in 1973;
- If Covil has looked for documents described by Palmer Covil that survived the fire;
- The content of the documents in the warehouse that survived the fire;
- The content of the documents in the vault that survived the fire;
- Whether or not personnel records exist, pre or post fire;
- Complaints about asbestos from Covil employees;
- What efforts Covil has made to determine whether or not Covil places asbestos containing insulation in boxes marked asbestos free as described by Dwaine Waters;
- Any attempts made to find records from other sources, including other defendants;
- How big the vault that housed documents that survived the fire was;
- Investigate at all whether or not documents survived the fire;
- Whether the state of North Carolina still has records related to asbestos submitted to it by Covil;
- What post-1973 fire docs exist;
- Whether or not Covil has 100% of their documents post 1973 fire;
- Whether or not the 24,000 pages described by Mr. Glenn are the entirety of documents generated by Covil from 1973 to its closing in 1991;
- If Covil has any safety records;
- The topic of Dr. Selikoff's talk which Palmer Covil attended wherein he learned asbestos was hazardous in 1966;
- Whether or not Covil knew exposure to asbestos could cause mesothelioma;
- If there are any other worker's compensation claims related to asbestos exposure before 1972;
- The existence of worker's compensation documents;
- Covil's document retention policy;
- If Covil documents were destroyed pursuant to a document retention policy after the 1973 fire;
- If Mr. Crawford worked around Covil employees;
- Whether Covil supplied insulation to the Spartanburg job;
- If Covil ever asked its suppliers about the hazards of asbestos;
- Information Covil or its employees may have had from union membership;
- Information Covil or its employees may have had from membership in trade organizations;
- What trade organizations Covil and/or its employees were members;
- If Covil safety procedures were enforced;
- If Covil had safety meetings for its employees;
- If Covil had a safety budget and how much it was;
- If written safety material or information made it to Covil employees;
- If Covil warned other contractors it was working around about the hazards associated with its work;
- How Covil's documents are kept and stored;
- How Covil's documents are organized;

- Who was in charge of safety at Covil throughout its history;
- What follow up was done on insurance policies and insurance coverage for the relevant years in this case;
- Whether or not Covil had insurance coverage specifically for work at Celanese Spartanburg;
- Whether or not Covil has contracts for work or supply to Daniel Construction;
- Whether or not Covil has any documents relating to Celanese Spartanburg.

See, e.g., id. at 56, 58, 63, 65, 70, 71, 76, 77, 78, 80, 81, 83, 93, 97, 98, 99, 102, 103, 104, 112, 113, 114, 115, 118, 127, 128, 129, 130, 132, 133, 135, 136, 142, 159, 160, 161, 166, 167, 169, 170, 173, 178, 180, 191, 197.

Mr. Glenn admitted that two weeks was not enough time to prepare to be the Covil 30(b)(6) representative. *Id.* at 56-57. When asked if he had more time to look at the document if he would be more prepared Mr. Glenn stated, “I would certainly be more knowledgeable [] about what went on with Covil.” *Id.* at 152.

Mr. Glenn and Covil were unprepared for this deposition. Sitting at the deposition, he was unable to describe what efforts or attempts Covil has made to even understand the limited documents that it does have:

Q. Sir, what has Covil done to try to understand what records it has?

A. I’m just getting started. So I’m at the early stage of I’m sure I’ll fin[d] out more about what I’m to do regarding those documents and such.

Id. at 168.

ARGUMENT AND AUTHORITIES

I. The Court should impose sanctions for spoliation against Covil.

A. Covil has intentionally destroyed or concealed relevant documents.

Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. In an adversarial judicial system, a litigant’s ability to access evidence controlled by the opposing party is crucial for the system to function effectively. A spoliation sanction “is not a substantive claim or defense but a ‘rule of evidence’ and thus is

‘administered at the discretion of the trial court.’” *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995)).

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black’s Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had “consciousness of guilt” or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was 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.

Ex. 11, *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778, at *2 (D.S.C. Oct. 22, 2012). Each of these elements are present here and support a finding that Covil has destroyed relevant evidence and that Plaintiffs are entitled to an appropriate sanction as a result of Covil’s misconduct.

1. Covil had a duty to preserve the records that its destroyed or misplaced.

“A party has a duty to preserve evidence during litigation and at any time “before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.”” *Cytec Carbon Fibers*, at *2 (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). There is a common law duty to preserve evidence and a party can only be

sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

Covil's duty to preserve the type of evidence that Plaintiffs seek arose when it was first named as a defendant in asbestos litigation. As noted, Covil first receive such notice in 1972.

2. Covil negligently or deliberately destroyed the evidence.

Covil claims to not have any documents prior to 1973. Although Mr. Covil testified under oath that relevant documents were destroyed in a fire, Mr. Carpenter's testimony establishes that this is untrue. By failing to maintain documents relevant to pending and future asbestos litigation, Covil had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The fact that it has misrepresented the circumstances of the destruction of its documents certainly suggests Covil intentionally engaged in wrongdoing. The destruction of the documentary evidence significantly hamstrings Plaintiffs' ability to present evidence to the jury and to prove its case against Covil.

The "culpable" state of mind requirement does not require willful destruction. Rather, "the moving party need only show that the evidence was destroyed 'knowingly, even without intent [to breach the duty to preserve it], or negligently.'" *Cytec Carbon Fibers*, at *2 (quoting *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, the evidence before the Court shows that Covil’s conduct of either destroying relevant documents or concealing relevant documents satisfies, at least, the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires that Covil have some degree of fault. Whether the Court concludes that Covil was negligent, grossly negligent, or willful in destroying the evidence, the Court should find that Covil had a culpable state of mind when it spoliated the evidence at issue.

3. The evidence destroyed or concealed by Covil was relevant to Plaintiffs’ case and its absence is prejudicial to Plaintiffs.

The last element, relevance to Plaintiffs’ claims, is also clearly present on these facts. Under Rule 401, SCRE, “relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears. *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986). Thus, any evidence which assists a jury at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely within the trial judge’s discretion. *Strickland v. Coastal Design Associates, Inc.*, 284 S.C. 421, 365 S.E.2d 226 (Ct. App. 1987).

Given Plaintiffs’ contention that Jerry Crawford was exposed to asbestos insulation supplied and/or installed by Covil during his work at Celanese between 1970-74, evidence from that time period is highly relevant to Plaintiffs’ claims. Plaintiffs are not required to demonstrate the content of the destroyed documents or evidence with certainty, to the contrary, once the

Plaintiffs show that the spoliated material is likely to be relevant, the burden shifts to the party charged with spoliation, here Covil, to demonstrate irrelevance.

Here, Plaintiffs have met their burden of showing the spoliated evidence is highly relevant to its case and the fact that Covil destroyed, concealed, or negligently misplaced such evidence is a severe detriment to Plaintiffs' ability to prove their underlying claims. As such, Covil should not profit or benefit from its failure to preserve this evidence. Of course, Plaintiffs have no way of knowing precisely what exactly has been destroyed. However, there is every reason to believe that the destroyed or concealed evidence would have aided Plaintiffs' case, which has suffered irreparable prejudice due to Covil's spoliation.

By destroying or negligently misplacing relevant evidence, Covil has succeeded in hiding the best evidence of its fault and deprived the Plaintiffs of the opportunity to present critical liability evidence to the jury. Thus, the Court should find that Covil spoliated relevant evidence and should issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

B. Plaintiffs ask the Court to impose sanctions to remedy Covil's spoliation.

A proper sanction serves the purpose of "leveling the evidentiary playing field" and "sanctioning the improper conduct." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). 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. A key factor courts consider in determining which, if any, spoliation sanction is appropriate is the "degree of prejudice suffered by the opposing party[.]" *See Nucor Corp. v. Bell*, 251 F.R.D. 191, 201 (D.S.C. 2008).

Covil's spoliation of evidence has caused great prejudice to the Plaintiffs, who have the burden of proving their claims. Justice, fairness, and the law all require more than the proverbial

EXHIBIT E

State of South Carolina) In the Court of Common Pleas
County of York) Sixteenth Judicial Circuit
2015-CP-46-02155

Roxanne Falls, Individually)
and as Personal)
Representative of the)
Estate of Charlotte Gaye)
Smith,)
Plaintiffs,)
vs.)
CBS Corporation, et al.)
Defendants.)
In re Receivership of Covil)
Corporation by and through)
its Receiver, Peter D.)
Protopapas.)
_____)

July 11, 2019

Columbia, South Carolina

B e f o r e:

The Honorable Jean H. Toal, Judge

A p p e a r a n c e s:

Jescelyn Spitz, Esquire
Mark Hardee, Esquire
Jon Robinson, Esquire
Brady Edwards, Esquire
Nancy Patterson, Esquire
Paul Zevnik, Esquire
Trey Branham, Esquire
G. Murrell Smith, Jr., Esquire
Warren Powell, Esquire
Chelsea Clark, Esquire

1 THE COURT: That's correct.

2 MR. HARDEE: Yes.

3 THE COURT: That is correct. That's ---

4 MR. HARDEE: And ---

5 THE COURT: --- after September when this billing
6 takes place.

7 MR. HARDEE: And insurance companies then came and
8 said, "We didn't even know about these cases until ..."
9 they said, " ... October 8," when in fact, they're billing
10 insurance companies for work they did on it in September.

11 So they knew about the cases even before they told
12 you in that hearing they didn't know. We know that for a
13 fact.

14 That's why we're here. We don't trust them. We
15 don't trust them and we found in a lot of documents as of
16 this spring, March of this year, 2019, Wall and Taylor
17 contacts the insurance company, Zurich, Travelers, and
18 Sentry, and he tells them they found this computer tape
19 and I have a picture of it. It's something you see --
20 something like an old movie, where it's like -- looks like
21 a reel-to-reel cassette. They actually put a copy of it.

22 They're asking the insurance company -- this is like,
23 in March of -- of this year -- the order clarifying the
24 Receiver's duty -- what they should do with the tape,
25 where it came from. They found a place in Dallas, or

1 Texas somewhere, that could -- that could see what's on
2 the tape. I'm sure everybody's interested. I'm sure the
3 Plaintiffs are interested what's on this tape, these
4 historical documents of Covil. You know who was not on
5 that chain? Peter Protopapas, the receiver. They didn't
6 ask him, they didn't say anything.

7 On July 3 ---

8 THE COURT: And this tape is a tape of historical
9 documents of Covil?

10 MR. HARDEE: We -- we believe. We haven't gotten --
11 we haven't gotten -- we are just now in the process of
12 getting possession of it. We ---

13 THE COURT: That -- that -- that is -- the existence
14 of those records has been the subject of litigation before
15 me for at least a year and was in part the reason for the
16 striking of their pleadings --

17 MR. HARDEE: Yes.

18 THE COURT: -- of Covil's pleadings, a matter that I
19 guess was on appeal and then ultimately settled?

20 MR. HARDEE: I mean, it could be nothing on it or it
21 could be a bombshell on it. We don't know.

22 But what I want to know is why wasn't Wall and
23 Templeton letting their client know 'cause it's -- it's
24 Covil's documents. So it's -- Peter Protopapas is in
25 control of that document, correct? Under your order,

1 (To the court reporter) Mark this in the Covil
2 proceedings. This is a tape that has dates on it in 1990
3 through 1991 and says (as read): "Final back up
4 10/18/91."

5 And I'm handing it to the court reporter for her to
6 mark it as Court's Exhibit No. 1.

7 (Marked Court's Exhibit No. 1, final back up tape
8 10/18/91.)

9 MS. MCVEY: Your Honor --

10 THE COURT: Now, don't get excited and start trying
11 to figure out what we're going to do about this tape yet.

12 MS. MCVEY: I've been looking for those documents a
13 long time.

14 THE COURT: I know, but you just --

15 MS. MCVEY: Okay.

16 THE COURT: -- that -- this is right here on my desk
17 at the moment.

18 MR. POWELL: Your Honor, may I approach?

19 THE COURT: You may.

20 MR. POWELL: Your Honor, this is what we emailed
21 yesterday afternoon. This is the hard copy of it, and you
22 may not have seen the email, but it went to all counsel.

23 And this is an explanation of what we've produced up
24 to now. And let me just say this, by way of explanation,
25 much of this is -- took place before I got involved. But

EXHIBIT F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
CHARLES T. HOPPER and REBECCA HOPPER,	)	C/A No. 2019-CP-40-00076
	)	
Plaintiffs,	)	
v.	)	ORDER ON HANDLING OF
	)	DATA TAPE PRODUCED BY MARK
	)	WALL
AIR & LIQUID SYSTEMS CORPORATION, et al.,	)	
	)	
Defendants.	)	
_____	)	

On July 11, 2019 during a hearing involving the Receiver for Covil Corporation, it was revealed that a tape purporting to contain data belonging to Covil Corporation (the “Data Tape”) has been in the possession of Covil’s lawyers¹ for decades and has not been disclosed or produced until now.

The Court took possession of the Data Tape at the hearing on July 11, 2019. The Court further ordered that the parties confer and submit an order for the handling of the Data Tape.

The parties have conferred and agreed that the Data Tape will be remitted to the Receiver, Peter D. Protopapas, and that the Receiver and his counsel, in consultation with Dean Omar Branham Shirley, LLP (“DOBS”), shall retain a forensic specialist to examine the tape, determine if data is contained on the tape and, if so, how to retrieve and retrieve the data. If there is no data on the tape, the forensic specialist will determine if the tape has been altered or damaged and, to

¹ Prior to 2018, Covil’s lawyers were Gallivan White & Boyd, LLP (“Gallivan”). Subsequently, Wall, Templeton & Haldrup, P.A. (“Wall”) was retained purportedly to represent Covil. It appears that as part of that transition, the tape was delivered from Gallivan to Wall. The Court notes, not without considerable concern, that Covil has been the subject of numerous orders on motions to compel and that this is the first time the Court and other counsel have learned of the existence of this tape.

the extent possible, whether the damage was intentional, inadvertent or a function of age. The cost incurred for the work of the forensic specialist will be split half and half between the Receiver and DOBS, attorneys for the Plaintiffs. Any documents recovered by the vendor will be delivered to the Court, Covil Corporation through its Receiver, Covil Corporation's counsel, and no other party. Covil Corporation will have ten days to provide to the Court and all parties a privilege log listing a description of any document it claims is privileged and all unprivileged documents recovered from the tape.

Upon the execution of this Order the Receiver may obtain the tape from chambers.

IT IS SO ORDERED.

Jean Toal, Chief Justice, Ret.



Richland Common Pleas

Case Caption: Charles T Hopper , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al

Case Number: 2019CP4000076

Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-08-22 12:02:03 page 3 of 3

EXHIBIT G

COVIL CORPORATION
COMPUTER EQUIPMENT
SCHEDULE

<u>DESCRIPTION</u>	<u>SERIAL #</u>	<u>COST</u>
NCR Base Processor 32/450	#19466214	30,600.
NCR 170MB Fixed Disk		
Hayes Modern 1200		
WYSE Model 50 CRT	#01140448	550.
WYSE Model 50 CRT	#01140453	550.
WYSE Model 50 CRT	#01140482	550.
WYSE Model 50 CRT	#01140518	550.
WYSE Model 50 CRT	#01140592	550.
WYSE Model 50 CRT	#01141179	550.
WYSE Model 50 CRT	#01141182	550.
WYSE Model 50 CRT	#01141186	550.
WYSE Model 50 CRT	#01141190	550.
WYSE Model 50 CRT	#01141195	550.
WYSE Model 50 CRT	#01141224	550.
WYSE Model 50 CRT	#01142314	550.
WYSE Model 50 CRT	#241024203	550.
WYSE Model 50 CRT	#2Y1024258	550.
Texas Instrument TI880	#88280090	2,395.
Texas Instrument TI880	#88280183	2,395.
Texas Instrument TI880	#2188780054	<u>2,395.</u>
TOTAL HARDWARE		<u>45,485</u>

COV_003702

CONTINUED -

COMPUTER EQUIPMENT SCHEDULE

<u>DESCRIPTION</u>	<u>SERIAL #</u>	<u>COST</u>
SOFTWARE:		
MARATHON MANAGEMENT SYSTEM		16,232.
COMPUTER SYSTEM DYNAMICS		<u>17,623.</u>
 TOTAL SOFTWARE		 <u>33,855.</u>
 TOTAL SYSTEM		 <u><u>\$79,340.</u></u>

COV_003703



COMPUTER SYSTEM DYNAMICS

12130 PENNSYLVANIA ST.
THORNTON, COLORADO 80241
PHONE (303) 450-5252

269

SOLD TO

AVIL CORPORATION
1 PINSLEY CIRCLE
PO BOX 1804
GREENVILLE, SC 29609

SHIP TO

AVIL CORPORATION
1 PINSLEY CIRCLE
PO BOX 1804
GREENVILLE, SC 29609

03385	SR#8758	NET 10	5071	11 02/88	CRB	23522	11/22/88

8	0	8	EA	CUSTOM SOFTWARE ADD ON CSA HAVE BACK ORDER QTY SHOW ONLY THE BACK ORDERED QTY NOT THE ORIGINAL QTY ORDERED	75.000	600.00
				150		

NOV 22, 1988 14:41:48

* INVOICE *

PAGE 1 OF 1



COMPUTER SYSTEM DYNAMICS

12130 PENNSYLVANIA ST.
THORNTON, COLORADO 80241
PHONE (303) 450-5252

52690

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PO BOX 1804
GREENVILLE, SC 29609

DEC 20

ORDER NO.	DATE	QUANTITY	UNIT	DESCRIPTION	PRICE	AMOUNT		
03385		NET 10		5394	12/03/88	HS	23636	11/30/88
3	0	3	EA	INSTALL & TRAINING - ADD ON	400.000	1200.00		
1	0	1	EA	ITA	736.000	736.00		
1	0	1	EA	AIR FARE	135.130	135.13		
1	0	1	EA	TRVSSA	135.130	135.13		
1	0	1	EA	AUTO EXPENSES	185.420	185.42		
1	0	1	EA	TRVSSC				
1	0	1	EA	MEALS & LODGING EXPENSES				
1	0	1	EA	TRVSSM				
1	0	1	EA	ON SITE TRAINING BY				
1	0	1	EA	ROBERTA KESLER, 11/8 TO				
1	0	1	EA	11/11/88				
DEC 8, 1988 16:33:05					2285.65			
*****					0.00			
* INVOICE *					0.00			
*****					0.00			
PAGE 1 OF 1					0.00			
TOTAL					2285.65			



COMPUTER SYSTEM DYNAMICS

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ORDER NO	ORDER REF	TERMS	CODE	ORDER DATE	SHIP DATE	BACKL	SHIPPING DATE
08385	CSR#8883	NET 10	5070	11/02/88	3RB	23616	11/30/88
QUANTITY	UNIT	DESCRIPTION	PRICE	AMOUNT			
8	0	8 EA CUSTOM SOFTWARE-ADD ON CSA CARRY REMARKS OVER TO THE BACK ORDER FROM THE ORIGINAL ORDER	75.000	600.00			
DEC 8, 1988 16:08:11				600.00			
***** * INVOICE * *****				0.00			
PAGE 1 OF 1				0.00			
TOTAL				600.00			

DEC 8, 1988 16:08:11

* INVOICE *

PAGE 1 OF 1

TOTAL 600.00

1669

THE FINANCING STATEMENT is presented to a Filing Officer for filing pursuant to the Uniform Commercial Code.		No. of Additional Sheets Presented:	3. Maturity Date (Optional):
1. LESSEE Name(s) (Last Name First) and Address(es): Covil Corporation Pinsley Circle Greenville, SC 29609	2. LESSOR Name(s) and Address(es): Equipment Leasing, Division of American Federal Bank, F.S.B. 300 E. McBee Ave. Greenville, SC 29601	4. For Filing Officer: Date, Time, File #, Filing Office: VHF 01/01 4974 046835/86-046835 10:27:40 001 09-02-88 PMH \$10.00 OFFICE OF STATE OF SOUTH CAROLINA	
7. This Financing Statement covers the following types or items of collateral: (Describe real estate, including record owner if item 6 is applicable) NCR Computer System more fully described and identified on the Schedule A attached hereto and by reference made a part hereof and covered under lease 05783. This financing statement is recorded for the purpose of complying with Section 27-23-80 of SC Code of Laws and for the purpose of protecting the interest of lessor in the foregoing collateral.		5. Assignee(s) of Secured Party, Address(es): 6. ☐ The described crops are growing or to be grown on the real property described in item 7. ☐ The described goods are or are to be affixed to the real property described in item 7.	
☒ Proceeds - ☐ Products of the collateral are also covered. 8. Signatures: (If debtor's signature omitted pursuant to G.S. 25-9-402 (7), indicate reason.) By <u>Covil Corporation</u> <u>Equipment Leasing, Division of American Federal Bank, F.S.B.</u> LESSEE <u>By [Signature]</u> SEC. (or Assignor(s)) <u>[Signature]</u> (or Assignee(s)) FINANCING STATEMENT Standard Form Approved by ALL STATES SHOWN ON STUD UCC-1			
(1) FILING OFFICER COPY-ALPHABETICAL.			

01536B

© EASTERN BUSINESS FORMS INC. GREENVILLE, S.C. 29615-9070



Equipment Leasing

Division of American Federal Bank, FSB

Drawer B457 • Greenville, South Carolina 29604

300 E. McBee Ave. • Telephone (803) 255-7635

EQUIPMENT LEASING, Division of American Federal Bank, FSB, hereby leases to the undersigned Lessee, and Lessee hereby leases and rents from Lessor, the personal property (herein called "equipment") described in the Schedule below, subject to the terms and conditions set forth below and continued on the reverse side hereof.

SCHEDULE

Quantity	Serial Number	Equipment (Manufacturer, Model No., Description)	Unit Price
1		NCR 32/450; 4 Mbyte RAM, 150 Mbyte Disk Drive, 24 Ports (Serial)	
12		150 Mbyte Tape Drive, 'nix V, 1200 Baud Modem	
1		Wyse 50 CRT	
		TI880 Printer	
		Hardware Installation/Integration	
		Construction Management System; DMS Basic, Accounts Payable,	
		General Ledger, Job Cost, Payroll,	
		Supplier: Hurstman Management Systems, Inc.	
		350 Interlocken Parkway, Suite 275	
		Broomfield, CO 80020	4274
1		POS Order Processing, POS	601
1		Inventory Control, IC	02
1		Purchasing, PO	02
1		Sales Analysis, SA	02
1		Accounts Receivable, AR	02
1		Bid/Quote System, BQ	02
1		Custom Software	02
		Supplier: Computer System Dynamics	
		12130 Pennsylvania St.	
		Thornton, CO 80241	



COMPUTER SYSTEM DYNAMICS

12130 PENNSYLVANIA ST.
THORNTON, COLORADO 80241
PHONE (303) 450-5252

SOLD TO

COVIL CORPORATION
131 PINSLEY CIRCLE
PO BOX 1804
GREENVILLE, SC 29609

0526 ad

KEY PUNCH

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GREENVILLE, SC 29609

SEP 15 1988

ACCOUNT #	CUSTOMER P.O. #	TERMS	ORDER #	ORDER DATE	SLSMN	SHIP DATE	INVOICE #	INVOICE DATE
C8385		NET 10	3773	06/02/88	HIS		22894	03/29/88
ORDERED	BACK ORDERED	SHIPPED	U/M	DESCRIPTION		PRICE	AMOUNT	
1	0	1	EA	POS ORDER PROCESSING		5000.000	5000.00*	
1	0	1	EA	POS INVENTORY CONTROL		3000.000	3000.00*	
1	0	1	EA	IC PURCHASING		3000.000	3000.00*	
1	0	1	EA	PO SALES ANALYSIS		1750.000	1750.00*	
1	0	1	EA	SA ACCOUNTS RECEIVABLE		3000.000	3000.00*	
1	0	1	EA	AR BID/QUOTE SYSTEM		3000.000	3000.00*	
-1	0	-1	EA	BQ DISCOUNT		1127.500	-1127.50*	
1	0	1	EA	DISC CUSTOM SOFTWARE-INITIAL		8830.000	8830.00	
-1	0	-1	EA	CSI DEPOSIT RECEIVED		3382.500	-3382.50	
				DEP				
AUG 29, 1988 15:25:57				ACCT	HARD	SOFT	MGMT	
						MERCHANDISE		23070.00
***** * INVOICE * *****				SHIP VIA		OTHER		0.00
				PAGE 1 OF 1		TAX 0.000%		0.00*
						FREIGHT		0.00
						TOTAL		23070.00

SEP 26 1988

1.15

CUSTOMER COPY

1672



COMPUTER SYSTEM DYNAMICS

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THORNTON, COLORADO 80241
PHONE (303) 450-5252

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PO BOX 1804
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COVIL CORPORATION
131 PINSLEY CIRCLE
PO BOX 1804
GREENVILLE, SC 29609

ACCOUNT	CUSTOMER NO	TERMS	ORDER	ORDER DATE	QTY	SHIP DATE	INVOICE	INVOICE DATE
C8385		NET 10	3778	06/02/88	HS		22894	08/29/88
ORDERED	BACK ORDERED	SHIPPED	U M	DESCRIPTION		PRICE	TOTAL	
1	0	1	EA	POS ORDER PROCESSING:		5000.000	5000.00*	
				POS				
1	0	1	EA	INVENTORY CONTROL		3000.000	3000.00*	
				IC				
1	0	1	EA	PURCHASING		3000.000	3000.00*	
				PO				
1	0	1	EA	SALES ANALYSIS		1750.000	1750.00*	
				SA				
1	0	1	EA	ACCOUNTS RECEIVABLE		3000.000	3000.00*	
				AR				
1	0	1	EA	BID/QUOTE SYSTEM		3000.000	3000.00*	
				BQ				
-1	0	-1	EA	DISCOUNT		1127.500	-1127.50*	
				DISC				
1	0	1	EA	CUSTOM SOFTWARE-INITIAL		8830.000	8830.00	
				CSI				
-1	0	-1	EA	DEPOSIT RECEIVED		3382.500	-3382.50	
				DEP				
AUG 29, 1988 15:25:57				ACCT	HARD	SOFT	MGMT	
								MERCHANDISE 23070.00
***** * INVOICE * *****				SHIP VIA			OTHER	0.00
				PAGE 1 OF 1			TAX 0.000%	0.00
							FREIGHT	0.00
							TOTAL	23070.00



F-7118 0383

INVOICE

Invoice No.	Invoice Date	Customer Number
3002030220	8/24/88	15677605
NCR Reference Number		
9335-9614-0000000000		803
Application		
Customer Purchase Order Number/Requestor		

DIRECT INQUIRIES TO:
NCR CORPORATION (803)297-5900
50 DIRECTORS DRIVE
GREENVILLE SC 29615

SERVICES
TO

COVIL CORPORATION
131 PINSLEY CIRCLE
BEREA INDUSTRIAL PARK
GREENVILLE SC 29609

BILL
TO

COVIL CORPORATION
ATTN: GENE TILLERY
P. O. BOX 1804
GREENVILLE SC 29602

DESCRIPTION

AMOUNT

LABOR

BUILD 10 CABLES, 1500-FT
COMP. ROOM PTR. INSTALL.
MATERIALS

968.00

OEM SUPPLIES
STATE TAX

900.00
45.00

PLEASE PAY FROM THIS INVOICE. TERMS: NET CASH. BALANCE DUE

1,913.00

INVOICE AMOUNTS NOT PAID WITHIN THIRTY (30) DAYS OF THE INVOICE DATE WILL BE SUBJECT TO SERVICE CHARGES, COMPUTED FROM THE INVOICE DATE AT TWO POINTS OVER PRIME RATE OR UP TO THE MAXIMUM RATE ALLOWED BY LAW WHICHEVER IS LESS.
RETAIN THIS PORTION FOR YOUR RECORD.



DISTRICT DAO
9614 9335

Invoice Date
8/24/88

COVIL CORPORATION

MAIL
PAYMENT
TO

NCR CORPORATION
PO BOX 75245
CHARLOTTE NC 28275

PAY THIS AMOUNT ***1913.00

000191300



COMPUTER SYSTEM DYNAMICS

12130 PENNSYLVANIA ST.
THORNTON, COLORADO 80241
PHONE (303) 450-5252

052690

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COVIL CORPORATION
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PO BOX 1804
GREENVILLE, SC 29609

ACCOUNT #	CUSTOMER P.O. #	TERMS	ORDER #	ORDER DATE	SLSMN	SHIP DATE	INVOICE #	INVOICE DATE
C8385		NET 10	4367	08/11/88	HS		22874	08/29/88
ORDERED	BACK ORDERED	SHIPPED	U/M	DESCRIPTION			PRICE	AMOUNT
1	0	1	EA	INSTALL & TRAINING - INITIAL ITI ON SITE TRAINING BY ROBERTA KESLER ON 8/16 TO 8/19/88			2500.000	2500.00
AUG 29, 1988 10:48:25				ACCT	HARD	SOFT	MGMT	
***** * INVOICE * *****				SHIP VIA			MERCHANDISE	2500.00
							OTHER	0.00
				PAGE 1 OF 1			TAX 0.000X	0.00*
							FREIGHT	0.00
				TOTAL			2500.00	

KEY PUNCH
AUG 31 1988

1.150

EXHIBIT H

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**ANN FINCH, Individually, and as Executrix of
the Estate of Franklin Delanor Finch,**

Plaintiff,

vs.

**BASF CATALYSTS LLC, sued individually and
as successor-in-interest to ENGELHARD, PITA
REALTY LTD, and EASTERN MAGNESIA
TALC CO., et al.,**

Defendants.

C/A No. 1:16-cv-01077

**DEFENDANT COVIL
CORPORATION'S SUPPLEMENTAL
RESPONSES TO PLAINTIFF'S
REQUESTS FOR PRODUCTION**

Pursuant to the Federal Rules of Civil Procedure, Defendant Covil Corporation hereby submits the following supplemental responses to Plaintiff's Requests for Production.

GENERAL OBJECTIONS

1. The answers and responses given herein are based upon such information and documents which are presently available to Covil's counsel. The events which are the subject of this lawsuit occurred many years ago. Covil was dissolved as an entity in 1993 and is no longer an active company. Covil has no active employees, agents or officers. As a result, it is difficult if not impossible for counsel for Covil to retrieve or reconstruct the information requested in these Interrogatories. Additionally, Covil sustained a fire at its Greenville, South Carolina headquarters and warehouse in 1973 and many of its records and job files were destroyed. Several years later, Covil's offices in Greenville, South Carolina were flooded and there was additional destruction and loss of records.

After Covil was dissolved in 1993, its remaining records as of that time were put in storage for safekeeping. Upon information and belief, in the late 1990's, one of the firms

representing Plaintiff in this case copied all of Covil's then existing records and that firm is believed to still be in possession of those copies.

To the extent requested, the Covil records will again be produced for inspection. Nevertheless, Covil continues to investigate this matter and will supplement or amend its responses in accordance with the Federal Rules of Civil Procedure if new or additional information becomes available.

2. Covil objects to these Requests for Production to the extent they are overly broad, unduly burdensome, oppressive, vague, ambiguous, compound and not reasonably calculated to lead to the discovery of either relevant or admissible evidence.

3. Covil objects to the instructions and definitions set forth in Plaintiff's discovery requests to the extent they are inconsistent with the Federal Rules of Civil Procedure and to the extent they purport to instruct Covil on how to respond. Unless indicated to the contrary, Covil, in answering Plaintiff's Requests for Production, has read the requests employing the plain and ordinary meaning of the words used.

4. Covil further objects to the extent that any request can be construed as calling for the identification or production of any materials covered by the attorney-client privilege, the work-product doctrine, the self-critical analysis privilege or that which may be confidential pursuant to applicable statutes or regulations. In making these responses, Covil does not waive, and specifically preserves its claims to privilege of any information requested that would be covered by these privileges or that is otherwise deemed confidential by law.

5. Covil objects to these Requests for Production on the grounds that they exceed the scope of discovery permitted under the Federal Rules of Civil Procedure and to the extent the

discovery seeks information about products sold, distributed and/or installed by Covil not connected in any way to Plaintiff's claims herein.

6. The foregoing objections are incorporated in Covil's responses as if repeated verbatim therein.

The following responses are given without prejudice to Covil's right to produce evidence at trial as to any subsequently discovered fact or facts which Covil may later identify. Covil accordingly reserves its right to supplement and/or change any and all responses herein as additional facts are ascertained, analyses and contentions are made, and when legal research is completed. The responses contained herein are made in a good faith effort to supply as much factual information and as much specification of legal contentions as is presently known, but should in no way be to the prejudice of Covil in relation to further discovery, research and analysis.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1

Produce any written or recorded statements by anyone referenced in your answers to the Interrogatory that were created as a result of this lawsuit or that discuss asbestos.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to and without waiving these objections, None. Investigation and discovery is ongoing.

SUPPLEMENTAL RESPONSE:

Covil directs Plaintiff's attention to the depositions taken in this matter which, on information and belief, are already in the possession of Plaintiff.

REQUEST FOR PRODUCTION NO. 2

Please produce all documents and tangible things that indicate the time and/or manner in which Defendant learned inhalation of asbestos fibers can lead to the development of asbestos-related diseases, including mesothelioma.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 3

Please produce all documents and tangible things relating to Defendant's establishment of the medical, safety, and industrial hygiene departments. This Request for Production specifically seeks, but is not limited to, any policies, procedures or guidelines given to each such department by Defendant's management, and any programs, testing, or other actions taken by each such department regarding the hazards of asbestos or nuisance dust in general.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 4

Please produce all documents and tangible things relating to health or safety inspections of Defendant, by local, state or federal regulatory agencies, including but not limited to OSHA. This Request for Production specifically seeks, but is not limited to all documents and tangible things relating to any violations, citations, or warnings, and includes inspections for asbestos and other dust hazards.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 5

Please produce all documents and tangible things relating to the inventories of all Defendant's libraries, research repositories, or other archives that contain magazines, journals, books, publications or other documents related to asbestos, pneumoconiosis, or any other dust-related disease (including, but not limited to, the effects of exposure to asbestos, industrial hygiene measures relating to asbestos dust, and medical information or research relating to asbestos or its effects on animals or humans, populations at risk, etc.). This Request for Production specifically seeks, but is not limited to all card catalogs, indices, holding lists, databases, other record Management systems, and subscription lists for periodicals such as Journal of the American Medical Association, Industrial Medicine, Journal of Industrial Hygiene and Toxicology, National Safety News, Industrial Hygiene Foundation Digest, and Public Health Reports of the United States.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 6

Please produce all documents and tangible things relating to Defendant's document and record retention (and/or destruction) policies or procedures, including, but not limited to:

(a) any supplements, addenda, memoranda, operating bulletins, revisions, or any other superseding instructions that refer to the stoppage, suspension or resumption of responsive policies or procedures; and

(b) policies or procedures regarding documents or records created, maintained, or stored by electronic, digital, optical and/or magnetic means (such as microfilm, microfiche, imaging, scanning, or storage on tapes, disks, CD or DVD-based media, databases, or on any

computer hardware, backup system, download system, file dumping or other system of information management, whether on-site or off-site).

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 7

Please produce all documents and tangible things relating to communications between Defendant and any of its worker's compensation insurance carriers or any other insurance companies, made at any time, regarding asbestos-containing products, the hazards of asbestos or nuisance dust in general and any asbestos-related studies, analyses or testing conducted by any insurance carriers.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 8

Please produce all documents and tangible things that indicate Defendant's net worth and/or financial position, including, but not limited to, all "10-K" forms, "10-Q" forms, and annual reports for the last ten (10) years. If Defendant is not a publicly traded entity, please produce Defendant's audited balance sheets, cash flow worksheets, and federal and state tax returns for the last ten (10) years.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 9

Please produce copies of all statements, affidavits, depositions, and trial transcripts of Defendant's employees, former employees, or representatives taken in any matter concerning asbestos, asbestos health effects, asbestos civil litigation and asbestos industrial hygiene.

RESPONSE:

Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil directs Plaintiff's attention to the following deposition transcripts:

- The deposition transcript of Palmer Covil in the matter of *Evelyn White v. Combustion Engineering Company* (U.S. District Court for the District of South Carolina) (July 13, 1977);
- The discovery and video deposition transcripts of former Covil employee and Plaintiff Franklin D. Finch (November 28-29, 2016); and

- The deposition of Russell Johnson in the matter of *Johnson v. Covil Corp.* in the North Carolina Industrial Commission.

Plaintiff is already in possession of these three depositions. Covil is unaware of other responsive documents (including any such documents related to the Firestone/Bridgestone facility in Wilson, North Carolina).

REQUEST FOR PRODUCTION NO. 10

Please produce or allow Plaintiff access to any and all product identification databases whether based upon Defendant's sales invoices, receipts, records and other written documentation together with any and all databases derived from witness testimony, including but not limited to previous co-worker and/or plaintiff testimony.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 11

Please provide any and all affidavits, depositions, written statements, and trial transcripts of all individuals, including but not limited to plaintiffs, co-workers and product witnesses in lawsuits alleging asbestos disease or property damage from asbestos, both concluded and pending at jobsites identified in this matter in the depositions conducted, including to the Firestone Plant in Wilson, North Carolina, in which Defendant is or was a party.

RESPONSE:

Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

At this time, Covil is unaware of any responsive documents other than those generated in this matter. Covil notes that Plaintiff is already in possession of the transcripts of any depositions or any affidavits which have been generated in this matter.

REQUEST FOR PRODUCTION NO. 12

Please produce all liability insurance policies providing potential coverage to defendant for liabilities related to asbestos-containing products, including but not limited to, any policy under which coverage has been refused or declined.

RESPONSE:

Subject to its objections, Covil will make available to Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil is aware of the following insurance policies which may have been in effect during the years that Plaintiff worked at the Firestone/Bridgestone facility in Wilson, North Carolina

(although Covil makes no representations as to the applicability of coverage under any such policies). Covil notes that these documents were previously produced to Plaintiff's counsel in a recent South Carolina matter, and as such, Covil identifies them by their Bates number.

<u>CARRIER</u>	<u>PRODUCTION</u>
Kemper	Palmer Covil Exhibit
<i>Maryland Casualty/ 41-206393</i>	COV-INS-000716
<i>Maryland Casualty/ 41-206393</i>	COV-INS-000716
Fidelity and Guaranty Ins. Underwriters (USF&G)/ SMP 490049	COV-INS-0805-0874
SC Insurance Co/Seibels Bruce GLA 630772 <i>Insured: Industrial Associates Inc of SC</i>	COV-INS-000776 COV-INS-000721
The Hartford Acc. & Indem Co./ 22C936166	COV-INS-000716; COV-INS-000587
Ranger Insurance Umbrella RU430944	COV-INS-000587 Palmer Covil Exhibit
The Hartford Acc. & Indem Co./ 22C941900	COV-INS-000737 COV-INS-000761 COV-INS-000769 COV-INS-000737
Hartford, Umbrella: 22HU 371494	
Evanston Insurance Co. Products coverage According to COI, policy number is SP 10431	COV-INS-000737
The Hartford Acc. & Indem Co./ 22C943927	COV-INS-000699 COV-INS-000699
Hartford, Umbrella: 22RHU 371789	
Evanston Insurance Co. Products coverage According to COI, policy number is SP 10588	COV-INS-000699

Scottsdale Insurance Co GLS 142842	COV-INS-000493 COV-INS-000484 COV-INS-000507 COV-INS-000226 COV-INS-000504 COV-INS-000230 COV-INS-000488
Scottsdale Insurance Co UMB 050031	COV-INS-000217
CIGNA/Pacific Employers Ins. Co. WDP 024877814	COV-INS-000333 COV-INS-000341 COV-INS-000352 COV-INS-000411

REQUEST FOR PRODUCTION NO. 13

Please produce all files regarding any workers' compensation claims filed against defendant where an individual has alleged an asbestos-related disease.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 16

If you contend that there is another entity that was in an equal or better position to warn users of any asbestos related dangers of any product made or sold by you please produce any documents that suggest that that entity had knowledge regarding the dangers of asbestos.

RESPONSE:

Subject to its objections, Covil states that investigation and discovery are continuing.

SUPPLEMENTAL RESPONSE:

Plaintiff's long-time employer, Firestone/Bridgestone, was in a better position to warn Plaintiff of any asbestos-related dangers of any product Plaintiff encountered at that facility. As such, Covil directs Plaintiff's attention to the deposition transcripts of Mr. Finch as well as Mr. Finch's co-workers in this matter. Covil also directs Plaintiff's attention to the documents produced by Firestone/Bridgestone in response to Plaintiff's subpoena.

REQUEST FOR PRODUCTION NO. 17

Please produce all documents and tangible things that indicate, in any way, each and every asbestos fiber supplier or asbestos-containing insulation supplier or other asbestos-containing products supplier to this Defendant.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production.

REQUEST FOR PRODUCTION NO. 18

Please produce all documents and tangible things that indicate, in any way, Defendant's knowledge or awareness of asbestos-free substitutes or alternatives for any product mined, manufactured, marketed, produced, researched, sold, distributed, or patented by Defendant regardless of Defendant's belief of the viability of such substitutes or alternatives.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege

log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 19

Please produce all documents and tangible things relating to cost-risk analyses, cost-benefit analyses, or any other study, analysis, report, or document generated or obtained by Defendant at any time, that discusses the cost of abating, removing, replacing, or encapsulating asbestos or implementing any safeguards or engineering controls designed to protect persons from the hazards of asbestos or nuisance dust in general.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 20

Please produce all documents and tangible things evidencing health surveys, epidemiological studies, environmental testing, air monitoring, or dust level counts conducted at any time by Defendant or at Defendant's request related to the use of Defendant's asbestos-containing products identified in the Interrogatories.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation.

