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August 17, 2020

Via E-Filing

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RE: Terran Dupree v. Johnson & Johnson, et al. & Mary Margaret Devey v. Johnson & Johnson, et al.
Appellate Case No. 2020-000645
Our File Nos. 003501.01848 & 003501.01849

Dear Mr. Shearouse:

Enclosed please find the Brief of Petitioner and Appendix for filing in the above-referenced matter. We are submitting the filings via the Court's e-filing system.

By copy of this letter, we are serving all counsel of record with a copy of these filings.

Respectfully,

s/ Nicholas A. Charles

Nicholas A. Charles

Enclosures
cc: W. Christopher Swett, Esquire
Gerald Malloy, Esquire
Louis P. Herns, Esquire
C. Mitchell Brown, Esquire

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 PETITIONERS

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STATEMENT OF THE ISSUE BEFORE THE COURT

Mr. Devey passed away at age 70 from pleural mesothelioma, a cancer in the lining of the lungs often associated with asbestos exposure. He worked with asbestos at a facility that manufactured asbestos-containing products. He nevertheless claims that he developed his disease from alleged exposure to trace levels of asbestos purportedly present in Johnson's Baby Powder.

Ms. Dupree is a 20-year-old woman with peritoneal mesothelioma, a cancer in the lining of the abdomen. Studies show that between 95% and 99% of peritoneal mesotheliomas in women in the United States develop as a result of naturally-occurring genetic errors during cell replications, and not from exposure to asbestos. She nevertheless claims that alleged exposure to trace levels of asbestos purportedly present in Johnson's Baby Powder caused her peritoneal mesothelioma.

The issue before the Court is:

Did the circuit court err in consolidating these two actions?

INTRODUCTION

This Court should reverse the trial court's order consolidating for a single jury trial two drastically different cases against Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (together "J&J").

In both *Devey* and *Dupree*, the decedent or plaintiff asserts that his or her disease was caused by asbestos allegedly present in Johnson's Baby Powder. But the similarities end there. In one case, a 20-year-old developed a type of mesothelioma that is weakly associated with asbestos exposure. Her cancer likely developed naturally as a result of genetic errors occurring during cell replications. In the other, a 70-year-old decedent developed a type of mesothelioma that is strongly associated with asbestos exposure—after working with asbestos at a facility that manufactured asbestos-containing products.

Each plaintiff has dramatically different—and substantial—obstacles to overcome in proving causation. However, if the jury hears the claims of both plaintiffs who used Johnson's Baby Powder and subsequently developed a form of mesothelioma, they may well assume that there *must* be something to the plaintiffs' allegations. In other words, consolidation would allow plaintiffs to bolster their claims by stacking allegations before the jury.

Consolidation can also be expected to confuse the jury. Each plaintiff's type of disease and history of exposure will be central to his or her case and will take the trials in very different directions with different proof and expert testimony. Further, the injured parties are very different—one is alive and cancer-free, while the other is deceased. This alone is especially problematic, as it improperly suggests to the jury that the fate of the deceased awaits the plaintiff who is living.

South Carolina juries have heard three J&J talcum powder trials and have never ruled for a plaintiff. Plaintiffs do not want to lose trials at a more efficient rate through consolidation. They want

to tilt the scales of the trials in their favor. The Court should reverse the circuit court's consolidation order.

STATEMENT OF THE CASE AND OF THE FACTS

The question presented to the Court involves two separately filed actions: *Devey v. Johnson & Johnson* and *Dupree v. Johnson & Johnson*.[1]

***Devey*.** Respondent Mary Margaret Devey alleges that her late husband, Robert L. Devey, contracted and died from pleural mesothelioma at age 70 as a result of being exposed to asbestos in Johnson's Baby Powder, which he used for over five decades. (App. 33-34, 38). Pleural mesothelioma is a cancer in the lining of the lungs often associated with asbestos exposure. Mr. Devey testified that he "worked with asbestos" while employed at a facility that handled raw asbestos and manufactured asbestos-containing products. (App. 236, 253-54). J&J intends to argue, among other things, that Mr. Devey's pleural mesothelioma was likely caused by this occupational exposure.

