| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND<br><br>Sarah J. Plant and Parker Plant,<br><br>Plaintiffs,<br><br>vs.<br><br>Avon Products, Inc., et al.,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTH JUDICIAL CIRCUIT<br><br>C.A. No.: 2022-CP-40-01265<br><br>**DEFENDANT WHITTAKER, CLARK & DANIELS, INC.'S MOTION FOR NEW TRIAL ABSOLUTE AND MEMORANDUM IN SUPPORT** |

Pursuant to Rule 59(a) of the South Carolina Rules of Civil Procedure and the law of the State of South Carolina, Defendant Whittaker, Clark & Daniels, Inc. ("WCD") moves, in the alternative *if* the Court denies its contemporaneously-filed Motion for Judgment Notwithstanding the Verdict (the "JNOV Motion"),[1] for a New Trial Absolute.

## ARGUMENTS

"A new trial may be granted . . . on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. In this case, there are multiple reasons why a New Trial Absolute is required, any one of which is independently sufficient to warrant this relief.

### I. WCD Is Entitled To A New Trial Under The Cumulative Error Doctrine Because A Combination Of Errors Deprived WCD Of A Fair Trial.

As this Court has explained, "[t]he cumulative error doctrine 'provides relief to a party when

[1] In addition to the separately-filed JNOV Motion, WCD has also filed a motion requesting setoff of the jury's verdict by Plaintiffs' settlements with joint tortfeasors and other related relief, in accordance with the Contribution Among Joint Tortfeasors Act, S.C. Code Ann. § 15-38-50 (Supp. 2020).

a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial, and it requires the cumulative effect of the errors to affect the outcome of the trial.'" *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* at 278-79 (3d ed. 2016) (quoting *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999)). The test for cumulative error is two-fold: (1) multiple errors committed during the course of the trial should be identified; and (2) those errors must have adversely affected the defendant's right to a fair trial. *Id.*[2] Such is the case here.

It is axiomatic that "the sitting judge must conduct all adversarial proceedings with fairness and impartiality." *State v. Hawkins*, 387 S.E.2d 251 (S.C. 1989). Moreover, it is an error of law – constituting an abuse of discretion – for the sitting judge to improperly shift the burden of proof to the defendant, *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 309 S.E.2d 776 (S.C. Ct. App. 1983). Furthermore, "it has been frequently held that a trial Judge should not by remarks in ruling upon testimony offered, indicate opinions or express views reasonably calculated to influence the jury in deciding a material issue of fact." *State v. Simmon*s, 209 S.C. 531, 535-36. 41 S.E.2d 217, 219 (1947); *see also State v. Dawkins*, 268 S.C. 110, 112, 232 S.E.2d 228, 229 (1977) (same).

A cascade of errors by this Court – all of which fell in Plaintiffs' favor – deprived WCD of a fair trial. Such errors began at the hearing on pre-trial motions and continued throughout the trial. At the pre-trial hearing held on February 15, 2023, this Court ruled it would allow Plaintiffs' experts to testify about general and specific causation while tying WCD's hands behind its back – improperly excluding WCD's primary medical expert purportedly on competency grounds (Dr.

[2] South Carolina courts have discussed application of the cumulative error doctrine both when trial counsel committed errors, *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002); *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999), and when – as here – the trial court committed errors, *Lynch v. Carolina Self Storage Centers, Inc*., 409 S.C. 146, 163, 760 S.E.2d 111, 121 (Ct. App. 2014).

Attanoos) and then further prohibiting all other experts from offering specific causation opinions (Dr. Feingold, Dr. Diette, and Dr. Weill). The result was to shift impermissibly the burden of proof to WCD to prove that the cosmetic talc it allegedly distributed ***did not cause Mrs. Plant's disease.*** Standing alone this error warrants reversal. However, this was compounded by additional errors outlined below that further hamstrung WCD's right to a fair trial.

Indeed, after WCD (with consent from other Defendants) exercised its constitutional right to remove this case to federal court – a removal which the federal court judge found to involve "tough substantive issues to decide" and was "unusually well-briefed and well argued on both sides"[3] – this Court injected into the trial its own critical opinion of WCD, claiming that the removing defendant who "caused this problem" will "pay some penalty" for having exercised its constitutional right. (*See* Ex. E, Trial Tr., 2/23/23 PM Session at 146:11-12). It is apparent this Court believed (contrary to the federal judge's comments) that the removal was frivolous, "a bad faith removal" (*see* Ex. B, Trial Tr. 2/21/2023 AM Session, at 11:13-14), and a "sanctionable situation" (*see id.*, at 53:6-7). Indeed, after learning of the removal, the Court informed the parties that it was "very disappointed and upset about this" (*see id.*, at 36:5-6) and would "certainly deal with what needs to be dealt with here, when the cases come back, as I believe they will" (*see id.*, at 53:9-11). The Court also reiterated when the trial began that it "still ha[d] a lot of heartburn about how this all came down." (*See* Ex. E, Trial Tr. 2/23/2023 PM Session, at 145:2-3).

Once the parties began presenting evidence to the jury, the Court's intended penalty became clear. As discussed *infra*, the Court improperly: (1) commented on the merits of WCD's expert

[3] *See* 2/22/23 Transcript of Hearing on Motions, ECF No. 22 at 48:22-24; 50:12-16, in *Sarah J. Plant et al. v. Avon Prods., Inc. et al*, Civil Action No. 3:23-cv-691-JFA, attached hereto as Ex. Q. The Court may take judicial notice of matters of public record in court filings. *See e.g., Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (common and appropriate use of judicial notice is for contents of court records).

opinions; (2) instructed the jury about opinions from WCD's experts solicited by Plaintiffs' cross-examination questions; and (3) even testified about the opinions of an expert Plaintiffs' counsel has used in other trials, but who did not testify at trial, to instruct the jury to disregard WCD's expert's opinions in this trial. (*See* detailed discussion of these errors, *infra*, Sections II and IV; *see also* Ex. O, Trial Tr., 3/2/2023 PM Session, at 121:11-22). In addition, the Court expressly overruled properly stated and timely objections made prior to the admission by Plaintiffs of certain exhibits on the stated grounds that the objections were (1) not timely by not having been made sometime even sooner, in writing, but, more significantly, because the Court declared that (2) WCD could not use a "lack of attention to proposed exhibits and couple it with your deliberate attempt to delay this trial with the removal and have me give any credibility to the objections you're now lodging. So, for those two reasons, overruled." (*See* Ex. F, Trial Tr. 2/24/2023 AM Session, at 75:16-96:2). The result was the admission of multiple lawyer-created charts not shown to be authenticated and not shown to be based on data that was independently admissible, as well as a document (referred to multiple times in Plaintiffs' Closing) that has been declared by the California Appellate Court as inadmissible hearsay. *See McNeal v. Whittaker, Clark & Daniels, Inc.*, 80 Cal. App. 5th 853, 296 Cal. Rptr. 3d 394 (2022), *reh'g denied* (July 22, 2022), *review denied* (Sept. 28, 2022). None of these are harmless errors in their own right, but in concert, there is no doubt that they far surpass the level required for cumulative error.

In fact, the Court's penchant to punish WCD continues even now: During the crunch for WCD to prepare and file timely post-trial motions, Plaintiffs boldly moved the Court to appoint a receiver in South Carolina over WCD, a viable corporation organized under New Jersey laws with its principal place of business in Connecticut (Answer ¶ 74), and unbelievably the Court issued a facially unconstitutional order granting the motion at close of business on a Friday afternoon, only

four (4) days after the motion was filed – without allowing WCD time to file a response despite WCD's request to do so, and without even holding a hearing. WCD's counsel clearly requested time to respond which the Court apparently disregarded completely:

> Dear Justice Toal and all,
>
> While I do not understand the urgency, I am not opposed to a briefing schedule. That said, I have unfortunately had a death in the family today that is going to require out-of-town travel and providing some assistance to my mother over the next week to two weeks, pending arrangements and other issues which are yet to be determined. With the post-trial motions requiring immediate attention, not to mention all of the other matters neglected during the trial, I would respectfully ask for some leniency and time to be able to address the complex issues that the Plaintiffs' motion implicates, with deadlines at least 10 days beyond those that are already in play for post-trial motions. Yet additional time beyond that would be greatly appreciated.

(*See* email exchange with Court and counsel concerning Motion to Appoint Receiver, attached hereto as Exhibit R). The Court's ongoing irritation with WCD for exercising its constitutional right to remove the case was apparent, and there can be no question that WCD was indeed penalized through the Court's repeated errors in Plaintiffs' favor. A new trial is required to ensure that WCD is given the fair trial to which is it constitutionally entitled.

## II. WCD Is Entitled To A New Trial Absolute Because This Court Improperly Excluded Or Otherwise Improperly Limited Testimony From WCD's Experts.

WCD's defense in this trial was irreparably hobbled by the Court's unfounded and complete exclusion of Dr. Richard Attanoos as an expert and the Court's improper limitation on and interference with Dr. Feingold's testimony.

### A. The Court erred by Excluding Dr. Richard Attanoos from testifying completely.

#### i. Procedural History

On February 15, 2023, the Pre-Trial Hearing for the above-captioned cases was held. One of the motions addressed was Plaintiffs' Motion *in Limine* to Exclude the Testimony of Dr. Richard Attanoos ("Dr. Attanoos"), a preeminent pathologist specializing in the diagnosis and causation of

mesothelioma who was offered by WCD and several other defendants.[4] Notably, Plaintiffs' Motion *in Limine* did not seek complete exclusion of Dr. Attanoos, but rather a limitation to exclude several of his opinions regarding the contributing factors and causes of Mrs. Plant's mesothelioma, which was similar to other Motions *in Limine* before the Court regarding Dr. Diette, Dr. Feingold, and Dr. Weill's testimony. The Court granted Plaintiffs' Motion, ruling even further that Dr. Attanoos would be excluded from testifying ***in his entirety***, despite permitting Drs. Diette, Feingold, and Weill to testify with limitations and permitting Dr. Attanoos to testify on three prior separate occasions before this Court. Notably, as discussed *supra*, of the aforementioned experts, Dr. Attanoos is the *only* one who has specifically published in the peer-reviewed literature and outside of the context of litigation on naturally occurring, spontaneous mesotheliomas, yet he was the only expert not permitted to testify on this very topic.

The Court summarized that its decision on Dr. Attanoos was different from her decision on other defense experts who addressed similar topics because it "***related to the inability to follow my directions, first***; and, second, his lack of any kind of foundation for being able to opine about the naturally occurring or idiopathic or any of those kind of causes as the cause of mesothelioma . . .."

[4] Dr. Attanoos is a world-renowned pulmonary pathologist, researcher, and scientist and is likely one of the most qualified witnesses offered in this case on the subject of mesothelioma and its causes. He is an invited member of the U.S.-Canadian Mesothelioma Panel and the International Mesothelioma Panel; he was a Medical Advisor to the All-Party Parliamentary Committee of the British Government of the Health Effects of Asbestos; he was invited by the International Agency of Research hon Cancer (IARC) to be a contributing author for the 4th Edition of the World Health Organization of Tumors of the Lung, Pleura, Thymus and Heart (contributing to the subsection on Malignant Mesothelioma); and he is the representative for the Genomics Committee of the Wales Thoracic Oncology Group. Dr. Attanoos has published over 190 peer-reviewed articles in the peer-reviewed literature, many of which are in the fields of occupational lung disease, asbestos, and mesothelioma. He also performed extensive research and published on inhaled particles of the lung, including asbestos and talc, asbestos-associated diseases and their causes, genetics, molecular biopsy, and carcinogenesis. Due to his preeminent qualifications, his testimony has been permitted before this Court and throughout the United States regarding the causes of mesothelioma, including the spontaneous development of mesothelioma. *See* Declaration of Richard L. Attanoos, B.Sc., MB BS, F.R.C. Path. dated February 28, 2023 (Ex. T).

(Ex. A, Pre-Trial Hearing, 2/15/2023, at 291:4-9) (emphasis added). Specifically, the Court stated that it recalled that Dr. Attanoos had previously testified in this Court conditionally under an order limiting his testimony and gave a detailed account of his conduct:

> He got right up in this witness box, and he **tried to disobey my order**. And then when we had a jury dismissed and discussed this matter some more, and I cautioned the witness, and the jury came back, he then **defied me again** and was asked a question that he thought would be a platform to say this, "But I can't say this" and then pointed up at me.

(*Id*. at 154:4-11). Accordingly, the Court decided, "I can't have a witness testify in any case I try that cannot accept the rulings of the Court about constraints of testimony." (*Id*. at 154:12-14).

As additional grounds for excluding Dr. Attanoos' testimony in its entirety, the Court also mentioned his opinions relating to spontaneous or naturally-occurring mesothelioma as well as issues with "what he has and has not looked at in this case." (*Id.* at 155:6-16, 156:1-6). During the Pre-Trial Hearing, WCD provided copies of its Responses to Plaintiffs' Motion to the Court, which were timely filed on February 14, 2023 at 3:18 PM and 4:58 PM respectively, during business hours on the due date. (*Id*. at 176:6-178:17). The Court had not reviewed WCD's Response prior to its initial ruling at the hearing (*id.* at 176:6-178:14) and stated that it would consider WCD's briefing regarding Dr. Attanoos' testimony (*id.* at 289:23-290:8), even though, "I don't think there's anything that will change my mind." (*id.* at 290:7-10). The Court informed WCD it would notify counsel the following day in the unlikely event WCD's Response affected her decision. (*Id*. at 290:10-13).

In fact, the Court did not change its mind, and on March 1, 2023, the Court filed its Order granting Plaintiffs' Motion *in Limine* to Exclude the Testimony of Dr. Richard Attanoos. (*See* Order Granting Plaintiffs' Motion in Limine to Exclude the Testimony of Dr. Richard Attanoos, entered on 3/1/2023). The Court opined that Dr. Attanoos should be excluded because: (1) he had not made an attempt to determine the products at issue contained asbestos, the fiber types of asbestos potentially

associated with any talc products at issue, had not reviewed any studies relating to the products at issue in this case either purporting to demonstrate the presence or lack of presence of asbestos in the products or for purposes of determining the amount of asbestos released from the normal and expected use of these products; (2) his opinion that the mesotheliomas arose unrelated to any asbestos or cosmetic talc exposures, as a naturally occurring cancer lacks foundation because he did not review any testing information about the asbestos content of any talc-based products, any exposure information about asbestos-containing talc products, without reviewing any corporate testing documents from the various defendants who retained him in these cases, and without considering the fiber type associated with any of those testing results and that for Ms. Plant specifically, there is no scientific basis for Dr. Attanoos to conclude that BRCA2 "caused" her mesothelioma absent a causal factor, such as asbestos exposure; and (3) he has a history of disobeying or disregarding orders limiting his testimony issued from this Court. (*Id*.)

With respect to portions of the first two propositions outlined by the Court, in his Report in this case, Dr. Attanoos cites multiple peer-reviewed publications and concludes that "there are no increased rates of mesothelioma reported in numerous epidemiological, or clinical human studies, or animal toxicological studies that evaluated the potential for cosmetic talc to induce cancer." (Ex. U, Report at p. 40). He further relied on the expert reports of Dr. Sanchez and Mr. Segrave, who analyze the processes of talc formation in cosmetic talc locations used in various products, talc testing protocols and analytical methods for the characterization of asbestos and talc, as well as reviewing bulk analyses from various laboratories of talc mine samples and talcum powder end products, and of Dr. Sahmel and Dr. Barlow, who evaluated the potential significance of cosmetic talc exposures to various products alleged used by Ms. Plant. (*Id*. at pp. 40-52). In his report, Dr. Attanoos, relying on the peer-reviewed literature and the expert reports in this case, reiterated that

"even if the aforementioned talc products contained cosmetic talc from mining sources which in themselves contained trace levels of asbestiform mineral or non-asbestiform amphibole/cleavage fragments, the overall effect on human disease and specifically in mesothelioma induction is inconsequential and de minimis because consistently there is no increased risk of mesotheliomas observed in epidemiological or clinical studies of heavily exposed subjects, or indeed in high dose toxicological animal studies." (*Id*. at p. 53). Dr. Attanoos further outlines the various asbestos fiber types, including those that are allegedly associated with cosmetic talc, and details his opinions related to their association, or lack thereof, with mesothelioma. (*Id*. at pp. 32-38). As discussed further *supra* in Section II.B.ii, Dr. Attanoos' opinions related to naturally-occurring, spontaneous mesotheliomas and BRCA2 and mesothelioma are well-founded and supported by the peer-reviewed literature. These opinions are clearly laid out in Dr. Attanoos' report, which was apparently disregarded by the Court.