REQUEST FOR PRODUCTION NO. 21

Please produce any and all documents, including but not limited to, sales records, invoices, billing records, shipping records, and any other type of document that show Defendant's presence on jobsites identified in discovery or in the depositions conducted in this matter, including the Firestone plant in Wilson, North Carolina.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation (although Covil is unaware of any documents relating to the Firestone plant other than those produced by Firestone itself in response to Plaintiff's subpoena).

REQUEST FOR PRODUCTION NO. 23

Please produce all documents and tangible things related to any agreement entered into by Defendant to repair and/or service any equipment at the premises identified in the depositions conducted in this matter.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production.

REQUEST FOR PRODUCTION NO. 24

Please produce any and all documents relating to asbestos gaskets or insulation or other asbestos- containing products sold, or distributed by you to jobsites identified in discovery of this matter.

RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege

log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production.

REQUEST FOR PRODUCTION NO. 25

Please produce any and all documents, invoices, correspondence, or other written information relating to your presence or business with any Worksite identified in discovery of this matter.

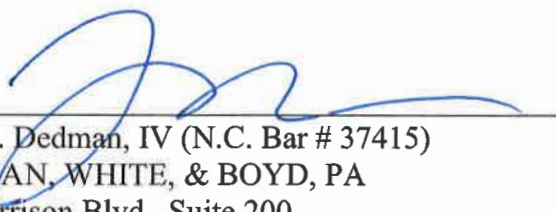
RESPONSE:

Covil objects to this request for production on the grounds that it seeks information protected by the attorney-client privilege or the doctrine of work product immunity. Subject to its objections, Covil will make available to the Plaintiff all documents that remain of Covil.

SUPPLEMENTAL RESPONSE:

Covil notes that it previously invoked certain privileges in response to this request for production in light of the broad nature of the request and the fact that, technically, the request seeks documents which could include documents protected by both the attorney-client privilege and/or the doctrine of work product immunity. Covil does not believe that it is required to identify its attorney-client communications and/or post-litigation work product on a privilege log. However, subject to and without waiving its prior objections, Covil notes that it is not withholding any documents in response to this request for production. Covil also recently produced 24,000 pages of documents to Plaintiff's counsel in South Carolina litigation (although Covil is unaware of any documents relating to the Firestone plant other than those produced by Firestone itself in response to Plaintiff's subpoena).

March 14, 2018



James M. Dedman, IV (N.C. Bar # 37415)
GALLIVAN, WHITE, & BOYD, PA
6805 Morrison Blvd., Suite 200
Charlotte, NC 28211
jdedman@GWBlawfirm.com
(704) 227-1944

Counsel for Defendant Covil Corporation

EXHIBIT I

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**ANN FINCH, Individually, and as Executrix
of the Estate of Franklin Delanor Finch,**

Plaintiff,

vs.

**BASF CATALYSTS LLC, sued individually
and as successor-in-interest to ENGELHARD,
PITA REALTY LTD, and EASTERN
MAGNESIA TALC CO., *et al.*,**

Defendants.

C/A No. 1:16-cv-01077

**DEFENDANT COVIL CORPORATION'S
ANSWERS TO PLAINTIFF'S
INTERROGATORIES**

Pursuant to the Federal Rules of Civil Procedure, the undersigned attorneys for Defendant Covil Corporation hereby submit the following responses to Plaintiff's Interrogatories.

GENERAL OBJECTIONS

1. The answers and responses given herein are based upon such information and documents presently available to Covil's counsel. The events which are the subject of this lawsuit occurred many years ago. Covil was dissolved as an entity in 1993 and is no longer an active company. Covil has no active employees, agents or officers. As a result, it is difficult if not impossible for counsel for Covil to retrieve or reconstruct the information requested in these Interrogatories. Additionally, Covil sustained a fire at its Greenville, South Carolina headquarters and warehouse in 1973 and many of its records and job files were destroyed. Several years later, Covil's offices in Greenville, South Carolina were flooded and there was additional destruction and loss of records.

After Covil was dissolved in 1993, its remaining records as of that time were put in storage for safekeeping. Upon information and belief, in the late 1990's, one of the firms

representing Plaintiff in this case copied all of Covil's then existing records and that firm is believed to still be in possession of those copies.

To the extent requested, the Covil records will again be produced for inspection. Nevertheless, Covil continues to investigate this matter and will supplement or amend its responses in accordance with the Federal Rules of Civil Procedure if new or additional information becomes available.

2. Covil objects to these Interrogatories to the extent they are overly broad, unduly burdensome, oppressive, vague, ambiguous, compound and not reasonably calculated to lead to the discovery of either relevant or admissible evidence.

3. Covil objects to the instructions and definitions set forth in Plaintiff's Interrogatories to the extent they are inconsistent with the Federal Rules of Civil Procedure and to the extent they purport to instruct Covil on how to respond. Unless indicated to the contrary, Covil, in answering Plaintiff's Interrogatories, has read the interrogatory employing the plain and ordinary meaning of the words used.

4. Covil further objects to the extent that any Interrogatory can be construed as calling for the identification or production of any materials covered by the attorney-client privilege, the work-product doctrine, the self-critical analysis privilege or that which may be confidential pursuant to applicable statutes or regulations. In making these responses, Covil does not waive, and specifically preserves its claims to privilege of any information requested that would be covered by these privileges or that is otherwise deemed confidential by law.

5. Covil objects to these Interrogatories on the grounds that they exceed the scope of discovery permitted under the Federal Rules of Civil Procedure and to the extent the discovery

seeks information about products sold, distributed and/or installed by Covil not connected in any way to Plaintiff's claims herein.

6. The foregoing objections are incorporated in Covil's responses as if repeated verbatim therein.

The following responses are given without prejudice to Covil's right to produce evidence at trial as to any subsequently discovered fact or facts which Covil may later identify. Covil accordingly reserves its right to supplement and/or change any and all responses herein as additional facts are ascertained, analyses and contentions are made, and when legal research is completed. The responses contained herein are made in a good faith effort to supply as much factual information and as much specification of legal contentions as is presently known, but should in no way be to the prejudice of Covil in relation to further discovery, research and analysis.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1

Set forth the full and correct name, the principal place of business and the state and date of incorporation of the answering defendant.

ANSWER:

Subject to its objections, Covil Corporation was dissolved in 1993 and is no longer an active corporation. It was formerly incorporated in South Carolina and its principal place of business was Greenville, South Carolina.

INTERROGATORY NO. 2

Please identify each person who has supplied any information or assisted in locating any documents or tangible things used in answering or responding to this discovery, and provide a year-by-year list of all positions or job titles held by each person.

ANSWER:

Subject to its objections, Covil Corporation is not an active corporation and does not have any active employees, agents, or officers. All Covil documents that exist will be made available to Plaintiff's counsel for review. Because the burden of deriving the answer from those business records is the same for Covil as for the Plaintiff, Covil refers Plaintiff to such business records and documents and will provide plaintiff an opportunity to review the records.

INTERROGATORY NO. 3

When and how did Defendant first learn that inhalation of asbestos fibers can lead to the development of asbestos-related diseases, including asbestosis and mesothelioma.

ANSWER:

Subject to its objections, Covil states that investigation and discovery is ongoing and this response will be supplemented.

INTERROGATORY NO. 4

Please list all trade organizations, trade associations, and any other groups to which Defendant, Defendant's representative or Defendants current or former employees belonged in which information relating to the hazards of asbestos or nuisance dust in general was discussed, disseminated, or in any way published before 1970. This list should include (but is not limited to) any membership in the American Hygiene Foundation, Industrial Hygiene Foundation, Chemical Manufacturer's Association (or its predecessor, the MCA), American Chemical

Council, American Petroleum Institute, National Safety Council, American National Standards Institute (ANSI), Asbestos Information Association, Industrial Medical Association, American Society of Mechanical Engineers; American Society for Testing and Materials, Chlorine Institute, American Industrial Hygiene Association, National Insulation Manufacturers Association, Asbestos Textile Institute, Society of Automotive Engineers, Society of Petroleum Engineers, ACGIH, American Occupational Medicine Association, American Public Health Association, Friction Materials Standards Institute, Brake Lining Manufacturer's Association, American Medical Association, NIOSH and any state safety organizations. As to each listed group, please state:

- (a) the time period when Defendant Defendant's representative or Defendants current or former employees was a member;
- (b) the identity of Defendant's employees, former employees, or representatives who attended any of the meetings held by each listed group, as well as the dates and locations of the meetings they attended; and
- (c) the identity of Defendant's employees, former employees, or representatives who served on any committees or subcommittees of any listed group (e.g., a medical advisory committee or legal committee).

ANSWER:

Subject to its objections, upon information and belief, Covil Corporation was a member of the National Insulation Contractors Association (NICA) and the Southeastern Insulation Contractors Association (SEICA). Palmer Covil attended meetings of both.

INTERROGATORY NO. 5

Please describe whether and, if so, how Defendant stores its documents and records including but not limited to any document retention or document destruction policies throughout Defendant's history from inception to the present. Also identify and describe Defendant's

document indexing or organizational system that has been in force from Defendant's inception until the present.

ANSWER:

Subject to its objections, Covil states that it has been dissolved as a corporation since 1993. Its records that existed at the time of the dissolution are stored in a mini warehouse in Greenville, South Carolina.

INTERROGATORY NO. 6

Please describe how Defendant's documents are stored, indexed, organized or maintained and identify all records custodians, librarians or other individuals who have presently or have had in the past access to Defendant's document repository.

ANSWER:

See response to Interrogatory No. 5.

INTERROGATORY NO. 7

Please identify each distributor or wholesaler in North Carolina You purchased from to distribute, supply or use at the Firestone plant in Wilson, North Carolina. For each distributor or wholesaler, please state:

- (a) Name and last known address;
- (b) The years of, and the geographical area encompassed by the relationship;
- (c) Whether there was a written distributorship agreement;
- (d) Whether the distributorship was exclusive; and
- (e) The extent to which sales to customers in this state were handled through distributors or wholesalers located outside this state.

ANSWER:

Covil states that investigation and discovery is continuing and this response may be supplemented. The existing business records of Covil Corporation will be made available to the

Plaintiff. Because the burden of deriving the answer from those business records is the same for Covil as for the Plaintiff, Covil refers Plaintiff to such business records and documents and will provide Plaintiff an opportunity to review them.

INTERROGATORY NO. 8

Identify the names, phone numbers and addresses of all lay witnesses whom you presently intend to call to testify at trial, and briefly identify the subject matter of their testimony and what connection each such person has with matters relevant to this lawsuit (e.g., former co-workers of Plaintiff, former plant manager of plant X, etc.). Indicate if the witness is within your control and if the witness is retained by counsel. Please supplement this list as you ascertain any additional witnesses.

ANSWER:

Covil objects to this interrogatory to the extent it seeks information protected by the doctrine of work product immunity. Covil further objects on the ground that this interrogatory seeks the mental impressions of its attorneys. Subject to its objections, Covil has not yet determined which lay witnesses it will call to testify at the trial of this case.

INTERROGATORY NO. 9

If it is your contention that you took the proper precautions to protect users from potential hazards associated with the use of said asbestos containing-product(s), please identify any such precautions and actions taken by you.

ANSWER:

Subject to its objections, Covil states that investigation and discovery are continuing and this response will be supplemented.

INTERROGATORY NO. 10

Please identify all persons with knowledge of facts relevant to the presence or absence of Defendant's presence or asbestos and/or asbestos-containing products used, distributed, or supplied at any worksites identified in discovery of this matter, please include a short statement as to the nature of the individual's knowledge as it relates to this subject matter.

ANSWER:

Subject to its objections, Covil states that investigation and discovery are continuing and this response will be supplemented if information is located.

INTERROGATORY NO. 11

Please indicate whether or not there are any documents, including but not limited to, invoices, billing records, sales records, contracts, correspondence, purchase orders, or any other like document that reflect any work conducted at the Firestone plant in Wilson, North Carolina.

ANSWER:

Subject to its objections, Covil states that investigation and discovery are continuing and this response will be supplemented if necessary. Because the burden of deriving the answer from those business records is the same for Covil as for the Plaintiff, Covil refers Plaintiff to such business records and documents and will provide Plaintiff an opportunity to review them.

INTERROGATORY NO. 12

Did Defendant ever use or recommend the use of any asbestos-containing product for use at the Firestone plant in Wilson, North Carolina?

ANSWER:

Subject to its objections, Covil states that investigation and discovery are continuing and this response will be supplemented if necessary. Because the burden of deriving the answer from

those business records is the same for Covil as for the Plaintiff, Covil refers Plaintiff to such business records and documents and will provide Plaintiff an opportunity to review them.

INTERROGATORY NO. 13

Please provide/identify any information or identifying documents which refer to any of your work or products which was used, sold, delivered, or distributed to the Firestone plant in Wilson, North Carolina.

ANSWER:

Subject to the objections, Covil states that all documents in its possession will be made available to the Plaintiff for review and inspection. The burden of reviewing those records and ascertaining the response to this interrogatory is the same for the Plaintiff as for the Defendant. Covil's counsel has been provided with various documents by the Plaintiff purporting to show sales of products by Covil to the Firestone Plant in Wilson, North Carolina. Covil is still investigating those documents and this response will be supplemented if necessary.

August 29, 2017



James M. Dedman, IV (N.C. Bar # 37415)
GALLIVAN, WHITE, & BOYD, PA
6805 Morrison Blvd., Suite 200
Charlotte, NC 28211
jdeman@GWBlawfirm.com
(704) 227-1944

Counsel for Defendant Covil Corporation

EXHIBIT J

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	C.A. No.: 2017-CP-42-04429
JERRY HOWARD CRAWFORD,	)	
Individually and as Personal	)	
Representative of the Estate of	)	
EVELYN KAY CRAWFORD,	)	In re:
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	
CELANESE CORPORATION,	)	
et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF MARK H. WALL

PERSONALLY APPEARED BEFORE ME, Mark H. Wall, who first being duly sworn deposes and states as follows:

1. I am a member of the South Carolina Bar and, an attorney in the law firm of Wall Templeton & Haldrup, P.A. who represented Covil Corporation ("Covil").
2. I give this Affidavit in opposition to Plaintiff's Motion for Relief from Judgment Under SCRCP 60(b) in the above-captioned case in that capacity.
3. That Wall Templeton & Haldrup began representing Covil as substitute counsel on or about May 2018 in all cases pending in South Carolina.
4. That Wall Templeton & Haldrup had not transferred the physical cabinets containing Covil's historical paper records from prior counsel for Covil at the time of the trial in the *Crawford* matter in July 2018.
5. That Wall Templeton & Haldrup was unaware of the existence of the data tape until after the Crawford trial and, thus, did not intentionally conceal it from Plaintiff or the Court.

6. That Wall Templeton & Haldrup first learned of the data tape present among Covil's paper records on or about August 2018.

FURTHER THE DEPONENT SAITH NOT.

Mark H. Wall

SWORN to before me this ^{11th} ~~8th~~ day of November, 2019.

(SEAL)

Notary Public for South Carolina

My Commission expires: 12-3-2024



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all counsel of record via the South Carolina E-Flex e-filing system on the 11th day of November, 2019.

ELLIS & WINTERS LLP

/s/ Ashley K. Brathwaite
Ashley K. Brathwaite
SC Bar No. 76952
E-mail: ashley.brathwaite@elliswinters.com
P.O. Box 33550
Raleigh, NC 27636
Telephone: (919) 865-7000

Attorney for Defendant Covil Corporation

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2017-CP-42-04429

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

v.

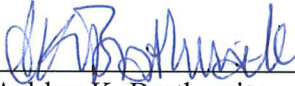
Celanese Corporation, Aurora Pump Company,
Carrier Corporation, CNA Holdings, LLC, f/k/a
Hoechst Celanese Corporation, Covil Corporation,
Crane Co., Daniel International Corporation f/k/a
Daniel Construction Company, Inc., Flowserve
Corporation, individually and as successor-in-interest
to Anchor/Darling 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.

NOTICE OF APPEAL

Covil Corporation ("Appellant") appeals the circuit court's Order granting a new trial to Plaintiff/Respondent under Rules 60(b)(2) and 60(b)(3), SCR, that was entered on November 25, 2019. That Order is attached hereto as Exhibit A. Appellant received the Order on November 25, 2019. Appellant previously filed an appeal in this action in Appellate Case No. 2018-001196. On September 20, 2019, the Court of Appeals issued an Order granting Respondent's motion for leave to file a motion for relief from judgment under Rule 60(b), SCR, and stating that the previous appeal would be held in abeyance pending the circuit court's consideration of that motion. The Court of Appeals' Order dated September 20, 2019, is attached as Exhibit B.

This the 23rd day of December, 2019.



Ashley K. Brathwaite
S.C. Bar 76952
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
Telephone: (919) 573-1297
ashley.brathwaite@elliswinters.com

Counsel for Covil Corporation

Other Counsel of Record:

Theile B. McVey
John D. Kassel
KASSEL McVEY ATTORNEYS AT LAW
1330 Laurel Street
Columbia, South Carolina 29202
(803) 256-4242
tmcvey@kassellaw.com
jkassel@kassellaw.com

Jonathan M. Holder
Ka'Leya Q. Hardin (admitted pro hac vice)
DEAN OMAR BRANHAM, LLP
302 N. Market Street, Ste. 300
Dallas, Texas 75202
jholder@dobllp.com
khardin@dobslegal.com

**Attorneys for Respondent Jerry Howard, Individually and as Personal
Representative of the Estate of Evelyn Kay Crawford**

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
JERRY HOWARD CRAWFORD,	)	C/A NO. 2017-CP-42-04429
Individually and as Personal	)	
Representative of the Estate of	)	
EVELYN KAY CRAWFORD	)	
	)	ORDER GRANTING PLAINTIFF'S
Plaintiff,	)	MOTION FOR NEW TRIAL
v.	)	PURUANT TO RULE 60(b)(2) and
	)	60(b)(3)
CELANESE CORPORATION,	)	
et al.,	)	
	)	
Defendants.	)	

Plaintiff Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, by and through his undersigned counsel, moved before the Court for relief from judgment pursuant to Rule 60(b)(2) and (3) of the South Carolina Rules of Civil Procedure. For the reasons stated below, Plaintiff's motion is GRANTED.

Plaintiff commenced this lawsuit on December 4, 2017, via a Summons and Complaint filed in the Spartanburg County Court of Common Pleas. Therein, Plaintiff sought recovery for the losses suffered as the result of Jerry Crawford's repeated exposures to asbestos while working at the Hoechst Celanese facility in Spartanburg, South Carolina from 1970 to 1974. As a result of his exposure to asbestos, Jerry Crawford was diagnosed with mesothelioma in or about November of 2017. At the time of trial, Covil Corporation was the only remaining defendant in this matter, and, against Covil, Plaintiff had three discrete causes of action: negligence, strict liability, and breach of implied warranty.

The trial of this matter began on July 16, 2018. Despite the significant evidence that Jerry Crawford was exposed to asbestos insulation supplied and installed by Covil when he worked at

the Celanese plant in Spartanburg in the 1970s, that this exposure was a substantial factor in causing his mesothelioma, and that Covil had knowingly sold asbestos products without a warning, the jury returned a defense verdict. (TT 7/19, at 553:6-554:2; Verdict Form.)

At trial, Covil did not deny that it generally sold and installed asbestos insulation, but maintained that it lost its sales invoices in a fire in 1973. (TT 7/17, at 307:11-14.) In addition, Covil's corporate representative, Robert Glenn, testified that he had reviewed available records and found no documents reflecting that Covil supplied insulation to Celanese from 1970 to 1974 or did work at that facility during that time frame, or that Covil and Daniel Construction worked together between 1970 and 1974. (TT 7/17, at 305:23-306:12.). This purported lack of documents formed the foundation for Covil's defense at the trial of this case.

The lack of documentary evidence was contradicted by the testimony of Harley Neelands, a former employee of Daniel Construction, that while he was working at the Celanese Spartanburg plant, Daniel was installing insulation that it had purchased from Covil Corporation. (Neelands Dep., p. 49, ¶ 57.)

After trial, on October 19, 2018, this Court granted Plaintiff's motion for new trial pursuant to the Thirteenth Juror Doctrine but denied Plaintiff's motion for judgment notwithstanding the verdict. Covil subsequently appealed the Court's decision. The appeal has been briefed and is pending before the South Carolina Court of Appeals.

New evidence has now come to light that Covil has a data tape in its possession, possibly containing documents relevant to this case, that it never disclosed to Plaintiff in this litigation. The existence of this new evidence was revealed at a hearing against Covil in other asbestos cases pending before this Court. At the hearing on July 11, 2019, Mark Wall's¹ counsel informed the

¹ Mark Wall of Wall Templeton served as counsel for Covil during the trial of this case. He no longer represents Covil Corporation.

Court and the parties that it has a data tape dating back to the 1990s. This data tape is apparently the last back up of the data on the Covil computers before the company stopped doing business in 1991.

Covil's attorney, who represented Covil for ~~decades~~ in asbestos litigation from the mid-1970s until April of 2018, took possession of the data tape in 1991.² Covil acknowledged at the hearing that neither Covil, its' attorneys nor its' insurance carriers ever attempted to download the data from the back up tape. Even more surprising is that the existence of the data tape has never been disclosed to any plaintiff in the hundreds of asbestos lawsuits in which Covil has been sued.

Covil attempts to excuse the inexcusable by arguing that the plaintiffs in asbestos litigation in years past could have possibly found the data tape if only they had looked hard enough for it. It is undisputed that in the case at issue here, the existence of the data tape was never disclosed either formally in discovery responses or informally. In fact, at the trial of this case, when ~~the~~ counsel for Covil argued against a spoliation charge, counsel stated:

As I mentioned in my argument earlier, we had produced 25,000 pages worth of documents approximately in this case. It has ben 27 years since this business ceased in 1991, and, frankly, we understand that the records have been kept in prior counsel's office, and we are—understand everything has been produced that we have. In addition to that, there is no additional testimony or evidence that portions of records were destroyed by Covil at any point besides the fire, which we contend was not a deliberate or intentional act on behalf of Covil.

(TT 7/16/18).

Thus, Covil announced, in open Court, that all the documents had been produced in this case. That was clearly not the case. It is undisputed that Covil never gave the data tape to the Plaintiff or his counsel or even listed the data tape in its discovery responses.

² Daniel White of Gallivan White & Boyd represented Covil for over 30 years and took possession of the data tape in 1991.

Following the disclosure to the parties in July of 2019, nearly a year after the trial in this case, of the existence of the data tape, the Court ordered disclosure of the tape. Plaintiff and Covil jointly hired an independent forensic computer expert to determine what data, if any, may exist on the tape. The expert has had the data tape since August of 2019. To date, the expert has determined that tape contains data and that the data does not appear to have been intentionally destroyed.

However, the expert has not yet been able to find the necessary programs it will take to read and download the data on the tape. It is unclear if the expert will ever locate the necessary programs to retrieve any data or how long it may take. It is equally clear that this data could and should have been downloaded in 1991 in the midst of a sea of asbestos litigation.

Relief is warranted under Rule 60(b)(2)

Rule 60(b)(2), SCRCP, states that “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” The term “newly discovered evidence” is a term of art and refers to evidence which existed at the time of the final judgment, order, or proceeding but which had not been discovered by the proponent of the Rule 60(b)(2) motion. *E.g.*, 11 Charles Alan Wright et al., Federal Practice and Procedure § 2859 (Supp. 2007) (“Under [Rule 60(b)(2)], the evidence must have been in existence at the time of the trial....”). “Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge.” *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004).

The South Carolina Court of Appeals has stated that to receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence: “(1)

will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.” *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2015).

The Covil data tape constitutes newly discovered evidence under Rule 60(b)(2). According to the information provided by Covil’s counsel, this data tape has been in existence since the 1990s and has been passed among the various counsel that have represented Covil in asbestos litigation. This evidence was thus in existence at the time of the jury’s verdict in this case. The evidence was discovered in another hearing nearly a year after the trial of this case.

Further, Plaintiff could not have discovered this evidence with due diligence. Plaintiff sought to discover all Covil documents relevant to its sales and installation of asbestos insulation at Celanese Spartanburg, but Covil withheld the data tape and the documents on the tape. Plaintiff could not possibly have discovered information and documents that were intentionally withheld by Covil in violation of its discovery obligations. Finally, what is contained on this tape is unknown to the parties and the Court because of the inaction of Covil, its lawyers and its carriers in failing to download the data. I find it probable that the evidence contained on the tape is not likely to be merely cumulative or impeaching.

Relief is warranted under Rule 60(b)(3)

Rule 60(b) also provides that the Court may relieve a party from a final judgment, order, or proceeding for “fraud, misrepresentation, or other misconduct of an adverse party.” SCRCp 60(b)(3). Relief under 60(b)(3) can generally be granted only for extrinsic fraud that prevents a party from presenting its case. *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). Extrinsic fraud is “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the

fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” *Hilton Head Ctr. of South Carolina v. Public Serv. Comm’n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

The Supreme Court has held that concealment of documents by an attorney is extrinsic fraud in that “the attorney, being an officer of the court, prevents the opposing party from presenting his case.” *Chewning*, 354 S.C. at 82 (citing *In the Matter of Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983); *Bankers Trust Co. v. Braten*, 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995)).

Concealment of documents is also fraud upon the court. *Chewning*, 354 S.C. at 83. “[F]raud upon the court is a narrow and invidious species of fraud that ‘subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.’” *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003). In order to show fraud upon the court, a plaintiff must show “that one has acted with an intent to deceive or defraud the court.” *Chewning*, 354 S.C. at 78. “Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs.” *Id.* at 83–84.

Here, Covil represented to counsel, this Court, and to the jury that every document had been produced and any missing documents had been lost in a fire. It is important to note that Covil does not and has not existed since 1993. It has been nothing more than a shell operated, controlled and abused by its insurers and those who purport to be attorneys for Covil. In finding in Covil’s

favor, the jury apparently credited this assertion and faulted Plaintiff for the lack of documentary evidence showing Covil's presence at Celanese Spartanburg. Covil's concealment of the data tape, which may very well contain the very documents that Covil claimed were destroyed, constitutes fraud against Plaintiff and fraud on this Court. This gross misconduct is an additional ground for relief from the jury's verdict and granting a new trial.

CONCLUSION

For the reasons set forth herein, the Court grants Plaintiff's motion for relief from judgment under SCRCP 60(b)(2) and (3) and finds that the concealed data tape is an additional basis for granting a new trial.

AND IT SO ORDERED this 25 day of November 2019

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



Spartanburg Common Pleas

Case Caption: Jerry Howard Crawford , plaintiff, et al VS Celanese Corporation ,
defendant, et al
Case Number: 2017CP4204429
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-11-25 10:07:07 page 8 of 8

EXHIBIT B

The South Carolina Court of Appeals

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

v.

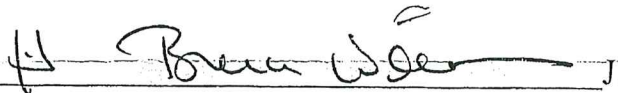
Celanese Corporation; Aurora Pump Company; Carrier Corporation; CNA Holdings LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation; Covil Corporation; Crane Co.; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Flowserve Corporation, individually and as successor-in-interest to Anchor/Darling Valve Company and individually and 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 successor in interest to Marley Cooling Towers Co.; Standard Motor Products, Inc., sued as successor-in-interest to EIS Automotive; United States Fidelity & Guaranty Company; The William Powell Company, Defendants,

Of Which Covil Corporation is the Appellant.

Appellate Case No. 2018-001965

ORDER

Respondent's motion for leave to file a motion for relief from judgment under Rule 60(b), SCRCP, is granted. This appeal shall be held in abeyance pending the circuit court's consideration of the motion. Respondent shall provide this court with status updates every sixty days.


FOR THE COURT

Columbia, South Carolina

cc:

Theile Branham McVey, Esquire
Jonathan Marshall Holder, Esquire
Ashley K. Brathwaite, Esquire
John D. Kassel, Esquire
Ka'Leya Hardin, Esquire
Graham Pollock Powell, Esquire

FILED

September 20, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2017-CP-42-04429

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/lc/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.

PROOF OF SERVICE

I, Ashley K. Brathwaite, of Ellis & Winters LLP, do hereby certify that I have served the Notice of Appeal on counsel, via electronic mail and by depositing the same in the United States Mail, properly posted on the 23rd day of December 2019, addressed as follows to counsel of record:

Theile B. McVey
John D. Kassel
KASSEL McVEY
ATTORNEYS AT LAW
1330 Laurel Street
Columbia, South Carolina 29202
tmcvey@kassellaw.com
jkassel@kassellaw.com

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

Jonathan M. Holder
Ka'Lea Q. Hardin (admitted pro hac
vice)
DEAN OMAR BRANHAM, LLP
302 N. Market Street, Ste. 300
Dallas, Texas 75202
jholder@dobllp.com
khardin@dobslegal.com

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

Ashley K. Brathwaite
S.C. Bar 76952
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
Telephone: (919) 573-1297
ashley.brathwaite@elliswinters.com

Counsel for Covil Corporation

1 STATE OF SOUTH CAROLINA)
 2) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF SPARTANBURG)
 3
 4 JERRY HOWARD CRAWFORD)
 4 AND THE ESTATE OF)
 5 EVELYN KAY CRAWFORD,) TRANSCRIPT OF RECORD
 5) 2017-CP-42-04429
 6 PLAINTIFFS,)
 6) JULY 16, 2018
 7 -vs-) SPARTANBURG, SOUTH CAROLINA
 7)
 8 COVIL CORPORATION,)
 8)
 9 (VOLUME I)
 9 DEFENDANT.

10
 11 B E F O R E:

12 THE HONORABLE JEAN HOEFER TOAL, JUDGE. ; and a jury.
 13

14
 15 A P P E A R A N C E S:

16 THEILE B. MCVEY, ATTORNEY AT LAW
 16 KASSELL MCVEY, ATTORNEYS AT LAW
 17 1330 LAUREL STREET
 17 COLUMBIA, SOUTH CAROLINA 29202
 18 ATTORNEY FOR THE PLAINTIFFS

19 CHARLES W. BRANHAM, III, ESQUIRE
 19 DEAN, OMAR & BRANHAM, LLP
 20 302 N. MARKET STREET, SUITE 302
 20 DALLAS, TEXAS 75202
 21 ATTORNEY FOR THE PLAINTIFFS

22 AARON D. CHAPMAN, ESQUIRE
 23 DEAN, OMAR & BRANHAM, LLP
 23 302 N. MARKET STREET, SUITE 302
 24 DALLAS, TEXAS 75202
 24 ATTORNEY FOR THE PLAINTIFFS
 25

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

MARK BUHA, ESQUIRE
DEAN, OMAR & BRANHAM, LLP
302 N. MARKET STREET, SUITE 302
DALLAS, TEXAS 75202
ATTORNEY FOR THE PLAINTIFFS

MARK H. WALL, ESQUIRE
WALL TEMPLETON, ATTORNEYS
POST OFFICE BOX 1200
CHARLESTON, SOUTH CAROLINA 29402
ATTORNEY FOR THE DEFENDANT

THOMAS BOGER, ESQUIRE
WALL TEMPLETON, ATTORNEYS
POST OFFICE BOX 1200
CHARLESTON, SOUTH CAROLINA 29402
ATTORNEY FOR THE DEFENDANT

MICHAEL R. WATTS
CIRCUIT COURT REPORTER

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(NO CROSS EXAMINATION)

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1 (PROCEEDINGS, JULY 16, 2018).

2 (Medical Records marked as Plaintiffs' Exhibit No.
3 803.1 for identification).

4 (Billing Records and Summary marked as Plaintiff's
5 Exhibit No. 804 for identification).

6 (Photograph marked as Plaintiffs' Exhibit No.
7 805.1 for identification).

8 (Photograph marked as Plaintiffs' Exhibit No.
9 805.2 for identification).

10 (Photograph marked as Plaintiffs' Exhibit No.
11 805.3 for identification).

12 (Photograph marked as Plaintiffs' Exhibit No.
13 805.4 for identification).

14 (Photograph marked as Plaintiffs' Exhibit No.
15 805.5 for identification).

16 (Photograph marked as Plaintiffs' Exhibit No.
17 805.6 for identification).

18 (Photograph marked as Plaintiffs' Exhibit No.
19 805.7 for identification).

20 (Photograph marked as Plaintiffs' Exhibit No.
21 805.8 for identification).

22 (Dr. John C. Maddox Curriculum Vitae marked as
23 Plaintiffs' Exhibit No. 806.1 for identification).

24 (Dr. John C. Maddox Curriculum Vitae marked as
25 Plaintiffs' Exhibit No. 806.2 for identification).

1 (Dr. John C. Maddox Report marked as Plaintiffs'
2 Exhibit No. 807.1 for identification).

3 (Dr. John C. Maddox Report marked as Plaintiffs'
4 Exhibit No. 807.2 for identification).

5 (Dr. John C. Maddox Report marked as Plaintiffs'
6 Exhibit No. 807.3 for identification).

7 (Dr. John C. Maddox Report marked as Plaintiffs'
8 Exhibit No. 807.4 for identification).

9 (Dr. John C. Maddox Report marked as Plaintiffs'
10 Exhibit No. 807.5 for identification).

11 (Dr. John C. Maddox Report marked as Plaintiffs'
12 Exhibit No. 807.6 for identification).

13 (Dr. John C. Maddox Report marked as Plaintiffs'
14 Exhibit No. 807.7 for identification).

15 (Dr. Arnold Brody Curriculum Vitae marked as
16 Plaintiffs' Exhibit No. 809 for identification).

17 (Map marked as Plaintiffs' Exhibit No. 822.1 for
18 identification).

19 (Map marked as Plaintiffs' Exhibit No. 822.2 for
20 identification).

21 (Information on Asbestos marked as Plaintiffs'
22 Exhibit No. 822.3 for identification).

23 (Subcontractor List marked as Plaintiffs' Exhibit
24 No. 822.4 for identification).

25 (Contract marked as Plaintiffs' Exhibit No. 822.5

1 for identification).

2 (Contract marked as Plaintiffs' Exhibit No. 822.6
3 for identification).

4 (Contract marked as Plaintiffs' Exhibit No. 822.7
5 for identification).

6 (Contract marked as Plaintiffs' Exhibit No. 822.8
7 for identification).

8 (Engineering Contract marked as Plaintiffs'
9 Exhibit No. 822.9 for identification).

10 (Contract marked as Plaintiffs' Exhibit No. 822.10
11 for identification).

12 (Purchase Order marked as Plaintiffs' Exhibit No.
13 822.11 for identification).

14 (Maintenance Service Contract marked as
15 Plaintiffs' Exhibit No. 822.12 for identification).

16 (Contract marked as Plaintiffs' Exhibit No. 822.13
17 for identification).

18 (Contract marked as Plaintiffs' Exhibit No. 822.14
19 for identification).

20 (Construction Report marked as Plaintiffs' Exhibit
21 No. 822.15 for identification)

22 (Progress Reports marked as Plaintiffs' Exhibit
23 No. 822.16 for identification).

24 (Billing marked as Plaintiffs' Exhibit No. 825.1
25 for identification)

1
2 THE COURT: This is the case of Jerry Crawford and
3 the Estate of Evelyn Kay Crawford against Covil Corporation.
4 It's C.A. 2017-CP-42-04429.

5 Ms. McVey?

6 MS. MCVEY: Good morning, Your Honor.

7 As you know, we have filed a series of motions in
8 this case dealing with repeat abuses, in our view, of Covil
9 in both the discovery process, mediation, and then trial
10 preparation.

11 One of the first issues, Your Honor, you heard a
12 little bit about this, is we scheduled a global mediation
13 with Covil on June 29th in Charleston with Tom Wells and
14 that mediation went forward.

15 Mr. Boger, as you heard last week, was there for
16 Armstrong. We were not told he was appearing for Covil, and
17 it was our understanding that Covil was not there to
18 actively participate in that June 29th mediation. And the
19 reason for that, that we understood to be a semi-valid
20 reason, is because Covil had called and said "we want to do
21 a global mediation with you guys, a private global
22 mediation, and talk about lots of your cases, not just the
23 Crawford case." And so we said "that would be great."

24 And they said "let's come to Dallas. We will do
25 it on July 9th." July 9th was also the deposition date for

1 their 30(b)(6), but we said "we will make both work. Come
2 on."

3 And so at the mediation we didn't make too big a
4 stink about it, but then what happened is on July 6th they
5 unilaterally cancelled that private mediation.

6 Now, I heard two different reasons for that. At
7 the time, July 6th, they told us they had a conflict and
8 they couldn't get there. In the pleadings that I received
9 over the weekend they say it was because our demand was
10 outlandish, so I don't know what the right answer is, but,
11 regardless, people say all the time that "your demand is too
12 high, Theile McVey." I mean, that's what people say. It
13 doesn't excuse them from participating in the mediation.

14 And so, Your Honor, for that reason we believe
15 that they did not participate in good faith in any sort of
16 mediation, either on the 29th, or on the later scheduled
17 July 9th motion.

18 THE COURT: And what are you asking for as
19 sanctions, as sanctions for the failure to participate in
20 mediation?

21 MS. MCVEY: So, Your Honor, initially we were
22 going to ask for you to compel them to attend the mediation
23 with somebody with full authority. I think that ship has
24 sailed at this point.

25 THE COURT: It has.

1 MS. MCVEY: So, you know, what we are asking for
2 are attorneys fees and costs in preparing for the mediation.

3 THE COURT: All right.

4 Mr. Wall?

5 MR. WALL: Yes, Your Honor.

6 Your Honor, there was -- there was no -- what
7 happened was mediation was set. The carrier said "we are
8 not going anywhere going this way. Why don't we have a
9 private mediation and we will come to Houston" -- excuse me,
10 Dallas, and they agreed to go to Dallas. It was all set up.
11 And then there was banter back and forth about who is going
12 to come, how much seats we need, etcetera, etcetera. At the
13 same time they confirmed the 30(b)(6) deposition of our
14 hired witness. And so we said "fine, we will go forward on
15 all of them."

16 Then Ms. Dean -- there was no conflicts. Ms. Dean
17 sent an e-mail that said "it's going to take eight figures
18 to settle this case, these cases." Your Honor, we barely
19 have seven figures worth of insurance. And she was very
20 adamant in her e-mail that it was going to take eight
21 figures.

22 So what the carriers did, they said, well,
23 we're -- "the 30(b)(6) is more important, so we want you to
24 take the 30(b)(6)", and they then cancelled the mediation
25 and they made an offer of \$75,000 that same time. So,

1 therefore -- that was done before the 9th. So, Your Honor,
2 even though the mediation didn't go forward, Covil had made
3 a bona fide fair offer to settle the case for \$75,000.

4 In addition to that, they offered to come to
5 Columbia on Wednesday for the pretrial. And, in fact, three
6 of them were there on Wednesday, the 11th, for the pretrial
7 and they spoke to plaintiffs' counsel and tried to get the
8 ball rolling to try and settle the Crawford case. And even
9 since that time Mr. Branham and the carriers have been
10 discussing attempts to settle the case. We've now disclosed
11 to him all the insurance coverage we believe exists in this
12 case.

13 As you know, Covil has no assets. It has no
14 employees. It has no business. All it has is the remaining
15 insurance coverage.

16 For the Crawford case, as I understand from what I
17 have read, there is less than half a million dollars worth
18 of insurance coverage on this case, and we were trying to
19 negotiate and settle the case. In fact, we have asked
20 several times for a reply to our \$75,000 and we have never
21 gotten a reply for \$75,000. Thank you.

22 THE COURT: Well, just a minute, Mr. Wall.

23 MR. WALL: Yes.

24 THE COURT: I have got a few questions.

25 MR. WALL: Yes, ma'am.

1 THE COURT: I understand the frustration of having
2 a client that has limited resources and trying to negotiate
3 within them, but I don't understand how that would allow,
4 given the orders, the standing orders in this case, as well
5 as the rules, I don't understand how that would preclude
6 them from the responsibility for participating in mandated
7 mediation.

8 MS. WALL: Yes, Your Honor, and we --

9 THE COURT: And, frankly, I'm not a fan of global
10 mediations that involve all kinds of different cases and so
11 forth, because I think it has the troubling ethical issue of
12 whether all are being treated fairly on their own merits by
13 their own attorneys, as well as attorneys on the other side.
14 So that kind of mediation is something that's uncomfortable
15 for me, but what I know is that particularly in these big
16 types of torts, the mandated mediation is a part of our
17 standing order and a part of what the rules require.

18 I'm not blaming you. You can only do what your
19 client allows you to do, but I don't understand why they,
20 Covil, feels that they can unilaterally cancel a mediation
21 that's been ordered by the court.

22 MR. WALL: Yes, Your Honor. I understand your
23 point.

24 Their point is it was futile. They were -- they
25 were demanding more money than there was insurance and --

1 THE COURT: Well, that -- that -- that presumes
2 that the mediator will have no role to play in going between
3 the parties during the course of a mediation. And I don't
4 care what they say about how absolutely settled they are,
5 you are very experienced as a lawyer, and I think I am as
6 well, with almost fifty years in practice, that has never
7 been a foundation for excusing the failure to participate in
8 a mandated arbitration if the other side is being
9 unreasonable. You don't have to settle in the arbitration.
10 Quite often it's the defendants who won't make any
11 settlement offer kind of thing, but whichever way it is, the
12 plaintiff would not have the right to say "well, they won't
13 make an offer. Therefore, I'm not going to participate in
14 mediation," nor would Covil.