***Dupree*.** Respondent Terran Dupree was diagnosed at the age of 14 with *peritoneal* mesothelioma. (App. 398). She underwent surgery and chemotherapy, and she is currently cancer-free. Peritoneal mesothelioma is a cancer in the lining of the abdomen that is less strongly associated with asbestos exposure. Studies show that between 95% and 99% of peritoneal mesotheliomas in women in the United States develop as a result of naturally occurring genetic errors during cell replications, and not from exposure to asbestos. (App. 241). J&J intends to argue, among other things, that Ms. Dupree's peritoneal mesothelioma developed this way.

The facts and claims in these cases vary in several significant ways, as illustrated in the chart below.

[1] *Devey* was commenced on February 14, 2018. *Dupree* was commenced on June 7, 2018.

	Devey	Dupree
Status	Deceased	Living and cancer-free
Age	70 at time of death	20
Age at Diagnosis	69	14
Cause of Action	Wrongful Death	Personal Injury
Diagnosis	Pleural Mesothelioma (lining of the lung)	Peritoneal Mesothelioma (lining of the abdomen)
Medical History	Skin cancers, melanoma, and ependymoma	Not identified
Alleged Manner of Johnson's Baby Powder Use	Primarily personal use and use on others	Primarily from others applying powder to her, and also personal use
Alleged Duration of Johnson's Baby Powder Use	55+ years	12 years
Alleged Years of Talcum Powder Use	1960s-2017	1999-2011
Alternative Causation	Occupational exposure to asbestos	Genetic errors during cell replications
Damages Sought	Loss of consortium	Compensatory

Respondents in both suits moved to consolidate their cases for trial. (App. 162-67, 191-214). On March 13, 2020, the Honorable Jean H. Toal held a hearing and orally granted the motion to consolidate the two cases despite their admitted differences. *See* (App. 2-27); *see also* (App. 28) (confirming that the court's oral ruling was final).

In its ruling from the bench, the court noted that "[t]here are certainly factual differences between these two plaintiffs. And some factual difference[s] between the exposure in terms of an occupational exposure in addition to an exposure to baby powder in the case of Mr. Devey." (App. 23). Despite the vast dissimilarities in the facts of these two cases, the court chose to consolidate. It concluded that "an almost completely common set of facts" would answer two questions: (1) "whether Johnson & Johnson Baby Powder contains asbestos"; and (2) whether "the use of Johnson & Johnson Baby Powder by Mr. Devey and Ms. Dupree resulted in their contraction of mesothelioma." (App. 23-24).

On April 23, 2020, J&J filed and served a petition for a writ of certiorari, which this Court granted. The Court ordered briefing on the issue: "Did the circuit court err in consolidating these two actions?"

STANDARD OF REVIEW

An order consolidating two cases under South Carolina Rule of Civil Procedure Rule 42(a) is reviewed for abuse of discretion. *See Bishop v. Bishop*, 164 S.C. 493, 162 S.E. 756, 757 (1932). "Abuse of discretion" in this context "is a strict legal term to indicate that the appellate court is simply of the opinion that there was a commission of an error of law in the circumstances." *Id*.

ARGUMENT

This Court should reverse the circuit court's order consolidating *Devey* and *Dupree*. Rule 42(a) provides that a court may consolidate actions when they involve "a common question of law or fact." Rule 42(a), SCRCP. "The moving party has the burden of persuading the court that consolidation is desirable." *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993) (affirming denial of a motion to consolidate).

Deciding whether to consolidate two cases for trial requires a balance of the supposed efficiency of presenting two cases in one proceeding against the high risk of unfairness. *See In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 444 (D.N.J. 1998) ("[A] court should weigh the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice") (internal quotation marks omitted); *see also* Rule 42(b), SCRCP ("[T]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim.").

The more the cases differ, the less efficiency is gained by consolidation. As one court recognized: "Joinder 'of several plaintiffs who have no connection to each other in no way

promotes trial convenience or expedites the adjudication of asserted claims.'" *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) (citation omitted). In other words, the supposed efficiencies of consolidation are often ephemeral.