As the Court did not change its ruling, WCD filed and circulated to the Court and all parties a Motion to Reconsider the Court's Ruling on Plaintiffs' Motion *in Limine* to Exclude the Testimony of Dr. Richard Attanoos on February 19, 2023. (*See* WCD's Motion to Reconsider the Court's Ruling on Plaintiffs' Motion *in Limine* to Exclude the Testimony of Dr. Richard Attanoos ("Mot. to Recons.")). As grounds for reconsideration, WCD first cited to the Court's primary basis for disqualifying Dr. Attanoos which was its recollection of the prior conduct of Dr. Attanoos in a trial that did not involve WCD. WCD pointed out in its motion that these grounds, seemingly based on this Court's personal opinions of Dr. Attanoos, were certainly not asserted in Plaintiffs' Motion *in Limine* and therefore WCD had no notice or opportunity to respond and be heard on such assertions. Indeed, WCD was not a party to the trials to which the Court was referring regarding Dr. Attanoos' alleged behavior. Further, upon looking into Dr. Attanoos' prior testimony before this Court, WCD

believes the Court mistakenly attributed the conduct of a different witness to Dr. Attanoos. Upon information and belief[5], those appearances were in the following three cases: (1) *Antoine Bostic, Individually and as Personal Representative of the Estate of Bertila Delora Boyd-Bostic v. Imerys Talc of America, et al*., May 21, 2018, C.A. No. 2017-CP-16-0400 (Transcript attached as Ex. B to the Mot. to Recons.), (2) *Antoine Bostic, Individually and as Personal Representative of the Estate of Bertila Delora Boyd-Bostic v. Imerys Talc of America, et al*., November 9, 2018, C.A. No. 2017-CP-16-0400 (Transcript attached as Ex. C to the Mot. to Recons.), and (3) *Beth-Anee F. Johnson and John W. Greenley, Jr. v. Johnson & Johnson, et al*., May 20, 2019, C.A. No. 2018-CP-40-01781 (Transcript attached as Ex. D to the Mot. to Recons.). Nowhere in these transcripts is the conduct described by the Court above, particularly the Court's alleged cautioning of Dr. Attanoos about his violation of a limitation on his testimony. Moreover, Dr. Attanoos has already been qualified by this Court as an expert in comparable cases ***on three occasions, making his exclusion in this case inexplicable.***

As a second ground for reconsideration of the Court's exclusion of Dr. Attanoos, WCD incorporated the arguments from its Response to Plaintiffs' Motion *in Limine*, which had not been reviewed by the Court before its initial ruling. (*See* WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos). WCD argued that Plaintiffs' Motion *in Limine* was an attempt to preclude WCD from presenting any evidence refuting Plaintiffs' theory of the case. Plaintiffs intended to present their case to the jury in a vacuum and summarily adjudicate—by striking all of WCD's conflicting evidence—that (a) mesotheliomas cannot arise in the absence of asbestos exposure, and (b) Mrs. Plant's mesothelioma specifically was caused by asbestos. (*See* Pls.' Mot. *in Limine* at p. 2). WCD argued that such a ruling would be contrary to peer-reviewed publications published outside of the

[5] To the best of WCD's knowledge, these are the only trials in South Carolina at which Dr. Attanoos testified. (*See* Prior Testimony List of Dr. Richard Attanoos, Ex. H to the Mot. to Recons.).

context of litigation, as well as the opinions of Plaintiffs' own experts about the existence of spontaneous, or idiopathic, or naturally occurring mesotheliomas that arise in the absence of asbestos exposure or other external agents. WCD argued that it was an attempt to summarily adjudicate the cause of Mrs. Plant's mesothelioma ahead of trial. As will be shown below, WCD's fears were not unfounded and the cause of Mrs. Plant's mesothelioma—***a crucial, foundational element of Plaintiffs' claims***—was determined by the Court before the trial even began. This burden should not have been shifted to Defendants or escaped through a Motion *in Limine*.

As a third ground for reconsideration, WCD requested that the Court conduct a *Daubert/Council* hearing relating to Dr. Attanoos before making the drastic decision to exclude his testimony completely. At the Pre-Trial Hearing, the Court cited to one of its Opinions for the South Carolina Supreme Court, *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (Toal, C.J.) as an example of the Court's gatekeeping responsibility regarding experts.[6] (Ex. A, Pre-Trial Hearing, 2/15/2023, at 151:23-152:6, 153:11-20, 156:19-157:11). In 2020, the South Carolina Supreme Court addressed a situation where the trial court failed to exercise its gatekeeping function relating to a scientific expert. *See State v. Phillips*, 430 S.C. 319, 334–35, 844 S.E.2d 651, 659 (2020). In *Phillips*, where a purported expert regarding DNA evidence was at issue, the Court held that:

> [I]f an objection is made, the trial court ***must*** hold a *Daubert/Council* hearing, the proponent of the evidence must present the factual and scientific basis necessary to satisfy the foundational elements of Rule 702, and the trial court must conduct an on-the-record balancing of probative value against the applicable Rule 403 dangers. The trial court should make specific findings as to each contested element or issue. By not conducting a *Daubert/Council*

[6] In South Carolina, the admissibility of expert testimony is generally governed by Rule 702 of the South Carolina Rules of Evidence. If the proffered testimony is scientific in nature, as it is here, the trial court must determine its reliability pursuant to the factors set forth in *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). *See Graves v. CAS Medical Systems, Inc.,* 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

> hearing, the trial court left itself without a meaningful opportunity to exercise its discretion.

*Phillips*, 430 S.C. 319 at 343, 844 S.E.2d at 663 (emphasis added). The *Phillips* Court contrasted the case with both *Watson* and *Graves*, where "the civil plaintiffs who sought to introduce the opinion testimony presented deposition testimony of their experts and/or live testimony outside the presence of a jury, and each expert explained in detail the factual and scientific basis for their opinions." *Phillips*, 430 S.C. at 334–35, 844 S.E.2d at 659. Based on the factors above, and the fact that the Court's initial ruling did not address each contested issue but relied primarily on the Court's recollection of Dr. Attanoos' prior testimony, WCD requested that a *Daubert/Council* hearing be conducted where WCD could present the factual and scientific basis to satisfy the necessary elements of Rule 702, SCRCP, and the Court could make findings specifically on each contested issue.

At trial, the Court ruled on WCD's Motion to Reconsider and ultimately excluded Dr. Attanoos from testifying completely, with no *Daubert/Council* meeting even contemplated. (Ex. D, Trial Tr., 2/23/23 AM Session at 39:6-44:19). During its consideration, the Court stated that "Dr. Attanoos is on the edge of what I would consider admissible testimony," but again referenced his prior trial appearances. (*Id.* at 42:8-25). The Court acknowledged that the behavior it referred to "***does not appear in the record***, but I have checked my trial notes, and it very much did occur." (*Id*. at 42:8-15) (emphasis added). In fact, the record instead reflects the Court's commendation of Dr. Attanoos' testimony in his most recent trial appearance before this Court, noting that he gave a "very forceful presentation about what he considers to be the situation with regard to" the cause of the plaintiff's mesothelioma. *Beth-Anee F. Johnson and John W. Greenley, Jr. v. Johnson & Johnson, et al*., May 20, 2019, C.A. No. 2018-CP-40-001781, at p. 1756-1757 (attached as Ex. D to the Mot. to Recons.). In addition to the Court's erroneous reasoning, WCD was further prejudiced due to its

lack of notice of this issue, which was not raised in Plaintiffs' Motion *in Limine*. With nothing appearing on the record in any prior trial, WCD had ***no reason*** to suspect, prior to the Pre-Trial hearing less than a week prior to the start of trial, that its key witness in its defense would be struck based on the Court's recollections and personal opinions. Dr. Attanoos had written a Report and appeared for a deposition in this case with nothing of the sort being raised as an issue.

On such short notice, WCD was unable to produce any comparable witness at the trial of this case and suffered greatly due to this fact. On Day 6 of trial, at the time Dr. Attanoos would have been called by WCD, WCD instead proffered an Affidavit of Dr. Attanoos along with his deposition taken in this case, and the materials that would have been used if he had been allowed to testify. (*See* Dr. Attanoos Proffer, made a Court Exhibit; *see also* Ex. O, Trial Tr., 3/2/23 PM Session at 221:23-223:13). Contrary to Plaintiffs' and the Courts' assertions, the Rough Transcript of Dr. Attanoos' testimony in this case was not introduced to the record in any prior submissions (*id*. at 224:25-225:10) and, therefore, was not considered by the Court in its exclusion of Dr. Attanoos.

WCD incorporates all of its arguments from its Response in Opposition to Plaintiffs' Motion *in Limine*, Motion to Reconsider, and at Trial and asserts that the Court erred in excluding Dr. Attanoos for the reasons articulated. The Court's exclusion based on a prior personal grudge, which was unsupported by the prior trial transcripts, is an insufficient ground for excluding an internationally recognized expert pathologist, who was thrice-qualified in this same Court for these very opinions. Further, the Court's findings related to Dr. Attanoos' lack of support for his opinions is demonstrably false, considering the sources cited to in his Report. While the Court may not like or agree with this expert's opinions, he is ultimately the scientist, and he is objectively qualified pursuant to the *Daubert/Council* factors. Limitation of the scope of his testimony and strict monitoring of his behavior in court could have quelled the Court's concerns without devastating

WCD's defense of this matter and effectively summarily determining Plaintiffs' element of causation. (*See supra* Section II.A(ii)(2)). Additionally, the Court's error was compounded by the following additional factors.

ii. **Plaintiffs opened the door on Dr. Attanoos' testimony and Defendants' inability to respond was irreparably prejudicial**

Despite the Court's ruling excluding Dr. Attanoos from testifying for Defendants before opening statements commenced, Plaintiffs did not refrain from peppering references to Dr. Attanoos throughout the trial. WCD argues that this rightly should have opened the door for Dr. Attanoos to ultimately testify.

First, in Plaintiffs' Opening Statement, Ms. Jessica Dean, counsel for Plaintiffs not only referenced Dr. Attanoos twice, but also ***showed his photo*** in her slideshow. Following a slide that bore the highlighted text: "The witnesses you will meet," (Ex. V, at Page 21), Plaintiffs' presentation featured a photo of Dr. Attanoos (*see id*.). Ms. Dean stated, "This is Dr. Attanoos. He's one of their experts. He's done hundreds of tissue digestions. Hundreds. They've never asked him to do one in this case. They have never asked him to look at Sarah's lungs to see what's there. They have never asked him to do it in any case." (Ex. E, Trial Tr., 2/23/23 PM Session at 44:15-19). She further stated, "Another thing that Dr. Attanoos and some of the other experts that are hired by these companies will say, You need to understand that there's a difference between men and women; that it's a signal tumor for men. If they have this cancer, yes, it signals that you're exposed to asbestos. But for women, over the last 60 years, we studied them, and we can't connect them to asbestos, not even through their husbands, not even through their dads." (*Id*. at 45:2-9).

On Day 2 of trial, Plaintiffs again referenced Dr. Attanoos' name during their redirect examination of Plaintiffs' expert experimental pathologist Dr. Arnold Brody, asking whether he knew who Attanoos was and whether he was asked to perform a "long [lung] fiber count." (Ex. F,

Trial Tr., 2/24/23 AM Session at 76:6-9). WCD objected, and the Court warned Plaintiffs during a bench conference, "I don't think you need to get into that or you're going to open the door to putting Attanoos up." (*Id*. at page 76:9-17). The door was obviously already opened at that point, and the damage had been done.

Nothing could be done to escape the prejudice of the unfulfilled promise to the jury after Plaintiffs' affirmative statements to the jury that they would be meeting Dr. Attanoos as a witness for WCD, paired with additional questions about him. Once his name, occupation, photograph, and role in this case was introduced, an instruction to the jury would only have served to draw additional attention to his absence and raise questions about why he was excluded. Nothing could have remedied the jury questioning *why* Dr. Attanoos was no longer testifying for WCD, other than permitting him to appear and testify.[7]

### B. The Court erred when it unfairly limited Dr. Allan Feingold's testimony and improperly instructed the jury regarding his testimony.

#### i. Procedural History

As previously noted, the entire trial was tinged with "penalties" against WCD following the removal, and subsequent remand, of the case. The Court stated on the first day of trial relating to the schedule, "They [the defendants] caused this problem. I get that. They're going to pay some penalty for that." (Ex. E, Trial Tr., 2/23/2023 PM Session, at 146:11-12). One of these penalties was relegating less than two days of trial for Defendants to present their case, compared to over four days for Plaintiffs. Consequently, Defendants were forced to consolidate their expert witnesses to optimize their allotted time. On the night of February 27, 2023, after the expert witness list had been consolidated amongst Defendants and circulated to Plaintiffs and the Court, Defendant Mary Kay

[7] At the Pre-Trial Hearing, in its Motion for Reconsideration, and during arguments at trial, WCD repeatedly raised the option of allowing Dr. Attanoos to testify with the same limiting instruction given to him as Drs. Diette, Weill, and Feingold. However, these requests were denied.

settled out of the case resulting in Mary Kay's experts being unavailable to WCD at trial. Accordingly, WCD scrambled to replace the now-missing experts. (*See, e.g.,* Ex. J, Trial Tr., 2/28/2023 AM Session, at 8:1-7). At the eleventh hour, WCD retained Dr. Feingold, an expert previously retained by co-Defendants in the case, flew him to town, and worked with him overnight to prepare his testimony for March 2, 2023.[8]

As with Dr. Attanoos, Plaintiffs had filed a Motion *in Limine* to Exclude the Testimony of Dr. Feingold that was addressed at the Pre-Trial Hearing on February 15, 2023. The Court ruled that the testimony of Dr. Feingold, along with Drs. Diette and Weill, was limited such that they:

> [m]ay testify generally about cosmetic talc and about asbestos and cosmetic talc and about how that affects the contraction of mesothelioma. ***They will not be allowed to opine about the cause of the mesothelioma that has been contracted by Sarah Plant*** or Shelby Linville Payne. So they can be a part of the expert testimony about this subject.

(*Id.* at 196:23-197:6) (emphasis added). In this ruling the Court made abundantly clear its own opinions on causation stating during the Pre-Trial Hearing, " And what Ms. Payne has, she may have the propensity for many other cancers, but mesothelioma is a signature cancer. **It's caused by asbestos**. And that's what she's got." (Ex. A, Pre-Trial Hearing, 2/15/2023, at 156:2-6).

**ii. In excluding WCD's expert testimony relating to Mrs. Plant's causation, the Court erred by shifting the burden to WCD to disprove that Mrs. Plant's mesothelioma was caused by asbestos and by preventing WCD from having a fair chance to dispute causation[9]**

[8] To the extent any issue is raised as to why WCD did not object earlier relating to the scope of Dr. Feingold's testimony, the reason is because, as stated above, due to the exclusion of Dr. Attanoos and the politics of the trial, WCD only first retained Dr. Feingold on the tail end of the trial. Any such objections that WCD made relating to Dr. Attanoos, before Dr. Feingold was retained, should equally apply to Dr. Feingold, who was retained for a similar purpose.