15 MR. WALL: Your Honor, I understand.

16 The parties agreed to excuse Covil from the rules
17 mediation because we are going to Dallas to meet directly
18 with honest lawyers with no mediator present. It was just
19 going to be the carriers and me and the plaintiffs' lawyers
20 and we were going to try and see if we could work things
21 out. When the demand came in for eight figures, they
22 figured there was no way and no reason to go down there, so
23 they in good faith offered \$75,000, the first offer that had
24 been made by Covil in this case, and that was done before
25 the cancellation of the mediation.

1 THE COURT: All right.

2 Ms. McVey?

3 MS. MCVEY: Your Honor, it if suits you, I can let
4 Mr. Branham respond to the e-mail about that mediation.
5 That was actually not from Ms. Dean. It was from Mr.
6 Branham and the negotiations that have happened since then.

7 THE COURT: All right.

8 Mr. Branham?

9 MR. BRANHAM: Your Honor, thank you.

10 I'm sorry to tag team this, but just because I was
11 involved, I think it's important to understand what actually
12 occurred.

13 They asked us for a demand for this private
14 mediation and we complied. We gave them a demand and then
15 they unilaterally cancelled it. I sent the e-mail making
16 the demand. And, of course, a demand is just that. It's
17 some sort of a wish list, if you will, based on our
18 evaluation of the case. And as a plaintiffs' lawyer I'm
19 going to bid higher than what I expected them to pay, but
20 there are a couple of other larger issues that Mr. Wall
21 raised that I think the court needs to understand.

22 The very first time they ever made an offer in
23 this case was July 10th, which was after the court-ordered
24 mediation and it was after the day of the scheduled
25 mediation, which candidly the week before trial I cleared my

1 desk, worked over the weekend to get ready to be available
2 for a Monday meeting. So that's the first issue.

3 The second issue is I can tell you that although I
4 do not believe it to be accurate, Mr. Wall has represented
5 that they have a half a million dollars in coverage. I have
6 e-mails from insurance counsel telling me they have at least
7 \$880,000 in coverage in this case. I have now reviewed
8 their insurance policies and I'm fairly convinced that they
9 are wrong. They have several policies that have million
10 dollar per occurrence cases, and there is even a policy
11 addendum to the insurance that I looked at last night which
12 has a three million dollar per occurrence incident for
13 events occurring between December 16th of 1971 and
14 January 26th of 1972, which is right in the wheelhouse of
15 here. So there is a lot of confusion about what the
16 policy -- how much insurance there is. And so even his own
17 carriers are disputing with what he's saying is available
18 here.

19 And the demand here, and there is a reason for it,
20 is, as you will recall in the Howe case, we asked for this
21 insurance information. They refused to provide it and the
22 court struck their answer. That's presently on appeal. And
23 so we have continued to try and get to the bottom of this
24 insurance issue, because as a lawyer before I can be
25 educated and make a proper demand, based on what I think the

1 damages are and the coverage is, particularly in a situation
2 where you have Covil who doesn't have any assets, all I'm
3 looking at is the policy, I got to know what those limits
4 are. And I keep getting a different story, even here today,
5 about what those policy limits are. And so what I have told
6 them is that this is a policy limits case and you can define
7 those for me, which they still to this day haven't done, and
8 then we can talk about whether I'm too high. But as I read
9 the coverage, there is a lot more than 880, and this is a
10 case that is very limited in its number of paying defendants
11 in it. You had -- Daniel was probably the largest defendant
12 in the case, aside from Covil. And then you had Celanese as
13 his employer, which obviously creates all sorts of issues,
14 and then a few minor players in this case. So you're not
15 looking at a very large set-off, and you are looking at a
16 situation in which you have an insulation contractor with
17 unknown insurance and a person who has a fatal disease that
18 is going to die. And so until I understand what the
19 policies cover and don't cover, it really makes it hard for
20 me to understand. When he says that there is -- that they
21 have less than seven figures of insurance total, that is not
22 what their policies seem to indicate.

23 And so, again, part of the problem here is getting
24 a clean and clear answer on insurance. And, candidly, the
25 corporate rep, who we will talk about in a minute, which is

1 this is one of the topics, couldn't really answer that
2 question either. So that's really what's going on here and
3 what the problem is.

4 And that's really the point of the mediation,
5 which is, you know, the carrier said they wanted to come out
6 and let's sit down and have a talk. He talks about the
7 carriers stayed around on Wednesday afternoon and met with
8 me. Well, one did, Travelers Insurance. Mr. Jerry Begley
9 met with me after the day-long hearing in Columbia on
10 Wednesday out in the hall. And I think Your Honor can
11 probably understand why it is that, you know, a first
12 meeting out in the hall after a day-long hearing is probably
13 not the best forum to try and get to a resolution. So, you
14 know, that's the reason that it makes a lot of sense to have
15 mediation, so we can try and hash some of these issues out.
16 That's the problem.

17 THE COURT: All right.

18 MR. WALL: If I misspoke about the \$500,000, I
19 misspoke.

20 He was dealing directly with two carriers
21 involved. They were sending him their interpretation of the
22 amount of coverage in the policy. Whatever they said was
23 available is available.

24 Your Honor --

25 THE COURT: Well, how much does that make

1 available?

2 MR. WALL: Whatever they told him. I don't -- I
3 wasn't involved in all of that. I'm not a coverage counsel,
4 but as I understand it, whatever he said, \$800,000 is what
5 whatever the amount is, that's what Covil's carriers say is
6 there.

7 THE COURT: What about the one million dollar
8 policy --

9 MR. WALL: They said it doesn't apply.

10 THE COURT: -- and three million dollar per
11 occurrence policy? Those are -- per occurrence, no claims
12 made. Back in those old days, I remember those policies
13 from our earlier years of practice. They have to stay on
14 them forever.

15 MR. WALL: According to what I saw in the exchange
16 of e-mails those are site specific. They went out and
17 bought a million dollar excess policy for a job, I think. I
18 mean, again, I'm not dealing with those. They are dealing
19 directly.

20 And, Your Honor, about the issue of insurance, as
21 you know, these cases are intermingled. We are now
22 representing Covil in North Carolina. There was a --

23 THE COURT: Well, you know, Mr. Wall, I can't deal
24 with those cases this way and I don't think it's ethical for
25 me to deal with these cases on the basis that Covil has got

1 other things, just as I don't think Covil can come into this
2 courtroom and say "well, we are not here. Our corporate rep
3 is not here and our insurance company is not here, so you
4 don't get to know anything."

5 MR. WALL: No, Your Honor. I was going to explain
6 to you that in a case called Finch the same law firm and our
7 law firm agreed and the judge ordered in North Carolina that
8 subpoenas prepared by them be sent to all the carriers and
9 the carriers are now responding to their subpoenas. So we
10 are attempting to get them all the information on all the
11 policies that are out there. I just wanted to say that,
12 because we are not trying to hide any policies. They have
13 all been subpoenaed by the Federal Court in North Carolina.

14 THE COURT: All right.

15 I'm going to go forward with and hear the next
16 motion and we will do something global about this at the
17 end, but let's just keep on going forward.

18 The next motion we will hear is plaintiffs' motion
19 for sanctions against Covil for spoliation of evidence and
20 discovery abuse.

21 Ms. McVey.

22 MS. MCVEY: Yes, ma'am, Your Honor.

23 You are very familiar with the history of the
24 Covil depositions, but just by way of background, Palmer
25 Covil was sort of the main guy and he has testified for

1 years that Covil had a fire in the early seventies and it
2 destroyed -- he didn't say all the documents, but he says
3 the vast majority of documents.

4 In 2018, Jim Covil, who is his son who also worked
5 for Covil, says all the documents were destroyed in the
6 fire, that they were all burned up.

7 Well, what we found is a deposition by a guy named
8 Machen Lee Carpenter, and Mr. Carpenter testified as a
9 co-worker in a lawsuit in 2004.

10 And Mr. Carpenter is an interesting man because he
11 went to work for Covil in 1967, and he worked for Covil from
12 '67 until 1991. And during that long time period he had a
13 lot of different jobs. He was a warehouse foreman. He was
14 the foreman of the fabrication shop. He was the vice
15 president of operations. He was kind of all in the know of
16 Covil. And he, in fact, verified that there was a fire in
17 the 1970's, but what he said is that not all the fire -- not
18 all the documents were destroyed in the fire.

19 And we put this in our brief, Your Honor, but on
20 page 103 of his deposition he was asked:

21 "Because of the fire or some other fire? I'm
22 trying to find out if there was any repository of
23 information, meaning documents."

24 "A. No, that's not right. It wasn't. The front
25 office complex did not burn down. It was protected by a

1 firewall. We kept all of our documentation in a vault.

2 "Now, where is it today," he goes on? "What is
3 the limitation on time frame in which you would have to keep
4 it?

5 "And I would say it would be seven years, or less,
6 so I would say it's history."

7 So what Mr. Carpenter says is nope, not all the
8 documents were burned up in the fire. In fact, we had --
9 the front office had a fire wall and it had a vault.

10 And in that vault, even Mr. Glenn, their
11 corporate -- their current corporate representative said it
12 would have been accounts payable, accounts receivable, all
13 sorts of important documentation, which would show where
14 they sold their asbestos insulation and to whom and when.
15 That's where it would be.

16 And what's important about this is Covil was first
17 sued and had a claim made against it in 1972. By 1977, when
18 he said maybe the document retention policy would kick in,
19 by 1977 they were a defendant in numerous, dozens of
20 lawsuits. That is the definition of spoliation. They know
21 they are on notice. They have a claim -- that claims are
22 being made, that they need to keep these documents and they
23 willfully destroyed them. They weren't all destroyed in the
24 fire, as we have been led to believe, and that is why we
25 made a motion for spoliation.

1 THE COURT: All right. Now, that's spoliation.
2 Is there anything additional by way of discovery
3 abuse?

4 MS. MCVEY: Yes, ma'am.

5 So in addition to the spoliation motion, this is
6 again another motion for discovery misconduct by Covil and
7 failing to have a 30(b)(6) prepared for their deposition.

8 Your Honor, you will recall in Howe that Jim Covil
9 testified, after being ordered to do so. He was ordered to
10 look for and produce certain documents, and it turns out
11 that he didn't do that. And for that reason Howe, Smith and
12 Sizemore cases that Covil pleadings were struck. That was
13 in March of 2018.

14 In April of 2018, of this year, we sent out a
15 30(b)(6) notice to Covil with our same kind of topics out
16 there and we asked them to get prepared.

17 And they said, "you know what? We need more time
18 to get prepared."

19 We said "you certainly do, so we are going to give
20 you the time."

21 And so they kept asking for more and more time and
22 finally we agreed -- so they could have a fully prepared
23 witness, we agreed to do that deposition, the 30(b)(6), on
24 July 9th, which was just two days before our pretrial
25 hearing. And in that deposition they produced a new

1 30(b)(6) witness and his name is Mr. Glenn.

2 THE COURT: What's his first name?

3 MS. MCVEY: Robert Glenn.

4 And so the deposition took place July 9th.

5 He testified in his deposition he was not even
6 contacted about being the Covil witness until two weeks
7 prior to the deposition. He testified he didn't even know
8 the Covil name before two weeks before the deposition.

9 And, Your Honor, we have listed in our brief all
10 the different ways he was unprepared. I think over 103
11 times he said "I don't know. I don't understand." He was
12 not -- he had only reviewed about a 100 documents out of the
13 24,000 available.

14 And, by the way, those 24,000 documents are
15 post-'73.

16 He was unprepared about Covil's safety procedures.
17 He was unprepared about whether or not Covil had ever
18 warned. He was unprepared about the last year Covil sold
19 asbestos-containing products.

20 Now, what Covil argues is "what do you want us to
21 do? He only had two weeks to get ready." And our point is
22 that's exactly the problem. That's exactly the problem.
23 Mr. Covil said he couldn't be prepared in two weeks. He
24 reviewed only a 100 documents, and those are not even
25 documents he found. Those were documents that were given to

1 him.

2 Covil further argues "you know what? You can't
3 sanction us for this conduct because we are not violating
4 any court order under Rule 37."

5 And I would disagree, Your Honor.

6 Number one, they know that there are court orders
7 out there saying that Covil has to have a prepared 30(b)(6)
8 witness.

9 But, more importantly, the standing order in this
10 asbestos litigation said they have to have a 30(b)(6)
11 witness who is prepared.

12 What they are really saying to you is "ha-ha, you
13 can't catch us, because we let you -- you didn't take our
14 deposition July 9th at our request and you didn't file a
15 motion to compel to get an order and then have us violate it
16 again." That's really what they are arguing to you, Your
17 Honor.

18 It is trial by ambush to have information that is
19 not out there.

20 And, Your Honor, it's more than just this, and we
21 can go into this a little bit later, too, but it's also this
22 idea of they have not given us an exhibit list. They
23 haven't named any experts. They are not participating in
24 this process.

25 So, Your Honor, we think we are entitled to

1 sanctions, and I'm happy to tell you what we are seeking.

2 THE COURT: Yes, please.

3 MS. MCVEY: All right.

4 For the spoliation motion we would ask that the
5 plaintiffs be allowed to introduce evidence of Covil's
6 destruction of the documents and misrepresentations about
7 the circumstances of the destruction.

8 We would ask that you instruct the jury that it
9 can draw a negative adverse inference from the defendant's
10 acts; that Jerry Crawford was exposed to asbestos insulation
11 supplied and installed by Covil at Celanese between 1970 and
12 1974.

13 I don't think this is going to be an issue,
14 because they haven't listed any experts, but we would also
15 ask that Covil not be allowed to introduce any expert
16 testimony at trial in this case.

17 For the sanctions motions, we would ask that you
18 exclude any witnesses testifying on behalf of Covil at trial
19 in this matter.

20 We would ask for a presumption that Mr. Crawford
21 was exposed to asbestos from insulation supplied by Covil.

22 We also ask, although I think the ship has sailed
23 as well, Covil to produce a knowledgeable witness for
24 plaintiffs to depose in Spartanburg prior to trial. Since
25 we are on the first day of trial, I think that ship has

1 sailed.

2 And then we would ask for any attorneys fees in
3 the preparation for the deposition, the deposition costs.

4 THE COURT: All right.

5 Mr. Wall?

6 MR. WALL: Mr. Boger --

7 MR. BOGER: Your Honor, if I could, if the court
8 will indulge us, we are going to -- I was going to talk
9 about the spoliation part of this and Mr. Wall is going to
10 discuss the witness portion of it.

11 THE COURT: All right.

12 MR. BOGER: As to the spoliation, the standard
13 that we are looking at here, or what they are asserting, is
14 some sort of intentional and deliberate destruction of
15 evidence, and we see that hard to find where a fire 45 years
16 ago burned a significant portion of the plant.

17 And in 1977, or '78, the then president Mr. Palmer
18 Covil, which was the closest testimony we have to the fire,
19 says "we don't have -- "all these records were destroyed,
20 including invoices," and we have cited that in our brief.

21 I have also attached to our brief photos that were
22 in the Greenville News the day after the fire. "\$700,000
23 fire ravages Covil Firm inferno." And I think that photo
24 itself shows this wasn't some, you know, back warehouse fire
25 that only destroyed products and not paper.

1 The fact that a witness 14, 15 years ago testified
2 that maybe some of the documents weren't destroyed but he
3 doesn't know where they are, does not infer that we have
4 deliberately destroyed documents or are withholding
5 documents.

6 The record also shows that we have produced 25,000
7 pages worth of documents.

8 So intentional, deliberate, that doesn't apply
9 here, and we don't think they are entitled to a negative
10 inference that we withheld any sort of information. We have
11 given up everything that we have and that we know of.

12 And to supplement that, too, Covil has been out of
13 business since 1991. So 27 years we have been without
14 employees, without a corporate body, without anybody that
15 would hold these documents.

16 And we have, as counsel for Covil, were
17 substituted in in May of this year and it was our
18 understanding that these records were kept by prior counsel
19 and we've done what we can to provide them those 25,000
20 pages, as I know.

21 And I'll let Mr. Wall discuss the testimony of the
22 30(b)(6) witness.

23 MR. WALL: Thank you, Your Honor.

24 As the court knows a lot about Covil and the
25 30(b)(6) witness, I won't go over that, except point out

1 that Covil is out of business, has been since 1991. The
2 charter was revoked in 1993; have no employees, have no
3 business, and a fire, and the court struck all of Covil's
4 answers in three cases, and unfortunately that's how we got
5 involved in the case and that was rather recently.

6 We know that there was no way you were going to
7 listen to Jim Covil again, so then I had to go out and try
8 and find someone who is willing -- if you read the statute,
9 has to be noncorporate employee, has to be willing to
10 testify for Covil. So I found one. It took me awhile to
11 find one. And when I finally found one, the name is Robert
12 Glenn. We delivered to him all the documents we had,
13 25,000, all the depositions we had, of which there were
14 four, and we told him to start work.

15 We went one step further. We had delivered to the
16 plaintiffs all of the same 25,000 documents.

17 We went in and found somebody who could make those
18 documents searchable. So we can now go in, and we did do
19 this, we searched in all those 25,000 documents for all of
20 the documents dealing with Daniel and with Celanese and we
21 produced those to plaintiffs' counsel at the deposition of
22 Mr. Glenn.

23 Mr. Glenn only had two weeks and he did the best
24 he could.

25 I find it more than interesting that they now have

1 subpoenaed him to come here again today, or tomorrow, to
2 testify again about the same thing he has.

3 He has continued to work on Covil documents, but
4 the sole set of facts that we have are the depositions that
5 were taken in the case and the documents that we have
6 produced to plaintiffs' counsel and that seemed to testify
7 about what he's found in those documents and what he's read
8 in those depositions, and he did that, Your Honor. Thank
9 you.

10 THE COURT: Mr. Wall?

11 MR. WALL: Yes, ma'am.

12 THE COURT: 30(b)(6), as I understand it, does not
13 allow you to condition a corporate representative's
14 knowledge on what you choose to supply him with.

15 I find it preposterous that I would be told
16 "because you took actions against Covil for their
17 untruthfulness in prior matters, we're not going to offer
18 the corporate rep that we should be offering, Mr. Covil, who
19 has got some direct connection with the company. We are
20 going to hire somebody who has no knowledge of Covil at all
21 and just have them read what we give them and then you can't
22 fuss with us if they don't know something, because they can
23 only do what we gave them to do in terms of their breadth
24 and knowledge." That turns 30(b)(6) on its head big time
25 and it rewards Covil and -- not you personally, but this is

1 Covil. Covil can't get away from saying "we have been
2 sanctioned before because we wouldn't be truthful, so now we
3 are going to hire somebody who knows nothing, give them some
4 documents we choose to give them, and then you can't fuss
5 with us if they don't know anything."

6 MR. WALL: Your Honor --

7 THE COURT: What in the world kind of argument is
8 that?

9 MR. WALL: I am told that you struck the answers
10 because Mr. Covil had no knowledge. I discussed with prior
11 counsel. They met with Jim Covil for numerous hours and so
12 deposed as to it. He could not comprehend the documents out
13 there. He could never, according to prior counsel, ever get
14 up to speed to supply the information that they wanted. He
15 worked --

16 THE COURT: Then what Covil should have done would
17 have been to get someone else connected with the company who
18 could respond. But to get someone off the street, who has
19 no connection with the company, to look at the documents and
20 testify about them doesn't make any good sense to me.

21 MR. WALL: We have nobody and know of nobody who
22 would be willing to do that. We have tried to contact a
23 former employee who lives in Myrtle Beach. We have called
24 him, I think, three times. He's never returned the phone
25 calls.

1 THE COURT: Well, here is what --

2 MR. WALL: Danny White called him and he
3 wouldn't --

4 THE COURT: Here is the what the record shows at
5 this time, Mr. Wall, that's before me right now. It shows
6 that there is one, and only one, piece of information from a
7 witness that has been supplied to me right now by someone
8 who has direct knowledge about that fire, and that is Mr.
9 Glenn. And what -- I mean, Mr. --

10 MS. MCVEY: Carpenter.

11 THE COURT: Mr. Carpenter.

12 And what Mr. Carpenter said is that there was a
13 vault within the office of Covil in which many of their
14 documents were held and that it was not destroyed by fire.

15 He further says that there was a firewall between
16 the office and the rest of the complex.

17 Now, if that's not so, you could have at least put
18 up Mr. Covil, unless he is mentally unable to do it, or
19 someone else to talk about the extent of that fire.

20 And, frankly, a photograph out of the Greenville
21 News is just not enough in the face of a witness with direct
22 knowledge who says what I just recited.

23 MR. WALL: Mr. Covil, Sr. Testified that it was
24 all destroyed.

25 Mr. Jimmy Covil testified twice that it was

1 destroyed. His testimony is already under oath. All three
2 of their testimonies are under oath before this court that
3 the fire consumed all of the documents, except for ones, and
4 there are some pre-'73 documents which are in that file and
5 we have produced them also. There is nobody else who can
6 say anything about the fire. No one --

7 Jimmy Covil, as I said, apparently is unable to
8 provide the information. He doesn't know the information.
9 He really doesn't want to be involved. And we cannot --
10 he's not an employee. We cannot force him to be involved.
11 So we had to do -- and we knew this was coming down the
12 pike. So under the rules we can go out and get anybody who
13 is willing to testify to testify as a 30(b)(6) witness and
14 we gave him all the information we had. Thank you.

15 THE COURT: Well, obviously this is --

16 Mr. Wall, when I look at page six for the
17 submission by plaintiff on this issue. And on page six and
18 seven it details -- six, seven, and eight, it details the
19 things that Mr. Glenn was not prepared to testify about, and
20 it includes such things as what percentage of their products
21 were asbestos-containing versus nonasbestos-containing;
22 safety procedures used; why Mr. Glenn was chosen as a
23 corporate representative; what documents would have been
24 saved in the fire in 1973. I mean, it goes down a list of
25 things that it seems to me are fundamental.

1 MR. WALL: And I think he answered those
2 questions.

3 THE COURT: Sir?

4 MR. WALL: The way I read the deposition, I
5 thought he answered those questions. He couldn't answer
6 them to -- he could not tell you what was in Palmer Covil's
7 mind. He could not say "well, Palmer Covil did this because
8 he thought X." There are no documents that support that
9 kind of analysis of what happened there.

10 THE COURT: Well, I mean, here are questions "who
11 was in charge of safety at Covil throughout the history?"

12 MR. WALL: He told them.

13 THE COURT: Who did he tell?

14 MR. WALL: Russell Johnson was the person he knew
15 was in charge of --

16 Well, first there was no safety director, but
17 training and safety was under Russell Johnson's direction.

18 THE COURT: How about "what followup was done on
19 insurance policies and insurance coverage for the years in
20 question?"

21 MR. WALL: We sent subpoenas to all of the
22 carriers.

23 THE COURT: In this case?

24 MR. WALL: In the Finch case, which is the same
25 case as this, the same lawyers.

1 THE COURT: Where are those? I haven't seen them.

2 MR. WALL: We didn't move them in this court.

3 They went out of the Federal Court in North Carolina.

4 THE COURT: Well, then they weren't in this case.

5 They were in the Federal Court?

6 MR. WALL: That's correct, they were not in this

7 case, but they were done.

8 THE COURT: I mean, what I'm trying to understand
9 is what does your client expect this court to do for the
10 next two weeks when your client is not providing any
11 information, is not going to put up any expert witnesses,
12 but says they can't be sanctioned because of some things
13 they are doing in the North Carolina case? I mean, what
14 position does that put this court in, in your view, Mr.
15 Wall?

16 MR. WALL: We have -- we have not put any experts
17 because we have none on the issues.

18 First -- the real issue in this case is there was
19 no Covil insulation products at the job site and there are
20 three people going to testify to that, already have
21 testified to that, and so -- we made insulation. There
22 is -- and we acknowledge --

23 THE COURT: And the three people that are going to
24 testify to that, where is the witness list that showed
25 me who they are?

1 MR. WALL: They are -- they are -- they have
2 already been deposed. They are the witnesses to them. They
3 are plaintiffs' witnesses.

4 THE COURT: That doesn't absolve you from putting
5 together a witness list for me, Mr. Wall.

6 There are fundamental --

7 MR. WALL: Your Honor, we put together a witness
8 list for you and we filed it with them and we lists --

9 THE COURT: I don't see the witness list. I have
10 looked over the filings this morning and I don't see that.

11 MR. WALL: We listed the two Covils.

12 We listed an expert who was on state of the art.
13 We are not going to call him.

14 And we listed then the right to call any other
15 witness who has been deposed, offered, or discussed in this
16 litigation, and there are two of those; the representative
17 of Daniel and the representative of Celanese, and they have
18 been deposed and we are going to try and play their video.

19 THE COURT: You haven't properly noticed them
20 to --

21 MR. WALL: We think we have.

22 THE COURT: Well, if you haven't properly noticed
23 them, then --

24 MR. WALL: I understand.

25 THE COURT: -- then, you know -- I mean, I don't

1 think your client is really serious about respecting this
2 court and this process. That's what's got me worried, Mr.
3 Wall.

4 MR. WALL: I disagree, Your Honor.

5 First of all, I have no client. They're out of
6 business.

7 THE COURT: Well, then -- what do you mean you
8 have no client? Are you here in -- the defendant in this
9 case is Covil Corporation.

10 MR. WALL: That's correct.

11 THE COURT: Are you here representing them and are
12 they your client?

13 MR. WALL: They are out of business, but I am
14 their -- I represent them.

15 THE COURT: Well, then, please don't start this by
16 telling me you don't have a client.

17 MR. WALL: Well, no, I'm here at the request of
18 the insurance company, who has the duty to defend Covil, and
19 I have been retained to defend Covil, and that's what we are
20 doing.

21 THE COURT: That's correct. So you have a client.
22 That's Covil.

23 MR. WALL: Yes.

24 THE COURT: You don't -- the insurance company is
25 not the client --

1 MR. WALL: That's correct.

2 THE COURT: -- here in front of me.

3 MR. WALL: That's correct.

4 THE COURT: Your client is Covil Corporation.

5 MR. WALL: That's correct.

6 THE COURT: All right.

7 Ms. McVey?

8 MS. MCVEY: Can I briefly -- I know you need to --

9 THE BAILIFF: Excuse me, Your Honor.

10 (Off the record).

11 (Back on the record)

12 THE COURT: All right.

13 We will -- to be continued.

14 MS. MCVEY: Okay.

15 THE COURT: Y'all are needed in the courtroom over
16 there, so y'all go over there and deal with jury
17 qualifications, and then we will come back and deal with
18 this after we get the jury picked.

19 MS. MCVEY: Thank you, Your Honor.

20 (Whereupon, proceedings were recessed).

21 (Whereupon, proceedings were reconvened).

22 THE COURT: Ladies and gentlemen, I have got a
23 statement of the case and voir dire from plaintiff and
24 defendant and let me ask couple of questions at this point.
25 This thing says this case arises from Mr. Jerry Crawford's

1 alleged occupational exposure to the asbestos. So far so
2 good.

3 The plaintiffs are Jerry Crawford and the Estate
4 of his, and I would say wife, Evelyn Crawford, and his three
5 children, Patty Giles, Tessa Quinn, and Danny Crawford.

6 Plaintiffs allege that Mr. Crawford died from
7 mesothelioma.

8 MS. MCVEY: Oh, my gosh.

9 THE COURT: I don't think so.

10 MS. MCVEY: No. Thank you. He has not.

11 THE COURT: Contracted mesothelioma.

12 MS. MCVEY: Yes.

13 THE COURT: Mesothelioma cancer as a result of
14 exposures to asbestos while working at Celanese Corporation.

15 Now, let's just stop there for a minute. How we
16 going to handle mentioning Celanese and why are we
17 mentioning Celanese?

18 MS. MCVEY: The exposure to Covil occurred while
19 he was working at Celanese.

20 THE COURT: I get that.

21 MS. MCVEY: So I think that's going to -- it's
22 going to be all over the case.

23 THE COURT: Okay. All right. I'm just checking.

24 MS. MCVEY: I know it.

25 THE COURT: Defendant in this case is Covil

1 Corporation.

2 All right. I'm just looking down the questions.

3 It says "is there any member of the jury panel who
4 knows or has any connection to the defendant in this matter,
5 Covil Corporation, who sold and installed insulation?"

6 It doesn't say in this case, but we haven't dealt
7 with our sanctions yet. We are going to deal with those in
8 a minute.

9 All right. "Is there any member of the jury panel
10 or any member of your immediate family, and by that I mean
11 your children, ever been a plaintiff or a defendant in a
12 lawsuit?"

13 I have gone that far.

14 "Anyone ever worked around asbestos?"

15 I don't know that I have gone that far. What --
16 how do we feel about that?

17 MR. BRANHAM: Judge, I think it's important for
18 both parties to know whether or not anybody believes that
19 they have worked around asbestos, but certainly if the court
20 declines to do it, we would fine with that.

21 THE COURT: Well, I got a little question there.

22 Now, there are a number of people who will testify
23 in the trial of this case. Do you know if there are any
24 problems with any, please stand. The witnesses are as
25 follows:

1 Harley Neelands. Who is that?

2 MS. MCVEY: He was --

3 THE COURT: Co-worker?

4 MS. MCVEY: Yes.

5 THE COURT: All right.

6 Arnold Brody I know.

7 John Maddox I know.

8 Jerry Crawford, plaintiff.

9 Patty Giles, child.

10 Tessa Quinn, child.

11 Palmer Covil and Jim Covil. I thought they
12 weren't going to testify.

13 MS. MCVEY: They -- if they testify, it will be by
14 deposition that they have already given.

15 THE COURT: All right.

16 Don Buck.

17 MS. MCVEY: He's a Daniel corporate
18 representative, by deposition.

19 THE COURT: I'm not planning on turning this into
20 a three week trial now.

21 MS. MCVEY: Your Honor, you are going to be so
22 proud of us. We are going to be finished this week.

23 THE COURT: Good. That's what I want.

24 MS. MCVEY: I knew you would be happy.

25 THE COURT: I like a one week trial.

1 MS. MCVEY: I know it.

2 MR. WALL: We have very few designations, ma'am.

3 THE COURT: All right.

4 Dwaine Waters. There is some controversy there.

5 We will get to that about whether that's going to be
6 allowed.

7 Machen Carpenter.

8 Dr. James Crapo.

9 Tony Watson, certified industrial hygienist.

10 That's y'all.

11 And Mr. Robert Glenn, corporate representative.

12 He's an industrial hygienist?

13 MR. WALL: He is by training.

14 THE COURT: Uh-huh. Okay.

15 MR. BRANHAM: Your Honor, Tony Watson was an
16 expert retained by other defendants in this case who blames
17 Covil in the case. It's literally about a five-minute
18 read-in.

19 THE COURT: All right.

20 MR. WALL: Your Honor, I have one -- I'm sorry,
21 are you ready for me?

22 THE COURT: Not yet.

23 MR. WALL: Okay.

24 THE COURT: Just let me get through theirs and
25 I'll go right to yours.

1 "Any members of the jury panel related by blood or
2 marriage to any of these witnesses?" That's okay.

3 "Do you know any of lawyers?" Tommy Boger was not
4 in here, but I would say Theile McVey, Aaron Chapman, Mark
5 Buha, Trey Brown, Mark Wall, Tommy Boger.

6 "Is there any member of the jury panel who has a
7 family member who has mesothelioma or any asbestos-related
8 disease?"

9 I can go that far.

10 "Is there anyone in the jury panel who has
11 expressed or formed any opinion?"

12 "Any member of the jury panel not prepared to give
13 them a fair trial?"

14 "Have you or anyone in your family ever worked as
15 an insulator, boilermaker, rigger, millwright, machinist,
16 pipe fitter, valve technician, engineer, or worked with
17 boilers, pumps, valves, gaskets for packing?"

18 "Ever served on a jury?"

19 All right. Here are the defendants.

20 "Anyone or had a family member worked at a fiber
21 plant, including Hoechst Celanese."

22 What is a fiber plant?

23 MS. MCVEY: That's your question?

24 MR. WALL: It's a company plant that make fibers
25 which have been woven, like Celanese.

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

3 MR. WALL: That's fine.

4 THE COURT: All right.

5 "Is any member of your family ever worked or been
6 around asbestos-containing thermal insulation?"

7 This is the one that I get kind of ancy about.
8 "Do you believe that you have been exposed to asbestos, or
9 do you believe a family member has been exposed to
10 asbestos?"

11 I don't like getting into what you believe and so
12 forth and so on, so I'm not inclined to ask that.

13 "Do you or anyone you know, including family or
14 close friend, presently have cancer?"

15 I don't generally go that far. Cancer is all over
16 the place.

17 "Does anyone who would be unable to give all
18 parties a fair trial?"

19 That's the same thing as the plaintiff.

20 "Who is so sympathetic that you would not be able
21 to follow the rules of the court, set sympathy aside when
22 evaluating the case where the plaintiff was injured or died
23 from mesothelioma?"

24 I would do something like that. It might be a
25 way --

1 "And who has got a strong or negative opinion of a
2 corporation?"

3 I don't ask that.

4 Okay. Anything else?

5 MS. MCVEY: Not as to voir dire.

6 THE COURT: As to voir dire.

7 Any exceptions?

8 MR. BOGER: Well, Your Honor, the only thing I
9 would point out, we had some witness issues that we haven't
10 gotten to, as far as the pretrial, that may be added or
11 subtracted from that list.

12 It was our understanding that the Celanese
13 30(b)(6), Bruce Boyer was going to be called. Then upon
14 receiving the voir dire last night his name was off their --
15 off their list, so we would want his testimony to be
16 included.

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

19 MR. BOGER: Bruce Boyer.

20 MS. MCVEY: And that's the argument. That goes to
21 our -- Your Honor, our -- whether or not they designated
22 timely.

23 THE COURT: I have not at this present moment ever
24 seen an exhibit list from the defendants still, after I
25 asked about it. I don't -- I -- I have no witness list.

1 MR. WALL: He did it. He will get it.

2 THE COURT: It hadn't been filed with the court
3 and it hadn't been filed with me, so we are going to talk
4 about that, but I'm going to ask about this guy, because I
5 want to go ahead and qualify them and let them go to lunch
6 so we can finish up our pretrial and not delay them. So
7 that's how I'm going to handle it, unless y'all --

8 MR. BOGER: Can I pass up our witness
9 designations?

10 THE COURT: You will when we get back to pretrial
11 motions, but at the present time I'm going to throw his name
12 in and I'm going to ask about it.

13 MR. BOGER: Thank you, Your Honor.

14 THE COURT: My high quality bet is they won't know
15 any of these people, except perhaps the Crawfords and their
16 family.

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

18 THE COURT: Yes.

19 MR. WALL: You talk about the estate.

20 THE COURT: Yeah, the estate of Evelyn Crawford.

21 MR. WALL: She's now deceased. Her consortium
22 claim is now lost. It's over.

23 MS. MCVEY: No, it's not.

24 MR. WALL: I think it is, Your Honor.

25 MS. MCVEY: It survives her death.

1 MR. WALL: I don't think so.

2 THE COURT: It survives her death.

3 MR. WALL: Consortium claim?

4 THE COURT: Yes.

5 She had it while she was still living and --

6 MR. WALL: I understand.

7 THE COURT: That's -- yeah. That's -- it has been
8 in the other cases I tried. You may say differently.

9 Okay. I propose to bring the jury --

10 Well, I can either -- how many of them are there?

11 MS. MCVEY: I think they were picking the first
12 trial, Your Honor, the first -- there is another wreck case
13 going maybe, or another personal injury case going.

14 THE BAILIFF: I'll check.

15 THE COURT: Tell you what. Find out how close
16 they are to the end of picking their jury.

17 THE BAILIFF: Yes, ma'am.

18 THE COURT: And if they still are going to have a
19 little time left, we could take a little time and knock out
20 the rest of these motions, or try to.

21 THE BAILIFF: Yes, ma'am.

22 MS. MCVEY: Yes.

23 THE COURT: Okay. Let him just find out about
24 that and then we will see.

25 (Off the record)

1 (Back on the record)

2 THE COURT: I'm going to look up the consortium
3 thing to make sure, Mr. Wall.

4 MR. WALL: Thank you.

5 THE BAILIFF: Your Honor, they are just now going
6 into that courtroom. They are taking a fifteen minute
7 break.

8 THE COURT: Okay. While they're taking a fifteen
9 minute break, do we want to try to --

10 MS. MCVEY: That would be great.

11 THE COURT: -- keep on plugging here for a minute?

12 Where we are, all these motions, except for
13 defendant's motion with respect to Mr. Waters, has been
14 argued. Am I right?

15 MS. MCVEY: The only thing that hasn't been argued
16 is the motion to strike their late deposition designations.

17 THE COURT: Right. Okay.

18 Let me get something straight then.

19 I want to see the exhibit list, the -- talking
20 about for defendants. I know the plaintiffs' exhibit list
21 and their exhibits and their witnesses have been sent to the
22 other side within the compliance period of the rule. I
23 certainly want copies of those things.

24 MS. MCVEY: Okay.

25 THE COURT: With respect to defendants, I want to

1 see your exhibit list, your witness list, and information
2 about when you designated your objections.

3 MR. BOGER: Okay. I'll -- can I pass the --

4 THE COURT: Sure. Come right on up.

5 MR. BOGER: -- witness list up?

6 THE COURT: Yes.

7 MR. BOGER: This is our witness list, Your Honor.

8 THE COURT: What I'm looking at is this. I'm
9 looking at Judge Hill's standing order regarding asbestos
10 trials. It was signed in 2015, that I have lived with and
11 not changed, and it says "at 125 days after filing of the
12 complaint counsel for the defendant shall designate all fact
13 witnesses expected to be called at trial. Designations
14 shall include brief summary of expected testimony, whether
15 the witness is a co-worker, family member, treating
16 physician, or other fact witness. This list may be
17 supplemented up to five days before the deadline to depose
18 defendant's fact witnesses. Counsel for the defendant shall
19 designate all expert witnesses and any plaintiffs' treating
20 physician called for trial. This designation shall include
21 a brief summary of anticipated. It may be supplemented up
22 to five days before the deadline to depose all defendant's
23 witnesses." Filing deadlines -- once the trial date has
24 been assigned, and I assigned the trial date a long time
25 ago.

1 "Depositions 70 days before trial.

2 "Depositions of defendant's fact witnesses
3 concluded, with the exception of 30(b)(6)."

4 So whether you call it 120 days after filing of
5 the complaint, or 70 days before trial, this July 2nd, 2018
6 designation of amended disclosure of witnesses is way past
7 any deadline.

8 MS. MCVEY: The only thing I tell you is at the
9 end -- I can see them getting up. The last page of that
10 scheduling order?

11 THE COURT: Yes.

12 MS. MCVEY: It said 14 days before trial the
13 parties to exchange final list of all witnesses to be called
14 at trial.

15 THE COURT: Right. This is an attempt to meet
16 that.

17 MS. MCVEY: I thank so.

18 THE COURT: But it's got to be witnesses that were
19 disclosed before in accordance with the rest of this order
20 so that they can be deposed, as I understand it.

21 MS. MCVEY: I think they did disclose those in --
22 Did they answer discovery?

23 If they answered discovery, my assumption is they
24 put those in there.

25 I don't see like there is a problem with their

1 witness list right there. I do have a major problem with
2 the other deadlines that they have missed.

3 THE COURT: Okay. So the three that they have
4 indicated are Palmer Covil, James Covil, and Brian D.
5 Harding, a PhD.

6 MR. WALL: We are not calling him. He was my
7 expert.

8 THE COURT: But you are not calling him?

9 MR. WALL: He's the state of the art expert.

10 THE COURT: So all you have listed by way of
11 witnesses are the two Covils.

12 MR. WALL: And, Your Honor, the other witnesses
13 listed by any party or the defendant.

14 The only thing we have done is when all this was
15 going on, they took the deposition of Daniel and took the
16 deposition of Celanese and those people are by reference
17 mentioned in that list, and they have -- they have now
18 designated or had initially designated the testimony, one.

19 Two, they were parties until just recently.
20 Daniel did not get out of this case until Wednesday, last
21 Wednesday, so they were parties in the case.

22 MS. MCVEY: Your Honor, briefly. This is the most
23 important issue I want to talk to you about.

24 Everybody has an obligation to list the
25 designations seven days before trial. That would have been

1 last Monday.

2 THE COURT: Right.

3 MS. MCVEY: All designations that you plan to use,
4 that has to be done, okay?

5 THE COURT: Right.

6 MS. MCVEY: They didn't do that.

7 And, in fact, not only did they not do that, when
8 they realized they were the only ones left, they were
9 supposed to counter our designations on Friday.

10 This is really important because it's not just a
11 matter of here is our designations. We have got to cut
12 video. It's a long process. They have not met any of those
13 deadlines. They didn't designate anything to begin with, so
14 they don't get to use anything. And they didn't counter
15 ours until past the deadline.

16 MS. WALL: That's correct.

17 MS. MCVEY: And the fact -- I mean, that's the
18 rule. If there are no consequences to that, then we can't
19 function.

20 I mean, this trial is going to move super fast.
21 Dr. Brody is going to go on today. We have got videos cut
22 for either this afternoon today and then starting tomorrow
23 morning. We are going to be finished pretty quickly in this
24 trial, so we have got to be ready to go with these
25 depositions and they didn't designate anything.

1 THE COURT: Mr. Wall?

2 MR. WALL: We have now designated. We were
3 getting ready for the Whitmire case.

4 THE COURT: So you are the only defendant that did
5 not get ready for both?

6 MR. WALL: Well, we --

7 THE COURT: Every other defendant got ready for
8 both and I have got mountains of material from all of them
9 designating witnesses, designating parts of transcript,
10 objections to parts, and all that kind of stuff.

