THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2020-000645

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

v.

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

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

And

Terran Dupree, ... Respondent,

v.

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

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

BRIEF OF *AMICI CURIAE* SOUTH CAROLINA CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AND SOUTH CAROLINA COALITION FOR LAWSUIT REFORM IN SUPPORT OF DEFENDANTS

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QUESTION PRESENTED

Whether the circuit court erred in consolidating two *very* different actions under South Carolina Rule of Civil Procedure 42(a)—*Dupree* is a personal injury case brought by a cancer-free, young, living female with no known exposures to asbestos and a type of cancer (*peritoneal* or "abdominal" mesothelioma) that typically has no known external cause, whereas *Devey* is a wrongful death case involving an elderly man who was occupationally exposed to asbestos, had various types of cancer, and allegedly died from a type of cancer (*pleural* or "lung" mesothelioma) that is associated with occupational exposure to asbestos at disease-causing doses—based on the assertion that both plaintiffs used Johnson's Baby Powder.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in South Carolina and their insurers. Accordingly, *amici* have a substantial interest in ensuring that South Carolina's tort system is fair, protects defendants' due process rights, and reflects sound policy. The trial court's order consolidating the two actions here violates these principles.

Amici file this brief to highlight the significant prejudices to tort defendants that flow from consolidation of dissimilar cases. As courts across the country have come to appreciate the unfairness of the practice and its practical shortcomings, many have banned or sharply limited consolidation of asbestos actions. *Amici* desire to use their national perspective to educate the Court about this trend. Finally, *amici* offer some suggestions for this Court to provide much-needed clarity to litigants and the circuit court as to when consolidation is appropriate under South Carolina Rule of Civil Procedure Rule 42(a).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decision to consolidate a particular set of cases has tremendous significance for individual litigants and the civil justice system. In appropriate cases, the practice may foster judicial economy. For instance, when a single catastrophic event occurs, joinder of cases at trial has the potential to reduce litigation costs, speed recoveries, and make more economical use of the court's time. On the other hand, if cases are not legally and factually similar, consolidation can have serious, undesirable impacts: it causes substantial prejudice to defendants, may violate due process, and invites the filing of claims (making any hoped-for efficiency unlikely). For these reasons, numerous jurisdictions increasingly have curtailed consolidations in asbestos and other tort cases.

This Court should replace the circuit court's informal procedure for consolidating asbestos cases with formal procedures that give litigants and the circuit court clear guidelines and reduce the risk of prejudice, confusion, and other adverse consequences that flow from consolidation.

Specifically, the Court should adopt the criteria set forth in *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993), "to strike the appropriate balance as to consolidation." In *Malcolm*, the Second Circuit articulated the criteria commonly used by the federal courts for evaluating whether the trial court had abused its discretion in consolidating asbestos cases: "(1) common worksite, (2) similar occupation, (3) similar time of exposure, (4) type of disease, (5) whether plaintiffs were living or deceased, (6) status of discovery in each case, (7) whether all plaintiffs are represented by the same counsel, and (8) type of cancer alleged." *Id.* at 350-351.

When the *Malcolm* criteria are applied here, it is clear that the two cases should not have been consolidated. This Court should vacate the circuit court's consolidation order.

ARGUMENT

I. CONSOLIDATED TRIALS ARE HIGHLY PREJUDICIAL TO DEFENDANTS, RAISING DUE PROCESS CONCERNS

"Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." James M. Beck, *Little in Common: Opposing Trial Consolidation in Product Liability Litigation,* 53 No. 9 DRI For The Def. 28 (Sept. 2011). That is exactly what happened in this case, but "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp*., 899 F.2d 1281, 1285 (2d Cir. 1990).[1]

Courts have recognized the "specific risks of prejudice and possible confusion" that can result from the piling on of evidence in cases consolidated for trial. *Cain v. Armstrong World Indus*., 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) (citation omitted). As the court explained in *Cain*, "The 'Try-as-many-as-you-can-at-one-time' approach is great if they all, or most, settle; but when they don't," plaintiffs get "a chance to do something not many other civil litigants can do—overwhelm a jury with evidence" that would otherwise be inadmissible in separate trials. *Id*. at 1457. And when multiple plaintiffs allege injuries from the same product, jurors may incorrectly assume that the claims must have merit. *See Bradford v. Coleman Catholic High Sch.*, 488 N.Y.S.2d 105 (App. Div. 1985) (noting potential for consolidation "to bolster each claim, to defendants' disadvantage.").