[9] This argument herein is centered around Dr. Feingold, as he was WCD's expert at trial. However, the argument pertains equally to Dr. Attanoos, who was intended to be WCD's expert relating to the cause of Mrs. Plant's mesothelioma.

At the trial, Plaintiffs' medical experts were permitted to testify directly as to the cause of Mrs. Plant's mesothelioma, but WCD's experts were not. Both Dr. Attanoos (*see* Ex. U, Attanoos Plant Report), who was preemptively excluded by the Court, and Dr. Feingold (*see* Ex. X, Feingold Plant Report and Supplement), who was subsequently retained by WCD (and as a direct result of Dr. Attanoos' exclusion), formed well-supported opinions, informed by their own experience and by many peer-reviewed articles, that Mrs. Plant's mesothelioma was caused not by asbestos or cosmetic talc, but instead was a naturally occurring, spontaneous mesothelioma, caused by intrinsic genetic errors. The exclusion and limitation of WCD's experts alone are prejudicial, yet the prejudice was compounded by the fact that consistently throughout the trial, Plaintiffs experts *were* permitted to testify about the causation. This made the error devastating to WCD's case, and the argument about the causation of Mrs. Plant's mesothelioma completely one-sided. By excluding all of WCD's expert opinions or evidence relating to any alternative causation *other* than asbestos-containing talc,[10] the Court effectively granted summary judgment on Plaintiffs' causation element before this trial even began.

**1. Preventing WCD's experts from testifying about the cause of Mrs. Plant's mesothelioma was erroneous and prejudicial**

Causation is a critical, foundational element of Plaintiffs' claims, and Plaintiffs bear the burden to demonstrate that Mrs. Plant's mesothelioma was caused by exposure to asbestos. This burden may not be shifted to Defendants or escaped through a Motion *in Limine*. However, that is exactly what happened here. The Court created a presumption that Mrs. Plant's mesothelioma was caused by the alleged exposure to asbestos in the products of Defendants—which effectively

[10] Notably, the Court also excluded any evidence of alternative exposures to asbestos to Mrs. Plant from the most likely source, based on the facts in the record—her father's plumbing work. Paired with the exclusion of the expert testimony above, this effectively eliminates ***all*** causation possibilities *other than asbestos-containing talc*.

allowed Plaintiffs to bypass a crucial part of the causation element of their case. This is especially important in this case, as talc cases are distinguishable from the traditional occupational exposure case in which "asbestos is generally a known, common and uniform ingredient of the defendant's product;" in cosmetic talc cases, asbestos is *not* an intended ingredient. *See Hanson v. Colgate-Palmolive Co.*, 2018 U.S. Dist. LEXIS 168016, *11 (S.D. Ga. Sept. 28, 2018). Essentially, Plaintiffs were able to present their case to the jury in a vacuum having already summarily adjudicated—by striking or excluding all WCD's conflicting evidence or opinions—that Mrs. Plant's mesothelioma specifically was caused by asbestos in cosmetic talc.

This was harmful in this case even more so than in a traditional asbestos case because this is not a typical asbestos case. The typical asbestos case involves alleged exposure to products known to contain asbestos because asbestos was an intended ingredient of the product. Thus, in a typical asbestos case, proof of exposure to the product equates to proof of exposure to asbestos at known levels. But this case is not about a product formulated to contain asbestos.

Here, Plaintiffs claimed that cosmetic talcum powder products used by Mrs. Plant (including some allegedly containing cosmetic talc supplied by WCD) contained asbestos. Plaintiffs' theory was not that these products were intended to contain asbestos; rather, Plaintiffs claimed that some of the cosmetic talc used in these products was contaminated with trace amounts of asbestos. Thus, unlike a traditional asbestos case, Plaintiffs had to establish not only the traditional element of *exposure* to the cosmetic talc for which WCD allegedly bears liability, but also that the cosmetic talc allegedly used by Mrs. Plant was actually contaminated with asbestos. *See Hanson*, 2018 U.S. Dist. LEXIS 168016, *11. Indeed, exposure to asbestos from a defendant's asbestos-containing product is a threshold issue on which Plaintiffs bear the burden of proof. Without exposure, there can be no causation. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, 150

F. Supp. 3d 644, 648 (D.S.C. 2015) ("Under a preponderance-of-evidence burden, a plaintiff must show, more likely than not, ***the substance*** caused, or was a substantial contributing factor to, her particular injury.") (emphasis added).

After establishing the threshold burden that Mrs. Plant used a product that contained cosmetic talc provided by WCD (which WCD maintains they failed to prove), Plaintiffs then needed to introduce admissible proof about the specific ways in which Mrs. Plant was exposed to asbestos, and admissible evidence that those exposures were substantial enough to cause or contribute to her development of mesothelioma.

There should be no question that evidence about *the cause* of Mrs. Plant's mesothelioma was relevant and admissible. South Carolina Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Put simply, "[r]elevancy is that quality of evidence which renders it properly applicable in determining the truth and falsity of matters in issue between the parties to a suit." *Toole v. Salter*, 249 S.C. 354, 361 (1967). In a case in which Plaintiffs allege that WCD caused Mrs. Plant's mesothelioma, it is paradoxical for the Court to rule that the cause of Mrs. Plant's disease (whether it was asbestos-related or not) is not relevant or that a causation opinion contrary to Plaintiffs' experts' theory of the case somehow prejudices Plaintiffs in such a way as to make it excludable.

Plaintiffs had the burden in this case to establish causation, and specifically as to WCD, that cosmetic talc supplied by WCD caused Mrs. Plant's mesothelioma. Mere *possibility* of causation alone is insufficient to establish Plaintiffs' case. *See Pace v. Air & Liquid Sys. Corp*., 642 F. App'x 244, 253 (4th Cir. 2016). Instead, "in order to carry the burden of proving a plaintiff's injury was caused by exposure to a specified substance, a plaintiff must demonstrate general and specific

causation." *In re Lipitor*, 150 F. Supp. 3d at 648 (internal quotation and citations omitted). "For specific causation, the plaintiff must 'demonstrate[] that the substance actually caused injury in her particular case.'" *Id.* (quoting *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1249 n.1 (11th Cir. 2010)). "Under a preponderance-of-evidence burden, a plaintiff must show, more likely than not, the substance caused, or was a substantial contributing factor to, her particular injury." *Id*. Accordingly, the jury was entitled to hear the complete record of evidence on the causation of Mrs. Plant's injuries, including the well-founded opinions of Dr. Attanoos and Dr. Feingold, that differed from that of Plaintiffs' own experts.

By excluding Dr. Attanoos' and Dr. Feingold's opinions that Mrs. Plant's mesothelioma was not the result of exposure to asbestos, the Court effectively adjudicated, without proof, that asbestos was the cause of Mrs. Plant's mesothelioma and circumvented Plaintiffs' burden of proving causation. However, Dr. Attanoos and Dr. Feingold are both respected experts whose opinion that mesotheliomas can and do occur naturally without any asbestos exposure are supported by substantial evidence, including peer-reviewed literature.

Indeed, it is generally accepted in the peer-reviewed literature that mesotheliomas can arise spontaneously, unrelated to any external agent, such as asbestos. In 2019, a major review article published with many of the world's foremost experts on the subject details the current state-of-the-art knowledge on the development of mesothelioma. Among the co-authors of the publication are distinguished researchers and practitioners from the University of Hawaii Cancer Center, Memorial Sloan Kettering Cancer Center, Rutgers Robert Wood Johnson Medical School, Brigham and Women's Hospital, Mayo Clinic, Icahn School of Medicine at Mt. Sinai, and MD Anderson Cancer Center. These authors conclude that "[c]ancer is caused by the accumulation of genetic damage. Genetic damage can be inherited, can develop spontaneously, can be caused by exposure to

carcinogens and oncogenic infectious agents, or can be caused by the interplay of a combination of these factors…As for any other cancer, irrespective of exposure and of inherited mutations, some mesotheliomas may occur because of the inevitable accumulation of spontaneous mutations, as observed in mesotheliomas developing in lions, cats, horses, dogs, birds, clams, sharks, etc." *Id.* at p. 406-407. In fact, Dr. Attanoos relies on this article in his 2020 book chapter when he writes that "[f]or most subjects in which mesothelioma is not clearly asbestos-related, the tumor is most likely naturally-occurring or spontaneous, an important risk factor for these tumors is subject age secondary to endogenous DNA replication errors." Attanoos, R.L., "Malignant Mesothelioma: Asbestos Exposure," Chapter 20 in *Occupational Cancers,* edited by S. Anttila and P. Boffetta, 363-378. Switzerland: Springer, 2020. (Ex. F to Mot. to Recons.).

Numerous other peer reviewed publications throughout the world and outside of the context of litigation show the majority of mesotheliomas in women *are not* attributable to asbestos exposure. For example, in a peer-reviewed article with a co-author from the National Cancer Institute in the United States, Spirtas and others found that approximately 77% of mesotheliomas in women are not attributable to asbestos exposure. (*See* Ex. M to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Spirtas, R., *et al.*, "Malignant mesothelioma: attributable risk of asbestos exposure," *Occup. Environ. Med.* 51:804-811 (1994); *accord* Dawson, A., et al., "Malignant mesothelioma in women," *Thorax* 48:269-274 (1993)). In 2009, using the Surveillance, Epidemiology, and End Results (SEER) registries maintained by the National Cancer Institute in the United States, Price and Ware found that less than 10% of mesotheliomas in women are not attributable to asbestos exposure. (*See* Ex. O to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Price, B. & Ware, A., "Time trend of mesothelioma incidence in the United States and projection of future cases: An update based on SEER data for 1973 through 2005," *Critical Rev. Toxicol.* 39(7):576-588 (2009)

("However, as the age-adjusted SEER data for females indicate, there was no increases in mesothelioma incidence that followed the increases in exposure. . . . [T]he female cases must be attributed to another cause or to other causes, not asbestos."); *accord* Ex. P to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Moolgavkar, S.H., et al., "Pleural and peritoneal mesotheliomas in SEER: age effects and temporal trends, 1973-2005," *Cancer Causes and Control* 20(6):935-944, 941 (2009); Ex. AB, Moolgavkar, S.H., et al., "Epidemiology of Mesothelioma," Chapter 3 in Asbestos and Mesothelioma, ed. Testa, J., Switzerland: Springer (2017) (extending the results reported in Moolgavkar, et al. (2009) to include SEER data through 2013 and reaffirming that the trend in mesothelioma incidence rates among women remain flat, "indicating that the commercial use of asbestos in the USA had little impact on these mesothelioma rates.")).[11] In 2013, authors from the Center for Disease Control and Prevention and from the Agency for Toxic Substances and Disease Registry in the United States, using data from the National Program for Cancer Registries (NPRC) and SEER, confirmed that between 2003 and 2008, female pleural mesothelioma rates were flat. (*See* Ex. AC, Henley, S.J., et al., "Mesothelioma incidence in 50 states and the District of Columbia, United States, 2003-2008, *Int J Occup Environ Health,* 19(1): 1-10 (2013)). In the United Kingdom, Rake and others (including an author from the Health and Safety Executive) likewise found that approximately 62% of mesotheliomas in women are not attributable to asbestos exposure. (Ex. N to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Rake, C., et al., "Occupational, domestic and environmental mesothelioma risks in the British population: a case-control study," *Br. J. Cancer* 100:1175-1183 (2009)). Peer-reviewed publications in the Netherlands, France, and Italy likewise report that a proportion of mesotheliomas in women are not

[11] The U.S. District Court for the Southern District of Georgia has previously found that Dr. Moolgavkar's research and publication of his article is sufficient for his opinions. *See* Ex. U to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Order, *Hanson v. Colgate-Palmolive Co.*, Case 2:16-cv-00034-JRH-BKE, Doc. 201 (S.D. Ga. Sept. 24, 2018), at 40-42.

attributable to asbestos. (*See* Ex. AD, Offermans, N.S., et al., "Occupational asbestos exposure and risk of pleural mesothelioma, lung cancer, and laryngeal cancer in the prospective Netherlands cohort study," *J Occup Environ Med*, 56(1):6-19 (2014); Ex. AE, Lacourt, A., et al., "Occupational and non-occupational attributable risk of asbestos exposure for malignant pleural mesothelioma, *Thorax*, 69(6):532-539 (2014); Ex. AF, Gennaro, V., et al., Incidence of pleural mesothelioma in Liguria Region, Italy (1996-2002), *Eur J Cancer*, 41(17):2709-14 (2005); Ex. AG, Marinaccio, A., et al., "Pleural malignant mesothelioma epidemic: incidence, modalities of asbestos exposure and occupations involved from the Italian National Register, *Int J Cancer*, 130(9):2146-54 (2012). In fact, WCD's own expert, Dr. Attanoos has published in the peer-reviewed literature outside the context of litigation on these studies finding that "there is a definite and sometimes quite substantial fraction of mesotheliomas that have no identifiable external cause, and that, not surprisingly, this fraction is greater in women than men…" and that in "North America few mesotheliomas in women at any site are attributable to asbestos exposure." (*See* Ex. AH, Attanoos, RL, et al., "Malignant Mesothelioma and Its Non-Asbestos Causes," *Arch Pathol Lab Med*, 142:753-760 (2018)).

Additionally, health organizations and institutions similarly recognize that mesothelioma can arise without any exposure to asbestos. For example, Baylor College of Medicine, where Plaintiff's treating physician, Dr. Ripley, works, reports on its website that "a significant percentage of mesothelioma patients have not been exposed to asbestos. This has led some experts to argue for a genetic predisposition." (*See* Ex. AI, Baylor Medicine Healthcare: Mesothelioma). The Mayo Clinic also highlights risk factors for the public, including "inherit[ing] a predisposition to cancer or some other condition could increase your risk." (*See* Ex. S to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Mayo Clinic Risk Factors). Furthermore, the National Organization for Rare Disorders expressly informs mesothelioma patients and organizations that serve them that

"[a]lthough asbestos is the major risk factor . . . asbestos exposure alone does not account for every affected individual . . . . [I]n rare cases, individuals develop mesothelioma without any obvious asbestos or erionite exposure. The cause in such cases is unknown (idiopathic or spontaneous mesothelioma)." (*See* Ex. T to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Rare Disease "Mesothelioma"). Moreover, Memorial Sloan Kettering, one of the world's top cancer treating centers, explains on its public website that "[p]eople can also *develop mesothelioma without being exposed to asbestos.*" *See* Ex. V to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, MSKCC Malignant Mesothelioma (emphasis added). Lastly, the American Lung Association states that with respect to mesothelioma, "[s]ometimes, no cause can be identified at all." (*See* Ex. W to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Mesothelioma Symptoms, Causes, and Risk Factors). The number of reputable institutions and medical organizations that specialize in the research and education of this rare disease that have endorsed this view are countless and should not have been kept from the jury under South Carolina law.

Even experts utilized by Plaintiffs in this very trial did not refute the existence of spontaneous or idiopathic mesotheliomas. For example, Dr. Brody admitted during his examination that approximately 20% of mesotheliomas cannot be associated with asbestos. (Ex. F, Trial Tr., 2/24/2023 AM Session, at 64:2-22). He testified about the possibility of both "idiopathic" mesotheliomas, meaning, you do not know the cause, and "spontaneous" mesotheliomas, meaning that "they develop from that person's own genetic background."[12] *Id*. However, this explanation was not enough to remotely even the scales between Plaintiffs and Defendants for proving causation. ***There is no justifiable reason for this opinion relating to spontaneous/idiopathic mesothelioma to***

[12] Notably, Dr. Brody's explanation of spontaneous and idiopathic mesothelioma is nearly identical to Dr. Attanoos' opinion on the same topics, again begging the question why Dr. Brody was permitted to testify while Dr. Attanoos was excluded completely.