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

15 MS. MCVEY: That's actually not true, Your Honor.
16 They settled on Wednesday --

17 MR. WALL: Yeah.

18 MS. MCVEY: -- and we didn't get those things
19 until Saturday -- Sunday.

20 MR. WALL: Well, it takes -- it takes a while to
21 generate.

22 THE COURT: I'm just -- I can't accept that, with
23 great respect, Mr. Wall. I don't think any preparation was
24 done of any meaningful nature by Covil until this weekend,
25 and that's what -- and I don't think any preparation even

1 started until after the mediation took place and I fussed
2 with your client in the other case, Armstrong, and that's
3 what's got my heartburn.

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

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

12 MR. WALL: The fact witnesses. Both fact
13 witnesses, Your Honor.

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

16 MS. MCVEY: So we have our designations of Don
17 Buck and Mr. Boyer, who are the two kind of corporate
18 representatives of Celanese and Daniel. We have got those
19 ready to go, our designations.

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

22 MS. MCVEY: One was received Sunday. The other
23 was Saturday, past the deadline.

24 THE COURT: Past the seven deadline for submitting
25 those?

1 MS. MCVEY: That's right.

2 And -- right.

3 MR. BOGER: And, Your Honor, if I could, they also
4 submitted supplementals. They designated the entire
5 transcript two weeks ago and then submitted a supplemental
6 designation to reduce all that, and these witnesses were
7 deposited in late June.

8 You know, it's not unreasonable that we were all
9 working to try to get those -- the specific designations
10 done. We have had our paralegals in touch with the video
11 person they provided, and we are trying to get the --
12 attempt to re-cut the video so we can add that in. It's not
13 a large amount of testimony that we're trying to --

14 MS. MCVEY: Your Honor, it is so much bigger than
15 that. It takes so much time, because then they are going to
16 designation stuff and we have to object to it. You have to
17 rule on it and we have got to get this going. We need to
18 play it tomorrow, if not today. We can't do it, and they
19 shouldn't be rewarded for sandbagging. Everybody knows what
20 the rules are.

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

25 MR. WALL: We designated them Saturday and Sunday,

1 Your Honor.

2 THE COURT: Yes, sir, that's past -- well past the
3 deadline.

4 MR. WALL: Okay. So you are not going to -- even
5 though they designated and they designated the entire
6 deposition.

7 THE COURT: I'm not going to allow them to --

8 MR. WALL: And then they came back and cut it out.

9 THE COURT: I am going to allow them to --
10 When did you designate the specifics?

11 MR. WALL: Last week.

12 MS. MCVEY: Thursday, Friday.

13 MR. WALL: Last week, and --

14 MS. MCVEY: No, we designated it --

15 MR. WALL: And we did Saturday and Sunday.

16 THE COURT: Wait a minute. Wait a minute.
17 They designated the whole deposition when?

18 MS. MCVEY: During the appropriate deadline, so
19 that would have been Monday.

20 THE COURT: And then after the deadline y'all cut
21 it down?

22 MS. MCVEY: We just cut some out based on what has
23 happened.

24 THE COURT: Well, that disadvantages them because
25 if they count on everything being designated and don't

1 designate anything specific, then that's what's happened
2 here, Ms. McVey.

3 MS. MCVEY: But they -- I understand that, and for
4 any other defendant who actually designated anything, but
5 they designated nothing. That's the difference in my view.
6 And we cut it out simply to cut the court time out. I mean,
7 it --

8 THE COURT: I understand that. You know, I'm just
9 trying to be even handed.

10 I'm very unhappy with Covil and I think they are
11 costing the state a lot of money to try cases which they
12 have made no real attempt to get ready, and I will say that,
13 but what I want to know now is what the -- I don't want to
14 get into a big who shot John. What have they designated?

15 MR. BRANHAM: May I, judge?

16 THE COURT: Yes.

17 MR. BRANHAM: Judge, I glanced briefly at the
18 designations. They are fairly substantial. Given the
19 lateness of them, I haven't had a chance to go through and
20 deal --

21 THE COURT: Fairly substantial, meaning how much
22 more material?

23 MR. BRANHAM: My guess is that it's probably about
24 45 minutes worth of what the testimony, but, again, I
25 haven't been able to go through it, but we may have

1 objections. The problem here is that we may have objections
2 to their testimony and we'll keep those to a minimum, if we
3 can, but those are going to have to be looked at and ruled
4 on.

5 If Your Honor is inclined to allow them to play
6 certain excerpts from the Daniel depositions, my suggestion,
7 in order to deal with court time appropriately, would be
8 that they play those in their case in chief after we rest so
9 that we're not in a situation of having to get our people to
10 cut in excerpts into whatever else that's already been cut.

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

13 MR. WALL: We are already in the process of doing
14 that, from what I'm told.

15 THE COURT: What I'm going to do, Mr. Wall, and I
16 think I'm bending over backwards to do it given what's
17 occurred here, I'm going to allow you to play what you have
18 already designated, not by re-cutting their deposition, but
19 in your case.

20 MR. WALL: Yes, ma'am.

21 THE COURT: And that's what I'm going to do.

22 MR. WALL: Yes, Your Honor.

23 THE COURT: All right. Does that resolve that
24 particular thing?

25 MS. MCVEY: Yes, ma'am.

1 THE COURT: All right.

2 Now, let's go back then for a minute. We have got
3 the --

4 MR. BOGER: Well, Your Honor, while we are on the
5 subject of witnesses, we also filed a motion to strike a
6 particular witness.

7 THE COURT: I'm getting there.

8 MR. BOGER: Okay.

9 THE COURT: I'm getting there.

10 All right. There is Dwaine Waters.

11 As I understand, Mr. Waters' deposition testimony
12 was designated in advance of the deadlines, correct?

13 MS. MCVEY: Yes, ma'am.

14 THE COURT: And the objection is that it's -- his
15 deposition was taken in a different case --

16 MS. MCVEY: It was.

17 THE COURT: -- and that's it.

18 MS. MCVEY: It was, which Covil was a defendant in
19 the case and present at the deposition.

20 THE COURT: And had the right to examination.

21 MS. MCVEY: That's right.

22 THE COURT: I'm going to deny the motion in limine
23 with respect to the testimony of Dwaine Waters.

24 All right. Now, we have then got sanctions for
25 spoliation, discovery abuse, and failing to participate in

1 mediation.

2 With respect to the failure to participate in
3 mediation, I find that Covil -- and, again, this is a
4 decision that their corporate insurance representatives made
5 and that the lawyers apparently let them make, which I think
6 is tough. I understand that's who hired them, but our
7 mediation rules require participation in mediation. And
8 when they got the plaintiffs to agree to a separate
9 mediation and then unilaterally cancelled that separate
10 mediation because the insurance lawyers were unhappy about
11 the demand made by the plaintiff, the rules don't
12 accommodate that. That was a deliberate failure to
13 participate in mediation, which is required by our rules and
14 by the standing order of the court with respect to asbestos
15 trials.

16 And so I find that they have violated those rules
17 in their failure to participate in an agreed-upon mediation,
18 and that as a sanction for the failure to participate in
19 mediation, I will award attorneys fees and costs, amounts to
20 be submitted by plaintiff for that violation of the
21 requirement of mediation and as a sanction for that
22 violation.

23 The record is very complete that this was a
24 deliberate decision by counsel for the insurance companies
25 that insure Covil. Covil is a corporation no longer in

1 existence and its appearance here is completely controlled
2 by several insurance companies which insure Covil for the
3 times in question in this lawsuit, and those insurance
4 counsel, or insurance representatives, made the deliberate
5 decision to renege on their agreement to mediate in a
6 private mediation session.

7 I find that the sparse attempt that was made to
8 then discuss settlement with plaintiff at the close of our
9 very lengthy all-day hearing on various motions related to
10 Whitmire and to Crawford on July 11th, just past, is not
11 sufficient to make up for the clear intentional refusal to
12 mediate, as required by the rules. So that's the ruling
13 with respect to sanctions on the mediation violation.

14 With respect to the spoliation and discovery
15 abuse, I find that the assertion that all records of Covil
16 were destroyed by fire is not supported by even the
17 information that Covil submitted in this case, which
18 included a letter from Palmer Covil, president of Covil
19 Insulation Company, addressed to our friends, customers, and
20 employees, and this document was submitted as Exhibit D to
21 Covil reply to plaintiffs' motion for discovery sanctions,
22 dated July 14th, 2018, and supplied to me today.

23 In that letter from Mr. Covil, which was written
24 shortly after the fire of May the 14th, 1973, Mr. Covil said
25 to his customers "on Monday afternoon, May the 14th, we had

1 a very disastrous fire which completely destroyed our
2 fabrication shop and warehouse and part of our offices in
3 the Berea Industrial Park.

4 "By Monday, May the 28th, we expect to be back in
5 fairly normal operation, except for our fabrication shop.
6 We have warehouse facilities located on Rutherford Road.
7 Our general offices, including accounting, payroll, customer
8 service, contract, power and processes will be located in
9 the basement floor of Cone Mill offices on Buncombe Road.

10 "We expect to be able to service our many
11 customers and friends from these locations on a temporary
12 basis and trust that you will bear with us until we are able
13 to build back our old location."

14 Later in Mr. Palmer Covil's deposition, attached
15 as Exhibit A to Defendant's supplemental reply to a motion
16 for discovery sanctions -- Exhibit B -- correction, Exhibit
17 C, Mr. Palmer Covil says "we had -- and this is at page
18 nine, "well, let me explain one thing. We had a fire in May
19 of 1973 and it burned up a lot of our records, but here is a
20 copy of the complaint and the plaintiff's name, all of them,
21 whether they worked for us or not, just basic stuff that's
22 come in in reference to this case and some stuff we had and
23 some copies of invoices and other things we pulled out."

24 The question is "well, maybe we ought to start out
25 by you telling us what records were destroyed, what types of

1 things were destroyed in regard to these plaintiffs that you
2 have got a list of.

3 "Well, some of our personnel files and employment
4 records were destroyed. We just have a few of them. A good
5 many of them were destroyed and most all invoices and things
6 back prior to '73. The only thing we say got out of the
7 fire was vital records that we had in a vault, you know,
8 like accounts payable and accounts receivable and stuff like
9 that. We had them in a vault and we saved those, but our
10 invoices and employment records and things like that were
11 all destroyed.

12 "How about your insurance records?

13 "Well, I think we went back and found enough
14 records we know who had insurance at different times and
15 things like that, what companies were involved with
16 insurance.

17 "What types of records are now available in your
18 office?

19 "Well, everything from 1972 forward."

20 And then a co-worker -- or a Covil employee from
21 2004, Mr. Machen Lee Carpenter, testified in an asbestos
22 suit that the fire did not destroy all Covil documents. He
23 said "the front office complex did not burn down. It was
24 protected by a firewall. We kept all of our documentation
25 in a vault. Now where it is today, what is the limitation

1 on the time frame in which you had to keep it, I would say
2 it would be seven years, or less, so I would say it's
3 history."

4 I conclude from the material that has been
5 submitted to me, much of it by the defendant, that all the
6 records of Covil were not destroyed in the fire and that
7 Covil had those records at a certain point in time, as they
8 were described by Mr. Carpenter and Mr. Palmer Covil, and
9 that now they contend that the records were destroyed and no
10 longer available. This is at a time after lawsuits had been
11 filed, some of which were discussed by Mr. Palmer Covil in
12 the deposition excerpt that was presented to me by
13 defendants today.

14 I conclude, therefore, that spoliation has taken
15 place by Covil of some of its corporate records that are
16 pertinent to these proceedings.

17 And I also conclude that there are insurance
18 records available that have not been available to the
19 defendants in this case, but which Covil is now making
20 efforts in another lawsuit in Federal Court in North
21 Carolina to locate.

22 Either -- it is not clear what happened to the
23 records, insurance records, that Mr. Palmer Covil definitely
24 said were in existence at one time, but the company now says
25 it doesn't have them, and I find that spoliation has taken

1 place with regard to its retained copies of those records.

2 And as a -- in addition to that, I find that grave
3 abuse of discovery rules was made in the designation of a
4 corporate representative.

5 The defendant contends that the two Covils were
6 not designated as corporate representatives because one of
7 them is not able to recall things at this time, and that is
8 understandable, but that the other corporate representative
9 simply is not going to -- he's not going to testify. He
10 won't do it voluntarily. They have not made any effort to
11 subpoena him to testify or tender him without his consent as
12 a representative, but instead they hired an industrial
13 hygienist that had no connection with Covil, and two weeks
14 before the 30(b)(6) deposition, having been delayed many,
15 many times, was finally scheduled for -- within the last
16 short period of time in this case. Mr. Glenn was given two
17 weeks to review 25,000 documents, Mr. Robert Glenn, the
18 designated corporate representative.

19 Mr. Glenn testified in his deposition that he
20 might have reviewed about a 100 pages of all the 25,000
21 pages of documents that were allegedly supplied to him, and
22 he flipped through some of the depositions, two Covils and a
23 Mr. Johnson, who was a safety representative for -- or
24 safety manager for Covil, and that's how he prepared. He
25 was unable to answer very basic questions about the

1 operations of Covil at the times pertinent to this lawsuit.
2 He was unable to answer anything in any specificity about
3 the safety practices of Covil or the knowledge of Covil
4 about asbestos-containing products, so he was completely
5 unprepared as a 30(b)(6) witness in any reasonable way.

6 I want to make sure that I make it clear that this
7 was a decision that Covil and its current representative
8 insurance people made about the way they would supply
9 30(b)(6) information. This is not the fault of Mr. Wall or
10 Mr. Boger, who are the lawyers who are representing Covil at
11 this time. This is the responsibility of the insurance
12 representatives for Covil and the Covils themselves, that no
13 one was properly prepared to be a 30(b)(6) representative in
14 this case, but that is a fundamental aspect of disclosure in
15 discovery by a corporation in toxic tort cases, such as
16 this, and the failure to provide any meaningful
17 representative of Covil to testify to many factual pieces of
18 information that are important in the case is a complete
19 breakdown of compliance with Rule 30(b)(6) by Covil.

20 And, therefore, as a sanction for that -- and,
21 therefore, as a sanction for the complete breakdown of the
22 integrity of this process, in terms of compliance by Covil
23 and spoliation of evidence, I will grant the plaintiffs'
24 request that it be allowed to introduce Covil's -- introduce
25 evidence of Covil's destruction of documents and

1 misrepresentation about the circumstances of the
2 destruction, which I understand would primarily be by Mr.
3 Carpenter's designation as a witness;

4 That, second, I will instruct the jury that it can
5 draw a negative adverse inference, also known as a
6 spoliation presumption, from the defendant's acts and that
7 the negative adverse inference which may be drawn is that
8 plaintiff, Jerry Crawford, was exposed to
9 asbestos-containing insulation supplied and installed by
10 Covil at Hoechst Celanese between 1970 and 1974.

11 Third, that --

12 Those are the two sanctions I will impose, that
13 evidence of destruction of the documents; evidence of the
14 negative adverse inference, that is, that Mr. Crawford was
15 exposed to asbestos insulation. That will be what I will
16 allow.

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

23 Now, that is my ruling on these particular
24 matters.

25 And I think I have covered everything in pretrial.

1 Mr. Boger?

2 MR. BOGER: Your Honor?

3 THE COURT: Mr. Boger?

4 MR. BOGER: Can I put something on the record,
5 Your Honor, regarding your ruling?

6 THE COURT: Oh, certainly. Let me just be sure I
7 have got all the motions outstanding.

8 MS. MCVEY: Those are all the motions we have,
9 Your Honor.

10 THE COURT: And I have got your motion?

11 MR. BOGER: Yes, Your Honor.

12 THE COURT: And, Mr. Boger, I know you want to put
13 exceptions on the record. Please go right ahead and do so.
14 You need to preserve your position for the record.

15 MR. BOGER: Thank you, Your Honor.

16 With respect to the ruling, we would submit that
17 the position taken by Covil in this matter was not that all
18 records were destroyed in the fire in 1973. There certainly
19 has been back and forth as to what was destroyed and was not
20 by a few of the fact witnesses, including Palmer Covil,
21 Jimmy Covil, and Mr. Carpenter.

22 As I mentioned in my argument earlier, we have
23 produced 25,000 pages worth of documents, approximately, in
24 this case. It has been 27 years since this business ceased
25 in 1991, and, frankly, we understand that the records have

1 been kept in prior counsel's office and we understand that
2 everything has been produced that we have.

3 In addition to that, there is no additional
4 testimony or evidence that portions of records were
5 destroyed by Covil at any point, besides the fire, which we
6 contend was not a deliberate or intentional act on behalf of
7 Covil.

8 In addition, we believe the facts and testimony of
9 this case will show that representatives of Daniel and
10 Celanese cannot place Crawford as applying and installing
11 insulation -- I'm sorry, Covil as applying and installing
12 the insulation at the Celanese plant during the period of
13 time that Mr. Crawford worked at the plant, from 1970 to
14 1974.

15 THE COURT: All right.

16 Mr. Wall?

17 MR. WALL: I will do my part of it.

18 Your Honor, Mr. Palmer Covil is dead, so he could
19 not testify. He's not refused to testify.

20 And Jim Covil has refused to testify -- well, we
21 have contacted his prior lawyers and said he can't handle
22 it. Too, they have subpoenaed him personally. So if he
23 comes, they can use him for whatever purpose they can.

24 Two, we have given them 900 pages of -- by a CD of
25 insurance records, the same insurance records that Palmer

1 Covil said they gathered altogether with the former counsel
2 and shipped them all to plaintiffs' counsel sometime ago.

3 THE COURT: Thank you, sir.

4 All right. All that is noted for the record, and
5 my ruling stands.

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

7 MS. MCVEY: I think we are ready for jury
8 selection.

9 MR. WALL: I got -- when you are finished. When
10 you are finished I got another issue to bring up.

11 THE COURT: All right.

12 MS. MCVEY: One question, that the inference that
13 you are going to give, will you give that at the beginning
14 before opening, or when will that happen? Will that be in
15 the charge at closing charges?

16 THE COURT: It ought to be done at the beginning
17 of trial, and my idea is going to be this. I will voir dire
18 the jury with these few questions I have for them. We will
19 make -- we will have jury selection. I will send them to
20 lunch and you all will present me with something before
21 opening takes place --

22 MS. MCVEY: Okay.

23 THE COURT: -- that you share with the other side,
24 of course.

25 MS. MCVEY: Okay. We will do that.

1 The only other issue, and we can take it up after
2 lunch, is we have given Mr. Wall our power point slides for
3 opening --

4 THE COURT: Yes.

5 MS. MCVEY: -- and I think he's got objections to
6 those, but we can take them up after lunch, or after we
7 select the jury, I guess.

8 THE COURT: After we select the jury. I don't
9 want to delay the jury.

10 Mr. Wall, you got -- are you wanting to talk about
11 the power point?

12 MR. WALL: Well, yes, but one other thing. Your
13 Honor, I didn't fully understand. Are you giving a negative
14 inference that he actually worked with the property --
15 products of Covil, or a negative inference that we destroyed
16 product?

17 THE COURT: I'm going to repeat this once again --

18 MR. WALL: Thank you.

19 THE COURT: -- so you understand what I have done.

20 MR. WALL: Thank you.

21 THE COURT: I have done two things as a sanction
22 for spoliation and for discovery abuse.

23 One, I am allowing them to introduce in their case
24 in chief evidence of Covil's destruction of documents and
25 misrepresentations about the destruction -- the

1 circumstances of destruction, and that, as I understand it,
2 will primarily be through the sworn statements of Mr. Machen
3 Carpenter. So that's what I have done, number one. That
4 will be done during the course of their case. I'm not
5 giving any instructions about that. That is simply going to
6 be testimony that is going to be offered on destruction of
7 documents and misrepresentations.

8 And I am going to instruct the jury that it may
9 draw a negative adverse inference from defendant's acts
10 that --

11 What I'm going to do is instruct them simply this.

12 I'm going to instruct them that plaintiff Jerry
13 Crawford was exposed to asbestos-containing insulation
14 supplied by and installed by Covil Corporation at Hoechst
15 Celanese between 1970 and 1974. That's what I'm going to
16 instruct the jury. I'm not going to go into it was
17 spoliation, negative inference. I'm simply going to tell
18 them at the appropriate time, which would be right before
19 opening statements, I will say that to them.

20 MR. WALL: Your Honor, first of all, as I said
21 before last on the 11th, I need a written order so I can --

22 THE COURT: No, sir, I have examined -- I have
23 examined that quite closely. I can on the record recite my
24 order. I'm not required to give you a separate written
25 order.

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

2 THE COURT: This is not a directly appealable
3 matter.

4 MR. WALL: I understand.

5 THE COURT: You can't stop the trial.

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

8 THE COURT: Right, and you can do that as a result
9 of my on-the-record recitation of my order.

10 MR. WALL: All right. You are agreeing that that
11 is in writing as -- because Rule 59 says it has to -- when
12 you get a written order, you apply it --

13 THE COURT: Yes, sir.

14 MR. WALL: Rule 59.

15 THE COURT: Yes, sir. It's going to be a
16 transcript of the trial and it's going to be in writing in
17 two different ways. Number one, the official court reporter
18 is taking down everything that I say and he will transcribe
19 that.

20 In addition to that, the plaintiffs, and perhaps
21 you all have collaborated on this, have a private court
22 reporter, Deborah Dusseljee, who is also taking down
23 everything that I'm saying and a written transcript can be
24 obtained from her.

25 So there are two different ways in which a written

1 transcription of my order on the record can be gotten.

2 MR. WALL: Two, I suggests, Your Honor, that the
3 sanctions that you have issued as to the witness and as
4 to -- saying that he was, in fact, exposed to products from
5 Covil, it's equivalent to striking my answer, because we
6 have a factual basis and a factual basis says he was not
7 exposed to our product and we have two witnesses who are
8 going to say that. So I suggest --

9 THE COURT: Your witnesses are going to say
10 something very different from that. Your witnesses are
11 going to say that they don't know of any exposure. That is
12 very, very different from whether or not he was exposed, and
13 so -- I have not struck your answer. I have not struck your
14 defenses, but I have -- because of Covil's behavior and
15 disregarding so extremely the requirements of the standing
16 order and the rules of discovery, I have sanctioned Covil by
17 allowing the jury to be instructed that Mr. Crawford was
18 exposed to asbestos-containing insulation installed by and
19 supplied by Covil between 1970 and 1974.

20 MR. WALL: I understand, and I'm not arguing with
21 the court.

22 THE COURT: Sure.

23 MR. WALL: And, finally, Your Honor, I find that
24 your sanctions -- I find -- I believe --

25 THE COURT: Yes, sir.

1 MR. WALL: -- that your sanctions are a directed
2 verdict against the defendant. So I suggest that the case
3 is now over, that you are already going to instruct the jury
4 that they are to find that our only defense is that we did
5 not give the materials there, that he was not exposed to our
6 products is not the facts of the case. So, Your Honor, you
7 have now directed a verdict against us.

8 THE COURT: All right.

9 Well, I do not find that I have done that, but I
10 will look again at how I word this instruction to the jury
11 to whether I simply instruct them, as I said just a moment
12 ago, that he was exposed, or whether I say to them you may
13 infer or you shall infer.

14 MS. MCVEY: And, Your Honor, just briefly in
15 response, you clearly haven't directed a verdict because we
16 still have to prove causation.

17 THE COURT: Exactly.

18 MS. MCVEY: We could prove that that exposure
19 caused mesothelioma.

20 THE COURT: Yes, sir.

21 MS. MCVEY: If Mr. Wall wants to stipulate to
22 that, then we could have a damages hearing, I suppose, but I
23 imagine he's not going to stipulate --

24 MR. WALL: We are -- we are not contesting that he
25 died of mesothelioma.

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

4 MR. WALL: If he was exposed to asbestos supplied
5 by Covil, it -- okay. Okay.

6 THE COURT: I mean, if you want to embrace any and
7 all exposure and all the other --

8 MR. WALL: No, I'm not --

9 THE COURT: I advise you that you may not want to
10 go that far.

11 MR. WALL: Right.

12 MS. MCVEY: If he wants to agree that the exposure
13 to Covil Insulation causes mesothelioma, then we can just --
14 we would agree and we could have a damages hearing.

15 THE COURT: Yeah, and if you want to do that,
16 that's fine. I don't think you want to do that, but I'm not
17 going to --

18 MR. WALL: Right.

19 THE COURT: -- advise you in that regard.

20 MR. WALL: Right.

21 THE COURT: Okay. All right.

22 And understand now, on these power points -- let
23 me see them and see what you are fussing about.

24 MR. WALL: It says -- may I approach?

25 THE COURT: Sure. Absolutely.

1 (Whereupon, the lawyers approached the bench for
2 an on-the-record discussion)

3 MR. WALL: We discussed this this morning.

4 THE COURT: Yes, sir, which generally happens with
5 these power points.

6 These are the ones that you are going to use in
7 your opening argument?

8 MR. WALL: Yes.

9 MR. CHAPMAN: I am, Your Honor.

10 THE COURT: All right.

11 Now, what are you objecting to about these?

12 MR. WALL: "They knew it. They did it. They hid
13 it."

14 THE COURT: Yes, sir. And you object to that?

15 MR. WALL: Yes.

16 THE COURT: Why?

17 MR. WALL: Because they haven't put any evidence
18 in yet.

19 THE COURT: Opening arguments are a statement of
20 what plaintiff intends to prove.

21 All right. The first thing on the power point,
22 all right, "they knew it. They did it. They hid it" is
23 appropriate opening argument.

24 If they don't prove it, I'm sure that you will
25 discuss that with the jury, but that's overruled. That's

1 okay.

2 What else?

3 MR. WALL: The same thing all way through there.

4 THE COURT: All right.

5 MR. WALL: Undisputed facts.

6 THE COURT: And disputed facts.

7 If it turns out that the undisputed facts ends up
8 being somehow not the real facts, I'm sure we can deal with
9 that, but so far "Jerry Crawford worked at Celanese
10 Spartanburg from 1970 to 1974, around asbestos-containing
11 pipe insulation." I'm going to allow them to infer that as
12 we talk.

13 "Jerry Crawford has cancer." I don't think there
14 is any doubt about that.

15 "Covil sold asbestos-containing products,
16 specifically pipe insulation." There is not going to be any
17 doubt about that.

18 MR. WALL: Well, Your Honor, we --

19 THE COURT: I understand you do, but they got
20 evidence to the contrary and they are going to put it in, so
21 it's going to be, you know, at most a disputed fact, but if
22 they --

23 MR. WALL: Okay.

24 THE COURT: If you end up putting the evidence up
25 like you are talking about, we will bring that to the

1 attention of the jury when you argue to them.

2 "Jerry Crawford did nothing wrong." Nobody says
3 he did anything wrong.

4 MR. WALL: Your Honor, the first one was the major
5 one.

6 THE COURT: Well, okay, overruled.

7 MR. WALL: Right.

8 Everything else is sort of generic, so I have no
9 problem with that.

10 THE COURT: Lifestyle, exposure.

11 MR. WALL: "They did it. They knew it, and they
12 hid it."

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

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

22 MS. MCVEY: Okay.

23 THE COURT: So the objection is overruled and an
24 exhibit -- a power point will be given to the court
25 reporter. And Mr. Reporter, you are to mark that as Court's

1 Exhibit No. 1. It doesn't mess up your designation. And
2 then Mr. Wall has got in the record what he wants for his
3 objection.

4 (Plaintiffs' Power Point marked as Court's Exhibit
5 No. 1 for identification)

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

9 THE COURT: That's correct. That's exactly why I
10 did it here and I made a complete record and I have put it
11 on the record, so you are protected.

12 MR. WALL: Thank you.

13 MS. MCVEY: Thank you, Your Honor.

14 THE COURT: All right.

15 All right. What else?

16 MS. MCVEY: I think we are good.

17 THE COURT: Very good.

18 Is the jury just sitting there wondering what in
19 the world is happening?

20 THE BAILIFF: Yes, ma'am.

21 THE COURT: Good bring them out.

22 I suggests, friends, it's 12:30. Let's go on and
23 get jury selection out of the way and then we will figure
24 out what we want to do for lunch.

25 MS. MCVEY: Perfect.

1 THE COURT: All right.

2 MS. MCVEY: Your Honor, we have -- after opening
3 we have Dr. Brody here today to go on.

4 THE COURT: What's that?

5 MS. MCVEY: We have Dr. Brody ready to go today --

6 THE COURT: Good.

7 MS. MCVEY: -- after opening.

8 THE COURT: All right. If you will bring the
9 jury, we will just stay here and let the whole venire be
10 brought in, Ben.

11 THE BAILIFF: Yes, ma'am.

12 THE COURT: Very good.

13 (Off the record).

14 (Back on the record).

15 (Whereupon, the jury venire panel was brought into
16 the courtroom)

17 THE COURT: Ladies and gentlemen, thanks very much
18 for your patience as we now come to jury selection in this
19 matter.

20 My name is Jean Toal. I'm from Columbia. I was
21 the Chief Justice of South Carolina for 15 years and on the
22 court for 27. I retired in 2015.

23 Since that time I have been serving as a Circuit
24 Court judge and I have been managing several kinds of cases,
25 including cases involving asbestos. This is the second time

1 that I have come to Spartanburg this year to try a case and
2 I very much appreciate the kindness and hospitality and
3 decency of the people of Spartanburg. You are special and
4 I'm honored to be among you.

5 What I will do right now is a couple of things.

6 First of all, I have a few more questions that
7 relate themselves to the specific facts of this case and I
8 will instruct you how to respond to those questions here
9 momentarily.

10 When we are finished, the clerk will develop a
11 list for the attorneys and they will pick the jury. And
12 after the jury is picked and you are seated in the jury box,
13 I will dismiss you for lunch and we will begin the opening
14 statements in this trial this afternoon.

15 Many times these asbestos cases run on for two
16 weeks, but I am very optimistic that this case will try this
17 week. Both sides have assured me that we can get through it
18 this week. I try to run a court in which your time is not
19 wasted, so if I have issues that I need to take up with the
20 attorneys, I do those when you're on a break, so that when
21 you come back we are prepared as I can get us to move
22 forward in an effective and efficient way for you to decide
23 the matters in this case.

24 Thank you again for your patience and let me now
25 turn to the questions that I have for you.

1 This case arises from Mr. Jerry Crawford's alleged
2 occupational exposure to asbestos.

3 The plaintiffs are Jerry Crawford, the Estate of
4 his wife Evelyn Crawford, and his three children Patty
5 Giles, Tessa Quinn, and Danny Crawford.

6 The plaintiffs allege that Mr. Crawford contracted
7 mesothelioma cancer as a result of exposures to asbestos
8 while working at Celanese in Spartanburg.

9 The defendant in this case is Covil Corporation.

10 I have some questions for you and at the end of
11 each question I will ask those who respond in the
12 affirmative to please stand.

13 The first question is does anyone on this jury
14 know Jerry Crawford? If so, please stand.

15 (No response).

16 THE COURT: Does anyone know his wife, Evelyn
17 Crawford? If so, please stand.

18 (No response).

19 THE COURT: Does anyone in the jury venire know
20 Mr. Crawford's children - Patty Giles, Tessa Quinn, and
21 Danny Crawford? If so, please stand.

22 (No response).

23 THE COURT: Is there any member of the jury who
24 knows or has any connection to the defendant, Covil
25 Corporation, C-O-V-I-L, who sold and installed insulation?

1 If so, please stand.

2 (No response).

3 THE COURT: Is there any member of the jury who
4 has any connection with Hoechst Celanese? If so, please
5 stand.

6 Yes, ma'am.

7 When you answer my question --

8 JUROR NUMBER 285: Okay.

9 THE COURT: -- what you do is give me your juror
10 number and then answer the question.

11 JUROR NUMBER 285: Okay. 285.

12 THE COURT: Yes, ma'am.

13 And what's -- what is your connection to Celanese
14 or knowledge about it?

15 JUROR NUMBER 285: My father worked there for over
16 50 years and retired from Celanese recently.

17 THE COURT: When did your dad retire?

18 JUROR NUMBER 285: Two years ago.

19 THE COURT: Thank you, ma'am.

20 Would the fact that your father worked for Hoechst
21 Celanese Corporation for 50 years interfere with your
22 ability to give a fair and impartial verdict in this case?

23 JUROR NUMBER 285: No.

24 THE COURT: Very good. You may be seated.

25 Is there any member -- is there any member of the

1 jury or any member of your immediate family, and by that I
2 mean your children, so you or your children, ever been a
3 plaintiff or a defendant in a lawsuit? If so, please stand.

4 Yes, ma'am, your juror number?

5 JUROR NUMBER 142: Number 142.

6 THE COURT: Yes, ma'am.

7 JUROR NUMBER 142: A lawsuit regarding an
8 automobile accident.

9 THE COURT: Involving who?

10 JUROR NUMBER 142: I was the plaintiff.

11 THE COURT: All right.

12 And would the fact that you were a plaintiff in a
13 lawsuit involving an automobile accident interfere with your
14 ability to give a fair and impartial verdict in this case?

15 JUROR NUMBER 142: Yes, due to my physical
16 limitations.

17 THE COURT: All right.

18 I will dismiss you from service on this jury, but
19 I will ask you to come here to the clerk. She will transfer
20 you to another court session.

21 JUROR NUMBER 142: Now?

22 THE COURT: So you come forward right now.

23 Yes, sir.

24 JUROR NUMBER 192: 192.

25 THE COURT: 192?

1 JUROR NUMBER 192: Correct.

2 THE COURT: All right, sir.

3 JUROR NUMBER 192: Yeah, I was a plaintiff in a
4 lawsuit following an automobile accident.

5 THE COURT: On a -- what kind of accident?

6 JUROR NUMBER 192: Automobile.

7 THE COURT: Automobile accident.

8 And would your participation as a plaintiff in a
9 lawsuit involving an automobile accident in any way
10 interfere with your ability to give a fair and impartial
11 verdict in this matter?

12 JUROR NUMBER 192: No, ma'am.

13 THE COURT: Very good. You may be seated.

14 Yes, ma'am.

15 JUROR NUMBER 108: 108.

16 THE COURT: 108.

17 Yes, ma'am.

18 JUROR NUMBER 108: I was a plaintiff in an
19 automobile accident.

20 THE COURT: All right.

21 And would the fact that you were a plaintiff in an
22 automobile accident interfere with your ability to give a
23 fair and impartial verdict in this matter?

24 JUROR NUMBER 108: No, ma'am.

25 THE COURT: Very good. You may be seated.

1 THE COURT: Yes, sir.

2 JUROR NUMBER 210: Juror 210.

3 THE COURT: Juror 210.

4 Yes, sir.

5 JUROR NUMBER 210: I have been a plaintiff in an
6 automobile accident years ago.

7 THE COURT: Yes, sir.

8 Would the fact that you were a plaintiff in an
9 automobile accident years ago interfere with your ability to
10 give a fair and impartial verdict in this case?

11 JUROR NUMBER 210: No, ma'am.

12 THE COURT: Very good. You may be seated.

13 JUROR NUMBER 210: Also I have a workmen's comp.
14 I don't know if you would call it a --

15 THE COURT: You were a claimant in a worker's
16 compensation matter?

17 JUROR NUMBER 210: Yes, ma'am.

18 THE COURT: And would the fact that you were a
19 claimant --

20 JUROR NUMBER 210: I guess it's ongoing.

21 THE COURT: Yes, sir.

22 And would the fact that you have an ongoing claim
23 in worker's comp interfere with your ability to give a fair
24 and impartial verdict in this matter?

25 JUROR NUMBER 210: No, ma'am.

1 THE COURT: Very good. You, may be seated.

2 Anyone else?

3 (No response).

4 THE COURT: All right.

5 Has anyone -- has any member of the jury venire
6 ever worked around asbestos?

7 Yes, sir, your number?

8 JUROR NUMBER 57: Juror 57.

9 THE COURT: Yes, sir.

10 JUROR NUMBER 57: Between the ages of 18 to 28 I
11 worked in the insulation contracting and --

12 THE COURT: All right.

13 JUROR NUMBER 57: -- removal of asbestos.

14 THE COURT: All right. And would the fact that
15 you worked at the ages specified in insulation and removal
16 of insulation interfere with your ability to give a fair and
17 impartial verdict in this matter?

18 JUROR NUMBER 57: No, Your Honor.

19 THE COURT: All right.

20 Yes, sir, juror number?

21 JUROR NUMBER 192: 192.

22 THE COURT: 192.

23 JUROR NUMBER 192: Yeah, I worked installing
24 Internet and had to crawl through the attics with the
25 insulation.

1 THE COURT: All right.

2 And would the fact that you had the experience of
3 working around insulation, as you have described it,
4 interfere with your ability to give a fair and impartial
5 verdict in this matter?

6 JUROR NUMBER 192: No, ma'am.

7 THE COURT: Very good. You may be seated.

8 Yes, sir.

9 JUROR NUMBER 75: Juror 75.

10 THE COURT: Yes, sir.

11 JUROR NUMBER 75: Our test lab at our facility
12 where I work is lined with asbestos tile.

13 THE COURT: Yes, sir.

14 And would the fact that the facility in which you
15 work has asbestos tiles interfere with your ability to give
16 a fair and impartial verdict in this matter?

17 JUROR NUMBER 75: No, Your Honor.

18 THE COURT: Very good. You may be seated.

19 All right. There are a number of people who are
20 going to testify in this case and if you know any of them or
21 have any concern or difficulty, please stand. I'm going to
22 read these witnesses, and any of you who may have any
23 association with any of them, please stand.

24 Harley Neelands.

25 Dr. Arnold Brody.

1 John Maddox.

2 Jerry Crawford.

3 Patsy Giles.

4 Tessa Quinn.

5 Palmer Covil.

6 Jim Covil.

7 Don Buck.

8 Dwaine Waters.

9 Machen Carpenter.

10 Dr. John Crapo, MD.

11 Tony Watson, certified industrial hygienist.

12 And Robert Glenn, certified industrial hygienist.

13 Yes, sir?

14 MR. BOGER: One additional name.

15 May I approach?

16 THE COURT: Yes, sir. All right. This is not the
17 time to be doing this, though, Mr. Boger.

18 (Off the record).

19 (Back on the record).

20 (Whereupon, the lawyers approached the bench for
21 an off-the-record discussion).

22 THE COURT: Bruce Boyer. All right.

23 None stood.

24 And so I take it that -- I know the answer to
25 this, but I need to ask it anyway. Is any member of the

1 jury panel related by blood or marriage to any of these
2 witnesses?

3 (No response).

4 THE COURT: All right.

5 Do any of you know the lawyers involved in this
6 matter; Ms. Theile McVey?

7 Mr. Aaron Chapman.

8 Mr. Mark Buha.

9 Mr. Trey Branham.

10 Mr. Mark Wall.

11 And Mr. Tommy Boger.

12 If so, please stand.

13 (No response).

14 THE COURT: Very good.

15 Is there any member of the jury panel who has a
16 family member who has mesothelioma or any
17 asbestos-associated disease? If so, please stand.

18 (No response).

19 THE COURT: Any member of the jury panel who has
20 expressed or formed any opinion with regard to this case or
21 any aspects of this case? If so, please stand.

22 (No response).

23 THE COURT: Is there any member of the jury panel
24 who is not prepared to give all parties in this case a fair
25 trial based on the law and the evidence as presented in this

1 courtroom? If so, please stand.

2 (No response)

3 THE COURT: Have you or anyone in your immediate
4 family ever worked as an insulator, and I do -- the
5 gentleman who answered that question don't need to stand up
6 again. Boilermaker, rigger, millwright, machinist, pipe
7 fitter, valve technician, engineer, or work with boilers,
8 pumps, valves, gaskets, or packing. If so, please stand.
9 You or any member of your family.

10 All right. Y'all just stay right there and I'll
11 go and --

12 First, yes, sir.

13 JUROR NUMBER 40: Juror number 40. I'm an
14 electrical engineer.

15 THE COURT: Very good.

16 Would the fact that you're an electrical engineer
17 in any way interfere with your ability to give a fair and
18 impartial trial in this matter?

19 JUROR NUMBER 40: No, it will not.

20 THE COURT: Yes, sir.

21 JUROR NUMBER 217: 217.

22 THE COURT: 217.

23 JUROR NUMBER 217: I'm a maintenance supervisor at
24 Wofford College. I have been in that kind of field for the
25 last 20 years.

1 THE COURT: All right, sir.

2 And would the fact that you are a maintenance
3 supervisor at Wofford in any way interfere with your ability
4 to give a fair trial in this matter?

5 JUROR NUMBER 217: No, ma'am.

6 THE COURT: Very good.

7 Yes, sir.

8 JUROR NUMBER 192: 192.

9 THE COURT: 192.

10 JUROR NUMBER 192: Yes. I work for in a machine
11 shop for about 15 years.

12 THE COURT: All right, sir.

13 And would the fact that you work in a machine shop
14 for 15 or 16 years interfere with your ability to give a
15 fair and impartial trial in this matter?

16 JUROR NUMBER 192: No, ma'am.

17 THE COURT: All right. Thank you.

18 Yes, ma'am, in the back.

19 JUROR NUMBER 204: Juror 204.

20 THE COURT: Yes, ma'am.

21 JUROR NUMBER 204: I'm currently a tool maker, but
22 I have been a machinist before for several years.

23 THE COURT: All right, ma'am.

24 And would the fact that you are tool maker and
25 have been a machinist in the past in any way interfere with

1 your ability to give a fair and impartial trial in this
2 matter?

3 JUROR NUMBER 204: No, ma'am.

4 THE COURT: Yes, sir.

5 JUROR NUMBER 144: Juror 144.

6 THE COURT: Yes, sir.

7 JUROR NUMBER 144: I work for the city utilities
8 doing preventative maintenance. We deal with a lot of
9 valves and pumps.