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[1] *See also In re Brooklyn Navy Yard Asbestos Litig*., 971 F.2d 831, 853 (2d Cir. 1992) ("The benefits of efficiency can never be purchased at the cost of fairness . . . and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation.").

Other risks of prejudice arise when, as here, joinder for trial involves plaintiffs with different diseases or who assert distinct claims, such as personal injury and wrongful death. *See Malcolm*, 995 F.2d at 351 ("The opportunity for prejudice is particularly troubling where" plaintiffs "who may under certain circumstances expect close to normal life spans, are paired for trial with those suffering from terminal cancers…."); *Matter of New York City Asbestos Litig. (Carpozio v. A.C. & S., Inc.),* 22 Misc.3d 1109(A), 880 N.Y.S.2d 225 (Table), 2009 WL 104628, at *4 (N.Y. Sup. Ct. N.Y. County Jan. 9, 2009) ("consolidating [wrongful death plaintiff] with *any* of the living plaintiffs' cases will prejudice Defendants in the latter cases *inter alia* because of the possibility that a jury will attribute the fate of the deceased to the living plaintiffs at this juncture especially where it appears that the living plaintiffs are long-term cancer survivors who are not at risk of immediately dying of their cancer.").

And while this particular case involves the same product and defendants, most asbestos cases do not. In multi-defendant asbestos cases, "there is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs." Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 373 (June 2006). Inflammatory evidence in one case can color a jury's perception of joined cases and amount to "guilt by association." *Sidari v. Orleans County*, 174 F.R.D. 275, 282 (W.D.N.Y. 1996). *See also Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1101 (Miss. 2004) ("the potential is that the collective evidence will be applied to all defendants, thereby prejudicing each [defendant]."); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 461 (E.D. Mich. 1985) ("If the unique circumstances of the cases are considered together in one trial, the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice."); *Grayson v. K-Mart Corp*., 849 F. Supp. 785,

790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."). Jurors also may have trouble differentiating asbestos products with different fiber types and potencies,[2] lumping them together as simply "asbestos."

Empirical evidence shows that consolidated trials "significantly improve outcomes for plaintiffs." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 574 (2007); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319, 1337-1338 (2002) (asbestos plaintiffs' probability of winning "when two or three plaintiffs have a consolidated trial," as compared to individual trials, is "statistically significant," and increases even more when additional cases are consolidated); *see also* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. of Applied Psychol. 909, 916 (2000) (study of jury behavior in controlled setting found that juries in small trial consolidations were significantly more likely on a statistical basis to find for the plaintiff and render a larger award than if the cases were tried individually); Irwin A. Horowitz & Kenneth S. Bordens, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & Psychol. Rev. 43, 66 (1998) ("empirical research shows clearly that consolidation can alter the patterns of

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[2] *See In re Asbestos Litig.*, 911 A.2d 1176, 1181 (Del. Super. Ct. New Castle County) ("[I]t is generally accepted in the scientific community and among government regulators that amphibole fibers are more carcinogenic than serpentine (chrysotile) fibers."), *appeal refused*, 906 A.2d 806 (Del. 2006); *Bartel v. John Crane, Inc*., 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

verdicts and awards handed down by jurors" and these changes "are generally more favorable to the plaintiffs than the defense.").