***be admissible when it comes from Dr. Brody, but excludable when it comes from Drs. Attanoos or Feingold.***

As the scientific literature emphasizes, the notion that mesothelioma can arise spontaneously without any asbestos exposure is not well-known outside the niche medical community that studies this rare disease. Because of that, it is even more critical in cases like this that the jury not be shielded from this expert testimony. Indeed, by excluding evidence regarding mesotheliomas occurring without asbestos exposure, effectively summarily adjudicating the cause of Mrs. Plant's mesothelioma, the Court blatantly ignored, or substantially minimized, and prevented the jury from properly considering a substantial body of medical evidence that has been well-documented in the literature, sanctioned by leading health organizations, and acknowledged by Plaintiffs' own expert in this case.

Had the opinions of Dr. Attanoos and/or Dr. Feingold been admitted relating to causation, Plaintiffs would have had every opportunity to challenge the opinions or the bases for them on cross-examination. Such issues go to the credibility and weight—not admissibility—of the testimony and should have been addressed during cross-examination. At trial, Plaintiffs were relieved the burden of proving the key element of causation and the jury was not fully educated about the legitimate possibilities. WCD was entitled to explain through its experts: (i) the potential causes of mesothelioma, (ii) the complexity of cancer, and (iii) how cancers develop; and Plaintiffs should have bore the burden to prove causation as part of their *prima facie* case.

**2. The Court erred by permitting Plaintiffs' experts, who were no more qualified than WCD's experts, to testify about the cause of Mrs. Plant's mesothelioma**

The Court's error in preventing WCD's experts from testifying as to the cause of Mrs. Plant's mesothelioma was compounded by the fact that Plaintiffs' experts, who were no more qualified than

Defendants' experts, were permitted to do just that. First, Dr. Attanoos' abundant qualifications have been addressed above and in prior briefing. As to Dr. Feingold, who was qualified as an expert in pulmonology and the diagnosis and treatment of diseases of the chest, the Court precluded his causation testimony, stating:

> And I have ruled that Dr. Feingold, just like Dr. Attanoos, is not trained by way of -- without training, education or experience, is not qualified to give an opinion on the cause of her mesothelioma. She is contending that her mesothelioma was caused by asbestos in products she used. Her primary treating physician has testified to that. And Dr. Feingold has not got the training, education and experience to opine about asbestos not being the cause of her mesothelioma.

(Ex. N, Trial Tr., 3/2/23 AM Session, at 121:17-122:4). However, the Court's decision that WCD's expert, Dr. Feingold, is unqualified to render such opinions, but Plaintiffs' experts, Drs. Haber and Ripley, *are* qualified is unfair and prejudicial. Dr. Feingold's expertise included board certification in both pulmonology and internal medicine. (Ex. O, Trial Tr., 3/2/23 PM Session, at 22:13-23:2). He also has a NIOSH certification as a B-Reader, which includes radiology, the review of x-rays, as well as the review of slides of pathology. (Ex. N, Trial Tr., 3/2/23 AM Session at 122:9-18). One of his areas of expertise in pulmonary medicine and pathology is analyzing what causes pulmonary diseases and what the diagnosis is. (Ex. O, Trial Tr., 3/2/23 PM Session, at 20:12-25:25).

Plaintiffs' expert, Dr. Haber, like Dr. Feingold, is also a pulmonologist and B-reader, but was permitted by this Court to provide a specific causation opinion related to the cause of Mrs. Plant's mesothelioma. Just like Dr. Haber, Dr. Feingold reviewed the medical records of Mrs. Plant, reviewed the x-rays, and reviewed the tissue available in the pathology slides. (*Id*. at 127:8-12). In order to assess causation, Dr. Feingold reviewed Mrs. Plant's available pathology and, as a NIOSH certified B-Reader, reviewed x-rays, for biomarkers of asbestos exposure, such as pleural plaques, asbestosis, or asbestos bodies. Dr. Feingold was prepared to opine, from a medical standpoint,

whether Mrs. Plant's mesothelioma should be attributed to asbestos. (*Id*. at 126:15-127:21). If Dr. Haber was qualified to talk about the cause of Mrs. Plant's mesothelioma, Dr. Feingold undoubtedly was too. (*Id*. at 126:3-127:21).

Dr. Ripley is a thoracic surgeon who treated Mrs. Plant and testified as an expert in this case. (*Id.* at 126:11-14). His expertise was not in diagnosis, but in surgery. He testified that typically, when he sees a patient, they almost always already have an established diagnosis or suspected diagnosis. (Ex. G, Trial Tr., 2/24/2023 PM Session, at 125:12-14). "So, when I see a patient, I'm usually focused on, "Okay, you've got the disease. Where do we go from here?'" (*See id.*, 2/24/2023 PM Session, at 125:15-16). When asked whether he views it as important to ask about all potential exposures to asbestos when treating a patient, he responded that, "Patients don't want me sitting in their room talking about their past. They want me to talk about how we're going to beat this disease and what are we going to do. So that is the vast majority of my efforts. So, do I go through all the [potential exposure] history and so forth? Not totally." (*Id.* at 125:15-22). Accordingly, while Dr. Ripley performed surgery on Mrs. Plant's chest, he was not the one that made her diagnosis of mesothelioma, and, by his own admission, did not focus on her past asbestos exposure. If Dr. Ripley was deemed qualified to talk about the causation of Mrs. Plant's mesothelioma, Dr. Feingold, who formerly practiced as a clinician, presently specializes in the diagnosis of pulmonary diseases, and reviewed the medical records and pathology materials of Mrs. Plant, should certainly have been qualified.

In sum, the result of the exclusions and limitations on WCD's experts—including the fact that Plaintiffs were able to opine about the cause of Mrs. Plant's mesothelioma and use Mrs. Plant's genetic information in their favor to bolster their case (as discussed *supra*), yet Defendants were prohibited from offering any alternative causes is blatantly unfair on its face and prejudicial to

WCD. The Court clearly erred in failing to exclude such evidence ***equally on both sides*** when such evidence was excluded for the defense experts. The Court failed again by ruling that Plaintiffs did not open the door when they boldly discussed Dr. Attanoos multiple times in front of the jury and had their own experts opine on spontaneous, naturally occurring or idiopathic mesotheliomas.

**iii. The Court erred in its double-standard relating to BRCA2 by permitting Plaintiffs to include argument relating to Mrs. Plant's BRCA2 Genetic Mutation in their case but prohibiting Defendants from including a counter-argument in their case**

The Court further erred by permitting Plaintiffs to reference and utilize Mrs. Plant's BRCA2 gene mutation in support of their case, but prohibiting and, in fact, punishing, Defendants for discussing Mrs. Plant's BRCA2 gene mutation in response.

The record in this case is full of references to the BRCA2 gene by Plaintiffs. Plaintiffs used Mrs. Plant's mutation as an egg-shell plaintiff argument, alleging that herBRCA2 mutation made her *more* susceptible to mesothelioma from ***less*** exposure to asbestos. For example:

- In Plaintiffs' Opening:
    - "[A]s it applies to Sarah in particular, y'all will learn that she has a gene called the BRCA2 gene, and what that means is that Sarah, her DNA has a harder time repairing cells that can ultimately lead to cancer. And what it means in terms of asbestos exposure is that Sarah is more vulnerable to lower level of asbestos exposure than someone who doesn't have the BRCA gene. That's it." (Ex. E, Trial Tr., 2/23/23 PM Session, at 22:6-12).
    - "And by 1960, they absolutely understand the specific cancer that Sarah had. Mesothelioma was caused almost exclusively because of this exposure to asbestos. And they also knew, while they didn't know to call it BRCA2 – they didn't know the specific gene -- they understood the individual's susceptibility." (*Id*. at 38:14-19).
- During Plaintiffs' direct examination of Plaintiffs' expert witness in thoracic surgery, Dr. Ripley.
    - "A: The mutation that Ms. Plant has is her ability to fix DNA is impaired, and that's what the BRCA2 mutation is. Q: Does that make her more susceptible to asbestos exposure? A: It makes her more susceptible because she's not able to fix an insult." (Ex. G, Trial Tr., 2/24/23 PM Session, at 121:19-123:3).

- Multiple times during Plaintiffs' direct examination of Plaintiffs' expert witness in pulmonology, Dr. Haber.

    - "[E]ach person has an individual susceptibility, and some can be more susceptible. So, for example, Ms. Plant would be – she would be the small glass because of the BRCA2 that certainly sets her up to being more sensitive because she doesn't have some of the DNA repair that people that don't have the BRCA2 mutations have." (Ex. H, Trial Tr., 2/27/23 AM Session, at 77:24-78:5. *See also id.* at 73:3-10, 78:17-79:6).

However, at the same time, the Court prevented WCD from arguing that the BRCA2 mutation that Plaintiffs claim led Mrs. Plant to be more susceptible to mesothelioma ***actually*** may have played a causal role. The Court articulated its rationale for this ruling as follows:

> I said [Dr. Feingold] could not assign genetics or BRCA2 as the reason for her mesothelioma, nor could he say that asbestos did not cause her mesothelioma, because he is not qualified to say that as a X-ray reader. He's not someone who treats mesothelioma or has studied mesothelioma in any way.

(Ex. N, Trial Tr., 3/2/23 AM Session, at 123:14-20). However, similar to the discussion above, the Court's decision that WCD's expert, Dr. Feingold, who was qualified as an expert in pulmonology and the diagnosis and treatment of diseases of the chest, is unqualified to render such opinions, but Plaintiffs' experts, Drs. Haber and Ripley, *are* qualified is unfair and prejudicial. Dr. Feingold and Dr. Haber are both pulmonologists and NIOSH certified B-Readers, but Dr. Haber was permitted by this Court to talk about Mrs. Plant's BRCA2 mutation and its effect on her health, as quoted above, while Dr. Feingold was not. Just like Dr. Haber, Dr. Feingold reviewed the medical records of Mrs. Plant, reviewed the x-rays, and reviewed the tissue available in the pathology slides. (*Id*. at 127:8-12). If Dr. Haber was qualified to talk about BRCA2 and its relationship to Mrs. Plant's mesothelioma, so was Dr. Feingold. (*Id*. at 126:3-127:21). There were no expert geneticists at the Plant trial. Simply put, Plaintiffs' pulmonologist B-Reader was deemed qualified while Defendants' pulmonologist B-Reader was deemed unqualified. Therein lies the double standard that prejudiced

Defendants. As an experienced board-certified pulmonologist, also board-certified in internal medicine, Dr. Feingold is every bit as qualified to discuss the medical effects of the BRCA2 mutation as Dr. Ripley, a thoracic surgeon. Admitting only the Plaintiffs' side was akin to tying WCD's hands behind its back, with no way to defend itself.

The testimony of Dr. Feingold or Dr. Attanoos relating to BRCA2 was entirely relevant to the jury's full understanding of the facts relating to the causation of Mrs. Plant's mesothelioma, which she developed at an unusually young age. Dr. Attanoos stated in his report:

> The presence of an inherited pathogenic germline BRCA-2 mutation has placed Ms. Plant at substantially increased risk of a variety of cancers, including mesothelioma, which has eventuated at the age of 34 years. The inherited pathogenic germline mutation represents one known intrinsic risk factor **which has played a causal role in the induction of her pleural mesothelioma**.

(Ex. U, Dr. Attanoos' Report at p. 56).

Dr. Attanoos and Dr. Feingold's opinions that BRCA2 played a causal role in the development of Mrs. Plant's mesothelioma is supported by the peer-reviewed literature. Indeed, it is well-established that germline mutations can induce cancer, including mesothelioma, without asbestos exposure. (Ex. AH, Attanoos, RL, et al. "Malignant mesothelioma and its non-asbestos causes." *Arch Path Lab Med* 142(6):753-760 (2018); Ex. AJ, Panou, V., et al. "Frequency of germline mutations in cancer susceptibility genes in malignant mesothelioma." *J Clin Oncol*, 36(28): 2863 (2018); Ex. AK, Pastorino, A., et al., "A Subset of Mesotheliomas With Improved Survival Occurring in Carriers of BAP1 and Other Germline Mutations," *J Clin Oncol*, 36, 2018; Ex. AL, Pagliuca, F., et al., "Inherited predisposition to malignant mesothelioma: germline BAP1 mutations and beyond," *Eur Rev Med Pharmacol Sci*, 25:4236-46 (2021); Ex. AM, Carbone, M., et al. "Tumour predisposition and cancer syndromes as models to study gene–environment interactions." *Nature Reviews Cancer* 20.9 (2020): 533-549. Ex. AN, Carbone, M., et al. "Medical and surgical care of

mesothelioma patients and their relatives carrying germline BAP1 mutations." *Journal of Thoracic Oncology* (2022). For mesothelioma, multiple articles report that at least 12% of mesotheliomas occur in carriers of pathogenic germline genetic mutations. Ex. AJ, Panou, V., et al. "Frequency of germline mutations in cancer susceptibility genes in malignant mesothelioma." *J Clin Oncol*, 36(28): 2863 (2018); Ex. AK, Pastorino, A., et al., "A Subset of Mesotheliomas With Improved Survival Occurring in Carriers of BAP1 and Other Germline Mutations," *J Clin Oncol*, 36, 2018; Ex. AO, Hassan, R., et al., "Inherited predisposition to malignant mesothelioma and overall survival following platinum chemotherapy," PNAS 116 (18), 2019; Ex. K to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Carbone, M., et al., "Mesothelioma: Scientific Clues for Prevention, Diagnosis, and Therapy," CA Cancer J Clin 0: 1-28, 2019; Ex. F to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Attanoos, R.L., "Malignant Mesothelioma: Asbestos Exposure," Chapter 20 in *Occupational Cancers,* edited by S. Anttila and P. Boffetta, 363-378. Switzerland: Springer, 2020; Exhibit AL, Pagliuca, F., et al., "Inherited predisposition to malignant mesothelioma: germline BAP1 mutations and beyond," *Eur Rev Med Pharmacol Sci*, 25:4236-46 (2021); Ex. AN, Carbone, M., et al. "Medical and surgical care of mesothelioma patients and their relatives carrying germline BAP1 mutations." *Journal of Thoracic Oncology* (2022). In his book chapter, Dr. Attanoos reports this finding, emphasizing that "[i]n a small but significant number of subjects (~12%) there exist a variety of inherited germline mutations which when present significantly increase the risk of cancer." Ex. F to WCD's Resp. in Opp'n to Pls.' MIL to Exclude Dr. Attanoos, Attanoos, R.L., "Malignant Mesothelioma: Asbestos Exposure," Chapter 20 in *Occupational Cancers,* edited by S. Anttila and P. Boffetta, 363-378. Switzerland: Springer, 2020. Numerous peer-reviewed articles from various institutions including the University of Chicago and the National Institutes of Health report BRCA2 germline mutations in the mesotheliomas studied.

Ex. AP, Bertelsen, B., et al. "High frequency of pathogenic germline variants within homologous recombination repair in patients with advanced cancer." *NPJ genomic medicine* 4.1 (2019): 1-11; Ex. AJ, Panou, V., et al. "Frequency of germline mutations in cancer susceptibility genes in malignant mesothelioma." *J Clin Oncol*, 36(28): 2863 (2018); Ex. AO, Hassan, R., et al., "Inherited predisposition to malignant mesothelioma and overall survival following platinum chemotherapy," PNAS 116 (18), 2019; Ex. AQ, Guo, R., et al., "Novel germline mutations in DNA damage repair in patients with malignant pleural mesotheliomas," *J Thoracic Oncol*, 15(4):655-660 (2020); Ex. AR, Betti, M., et al. "CDKN2A and BAP1 germline mutations predispose to melanoma and mesothelioma." *Cancer letters* 378.2 (2016): 120-130. To exclude evidence relating to known genetic errors in a case in which it is undisputed that genetic errors lead to the disease at issue is a perversion of the legal system, unduly prejudicing the defendants by forcing this case to be tried in a vacuum, flipping the burden of proof to the defendants, and preventing the jury from hearing and weighing the available evidence necessary to make their decisions.