10 THE COURT: Uh-huh.

11 And would the fact that as a city maintenance
12 worker, you are around valves and pumps, in any way
13 interfere with your ability to give a fair trial and
14 impartial trial in this matter?

15 JUROR NUMBER 144: No, ma'am.

16 THE COURT: All right, sir.

17 Yes, sir.

18 JUROR NUMBER 90: Juror number 90.

19 THE COURT: Yes, sir.

20 JUROR NUMBER 90: Work in the maintenance
21 department with valves, boilers, and all the above.

22 THE COURT: All right.

23 And would the fact that you work in the
24 maintenance department with valves and other related
25 equipment interfere with your ability to give a fair and

1 impartial trial in this matter?

2 JUROR NUMBER 90: No.

3 THE COURT: Very good.

4 All right. And, finally, this may be a little
5 repetitive, some questions Judge Hayes would have asked you
6 about jury service, but have any of you served on a jury?
7 If so, please stand.

8 Yes, sir. All right. Yes, sir.

9 JUROR NUMBER 18: 18.

10 THE COURT: When?

11 JUROR NUMBER 18: Probably 15 years ago.

12 THE COURT: All right. Civil or criminal?

13 JUROR NUMBER 18: Civil.

14 THE COURT: You, sir?

15 JUROR NUMBER 72: 72. About -- back in '91.

16 THE COURT: All right, sir.

17 Civil or criminal?

18 JUROR NUMBER 72: Civil.

19 THE COURT: You?

20 JUROR NUMBER 210: Probably -- I'm not sure

21 what --

22 THE COURT: Your number?

23 THE WITNESS: 10 years. 210.

24 THE COURT: And?

25 JUROR NUMBER 210: Civil.

1 THE COURT: Several years ago?

2 JUROR NUMBER 210: Probably 10, 15 years ago.

3 THE COURT: Civil or criminal, if you remember?

4 JUROR NUMBER 210: Civil.

5 THE COURT: Okay. You in the back, yes, sir.

6 JUROR NUMBER 75: 75.

7 THE COURT: Yes, sir.

8 JUROR NUMBER 75: Civil jury.

9 THE COURT: How long ago?

10 JUROR NUMBER 75: 2015.

11 THE COURT: All right. 2015.

12 Yes, ma'am.

13 JUROR NUMBER 283: 283. Civil, 10 years ago.

14 THE COURT: All right.

15 In back?

16 JUROR NUMBER 81: 81. It was a federal case, four
17 months ago.

18 THE COURT: Now called for this duty. God bless.

19 Yes, ma'am.

20 JUROR NUMBER 120: Juror 120. Civil, in the
21 1980's.

22 THE COURT: All right.

23 In the back there. Yes, ma'am.

24 JUROR NUMBER 204: 204, civil, last week.

25 THE COURT: Oh, my. In magistrate's court?

1 JUROR NUMBER 204: Yes, ma'am.

2 THE COURT: Uh-huh.

3 Yes, ma'am.

4 JUROR NUMBER 86: Juror number 86. It was in
5 2008. It was criminal.

6 THE COURT: All right.

7 And in back there?

8 JUROR NUMBER 285: Juror number 285. It was civil
9 and it was about 20 years ago.

10 THE COURT: Okay.

11 Up front here.

12 JUROR NUMBER 265: Juror 265, early eighties,
13 civil.

14 THE COURT: All right.

15 You, sir?

16 JUROR NUMBER 57: 57. Juror about 20 years ago.

17 THE COURT: All right, sir.

18 JUROR NUMBER 57: Civil.

19 THE COURT: Civil.

20 Yes, ma'am.

21 JUROR NUMBER 168: Juror 168. It was criminal and
22 it was over 20 years ago.

23 THE COURT: All right.

24 Now, I'm just going to ask all of you at one time,
25 all right, who answered affirmatively that you had

1 participated in jury service, either very recently, like our
2 two friends on this side of the aisle, or at more of a
3 distance, would your participation in a jury trial in any
4 way interfere with your ability to give a fair and impartial
5 trial in this matter? If so, please stand.

6 (No response).

7 THE COURT: Very good.

8 I have asked you about Celanese.

9 Has any member of your family ever worked around
10 asbestos-containing thermal insulation? If so, please
11 stand.

12 (No response)

13 THE COURT: Is there anyone who would not be able
14 to follow the rules of court and set sympathy aside when you
15 are evaluating a case and where the plaintiff was injured by
16 mesothelioma, contracted mesothelioma? If so, please stand.

17 (No response).

18 THE COURT: That completes my questions, ladies
19 and gentlemen.

20 Now, the clerk will generate a list for the
21 parties to use and they will select a jury.

22 MS. MCVEY: Your Honor, can we approach quickly?

23 THE COURT: You may.

24 (Whereupon, the lawyers approached the bench for
25 an off-the-record discussion)

1 THE COURT: Ladies and gentlemen, the parties may
2 need a few moments to examine the list and then decide so
3 that our picks of the jury will move very quickly, so what
4 I'm going to do is take a break now. It's ten minutes of
5 one and ask the venire to come back after that time and what
6 I would like you to do is come back at 2:15. We will then
7 select the jury. Those of you who are not selected may
8 mercifully go about your business and the others will listen
9 to opening statements. So I will see you back here at 2:15.

10 (Whereupon, the jury venire panel left the
11 courtroom)

12 (Off the record).

13 (Back on the record).

14 THE COURT: Let's talk about the length of opening
15 statements and who is going to give them.

16 Who is going to be speaking for the plaintiff?

17 MR. CHAPMAN: I am, Your Honor.

18 MS. MCVEY: Mr. Chapman.

19 THE COURT: All right, Mr. Chapman.

20 And who will be opening for --

21 MR. WALL: Me.

22 THE COURT: Mr. Wall.

23 What y'all want? I'll see what I will give.

24 MR. CHAPMAN: Your Honor, I think I can be done
25 and sitting down in less than 45 minutes.

1 THE COURT: Good. I will allow an hour for each,
2 just so you won't be stressed out. And if you want to
3 reserve anything, plaintiffs, you can do that, but it sounds
4 to me like we will move along rather rapidly.

5 MR. WALL: I'm probably 15 or 20 minutes.

6 THE COURT: That's fine.

7 Then y'all will be within my range of what I think
8 is not going to wear the jury out, so I'll just trust you to
9 do usual capable jobs.

10 MR. BRANHAM: Your Honor, after opening statements
11 we are going to have Dr. Brody here.

12 THE COURT: Yes.

13 MR. BRANHAM: The court is very familiar with Dr.
14 Brody.

15 THE COURT: I am.

16 MR. BRANHAM: Dr. Brody has a flight at eight
17 o'clock tonight.

18 THE COURT: Yes.

19 MR. BRANHAM: I expect that we can get him done in
20 two hours, which it sounds like we will have, but to the
21 extent that we need an extra thirty minutes, or so, to work
22 to get him on and off today, I would ask --

23 THE COURT: We are going to get -- no problems
24 there.

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

1 THE COURT: Yes, sir.

2 MR. CHAPMAN: If I have some time remaining
3 underneath my hour, which I think I will, can I reserve that
4 time to rebut anything that Mr. Wall --

5 MR. WALL: No, Your Honor.

6 MR. CHAPMAN: -- says?

7 MR. WALL: I object.

8 MR. CHAPMAN: I'm just trying to understand what
9 you are saying.

10 THE COURT: I generally allow plaintiff to reserve
11 a little time, since they got the burden of proof, but if
12 you object to it, let's just stick with each side giving
13 their opening and go on forward with it.

14 MR. CHAPMAN: Thank you, Your Honor.

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

17 MR. WALL: No, Your Honor.

18 MS. MCVEY: We just need strike sheets and that's
19 it.

20 THE COURT: Okay. She's got -- have I got the
21 strike sheets, Maribell?

22 THE CLERK: I'm doing that right now.

23 MS. MCVEY: And, Your Honor, can we leave the
24 courtroom open so that our tech guys can set up for opening
25 during lunch?

1 THE COURT: Certainly.

2 MS. MCVEY: Okay.

3 THE COURT: Y'all leave the courtroom open and let
4 their technical people set up.

5 And y'all are going to get strike sheets from
6 Maribell right now.

7 MS. MCVEY: And then we will be ready to strike as
8 soon as we get back.

9 THE COURT: Okay. Good. I'm going to depart from
10 you.

11 MS. MCVEY: Thank you.

12 (Whereupon, proceedings were recessed)

13 (Whereupon, proceedings were reconvened)

14 THE COURT: Bring us the jury.

15 Before the jury comes in, Mr. Wall, have you seen
16 the stipulation?

17 MR. WALL: Yes, Your Honor.

18 THE COURT: All right. I know that you don't like
19 it, but --

20 MR. WALL: I object to it, Your Honor. I think
21 it's too severe. That doesn't match the crime what the law
22 says. You should have done what you said you were thinking
23 about doing was saying that the jury could decide an
24 inference that he was exposed to insulation --

25 THE COURT: Well, what it was going to be was a

1 presumption based on the fault of the defendant, but do you
2 remember, I decided early on that I wasn't going to tell
3 them about badness on y'all's part, that other ruling is a
4 motion in limine I ruled on at the pretrial, so what I'm
5 going to do is charge it this way and you object to it and
6 you say it's tantamount to a directed verdict, etcetera,
7 etcetera, and your position is preserved.

8 MR. WALL: Thank you, Your Honor.

9 THE COURT: Yes, sir.

10 MR. WALL: I won't say another word based upon
11 your representation.

12 THE COURT: Absolutely. Absolutely.

13 And what this will be done, it won't be done now.
14 It will be done right before the lawyers open.

15 MS. MCVEY: Okay. That's what I wanted to just
16 clarify.

17 THE COURT: Yeah.

18 MS. MCVEY: Thank you, Your Honor.

19 (Off the record).

20 (Back on the record).

21 THE COURT: Now, one other thing I will just tell
22 y'all. I allow note taking and I have instructed the
23 clerk's office to make tablets available for the purpose of
24 note taking and I give them an instruction about that.
25 Those of you who have tried some other cases with me know

1 that I do it. I think it keeps them a little more focused
2 than they otherwise would be.

3 MS. MCVEY: Will we just make sure that it's a
4 clean note pad?

5 THE COURT: Yes.

6 Ms. McVey knows. We had one where I had to DQ a
7 juror right off the bat because they gave them -- in York I
8 tried one case there already and gave them the same
9 notebooks for the next jury and still had the old jury's
10 notes. This one fellow had spread red through all of it.

11 (Off the record).

12 (Back on the record).

13 (Whereupon, the jury venire panel was brought into
14 the courtroom).

15 THE COURT: You may be seated, counsel.

16 The jury is present and the lawyers will now
17 select from a strike sheet.

18 Let me explain to you, members of the jury, what
19 is going on with that.

20 A computerized spin of the wheel, so forth, not
21 like the old days when the blind person would reach into the
22 old jury box and pull out the names one by one, but the
23 modern equivalent of that is a computerized random selecting
24 of 29 names from which will be drawn 12 jurors and three
25 alternates with alternating strikes by the two sides. Those

1 names have been renumbered, so that when the number is
2 called out, it won't bear any relation to the number that
3 you have on your jury tag, so you won't know what's being
4 done, but when the number is -- the jury number is called
5 out, they will perform their strikes and then the clerk will
6 read out those who are to be seated as jurors and they will
7 be seated in the jury box.

8 The jury box is over here and you will be seated
9 there and one of the first things I would do is allow you
10 who have been selected to retire to your jury room. Those
11 who have not, hallelujah, you would be able to gather your
12 possessions and go, and then I'll have a few instructions
13 for you and then opening statements will begin. So that's
14 what we are doing right now.

15 All right. Madam Clerk.

16 THE CLERK: At this time I will ask the attorneys
17 to give me their strikes, with the plaintiff going first,
18 and then alternating with the defense, using the numbers to
19 the left of the name.

20 MS. MCVEY: Plaintiff strikes number 13.

21 MR. WALL: Defense strikes number 10.

22 MS. MCVEY: Plaintiff strikes number 15.

23 MR. WALL: Defense strikes number 3.

24 MS. MCVEY: Plaintiff strikes number 9.

25 MR. WALL: Defense strikes number 4.

1 MS. MCVEY: Plaintiff would strike number 8.

2 MR. WALL: Defendant strikes number 17.

3 THE CLERK: Now for the alternate.

4 MS. MCVEY: Just so I'm clear, we are going to
5 strike three at a time, the first three?

6 MR. WALL: Yes.

7 MS. MCVEY: Each side will strike, correct?

8 THE COURT: Each side has a strike, and you begin
9 with number 21, do you not, Madam Clerk?

10 THE CLERK: Yes.

11 THE COURT: Very good.

12 MS. MCVEY: Yes, ma'am.

13 Thank you, Your Honor.

14 Plaintiff will strike number 21.

15 MR. WALL: Defendant will strike number 22.

16 MS. MCVEY: Plaintiffs strike number 25.

17 MR. WALL: Defendant will strike number 24.

18 MS. MCVEY: Plaintiffs strike number 27.

19 MR. WALL: Defendants will strike number 29.

20 THE CLERK: Now I'll read them back out to you.

21 For the plaintiff I have number 8, number 9,
22 number 13, and number 15. And then the alternate is number
23 21, 25, and 27. Is that correct?

24 MS. MCVEY: Yes, ma'am.

25 THE COURT: Okay. For the defendant I have got

1 number 3, number 4, number 10, number 17. And then I have
2 got number 22, 24, and 29, is that correct?

3 MR. WALL: That's correct from the defense.

4 THE COURT: Okay. If you would just give me one
5 moment.

6 (Off the record).

7 (Back on the record)

8 THE CLERK: Ladies and gentlemen of the jury, at
9 this time I will be calling the name and juror numbers of
10 the jurors that have been selected for service in this
11 trial. When your name and number is called, please bring
12 all your belongings with you and have a seat in the jury
13 box.

14 Juror number 34, Sarah M. Burdick.

15 Juror number 92, Stacy A. Gillen.

16 Juror number 168, Kathleen M. Lynch.

17 Juror number 118, Michael S. Hayes.

18 Juror 100, Tammy R. Graham.

19 Your number 132, Zachary R. Hunter.

20 Juror number 202, Hannah N. Napoli.

21 Juror number 32, Christina S. Buckner.

22 Juror number 55, Anthony T. Cox.

23 Juror number 117, Johanna Harvey.

24 Juror number 232, Geneva D. Robinson.

25 Juror number 108, Sandra K. Grizzle.

1 This is for our alternates.

2 Juror number 62, Casey L. McKinney.

3 Juror number 244, Sarah L. Scott.

4 And juror number 279, Alicia D. Townsend.

5 Your Honor, your jury has been selected.

6 THE COURT: Thank you, ladies and gentlemen of the
7 jury, and I have looked very much forward to working with
8 you on this case. It's so important to both sides.

9 What we will do now is ask you to go to your jury
10 room. At that time please select one of the jurors as the
11 foreperson of the jury. I let y'all do that rather than
12 have me just arbitrarily pick someone, so you tell me who
13 you would like to have serve as the foreperson of the jury,
14 and that person will be seated right here where the
15 gentleman in the blue shirt is seated.

16 I am I right, or up one?

17 THE BAILIFF: No, that's fine.

18 THE COURT: Is he -- he's a regular juror, not an
19 alternate, right?

20 THE BAILIFF: Regular juror.

21 THE COURT: Right.

22 The end seat is where the foreperson of the jury
23 sits. It's easier for that foreperson to pass me a message
24 if it needs to be passed and so forth. Of course, if it can
25 come from any one of you.

1 You will find that when you go to your jury room
2 that you have some tablets. I allow jurors to take notes.

3 And let me just give you a little instruction
4 about taking notes. I let you do it because if you are like
5 I am, you hear all this technical testimony and, frankly,
6 you will be deers in the headlights to begin with hearing
7 all these unusual terminology, and I feel the same way and I
8 have heard these cases before, but I find I focus a little
9 bit better if I can just scribble some little notes to
10 myself.

11 What you need to know about notes is that they are
12 just for your personal use. They don't overcome another's
13 independent recollection and they shouldn't be used in place
14 of your own memory about things, but they are just a little
15 aid to help you kind of keep up with what's going on.

16 You don't have to take notes. It's nothing
17 mandatory about it. It's simply there if that's what you
18 want to use.

19 Alternates, you are an extremely important part of
20 this process and I don't just say that as something
21 deliberate. It's said to every jury. I select so many
22 jurors because these types of tort cases like this one are
23 complicated and sometimes things can come up, even if the
24 case doesn't last but a week, and certainly it could last
25 longer than that, and I have had jurors that, for one reason

1 or another, had to be released because of something that
2 came up in their situation or because of something that they
3 figure it out they knew about the case, and it would be a
4 shame to have all the time and effort put into this case and
5 then not have 12 jurors we need and must have to decide the
6 case. So you are just as important, alternates, as are the
7 regular jurors and you will be right in there with the
8 regular jurors, and only when the case actually goes to the
9 jury verdict will you not be in there with them, but I
10 generally keep my alternates until the case -- until a
11 verdict is reached. And I do that because, even when you
12 are deliberating, something may occur and, therefore, an
13 alternate might be needed and you would have to kind of redo
14 some of the discussions that you have had. But, in any
15 event, that's how we operate.

16 I try to start court at nine, if I can, and I try
17 to get you out of here no later than 5:30 every day.
18 Sometimes it can be shorter than that, depending on how the
19 testimony goes. A lot of times it will be a little before
20 five.

21 I take two breaks, one in the morning and one
22 mid-afternoon, and I take a lunch break. So there is plenty
23 of opportunity. And, needless to say, if you need a break,
24 all you have got to do is raise your hand, send a note to
25 your foreperson and I will take a break. Your comfort is

1 paramount and your ability to concentrate is extremely
2 important and I want to work with you to be sure that you
3 have what you need to render a fair and impartial verdict in
4 this matter.

5 So if you would go to your jury room, select your
6 foreperson, and we will be ready to start probably in about
7 five minutes, or so. It generally takes you a while to get
8 in there, get set and get your materials and get out, so it
9 will be five or ten minutes, but I will call for you when
10 your bailiffs say that you are ready to proceed. So
11 everybody be refreshed, that's important, and then we will
12 call you out and the lawyers will present their opening
13 statements to you, jurors.

14 Thank you. You may go to your jury room.

15 (The following takes place outside the presence of
16 the jury panel)

17 THE COURT: All right. Be at ease and we will
18 have the bailiff advise us when the jury is ready to
19 proceed, but I would like to proceed no later than ten of
20 the hour.

21 MR. WALL: You let the panel go?

22 THE COURT: What's that?

23 MR. WALL: You let the rest of the panel go?

24 THE COURT: Yes. Y'all sit down so I can talk to
25 this group of lucky people.

1 Jury service is so important for this wonderful
2 democracy of ours and there really isn't a country in the
3 world that does it as the United States does it. It's a
4 precious gift that's been given to us by the founders and
5 the Constitution and all the old traditions from Magna Carta
6 days forward, but it can only work because of you. And you
7 come, not because you got to some specialized training,
8 because you are real decent people of the community who give
9 up service so that we can all have a system of justice that
10 works for everybody, no matter their station in life, no
11 matter their position in life. So I thank you so much and I
12 know that you are glad, that having been called for a jury,
13 that hopefully you won't have to come back any time soon.
14 Thank you very much and you are dismissed.

15 (Whereupon, the jury venire panel left the
16 courtroom)

17 (Whereupon, proceedings were recessed)

18 (Whereupon, proceedings were reconvened)

19 THE COURT: Bring the jury in.

20 (The following takes place in the presence of the
21 jury panel)

22 THE COURT: I see that you have selected a
23 foreperson and your name is?

24 JURY FOREPERSON: Sarah.

25 THE COURT: Sarah Scott?

1 JURY FOREPERSON: Burdick.

2 THE COURT: Burdick.

3 Yes, I got you, Sarah.

4 All right. Ms. Burdick is your foreperson.

5 Lawyers, you may be seated, and let me give you
6 your first what would be many instructions, if I can find
7 it.

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

13 And with that, plaintiff, you may open.

14 MR. CHAPMAN: Thank you, Your Honor.

15 I'll get set up here.

16 THE COURT: I'm sorry, ladies and gentlemen of the
17 jury, before it gets dark, we have to put the light back up
18 again, friend.

19 Madam Clerk, you may give the jurors their oath.

20 THE CLERK: Ladies and gentlemen --

21 THE COURT: Will you please stand, members of the
22 jury?

23 THE CLERK: If you will, raise your right hand.

24 Do you swear or affirm in the case about to be
25 tried to truly try the issues joined in the case and a true

1 verdict render, according to the law and evidence, so help
2 you God?

3 THE JURY PANEL: (Collectively said I do).

4 THE CLERK: Thank you.

5 THE COURT: Thank you. You may be seated.

6 MR. CHAPMAN: May I proceed?

7 THE COURT: Mr. Chapman.

8 Mr. Chapman, I think they can see that without
9 getting completely dark in here.

10 MR. CHAPMAN: I think so. I think so.

11 Can everybody see that okay?

12 Good afternoon. I am very excited to get to
13 finally talk to y'all. I hope that you are excited to be
14 here. I know it's Monday and you are giving up your time to
15 do it. I know that can be especially tough this time of the
16 year when kids are out of stool and when people are trying
17 to take vacations and things like that, so before I really
18 get into anything I want to say thank you. Thank you for
19 your time. The judge said a second ago that one of the best
20 things about the United States is our jury system and that
21 doesn't work without you, so thank you for being here.
22 Thank you for your time and for your attention.

23 There is going to be a lot of evidence in this
24 case, a lot of testimony. And as we really dig into the
25 meat of it, I want you to remember three things; that they

1 knew it, that they did it, and that they hid it.

2 Now, we kind of got introduced before. My name is
3 Aaron Chapman and I, along with Theile McVey and Mr. Mark
4 Buha, we are proud to represent a man named Jerry Crawford.

5 This is Jerry.

6 Unfortunately Mr. Crawford is not going to be able
7 to be in the courtroom with us for this trial. Mr. Crawford
8 has cancer. The cancer that he has is called mesothelioma
9 and because of that he's just too sick to be here, but we
10 have got his family here.

11 And could y'all please stand up? We have got
12 Patty and we have got Tessa. These are his daughters.

13 His daughters, along with us, we are here to stand
14 for him when he can't. We are here to fight against the
15 injustice which he has endured, to fight for his pain, and
16 to fight for his suffering. Okay.

17 And you are going to hear that the defendant in
18 this case, Covil. Covil Insulation sold products, like
19 insulation and gaskets, from the 1940's for decades. Okay.
20 You are going to hear that they did this throughout
21 Spartanburg County, throughout the State of South Carolina,
22 and throughout the entire southeastern United States.

23 You are going to hear that what they supplied was
24 asbestos-containing insulation. They did this at a time
25 when they knew it killed people and they failed to provide

1 any sort of warnings.

2 So what I'm really trying to say, ladies and
3 gentlemen, is that they knew it, they did it, and they hid
4 it.

5 Now, you have already received one instruction
6 from the judge, and I wrote it down so I wouldn't mess it
7 up. The judge told you already that Jerry Crawford was
8 exposed, was exposed to asbestos insulation supplied by and
9 installed by Covil at Celanese between 1970 and 1974.
10 That's already been instructed. On top of that, ladies and
11 gentlemen, you are going to see that the evidence, that the
12 testimony and that the documents show this to be true.
13 Okay.

14 So I want to get into what some of the undisputed
15 facts are in this case.

16 It is undisputed that Mr. Crawford worked at
17 Celanese Spartanburg, just down the road, from 1970 to 1974.
18 When he did this work, he was working around
19 asbestos-containing insulation.

20 Jerry Crawford has cancer. No one is going to
21 come here and tell you he don't.

22 Covil sold asbestos-containing products,
23 specifically pipe insulation, and I'm going to get into what
24 that means in just a second, but that's undisputed. That's
25 what they sold. That was their business.

1 And not a single soul is going to stand up here
2 and tell you Mr. Crawford did anything wrong.

3 Now, when I say pipe insulation, this is what I'm
4 talking about. This is the product at issue in this case.

5 This was the first asbestos-containing products,
6 ladies and gentlemen, that was ever studied and understood
7 to be dangerous, and it was understood to be deadly. It is
8 effectively banned in the United States today.

9 In fact, ladies and gentlemen, you will hear that
10 if you see asbestos-containing insulation, or even
11 insulation that you believe to be asbestos, may be asbestos,
12 you have to take all sorts of precautions. You have to hire
13 professional companies. They have got to come in and use
14 special filters, wear special suits wear, use special
15 sheeting. It's a known hazard.

16 And you are going to see, ladies and gentlemen,
17 that from the 1940's, until -- for decades Covil chose to
18 sell this. They made the choice.

19 We all got to take responsibility for the choices
20 that we make; me, Mr. Crawford, and Covil. It was about
21 making Covil take responsibility for their choice.

22 All right. So let's get into the disputed facts,
23 and what it all boils down there are really two of them. We
24 disagree, we fundamentally disagree, over the value of a
25 human life and that's going to be the toughest question --

1 MR. WALL: Objection, Your Honor. It's not the
2 issue of value of human life and I object.

3 THE COURT: Overruled.

4 MR. CHAPMAN: So, again, it boils down to the
5 first one is we fundamentally disagree over the value of a
6 human life, and that is going to be the toughest question
7 that you guys are going to be asked to answer. Okay.

8 And the second question is what amount is Covil at
9 fault here.

10 Now, there is this concept of total loss and I'm
11 not going to spend a whole lot of time on it, but at the end
12 of this case I'm going to ask you to find in our favor, all
13 right, based on all the evidence that you are going to see.
14 And if you find in our favor, I'm going to ask you for a
15 number, okay?

16 If you decide to find in our favor and if you
17 decide to give us a number, I want you to know right now
18 that the number that you give us will be based on the total
19 loss suffered by Mr. And Mrs. Crawford, the total value of
20 that.

21 And after you give that number and you serve, the
22 judge is going to decide what position of that Covil may
23 have to pay, and you are not going to know what that number
24 is and that would drive me crazy, and I'm sorry, but that's
25 the way it works here. So I want you to understand that if

1 you give us a number, that represents the total loss
2 suffered by Mr. And Mrs. Crawford.

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

6 I want to talk to you about mesothelioma, what it
7 actually is.

8 I want to talk to you about asbestos. You may
9 have heard about it, but what is asbestos actually.

10 And, finally, talk to you about Covil, what they
11 did and what they didn't do.

12 Mesothelioma.

13 Now, we have all heard those commercials on TV,
14 I'm sure most of us have, about mesothelioma. It almost has
15 become kind of a joke, right? But, ladies and gentlemen,
16 for people like Jerry that actually have mesothelioma, I can
17 assure it's anything but a joke.

18 You are going to hear mesothelioma is cancer. And
19 you are going to hear throughout the testimony in this case
20 that around all of our major organs is this lining, okay?
21 It's like a saran wrap type lining. In fact, if you look up
22 here at the picture at the healthy human lung, it's kind of
23 shiny. That's because there is this lining around it. And
24 you are going to see that within that lining are these
25 cells. They are called mesothelial cells. Mesothelioma is

1 the cancer of the lining around the lung. Not the lung
2 itself, but the lining around it. And, in fact, we are
3 going to bring an expert molecular biologist to come and
4 testify. His name is Dr. Arnold Brody, and Dr. Brody
5 probably knows more about this stuff than anybody else on
6 the planet and he's going to explain it all to you and how
7 it works, but I want you to understand basically what
8 mesothelioma is.

9 Like I said, mesothelioma is a cancer.

10 I want to be clear about this, ladies and
11 gentlemen. There is no cure for mesothelioma. We are going
12 to hear mesothelioma is fatal. Things like chemotherapy and
13 radiation can sometimes slow it down, but that's all it
14 does.

15 There is two things up here I want to spend just a
16 few minutes with you about.

17 The first is this concept called latency, okay,
18 and it is well established, and you are going to hear that
19 it's well established in the medical and scientific
20 literature going back decades that there is a gap. There is
21 a period of time between when a person is exposed to
22 asbestos and when that person gets sick, when that person
23 gets mesothelioma. It's a well known time period, and that
24 time period is anywhere from 10 to 40, or more, years.

25 So you are going to hear about Mr. Crawford's work

1 in the 1970s, and his work around asbestos-containing
2 insulation, and that's going to make a lot of sense, because
3 that's right in that known time period of latency.

4 The second is individual susceptibility. That
5 means basically what it sounds. Different people react
6 differently to asbestos.

7 Now, these are extreme examples, but it's possible
8 someone walks by airborne asbestos, gets sick years later.
9 It's also possible someone works with this stuff their
10 entire life and doesn't get sick. Everybody reacts
11 differently to it.

12 What's clear is that mesothelioma is only caused
13 by exposure to asbestos.

14 And this link between mesothelioma and asbestos is
15 so clear that it's called a signal tumor. What that means
16 is when that a doctor diagnosis a patient with mesothelioma,
17 or suspects that a patient might have mesothelioma, the
18 first question they ask is "where were you exposed to
19 asbestos?"

20 Okay. So the first question that they ask is
21 "where were you exposed to asbestos," and that's because of
22 this casual link, this known link in the scientific and
23 medical literature between asbestos exposure and
24 mesothelioma. Okay. That's mesothelioma.

25 Let me tell you about asbestos. You may have

1 actually heard about asbestos. You may know that it's
2 dangerous, but what is it actually? If you are like me
3 before I started doing this kind of work, I had no idea, so
4 asbestos is a known hazard. It has been studied for more
5 than a 100 years. You are going to hear that the first
6 articles talking about asbestos, the hazards of asbestos and
7 asbestos diseases go all the way back to 1898.

8 You are going to hear that Covil Corporation
9 started using asbestos-containing products, 1948.

10 Asbestos is a mineral. Okay. It is mined from
11 the ground, and has been for a long period of time. It is
12 dangerous and there is no known safe level. I'm going to
13 say that again. There is no known safe level of exposure to
14 asbestos.

15 I don't know what the defendants are going to say,
16 right, but I think they may come up here and tell you that
17 if Mr. Crawford was exposed, which we know he was, then he
18 was exposed at some low level that it couldn't have caused
19 his disease.

20 Now, that's wrong for a lot of reasons, but
21 primarily because there is no known safe level and because
22 the evidence is going to show you that he was exposed to
23 huge levels of asbestos in this case. Okay.

24 So as far as asbestos is concerned, we have three
25 main types. All right? The first is called chrysotile, or

1 sometimes it's called white asbestos. There is something
2 called amosite. That's brown asbestos. And then there is
3 also something called crocidolite, and that's blue asbestos.

4 I want to be clear what we are talking about in
5 this case is primarily amosite, brown asbestos. All three
6 are dangerous. All three cause mesothelioma. All three are
7 a known hazard.

8 This is so hazardous, in fact, ladies and
9 gentlemen --

10 Well, before I get -- before I get there, asbestos
11 is made up of very strong fibers. That's what it is, and
12 these fibers work together. It's used primarily in heat and
13 steam applications because they were so good at insulation.
14 It's virtually fireproof and it's really, really hard to
15 destroy. They were using products, thousands of products,
16 for years and they did a lot of good for the products that
17 they were in. They worked, but it also happens to be one of
18 the most deadly substances known to man.

19 In fact, ladies and gentlemen, you are going to
20 hear that asbestos is responsible for one out of every three
21 occupational cancer deaths. One out of every three.

22 There is one more concept I want to kind of get to
23 and that's dose response. Mesothelioma is known as a dose
24 response disease. What that means is that the more asbestos
25 that you're exposed to, the more likely you are to get

1 mesothelioma. That's what that means.

2 What this doesn't mean is that someone with a low
3 dose of exposure to asbestos won't get sick. And what this
4 doesn't mean is that someone with a high dose will definitely
5 get sick, but there is a correlation, and this is known in
6 studies between the amount of exposure and likelihood of
7 getting sick.

8 So I keep talking about exposure. How does
9 exposure to asbestos actually happen? And you are going to
10 hear, ladies and gentlemen, that you are exposed to asbestos
11 in a hazardous way when you breathe it in. I think Dr. Brody
12 is going to tell you about that. You breathe in the fibers
13 and they get to the lungs and they get to your mesothelial
14 cells.

15 When these fibers get airborne, you are going
16 to -- it's -- let's talk about pipe insulation specifically,
17 because that's what Mr. Crawford worked around. With pipe
18 insulation, when you rip off, when you cut, when you install
19 pipe insulation that contains these asbestos fibers, these
20 fibers become airborne. They get kicked into the air. And
21 you are going to hear that once they get put into the air,
22 they stay in what's known as your breathing zone. Literally
23 the zone around you in which you breathe air. They stay
24 there for hours, and these tiny fibers float there. And
25 when they eventually fall to the floor, you are going to

1 hear that walking over it, or sweeping up, and you are going
2 to hear Mr. Crawford did a lot of sweeping up after
3 insulation. When do you that, it kicks them back up into
4 the air and they stay there for hours. And so your exposure
5 period, ladies and gentlemen, you are going to hear is long
6 after when the work actually occurred.

7 And here is what makes asbestos fibers so
8 dangerous. They are microscopic. You can't smell them.
9 You can't feel them. You can't touch them. You can't taste
10 them. With other potential hazards, if you touch a
11 poisonous plant, you get a rash. There is reaction. If you
12 cut an onion, you cry. There is a reaction. If you work
13 with something like ammonia, there is a smell. There is a
14 reaction. If you are working around asbestos, it doesn't
15 make you sneeze. It doesn't make you cough. You could be
16 working around and breathing literally millions of fibers
17 and never know it, never see it.

18 There are three primary diseases in which asbestos
19 causes. I want to touch on them briefly.

20 The first is asbestosis; literally a disease named
21 after asbestos. There is lung cancer as we think of it, and
22 then there is mesothelioma, which we have already talked
23 about.

24 So first asbestosis. It was known by at least
25 1930 that asbestos can cause the disease asbestosis.

1 Asbestosis is where you breath in the fibers. The fibers
2 reach your lungs and literally cause scar tissue on your
3 lungs. That scar tissue doesn't allow you to breath in. It
4 doesn't move with your lungs. So a person with asbestosis
5 can literally suffocate to death because they can't breath
6 because of that scar tissue. This was known by the 1930's.

7 There was a known link in science and industry
8 that asbestos can cause cancer in the 1950's; and
9 importantly 1960's, mesothelioma is known and understood.
10 It was understood by science, understood by medicine,
11 understood by industry, and you are going to hear, ladies
12 and gentlemen, it was understood by Covil that asbestos can
13 cause disease; that asbestos can kill. Literally hundreds
14 of articles about this by this time.

15 Let's talk about Covil, their time line, okay?
16 Covil was founded --

17 Before we get there, like I said, asbestos is a
18 known disease -- a known hazard that cause disease. People
19 knew it could kill you by 1930. All right.

20 1948, 18 years after that literature, 18 years
21 after science and industry knew asbestos could kill you, a
22 man named Palmer Covil found an insulation company selling
23 asbestos-containing products.

24 1967, and this is an important year for a lot of
25 reasons. 1967, Palmer Covil flies up to New York City from

1 Greenville, South Carolina, attends a conference given by a
2 man name Irving Selikoff. Irving Selikoff is important,
3 because you are going to hear he is a pioneer in
4 understanding asbestos and asbestos-related diseases. He
5 wrote some of the most important papers about this topic.
6 And you are going to hear, ladies and gentlemen, that the
7 papers that he wrote and the products that he first studied
8 were pipe insulation, exposure to people working on pipe
9 insulation, the very product at issue in this case.

10 So Mr. Covil goes up there and he goes to a talk.
11 He sees a memo by Irving Selikoff, 1967 learns this, learns
12 asbestos can kill.

13 In that same time frame, 1966, 1967, Mr. Covil
14 goes back down to South Carolina where the Celanese
15 Spartanburg facility is being built and it's being supplied
16 by Covil asbestos-containing insulation. What does Mr.
17 Covil do when he learns about these hazards from Mr.
18 Selikoff in 1967? Does he go back and say "whoa, whoa,
19 whoa, we got to stop putting this in. We got to stop
20 selling this." Nope, he keeps selling it. He keeps selling
21 it.

22 You are going to hear, ladies and gentlemen, 1970,
23 1974, that's when Jerry Crawford was there. That's when he
24 was exposed.

25 1984. Palmer Covil, founder of Covil, passes away

1 from mesothelioma, the very cancer that Jerry Crawford has,
2 the very cancer that is caused by exposure to asbestos.
3 They did it.

4 You are going to hear that Covil supplied
5 asbestos-containing insulation for the original construction
6 of Spartanburg; that they supplied asbestos-containing
7 insulation for continued construction while Mr. Crawford was
8 there; that they failed to warn a soul about the hazards of
9 asbestos in their product; that they failed to warn that
10 asbestos can kill; they failed to tell anybody that asbestos
11 was even in their product. And you understand here is the
12 man. You are going to hear it from their own employees.

13 Now, I have talked to you a little bit about pipe
14 insulation. Let's talk about it in the context of this
15 case. Covil supplied this asbestos-containing pipe
16 insulation to Celanese. Literally, literally miles of it.
17 Miles of asbestos-containing pipe insulation, the very
18 facility where Jerry Crawford was working.

19 You are going to hear that this is dusty to cut,
20 dusty to put on, dusty to take off. You are going to hear,
21 ladies and gentlemen, that if you are seeing dust from
22 asbestos-containing pipe insulation, that if you can
23 physically see them, your exposure level to those asbestos
24 fibers are through the roof.

25 You are going to hear that Jerry Crawford was

1 physically there when they were being worked on.

2 Now, I know he can't be here, but we took his
3 deposition and we are going to be able to show that to you
4 and he is going to tell you that he saw the dust. He swept
5 up the dust after that and that's where his exposure is
6 going to come from.

7 And, importantly, ladies and gentlemen, you are
8 going to hear that the type of asbestos being used was
9 primarily amosite insulation. That's the brown type of
10 asbestos.

11 So they had this. They did it. They knew about
12 it. What did they do? Nothing. The evidence is going to
13 be overwhelming, ladies and gentlemen. No verbal warnings,
14 no written warnings, nothing on the insulations. They
15 didn't tell anything to the Celanese employees. No
16 communication. Nothing that says asbestos can cause cancer.
17 Nothing that says that it's hazardous. Nothing that says
18 it's deadly. Never told anybody that was actually working
19 on or near their product.

20 I want to talk about responsibility for a second.
21 I'm going to be the first one to tell you we don't believe
22 Covil is the only one responsible, all right? There was the
23 plant. I think they bear some responsibility. There was
24 the general contractor. I think they bear some
25 responsibility, but I'm going to take a second.

1 Chase, if we could switch to the elmo, please.

2 I'm going to show you, ladies and gentlemen, why I
3 think Covil bears the most responsibility here.

4 Are we up? Good.

5 Okay. So in this particular case we have a
6 supplier. See that? Good. That's Covil.

7 We have an employer. That's Celanese, if I can
8 spell.

9 And then we have the employee. That's Mr.
10 Crawford.

11 If we are dealing, ladies and gentlemen, with a
12 known hazard, like asbestos, then you are going to hear it's
13 up to the supplier to warn the employer. Then once the
14 employer has been warned, it's up to them to control the
15 employee. And once the employee has been controlled through
16 policies, or whatever it is, you better follow it, right?
17 If you know about this and you don't do anything about it,
18 that's on you. But if Covil doesn't warn, then the employer
19 cannot effectively control. And if the employer cannot
20 effectively control, Mr. Crawford can't follow it. This is
21 particularly important when the hazard is not obvious. For
22 all the reasons we just talked about, asbestos is not an
23 obvious hazard, and this is particularly important when the
24 consequences are the most severe. This is particularly
25 important when the consequences are the most severe; when

1 death is on the line.

2 Switch it back. Thank you.

3 Not an obvious hazard.

4 Any sort of industrial site you are going to have
5 hazards. You are going to have obvious hazards; sharp
6 edges, tripping hazard, something you can see. Common sense
7 can tell you to watch out for that. Common sense can't tell
8 you to watch out for asbestos, unless you are warned.

9 Information -- I'm repeating this because it's so
10 important. Information is the most important when the
11 consequences are the most severe.

12 Why didn't they warn? I had a chance -- just like
13 we deposed Mr. Crawford, I had a chance to go depose Covil
14 in this case. I asked them that question, why didn't you
15 warn? Their answer was because they didn't think they
16 legally had to. That's their answer in this case.

17 And so I followed up on that and I said, okay,
18 even if you didn't think had you a legal obligation --

19 MR. WALL: Your Honor, that's arguing now.
20 Objection.

21 THE COURT: Overruled.

22 MR. CHAPMAN: Thank you, Your Honor.

23 I told them even though you don't think you have a
24 legal obligation, you are going to hear this, I asked them
25 what about ethically, morally, don't you have an obligation

1 to warn?

2 Covil's response was that it was a business
3 decision. That's what they said. That's what you are going
4 to hear.

5 Now, this next part, ladies and gentlemen, you are
6 going to be hearing as a jury for the first time what it
7 took us almost a half a year to figure out, and there is
8 three primary subjects to this.

9 First is Covil's documents. Okay. One of the
10 things we did is we asked them send me your invoices, right.
11 Give me your sales records. Let me see if you supplied to
12 Celanese.

13 And what they told me was that we had a fire in
14 our warehouse in 1973, and almost everything before that was
15 destroyed. Sorry, we got no documents.