For example, a study of New York City asbestos litigation ("NYCAL") data found that "consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts." Peggy Ableman, *et al*., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency,* 14 Mealey's Asbestos Bankr. Rep. 1, 1 (Apr. 2015). "[F]rom 2010 through 2014, NYCAL jury awards in consolidated trials . . . totaled a staggering $324.5 million across 14 plaintiffs for an average of more than $23 million. These consolidated verdicts are 250% more per plaintiff than NYCAL awards in individual trial settings over that same span, and 315% more per plaintiff than the national average award." *Id*. at 1. Furthermore, the jury bias caused by consolidation increases the frequency of plaintiff victories in cases that go to verdict. "Since 2010, 88% of plaintiffs (14 of 16) in NYCAL consolidated verdicts received jury awards, as compared to 50% of plaintiffs (4 of 8) in NYCAL individual trials, and approximately 60% nationwide." *Id*. at 2.

A different and especially serious due process problem arises from the consolidation of cases that include punitive damages claims. "Under current [United States] Supreme Court precedent, consolidating plaintiffs' cases for trial when plaintiffs assert punitive damages claims is quite likely a per se constitutional violation." Beck, *Little in Common*, 53 No. 9 DRI For The Def. at 33. The Supreme Court of the United States has held that the United States Constitution's "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts . . . upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). The Court said it could

find "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Id*. at 354; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("A defendant should be punished for the conduct that harmed the plaintiff….").

Here, Ms. Dupree and Mr. Devey are "strangers." If their cases are tried together, the jury is likely to conflate evidence that is specific to each person and improperly return a punitive damages based on the totality of the evidence heard. *See Williams*, 549 U.S. at 355 ("a jury may not . . . use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."); White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. at 367 ("Small consolidations increase plaintiffs' probabilities of winning and receiving punitive damages…."); *see also Bailey v. N. Trust Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000) (in consolidations the jury will consider "all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case…. The need to focus the jury's attention on the merits of each individual plaintiff's case counsels against proceeding with . . . one consolidated trial.").

II. THERE ARE FEW, IF ANY, EFFICIENCIES TO BE GAINED BY CONSOLIDATING ASBESTOS CASES

A. Consolidations Can Lengthen Trials And Burden Appellate Courts

Because asbestos trials today are often factually and legally dissimilar (e.g., different worksites, occupations, products, durations of exposure, diseases, and plaintiff health statuses), there are few, if any, efficiencies to be gained through consolidation.[3] *See* Ableman, *et al*., *The*

[3] In the 1980s and 1990s, before the leading asbestos-containing thermal insulation defendants exited the tort system in bankruptcy, similarities made asbestos cases more appropriate for small consolidations. *See, e.g., Hendrix v. Raybestos-Manhattan*, 776 F.2d 1492, (Footnote continued on next page)

Consolidation Effect, supra, at 12 ("an examination of the trial duration for both individual and consolidated trial proceedings in NYCAL shows that the Court is not saving a material level of resources through consolidation."). In fact, more trial time *per plaintiff* can be taken up on consolidated trials. *See Matter of New York City Asbestos Litig. (Abrams v. Foster Wheeler Ltd.)*, No. 108667/07, 2014 WL 3689333, at *4 (N.Y. Sup. July 18, 2014) ("of the most recent 13 asbestos trials in New York County, those with only one plaintiff lasted up to two weeks each, whereas those with more lasted as long as 16 weeks….").

One reason is that consolidated trials are more complex. Efforts must be made to try to reduce juror confusion. These instructions take time—yet still fail to prevent prejudice to defendants and potential due process problems. *See* Ableman, *et al*., *The Consolidation Effect, supra,* at 7 ("The disparity in the value of awards between plaintiffs in NYCAL consolidated and individual trials, as well as the rate of plaintiff victories in NYCAL consolidated trial settings, illustrates that a prejudice against NYCAL trial defendants is created during a consolidated trial despite whatever jury instructions, notebooks or other court devices are put in place to guard against confusion and bias.").

Then, there are the inevitable post-trial motions and appeals that flow from the extraordinary verdicts that are common in consolidated asbestos actions:

1496 (11th Cir. 1985) (consolidation of four plaintiffs, two were brothers, all were insulators who worked at the location, frequently on the same jobs, were exposed to asbestos during the same time frame, all suffered the same disease, were being treated by the same physician, and their medical prognoses were nearly identical). Over the past two decades, asbestos plaintiffs' attorneys have shifted their focus "towards peripheral and new defendants," Marc C. Scarcella, et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012), and the litigation become an "endless search for a solvent bystander," *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

> In fact, 10 of the 14 NYCAL consolidated plaintiff awards since 2010 have been reduced on remittitur by an average of nearly 75%, with two additional jury awards getting vacated on appeal. In contrast, since 2010, none of the four plaintiff verdicts awarded in NYCAL individual trials have been remitted, with remittitur still pending in one case.