Moreover, the Court committed further error relating to the BRCA2 gene mutation by striking Dr. Feingold's testimony relating to BRCA2 after he was asked about it ***by Plaintiffs***. Plaintiffs' counsel undoubtedly opened the door for Dr. Feingold's explanation, not only by discussing the mutation throughout this trial, but by specifically asking Dr. Feingold about Mrs. Plant's BRCA2 mutation. His answer was appropriate, clarifying and explaining the medical background in response to her question:

> Q: One of the things you have in your report, it was just a notation of what her actual treating physician said, is that one of the real -- one of the many drawbacks of her mesothelioma is that it has delaying her getting important surgeries because she has BRCA2. Do you remember that?
>
> A: Yes.

Q: They had to hold off her hysterectomy due to the concerns from her actual treating physician, Dr. Ripley, that premenopausal women have the greatest outcomes from mesothelioma. And so taking away her estrogen, taking away that extra protection that's been noted in the literature was a problem. Just starting off, do you remember this being in one report noting a medical record for Sarah Plant?

A: Yes. But you've got it all confused. Premenopausal women have the greatest outcomes because, universally, their mesotheliomas are not caused by asbestos. And especially -- especially -- mesotheliomas caused by germline mutations have a seven-year prognosis instead of a one-year prognosis. So you're confounding. You're saying it's because they're premenopausal. It's not because they're premenopausal. It's because their mesothelioma was not caused by asbestos, most likely caused by BRCA1 or BRCA2. And those people have a much better prognosis.

MS. DEAN: Your Honor, I move to strike as nonresponsive and in violation of clear orders.

THE COURT: The testimony is struck.

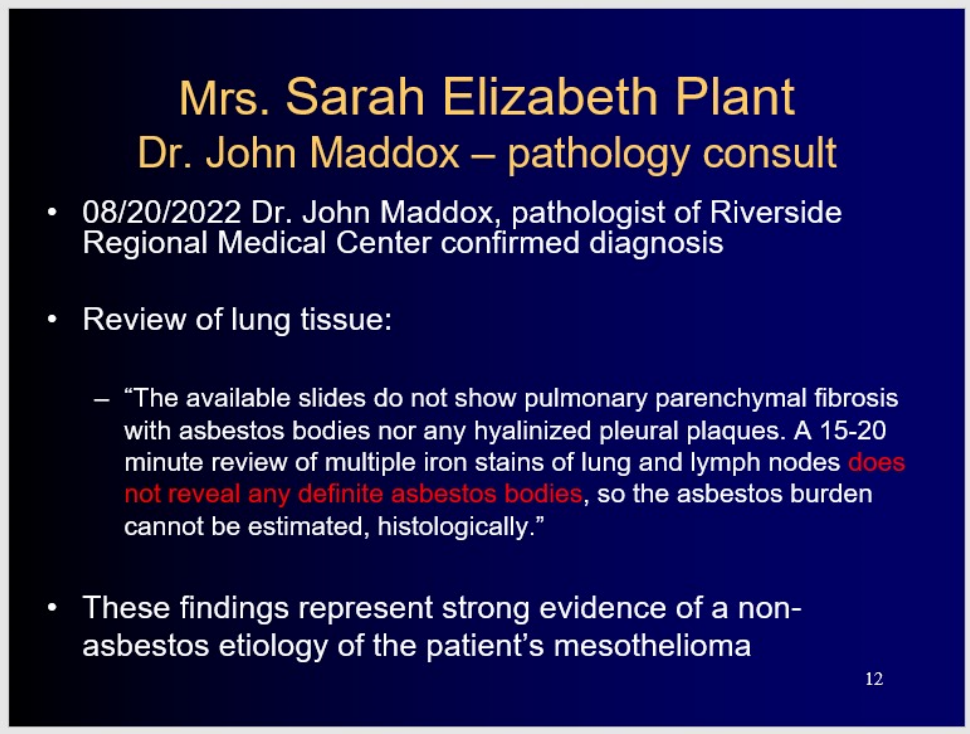
(Ex. O, Trial Tr., 3/2/2023 PM Session, at 115:14-116:23). The Court's insistence on striking Dr. Feingold's statement prejudiced WCD both by (1) excluding important information from the jury that would have explained an important topic related to the causation of Mrs. Plant's mesothelioma, and (2) signaling to the jury that Dr. Feingold was behaving badly and severely hindering his authority in their eyes.

From the onset, it was evident that the Court had personal opinions regarding BRCA2 and its relationship with mesothelioma and did everything it could to exclude such testimony. Indeed, at the Pretrial Conference the Court remarked as follows: "Well I have not heard of anyone talk about BRCA as causing mesothelioma . . . . And to say that BRCA, genetic factors, I have those too. I survived breast cancer . . . ." (Ex. A, Pre-Trial Hearing, 2/15/2023, at 156:8-10).

### iv. Error relating to Dr. Maddox

The Court further erred by instructing the jury that WCD and its expert, Dr. Feingold, were misleading them with a slide about Dr. Maddox's Pathology Report, when, in fact, the slide was completely accurate. The Court's advocacy against WCD through its erroneous instruction to the jury undermined the jury's trust for WCD and its experts and adversely affected the outcome of this case for WCD.

Before Dr. Feingold was called, WCD exchanged its power point slide deck with counsel for Plaintiffs in order to address any objections. Certain objections were made, and slides were willingly cut accordingly. One of the slides that was explicitly NOT objected to, was number 12, which referenced Dr. Maddox, an expert retained by Plaintiffs in this case who generated a report, but did not testify at trial. The slide at issue follows below:



(Ex. W, Feingold Slideshow at 12). As was made clear by the witness, the outside bullet points are the words and opinions of Dr. Feingold, and the indented paragraph with quotation marks is a ***direct quote*** from Dr. Maddox's Report relating to Mrs. Plant, issued in this case:

> Q: I want to be real clear of this last thing that you write here, that this represents strong evidence of a nonasbestos mesothelioma?
>
> A: Yes.
>
> Q: That didn't come from Dr. Maddox, did it?
>
> A: No. It came from me, and it's overwhelmingly true.

(Ex. O, Trial Tr., 3/2/2023 PM Session at 118:20-119:2). Counsel's nonobjection to this slide, coupled with this exchange, shows that there was nothing misleading about this slide.

Before Dr. Feingold was called, the Court was made aware that Dr. Maddox would be mentioned in a slide, but that Plaintiffs had no objection as long as Dr. Maddox was not referenced as a witness retained by Plaintiffs. (*See id*., at 9:24-10:23). Counsel for Plaintiffs, after pre-reviewing the slide above, even stated in an email, "we won't object as long as nobody (counsel or witness) refers to Dr. Maddox as 'as plaintiff's expert' or 'retained by the plaintiff in this case'." (*See* Ex. Y, e-mails between WCD and Plaintiffs' counsel).

Despite all of the careful preparation, this proved not to be true in front of the jury. During Plaintiffs' cross-examination of Dr. Feingold, after he clearly stated that the final opinion on the slide[13] was his own, Plaintiffs' counsel accused Dr. Feingold of being "dead wrong," alleged that Dr. Maddox said the exact opposite of him, and alleged in open court that WCD violated one of the

[13] The final bullet on slide 12 stated, "These findings represent strong evidence of a non-asbestos etiology of the patient's mesothelioma" (Ex. W, Feingold Slideshow at 12).

Court's orders[14]. (Ex. O Trial Tr., 3/2/2023 PM Session, at 120:3-121:8). The Court intervened, and the following exchange occurred in front of the jury:

> THE COURT: Well, I am concerned about this, Mr. Thackston, that ***this slide would imply that Dr. Maddox said that there was no definite asbestos bodies, so the asbestos burden can't be estimated***. ***But it turns out that's not Dr. Maddox's words, is it?***
> MR. THACKSTON: No, Your Honor.
>
> THE COURT: All right. This is—
>
> MR. THACKSTON: There was no objection to the slide before we started.
>
> THE COURT: This is – well, I, frankly, am surprised because I didn't understand it that way. ***But what you're saying is that he took a pathology report and looked at slides that Dr. Maddox had looked at, and he comes – "he," this witness, comes to the conclusion that there is no asbestos***.
>
> MR. THACKSTON: Yes, Your Honor.
>
> THE COURT: All right. ***Dr. John Maddox, as I understand it, came to exactly the opposite conclusion. He was the pathology expert. Am I correct about that***?
>
> MS. DEAN: ***That is correct***.
>
> THE COURT: All right.
>
> THE WITNESS: ***That's not correct***.
>
> THE COURT: ***Let the record reflect that this is a misleading slide as it's currently being put up. It turns out he disagrees with the – with Dr. Maddox's analysis,*** and so the record is clear. And I won't strike it, but ***I will clarify that this is not the opinion of Dr. Maddox. This is Dr. Feingold's opinion.*** All right? ***The pathology report says exactly the opposite.*** All right. With that clarification, you may proceed.

(*Id*. at 120:9-121:22).

[14] A recurring pattern throughout this trial involved counsel for Plaintiffs themselves eliciting testimony from witnesses, through their own questions, that they then turned around and alleged violated one of the Court's limiting orders. This very slide was already carefully addressed through WCD's *direct examination*, including an explanation of the terms used in the quote, without a single objection. (Ex. O, Trial Tr., 3/2/2023 PM Session, at 45:17-47:18). It was only during Plaintiffs' cross-examination that issues arose. This argument continues in the following section.

Contrary to the Court's instruction that Dr. Maddox's pathology report says "exactly the opposite" of the slide, Dr. Maddox stated in his Report ***precisely*** what was quoted in the slide, "The available slides do not show pulmonary parenchymal fibrosis with asbestos bodies nor any hyalinized pleural plaques. A 15-20 minute review of multiple iron stains of lung and lymph nodes does not reveal any definite asbestos bodies, so the asbestos burden cannot be estimated, histologically." (Ex. Z, Dr. Maddox Plant Report at p. 3). Dr. Maddox's report ultimately concluded that Mrs. Plant's mesothelioma was caused by her cumulative asbestos exposures, but his conclusion was ***not*** based on finding any asbestos bodies in her pathology material. According to the Helinski criteria that Dr. Maddox cited in his Report, "in the absence of such markers, a history of significant occupational, domestic, or environmental exposure to asbestos will suffice for attribution." *Id*. Thus, Dr. Maddox's conclusion was simply based on the summary of Mrs. Plant's alleged historic asbestos exposure provided to him by Plaintiffs' counsel, rather than a finding of asbestos bodies. (*Id.* at p. 1). Dr. Feingold and Dr. Maddox ***were*** in perfect agreement about the lack of asbestos bodies in the slides. They simply drew differing conclusions from this information, as experts sometimes do. Plaintiffs' counsel was addressing this through cross-examination before the Court interfered and went too far.

Accordingly, the Court's representation to the jury that WCD and its expert were misleading, and that Dr. Maddox's pathology report said "exactly the opposite" of the slide was: (1) demonstrably wrong, and (2) supremely detrimental to WCD's trust from the jury. Further, the Court mentioned the very point that Plaintiffs did not want mentioned—that Dr. Maddox was their retained pathology expert. When the Judge, the authority figure in the courtroom, instructs the jury that a party and/or its witness is misleading them, the damage and prejudice is extraordinary and difficult

to return from. The fact that the Court erred in its understanding of the slide and instructed the jury with a falsehood is a very serious error that adversely affected the outcome of this case for WCD.

**v. The Court erred by making a special instruction to the jury following Dr. Feingold's testimony that further limited his testimony.**

As noted above, a recurring pattern throughout this trial involved counsel for Plaintiffs themselves eliciting testimony from witnesses, through their own questions, then proceeding to allege that WCD violated one of the Court's limiting orders and seeking sanctions. This occurred during Dr. Feingold's examination regarding the issues relating to Slide Number 12, discussed above. The slide was carefully addressed through WCD's *direct examination*, without a single objection. (Ex. O, Trial Tr., 3/2/2023 PM Session, at 45:17-47:18). It was only during Plaintiffs' cross-examination that issues arose due to Plaintiffs' own insistent questioning. After Plaintiffs' counsel, during a hostile cross-examination, brought up Mrs. Plant's BRCA2 genetic mutation and asked Dr. Feingold about premenopausal women having the greatest outcomes from mesothelioma, he responded by correcting her medical conclusion generally and explaining, "It's not because they're premenopausal. It's because their mesothelioma was not caused by asbestos, most likely caused by BRCA1 or BRCA2. And those people have a much better prognosis." (Id., at 116:14-19). Notably, Dr. Feingold was referring to premenopausal women, not Mrs. Plant specifically. Nevertheless, Plaintiffs later told the court that, "[H]e testified that the BRCA2 gene is what caused her cancer." (*Id*. at 159:22-25).

Following the Court's suggestion of an instruction to the jury, counsel for WCD stated that, "Your Honor, all I'll say is he didn't say a word about it on direct. **He was badgered on cross specifically about Mrs. Plant until he said something *that could be construed as a causation opinion***. He didn't do that on direct. That was them going into it over and over and over again." (*Id.*, at 162:3-11) (emphasis added). The Court responded, "Well, that may well be so. I'm not

disagreeing with you about that, Mr. Thackston." (*Id*. at 162:12-14). Yet, still, the Court gave the charge to the jury that, "In connection with the last expert we heard from, Dr. Feingold, I made rulings about the scope of his testimony before he took the stand. Dr. Feingold cannot express any direct opinion about the cause of Sarah Plant's mesothelioma but he, of course, can testify as he did in his area of expertise about the matters he presented." (*See* Ex. AA, Final Jury Charge). Such an instruction was not warranted based on Dr. Feingold's testimony. It was not a direct causation opinion relating to Mrs. Plant's mesothelioma and, furthermore, the door was well-opened by Plaintiffs.

If the Court had not already sufficiently neutered WCD's expert and undercut his credibility with the jury, surely this special charge—the only charge mentioning any expert by name—was enough to severely prejudice WCD. The Court's special charge targeting Dr. Feingold, despite Plaintiffs opening the door to such testimony throughout the entire trial, in addition to badgering him about it on cross-examination, was in error.

## III. WCD Is Entitled To A New Trial Absolute Because WCD Was Denied Its Statutory Right To Assert Another Potential Tortfeasor, Whether A Party Or Not, Contributed To The Alleged Injury Or Damages.

The Court also erroneously restricted WCD's statutory right to introduce evidence and present argument regarding other potential contributors to Plaintiffs' damages. Regardless of whether it is called the "empty-chair defense" or the right to assert another tortfeasor contributed to the injury, the result is the same: A defendant has the right to point to another potential cause for the injuries alleged by the plaintiff, and the General Assembly codified this right ***without any exception for asbestos cases.*** As the South Carolina Court of Appeals explained:

> The empty-chair defense is the defendant's "right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages" and was codified in the Uniform Contribution Among Tortfeasors Act (the Act) at section 15-38-15 of the South Carolina Code (Supp. 2020). *Smith v. Tiffany*, 419 S.C. 548,

> 557, 799 S.E.2d 479, 484 (2017) (emphasis added) (quoting § 15-38-15(D)). Dawkins [plaintiff in the underlying case] relies on *Tiffany* for the proposition that the defense "is not boundless and the non-settling defendant cannot expand the scope of the case and make evidence relevant by the fact [that] another tortfeasor settled." However, *Tiffany* is distinguishable. In that case, the court interpreted the Act on appeal of a defendant's request to join as a party an individual—with whom plaintiff had already settled and released from the action—in order to allow the jury to apportion fault. *Id.* at 554–55, 799 S.E.2d at 482–83. The court held the plain language of the Act precluded the defendant from joining the prior codefendant. *Id.* at 555–59, 799 S.E.2d at 483–85 . . . ***Tiffany*** **did not discuss the empty-chair defense in the context of an intervening and superseding negligence defense or provide the parameters of the defense . . . .**

*Dawkins v. Sell*, 434 S.C. 572, 590, 865 S.E.2d 1, 10 (Ct. App. 2021), *reh'g denied* (Dec. 2, 2021) (emphasis added).