16 So I did some digging and what we found was an old
17 Covil employee. His deposition about ten years ago, maybe
18 more, where he said "yeah, there was a fire. Documents
19 didn't get destroyed. Documents weren't involved. They did
20 not burn up." And he says they are gone, but because Covil
21 destroyed them. At the end of this case the judge is going
22 to tell you legally what that means to you, but factually
23 that's what the evidence is going to show.

24 Now, at this same time when Covil said that a fire
25 destroyed their documents, they claim they went asbestos

1 free. So all the documents that they have show
2 asbestos-free insulation. It turns out this claim wasn't
3 true either and you are going to hear that. You are going
4 to hear that there are documents that show
5 asbestos-containing insulation being supplied to facilities
6 by Covil after 1973; literally miles of it, after 1973.

7 Last thing on that list, the boxes. You are going
8 to see the deposition by video of a man named Dwaine Waters.
9 Mr. Waters worked at Covil for a bit of time and he's going
10 to tell you, you are going to hear this from his mouth, that
11 Covil took asbestos-containing insulation and put it into
12 boxes labeled asbestos free and then they shipped that out.
13 You are going to have to decide what to do about a company
14 like that, but that's what the evidence is going to show,
15 ladies and gentlemen.

16 At the heart of this, this is a negligence case,
17 okay, not so different from when a texting driver hits
18 another driver, except instead of the texting driver we are
19 dealing with a corporation's actions.

20 The evidence is going to show that asbestos --
21 knew asbestos -- excuse me, Covil knew asbestos can kill,
22 they used it anyway, and they failed to warn.

23 The evidence is going to show they supplied,
24 knowingly supplied, a defective product, and they hid that
25 fact from people like Jerry Crawford.

1 They knew it, they did it, and they hid it.

2 What's the result?

3 You are going to see, ladies and gentlemen, the
4 result is Mr. Crawford's cancer, Mr. Crawford's pain, Mr.
5 Crawford's suffering, the suffering of his family. And as
6 sorry as I am to say, eventually Mr. Crawford's death. This
7 didn't have to happen. Tragedies happen to us every day.
8 Family members gets sick and die. Those are tragic. How is
9 Mr. Crawford any different? This is different because this
10 didn't have to happen. It should not have happened.

11 Covil's actions, what they did, were willful,
12 wanton and, frankly, reckless. And throughout this case,
13 ladies and gentlemen, the evidence is going to
14 overwhelmingly show and overwhelmingly support --

15 MR. WALL: Again, Your Honor, he's arguing.
16 Objection.

17 THE COURT: Overruled.

18 MR. CHAPMAN: Thank you, Your Honor.

19 The evidence, ladies and gentlemen, is
20 overwhelmingly going to support and show that Covil knew it.
21 They knew that it was hazardous. They did it and they
22 supplied it anyway and then they hid that fact from people
23 like Jerry.

24 Thank you so much for your time and for your
25 attention.

1 THE COURT: Thank you, Mr. Chapman.

2 MR. CHAPMAN: Yes, Your Honor. Thank you.

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

5 Mr. Wall.

6 MR. WALL: May it please the court.

7 Ladies and gentlemen, I'm Mark Wall. I'm with the
8 law firm of Wall Templeton, and here with me today is Tommy
9 Boger, a lawyer in our office and we represent Covil.

10 Covil is a defunct out-of-business corporation
11 with no employees, no business, and no owner, and it's been
12 out of business since 1991.

13 Covil started in 1948, in Greenville, South
14 Carolina, by a man named Palmer Covil, who is deceased.

15 Covil was, when in business, an industrial
16 insulating contractor and also distributed industrial
17 materials, but it was not a manufacturer. It did not
18 manufacture the pipe covering that we are hearing about and
19 talking about. It bought it from manufacturers.

20 You will find out that Daniel Construction Company
21 bought its asbestos, not from Covil, but from manufacturers.

22 Covil, like all the industrial insulators, did, in
23 fact, sell asbestos materials, and in the late seventies it
24 went, like everyone else did, to asbestos-free asbestos, or
25 materials.

1 In May of 1973 Covil had a fire at the plant and
2 it destroyed most, not all, most, not all, of the sales
3 records. We have some sales records. We have some
4 corporate files. We have some documents that show doing
5 business with different companies at different times, but we
6 have almost no sales records. We have records from some of
7 the sixties, but basically everything was from '74, up.

8 These documents that were not destroyed and that
9 were accumulated after that, there were about 25,000 pages
10 of these documents. That does not include some old
11 employees files which were not burned.

12 Also which was not burned was some sales
13 records -- excuse me, some business records of cash deposits
14 and other things that were actually in the safe. The sales
15 records were not in the safe. They were in the warehouse
16 that burned down. You may get a chance to see a picture of
17 the fire. I got it from the Greenville News. The whole
18 place burned down bad.

19 In order to find out what Covil did, we had to
20 hire someone to read all their documents, read all their
21 depositions, and try and consider so that he could testify
22 about what Covil did in the seventies and before, because
23 there are no documents to establish what they did.

24 As I said, Mr. Covil is deceased. His son Jimmy
25 Covil never was in the industrial side and was not -- is not

1 interested in dealing with the company, because it's been
2 out of business since 1991.

3 The person that we hired is a person you will hear
4 by the name of Bob Glenn and he will tell you what he was
5 able to glean from looking at the documents, from reading
6 Mr. Covil's deposition, and reading his son's deposition,
7 and a couple of other depositions at Covil.

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

10 Mr. Glenn will tell you that he reviewed the
11 records of Covil that were not destroyed and he could not
12 find any sales of any materials to Celanese. He could not
13 find any workers who worked at Celanese installing
14 materials. He found no records from the '70 to '74 period.

15 Now, to be sure, there are records that we did
16 work with Celanese at later dates, but not the period of '70
17 to '74.

18 You will also hear from a representative of
19 Celanese who will tell you that he has reviewed all their
20 records and he has found no records of any sales of asbestos
21 products by Covil to Celanese.

22 And you will hear later that the law of the
23 country of South Carolina is the plant owner is responsible
24 for the safety of all their workers in the plant.

25 You will also hear from a representative of Daniel

1 Construction Company, which is now Fluor Daniel. It's a
2 very big national contractor, originally started in
3 Greenville, and they will tell you that they, Daniel, built
4 the Celanese plant in the 1960's.

5 They will also tell you that Daniel did all the
6 maintenance at the plant from the sixties and the seventies.

7 They will also tell you that Daniel did all the
8 improvements and changes at the plant in 1970 to 1974.

9 And he will tell you as he reviewed all the
10 construction files held by Daniel, he viewed them all, and
11 he found no reference to any products sold to Daniel by
12 Covil.

13 He will tell you that Daniel bought their products
14 from the manufacturer, directly from the manufacturer, not
15 from Covil.

16 He will tell you that in this time period, by 1973
17 Daniel had a program that they would not use
18 asbestos-containing insulation in pipe covering, starting in
19 1973, and he says there was none there.

20 A Mr. Buck, who is the Daniel representative,
21 looked through all these 40 boxes and the only reference he
22 could find to Covil was that at one point Covil had three
23 employees on the job site putting fireproofing material on
24 structural steel. That's all. That's all Covil did.

25 He will also tell you that Daniel bought all the

1 materials from the manufacturers and were asbestos free in
2 1973.

3 Lastly, you will hear some testimony about the
4 fact that Mr. Crawford also changed asbestos brakes for
5 years and years on his own car and with a friend and was
6 exposed to asbestos brakes while he was working on those.

7 After you hear all this evidence, and if you
8 believe it at the end of the case, I will ask you to return
9 a verdict for Covil, a verdict for the defendant.

10 Thank you very much.

11 THE COURT: Thank you, Mr. Wall.

12 Ms. McVey, call your first witness.

13 MS. MCVEY: Yes, Your Honor.

14 We call Dr. Arnold Brody.

15 THE COURT: Come around, Dr. Brody, for the oath.

16 DR. ARNOLD BRODY, having been first duly sworn,
17 testified as follows:

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

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: All right. If you will just give me a
21 second.

22 Dr. Brody, good to see you.

23 THE WITNESS: Thank you, Your Honor.

24 MS. MCVEY: Judge, did you want me to get started
25 qualifying him, or --

1 THE COURT: Just a second, if you would.

2 MS. MCVEY: All right.

3 (Off the record).

4 (Back on the record)

5 THE COURT: Okay, I got it now.

6 Ladies and gentlemen of the jury, Dr. Arnold Brody
7 is going to be offered as an expert witness, and let me just
8 tell you a little something about expert witnesses.

9 Experts are a different kind of witnesses from the
10 normal fact witnesses. Normally you can't testify to your
11 opinions about anything. You testify about the facts, but
12 if a person, by reason of their training, education, and
13 experience, becomes an expert in a field that is kind of
14 beyond our common knowledge where we might need some
15 assistance from someone who has an expertise, if they have
16 the proper training, education, and experience, they would
17 be qualified as an expert witness and they will then be able
18 to give you opinions about their field of expertise, but
19 remember this. You are the judges of the facts, the sole
20 judges of the facts. I am not the judge of the facts. I'm
21 the judge of the law, and you, and only you, who determine
22 the facts.

23 And with regard to expert witnesses, they may give
24 you opinions, but you are the sole judge of their
25 credibility and you may accept what is said, you may accept

1 some of it, reject other parts of it. You may give an
2 opinion whatever weight you as a jury think that opinion
3 entitles you.

4 So that's kind of an explanation about why a
5 witness can give you an expert opinion by reason of their
6 education, training and experience, but you, yourself, are
7 the judges of whether you accept that opinion.

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

9 MS. MCVEY: Thank you, Your Honor.

10 DIRECT EXAMINATION BY MS. MCVEY:

11 Q. Dr. Brody, would you introduce yourself, please?

12 A. Yeah, sure.

13 My name is Arnold R. Brody, B-R-O-D-Y.

14 I'm Professor Emeritus in the pathology department at
15 the Tulane University Medical School in New Orleans.

16 I was the vice chairman of the pathology department
17 there for years. I'm trying to be retired.

18 I'm emeritus professor and my field is lung injury and
19 asbestos disease.

20 Q. Are you a medical doctor?

21 A. No, I'm a Ph.D.. I'm a scientist and I have been
22 teaching doctors about this field for a long time.

23 Q. And what is it to be a cell -- what is a cell
24 biologist?

25 A. Cell biology is the study of life. As a cell biologist

1 I use various kinds of cells.

2 Everything is made of cells. Every living thing is
3 made of cells. We need to understand how the cells
4 function.

5 My focus has been on lung cells. Some scientists study
6 liver cells and kidney cells, so my focus has been on lung
7 cells.

8 Q. And up here we talked about experimental pathologist.
9 What does that mean?

10 A. So pathology is the study of disease.

11 Scientists like myself do experiments to understand
12 disease, so that's the field of experimental pathology.

13 Q. And Dr. Brody, have you studied asbestos over the
14 course of your career?

15 A. I have.

16 Q. Have you spent essentially your career studying
17 asbestos and its effects on the lungs?

18 A. That's correct.

19 Q. Among other things.

20 I have handed you your CV we have marked as Exhibit
21 809.

22 A. Uh-huh.

23 Q. Is that a current and up-to-date CV?

24 A. I will tell you in one second.

25 Yes.

1 Q. I think we are glad we're in here today with the storm
2 going.

3 Can you give the jury the benefit of your educational
4 background?

5 A. Sure.

6 After high school in New Hampshire, I went out to
7 Colorado to do a Bachelor of Science Degree in Zoology.
8 That's the study of animals.

9 Then I went to the University of Illinois, where I
10 received a Master of Science Degree in what's called
11 Anatomy; that was human anatomy, animal anatomy. That's
12 where we learn how all of our parts fit together and
13 function; muscles, bones, nerves, joints, that sort of
14 thing.

15 Then I went back to Colorado to do a Ph.D.. That's a
16 doctorate. We were just talking about in cell biology.

17 And then I did three years of post-doctoral study at
18 Ohio State University.

19 And then I started my academic career after that.

20 Q. And Dr. Brody, how did you get interested in the study
21 of asbestos disease?

22 A. Uh-huh.

23 So this takes us into my first academic position, which
24 was as an assistant professor, that's a beginning professor,
25 in the pathology department in the medical school at the

1 University of Vermont. And while there we had a visitor to
2 the department. His name was Dr. Wagner. It looks like
3 Wagner, W-A-G-N-E-R.

4 Dr. Wagner had established in 1960 that asbestos causes
5 this cancer. I know you just heard about called
6 mesothelioma. So here was Dr. Wagner in this department
7 sitting down with a young professor, me, and seeing the work
8 that I was doing with human lungs and he asked me to come
9 and work with him in Wales in the United Kingdom. So this
10 was a great opportunity for a young scientist to go and work
11 with this very famous person in this field of
12 asbestos-induced injury and that's where I got started.

13 There was so many questions to be answered about how
14 asbestos causes disease. So when I worked with Dr. Wagner,
15 it was clear asbestos causes disease - asbestosis, lung
16 cancer, mesothelioma - but a lot of open questions on how
17 asbestos does that.

18 Q. And is that what you wanted to go study, how it
19 happens?

20 A. Exactly.

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

23 A. Uh-huh.

24 Q. Do you get funding for your research?

25 A. Oh, sure. I mean -- yes, of course. I mean, the

1 universities where I have been a professor all these
2 decades, they give you an office and a place to do your
3 work, but they don't pay you for the science, so we have
4 to -- we have to get funded from outside sources.

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

7 A. Well, my work has been funded by the National
8 Institutes of Health. So you have probably heard the name
9 the National Cancer Institute, the National Heart, Lung &
10 Blood Institute, the National Institute of Allergy &
11 Infectious Disease. These are different institutes in
12 Washington, D.C., and they are set up to understand human
13 health so that effective treatments can be developed where
14 there are none.

15 What we have to do, what scientists have to do, is
16 write proposals, applications. I have been competing with
17 the grade schools in South Carolina and Texas and California
18 and New York all my life writing applications for a limited
19 amount of dollars and the top 10 to 15 percent of the
20 applications get funded. So it's a very competitive
21 environment.

22 To answer your question, my work has been funded
23 without interruption by the National Institutes of Health
24 for my career.

25 Q. And the National Institute of Health doesn't just fund

1 the 90 percent? They fund the cutting edge, is that fair?

2 A. Well, yes. I mean, it's the research that's most
3 likely to teach us something about what's necessary to be
4 able to develop an effective treatment. There are no
5 effective treatments for any of the asbestos-related
6 diseases, so we are trying to move the field ahead to be
7 able to develop those kinds of treatments.

8 Q. Dr. Brody, have you served on any government panels or
9 agencies relating to asbestos?

10 A. Sure, I have been on panels from the Environmental
11 Protection Agency.

12 I have been on congressional subcommittees where we are
13 meeting to understand where some of this funding should go,
14 what the priorities should be.

15 I have served on boards from the National Institutes of
16 Health, the National Science Foundation, etcetera.

17 Q. Can I ask you a little bit about peer review
18 publications?

19 Will you describe the process for getting a publication
20 peer reviewed or having a peer reviewed paper published?

21 A. Sure.

22 So if I do a series of experiments in my laboratory and
23 I want that information to be out in the open medical
24 literature so that if anybody is interested in seeing that
25 work, it can be found in the journal called a peer review

1 journal. It's called that because when I write this
2 information up about the experiments that I did, I write an
3 introduction. I write a methods and materials that I use.
4 I write a discussion of the work that was done and I send it
5 to a journal. It could be one of twenty, or so, different
6 journals.

7 The editor takes that paper and sends it to two or
8 three or four of my peers, other scientists like myself, who
9 anonymously review my work. And they write a report back to
10 the editor and they may say well", this needs some
11 clarification. You need additional experiments to be done
12 to complete this work." It might be fine. It might be
13 ready to go.

14 And so when the editors are satisfied and I'm
15 satisfied, and I may have to do a series of experiments,
16 rewrite the paper and send it in again. It might be
17 reviewed again.

18 When the editor says I'm satisfied, the reviewers are
19 satisfied, the work then appears in the open medical
20 literature as a peer reviewed paper.

21 Q. And how many of your publications have been peer
22 reviewed or published?

23 A. So this is my CV that you have handed me that has -- it
24 shows 154 peer reviewed papers.

25 I also have a series of separate section called Invited

1 Reviews, where they might be -- review articles about my
2 work and other people's work, and also a book.

3 Q. Of those publications you just described, how many deal
4 with asbestos?

5 A. So of the 154 peer reviewed papers, about a 120, or so,
6 of them are directly related to asbestos. Others may relate
7 to some lung cell work that I have done. I have published
8 several papers on viral diseases. Some papers on asthma.

9 Of the reviews, the 55 book reviews and chapters, all
10 of those deal directly with asbestos.

11 I'm currently working on a review right now.

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

13 A. I have published a book.

14 Q. And what's the name of that book?

15 A. It's called "The Science Class You Wish You Had." It
16 is -- it's subtitled the seven greatest scientific
17 discoveries in history and the people who made them. It's
18 in its fourth edition. It's in six different languages and
19 find it on Amazon.Com.

20 Q. You spent your career studying asbestos.

21 And how did you get involved in litigation, doing what
22 you are doing here today?

23 A. Yeah. Well, that's kind of an interesting question.
24 There is a law firm in South Carolina down in Charleston
25 with a gentleman down there who has been in asbestos

1 litigation for many years and he had been -- he had a
2 meeting with Dr. Irving Selikoff and Irving Selikoff's name
3 appeared on the screen up there as one of the references
4 that the gentleman who was opening, gave the opening
5 statement. He referred to Dr. Irving Selikoff, because Dr.
6 Selikoff had studied these insulators, these people who
7 actually develop very high rate of mesothelioma from their
8 exposures. And this attorney had visited Dr. Selikoff and
9 said -- asked Dr. Selikoff to come into court and give the
10 kind of testimony that you have asked me to give here today
11 and Dr. Selikoff wasn't interested. He had had -- Dr.
12 Selikoff had had polio as a youngster and he wasn't very
13 mobile, but Dr. Selikoff said, "you know, there is this
14 young guy down in North Carolina and he has been studying
15 how asbestos causes disease. I saw his papers. I invited
16 him to give a talk. Why don't you go see Dr. Brody." So
17 this attorney comes walking into my office and he said "Dr.
18 Selikoff told me that you can explain how asbestos causes
19 disease."

20 I said "well, that's what I do."

21 And so then the attorney said "could you do it for a
22 jury, like you do it for your medical school classes that
23 you teach?"

24 I said "I don't know."

25 He said "would you like to find out?"

1 So I gave a seminar to that group and I have been doing
2 this now for about 20 years, or so. And so it's -- that's
3 how it started.

4 Q. So since that time you have testified as an expert
5 witness in many different states, is that fair?

6 A. Many different states across the country. Many
7 different settings. I have given talks in various places
8 around the world for a number of different reasons.

9 Q. And do you typically testify more for plaintiffs or
10 defendants?

11 A. Yeah, it's usually for -- in cases like this for
12 plaintiffs, where somebody has been injured by asbestos, but
13 I have testified for a number of different companies as
14 well. If the company would like the jury or the court to
15 know how asbestos causes disease, then I testify exactly the
16 same way for them.

17 Q. That's what I was going to ask you. Have you recently
18 testified on behalf of a corporation?

19 A. Well, I was -- yes, last year, if that's recent. Now
20 it's not -- last year is not so recent any more, but, yes, I
21 testified last year for a defendant, and I have just been
22 retained by an asbestos manufacturer to testify.

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

1 A. Not at all.

2 Q. Okay. How much do you charge for your time to be here
3 today?

4 A. \$575 per hour.

5 Q. And how long, Dr. Brody -- I think you said 20 years
6 you have been testifying?

7 A. At least.

8 MS. MCVEY: Your Honor, at this time I would like
9 to move to admit Dr. Brody's CV into evidence.

10 THE COURT: Any objection?

11 MR. WALL: Your Honor, it's always my belief that
12 that's hearsay. He's testified about it. It should not
13 come into evidence.

14 THE COURT: Very good.

15 Overruled. It will be accepted into evidence.

16 (Whereupon, Plaintiffs' Exhibit No. 809 was
17 entered into the record as evidence).

18 MS. MCVEY: And, Your Honor, we would also like to
19 tender Dr. Brody as an expert in cell biology and
20 experimental pathology as it relates to asbestos and the
21 diseases it causes.

22 THE COURT: All right.

23 Voir dire?

24 MR. WALL: No, Your Honor, no voir dire.

25 THE COURT: Very good.

1 All right, ladies and gentlemen, by reason of Dr.
2 Brody's education, training and experience, I find that he
3 is qualified as an expert in the field of cell biology and
4 experimental pathology and is qualified to give opinions
5 about the disease of mesothelioma, its causes and its
6 progress in the system.

7 MS. MCVEY: Thank you, Your Honor.

8 BY MS. MCVEY:

9 Q. Would it be -- Dr. Brody, have you prepared a slide --
10 there are slides that you can show the jury to help explain
11 your testimony?

12 A. Yeah, sure. I have a series of slides that I use when
13 I talk to medical students.

14 I gave a talk at the Case Western Reserve Medical
15 School a few months ago.

16 I have given talks at the Institut Pasteur in Paris.

17 I was a medical educator in Beijing for several weeks.

18 And all of these places I use a series of slides from
19 my work and from textbooks that help me to explain it. And,
20 of course, I do the same thing for jurors.

21 Q. So the same slides you are going to show our jury are
22 the slides that you show medical students?

23 A. Yeah, I use a different vocabulary for the jurors than
24 I do for the medical students and I don't show them all the
25 slides that I show the medical students, but, yeah, they are

1 a subset, shall we say.

2 MS. MCVEY: Would it be okay if he came down to --

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

7 THE WITNESS: If I could. I think this would
8 work, Your Honor.

9 THE COURT: I think so. Let's see if your pointer
10 will work.

11 Yes, it will.

12 THE WITNESS: Perfect.

13 THE COURT: Very good.

14 You may proceed, Dr. Brody.

15 THE WITNESS: Thank you, Your Honor.

16 BY MS. MCVEY:

17 Q. Dr. Brody, just the first thing, what is asbestos?

18 A. Okay. So I had the opportunity to sit here and listen
19 to the opening statements, just like you, so now I know what
20 asbestos is. No.

21 So asbestos -- asbestos is a -- as you saw a picture of
22 that huge mine. So it is a mineral that is mined from the
23 soil. It's mined in a lot of different places. It's mined
24 in Russia and Canada. It was mined in the U.S.. A lot of
25 it in Australia. A lot of it came from South America,

1 Brazil, some from Italy. So a lot of places around the
2 world.

3 There are three different kinds that were up there;
4 chrysotile, crocidolite, and amosite.

5 Chrysotile is about 90 percent of the world's use. The
6 other types make up about five percentage of the world's
7 use, but it really depends on the product. In other words,
8 if it was insulating -- if it was an insulating product, it
9 would be mostly amosite.

10 So the overriding point here is that all the asbestos
11 varieties cause all of the asbestos diseases. And with that
12 we can --

13 Q. And just one question on that. Is the potency, though,
14 the same for the different types of asbestos?

15 A. Well, yes. But, I mean, if a person is exposed --

16 Yeah, so -- for causing mesothelioma, the amphiboles,
17 amosite and crocidolite are more potent in causing
18 mesothelioma, but if you are exposed to any of them, you
19 have obviously a dramatically increased risk.

20 Q. Okay. Could you talk about and explain to us what
21 diseases are caused by exposure to asbestos?

22 A. Sure. So the disease --

23 Well, let me -- let me just go to the first slide.

24 So this is a -- obviously a diagram that I have that I
25 took from a textbook, and I know that you know where your

1 lungs are, but let me just make the point that when you take
2 a breath, the air comes down this tube that we call the
3 trachea or windpipe, and you can feel the top of that in
4 your adam's apple right here. That's your trachea on top of
5 your windpipe.

6 You take a breath and the air comes down into this
7 series of tubes called conducting airways, because they
8 conduct air down into the lungs.

9 So the diseases you are asking me about, the first one
10 that you would come to as you move down the airways is lung
11 cancer. Lung cancer develops in the walls of the airways.

12 Every one of these diseases has a target cell from
13 which that disease develops, and I'll show you these cells
14 as we get deeper into the lung. So cancer -- a lung cancer
15 develops in the walls of these tubes.

16 And then as the tubes descend into the lung, we get
17 into what's called the gas exchange air of the lung, where
18 we exchange oxygen and carbon dioxide. The room has
19 about -- room air has about 20 percent oxygen in it. We
20 need to extract the oxygen from the room air and exchange it
21 with the -- make carbon dioxide in our body and expel it and
22 that's going on all the time, and that's done down here in
23 the gas exchange area and that's where the disease
24 asbestosis develops.

25 Asbestosis is scar tissue in the lung from inhaling

1 asbestos. And as you were told correctly, that's the --
2 that was the first disease discovered to be caused by
3 asbestos.

4 The next one was lung cancer in the fifties. And then
5 in 1960, Dr. Wagner established this cause of asbestos
6 causing mesothelioma.

7 Q. Dr. Brody, I neglected to ask you this, but will you
8 promise that any opinions that you give will be to a
9 reasonable degree of scientific certainty?

10 A. Sure.

11 Q. Okay. Can you tell the jury how asbestos causes
12 disease?

13 A. And we are on our way.

14 Q. Okay.

15 A. All right. And so you see this black line that runs
16 around the outside of the lung. That black line represents
17 the pleura, P-L-E-U-R-A. The pleura is a very thin, I mean
18 saran rap thin membrane. It wraps around the outside of the
19 lung, makes your lungs air tight, like balloons. So you
20 take a breath and then the pleura expands and it comes back
21 down like a balloon.

22 Now, there is a single layer of cells that runs around
23 the outside of the pleura and those cells are called
24 mesothelial cells. And so if you have a cancer of the
25 mesothelial cells, it's called mesothelioma.

1 So the concept today is explained how asbestos that's
2 floating around in the air from whatever source, how that
3 asbestos causes that cancer mesothelioma. That's what you
4 have asked me to do. That's my goal today.

5 Q. Thank you, Dr. Brody.

6 A. All right.

7 So one of the ways that we do that is by using
8 different kinds of microscopes, because you cannot see
9 individual asbestos fibers. You cannot see the individual
10 cells without a very powerful microscope, so this is called
11 an electron microscope.

12 Q. Who is that guy?

13 A. And -- well, I had this microscope for a very long
14 time. In fact, this microscope was a victim of Hurricane
15 Katrina when I was at Tulane University in New Orleans.

16 And I can take a piece of tissue as small as a period
17 at the end of a sentence, or as big as this device I have in
18 my hand, and I put that tissue into this door right here in
19 front of me and this column has a vacuum inside, so it's
20 evacuated. And at the top of the column there is an
21 electron gun that produces trillions of electrons that come
22 down that column and strike that sample that I put into the
23 microscope. And then the electrons that pass over that
24 tissue that I -- that lung tissue that I put in there, or
25 asbestos, the electrons set up a secondary charge on the

1 surface of the sample and I collect those electrons and
2 produce an image that's a re-creation of exactly what is in
3 the tissue actually looks like. And that tissue image then
4 appears right in front of me, and just off of the screen
5 there is a camera so I can take a permanent image of
6 whatever it is I'm looking at.

7 So, for example, if I cut a piece of tissue out of the
8 lung here and you will see the pleura going over the surface
9 and you will see these conducting airways going up, and I
10 cut this tissue out and you can see now this lung. You can
11 see the airways going up here and you can see the pleura
12 running around the surface here, and you see how thin the
13 cut edge of that is, because I told you that it's saran wrap
14 thin. The mesothelial cells are out here on the surface of
15 the pleura. A sheet of hundreds of millions of mesothelial
16 cells covering the surface.

17 There is a conducting airway, so you take a breath
18 and -- let's say that there are asbestos fibers floating
19 around in the air and you take a breath, some proportion of
20 those fibers get caught in your nose. Moisture in the nose
21 catches them. Nose hairs catch them. Some fibers get
22 caught in the back of the throat. Those don't go any
23 farther. You cough them out or you blow them out, you
24 sneeze, or whatever.

25 Some of the fibers go right past that and get down into

1 the airways, these conducting airways. We will take a look
2 at that in a second.

3 And then some of them go right past these airways and
4 get out into the gas exchange area, which we will take a
5 look at in a second.

6 And then once they get here, there are pathways I'm
7 going to show you to the surface of the pleura where the
8 target cell, where the mesothelial cells are. So that's
9 what we are going to take a look at.

10 Q. So what happens next, diving down?

11 A. Yeah. So we are going to take a look at the cells that
12 line the airways.

13 And I saw the lights go down earlier. Is it possible
14 to do that?

15 THE COURT: Yes.

16 A. Because the picture is going to show a lot better.

17 That's great, actually. That's perfect, just like
18 that.

19 Okay. So I'm going to focus the microscope right down
20 here on the surface of the airway. It could be anywhere
21 along the airway. It could be you, me, a rat, cat, a dog, a
22 giraffe, elephant. We all have these exact same kinds of
23 cells and structures.

24 So I'm going to focus the microscope and I'm going to
25 fill the screen with what's in that red spot from anywhere

1 along here. So let's focus right there, take a picture and
2 now you can see this says human bronchial. Bronchial is a
3 small airway. Our airways are lined by these little
4 hair-like structures. They are not hairs at all. They're
5 extensions of the cell surface called cilia, C-I-L-I-A, and
6 they are constantly beating in a synchronous wave-like
7 fashion, so that any particles that get past your nose and
8 your throat that land down on the airway gets swept up to
9 your mouth by these cilia and you swallow them or spit it
10 out, and that's going on all the time.

11 Then you can see that there is some cells here that
12 don't have cilia, and those cells make mucus. And you don't
13 think much about mucus, unless you're a cigarette smoker, or
14 you have a cold and you can feel that mucus. It gets swept
15 up and you swallow it or you spit it out. So that's all
16 normal, clear, and that's what's supposed to be happening
17 all the time.

18 We are going to talk about what happens when you get
19 too much asbestos in your lungs, but that's what is supposed
20 to be going on all the time.

21 Okay. So -- I'm sorry.

22 BY MS. MCVEY:

23 Q. That's all right.

24 What is that the line at the bottom, the marker?

25 A. Yeah, sure.

1 So this is called a size marker, because we always want
2 to know how big and small these things are. When you see
3 asbestos fibers, you want to know if they are small enough
4 to get down into these areas of the lung. So this one here
5 you see says ten mu or microns. So this line represents ten
6 microns.

7 Obviously you can see it, but let me explain how big a
8 micron is. If you take your thumb and your forefinger and
9 you make a little space, you can just barely see it with the
10 naked eye, you have made just about a millimeter, okay?
11 Now, that means -- naked eye means no microscope, no
12 magnifying glass. This is what you can normally see with
13 your naked eye. It's about a millimeter.

14 Now, take that millimeter and divide it a thousand
15 times. So what you have done then is you have made a
16 thousand microns. So a thousand microns is the same as a
17 millimeter. And so the human eye can see about a thousand
18 microns. You obviously can't see ten. You can barely see a
19 thousand, right, but with the microscope it's easy to see
20 ten microns.

21 And then if you take this bar and you line it up
22 against these cilia, you can see that these cilia are just
23 about eight to ten microns long, and that's the cilia that
24 line our airways.

25 Okay. So we are going to back up for a second, because

1 we are going to go past the cilia now and out to the gas
2 exchange area, because we want to progress toward the target
3 area, the pleura where the mesothelial cells are.

4 So let's take a look at this area right here moving
5 past the airway and here we are now at the end of the airway
6 and we are out where the small air spaces of our lungs. You
7 see, we have hundreds of billions of these microscopic air
8 spaces in our lungs. And if you think of each one of these
9 as a room, maybe kind of like this courtroom. You take the
10 ceiling off and if you look down on the floor, there is a
11 carpet. And I don't know if there are carpet squares or
12 not, but everyone knows what carpet squares are. And if you
13 think of -- if you think of each carpet square as a cell,
14 you have an idea of what lines all of our air spaces.

15 We have a thin layer of cells that line the floor, go
16 up over the wall into the next air space and line all of our
17 air spaces with a cell that's thin enough so that you take a
18 breath and the room air comes running in and fills all these
19 air spaces. And the oxygen in the room air diffuses right
20 through the carpet, because underneath the carpet there is
21 blood running. And the blood goes to your brain and your
22 muscles and you send the oxygen there and you use it up and
23 you make carbon dioxide and you send it back to your lungs
24 and you go like that. Okay. So that's what's going on in
25 our lungs all the time.

1 So I'm going to take us into a single human air space.
2 It could be any one of these. So it's like perching the
3 microscope over the room and looking down right on the
4 carpet. So let's do that in a single human air space.

5 There is a single human air space. I'm outlining one
6 of the cells for you. I call it a carpet square, but nature
7 doesn't make squares very well. Nature makes smooth
8 surfaces. Just look at all of us. We have smooth contours
9 on all of us. No squares, right?

10 And so it's the same thing with the cells that line our
11 air spaces. They come in oval shapes and odd shapes and
12 round shapes. And these smaller round cells, the little
13 bumps all over them actually are a kind of a stem cell.

14 If our big flat carpet cells get injured, damaged by
15 asbestos or by infection, these smaller cells start to
16 divide and take their place. So we all have this repair
17 mechanism in all of our air spaces.

18 So I'm going to -- we have one more line of defense.

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

20 A. Okay. So I'm going to take us right down on the carpet
21 down here. And remember the cell with the bumps all over it
22 here, so let's focus right there. I'm going to go down so
23 far that you are going to actually be able to count the
24 bumps on the cell, okay? So we are right down on the carpet
25 now and here is the cell, the stem cell, and here is the

1 carpet cell.

2 Then there are a couple of other actors. There is this
3 one, kind of ruffled, not going anywhere. Then there is
4 this cell with the tail end and a couple of what are called
5 false feet out in front of it, and I caught it in the act as
6 it was going this way going after this pollen grain right
7 here.

8 So what's going on here is that this lung once belonged
9 to somebody who was killed in a motorcycle accident. I was
10 on the medical examiner's autopsy call and I went in and
11 prepared this person's lung within just an our or so after
12 death and we had this chemical fixative that stops
13 biological activity and freezes it, essentially, in a
14 life-like situation, condition, and I was using my electron
15 microscope to go from air space to air space looking for
16 interesting things to show the medical students and I came
17 across these two cells; this one kind of ruffled, not going
18 anywhere, but this one going after this pollen grain.

19 Now, these cells are called macrophages. Macro means
20 big and phage means eater. These cells patrol our air space
21 surface. And as this person was riding along on his
22 motorcycle he was probably inhaling a lot of different
23 things. One thing we know he inhaled was this pollen grain
24 which went zipping right past his cilia and the mucus and
25 landed on the carpet.

1 We don't want any kind of foreign particles sitting on
2 our gas exchange surface, so we have these cells, these
3 macrophages, that detect the presence of foreign particles
4 and they can move to those particles, pick them up, bring
5 them into the substance of the cell, sort of eat them in a
6 cellular way, not with -- not with a mouth and teeth, but
7 take it into the substance of the cell and digest it, not
8 for nutritional purposes, but to get rid of it, and then
9 they move onto the cilia. Actually the big word for the
10 mucus and the cilia is called the mucociliary escalator,
11 because it escalates things up from our mouth. And so they
12 get on the escalator. Every time you swallow, you are
13 swallowing a few of your friends, these macrophages that are
14 constantly cleaning your air spaces of things, dust
15 particles and things that don't belong there.

16 So this is going on all the time and these macrophages
17 we found go after asbestos fibers, because they are trying
18 to remove the asbestos from the lung, just like they are
19 removing this pollen, and we actually discovered that its
20 signal in my laboratory. We discovered the chemical signal
21 that attracts the asbestos -- attracts the macrophages to
22 the asbestos.

23 The problem is that asbestos is toxic. So here the
24 macrophages are coming in to clean the asbestos off of the
25 carpet, but the asbestos kills the macrophages and they

1 become part of the disease process.

2 So I'm just telling you about some of the things that
3 we have studied and discovered over the years. So let me
4 then go on, if I may, and talk about asbestos.

5 Q. Please. Tell us about asbestos.

6 A. Okay. So this is one of the kinds of asbestos. It's
7 chrysotile.

8 I have a picture of crocidolite I'm going to show you
9 in a couple of minutes, which is basically the same picture
10 as amosite.

11 And you notice that I'm talking about asbestos in
12 general, because all of the asbestos fibers do all the same
13 things. There is no reason to separate out one kind versus
14 another.

15 Notice that the fibers -- in this particular group the
16 fibers are in a bundle. That means they are a group of
17 fibers stuck together. Some of them are fracturing off.
18 You can see this a one micron bar right here. So that means
19 you can hold this bar up and find that this fiber is
20 hundreds of microns long as it goes off the screen. This
21 fiber starts at about a micron thick and fractures down and
22 they can become extremely thin, down to tenths of microns.

23 If this whole bundle were floating by and the light
24 were just right, it would look like a speck of dust. You
25 know how you walk in a room sometimes and it looks really

1 dusty, but you can't really notice it unless the light is at
2 a certain angle? Well, if you can see a speck of asbestos
3 dust, that means that you are looking at thousands of
4 fibers, because look at how small they are. Look at in this
5 bundle, which you can just barely see, once they have
6 fractured out, you would have thousands of fibers. They are
7 constantly breaking down and becoming thinner and smaller.
8 And, in fact, that whole bundle, if you can see the whole
9 bundle, you can't inhale the bundle. It's too thick, if you
10 can see it with your naked eye. It's the fibers that are
11 constantly fracturing off of the bundle.

12 So that's my point. If it's dusty in an environment
13 and you can see individual dust particles, if it's asbestos,
14 there are thousands of fibers coming off of each speck of
15 dust, and those are the ones that get into the lungs. The
16 ones you cannot see is the ones that get into the lungs.

17 Q. So the real danger is the stuff that you can't see?

18 A. Exactly.

19 Q. Okay.

20 A. But seeing it as a dusty setting means that those
21 microscopic fibers that you cannot see are there as well.

22 Q. Got it.

23 A. Okay. So I want to show you a couple of slides from
24 some experiments that we did to understand where the
25 asbestos goes and how it does what it does. So in order to

1 do that, you have to use what are called animal models.

2 Q. And why are animal models useful?

3 A. Right. Because if you think about how people are
4 typically exposed, they are exposed at a work site, a
5 workplace, and then decades later they get sick. You don't
6 get to watch what's going on in that person during those
7 decades. So scientists -- and there are a lot of diseases
8 like that. And so scientists have used animal models,
9 typically rats and mice.

10 If you prove -- and that's -- this is what Dr Wagner
11 did when I worked with him. He showed that if he exposed
12 rats to asbestos, they get asbestosis, lung cancer and
13 mesothelioma. And so I showed, and other scientists showed,
14 they get those diseases from the same cells as people; same
15 anatomic sites, same cells. So now we can use it as a model
16 to understand the human disease, which is what this is all
17 about. This isn't to help cure rats. I mean, this is to
18 understand what is happening in the lungs of people.

19 And you can say that about any of the diseases that
20 people get that we have animal models. We use it to
21 understand tuberculosis, HIV disease, diabetes, kidney
22 diseases. A whole list of infectious diseases, we have
23 animal models to understand the human disease.

24 So this slide is from a rat, lung of a rat that was
25 exposed to asbestos for a single hour. Well, why would I do

1 that? That's not going to bring the rat to the clinic. You
2 have to expose them for through almost their life span to
3 produce cancers in these animals, and we know you can do
4 that, but if you want to ask the question well, where does
5 the fibers actually land in the lung, you have to expose
6 them for a short time and then take them out of the
7 chambers. We have these chambers about six feet high and
8 four feet wide. There is an asbestos generator at the top
9 of the chamber. It makes it dusty in the chamber, just like
10 in some work sites, dusty. Animals inhale the dust. And
11 then immediately after exposure they take them out, give the
12 animals an overdose of anesthetic and then I can study any
13 asbestos I see in the lung must have landed there during
14 that first hour. That's the only way the asbestos is going
15 to get there.

16 And then if I want to know where the asbestos goes, I
17 let another group of animals go back to their food and water
18 for a couple of hours and I give those animals an overdose.
19 And I may have let some go for days, others weeks, others
20 months, others years, okay, and some you have exposed for an
21 hour, some you expose for days, weeks, or months.

22 So these are experiments that take years to sort out
23 and literally hundreds of different publications to explain
24 all the findings, and I'm going to show you just a couple of
25 snippets of these.

1 This is one from a rat that was exposed to asbestos for
2 a single hour and you recognize now these different -- these
3 air spaces, these rooms that I was telling you about. There
4 is an airway. Here are the individual air spaces. So
5 let's --

6 I'm going to focus on this spot right here immediately
7 after exposure. This black hole right here. You see, the
8 air can come in here. It can go down this hole, or it can
9 go up here, or here, or it can go this way, and can split
10 again. So there are a number of different splits it can
11 take. So the air is coming here. This black hole here is
12 this one right here. So that means we are going to study
13 this area right here. So let's look at it. Here is that
14 black hole.

15 Now, you see this is a ten-micron bar. Ten microns; in
16 other words, you can barely see a thousand. This one is ten
17 microns long. That means this asbestos fiber is about ten
18 microns long, a little longer. It's kind of a long fiber
19 here. Then there is some short fibers you see. Now the
20 asbestos is distributed across the carpet.