Id. at 2; *see also id*. ("[T]he post-trial attorney and judicial resources required to correct these initial outcomes erases any judicial economy that consolidated trial settings were intended to achieve.").

On top of all of this, "finding jurors who will commit to a lengthy trial prolongs jury selection, as does the necessity of selecting extra alternates against the possibility that one or more jurors will seek to be released before the trial concludes." *Matter of New York City Asbestos Litig*. *(Abrams)*, 2014 WL 3689333, at *4. This, in turn, leads to less diverse jury pools, another potential due process problem raised by consolidated trials.

B. <u>Consolidations Invite More Filings</u>

The prejudice to defendants from consolidation results in coerced settlements in many instances, so while cases may take longer to try, many never get that far. This, in turn, encourages the filing of more cases, making consolidation inefficient in the long run. As Duke Law School Professor Francis McGovern explained:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997); *see also* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 232 (2006) ("However well-intentioned, these experiments [with aggregation] failed, not only as mechanisms to clear dockets and to adjudicate the claims then pending, but also by facilitating the increasing rate of claim filings. . . ."); Victor E. Schwartz & Leah Lorber,

A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 Am. J. Trial Advoc. 247, 249 (2000) (courts that emphasize efficiency over fairness invite litigation).

When leverage is applied to force defendants to settle weak or meritless cases, or pay inflated amounts to settle stronger cases, it is inevitable that plaintiffs will flock to take advantage of this situation. *See* Helen E. Freedman, *Product Liability Issues in Mass Torts — View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) ("Increased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases"); Eduardo Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 187 (2013) ("Aside from the significant due process issues raised by forcing parties to litigate or settle cases in groups, aggregation promotes the filing of cases of uncertain merit. The incentive becomes the number of cases that can be filed, *not* the relative merit of the individual case."); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945, 954 (2003) ("When plaintiffs learn that a particular forum will coerce settlement procedurally irrespective of the merits of their claims, one doubts whether that forum will remain unclogged for long.").

III. THE TREND IS TO BAR OR SHARPLY LIMIT CONSOLIDATIONS

A. Consolidation Should Require Consent of All Parties or Should Be Limited to Members of the Same Household

Because of the serious legal and policy problems discussed above, a number of significant jurisdictions have ended or substantially curbed the use of trial consolidations in asbestos cases. *See Matter of New York City Asbestos Litig. (Andreadis v. ABB, Inc.)*, No.

190411/13, 2015 WL 4501189, at *3 (N.Y. Sup. July 24, 2015) ("the trend is to prohibit the consolidation of asbestos trials absent the consent of all parties.").[4]

For instance, the Michigan Supreme Court precludes the "bundling" of asbestos-related cases for settlement or trial. The court's Order states:

> The Court has determined that trial courts should be precluded from "bundling" asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only.

Mich. Supreme Court, AO No. 2006-6, Prohibition on "Bundling" Cases (Aug. 9, 2006). A justice who supported making the Michigan Supreme Court's Order permanent based on its benefits—and lack of negative impacts—explained:

> I concur with the order retaining Administrative Order No. 2006-6. I write separately to point out that, contrary to the dire predictions of the dissenters to the administrative order, the initial adoption of our antibundling order . . . has not caused the sky to fall. The order has not disrupted the progress of the asbestos docket…. Since the administrative order was adopted, we are informed that all the cases scheduled each month have been settled without trial, just as had occurred before the adoption of the order.
>
> The only reported new effect of Administrative Order No. 2006-6 is that settlement negotiations occur among the parties without court participation. Contrary to the dire predictions, the asbestos docket has not come to a grinding halt nor has our order required ten additional Third Circuit judges or dramatically