This Court, contrary to the plain language of the statute and the Court of Appeals' recent pronouncements regarding the limited holding of *Smith v. Tiffany*, crafted its own impossible standard of proof for WCD, which the Court then imposed as a prerequisite for any defendant who wishes to invoke its statutory right to the empty chair defense in asbestos/talc cases:

> I'm not going to allow you to tell the jury, "You need to find Mary Kay liable, because as bad as we were, we weren't as bad as Mary Kay." That's not how empty chair works. You can't mention the name of Mary Kay or anybody else and say they're the bad guys, not us. Unless you can show that they 100 percent caused Sarah Plant's injuries, then there's nothing in the record that would support that.

(Ex. N, Trial Tr., 3/2/23 AM Session at 68:5-15).

> The defense is that if the other person – we have shown you that the other person we want to say is the responsible party, negligence was so direct and well proved that it supersedes any negligence we might have had. That's what an empty chair is. It's not there's somebody else out there, and they also have some responsibility.

(*Id.*, at 65:2-10).

> Just like all the people that were dismissed beforehand, settled beforehand, they are out of the equation because there's no evidence that's been put before this jury that other defendants, potential defendants settled. Did defendants meet the requirements of the empty chair, which is the 100 percent requirement. Nothing has been put in that proves that.

(*Id.* at 66:3-12). Compounding the Court's erroneous refusal to allow WCD to introduce evidence of other potential contributors to Plaintiffs' injury is the fact that the Court ***did not restrict Plaintiffs from doing so***, as they were permitted to elicit testimony about "other companies of concern." (*See* Ex. H, Trial Tr., 2/27/23 AM Session at 77:3-11). This confused the jury and prejudiced WCD.

The language of the statute is plain, and it does not require a defendant to meet a burden of proof before being qualified to take advantage of the statute's protection. Section 15-38-15(D) also does not limit the parameters of this defense or make it contingent on whether a defendant alleges the other potential tortfeasor contributed 10% to the injuries or 100% to the injuries. This "codified empty-chair defense" does not require a defendant to prove or even allege that another potential tortfeasor (like any of the settled defendants or any other joint tortfeasor who was never a party but whose products – including art-related products and winemaking-related products – could have contributed to Mrs. Plant's injuries in this case) was the sole proximate cause or sole party 100% responsible for Mrs. Plant's injuries – as the Court seems to have concluded it does. Quite the opposite. Pursuant to the plain language of § 15-38-15(D), the defense is available even if a defendant claims the other potential tortfeasor ***just "contributed"*** to the alleged injury or damages, regardless of whether that party "may be liable for ***any or all*** of the damages alleged by any other party" (although the use of the conjunction "and/or" in the statute makes clear that argument is permitted as well). S.C. Code Ann. § 15-38-15(D)(emphasis added).

The Court's misreading of the statute was extremely prejudicial to WCD, as it was repeatedly denied the right to argue or even introduce evidence that another potential tortfeasor contributed to Plaintiffs' injuries. (*See* Ex. H, Trial Tr., 2/27/23 AM Session at 121 (refusing to allow another defendant's counsel to explore possible other exposures to asbestos-containing products); at 131-36 (refusing to allow WCD's counsel to elicit on cross-examination any testimony from Mrs. Plant

regarding possible other contributors to her injury and instructing the jury to disregard any references thereto); and at 6-12 (additional discussion of the above two "violations"); *see also* Ex. A, Pre-Trial Hearing, 2/15/2023 at 28:1-22 (invoking *Smith v. Tiffany* as authority for the determination that there would be no mention of any settled defendants)). Although this Court has wide discretion to determine the relevancy of evidence, the statutory language controls here. Because WCD was prejudicially denied its statutory right to introduce evidence at trial that another potential tortfeasor contributed to Plaintiffs' alleged damages, a new trial absolute is the only remedy.

## IV. WCD Is Entitled To A New Trial Absolute Because The Court Improperly Instructed The Jury.

The Court also improperly instructed the jury on four topics, and a new trial is required as a result of these errors as well. The Court misguided the jury and prejudiced WCD when it: (1) failed to charge the jury as to WCD's statutory right to argue the empty chair as required by S.C. Code § 15-38-15(D); (2) failed to charge the jury on "but for" causation; (3) failed to charge the jury on the sophisticated purchaser/user defense; and (4) improperly instructed the jury to disregard portions of Dr. Feingold's opinion testimony. None of these errors was harmless. *See State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." (internal quotation marks omitted)). While each of the four erroneous instructions stands alone in warranting a new trial, the compounding effect of all four errors resulted in overwhelming prejudice to WCD that can only be rectified by the granting of a new trial. *See Horry Cty. v. Laychur*, 315 S.C. 364, 368, 434 S.E.2d 259, 262 (1993).

### A. The Court erred when it failed to charge the jury as to WCD's statutory right to argue the empty chair as required by S.C. Code § 15-38-15(D).

The law is clear: "It is error for the trial court to refuse to give a requested instruction which

states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) (citing *Sanders v. W. Auto Supply Co*., 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971)). Such is the case with WCD's statutory right to point to other potential tortfeasors as contributors to Plaintiffs' injuries, which WCD requested to be charged in two different ways – each of which was rejected by the Court. First, when Plaintiffs proposed as part of Charge No. 4 a section titled "**OTHER PARTIES ARE GONE,**" notifying the jury that two absent parties were "no longer defendants" (in black below), WCD requested that such an instruction *also* notify the jury of WCD's retained right under § 15-38-15(D) to argue those absent parties contributed to Plaintiffs' injuries (in green below):

> **OTHER PARTIES ARE GONE**
> MARY KAY AND COLOR TECHNIQUES ARE NO LONGER PARTIES TO THIS CASE. YOU ARE NOT TO SPECULATE AS TO THE REASONS. **THOUGH YOU MAY STILL CHOOSE TO HOLD EITHER OF THEM FULLY LIABLE FO THE PLAINTIFFS' INJURIES IF YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT EITHER MARY KAY OR COLOR TECHNIQUES IS RESPONSIBLE FOR THOSE INJURIES.**

The Court refused, prejudicing WCD by denying it a requested charge stating "a sound principle of law" applicable to former parties and "not otherwise included in the charge." *Clark*, 339 S.C. at 390, 529 S.E.2d at 539.

Second, when Plaintiffs proposed as part of Charge 22 a portion that approximated WCD's right under § 15-38-15(D), but erroneously conditioned that right on whether Plaintiffs had met their burden of proof, WCD objected:

UNDER SOUTH CAROLINA LAW, A DEFENDANT IS ENTITLED TO ASSERT THAT OTHER PERSONS OR ENTITIES, CONTRIBUTED TO THE ALLEGED INJURY OR DAMAGES.

~~THE MATTER OF THE OTHERS' ALLEGED FAULT IN CAUSING THE PLAINTIFFS' INJURIES HAS BEEN RAISED BY THE DEFENDANT, AND IT IS PROPER FOR YOU TO CONSIDER THE ACTIONS OF OTHERS, BUT ONLY IN SO FAR AS PLAINTIFFS HAVE MET THEIR BURDEN PROOF.~~ OBJECTION: THE "EMPTY CHAIR" DEFENSE IS NOT TETHERED TO THE PLAINTIFF'S BURDEN OR EVEN TO WHETHER OR NOT THE ALLEGED ENTITY AT FAULT IS A PARTY IN THIS ACTION. S.C. CODE 15-38-15(D) PROVIDES A DEFENDANT SHALL RETAIN THE RIGHT TO ASSERT ANOTHER POTENTIAL TORTFEASOR, *WHETHER OR NOT A PARTY*, CONTRIBUTED TO THE ALLEGED INJURY OR DAMAGES AND/OR MAY BE LIABLE FOR ANY OR ALL OF THE DAMAGES ALLEGED BY ANY OTHER PARTY.

It is utterly inconsistent with § 15-38-15(D) for Plaintiffs to limit WCD's right to assert that others contributed to Plaintiffs' injuries "only in so far as Plaintiffs have met their burden proof [sic]" as to the "actions of others." WCD's proposed modification above would have omitted that inconsistent portion – leaving only the correct statement of law. The Court refused WCD's proposal and charged the jury as Plaintiffs requested. When WCD expressed concern that the Court's charge was inconsistent with the statutory right afforded to WCD, the Court reiterated its erroneous belief that "[y]ou've got to show, in order to avail yourself of the defense of empty chair, that the absent defendant was 100 percent completely responsible to the exclusion of the defendant that's in the case." (*See* Ex. N, Trial Tr., 3/2/23 AM Session at 102:4-8). As discussed, *supra,* in Section IV, the Court's interpretation of § 15-38-15(D) continues to impose – contrary to the plain language of the statute – a prerequisite level of proof as to the potential fault of a non-party. This denies WCD the right the General Assembly clearly afforded to it, and to every defendant *regardless of whether the case at hand involves asbestos or talc or any other subject matter*. There is no exception for cases on the asbestos docket. At the conclusion of this discussion with the Court, Plaintiffs' counsel piled on to the Court's misinterpretation of § 15-38-15(D) by – quite astonishingly – suggesting that perhaps WCD could have been able to invoke its rights under § 15-38-15(D) "if they had expert

testimony coming in here and saying that this exposure or that exposure was a proximate cause." (*See id*. at 103:9-14). Of course, the only reason WCD did not present evidence of the type that would have done the trick according to Plaintiffs' counsel, is because the Court excluded it by invoking § 15-38-15(D), as discussed *supra,* Sections II and III (prohibiting WCD from presenting any evidence that another entity's product contributed to Plaintiff's injuries).

This second error was highly prejudicial as it conditioned WCD's right under § 15-38-15(D) on whether Plaintiffs had met their burden of proof regarding the actions of others – which is utterly contradictory to the very plain statutory language: "A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." The Court's above refusal on Charge 4 to include WCD's proposed language only deepened the prejudice WCD suffered when the Court incorrectly limited WCD's statutory right in Charge 22. Together, these errors worked to completely deprive WCD of its statutory right under § 15-38-15(D), requiring a new trial.

**B. The Court erred when it failed to charge the jury on "but for" causation.**

It was also error for this Court to refuse to charge WCD's requested instruction on causation, which included South Carolina's well-settled proximate cause jurisprudence on "but-for" causation. (*See* WCD Additional Proposed Charges on Proximate Cause, filed 3/2/2023). The Court refused to charge but-for causation in this case, because it agreed with Plaintiffs that the causation standard in a talc case is the "frequency, regularity, and proximity" test used to determine the applicability of the Door Closing Statute[15] in *Henderson v. Allied Signal, Inc*., 373 S.C. 179, 644 S.E.2d 724 (2007). (*See* Ex. N, Trial Tr., 3/2/23 AM Session at 97:10-24).

[15] S.C. Code Ann. § 15-5-150(2).

WCD does not dispute there may be an inherent conflict between "the frequency, regularity, and proximity" test and traditional standards of proof for proximate cause under South Carolina law, but a test *Henderson* borrowed for use in applying the Door Closing Statute cannot supplant long-standing South Carolina standards for proving proximate cause – including but-for causation – in a defective product case like this one. Indeed, the Court in *Henderson* adopted the test when considering a non-resident plaintiff's capacity to sue under South Carolina's Door Closing Statute, *not when considering a plaintiff's burden to show the causation element of a products liability claim*. In this case, which for WCD does not implicate the Door Closing Statute's requirement of "actionable exposure" in South Carolina, *Henderson*'s use of the "frequency, regularity and proximity" test cannot replace South Carolina's traditional causation standard.

It is axiomatic that for any claim under South Carolina law premised on a defective product theory, Plaintiffs must establish that the product defect was the proximate cause of the injury sustained. *See Bray v. Marathon Corp*., 356 S.C. 111, 117, 588 S.E 2d 93, 95 (2003); *Rife v. Hitachi Const. Machinery Co., Ltd*., 363 S.C. 209, 216, 609 S.E.2d 565, 569 (Ct. App. 2005). Proximate cause requires proof of both causation-in-fact and legal cause. *Bray,* 356 S.C. at 116-17, 588 S.E.2d at 95. To establish the causation-in-fact arm of the analysis, Plaintiffs must show that their injuries would not have occurred "but for" WCD's negligence. *Small v. Pioneer Mach., Inc.,* 329 S.C. 448, 462, 494 S.E.2d 835, 843 (Ct. App. 1997). Even when potentially concurring causes are involved, as Plaintiffs have alleged in this case, WCD's conduct still must be established as one of the "*direct*, concurring causes of the injury." *Rife*, 363 S.C. at 216-17, 609 S.E.2d at 569 (emphasis added); *see also Small,* 329 S.C. at 464, 494 S.E.2d at 843.

It is clear that *Henderson* did not adopt the "frequency, regularity and proximity" standard to override the need for a plaintiff to establish proximate cause, but rather to determine whether a party

has the capacity to proceed with its claim under the Door Closing Statute. Both *Henderson* and *Murphy v. Owens–Corning Fiberglas Corp.,* 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), to which *Henderson* cited, considered "whether the foreign corporation's activities that allegedly exposed the victim to the injurious substance, and the exposure itself, occurred within the State" such that "the legal wrong was committed here." *Murphy*, 356 S.C. at 598. The determination of whether a cause of action arose in South Carolina, to include whether the alleged exposure occurred in South Carolina, is purely a question of a party's capacity to sue. *Farmer v. Monsanto*, 353 S.C. 553, 557, 579 S.E.2d 325, 328 (2003). Plaintiffs' capacity to sue is not at issue in this case. Moreover, *Henderson* borrowed the test from the Fourth Circuit's decision in *Lohrmann v. Pittsburgh Corning Corp*., 782 F.2d 1156, 1162-63 (4th Cir. 1986) – a case decided under *Maryland's* standard for "reasonable inference of substantial causation from circumstantial evidence," not South Carolina's "but for" standard for causation-in-fact. Ultimately, the Court in *Henderson* found that the non-resident plaintiff lacked the capacity to bring his action against the foreign manufacturer defendants because "'presence in the vicinity of static asbestos is not exposure to asbestos'" actionable under the Door Closing Statute. 373 S.C. at 185, 644 S.E.2d at 727.

Substitution of the "frequency, regularity, and proximity" test for South Carolina's proximate cause standards would obviate the requisite "but for" and "direct" components. The "frequency, regularity, and proximity" test measures the probability of exposure to a defendant's product; it does not address whether exposure to the defendant's product alone would have been sufficient to cause the harm. Moreover, the threshold of proof that triggered the Door Closing Statute in *Henderson* is vastly different from the threshold to prove causation as an essential element of a plaintiff's claim. Whether exposures occurred is not synonymous with whether exposures were the cause of the injuries at issue.

By replacing the traditional standards for causation with the "frequency, regularity, and proximity" test in its jury instructions, this Court effectively shifted the burden for proof of causation from plaintiff to defendant, requiring a new trial.