21 Now for the first time there is a publication in the
22 literature that shows that asbestos lands on the carpet.
23 And not only does it just land on the carpet, but it turns
24 out we discovered that these carpet cells actually come up
25 over the fibers, a proportion of the fibers. About 20

1 percent of the fibers get shoved under the carpet. And you
2 can actually see that happening right here. You see the
3 fibers here, but you can't see them here. You can see them
4 here, but you can't see them here. So it turns out -- I'm
5 just showing you one picture of thousands that I have taken
6 of this and cut sections through them and proved to my
7 colleagues what I'm telling you is true. I'm just showing
8 you a snippet of this. So here are these -- what happens is
9 these fibers land on the carpet. The carpet cells respond
10 to these toxic fibers by covering them and shoving them
11 under the carpet. We don't want any kind of toxic particles
12 sitting on our gas exchange surface.

13 Now, I know you haven't heard about background asbestos
14 yet, because I was in the courtroom and I heard the opening.
15 We all have asbestos in our lungs, small amounts of asbestos
16 that we get from the background as we walk around. There
17 are products that have been released from car brakes and
18 building materials. Everywhere you go there is a small
19 amount of asbestos in the air called background and it's not
20 enough to cause disease, but it's enough that you can
21 measure it in the lungs of the average person, and I have
22 published papers showing that, and I asked rhetorically
23 where are those fibers? They are under the carpet in our
24 lungs. That's a storage space and they are not enough --
25 it's not enough to cause disease. It's when you get above

1 this background level, like in occupational setting, that's
2 when -- that's when asbestos causes disease.

3 So here these fibers are sitting under the carpet and
4 I'm going to show you that there is a pathway to the pleura
5 from underneath the carpet. Okay, so --

6 Q. What is the pathway?

7 A. Yes.

8 So the next experiment, again one picture shows that.
9 So here is an air space up here, another one here, and here
10 is the carpet here, and you see these characters here look
11 like donuts.

12 This is what our red blood cells look like. And you
13 can see that these are individual cells, red blood cells,
14 and they have a shape that it -- it looks like a donut, but
15 there is no hole there actually. It's just a depression,
16 not a hole, and they line up in single file as they flow
17 through these vessels called capillaries.

18 Now, you see there is an asbestos fiber bundle right
19 here and there is a single asbestos fiber right here on its
20 way into the flow of the blood. Then there is a group of
21 fibers here, and there is actually one here that's
22 completely covered by the carpet.

23 So this is a dynamic situation. This group of fibers
24 just landed there and it hasn't been taken up yet. This one
25 landed probably an hour earlier and it's already covered.

1 Some of them are already entering the flow.

2 Now, that's the way fibers get to the pleura, to the
3 target cell. There is a fluid flow of the lung. And the
4 fluid flow of the lung has two compartments; one is blood,
5 which is easy to see, but there is another one that's more
6 important than blood and it's called lymph, L-Y-M-P-H.
7 Lymph is a clear fluid that flows in our bodies head to toe
8 and the lymph flow in the lung starts under the carpet. If
9 I were to pull the carpet back, I would show you that it's
10 moist under there, because we have this clear fluid called
11 lymph and the lymph flows towards the pleura. So any fibers
12 that get into that flow collect in small vessels that go to
13 the pleura.

14 Now, I just want to mention, I said this is what our
15 red blood cells look like, but this is the lung of a rat.
16 This is exactly what our red blood cells look like; same
17 size, same shape.

18 Okay. So we are talking about fluid flow and you can
19 see here. Now, this is a diagram. It's called a Netter
20 Diagram, because this is from Dr. Netter, who has given us
21 atlases of the human body in health and disease, and Dr.
22 Netter here is showing us the pattern of lymph flow in the
23 lung. And the pattern of lymph flow in the lung goes to the
24 pleura. You see these small vessels? Well, these, that
25 many of which end at the pleura. And if you look at the

1 surface of the pleura, you will see a network of small
2 vessels out there, and this flow started under the carpet
3 and collected in these small vessels that go to the pleura.

4 So what is the proof? Again I ask rhetorically, what
5 is the proof that the fibers that are in the lymph system
6 get -- that flow in the lymph, what's the evidence that they
7 actually flow in the lymph?

8 Well, we all have these structures called lymph nodes.
9 You have probably heard of lymph nodes. Lymph nodes are
10 small bundles of tissue that are found wherever lymph flows.
11 And that means from head to toe. You know about some lymph
12 nodes around in your arm pits, or on your neck. Sometimes
13 they swell when you are getting a cold, because -- or you
14 are getting the flu, or something, because the lymph system
15 carries cells of the immune system. And so you are feeling
16 the inflammation and the effect of a developing cold or
17 something like that, but we have lymph nodes in our ankles
18 and in our wrists and all around our body.

19 We also have lymph nodes around the lung, and that's
20 what the artist, Dr. Netter, has given us here. You see
21 these green blobs? These are lymph nodes around the lungs.
22 They are called thoracic nodes, because they are in the
23 thorax, in the chest.

24 There is another set of very important nodes in the
25 peritoneal cavity.

1 So the lung, this surface, these surfaces out here,
2 these mesothelial surfaces are the most likely place to get
3 a mesothelioma, those mesothelial cells.

4 The second most likely place is the peritoneal cavity.
5 Which holds your stomach and your intestines. There is a
6 lot of lymph down there, a lot of lymph nodes down there.

7 So some scientists -- this is not my work now, but some
8 scientists study the contents of the lymph nodes around the
9 lung and in the peritoneal cavity and they find asbestos and
10 particularly concentrated in people occupationally exposed.

11 There is only one way for an asbestos fiber to get into
12 a lymph node. That's to be inhaled, travel into the lymph
13 system through the surfaces of the air spaces and get
14 trapped in these lymph nodes, because lymph is a
15 circulation. It circulates all around the body. And if
16 there are lymph nodes around the lung and in the peritoneal
17 cavities, that means these asbestos fibers at one time in a
18 person's life were inhaled.

19 Okay. So we now have the fibers at the target site.
20 That's where the mesothelial cells are. So we can talk -- I
21 can spend the rest of the time talking about how asbestos
22 causes these mesothelial cells to become cancer cells.

23 Q. How does that occur?

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

25 So here is a normal pleura. You see how thin and shiny

1 it is, and it's shiny because it's moist from the lymph, and
2 compare that to a pleura with a person with mesothelioma.
3 Dramatically thickened with tumor cells.

4 So let's talk about how asbestos causes cancer.

5 So this is the proceedings of a meeting I was at a few
6 years ago. I gave a talk at this conference and the
7 concept, the focus of the conference, was how fibers cause
8 cancer. So there is a big word, carcinocancer genesis
9 formation. How do fibers cause cancer? That was the focus.

10 I have talked to you today about cells. I showed you
11 some cells and I showed you that some cells pick up
12 asbestos. I talked about some of the cells, but you cannot
13 talk about carcinogenesis, cancer formation, unless you talk
14 about the molecular aspects.

15 Q. Can you talk just a little bit about the molecular
16 aspects of that?

17 A. Right. So molecular aspects means your genes.

18 Molecular biology is the study of genes and genetics.

19 Cancer is a genetic disease.

20 I'm going to give you the simplest definition of cancer
21 and then I'm going to explain what that means.

22 So cancer is the loss of control of cell growth. Let
23 me say that again and I'll explain it. Cancer is the loss
24 of control of cell growth.

25 Every one of our cells has a rate at which it is

1 supposed to divide and multiply. Your skin, for example, we
2 are always losing skin off the surface. We have to keep
3 replacing our skin cells, and we do that at a rate of about
4 ten percent. So if I cut a piece of your skin and I put it
5 under a microscope, I can show you that about ten percent of
6 your skin cells are dividing and making new cells.

7 Your lung and your liver, about one percent. Shouldn't
8 have to be making a lot of new lung and liver cells.

9 And the mesothelioma cells, a half of one percent.
10 Very low background rate of division. You shouldn't have to
11 be making new mesothelial cells.

12 Now, humans have about 20,000, or so, genes that makes
13 us what we are. If you look around and you see different
14 hair color, eye color, skin color, different size people,
15 different metabolic rates, these are all things that you can
16 see that are 20,000, or so, genes control most of the things
17 that our genes do you don't get to see. Of about 100 of
18 those -- like, for example, the genes that make the enzymes
19 that digest our food, you don't see those genes working, but
20 you know that we know they are there.

21 Now, of those 20,000, or so, genes, about a 100, or so,
22 might be up to 200 now, but somewhere between 100 and 200 of
23 these are called growth-controlled genes, and they keep a
24 set pattern of growth in our different cells. Cancer is the
25 loss of control of that growth. That means that there are

1 errors or mistakes, mutation, in genes that control cell
2 growth. That is as simple as it can possibly make a
3 description of cancer, because cancer is a very complex
4 process, because in all those sets of genes that we have, we
5 don't yet know just which genes are required to be damaged
6 to cause the cancer, but let me show you what we do know
7 about how asbestos acts as a carcinogen; that is a cancer
8 causing agent.

9 So one of the ways we do that is by taking cells out of
10 the body, out of humans, out of animals, put those cells in
11 a dish and give those cells the right nutrients and they
12 will grow. They will divide, and you can study the genes
13 and you can study the DNA, DNA meaning just genetic
14 material, and you can add to those cells things that you are
15 interested in studying, like asbestos. We produce cancers,
16 cancer cells, right in these dishes and that's a way to
17 study how these different carcinogens function, how they
18 work. And so we -- we and other laboratories have been
19 doing those kinds of experiments for a long time.

20 And here is an example of that. On the cover of this
21 proceedings there is two cells. Here is one I'm outlining
22 for you, and then there is another one over here, and some
23 fibers were added to these cells. The cells are sitting in
24 a special medium of fluids that gives them the right
25 nutrients so they can live and grow. Some cells live like

1 that overnight and some will live for months. It depends on
2 the kind of cell it is. So you can see some fibers have
3 been added. You see it's kind of a long fiber and then
4 there is some short fibers. See how those fibers have
5 collected around the center circle in the cell? But they
6 are excluded from that center circle. The center circle in
7 our cells is called the nucleus and the nucleus contains all
8 of our DNA. All of our genetic material is crammed into the
9 nucleus of our cell. Take any -- take mesothelial cell,
10 skin cell, the lung cell, the same story that I'm telling
11 you now. Okay. The DNA is cramped into the nucleus.

12 And we have this membrane that protects the DNA. You
13 see how the fibers have been excluded from the DNA? That's
14 a good thing. That's what's supposed to happen, but one
15 thing that scientists have known for a long time is that
16 when a cell divides, when we make new cells, we lose that
17 protective membrane around the DNA, and that makes the cell
18 more vulnerable.

19 And we know that a dividing cell is more than likely to
20 become a cancer cell, and that's why this process of cell
21 division in us and in rats and mice and worms and insects is
22 very fast. It goes very quickly, because we don't want to
23 leave the DNA vulnerable. Okay? But when it's vulnerable,
24 the cells are more likely to become a cancer cell. So we
25 asked it in my laboratory with a collaborating laboratory

1 what would happen if we added asbestos and other agents when
2 the cell is dividing and it's more vulnerable? So let me
3 just show you that a little bit.

4 Q. Do you have a picture of that?

5 A. I do, because that's how you learn how asbestos acts as
6 a carcinogen, a cancer causing agent, by doing those kinds
7 of experiments.

8 Okay. So here is what's supposed to happen in normal
9 cell division. Here are three cells; one, two, three cells.
10 The two cells on the outside are not dividing.

11 Now, there is no asbestos here. This is just normal.
12 This is what's going on in all of us all the time right now.
13 Okay. The nucleus is intact. The DNA is stained blue so
14 you can see where it is. The cell in the center is
15 dividing. I know that because all the DNA is condensed into
16 these white threads called chromosomes.

17 Chromosomes are bands of condensed DNA. This is what
18 happens in -- this is normal. This is what happens in all
19 of our cells as the cells divide. The DNA condenses and
20 forms these chromosomes. Now the idea is to make another
21 cell. The chromosomes duplicate. They replicate. They
22 make another cell. And then you get two new cells, just
23 like the original. Okay. That's what's supposed to happen
24 every time.

25 Let me show you what our chromosomes look like. So if

1 you take -- if you take this kind of cell and spread out the
2 chromosome, you can see that humans have 23 pairs of
3 chromosomes. You probably heard ads from this company 23 &
4 Me? Well, that comes from this 23 pairs of chromosomes that
5 humans have. Okay. And on these chromosomes you can see
6 these light and dark bands. And the light and dark bands
7 that where you find all of the 20,000, or so, genes
8 distributed across the chromosome.

9 Now, the important point here is that every one of our
10 genes must be on the right chromosome and in the correct
11 place on that chromosome. There is no mixing and matching
12 allowed when it comes to where our genes are located. It's
13 the same for you and me and rats and mice and grasshoppers
14 and all that. Okay? We all have this same concept of
15 chromosomes of genes in the right place in the right
16 chromosome.

17 So when we say faithful replication, so let's see what
18 happens here when it goes correctly. Here is a normal cell.
19 The chromosomes are stained purple this time so you can see
20 them and now they are going through what's called faithful
21 replication with each gene in the right place in the right
22 chromosome and you get two what are called daughter cells.
23 So two new daughter cells just like the original.

24 Now, I told you that we have of these 1,000 of these
25 ten -- of these 20,000, or so, genes that we have, about a

1 100 of them are called growth controlled genes. I'm going
2 to tell you about one of them just as an example. One of
3 them is called P -- how we doing?

4 Q. Okay.

5 A. We are going. I'm almost finished.

6 Q. Okay.

7 A. So we have -- we have this -- a gene called P-53. P-53
8 has been called the guardian of the genome. It is a tumor
9 suppressor gene. Now, that gives you a concept of how
10 important it is. And this tumor suppressor gene is damaged
11 in about 50 percent of all human cancer. It's central to
12 the development of many human cancers. What happens is if
13 you have a carcinogen, like asbestos, or cigarette smoke,
14 affect your cells, the P-53 gene gets activated, turns and
15 shuts the cell down. It stops the cell from dividing. That
16 means it can't make the new daughter cells and send these
17 mistakes off into the new cell. It supresses the tumor, a
18 potential tumor. It's a very important gene.

19 Not only that, it controls what's called a death
20 pathway. We have a whole series of genes that protect us.
21 We have what are called molecular defenses. Most of us are
22 not going to get cancer. Most people, no matter how much
23 asbestos they are exposed to, don't get cancer. Even as
24 dangerous as smoking cigarettes is, most cigarette smokers
25 don't get cancer, because we have these very effective

1 genetic defenses, like P-53. I'm not going to tell you
2 about the hundreds of others that we have, but they are all
3 distributed, and we know where many of them are. Like P-53,
4 for example, is at the tip of human chromosome 17. Now, if
5 it's not at the tip of human chromosome 17, it's not going
6 to function and it can't protect us.

7 So let's go on and you will see why I'm telling you
8 this, because here is now an experiment that was done with
9 asbestos, where we -- here is a normal cell. This is one of
10 millions of cells in this experiment. There is no asbestos
11 over here. Half of the chromosomes go to one side, half to
12 the other, and that's going to produce two normal daughter
13 cells.

14 Over here is asbestos. This happens to be crocidolite
15 asbestos, which is basically the same as amosite asbestos,
16 and you can see the five long fiber here and a little
17 shorter one, a little shorter one. Most of the DNA is where
18 it supposed to be, but look at some of the DNA is bound to
19 the surface of the asbestos fibers. And that results in
20 this condition called aneuploidy, and I'm going to tell you
21 about aneuploidy in just a second. Let just show you one
22 more example where we have another kind of asbestos causing
23 aneuploidy, and these are mesothelial cells.

24 So here is a mesothelial cell, no asbestos. Half the
25 chromosomes go here, half of them go here, and now you have

1 normal cell division.

2 Over here the daughter cells have essentially formed,
3 but there is some DNA bound to the surface of the fiber
4 producing this condition aneuploidy.

5 Aneuploidy means abnormal chromosome separation. These
6 are not cancer cells, but the door has been opened. And if
7 you have been listening to anything that I have said, you
8 will know the reason is because in this DNA that's not where
9 it's supposed to be could be a gene like P-53, or any of the
10 other molecular defenses. We have genes that produce
11 enzymes that can repair DNA. They are called DNA repair
12 enzymes and they can actually bind together DNA that's been
13 damaged.

14 Now, I tell you about one more thing related to this
15 event, to these events. Aneuploidy -- let me finish this.
16 Aneuploidy means abnormal chromosome distribution. They are
17 not cancer cells, but the door has been opened because there
18 is DNA that's been displaced, and in this DNA could be a set
19 of genes that protects us and now the gene is not where it's
20 supposed to be, so it's not going to work. Okay? That's
21 one way asbestos causes cancer.

22 The second way is because asbestos generates what are
23 called reactive oxygen species. High-energy short-lived
24 chemical compounds that we have been known for many
25 generations of scientists that damage DNA. That's the way

1 cigarette smoke causes genetic defects in the airway
2 linings. That's the way radiation causes cancer, by
3 generating oxygen rapidly. Asbestos, all the asbestos
4 varieties, the individual fibers generate oxygen rapidly.
5 So here now are these asbestos fibers in this same
6 compartment as the DNA generating oxygen rapidly. So
7 asbestos can produce a double whammy as a carcinogen. It
8 binds DNA and it generates oxygen rapidly.

9 I have one more slide. This is the last slide.

10 Q. What is that slide showing us?

11 A. Okay. So this is a summary of what I just told you
12 that will take just a second. I want you to understand what
13 was going on during those decades of latency. All right.

14 So what happened between the time the individual was
15 exposed to asbestos, whether it was one year or four years,
16 it's typically decades after exposure that the person comes
17 to the clinic with the cancer. What was going on. That's
18 what I want you to know and then I'll be finished.

19 So here the artist has given us a layer of mesothelial
20 cells, single cell layer, right? Hundreds of millions of
21 cells lining the surfaces of the lung. And he's got a
22 couple of lightening bolts coming in here and he says DNA
23 damage. That's what that says. Now, as far as I know,
24 lightening doesn't cause DNA damage. What the point is,
25 this is a mesothelioma. So something from the environment,

1 namely asbestos, has breached the target cell. The target
2 cell is the cell from which the disease develops. The
3 mesothelial cells lining the surface of the lung have been
4 breached. The DNA has reached that site, and I showed you
5 how that happened.

6 So now the cell has -- the carcinogen, the asbestos,
7 has reached the cell and the cell is dividing and the artist
8 has one of the daughter cells going off into the upper
9 left-hand corner here. The DNA is clumped up. The cell is
10 dying and this daughter cell is going to die, because the
11 artist knows very well that's what happens to most cells
12 with DNA damage. They die.

13 You go out and you get a sunburn, you have DNA damage
14 in certain cells and you get aneuploidy and you get DNA
15 damage, but you typically don't get skin cancer, because
16 those cells die.

17 The aneuploid cells that you find in the lungs of
18 cigarette smokers, they typically die, because of these
19 genetic defenses that drive the cells down the death
20 pathway. And that's what this cell represents is that death
21 pathway.

22 But we have a cancer. We have a tumor and the artist
23 has given us a tumor right here. And I'll tell you about
24 that funny color that the tumor has in just in second, but
25 that means that one of the daughter cells with that genetic

1 error, that DNA damage, must survive and there that cell is.

2 Now, between that surviving daughter cell and the
3 development of this tumor you got to give me about 50 years.
4 Okay. The artist didn't help much with that space right
5 there, but you going to give me about 50 years between that
6 first daughter cell and the tumor.

7 So what's going on? So think about the hundreds of
8 millions of mesothelial cells and now you have one with an
9 error in a gene that controls cell growth, the gene that
10 protects us, and that cell sits there now looking and acting
11 like a normal mesothelial cell. You would never know it was
12 there. No one is going to be going in there and start
13 collecting mesothelial cells from somebody. And that cell
14 then can sit there, as I say, like that for months, but
15 eventually it has to divide. I told you half of one
16 percent, very low background rate, but eventually it has to
17 divide; two cells, four cells, eight cells, 16, 32, 64,
18 making what's called a field of similar cells, all with that
19 one error.

20 Now, one or more of those might die, but in order to
21 get a cancer, several -- more than one has to persist. And
22 then the person gets hit again. Another one of those cells
23 gets hit again and another error. One error in a gene is
24 not enough. Two is not enough. Three is not enough. Four
25 is not enough. Five is probably not enough.

1 When you look at the cells from mesothelial tumors,
2 people with mesothelioma, there is a whole array of
3 different genetic errors. And I think I told you this
4 earlier. We can't tell you just which ones yet were
5 necessary and required for that cancer, but we do know that
6 you have to have a series of them.

7 So now we are up to two. Okay. So now there is a cell
8 with two genetic errors and it sits there looking and acting
9 like a normal mesothelial cell and it sits there like that
10 for months. Then it starts to divide. Two, four, eight,
11 16, 32, 64, making another field, a separate field of cells
12 with those errors. Okay. Now, think about that process for
13 decades, going on with the addition of errors over the
14 decades.

15 Finally, near the end of that latency, the single cell
16 with sufficient errors and in the right combination for that
17 person; remember, very rare cancer, a single cell grows out,
18 and that's why the artist made this all the same color, this
19 tumor is all the same color, because it all came from a
20 single cell. The clone that grew out into this cancer,
21 which is now going to keep growing by definition. It's not
22 now just a -- just a field. It's not now just a field of
23 similar cells. It is a cancer that is going to keep growing
24 until it takes that person's life.

25 Q. Thank you, Dr. Brody.

1 A. You are welcome.

2 Q. I got just a few more questions.

3 Dr. Brody, does smoking cause mesothelioma?

4 A. No, smoking has nothing to do with mesothelioma. We
5 know this because some scientists -- these are now called
6 epidemiologists. Epidemiologist is a scientist who studies
7 populations and they ask what causes disease in a population
8 and they found that people who smoke cigarettes don't have
9 an increased risk of mesothelioma.

10 Then they looked at people who are exposed to asbestos,
11 where there is a clear risk of mesothelioma, and if they
12 smoked, it didn't increase their risk.

13 So the answer is no, smoking has nothing to do with
14 mesothelioma.

15 Q. And how well established in the scientific community is
16 the causal relationship between exposure to asbestos and the
17 development of mesothelioma?

18 A. Well, there really -- I mean, it's like if you ask me
19 that same question about smoking and lung cancer. I mean,
20 it's called -- and I know that you saw this. It's called a
21 signal tumor. Somebody walks in with a mesothelioma, it's
22 signaled the doctor that there was very likely and probably
23 an asbestos exposure.

24 Q. And you talked a little bit about this, but in terms of
25 dose response, I'm going to talk to you about that for a

1 moment.

2 Is it the case that in some circumstances a person who
3 is actually doing the hands-on work with asbestos would not
4 develop this disease, but a person who is a bystander to
5 that person doing the work would develop the disease?

6 A. Oh, of course. It's all related to susceptibility.

7 Q. And --

8 A. There are -- there are -- it's called a bystander, and
9 there are a number of cases where workers, asbestos workers,
10 come home and the person who is taking care of the clothes,
11 is washing the clothes and shaking things out, that's the
12 person that gets the mesothelioma, not the worker. There
13 are a lot of cases like that.

14 Q. That would not be unusual?

15 A. That's correct, not at all.

16 Q. And can you talk to the jury a little bit about
17 cumulative dose? When you have different kinds of
18 exposures, can you pull one out?

19 A. Oh, okay, sure.

20 So whatever a person is exposed to, whenever a person
21 is exposed, a certain proportion of that asbestos
22 accumulates in the person's lung.

23 The lung does not discriminate among the various
24 sources of exposure. It just accumulates the material from
25 wherever it came. So if a person is exposed then as an

1 insulator and works on car brakes and then works in another
2 place where there is asbestos, all of those contribute to
3 the dose that that person gets and it's that person's dose
4 that caused their disease.

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

7 A. Well, not above background. In other words, I told you
8 about this level that we all have in our lungs. We
9 published papers finding that -- showing that we all have it
10 and it's there, but typically not enough to cause a disease.

11 So if you say background typically does not cause
12 disease, fine, but there is no level that we know that is
13 published above that, above that background that we all have
14 that's known to be safe.

15 Q. And, Dr. Brody, have government agencies looked at that
16 concept and come to the same conclusion?

17 A. Well, sure. I mean, that's where I get my information.
18 You know, this is not -- this is not something that I
19 deduced myself. This is what the epidemiologists have told
20 us.

21 Q. And what are some of the government agencies that have
22 agreed with that?

23 A. Well, The National Institute to Health, The American
24 Cancer Society, The World Health Organization, The
25 Environmental Protection Agency. National Institute of

1 Occupational Safety & Health. Every agency that's ever
2 actually asked that question comes to that conclusion.

3 Q. Dr. Brody, I would like to give you a hypothetical, if
4 I could.

5 Would you assume for me exposure to a person on a
6 regulars basis as a bystander to workers installing and
7 cutting asbestos insulation in the same building where he
8 was close enough to see dust over a period from 1970 to
9 1974?

10 And would you further assume for me exposure from
11 sweeping up after the insulation and cutting of asbestos
12 insulation near the same -- over that same four-year period,
13 from 1970 to 1974?

14 Would those exposures be a significant contributing
15 cause of the development of mesothelioma?

16 MR. WALL: Objection to the form of the question,
17 Your Honor. It calls for speculation.

18 THE COURT: Overruled. It's a proper hypothetical
19 question.

20 A. No question. Absolutely. That is the kind of exposure
21 that has caused many cases of mesothelioma.

22 BY MS. MCVEY:

23 Q. Thank you, Dr. Brody.

24 A. You are welcome.

25 MS. MCVEY: I pass the witness.

1 THE COURT: Your witness, Mr. Wall.

2 MR. WALL: No questions.

3 THE COURT: Very good.

4 Dr. Brody, thank you so much. You may come down.

5 THE WITNESS: My pleasure, Your Honor. Thank you.

6 MS. MCVEY: Your Honor, may Dr. Brody be excused?

7 THE COURT: He may be excused. Thank you, Dr.

8 Brody.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Good to see you, sir.

11 THE WITNESS: Pleasure. Thank you.

12 THE COURT: Ms. McVey?

13 MS. MCVEY: Your Honor, we have a video that we
14 can play, or we can start again tomorrow.

15 THE COURT: All right. This jury has been at it a
16 long time and I did not honor my promise to give them their
17 mid-afternoon break in order to get Dr. Brody through, so
18 what I am going to do, ladies and gentlemen of the jury, is
19 let you go for the day.

20 We will start at nine o'clock tomorrow morning.

21 And, again, I thank you for the attention that you have
22 given us. This is not easy jury duty. This is tough jury
23 duty, but I want to remind you please don't read anything
24 about this case. Don't go to the Internet and start doing
25 research on mesothelioma and try to figure out what you want

1 to know. Your evidence comes from this witness stand, and
2 one of the things that I always have to caution jurors
3 about, we are so lucky in this day and age with social media
4 and the Internet, we have access to all kinds the
5 information. I want you to please refrain from trying to do
6 independent research about the case.

7 It is so important to how a case is presented that
8 we have a record of what information you receive about the
9 case from the witnesses that testify to that information
10 here or show you documents that are exhibited and allowed to
11 go back to the jury room for you. So if you would please
12 help me out by trying this case fairly and not doing
13 research.

14 Another thing I would ask you not to do is post on
15 the Internet. It's awfully easy sometimes to throw
16 something on social media or post something about what kind
17 of a day you have had, particularly when you are doing
18 something that you don't normally do, and this is certainly
19 outside your normal every day work experience or living
20 experience hearing a complicated case like this. But if you
21 post something, it might interfere with your ability to be
22 perceived as fair and objective jurors. So if you will
23 please cooperate with me by don't posting anything on social
24 media, don't do any personal research, don't read anything
25 about the case.

1 Then have a wonderful evening and I'll see you
2 tomorrow morning. We will try to start at nine. So if
3 would be here just a little bit before nine, we will try to
4 hit the ground running at nine o'clock.

5 Thank you so much. You may retire to the jury
6 room.

7 Madam Forelady, did you have a question or have I
8 answered it?

9 JURY FOREPERSON: Do you go to this jury room, or
10 do you go to the jury assembly room?

11 THE COURT: You go to this jury room now. This is
12 your room now, so that is where you will assemble.

13 JURY FOREPERSON: Thank you.

14 THE COURT: Thank you so much, ladies and
15 gentlemen.

16 (The following takes place outside the presence of
17 the jury panel)

18 THE COURT: All right. Do we have any issues that
19 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 those
23 of you who have tried cases with me, I will try to be here
24 about 8:30, or so.

25 MS. MCVEY: Great.

1 THE COURT: And so if you have some dilemmas that
2 develop that you think I need to assist you with or hear, I
3 will be here for you and you just let me know.

4 And I promise I will bring my cell phone and my
5 laptop tomorrow -- I mean my I-pad tomorrow so I will be
6 more accessible, but if things come up during the evening
7 that either side feels that you need any activity on my
8 part, all you have to do is e-mail me or text me. My cell
9 phone number is 803-530-0457. And my e-mail address, which
10 I think y'all know well, but I will just have it so you will
11 have it as noted jtoal@sccourts.org.

12 Have a good evening.

13 MS. MCVEY: Your Honor, just before we go, just to
14 confirm, tomorrow we are going to have Dr. Maddox in the
15 morning and then I understand that Covil is going to bring
16 their corporate representative, since we subpoenaed him.

17 MR. WALL: In the afternoon, not in the morning.

18 MS. MCVEY: Right.

19 THE COURT: Veer good. All right.

20 Thank you very much. See you tomorrow morning.

21 (Whereupon, proceedings were adjourned to July 17,

22 2018)

23

24

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS

3

4 JERRY HOWARD CRAWFORD)
5 AND THE ESTATE OF)
6 EVELYN KAY CRAWFORD,) TRANSCRIPT OF RECORD
7) 2017-CP-42-04429
8 PLAINTIFFS,)
9) JULY 17, 2018
10 -vs-) SPARTANBURG, SOUTH CAROLINA
11)
12 COVIL CORPORATION,)
13)
14) (VOLUME II)
15 DEFENDANT.

10

11

12 B E F O R E:

13

14 THE HONORABLE JEAN HOEFER TOAL, JUDGE. ; and a jury.

15

16

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

18

19 THEILE B. MCVEY, ATTORNEY AT LAW
20 KASSELL MCVEY, ATTORNEYS AT LAW
21 1330 LAUREL STREET
22 COLUMBIA, SOUTH CAROLINA 29202
23 ATTORNEY FOR THE PLAINTIFFS

24

25 CHARLES W. BRANHAM, III, ESQUIRE
26 DEAN, OMAR & BRANHAM, LLP
27 302 N. MARKET STREET, SUITE 302
28 DALLAS, TEXAS 75202
29 ATTORNEY FOR THE PLAINTIFFS

30

31 AARON D. CHAPMAN, ESQUIRE
32 DEAN, OMAR & BRANHAM, LLP
33 302 N. MARKET STREET, SUITE 302
34 DALLAS, TEXAS 75202
35 ATTORNEY FOR THE PLAINTIFFS

36

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

MARK BUHA, ESQUIRE
DEAN, OMAR & BRANHAM, LLP
302 N. MARKET STREET, SUITE 302
DALLAS, TEXAS 75202
ATTORNEY FOR THE PLAINTIFFS

MARK H. WALL, ESQUIRE
WALL TEMPLETON, ATTORNEYS
POST OFFICE BOX 1200
CHARLESTON, SOUTH CAROLINA 29402
ATTORNEY FOR THE DEFENDANT

THOMAS BOGER, ESQUIRE
WALL TEMPLETON, ATTORNEYS
POST OFFICE BOX 1200
CHARLESTON, SOUTH CAROLINA 29402
ATTORNEY FOR THE DEFENDANT

MICHAEL R. WATTS
CIRCUIT COURT REPORTER

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1 (PROCEEDINGS, JULY 17, 2018)

2 THE COURT: Please be seated.

3 All right. Ladies and gentlemen, let me take up
4 something with the lawyers before, and this is on the
5 record, before we bring in the jury.

6 One of our jurors, juror number 168, has had a
7 domestic situation develop. She was very recently divorced
8 and her husband, who is an ex-deputy sheriff, and,
9 therefore, well knows how these proceedings work, has taken
10 advantage of the fact that she is here and on the jury and
11 does not have access to her cell phone to threaten their
12 sixteen year old son. And the result of that is that 9-1-1
13 was called. She was still here and gets out and has all
14 these calls on her cell phone and so forth. A very ugly
15 situation. And she has come to me this morning and placed
16 it before me and I have made the decision to allow Ms. Lynch
17 to be excused from jury service for her own safety, and I
18 have instructed the sheriff's department to accompany her
19 and be sure that her safety and the safety of her son is
20 assured.

21 I certainly will invite your comments, if you have
22 any, or if you have any dilemmas about that, but I just felt
23 that her safety required it.

24 MR. WALL: No objection, Your Honor.

25 MS. MCVEY: No objection.

1 THE COURT: Very good.

2 That will mean that the first alternate will now
3 be on the jury. I don't have my jury list right here.

4 THE BAILIFF: Juror 62, Your Honor.

5 MS. MCVEY: Number 62, sir?

6 THE BAILIFF: Yes, ma'am.

7 MS. MCVEY: Thank you.

8 MS. MCVEY: What's her name?

9 THE COURT: Casey L. McKinney, juror number 62,
10 will move up to be a member of the jury.

11 And, as you can see, this illustrates the
12 advisability in these kind of cases of having a sufficient
13 number of alternates to meet the challenges that we face,
14 but I appreciate your understanding.

15 All right. Now, is there anything I need to help
16 you with before we bring our jury in?

17 MS. MCVEY: Your Honor, just one thing.

18 First let me just give you the schedule of the day
19 and tell me one issue we are going to need to argue I think
20 this afternoon.

21 THE COURT: Right.

22 MS. MCVEY: We have a medical stipulation that we
23 have agreed to that I would like to publish to the jury this
24 morning.

25 THE COURT: Right.

1 MS. MCVEY: And Dr. John Maddox is here and he'll
2 go up.

3 THE COURT: Very good.

4 Hey, Dr. Maddox. Good to see you again, sir.

5 MS. MCVEY: We have some video to play of Mr.
6 Crawford and others.

7 THE COURT: Yes.

8 MS. MCVEY: And then Mr. Glenn, the corporate
9 representative for Covil, is coming this afternoon.

10 THE COURT: All right.

11 MS. MCVEY: And then depending upon how the day
12 goes, we will either put a family member up or not.

13 THE COURT: Right.

14 MS. MCVEY: Depending upon how much time we have.

15 THE COURT: So that's kind of a broad outline as
16 to what we can expect today?

17 MS. MCVEY: Yes.

18 Before Mr. Glenn testifies, we filed a brief on
19 corporate representative hearsay. We filed it and served it
20 earlier this week. We don't need to argue it now, but just
21 before Mr. Glenn testifies, which will probably be after
22 lunch.

23 THE COURT: All right. Very good. I will take
24 that and keep that here.

25 Mr. Wall, I will certainly hear anything that you

1 and Mr. Boger would like to argue about it.

2 MR. WALL: Yes, Your Honor. If he's the corporate
3 representative, how can it be hearsay?

4 THE COURT: I understand that, but we will argue
5 that at the appropriate time, but you will be fully heard on
6 it.

7 And preliminarily I think plaintiffs may be
8 protecting the record, but I understand what you say.

9 MR. WALL: Okay.

10 THE COURT: All right. Now, anything else by way
11 of anything preliminarily?

12 Mr. Boger?

13 MR. BOGER: Yes, Your Honor.

14 I have failed yesterday to put some objections on
15 the record as to a witness that at some point they are going
16 to play a video of, Mr. Waters, and we can -- if you want to
17 take them up now, we can get it on the record, or we can do
18 that prior to the witness being presented by the video.

19 MS. MCVEY: I thought you did argue that. Didn't
20 you file a motion and --

21 THE COURT: We --

22 MR. BOGER: We filed a motion.

23 THE COURT: You filed a motion. We argued it and
24 I ruled on the matter.

25 Is this just some more argument?

1 MR. BOGER: There was -- I didn't get my argument
2 before the ruling, Your Honor.

3 MR. WALL: You ruled on the briefs.

4 THE COURT: Well, true, but I had your position in
5 front of me, but you did not have a chance to orally argue
6 it?

7 MR. BOGER: Yes, ma'am.

8 THE COURT: Why don't we just do that before he
9 gets up and let you place anything else you want to place
10 before us at that time so that we can kind of --

11 MS. MCVEY: That would be fine, Your Honor. We
12 plan on playing Mr. Waters' deposition, which is a short
13 deposition.

14 THE COURT: When?

15 MS. MCVEY: Before Mr. Glenn testifies this
16 afternoon.

17 THE COURT: Okay. Well, we will have some breaks
18 before then where we will accommodate what you want to do,
19 Mr. Boger.

20 MR. BOGER: Thank you, Your Honor.

21 THE COURT: Very good.

22 MS. MCVEY: Thank you.

23 THE COURT: All right. Bring me the jury.

24 THE BAILIFF: Yes, ma'am.

25 (The following takes place in the presence of the

1 jury panel)

2 THE COURT: Ladies and gentlemen of the jury --
3 You may be seated, counsel.

4 Ladies and gentlemen of the jury, I hope you had a
5 pleasant evening. I certainly did watching home run derby.
6 Although I'm not a Nat's fan, so I'm not a big Bryce Harper
7 fan, but, boy, that was a lot of powerful hitting going on.

8 Illustrating the wisdom of having alternates, one
9 of your members has had to be excused from jury service
10 because of a serious personal issue that has arisen and she
11 is sorry about it, and so are we. It's juror number 168,
12 and she will now be replaced by juror number 62. Raise your
13 hand, please. Juror 62 is now a full member of the jury.

14 And thank you, alternates, and, again, as you can
15 see, that illustrates the reason for having alternates,
16 because you can become a part of this jury at any moment in
17 time.

18 Our day will go like this. Plaintiff is in the
19 midst of presentation and will begin with a video?

20 MS. MCVEY: With a stipulation.

21 THE COURT: She will begin with some stipulations
22 that both sides have agreed to. Then Dr. John Maddox will
23 testify. There will be some videos played of Mr. Crawford
24 and perhaps other witnesses. There will be some other
25 witnesses presented. And while we will kind of see how this

1 day goes, but my target is sometime between 5:00 and 5:30
2 for completion of this day's activities. So that's kind of
3 what you are looking at.

4 You may proceed, Ms. McVey.

5 MS. MCVEY: Thank you, Your Honor.

6 Good morning.

7 A stipulation: The plaintiffs and Covil
8 Corporation stipulate that Jerry Crawford's reasonable and
9 necessary medical bills related to his treatment for
10 mesothelioma total \$567,937.64. \$567,937.64. Thank you.

11 Your Honor, I would like to admit that in
12 evidence. We have marked it as Plaintiffs' 804.

13 THE COURT: Admitted, without objection.

14 (Whereupon, Plaintiffs' Exhibit No. 804 was
15 entered into evidence).

16 MS. MCVEY: Thank you.

17 MR. CHAPMAN: Your Honor, the plaintiffs would
18 like to call Dr. John Maddox.

19 THE COURT: Very good.

20 Dr. Maddox, come around, please, sir, and be sworn
21 by the clerk.

22 DR. JOHN MADDUX, having been first duly sworn,
23 testified as follows:

24 THE WITNESS: Yes, ma'am, I swear.

25 THE COURT: Thank you, Dr. Maddox. You may be

1 seated.

2 Ladies and gentlemen of the jury, Dr. Maddox is an
3 expert witness. And as I have explained to you yesterday,
4 we will hear his education, training and experience. And
5 unless I'm gravely mistaken, I will probably qualify him as
6 an expert witness, which means he may give you opinions
7 about his areas of expertise.

8 You are the judges of the facts and you will
9 examine this evidence and give it the credibility you think
10 it deserves. You are the sole judges of the facts, not me,
11 not anyone else in this room. Thank you.

12 And you may proceed, Mr. Chapman.

13 MR. CHAPMAN: Thank you, Your Honor.

14 DIRECT EXAMINATION BY MR. CHAPMAN:

15 Q. Good morning, Dr. Maddox.

16 A. Good morning, sir.

17 Q. How are you doing this morning?

18 A. Very well. Thanks.

19 Q. Can you please introduce yourself to the members of the
20 jury?

21 A. Sure. My name is John Colter Maddox, M.D.. I am a
22 pathologist practicing in a community hospital called
23 Riverside Regional Medical Center located in Newport News,
24 Virginia.

25 Q. You said M.D.. What kind of physician are you?

1 A. I'm a good one.

2 My degree is medical doctor, M.D., and I practice
3 laboratory medicine.

4 Now, I also practice hematology, which involves seeing
5 a few patients for hematologic problems. I perform some
6 biopsies myself.

7 I spend a lot of time at a microscope reading biopsies
8 and helping to interpret other types of laboratory work.

9 Q. Doctor, for how many decades have you been analyzing or
10 examining tumors in order to diagnose what condition a
11 person is suffering from?

12 A. Well, for 42 years. The same year I was married I
13 started a pathology internship and residency program after
14 medical school.

15 Q. Doctor, where did you go to school?

16 A. Well, I grew up in Charlottesville, Virginia, where I
17 attended the public schools and the Baptist Church.

18 I then went to college at the University of Virginia,
19 again in Charlottesville, and took a B.A. in biology.

20 Then I went to medical school, again in
21 Charlottesville, and took the M.D. Degree in 1976.

22 MR. CHAPMAN: Your Honor, may I approach the
23 witness?

24 THE COURT: You may.

25 BY MR. CHAPMAN:

1 Q. Dr. Maddox, I'm going to hand you what I have
2 pre-marked as 806.1.

3 MR. CHAPMAN: And, Your Honor, I have a fresh copy
4 for the bench.

5 THE COURT: Thank you, sir.

6 BY MR. CHAPMAN:

7 Q. Dr. Maddox, what are we looking at?

8 A. This is a copy of my curriculum vitae.

9 Q. And is that a fair and accurate summary of your
10 education, experience and publications?

11 A. Yes, sir, it is.

12 MR. CHAPMAN: Your Honor, move to admit.

13 THE COURT: Without objection?

14 MR. WALL: Your Honor, as I said earlier, it's
15 hearsay, but I understand the court is going to allow it in.

16 THE COURT: Very good. Overruled. It would be
17 admitted.

18 (Whereupon, Plaintiffs' Exhibit No. 806.1 was
19 entered into the record as evidence).