[4] In a much earlier, less enlightened era in the asbestos litigation, courts did experiment with consolidation, *see Central Wesleyan College v. W.R. Grace & Co*., 143 F.R.D. 628, 632 (D.S.C. 1992) (referring to "trend in asbestos personal injury litigation is directed toward some type of class or consolidated proceeding."), *aff'd*, 6 F.3d 177 (4th Cir. 1993)—a case cited by plaintiffs—but the trend was reversed after the experiment failed. *See In re Asbestos Personal Injury and Wrongful Death Litig. Global*, No. 24-X-87-048500, 2014 WL 895441 (Md. Cir. Ct. Baltimore City Mar. 5, 2014) ("[W]hen federal and state courts, legislative and judicial branches, appellate and trial benches, in nearly every region of the country, all conclude that consolidation of mass tort claims is ineffective, then we must also take heed of past mistakes so we are not condemned to repeat them.").

> increased the workload. In fact, the circuit court should have more time available because of the loss of court-ordered settlement conferences. I support Administrative Order No. 2006-6 because it continues to serve the sound and simple purpose of ensuring that each case is considered on its own individual merits.

Mich. Supreme Court, Retention of AO No. 2006-6 (June 19, 2007) (Corrigan, J., concurring).

Similarly, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to generally prohibit the joinder of asbestos cases for trial absent the consent of all parties. *See* Ohio R. Civ. P. 42(A)(2) ("Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household.").

The Mississippi Supreme Court has held that joinder of multiple plaintiffs with little in common beyond the product that allegedly injured them would "unavoidably confuse the jury and irretrievably prejudice the defendants." *Armond*, 866 So. 2d at 1098. Mississippi now requires "a distinct litigable event linking the parties." Miss. R. Civ. P. 20 Advisory Committee Notes.[5]

In New York City, when an asbestos plaintiff "has asserted a punitive damages claim against one or more defendants, that case may not be joined with any other plaintiff's case for jury trial absent stipulation of the parties."[6] In asbestos actions that do not assert punitive damages claims, two plaintiffs' cases may be joined if those plaintiffs demonstrate that joinder is warranted under the factors listed in *Malcolm* and its progeny. Where there is good cause, a trial

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[5] The Mississippi Supreme Court has also severed several multi-plaintiff asbestos-related cases. *See, e.g*., *Alexander v. AC & S, Inc*., 947 So. 2d 891 (Miss. 2007); *Albert v. Allied Glove Corp*., 944 So. 2d 1 (Miss. 2006); *Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853 (Miss. 2005); *Ill. Cent. R.R. v. Gregory*, 912 So. 2d 829 (Miss. 2005); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004).

judge may join up to three cases for trial if joinder is warranted under three or more of the *Malcolm* factors *and* all three plaintiffs share the "same disease" (defined as (1) pleural mesothelioma, (2) non-pleural mesothelioma, (3) lung cancer, or (4) other cancers).[7]

In Seattle, Washington, the asbestos case management order presumes individual trials in the absence of good cause shown (which is a rarity).[8]

Texas, Georgia, Kansas, Iowa, and West Virginia (for nonmalignant conditions) ban the consolidation of asbestos cases unless all parties consent or the claims relate to members of the same household. *See* Tex. Civ. Prac. & Rem. Code Ann. § 90.009; Ga. Code Ann. § 51-14-11; Kan. Stat. Ann. § 60-4902(j); Iowa Code § 686B.7; W. Va. Code § 55-7G-8(d)(1). Louisiana bans consolidations that cause jury confusion, prevent a fair and impartial trial, give one party an undue advantage, or prejudice the rights of any party. *See* La. Code of Civ. P. Art. 1561(B).

B. Individualized Justice Would Not Clog the Trial Courts

Individualized justice in asbestos cases has not clogged the courts in Ohio, Texas, or Michigan, among other jurisdictions. These are not small states with insignificant asbestos dockets.