### C. The Court erred when it failed to charge the jury on the sophisticated purchaser defense.

When considering whether the failure to include a jury charge was error, the "court's jury charge [should be considered] as a whole in light of the evidence and issues presented at trial," *Bragg v. Hi-Ranger, Inc*., 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995), and a new trial is required if the applicable principle was "not otherwise covered by the charge," *Sanders v. W. Auto Supply Co*., 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971). Such is the case with WCD's proposed sophisticated purchaser charge, which the Court rejected outright and which was not otherwise covered by the charge as a whole:

> **ADDITIONAL PROPOSED CHARGE:**
> **SOPHISTICATED PURCHASER**
> A MANUFACTURER, SUPPLIER AND/OR DISTRIBUTOR HAS NO DUTY TO WARN OF POTENTIAL RISKS OR DANGERS INHERENT IN A PRODUCT IF THE PRODUCT IS DISTRIBUTED TO A SOPHISTICATED INTERMEDIARY WHO IS IN A POSITION TO UNDERSTAND AND ASSESS THE RISKS INVOLVED, AND TO INFORM THE ULTIMATE USER OF THE RISKS, AND TO, THEREBY, WARN THE ULTIMATE USER OF ANY ALLEGED INHERENT DANGERS INVOLVED IN THE PRODUCT. UNDER THIS RULE, A COMPANY MAY DISCHARGE ITS DUTY TO WARN END USERS ABOUT KNOWN RISKS OF ITS PRODUCT IF IT (1) PROVIDES ADEQUATE WARNINGS TO THE IMMEDIATE PURCHASER OF THE PRODUCT OR SELLS TO A SOPHISTICATED PURCHASER THAT IT KNOWS IS AWARE OR SHOULD BE AWARE OF THE SPECIFIC DANGER, AND (2) REASONABLY RELIES ON THE PURCHASER TO CONVEY THE APPROPRIATE WARNINGS TO DOWNSTREAM USERS WHO WILL ENCOUNTER THE PRODUCT.
>
> IT IS ALSO SIGNIFICANT IF THE INTERMEDIARY ITSELF HAD A LEGAL DUTY TO WARN THE ULTIMATE USERS ABOUT THE DANGERS OF THE PRODUCT. FURTHER, IT MAY BE REASONABLE FOR THE SUPPLIER TO RELY ON THE INTERMEDIARY TO WARN END USERS IF IT WAS NOT

REALISTICALLY FEASIBLE FOR THE SUPPLIER TO CONVEY EFFECTIVE WARNINGS DIRECTLY TO THE END USERS.

(Ex. N, Trial Tr., 3/2/2023 AM Session at 109:19-116:16; *See* WCD's Proposed Instructions, filed 3/2/2023).

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 227, 781 S.E.2d 548, 557 (2015)(internal cites omitted). The *Lawing* Court, which discussed the use of a sophisticated purchaser jury instruction extensively but ultimately found it "need not formally adopt the doctrine at this time because as discussed, infra, the facts of this case do not implicate the sophisticated user defense," 415 S.C. at 226, 781 S.E.2d at 557, emphasized that "the threshold question in determining whether the trial judge erred in charging the sophisticated user defense to the jury is whether the law was implicated by the evidence in this case," 415 S.C. at 227, 781 S.E.2d at 557. When considering the evidence presented in this case, it is clear the facts are distinguishable from those at issue in *Lawing* and warranted a jury charge on the sophisticated user defense.

As one commentator has explained the parameters of the sophisticated purchaser defense, "[a] supplier [like WCD in this case] may not need to warn a knowledgeable user or purchaser of the dangers associated with a product if that person has special knowledge of the product's dangers;" moreover, the defense "may also be applicable when [as here] the [sophisticated] purchaser then allows another third party to use the product." Christopher Henry, *Death by Dicta: The Life of the Sophisticated User Doctrine in South Carolina, Products Liability Law*, 69 S.C. L. Rev. 1039, 1047 (2018). In this case, unlike in *Lawing,* the evidence outlined below showed that purchasers of talc from WCD – many of whom were defendants in this case at some point: (1) specified a particular product for WCD to supply; (2) directed WCD to test that product or tested it themselves upon

receipt; and (3) thereafter reformulated, repackaged, and sold the talc in a product that was wholly distinct from the raw material WCD originally provided. In other words, WCD's raw material talc was completely reconfigured and repackaged into another product altogether. As Dennis St. George, WCD's 30(b)(6) representative, testified:

> Q: My simple question before we test that theory is, did WCD ever warn its industrial or cosmetic talc customers that asbestos was in talc?
>
> A: I'm not aware that it did, that it provided a warning, because those customers were as aware as Whittaker of the issue.

(Ex. H, Trial Tr., 2/27/2023 AM Session at 56. *See also id.* at 133 (Q: "Were there manufacturers that dictated how Whittaker was supposed to test products -- or raw materials, rather, that were sent to those manufacturers?" A: "Yes"); (Q (By Ms. Flynn): "Were there also manufacturers who also advised Whittaker that they tested the products or the raw material talc after Whittaker distributed it?" A: "Yes."). Not only did the purchaser control when and if WCD interacted with the talc to test it before shipment, but there were times when WCD ***never interacted with the talc at all***, instead facilitating direct shipment of the talc from the miner to the purchaser. (Ex. H, Trial Tr., 2/27/2023 AM Session at 104 (Q: "Were there times during the distribution process where if you had talc that had been packaged where it would not make a stop at Whittaker's warehouse?" A: "Yes. There were times when, particularly with a large order, the material would have been shipped directly from the supplier to the customer. But Whittaker would have facilitated that."). This Court indicated that *Lawing* drove its decision not to charge the jury with the sophisticated purchaser defense in this case, but the facts of this case simply are not the facts in *Lawing.* It was error and prejudicial to WCD for the Court not to charge WCD's proposed sophisticated purchaser charge in this case.

### D. The Court erred when it improperly instructed the jury to disregard portions of Dr. Feingold's opinion testimony.

A new trial is also required because, as discussed extensively *supra* in Section II.B.v., the Court prejudicially instructed the jury using a special charge targeting only Dr. Feingold's testimony – the only expert mentioned by name in the charge. And it did so despite Plaintiffs opening the door to such testimony throughout the entire trial in addition to badgering him about it on cross-examination. (Ex. O, Trial Tr., 3/2/2023 PM Session at 162:3-11). The Court's prejudicial charge as to Dr. Feingold, found in Charge No. 7 of the Final Jury Charge and to which WCD objected (*see id.* at 217:2-11), instructed the jury as follows:

> IN CONNECTION WITH THE LAST EXPERT WE HEAR FROM, DR. FEINGOLD, I MADE RULINGS ABOUT THE SCOPE OF HIS TESTIMONY BEFORE HE TOOK THE STAND. DR. FEINGOLD CANNOT EXPRESS ANY DIRECT OPINION ABOUT THE CAUSE OF SARAH PLANT'S MESOTHELIOMA BUT HE, OF COURSE, CAN TESTIFY AS HE DID IN HIS AREA OF EXPERTISE ABOUT THE MATTERS HE PRESENTED.

(Ex. AA, Final Jury Charge). This charge was prejudicial for three reasons. First, it was an incorrect statement of what occurred: Dr. Feingold offered no "direct opinion" about causation; instead, Plaintiffs elicited that testimony from him and opened the door. Second, it was unnecessary because the Court had already undercut Dr. Feingold's credibility with the jury, as outlined in more detail *supra,* Sections II.B.iv. and v. Third, this instruction to the jury was dynamically charged with prejudice because it was the only charge mentioning any expert by name. It was highly prejudicial error that can only be cured by a new trial.

## V. WCD Is Entitled To A New Trial Absolute Because Plaintiffs' Expert Evidence Should Have Been Disallowed.

Further, WCD is entitled to a New Trial Absolute because Plaintiffs' expert testimony was insufficient to meet proper opinion standards and requirements under South Carolina law and thus was not probative opinion testimony. Plaintiffs' expert evidence should have been disallowed as

unreliable and improper under the standards set forth by the South Carolina Supreme Court in *Watson v Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) and related cases.

As an initial matter, Dr. William Longo's opinions and test results should have been excluded because they were premised on fundamentally flawed testing methods that have not been published or peer reviewed in scientific literature, nor is there evidence that such modified testing methods have ever been replicated by anyone. Specifically, and has had been set forth at great length in WCD's Motion *in Limine* to Exclude the Speculative and Unreliable Opinions of Dr. William Longo,[16] Dr. Longo relied on a "modified" Colorado School of Mines ("CSM") method that he admittedly continues to tweak, refine and modify in an effort to finalize it. In fact, it has been through three iterations and is still not in final form. Despite attempts to classify Dr. Longo's "modified CSM method" as an actual testing protocol, he has conceded that no such protocol exists (and he refuses to produce a copy of any such protocol in any event). Further, neither the original, nor Dr. Longo's modified CSM method, done to "optimize it" for chrysotile quantification, has been adopted or utilized by any federal or other governmental agency or world health agency as a method for testing talc. Moreover, neither the ISO nor any other organizations or agencies have certified the modified CSM method to test talcum powder for asbestos, and no other experts retained by Plaintiffs use the modified CSM method to test talc for asbestos. Thus, it follows that any testing performed using said "method" could not have satisfied the requirements of Rule 702, SCRE, and the *Council*[17] factors, and should have been excluded under Rule 403, SCRE as well. Likewise, the exhibits that

[16] In addition to the arguments set forth herein, WCD hereby also refers the Court back to its Motion *in Limine* to Exclude the Speculative and Unreliable Opinions of Dr. William Longo and Dr. Long's Testing Using his Modified Colorado School of Mines Method, which WCD incorporates herein in full pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure.

[17] *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999).

were admitted into evidence summarizing the test results that Dr. Longo used to support his opinions should also have been excluded.[18]

The admissibility of expert testimony is governed by Rule 702 of the South Carolina Rules of Evidence. While South Carolina has not adopted the *Daubert* standard, the analysis under Rule 702, SCRE, is functionally similar. *Council*, 335 S.C. at 20, 515 S.E.2d at 518. In determining whether to admit expert testimony under Rule 702, the Court was required to make three inquiries: (1) whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter; and (3) whether the substance of the testimony is reliable. *See Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446–47, 699 S.E.2d 169, 175–76 (2010). The reliability requirement is "the central feature of the inquiry." *Graves*, 401 S.C. at 74, 735 S.E.2d at 655. Dr. Longo's testing procedures, together with his opinions and summary charts based thereon, squarely failed to meet the reliability requirement of Rule 702.

If the proffered testimony is scientific in nature, then the trial court was required to determine its reliability pursuant to the *Council* factors. *Id*. There can be little doubt that testimony relating to testing of talc for the presence of asbestos is complex and scientific in nature. Thus, the Court was required to consider:

- the publications and peer review of the technique;
- prior application of the method to the type of evidence involved in the case;

[18] In this case, Plaintiffs introduced into evidence multiple charts reflecting and summarizing test results for testing performed on various talcum powder products using Dr. Longo's modified CSM method. The exhibits included, at a minimum, Trial Exhibits 3677, 3678 , 3679, 3680, 3681, 3804.

- the quality control procedures used to ensure reliability; and
- the consistency of the method with recognized scientific laws and procedures.

*See id.*; *Council*, 335 S.C. at 19, 515 S.E.2d at 517. Dr. Longo's modified CSM testing method and his opinions offered thereon did not satisfy *any* of the *Council* factors because (1) they have never been published or peer reviewed; (2) no other experts are using Dr. Longo's modified CSM method to test talc; (3) Dr. Longo has refused to disclose any written protocol or other information to even allow anyone to attempt to replicate what he is doing or to determine whether there is any quality control or reliability whatsoever; and (4) Dr. Longo himself continues to tweak, refine and modify the method to work out kinks and problems with it. These failures render his opinions and test results entirely unreliable. *See Elock v. Kmart Corp.,* 233 F.3d 734, 748–49 (3d Cir. 2000) (evaluating, under the *Daubert* factors, the testimony of an expert witness who had synthesized two methodologies into a novel, "hybrid methodology" / "combination method;" noting there was no evidence that this "combination method" was used by other experts or even referenced in the relevant literature; and explaining that combining multiple methodologies, which, "taken in isolation, may very well contain sufficient analytical rigor to be deemed reliable," was "nothing more than a hodgepodge" supported only by the expert's subjective judgment "in the guise of reliable expert opinion"); *Bahrle v. Exxon Corp.,* 279 N.J. Super. 5, 34 (App. Div. 1995) (affirming the exclusion of an expert who "failed to show that his methodology was scientifically reliable under any relevant test" and "conceded that the methodology had never been used by experts in any field"). *See also Watson*, 389 S.C. at 251–52, 699 S.E.2d at 178 (holding that the trial court erred in admitting the expert's testimony because there was no evidence in the record to show that the substance of his testimony was reliable, and explaining: "In our view, there is no evidence indicating that [the expert's] testimony contained any indicia of reliability. He had never published articles on his theory nor had he tested his theory").

Based on the foregoing, the Court should have stricken his opinion testimony and testing summaries in keeping with other courts that have rejected Dr. Longo's new testing method and his opinions based thereon. *See, e.g., In re Johnson & Johnson Talcum Powder Products Mktg., Sales Practices & Products Litig.,* 509 F. Supp. 3d 116, 154-55 (D.N.J. 2020). In April 2020, the U.S. District Court for the District of New Jersey precluded Dr. Longo from testifying about his ISO 22262-1 PLM Method, a method Dr. Longo used to test samples of brands of products alleged to be at issue in this case. *See id.* (excluding, as unreliable, any opinions based on Dr. Longo's PLM testing, as well as Dr. Longo's opinion that women who used talcum powder products were exposed to asbestos). The court noted that, "[i]n addition to the ISO 22262-1 PLM methodology, Dr. Longo conducted a heavy liquid separation before conducting the PLM analysis because it 'increase[es] the analytical sensitivity of the PLM analysis for cosmetic grade talc.'" *Id*. at 154. The court found that an inability to reproduce Dr. Longo's results constituted evidence that Dr. Longo's testing methods were unreliable:

> What is more, as Defendants further point out, Dr. Longo's PLM methodology is unreliable because it was ***replete with subjectivity and reproducibility problems***. Dr. Longo explained at the *Daubert* hearing that pursuant to the PLM methodology, for positive asbestos samples, the quantity of asbestos in the samples was determined by visual examination "based on past standards, based on petrographic that show what the various percentages are." These standards (weight percentages) were generated by MAS and were not produced to Defendants. Defendants argue that because Dr. Longo did not disclose this information in connection with his expert report, replication of Dr. Longo's testing is difficult. I agree. Dr. Longo was questioned on the stand during the *Daubert* hearing as to why he did not disclose the weight percentages. He did not have an adequate explanation. This is troubling, because the weight percentages are central to the asbestos analysis under the PLM; indeed, these percentages were used by individual lab analysts to determine the amount of asbestos in a given sample. Without that information, which is internally created by MAS, reproducing Dr. Longo's test under the PLM would not be possible, and hence, the testing is unreliable.

> This reproducibility issue was made plain by Dr. Longo's decision to have a third-party laboratory replicate his findings. Dr. Longo requested Dr. Lee Poye of J-3 Laboratory ("J-3") to perform a PLM analysis using the same ISO 22262-1 method on 22 of the historical talc samples. However, J-3's PLM analysis was negative for asbestos for each sample. While Dr. Longo attempted to explain away why this discrepancy occurred, he nevertheless conceded that "[t]hese differing results between the two labs will require further investigation to understand the reason for these differences." Again, Dr. Longo had no explanation. This underscores the very real reliability and ***reproducibility issues plaguing Dr. Longo's PLM testing***. As such, Dr. Longo is not permitted to testified as to his testing results under the PLM.

*Id.* (internal citations omitted) (emphasis added).

Despite the foregoing, Plaintiffs in this case were permitted over objection to submit as exhibits the test results and test summaries of MAS that included the testing of product brands at issue in this case, as well as other brands not relevant to WCD, while WCD was entirely deprived of any ability to analyze and defend against Dr. Longo's unproven and inconsistent methodologies with an unknown error rate. Dr. Longo has been permitted to hide behind a claim of "confidentiality" as to the quality of his and MAS's work product, while affirmatively testifying in open court that products that incorporated (or potentially incorporated) WCD-supplied talc contained asbestos fibers.

Moreover, the prejudicial effect of admitting results derived from Dr. Longo's modified CSM method far outweighed the probative value of such evidence. Even if the Court determined that Dr. Longo's opinion testimony was relevant and admissible under Rule 702, his testimony and exhibits reflecting his test results should have still been excluded under Rule 403 because their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518; *Jones*, 383 S.C. at 549, 681 S.E.2d a 587; Rule 403, SCRE.