20 MR. CHAPMAN: Thank you, Your Honor.

21 BY MR. CHAPMAN:

22 Q. Doctor, have you provided me with a set of slides so we
23 can get some background explanations on these topics?

24 A. Yes, sir, power point slides.

25 Q. Okay. And are these these slides?

1 A. Yes, sir.

2 THE WITNESS: May I stand while we are going
3 through these, or --

4 THE COURT: Certainly, whatever is most
5 convenient, Dr. Maddox. Just be sure the jury can see you
6 and hear your presentation.

7 THE WITNESS: Yes, ma'am. Thank you very much. I
8 just can't really see them from sitting in the chair.

9 BY MR. CHAPMAN:

10 Q. Dr. Maddox, we started to talk about your education.
11 Can you give this jury just kind of a thumbnail of your
12 background and training?

13 A. Sure.

14 After college and medical school I did what's called
15 postgraduate training. That includes an internship, a
16 residency and a fellowship at Stanford University, which is
17 a university located in Palo Alto, California. Nowadays
18 they call that the Silicon Valley, but this was so long ago
19 that they called it The Farm back then. At any rate, I took
20 this training in anatomic pathology.

21 Anatomic pathology essentially is where a surgeon takes
22 a biopsy. A pathologist then examines that biopsy and looks
23 at cells under a microscope to figure out what it is,
24 whether it's a malignant tumor, whether it's an infectious
25 disease, or what.

1 And while I was there I had an opportunity to work with
2 Dr. Charles Carrington. At the time Dr. Carrington was the
3 chairman of the U.S. and Canadian Mesothelioma Panel, which
4 was an expert group that was formed to help other physicians
5 figure out whether they were dealing with mesothelioma, or
6 lung cancer, or some other type of tumor. And through Dr.
7 Carrington I learned the essential facts of asbestos-related
8 medicine.

9 So I finished my training period there at Stanford and
10 I went and took a fellowship at M.D. Anderson Hospital and
11 Tumor Institute located in Houston, Texas. It's one of the
12 big regional cancer centers around the United States, like
13 Memorial Sloan-Kettering, Mayo Clinic, places like that.

14 While I was there I had an opportunity to work with Dr.
15 David Dale, who was a lung pathologist and who was the
16 co-author of the standard textbook of lung pathology called
17 Pulmonary Pathology, which is now in its third edition.

18 At any rate, the point is that I saw some additional
19 cases of lung tumors, including mesotheliomas, while I was
20 at M.D. Anderson.

21 Then in 1980 I moved from Houston, Texas to Richmond,
22 Virginia, where I spent two years studying hematology and
23 clinical pathology.

24 In 1982 I took my board examinations in anatomic and
25 clinical pathology and I was certified in both of those

1 subspecialty fields.

2 Then in 1998 I finally went ahead and took the board
3 examination in hematology, because I had already done
4 hematology training. I just never bothered to take the
5 exam, so I took it in 1998. I passed that exam and I was
6 certified as a subspecialist in hematology as well.

7 So that's the basis of the post-graduate education.

8 Q. Doctor, throughout your career have you actually
9 treated or reviewed mesothelioma?

10 A. Oh, yes, sir.

11 Since we started keeping computerized records in 1985,
12 we have had at our hospital over 500 patients that were
13 treated -- either diagnosed or diagnosed and treated for
14 mesothelioma at our hospital.

15 Back in the 1980's there were a couple of years where
16 we were seeing 30 new mesotheliomas per year at one
17 hospital, which is fantastic. That is like one percent of
18 all the mesotheliomas in the country at that one hospital,
19 so I have had a lot of hands-on practical experience with
20 the diagnosis of malignant mesothelioma.

21 Q. Is there a reason for that?

22 A. There is. Newport News, Virginia is home of the
23 Newport News Ship Building and Dry Dock Company and that's
24 the place where they built battleships, aircraft carriers,
25 submarines. And, you know, much of the Navy's fleet during

1 World War II came from Newport News shipyards, so they built
2 a lot of warships.

3 Warships during the 2nd World War and up until the --
4 until about 1970 were built with a lot of asbestos
5 insulation in them.

6 We have a fairly stable population base in Newport
7 News. We have a lot of people that are retired now, but
8 they worked at the shipyard when they were younger and they
9 had heavy exposure to asbestos during the construction of
10 those ships. Consequently we see a lot of asbestos-related
11 disease at our hospital.

12 Q. Doctor, can you tell me a little bit more about what
13 your role has been specifically at the hospital?

14 A. Sure. Well, currently I'm the senior partner of the
15 pathology group at the hospital, which includes six doctors
16 and some technical assistants and some clerical people. So
17 over the years I have gone from the youngest guy there to
18 now I'm the old guy there.

19 What I do on a daily basis is examine tissue slides to
20 see if there is a malignant tumor, or an infectious disease,
21 or what.

22 I also review a lot of blood samples, blood smears. I
23 look at them under a microscope to see whether those cells
24 represent anemia, or leukemia, or something else. As a
25 matter of fact, last week we even diagnosed a case of

1 malaria, so that's the kind of work I do on a daily basis.

2 Also I consult on asbestos-related disease cases,
3 because now I have got years or decades of experience and I
4 can help to guide people when they are trying to make
5 decisions on that.

6 Q. Doctor, have you been published in peer reviewed
7 literature about asbestos disease?

8 A. Yes, sir, I have. I have -- I have -- I'm not an
9 academician. I'm not a university professor. There is
10 nothing in my job description that says that I have to write
11 any papers at all. My job is basically to take care of sick
12 people, but, nonetheless, I have managed to publish about
13 four papers on asbestos-related disease. And also about the
14 same number of papers on hematology. So that's what I have
15 done. It's not as much as a university professor, who may
16 have 300 articles on a bibliography, but it's my
17 contribution.

18 Q. Is mesothelioma a rare type of cancer?

19 A. Yes, sir, it's pretty rare. There is about 3,000
20 cases, or 3,000 new cases of mesothelioma in the United
21 States every year. Compare that to about 180 to 200,000
22 cases of lung cancer per year in the United States. So it's
23 not real common.

24 Q. Doctor, you mentioned that now you do some consulting
25 work. Let me ask you, does that include consulting work for

1 other doctors and other hospitals?

2 A. Yes, for other doctors, for other hospitals, and also
3 for legal groups, and I have been doing that for years.

4 Now, also during the period from 1985 through 2000, we
5 had an electron microscope unit at our hospital and we would
6 use the electron microscope as a higher magnification type
7 of machine that would allow us -- that would help us in
8 making diagnosis of tumors, particularly undifferentiated
9 tumors, where you couldn't tell just using an optical
10 microscope.

11 So during that period of time I used the electron
12 microscope to do approximately 1,200 samples of lung tissue
13 to look at the particles that were contained within the lung
14 tissue, and that was a procedure that I performed at the
15 request of other doctor's groups, plaintiffs' attorney's
16 firms, and defense attorney's firms that accounted for
17 approximately one-third of that work.

18 Q. Doctor, whether you are doing this kind of work for a
19 hospital, another doctor, or someone like me, is your
20 process of examination any different?

21 A. No, there is no difference in the process of
22 examination or the way I come to conclusions. I try to use
23 published criteria as my guide for how to make a decision.

24 Q. You said that you try to review published criteria.
25 Have you reviewed medical and scientific literature about

1 asbestos and asbestos-related diseases?

2 A. Oh, surely I have. In fact, I submitted a reliance
3 list of medical articles and books that I depend upon and/or
4 have reviewed and that's 60 pages long. I know because I
5 typed it myself.

6 Q. Is diagnosing and determining the cause of disease
7 something that you do as a pathologist?

8 A. Yes, sir, it's the type of thing I do every day.

9 Q. And, doctor, are you as a pathologist who looks at the
10 diagnosis of asbestos diseases through your education,
11 experience and training able to evaluate the causes of those
12 asbestos-related diseases?

13 A. Yes, sir, in many cases I am. I would use the
14 published criteria, specifically a publication called
15 Helsinki Criteria, because it's from a conference that was
16 held in Helsinki, Finland. Not the one with President Trump
17 and President Putin, but this was one that was held back in
18 1997.

19 Q. And is this something that you have done throughout
20 your career?

21 A. Yes, sir, it is.

22 MR. CHAPMAN: At this time, Your Honor, plaintiffs
23 would tender Dr. Maddox as an expert in the diagnosis and
24 causation of asbestos-related diseases from various
25 asbestos-containing products.

1 THE COURT: By reason of Dr. Maddox's --

2 Well, let me stop.

3 Voir dire?

4 MR. WALL: No, Your Honor.

5 THE COURT: All right. Any objection to his
6 qualification as a witness?

7 MR. WALL: No, Your Honor.

8 THE COURT: Very good.

9 By reason of Dr. Maddox's education, training and
10 experience, he is recognized and qualified as an expert in
11 the fields just recited by Mr. Chapman that deal with the
12 pathology and treatment and diagnosis of mesothelioma.

13 You may proceed, Mr. Chapman.

14 And, Dr. Maddox, you can either stand or be
15 seated, as you please.

16 I stand often when I address the jury because I'm
17 so short, I can't see them. Look at you this way, but at
18 your pleasure.

19 THE WITNESS: Thank you, ma'am. I certainly
20 appreciate it. I think I will probably stand, because I
21 really can't see the screen from the chair.

22 THE COURT: Very good. That's perfectly okay.

23 BY MR. CHAPMAN:

24 Q. Dr. Maddox, will you agree that the opinions that you
25 give in this case will be to a reasonable degree of medical

1 and scientific certainty?

2 A. Yes, sir, they will.

3 Q. Now, you mentioned that in addition to consulting for
4 doctors and hospitals, you do this kind of work for
5 attorneys?

6 A. Yes, sir, I do.

7 Q. How did this happen?

8 A. Well, it started with the patients that we had at the
9 hospital in the early 1980's. Many of them went to local
10 attorneys looking for compensation for their lethal
11 malignant disease and I was contacted by those local
12 attorneys. And then gradually by word of mouth, not by any
13 kind of advertising that I did, my experience, or the fact
14 that I could help, spread and I started being contacted by
15 more and more firms over the years.

16 Q. And, doctor, whether you are doing this kind of work
17 for a hospital, or a doctor, or someone like me, do you
18 charge for your time?

19 A. I personally don't charge, but the company that I work
20 for called Peninsula Pathology Associates, Incorporated,
21 charges \$500 an hour for my time.

22 As a partner in that group I receive approximately \$112
23 an hour for my time after it's split with all of the rest of
24 the people, the partners in the group.

25 Q. And, doctor, you and my law firm have worked together

1 in the past doing this same kind of thing?

2 A. Yes, sir, I have done -- I have done previous cases
3 with your law firm before.

4 Q. Okay. In this particular case have you had a chance to
5 review Mr. Crawford's pathology?

6 A. Yes, sir, I have.

7 Q. And do you have any opinions about what diseases he may
8 have?

9 A. Yes, sir, in my opinion Mr. Jerry Crawford has a
10 malignant mesothelioma of the biphasic type of his right
11 pleura.

12 Q. Okay. So we are going to get into more of that more
13 specifically, but let me ask you just generally, doctor,
14 what causes mesothelioma?

15 A. Well, the main cause of malignant mesothelioma is
16 asbestos.

17 There is various estimates on the percentage of cases
18 that are caused by asbestos. Some people would say 90
19 percent of cases are caused by asbestos. Some people would
20 say more. The German Mesothelioma Registry says 94 percent
21 of their cases have a definite history of asbestos exposure.

22 The Helsinki Criteria say that 80 percent of the people
23 with mesothelioma have occupational asbestos exposure that's
24 a cause of the tumor, but there is other causes besides
25 occupational. There can be domestic take-home exposure as

1 well.

2 So I would say that at least 90 percent of
3 mesotheliomas are caused by asbestos exposure.

4 There are rare cases of mesothelioma that can be caused
5 by a relatively high level radiation exposure. Like, for
6 example, people with Hodgkin's Disease who have received
7 mantle radiation for the Hodgkin's Disease, or ladies with
8 breast cancer who have had external beam radiation to the
9 breast cancer, high level radiation, there is an increased
10 rate of malignant mesothelioma in those patients.

11 Now, radiation can act hand in hand synergistically
12 with asbestos exposure, so you can have multiple causes for
13 one tumor.

14 Q. Okay. So we will get more into the details of it later
15 on, but let me just ask you, do you believe that Mr.
16 Crawford's mesothelioma was asbestos-related?

17 A. Yes, sir, I certainly do believe that it was. And I
18 did not see any other factor, any other type of exposure
19 that had contributed to his mesothelioma.

20 Q. And, doctor, in your examination of his slides to make
21 your determination that he had malignant mesothelioma, were
22 you able to determine whether or not that was consistent
23 with what his treating physician said?

24 A. Well, yes, it was, as far as I could determine. It was
25 certainly consistent.

1 Q. Okay, doctor.

2 So just to kind of give everybody -- let everybody know
3 where we are going, here are the things I would like to
4 cover with you today. I just want to make sure that you are
5 prepared to talk about all these things.

6 First is that when it was understood that asbestos can
7 cause disease.

8 Second, what the literature says about exposure to pipe
9 insulation in asbestos products.

10 Third, what exposure to a direct or substantial
11 contributing -- what exposure -- excuse me, what exposures
12 were a direct or substantial contributing cause to Mr.
13 Crawford's mesothelioma, based on a set of facts I'm going
14 to ask you to assume.

15 And lastly about his treatment and diagnosis.

16 Are you prepared to talk to me about all those things?

17 A. Yes, sir, I am.

18 Q. Now, we talked about the literature that you relied on,
19 doctor. I also want to get an idea of some of the
20 literature that you have reviewed. Can you talk to me about
21 what it is that doctors like you consider in making these
22 sort of causation diagnoses?

23 A. Well, there is a whole variety of types of medical
24 literature that doctors would consider. There are things
25 like case reports of people who have had similar types of

1 exposures.

2 There is series of cases. Like, for example, one of
3 the very first papers, and we will mention it again soon, I
4 bet you, was a paper from 1960, where there was about 30
5 people that were asbestos miners in a mine in South Africa
6 and they got malignant mesothelioma. There weren't that
7 many people that worked in the mine, but a large number of
8 them did. That was not an epidemiologic report, but it was
9 a case series that carried a lot of weight.

10 At any rate, in addition to case reports and case
11 series there is also epidemiologic studies.

12 There is several different types of epidemiologic
13 studies. One type is called a cohort study.

14 A cohort study is where you start with a defined group
15 of people that are doing a similar job or have some similar
16 type of exposure, and then you follow the development of
17 those people over a period of time. You would call that a
18 prospective study.

19 There is also a different type of study called a
20 retrospective study or a case-controlled study.

21 A case controlled study is where you start with a group
22 of people that have malignant mesothelioma and then you look
23 backwards. You look retrospectively and try to determine
24 what type of occupation or what type of exposure, what type
25 of asbestos were they exposed to. How. So, you see, you

1 can look in either direction.

2 There is other types of epidemiologic studies called
3 registries, and that would be something like a government
4 unit that tracks the development of mesothelioma and then
5 records occupational exposures that people may have had.

6 There are animal studies that should be considered,
7 like where you have a test animal that's either given
8 inhalation of asbestos dust or an injection of asbestos
9 fibers into the peritoneal cavity.

10 And then there is -- in addition to that there is in
11 vitro studies; in other words, studies in test tubes, where
12 cell cultures are dosed with asbestos fibers to see what
13 kind of harmful effects those fibers will have on the
14 cultured cells.

15 So there is all this body of information out there and
16 what it says is basically asbestos causes mesothelioma. Not
17 only that, but all types of asbestos cause mesothelioma and
18 it doesn't take much to do it.

19 Q. Doctor, you told us about a list that you typed up of
20 articles that you reviewed. Do you recall that?

21 A. Yes, sir.

22 Q. Doctor, I'm going to hand you what I have marked for
23 identification as 806.2.

24 A. Yes, sir.

25 MR. CHAPMAN: And, Your Honor, I have a copy for

1 you as well.

2 THE COURT: All right.

3 BY MR. CHAPMAN:

4 Q. Doctor, can you tell the jury what we are looking at?

5 A. Well, this is the reliance list that I have typed.

6 This particular copy of it is dated May of this year.

7 Q. And, doctor, I know you may not agree with every single
8 word and every single study on there, but do you find the
9 studies in that report authoritative and reliable?

10 A. Generally speaking, yes.

11 In one section, the section on brake dust, I have
12 included some articles that I do not agree with, simply for
13 the sake of completion, but most of the other articles on
14 the list are ones that I have general agreement with.

15 Q. Okay.

16 Now, we talked to Dr. Brody yesterday, Dr. Maddox --

17 A. Yes, sir.

18 Q. -- and Dr. Brody told us that all types of asbestos
19 cause mesothelioma. Do you agree with that?

20 A. Yes, sir, I do.

21 Q. Can you tell us a little bit about that?

22 A. Sure. I guess I need to define first the types of
23 asbestos.

24 There is two general types of asbestos.

25 One type is called serpentine asbestos and that type is

1 represented by one type of fiber that's called chrysotile
2 asbestos. Chrysotile asbestos is the type of asbestos that
3 was most commonly used in the United States during the 20th
4 Century.

5 There is a second family of asbestos called amphibole
6 asbestos. In the amphibole family there is three types of
7 commercially used asbestos, namely amosite, crocidolite and
8 anthophyllite. Of those three, amosite was the one that was
9 most commonly used, with only a few places or a few products
10 in the United States that ever used crocidolite or
11 anthophyllite.

12 Now, in addition to that there is also amphibole types
13 of asbestos that are not used commercially, but instead they
14 are found as impurities in chrysotile asbestos, the first
15 type that we discussed. Those impurity types include
16 tremolite and actinolite asbestos.

17 There is also some other lesser varieties of asbestos
18 that are found as impurities. For example, in Libby,
19 Montana there was a big vermiculite mine that had a number
20 of amphibole asbestos types included with that.

21 In some other mineral deposits you can find slight
22 variations on the theme of anthophyllite -- excuse me, on
23 the theme of amphibole asbestos, but that is -- that's a
24 whole catalog for you.

25 In this particular case I think you need to think about

1 chrysotile asbestos, the serpentine form. And then the
2 amphibole asbestos that's pertinent in this particular case
3 would be amosite asbestos.

4 Q. Doctor, what are we looking at here on the screen?

5 A. This is a diagram, a picture, of human lungs.

6 Now, what you see here --

7 Did you want me to use a laser pointer or something to
8 illustrate this?

9 Q. I think the clicker has one, if we can figure out how
10 to get it to work.

11 Yes. The red button there, doctor?

12 A. Thank you much.

13 These are the human lungs.

14 Now, this is the trachea here in the midline, the big
15 pipe that you feel in your neck. It comes down. It splits
16 into the right and left main stem bronchi.

17 This is the right lung, which has three lobes. This is
18 the left lung, that has two lobes.

19 Once you get down into the smaller and smaller bronchi
20 from the main stem down in the segmental, the sub-segmental,
21 and so forth, you eventually get to the respiratory
22 bronchials. And the respiratory bronchials empty into
23 alveolar air sacs. The alveolar air sacs are where
24 respiration actually takes place.

25 Now, around those alveolar air sacks there is a system

1 of capillaries; arteries, veins, and capillaries. That's
2 where the exchange of gasses actually takes place. That's
3 where fibers will start to enter the systemic circulation.
4 Also that's where fibers can penetrate the walls of the air
5 sacs, get into the interstitium of the lung and enter into
6 another type of vascular channel that's in there called
7 lymphatic channels.

8 Lymphatics are like a low pressure drainage system that
9 drains off excess tissue fluids from the lungs or from other
10 organs.

11 In the lungs the lymphatics run in two directions. In
12 one direction they run to the pleura. They open to the
13 pleura through the -- they open to the pleural space through
14 the pleura covering the surface of the lung.

15 They also run into the middle part of the chest where
16 lymph nodes are. Lymph nodes are like filters that help
17 clean the fluid that's draining out of the lung. They try
18 to fight against bacteria, viruses, or other types of
19 particulate material that may be coming out of the lungs.

20 So the point is that's how asbestos fibers get into the
21 lung. They come down the -- they come down the trachea.
22 They get out into the air sacs and then they slip into the
23 interstitium, where they get into some of these vessels.
24 That's how they get into the pleural space.

25 Sometimes you can find them later on. You can find

1 some of them later on still lodged in the lung tissue, or
2 even you can sometimes find them in these lymph node
3 structures that are up here in the center portion of the
4 chest.

5 Q. Doctor, can you tell us some of the diseases that
6 asbestos can cause? You can hang onto the clicker.

7 A. Okay.

8 Q. If you want to --

9 A. Some of the diseases that asbestos can cause.

10 There are four main diseases that can be caused by
11 asbestos.

12 First of all, there is a scarring injury that asbestos
13 fibers can have on the lung tissue itself that's called
14 asbestosis.

15 Asbestosis is when these fibers that remain in the lung
16 are so numerous that they cause an inflammatory reaction and
17 cause scar tissue development.

18 The scar tissue is generally first located in the
19 respiratory bronchials; that is to say those smallest tubes
20 just before they open into the alveolar air sacs, but as
21 asbestosis progresses the fibrosis goes from just the
22 respiratory bronchials into the walls of the alveolar air
23 sacs. As those alveolar walls become denser and denser,
24 thicker and thicker, it becomes harder to exchange air back
25 and forth across them from the air sacs into the capillaries

1 that are -- that's where oxygen and carbon dioxide are
2 exchanged. At that point the person starts to develop
3 respiratory failure. In severe cases asbestosis can
4 actually kill a person.

5 Another process is called pleural plaques.

6 Now, pleural plaque are benign. They are not a
7 malignant disease, but they are also accumulations of scar
8 tissue that are found on the inside of the chest wall.
9 Sometimes they run parallel to the ribs. Sometimes they
10 calcify. Generally they are a hard pearly material. They
11 form in a human being on the chest wall the way that a grain
12 of sand will cause a pearl in an oyster.

13 Q. Let me ask you something, doctor. Does an individual
14 have to have pleural plaques or asbestosis before you can
15 make a diagnose of mesothelioma?

16 A. No, many people with mesothelioma do not have pleural
17 plaques, do not have pulmonary parenchymal asbestosis
18 either. It depends upon the level of exposure. The more
19 heavily exposed you are to asbestos, the more likely you are
20 to have asbestos -- excuse me, asbestosis, the more likely
21 you are to have pleural plaques, and the more likely you are
22 to develop a malignant pleural mesothelioma, but this is not
23 a linear sequence that's dependent upon each other. It's
24 different outcomes of that original asbestos exposure,
25 either to form asbestos, or plaques, or mesothelioma, or any

1 combination of the three, depending upon the level of
2 exposure.

3 Q. Dr. Maddox, with your own eyes have you seen people
4 with mesothelioma that do not have asbestosis?

5 A. Yes, sir, I certainly have. I would estimate about
6 half the people with malignant mesothelioma do not develop
7 pleural plaques.

8 You know, it's a question of individual's
9 susceptibility. People react different to various stimuli
10 or trauma. Have you ever seen people who develop
11 hypertrophic scars when they cut their hand or when they
12 pierce their ears? Sometimes they will develop a nodule at
13 the site of that scar, called a hypertrophic scar. Some
14 people do that. Other people don't. Likewise, some people
15 will form pleural plaques, other people won't.

16 Q. Let me ask you asbestosis, can a person die from
17 asbestosis?

18 A. Yes, sir, it can be so severe that in some cases people
19 will die from respiratory failure and that's a pretty tough
20 death.

21 Q. Let me ask you, doctor, what levels of exposure does a
22 person need in order to pass away from asbestosis?

23 A. It needs to be pretty high. It needs to be pretty
24 high. It needs to be on the order of 10,000, or more, times
25 higher than the normal background environmental level.

1 Q. Okay. And we will get to background later, but let me
2 ask you, doctor, what are we looking at here?

3 A. Well, this is an example of lung cancer and an example
4 of mesothelioma. These are two different diseases.

5 The lung cancer is a cancer, a malignancy that develops
6 either from one of those bronchial tubes that brings air
7 into the lungs or from the spongy air filled portion of the
8 lung itself, the lung parenchyma.

9 You know, lung cancers can be caused by asbestos, but
10 they can also have other causes as well. They can be caused
11 by cigarette smoking. They can be caused by uranium dust
12 inhalation. They can be caused by other chemical agents, or
13 a combination of all those. They can even be caused by
14 radon gas exposures, like comes out from the foundation of
15 some houses.

16 Well, mesothelioma, on the other hand, does not develop
17 in the lung itself, but it develops in the pleural space.

18 The pleura is the covering of the lung and the lining
19 of the chest wall. There is a space called the pleural
20 space, which in a normal person is a potential space, but in
21 mesothelioma patients there tends to initially be an
22 accumulation of fluid, called a pleural effusion. That
23 pleural effusion develops large numbers of malignant cells
24 and groups of malignant cells within it. Some of those will
25 implant on the pleural surfaces and they will start to grow

1 as a malignant and eventually invasive malignancy, and
2 that's what you have got here.

3 Now, this is a fairly late stage of this particular
4 mesothelioma where the pleural effusion has been drained
5 away and essentially the tumor has started to grow into the
6 lung and also grow into the chest wall, and also some of the
7 tumor has metastasized to the lymph nodes in the center
8 portion of the chest.

9 Q. Doctor, would you be able to give this jury an idea of
10 how early on in the medical community it was accepted that
11 asbestos can be lethal?

12 A. Well, there first started being case reports about the
13 lethality of asbestos back in the late 1890's, around the
14 turn of the century then. There were textile workers,
15 asbestos textile workers, in Britain who had asbestos
16 exposure and they died of respiratory failure. They had
17 very high levels of exposure.

18 In 1930 there was a study done by the British
19 Commissioner of Factories, I think the title was. The
20 surveyors were Meriweather and Price in 1930 determined that
21 there was a significant hazard to asbestos textile workers.

22 And at that time they also warned about exposures to
23 asbestos in other types of material, including things like
24 woven brake linings, or jointings. Jointings is the British
25 word for gaskets that are used between pipe flanges. They

1 warned about this in 1930. They warned about it in the
2 context of asbestosis, however, because at that time it
3 really wasn't appreciated the risk of developing
4 mesothelioma, because it was such a rare disease.

5 Q. What about the 1940's and '50's, doctor?

6 A. In the 1940's and '50's people became more gradually
7 aware of the fact that malignant diseases could result from
8 asbestos exposure. At first this was in terms of lung
9 cancer, carcinoma of the lung.

10 Back in the 30's there were very heavy exposures in
11 shipyards and mines, in other industrial applications of
12 asbestos. So those were the levels that were sufficient to
13 cause asbestosis. Those were the levels that were
14 sufficient to cause, particularly in conjunction with
15 cigarette smoking, a significant risk of developing lung
16 cancer.

17 So finally by 1950 there came out a big editorial in
18 the Journal of the American Medical Association. It said
19 asbestos clearly causes lung cancer. There should be no
20 further question or doubt of that fact.

21 A big epidemiologic study came out in 1955 that shows
22 statistical proof for that -- for that determination.

23 Q. And what about the 1960s, doctor?

24 A. Well, in 1960's there were several articles that dealt
25 with malignant mesothelioma. The most important or the most

1 well known of these landmark articles was one by Dr. J.C.
2 Wagner. That's a South African pronunciation of what we
3 might call Wagner, but he called himself J.C. Wagner. He
4 studied a group of asbestos miners, crocidolite mines in
5 South Africa, 20 or 30 people in the study group. All of
6 them -- well, most of them were miners. Some of them were
7 family members. Some of them lived nearby the mines, near
8 the tailings that were taken from the asbestos mines, and
9 all of them had very high levels of exposure to crocidolite
10 asbestos. They developed mesothelioma. It wasn't an
11 epidemiologic paper. It was a case series, but it was such
12 a significant case series that it swung people's opinion to
13 realize asbestos definitely causes malignant mesothelioma.

14 That same year there was another paper by Dr.
15 Eisenstock from Texas, from outside of Houston, Texas, in
16 what's call the oil patch, where they have a lot of
17 refineries, chemical refineries and petroleum refineries.
18 And the workers in the refineries, which were insulated with
19 chrysotile asbestos, were also developing malignant
20 mesothelioma. Again, not a statistical series, but a case
21 series that pointed this out.

22 MR. CHAPMAN: Your Honor, may I approach?

23 THE COURT: You may.

24 BY MR. CHAPMAN:

25 Q. Dr. Maddox, what have I just handed you?

1 A. This is a graph that shows the recognition of the
2 association with asbestos exposure in terms of lung cancer
3 mesothelioma, and possibly cancers in other organs.

4 MR. CHAPMAN: Your Honor, before we continue, may
5 I publish this graph to the jury?

6 THE COURT: Any objection?

7 MR. WALL: It's not in evidence, Your Honor. It's
8 a publication, correct?

9 MR. CHAPMAN: Correct.

10 THE COURT: You got to speak up, Mr. Wall.

11 MR. WALL: It's not in evidence. It's publishing
12 it to the jury.

13 MR. CHAPMAN: That's right, Your Honor.

14 THE COURT: Right. It's not in evidence. He is
15 just publishing it as a demonstrative piece of evidence to
16 the jury.

17 MR. CHAPMAN: That's right, Your Honor.

18 THE COURT: All right. You may do so.

19 MR. CHAPMAN: Thank you.

20 A. Yes, sir. This -- this graph came from an original
21 peer reviewed medical article by Dr. Becklake and it comes
22 from a reproduction in the textbook, the Dale & Hammer
23 textbook that I have already alluded to a couple of times.

24 BY MR. CHAPMAN:

25 Q. This graph we have on the screen, is that the same

1 thing that's in your hand?

2 A. Yes, sir, it is.

3 Q. Okay. Can you tell us a little bit about that, please?

4 A. Sure.

5 This shows the year, from 1980 -- excuse me, from 1880
6 through 1980, and this Y axis of the graph talks about the
7 world's commercial production of asbestos, the commercial
8 usage of asbestos.

9 Chrysotile was used at the start. It was used
10 primarily in textiles.

11 Crocidolite started to be used soon after that in
12 textiles and other applications.

13 Amosite was used after that and it got used as a
14 thermal system insulation; in other words, pipe insulation,
15 boiler insulation, things of that sort.

16 Anthophyllite asbestos was used after that, but only in
17 certain specialty goods. It was used in Scandinavia a lot
18 more than it was in the United States. To my knowledge,
19 there is only maybe two places in the United States that
20 used anthophyllite.

21 Other uses multiplied. It started being used in
22 brakes, started being used in gaskets, and a whole variety
23 of different products. I think it's been estimated that
24 over 3,000 products contained asbestos by the 1960's.

25 The use went up and up. Particularly it accelerated

1 during World War II, when it was used for insulation in
2 warships. And along that time people started realizing the
3 various diseases that it was related to.

4 The first to be recognized was asbestosis, which is
5 really just seen in really, really high dose exposures, but
6 then lung cancer, malignant mesothelioma, other cancers as
7 well.

8 Now, this mesothelioma bar graph should basically turn
9 from probable association to definite association right at
10 1960. That's when it really became indisputable.

11 There had been case reports or small series of
12 mesothelioma cases even back into the 1940's, so there was a
13 suspicion, but in 1960 it really became crystal clear that
14 it was a very significant association there.

15 Q. Doctor, this jury has heard the name Irving Selikoff.

16 Do you know who that is?

17 A. Yes, sir, Irving Selikoff was a physician who practiced
18 at Mount Sinai Hospital in New York City.

19 Dr. Sinai (sic) came to the United States during the
20 1930's from Europe. He was a specialist in pulmonary
21 medicine and he began studying this question of what
22 diseases are caused by malignant -- excuse me, what diseases
23 are caused by asbestos, chrysotile asbestos, amosite
24 asbestos, whatever type, what diseases are caused by them.

25 In order to study this he selected a group of people

1 for a cohort study; that is to say, a prospective study.

2 The people that he began to study were asbestos
3 workers. I think it was called the Heat and Frost Union of
4 New York. He registered these people, looked at how long
5 they were exposed, what type of asbestos they used, and
6 whether they developed any kind of disease from it;
7 asbestosis, lung cancer, mesothelioma.

8 Some of the people in the group were studied with
9 radiology to see if they developed pleural plaques, or any
10 evidence of pulmonary asbestosis. And he collected these
11 figures and published them during the 1960's.

12 He held a large conference in 1964, at which not only
13 other physicians, but also representatives from the asbestos
14 industries were invited to discuss this, to talk about
15 whether they had seen people in their industries with
16 asbestos-related diseases to find out how widespread this
17 problem really was.

18 Q. So you talked about the conferences that Dr. Selikoff
19 held to talk about this. And I think you mentioned that
20 members of industry would attend those as well?

21 A. Yes, sir, members of industry were invited to the
22 conferences and many did attend.

23 Q. And, doctor, if someone attended a Selikoff conference
24 in 1967, would you be able to tell this jury what they would
25 have learned about the hazards of asbestos at that

1 conference?

2 A. Well, they would have learned many things that we know
3 today. Number one, that it causes these four different
4 diseases that I have spoken about. They would have seen
5 evidence that some people could develop malignant tumors,
6 including mesothelioma, at relatively low exposure levels.
7 There was some cases that were presented in the conference
8 where the exposures were exceedingly brief, but the people
9 went on to develop malignant mesothelioma.

10 They began to understand that this was a dose response
11 disease. In other words, if you had a high level of
12 exposure, you had a high level of risk for developing
13 mesothelioma. If you had a lower level of exposure, you had
14 a lower level of risk for developing mesothelioma. And, of
15 course, we know today also that if you have no exposure to
16 asbestos above normal background environmental ambient air
17 levels, then you have no increased risk of developing
18 malignant mesothelioma.

19 Q. Doctor, let me ask you, if an individual attended a
20 Selikoff conference in 1967, what, if anything, would they
21 have learned about asbestos-containing pipe insulation?

22 A. Well, they would have learned that some asbestos --
23 some pipe insulation does contain asbestos, first of all.
24 Some of it contains chrysotile asbestos. Some of it
25 contains amosite asbestos. Some of it contains a mixture of

1 both types.

2 There is also asbestos-free pipe insulation that's
3 sometimes referred to as calcium silicate, but, you know, if
4 you have got one of the types that contains either a single
5 type of asbestos or mixed asbestos content, then that
6 material is hazardous.

7 Also by the sixties some of the initial studies had
8 been done on pipe insulation, boiler insulation, showing the
9 levels of exposure that could be encountered if one was
10 doing that type of work. In other words, when you bring in
11 a half round piece of pipe insulation, you may have to cut
12 it with a knife or a saw to the right length. It's somewhat
13 friable; in other words, it can crumble or release fibers
14 fairly easily. You bring in a second piece of half round,
15 you then may have to wire them together or wrap them in
16 cloth to keep them to stay together.

17 Okay. So the asbestos is in place, and then years
18 later you come in, you have to revise something, add in a
19 joint or an extra feed pipe, or something of that sort, you
20 are going to have to pull that stuff off. And it's not
21 usually pulled off as gently as it is when it's applied.

22 When you pull off or tear down friable asbestos
23 insulation, you can have very high levels of exposure. You
24 can have levels of exposure -- or I should say levels of
25 exposure have been measured during the job of greater than a

1 100 fibers per CC of air during that type of work.

2 During that type of work there is so much asbestos in
3 the air that there is a misty cloud of dust that surrounds
4 the work site. That's a cloud of dust that remains in the
5 air for a period of time and a cloud of dust that can be
6 carried into adjacent spaces. There is studies in the
7 literature that even show that that dust can be measured in
8 the next room, depending upon the ventilation.

9 So, yeah, that's the type of stuff that you might have
10 been starting to hear even during the 1960's at the Selikoff
11 conferences.

12 Q. Doctor, you said something a second ago that the
13 exposures from pipe insulation could be up to a 100 fibers
14 per CC. What does that mean?

15 A. Well, that means that you have enough fibers suspended
16 in the air to create a cloud of dust that's easily
17 visualized in normal light without any kind of special
18 equipment or microscopes or anything. I mean, that's --

19 If you have gone down a country road following too
20 close to another car, you get cloud of dust that comes up
21 from the car. That's the type of cloud of dust that I'm
22 referring to, except it's not just clay. It's asbestos
23 fibers and whatever other type of binder is mixed in, like
24 calcium silicate.

25 Q. Is that a high exposure or a low exposure?

1 A. That would be a very high exposure.

2 Q. Doctor, what is signature disease? What does that
3 mean?

4 A. Well, it means that this is a type of malignant disease
5 that is usually caused only by one thing and that's by
6 asbestos exposure.

7 We have already talked about how there are a few cases,
8 a handful of cases, where there may be high dose radiation
9 involved that can cause mesothelioma, but almost all cases
10 of mesothelioma are caused by asbestos exposure.

11 There is some other tumor types, likes angiosarcoma of
12 the liver, that can be caused by vinyl chloride exposure and
13 that's about the only agent that will cause angiosarcoma of
14 the liver.

15 Well, even more frequently we see cases of drowning.
16 What causes drowning? Well, it's usually water. I mean,
17 it's possible that you could drown in olive oil, but you
18 don't see much of that, so I guess signature disease
19 drowning and water would be the association there.

20 Q. Doctor, Dr. Brody talked to us about this yesterday.
21 Could you just kind of briefly give us an understanding of
22 latency?

23 A. Latency is an important concept.

24 Now, the point is it takes a while for the asbestos
25 fibers to sink in, interact with cells and have their effect

1 of causing malignancy. It doesn't happen overnight. I
2 mean, you can't just have the tumor and then, you know, get
3 some asbestos out of a salt shaker and breath it in and
4 blame that the next day if you die of a tumor. It takes
5 years for those asbestos fibers to sink in and have their
6 effect before they can be considered to be a cause of the
7 malignant mesothelioma.

8 The Helsinki Criteria require at least a ten year
9 latency period. In fact, most cases of mesothelioma have a
10 30 to 40 year latency period.

11 Latency period is defined as that period of time from
12 the first exposure to asbestos until the time of diagnosis
13 of mesothelioma. Like I say, a minimum of ten years, more
14 commonly 30 or 40 years.

15 Q. Doctor, would you be able to tell us about individual
16 susceptibility briefly?

17 A. I think I already mentioned that concept earlier. With
18 people with hypertrophic scars, ear lobes, their skin
19 somewhere, some people develop that type of response, other
20 people don't.

21 Likewise, some people are exposed to asbestos and never
22 develop a malignant mesothelioma.

23 In fact, the most highly exposed groups of people,
24 like, for example, Selikoff's insulation workers, or some of
25 the factory workers that worked with amosite asbestos to

1 incorporate that type of asbestos fiber into products, or
2 some of the miners that worked with extremely high levels of
3 asbestos, even in those most highly exposed groups only 10
4 to 15 percent of the workers developed malignant
5 mesothelioma.

6 On the other hand, some of them die of asbestosis, or
7 of lung cancer as well, but there are some other people that
8 never develop a malignancy. Because of their genetic
9 makeup, perhaps? They have better tumor suppressor genes
10 that helps them avoid developing a malignant disease.

11 So what you will see then is that lower levels of
12 exposure, instead of having 10 to 15 percent of people
13 developing malignant mesothelioma, it may only be one
14 percent or a tenth of one percent.

15 Normally malignant mesothelioma is not found in people
16 that are not exposed to asbestos.

17 There have been historical studies that look back at
18 the lung tumors, the chest tumors that were found in people
19 from the 1800's at places like the Mayo Clinic, or at
20 Harvard University, where they have maintained samples that
21 go back over a century, and they just didn't see
22 mesothelioma back in those days before it started being used
23 commercially. They just didn't see it. It wasn't there.

24 Q. Doctor, in this particular case did we ask you to look
25 at Mr. Crawford's pathology report and accompanying

1 materials?

2 A. Yes, sir, you did. You asked me to look at that so
3 that I could confirm the diagnosis. And I did, in fact,
4 confirm the diagnosis, malignant mesothelioma, biphasic
5 type.

6 Q. What I'm going to do, doctor, is hand you what i have
7 pre-marked as Plaintiffs' Exhibit 803.1.

8 MR. CHAPMAN: A copy for Your Honor.

9 BY MR. CHAPMAN:

10 Q. Doctor, what are we looking at there?

11 A. You are looking at the pathology report from the
12 original hospital where he was treated for -- or where the
13 diagnosis of the mesothelioma was made.

14 MR. CHAPMAN: Your Honor, move to admit.

15 THE COURT: Any objection, Mr. Wall?

16 MR. WALL: No objection, Your Honor.

17 THE COURT: Without objection.

18 (Whereupon, Plaintiffs' Exhibit No. 803.1 was
19 entered into the record as evidence)

20 MR. CHAPMAN: May I publish to the jury?

21 THE COURT: You may.

22 BY MR. CHAPMAN:

23 Q. Doctor, what we have on the screen, is it the same
24 thing that you have in your hand?

25 A. Pretty much. They called it epithelioid type. I