Lessons recently learned in the federal multi-district asbestos litigation (MDL-875) are also instructive. For years, the federal judiciary "tried and failed" consolidation practices from

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6 *In re New York City Asbestos Litig*., No. 782000/2017, Case Mgmt. Order, at XXV(C) (July 20, 2017).

7 *Id.* at XXV(B).

8 *See In re King County Asbestos Cases*, No, 89-2-18455-9, Revised Consolidated Pretrial Style Order, ¶ 1.11 **(**Wash. Super. Ct. King County Aug. 1, 2011) ("Asbestos claims containing more than one plaintiff may not be filed without leave of court. For this purpose, a husband and wife shall be considered one claimant or plaintiff. Unless good cause is subsequently shown, each plaintiff's case shall be tried separately.").

"small consolidations of four to thirty cases, 'trials in the round,' and local consolidations," but none provided "any basis for a long-term solution to the so-called asbestos crisis." Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. at 108. Consolidations also "raised concerns regarding due process issues because of the variety of claims and injuries handled within each suit." *Id*. Judge Robreno, the present manager of MDL-875, realized that a new approach was needed. *See id.* at 126 ("After nearly twenty years of intensive litigation in the federal courts, it seemed apparent to the court that efforts toward aggregation of cases and consolidation of claims had proven ineffective.").

"Given the apparent failure of aggregation and consolidation," Judge Robreno determined that "each case would be 'disaggregated' . . . and proceed as 'one plaintiff-one claim.'" *Id.* at 127. "The purpose was to separate each case, and within each case, each claim against each defendant so that each claim could stand on its own merit." *Id*. "Multiple plaintiffs are to be severed into single plaintiff cases." *Id*. at 187. This process has allowed the court to focus on "each claim by each plaintiff against an individual defendant…." *Id*. at 137. Judge Robreno explained the benefits of this system for the parties and the court:

> Under a 'one-plaintiff–one-claim' process, case outcomes benefit both plaintiffs and defendants. Defendants see a decline in the number of claims which they have to defend, due to an early assessment of the merit of each claim with a concomitant reduction of costs of defense. Conversely, plaintiffs see the more meritorious claim move to the head of the line, as unmeritorious claims are dismissed and removed from the docket. Both sides see the benefits and are prepared to support the court's plan.

Id. at 189. The system has worked. "For all practical purposes, MDL-875 is near its end." *Id.*

Influential scholars have noted the success of Judge Robreno's approach. *See* Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation The Answer to the Asbestos Mess?*,

88 Tul. L. Rev. 1039, 1067-68 (2014) (Reporter to the ABA Tort Trial and Insurance Practice Section's Asbestos Task Force: "Of course, during the 1990s and early 2000s, I was not alone in thinking that using aggregation to resolve mass tort cases was a good thing…. Leading into the first Task Force hearings in Washington, D.C. [in June 2013], my initial instinct was to think that aggregation was the answer," but "it appears that one-on-one litigation, with proper disclosures, managed by strong judges getting cases ready for trial, and not aggregation, may be the best solution to wrapping up the elephantine mass."); Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 Nev. L.J. 1445, 1477 (2015) ("For old-school aggregationists who have begun a process of rethinking of (or re-education about) the virtues of aggregation, perhaps a good starting point is an appreciation of the fact that — contrary to received wisdom — it is not impossible to adjudicate large-scale dispersed litigation on an individualized basis. Judge Robreno has shown the way.").[9]

The successful adjustment made by Judge Robreno and other courts across the country regarding asbestos case trials is instructive. South Carolina courts likewise would benefit if this Court were to adopt the procedures set forth in *Malcolm.*

[9] *See also* Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts,* 26 Rev. Litig. 883, 924 (2007 ("The procedural progress of recent mass toxic torts suggests that judges may be changing their practices regarding this litigation as well.... Over time, judges who once thought the sole way of clearing their dockets of mass tort cases was to press for global settlement may be learning that summary judgment and dismissals offer another--sometimes more appropriate--avenue for resolving mass claims.").