Courts routinely exclude such evidence where such a risk exists. And indeed, courts have stated that "Dr. Longo's testimony reveal[ed] it to be practiced and to employ misdirection and

evasiveness. It is at best disingenuous, not credible and supported by any respectable community of scientist." *In re Lamar Cty. Asbestos Litig*., No. 2000-3559 (Tex. Dist. Ct. July 5, 2001). Other courts have described Dr. Longo's studies as being "pseudoscience at best…[and] carried out in such a way as to produce the highest results possible and to overdramatize the process." *In re Garlock Sealing Techs*., LLC, 504 B.R. 71, 79-80 (Bankr. W.D.N.C. 2014) (stating "[a]s such, the court cannot accept [Dr. Longo's] studies or opinions as probative"). WCD was prejudiced by having to defend and refute Dr. Longo's findings of alleged chrysotile fibers using a methodology that has not been reproduced, replicated, peer-reviewed, utilized by other scientists in the scientific community, or adopted by any governmental organizations. Accordingly, because Dr. Longo's opinions were inconsistent with the appropriate legal standard and, therefore, useless to a jury, further exclusion was warranted under Rule 403, SCRE, on the basis that any probative value of Dr. Longo's testing methods and opinions, together with the summary charts based thereon, was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury.

To compound the above, Plaintiffs' other experts then improperly relied, in varying degrees, on Dr. Longo's opinions and test results as a basis for their opinions that talc in products used by Sarah Plant contained asbestos, and therefore, Mrs. Plant's exposure to such asbestos could be causative of her disease. Dr. Haber, for instance, was referred to the charts reflecting the test results of Dr. Longo and MAS that had been made exhibits to the case. *See, e.g*., Feb. 27, 2023 Trial Tr. 49:19-50:2. Similarly, Mark Bailey, Plaintiffs' geology expert, relied on MAS testing received since June of 2020, which was reflected in Exhibit 3795, in support of his opinion that products containing talc from southwest Montana consistently contained chrysotile asbestos. *See* Feb. 28, 2023 Trial Tr. 86:8-87:4 and Exhibit 3795. Importantly, Mr. Bailey's opinions in 2022 are admittedly a departure from his opinions regarding Montana talc that he previously gave in 2015, (*see id*. 87:11-88:4), and

one of the things that caused him to reconsider his former opinions were the testing results from Dr. Longo's MAS lab supplied to him by Plaintiffs' counsel (*see id.* 109:13-110:23). Further, Plaintiffs' expert in statistics and epidemiology, Dr. David Madigan, admitted that his probability opinions were based on the testing largely from Dr. Longo and MAS. *See* Trial Tr. 2/27/2023 PM Session, at pp.36-40. Dr. Madigan agreed that if the input data from Dr. Longo's testing and opinions was incorrect, his output would change as well. *See id.*

In addition to the foregoing, while certain of Plaintiffs' experts were offered in their requisite areas of expertise, without objection, they then testified beyond the boundaries of their areas of expertise and crossed over into other areas in which they clearly were not qualified. *See, e.g.*, Trial Tr. 2/27/2023 AM Session, at 41:13-22 (Dr. Haber was asked for an opinion about the presence of asbestos in mines in Montana, Vermont, Italy, China and Brazil); *See id*. 54:17-56:23; 144:7-18 (Dr. Haber provided an opinion about testing methods and microscopy, including why he did not believe certain testing methods to be sufficient, despite the fact that he is not a microscopist); *See id.*, at 98:20-100:11 (Dr. Haber being asked about history of knowledge of hazards).

## VI. WCD Is Entitled To A New Trial Absolute Because The Court Improperly Admitted Into Evidence Corporate Records Of Other Entities Without A Proper Foundation Or Showing Of Authenticity.

WCD also is entitled to a New Trial Absolute because the Court improperly admitted into evidence and permitted reference to, and testimony regarding, a plethora of corporate documents relating to other entities, specifically including, but not limited to Johnson & Johnson, Avon Products, Inc., Pfizer, and Johns-Manville, among others, not shown to have originated from WCD, not produced by WCD, and not even received by WCD. Such documents were used for purposes including evidence of what Plaintiffs contend were "bad acts" by the "industry" that they sought to attribute to WCD. Such documents and evidence were irrelevant to notice to, or conduct on the part

of WCD, and unduly prejudicial. WCD repeatedly asserted its objections to such documents both orally and in writing, even making reference to the fact that an appellate court in California reversed a punitive damages award because one of the documents sought to be admitted included a hearsay opinion. *See* Trial Tr. 2/23/2023 PM Session, at 150:20-152:13; 2/24/2023 AM Session, at 8:22-9:21, 95:3-10; 2/27/2023 AM Session, at 16:14-17:16, 48:2-11; 3/1/2023 AM Session, at 19:14-20:22; WCD's Objections to Plaintiffs' Request to Preadmit 71 Exhibits Against WCD, incorporated by reference as if set forth fully herein, pursuant to Rule 10(c), SCRCP; and WCD's Objections to Plaintiffs' 27 Exhibits to Use with Dr. Haber, incorporated by reference as if set forth fully herein, pursuant to Rule 10(c), SCRCP; *see also McNeal v. Whittaker, Clark & Daniels, Inc.*, 80 Cal. App. 5th 853, 296 Cal. Rptr. 3d 394 (2022), *reh'g denied* (July 22, 2022), *review denied* (Sept. 28, 2022). Plaintiffs further sought admission of some of WCD's corporate documents without use of a sponsoring witness to lay a proper foundation. Notably the document excluded by the California appellate court as hearsay was referenced at least three or four times during Plaintiffs' closing argument.

South Carolina law permits introduction of business records, but only "if the custodian or other qualified witness testifies to its identity and the mode of its preparation." S.C. Code Ann. § 19-5-510; *see also* Rule 803(6), SCRE (noting that the proper showing must be made by "the testimony of the custodian or other qualified witness"); *Ex parte Dep't of Health & Envt'l Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002) (noting, *inter alia*, that the record must be "identified by a qualified witness who can testify regarding the mode of preparation of the record" and "found to be trustworthy by the court"). Plaintiffs failed to call the custodian or other qualified witness to lay a foundation for these records and thus the records should have been excluded. To the extent Plaintiffs claimed that authenticating information was provided by citation to prior

depositions or other discovery that they represented would establish authentication as to some of the documents, there were many without such citations, and the underlying documents purporting to authenticate the documents were in many cases not provided. *See, e.g.*, Trial Exhibits 349, 37, 1274, 1275, 1380, 4155, 1295, 546, 335, 947, 3629, 3630, 3795, 571 to Plaintiffs' Second Motion to Pre-Admit Exhibits.

In light of the prejudice to WCD resulting from the cumulative effect of admission of these records without a proper foundation or showing that they could be properly admitted as to notice or for any other purpose, a new trial absolute is required.

## VII. WCD Is Entitled To A New Trial Absolute Because The Court Impermissibly Admitted Summaries Pursuant To SCRE 1006.

During trial, Plaintiffs sought to admit, and did ultimately admit and use as exhibits, multiple summary charts under the guise of Rule 1006. SCRE. Per representation of Plaintiffs' counsel, the summary charts had been provided three days before they first sought to admit any of them. *See* Trial Tr. 2/24/23 AM Session, at 75:16-96:2. The summary charts ultimately admitted as exhibits included Trial Exhibit numbers 60, 61, 62, 674, 1230, 3016, 3677, 3678, 3679, 3680, 3681, 3795, 3804 and 3817. Rule 1006 provides in relevant part:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, *provided the underlying data are admissible into evidence*. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place.

Rule 1006, SCRE (emphasis added). At the time such documents were sought to be admitted, WCD objected on the grounds that, not only were the underlying documents supporting such summary charts not provided with the charts, such that WCD had any reasonable opportunity to evaluate them, but the underlying documents were not shown to be independently admissible in evidence. WCD

further objected on the grounds that some of the summary charts included excerpts of the documents that were cut and pasted into the body of the charts, which is not contemplated under Rule 1006.

The Court rejected and overruled WCD's objections to the charts, not on any evidentiary basis supported by the South Carolina Rules of Evidence, but for two other reasons that were clearly articulated by the Court. First, the Court declared that the objections, although made prior to admission, were not timely and that WCD had not filed any objections in writing.[19] Second, the Court asserted that WCD could not use the failure to have timely objected and "couple it with your deliberate attempt to delay this trial with the removal and have me give any credibility to the objections you're now lodging. So, for those two reasons, overruled." (*See* Ex. F, Trial Tr. 2/24/2023 AM Session, at 75:16-96:2).

Plaintiffs argued, and the Court accepted, that WCD somehow had the data because it had been produced in the case, because WCD knew about it from prior cases, and/or because the data was somewhere in a set of approximately 5,140 exhibits that Plaintiffs had produced. (*See generally id.*, at 78;15-97:17; Ex. I, Trial Tr. 2/27/2023 PM Session, at pp.144-153.

Rather than requiring any showing by Plaintiffs that the charts were, in fact, based on independently admissible documents, the Court instead put the burden squarely on WCD to prove the negative and show that there was nothing in the more than 5,140 exhibits produced by Plaintiffs to support the summary charts, which was an utterly impossible task. Further, the very face of the summary charts showed that they incorporated information and data irrelevant to the facts of this

[19] WCD did subsequently assert objections in writing provided to opposing counsel on 2/23/2023 and filed with the Court on 2/27/2023, encompassed within WCD's Objections to Plaintiffs' Request to Preadmit 71 Exhibits Against WCD, which document is incorporated by reference as if set forth fully herein, pursuant to Rule 10(c), SCRCP. WCD further objected yet again in writing in WCD's Objections to Plaintiffs' 27 Exhibits to Use with Dr. Haber, provided to opposing counsel and then later filed also on 2/27/2023. Such objections are also incorporated by reference as if set forth fully herein, pursuant to Rule 10(c), SCRCP.

case, including talc codes and products not at issue, creating confusion of the issues and misleading of the jury, pursuant to Rules 401 and 403, SCRE. The resulting admission of lawyer-created summary charts not shown to be based on documents that were admissible into evidence, caused severe prejudice to WCD, and a new trial is warranted on such grounds.

## VIII. Plaintiffs Presented Inadmissible Evidence and Arguments of Acts or Omissions of Separate Corporations.

The Court improperly disregarded the corporate form by allowing Plaintiffs to present evidence and argument against WCD based on the acts and/or omissions of different corporations—thus attempting to hold or insinuating that WCD held the same knowledge and was liable for the other corporation's actions—without establishing a legal or factual basis for doing so. Allowing evidence of actions by other corporations treats those corporations as a single business enterprise. WCD cannot be liable for the other corporations' acts or omissions absent an alter-ego or amalgamation finding. Plaintiffs bear the burden of proving the corporate form should be disregarded but presented no evidence to support such a finding. *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 603, 649 S.E.2d 135, 143 (Ct. App. 2007).

Specifically, despite that the evidence is undisputed that WCD was only ever a distributor of raw materials, and not a miner, manufacturer, miller, processor, or some other like entity, Plaintiffs presented evidence and argued vigorously that WCD was a shareholder and/or owner of other entities, including Pioneer Talc Company, Cherokee Minerals, Clark Minerals, Apache Minerals, and further made claims that WCD split profits with Charles Mathieu and Donald Ferry (an owner of Metropolitan Talc) from a mill that sold Canadian talc. *See* Ex. I, Trial Tr. 2/27/2023 PM Session, at pp.54-55; Ex. J, Trial Tr. 2/28/2023 AM Session at 19:9-21:12; Ex. P, Trial Tr. 3/3/2023 AM Session, at 74:21-75:11. WCD's objections on these issues were overruled. *See* Ex. O, Trial Tr. 3/2/2023 PM Session at 261:5-264:11. Plaintiffs' examination, evidence and arguments on these

issues implied a significant degree of knowledge and/or control over by WCD over miners, millers and other such entities, and impermissibly invited the jury to impute knowledge, acts, or omissions that those entities may have onto WCD without having made the proper showing that would support that WCD and the above-referenced entities should be considered a single business entity or should be amalgamated.

To disregard the corporate form based on an alter-ego theory, Plaintiffs must show total domination and control of one entity by another and inequitable consequences caused thereby. *Mid-S. Mgt. Co. Inc.*, 374 S.C. at 603, 649 S.E.2d at 143. Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. *Id.* However, this theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice. *Id.* Plaintiffs presented no evidence of dominance, fraud, or misuse of control between WCD and any of the entities referenced above. Moreover, Plaintiffs presented no evidence of control. Therefore, Plaintiffs presented no evidence that would support an alterego finding, and the court never made an alter-ego finding.

The Court also made no finding that WCD and any other entity were amalgamated or operating as a "single business enterprise," and Plaintiffs presented no evidence that would support such a finding. The amalgamation or "single business enterprise" doctrine "is not to be applied without substantial reflection." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 281 (2018). The Supreme Court has explained this doctrine in the following manner:

> [W]here multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

*Id.* at 652–53, 817 S.E.2d at 279. The doctrine requires Plaintiffs to present evidence of some sort of injustice or abuse of the corporate form to warrant disregarding the distinct corporate entities and treating the businesses as a single enterprise. *Id.* at 654, 817 S.E.2d at 280.

The South Carolina Supreme Court recently adopted the following analysis from the Texas Supreme Court:

> We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or . . . injustice and inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used . . . as shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. Such abuse is necessary before disregarding the existence of a corporation as a separate entity. Any other rule would seriously compromise what we have called a "bedrock principle of corporate law"—that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations.

*Id.* at 654–55, 817 S.E.2d at 280 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)).

This court committed an error of law when it allowed Plaintiffs to present evidence and argument that WCD held equal knowledge and/or was responsible for the acts or omissions of any mining and/or milling entities or other companies solely on the ground that WCD held shares in those entities. Rather than analyzing whether to disregard the corporate form, as required by South Carolina law, the Court summarily ruled that evidence and arguments were admissible based on ownership of shares. Allowing the presentation of evidence based on such relationships is directly contrary to South Carolina law on limited liability for corporations. The mere fact that two corporations have some relationship is not a basis for imputing knowledge and liability for the actions of one corporation to another, which is what this Court did when it allowed Plaintiffs to

present evidence and argument that WCD "had huge ownership in mills," including a Canadian mine, and that WCD processed the talc. Such evidence is inadmissible against WCD without an alter-ego or amalgamation analysis. The presentation of this evidence was prejudicial to WCD because it allowed the jury to improperly impute a significantly greater degree of knowledge, acts, or omissions to WCD than was otherwise shown by the evidence. Therefore, WCD is entitled to a JNOV.

## CONCLUSION

For any or all reasons outlined above, WCD respectfully requests a hearing be granted on this Motion and that this Court enter an Order granting a New Trial Absolute. This Motion is based on the Rules of Civil Procedure, the Rules of Evidence, the relevant statutory and case law, the grounds stated herein, pleadings on file, transcripts of the trial and any hearings conducted in conjunction therewith, any motions and other argument referenced and incorporated as if fully set forth herein, any additional memoranda in support of this Motion and any in reply, all arguments presented to the Court, and other materials properly received and considered by the Court in connection therewith.

Respectfully submitted,

s/Nicolas J. Cherry
Stephanie G. Flynn, SC Bar No. 16653
Nicolas J. Cherry, SC Bar No. 102671
Allyson R. Twilley, SC Bar No. 101884
FOX ROTHSCHILD LLP
2 W. Washington St., Ste. 1100
PO Box 87, Greenville, SC 29602
864-751-7607/FAX 864-751-7800
sgflynn@FoxRothschild.com
ncherry@FoxRothschild.com
atwilley@FoxRothschild.com

***Attorneys for Defendant***
***Whittaker, Clark & Daniels, Inc.***