IV. CLEAR GUIDELINES ARE NEEDED TO GOVERN CONSOLIDATION OF ASBESTOS CASES UNDER RULE 42(a)

A. *Malcolm* Factors Should be Adopted to Limit the Risk of Prejudice and Confusion in Consolidated Asbestos Trials

As the above discussion makes clear, the decision to consolidate a particular set of cases has tremendous significance. A strong policy argument can be made for abolishing consolidated asbestos trials absent consent of all parties or limiting such actions to members of the same household, as other jurisdictions have done. If this court allows asbestos case consolidations to continue under South Carolina Rules of Civil Procedure Rule 42(a) then, at a minimum, litigants and trial court judges should be given clear guidelines to reduce the risk of prejudice and confusion, among other adverse consequences, that flow from the improper joinder of dissimilar actions.

In that regard, the Court should adopt the criteria set forth in *Malcolm v. National Gypsum Co.* for evaluating whether a trial court erred in consolidating asbestos cases: "(1) common worksite, (2) similar occupation, (3) similar time of exposure, (4) type of disease, (5) whether plaintiffs were living or deceased, (6) status of discovery in each case, (7) whether all plaintiffs are represented by the same counsel, and (8) type of cancer alleged." *Malcolm*, 995 F.2d at 350-351. Texas courts have added a ninth factor: "(9) the type of asbestos-containing product to which the worker was exposed." *In re Ethyl Corp*., 975 S.W.2d 606, 616-617 (Tex. 1998). Further considerations are "the maturity of the mass tort," *In re Van Waters & Rogers, Inc*., 145 S.W.3d 203, 208 (Tex. 2004), and "whether the law applicable to all plaintiffs is the

same." *In re Welding Rod Fume Prods. Liab. Litig*. *Global*, Nos. 1:03CV17000, MDL 1535, 2006 WL 2869548, at *3 (N.D. Ohio Oct. 5, 2006).[10]

The *Malcolm* criteria are especially appropriate in South Carolina because South Carolina Rule of Civil Procedure 42(a) is virtually identical to Federal Rule of Civil Procedure 42(a), and courts and counsel in South Carolina are already familiar with the *Malcolm* criteria.[11]

B. ***Malcolm*** **Criteria Would be Enhanced by Additional Guidance**

In adopting the *Malcolm* criteria, South Carolina courts and litigants would benefit from this Court's additional guidance explaining the practical meaning of each factor and the level of commonality that is required to consolidate cases for trial. A clear procedural framework will allow everyone to know the boundaries and stay within them, limiting future appeals.

For example, the Court should clarify that the "common worksite" factor from *Malcolm* means that ordinarily only cases involving the same worksite can be consolidated. And the "type of disease" factor means that all plaintiffs must share the same disease and rely on the same type of evidence—i.e., impairing asbestosis cases are tried only with other impairing asbestosis cases, cases of nonsmokers with lung cancer are tried only with other nonsmokers with lung cancer, smokers with lung cancer are tried only with other smokers with lung cancer, pleural mesotheliomas are tried only with other pleural mesotheliomas, peritoneal mesotheliomas are tried only with other peritoneal mesotheliomas, pericardial mesotheliomas are tried only with other pericardial mesotheliomas, testicular mesothelioma cases are tried only with other

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[10] *See also In re Consol. Parlodel Litig*., 182 F.R.D. 441, 447 (D.N.J. 1998) ("the economies of consolidation would be significantly reduced in these cases by the need to apply different law to each Plaintiff's claim, and even to individual issues within each claim.").

[11] *See Foster Wheeler LLC v. Superior Court,* No. A119429, 2007 WL 3230293 (Cal. Ct. App. Nov. 2, 2007) (stating that given the similarities between California's consolidation statute (Footnote continued on next page)

testicular mesothelioma cases, and so on. Finally, living plaintiffs' cases should not be tried with deceased plaintiffs' cases.

C. Application of the *Malcolm* Factors Demonstrates That The Circuit Court Erred in Consolidating the Instant Actions

It appears that the only *Malcolm* factors present here that support consolidation are that both plaintiffs used the same product (Johnson's Baby Powder) and are represented by the same firm. Every other factor—including those that relate to causation, whether plaintiffs were living or deceased, and type of cancer alleged—highlights that the cases are dissimilar and counsels against consolidation. That is particularly true given that these other factors are "far more important than identity of counsel and progress of discovery." *In re Repetitive Stress Injury Litig*., 11 F.3d 368, 374 (2d Cir. 1993); *see also In re Ethyl Corp*., 975 S.W.2d at 616 (whether plaintiffs are represented by the same counsel and the status of discovery "are far less important than the other considerations identified by the [*Malcolm*] criteria.").

Devey is a wrongful death action involving a 70-year old man who had occupational exposure to asbestos, was diagnosed with various cancers including, at the time of death, ependymoma (a type of tumor that can form in the brain and spiral cord), and allegedly died from *pleural* mesothelioma—a cancer that damages the lining of the *lungs* (the pleura). Occupational exposure to asbestos at disease-causing doses is associated with an increased risk of pleural mesothelioma, especially in men. Mr. Devey alleges use of Johnson's Baby Powder for over 55 years from the 1960s until 2017.

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and the federal Rule 42(a) and the familiarity of California courts and counsel with the *Malcolm* criteria, "we think it is appropriate to employ them.").

Dupree involves a personal injury claim by a living 19-year old female who was diagnosed with *peritoneal* mesothelioma—a cancer that develops in the lining of the *abdomen*—at the age of 14, has no other significant medical history or known exposures to asbestos, and is purportedly cancer-free after successful treatment. Ms. Dupree alleges use of Johnson's Baby Powder for 12 years from 1999-2011. A defense expert has testified that "perhaps better than 95 to 99 percent of all peritoneal mesothelioma among women in the United States . . . cannot be attributed to any asbestos exposure and occur spontaneously as a consequence of the naturally occurring biological processes." Dr. Suresh Moolgavkar, Telephonic Deposition, *Pipes v. Johnson & Johnson*, No. CJ-2017-3487, at 26 (Okla. Dist Ct. Dec. 13, 2018).

Consolidation in these circumstances would severely prejudice the defendants. In separate trials, jurors would likely be highly skeptical of plaintiffs' claims. For instance, a jury might reasonably conclude that Mr. Devey's *pleural* (lung) mesothelioma was the result of occupational exposure to asbestos, like most men that allege pleural mesothelioma, or that he was somehow cancer-prone given his diagnoses of many other cancers. A jury also might reasonably conclude that Ms. Dupree's *peritoneal* (abdominal) mesothelioma was idiopathic, like virtually all *peritoneal* (abdominal) mesotheliomas.

But, a jury that hears an over-simplified version of the facts might be misled to conclude that since both plaintiffs used Johnson's Baby Powder and both developed "mesothelioma," the Baby Powder was more likely than not the cause of their cancers. This is a classic example of the *post hoc ergo propter hoc* fallacy, which presumes that if one thing follows something else, that first thing must have caused the second thing. And while Ms. Dupree is cancer-free, plaintiffs' counsel will no doubt look to Mr. Devey's distinct situation in order to bolster any

suggestions to the jury that Ms. Dupree's cancer could return and be fatal—even though the two plaintiffs' diseases are medically different.

Courts have widely acknowledged that consolidations create these problems. *See In re Joint E. & S. Dists. Asbestos Litig*., 125 F.R.D. 60, 65-66 (E.D.N.Y. 1989) ("dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living. The prejudice lies in the possibility that the living claimants' asbestos-related diseases in fact may not prove fatal."); *Cantrell v. GAF Corp.,* 999 F.2d 1007, 1011 (6th Cir. 1993) ("Evidence relevant only to the causation of one plaintiff's cancer may indicate to the jury that the other plaintiff will likely develop cancer in the future.").

Given the predominance of dissimilar issues in this case, this Court should hold that the trial court abused its discretion in ordering the cases consolidated for trial. Instructions to the jurors will not be sufficient to dispel the potential prejudice to the defendants from having one jury try these two very different cases.

CONCLUSION

For these reasons, this Court should implement a formal process for the consolidation of asbestos cases and vacate the circuit court's order consolidating the subject actions.

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Dated: August 17, 2020