To the extent there is efficiency to be gained from combining these unrelated plaintiffs for trial, "the benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). A consolidated trial would be more than just prejudicial; it would deprive J&J of a fair trial in violation of its Due Process rights. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." (internal quotations and brackets omitted)); *cf. Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980) ("[A] trial court must . . . determine whether the permissive joinder of a party will comport with the principles of fundamental fairness.").

Consolidation would allow plaintiffs to bolster their claims merely by stacking the claims of unrelated plaintiffs on top of each other. *See infra* § I. The cases involve different claims, different defenses, and different evidence, making a consolidated trial less efficient, more confusing, and unfair to J&J. *See infra* § II. Numerous states have placed strict restrictions on consolidations in asbestos cases. *See infra* § III. The problem of consolidation is exacerbated when plaintiffs seek punitive damages because the Due Process Clause requires courts to provide assurances that any punitive award is tailored to each individual plaintiff. *See infra* § IV. The circuit court's order should accordingly be reversed.

I. Consolidation Improperly Bolsters Plaintiffs' Claims By Multiplying The Number Of Unrelated Plaintiffs.

A central question at trial will be whether Johnson's Baby Powder is contaminated with asbestos. J&J will explain to the jury that no asbestos contamination is present at all. Consolidating

these cases for trial, however, will inevitably bolster the plaintiffs' cases and weaken J&J's defenses without any additional evidence. A jury could think that there *must* be something to plaintiffs' allegations if multiple unrelated people developed cancer after using Johnson's Baby Powder.

Courts frequently exclude evidence of other lawsuits precisely because of the potential for this kind of thinking. If these two cases were not consolidated, evidence about Mr. Devey would never be admissible in Ms. Dupree's case, and vice versa.[2] *See, e.g., Davenport v. Goodyear Dunlop Tires N. Am., Ltd.*, 2018 WL 833606, at *3 (D.S.C. Feb. 13, 2018) ("Evidence of other lawsuits is inadmissible under Rule 403. Evidence of other lawsuits is likely to confuse and mislead the jury and it is highly prejudicial." (internal ellipses omitted)).[3] Plaintiffs should not be able to pile multiple plaintiffs' claims together in front of the jury to make it seem like there must be a problem with J&J's product just because more than one user ended up developing mesothelioma.

This concern is buttressed by academic research. Studies confirm that combining multiple plaintiffs in a jury trial increases the likelihood of verdicts in favor of plaintiffs, and generally

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[2] Indeed, Plaintiffs have typically agreed to a motion in limine to exclude evidence of other lawsuits in the prior J&J talc trials in South Carolina. Judge Toal generally prohibits even mentioning that prior testimony came from another trial when impeaching an expert witness.

[3] *See also, e.g., Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) ("[C]ourts are reluctant to cloud the issues in the case at trial by admitting evidence relating to previous litigation involving one or both of the same parties."); *McLeod v. Parsons Corp.*, 73 F. App'x 846, 854 (6th Cir. 2003) (affirming the exclusion of other-lawsuit testimony, because "the potential for prejudice that would have accompanied this evidence would have substantially outweighed its probative value, and this evidence would have misled the jury"); *Ross v. Am. Red Cross*, 567 F. App'x 296, 308 (6th Cir. 2014) (affirming the exclusion of other-lawsuit testimony, even where it "would have provided relevant background information," because any "probative value is substantially outweighed "by the risk that the jury will draw improper conclusions from other incidents in which [the defendant] allegedly caused injuries"); *Park W. Radiology v. CareCore Nat. LLC*, 675 F. Supp. 2d 314, 330 (S.D.N.Y. 2009) ("[A]ny probative value of references to the Other Litigations is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, and waste of time.").

increases the amount of jury awards. Professor Steven D. Penrod, who has specialized in the study of the legal and psychological aspects of jury decision-making for decades, has explained that numerous studies "clearly and uniformly demonstrate that when evidence of consolidated claims is presented to a jury, the jury is substantially more likely to find against a defendant on a given claim than if it had not heard evidence of the other claims." (App. 299). One study of over 4,600 asbestos cases reported that "plaintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials" and "plaintiffs' probability of being awarded punitive damages increases by 6 percentage points." (App. 302).

In addition, studies show that jurors who are confronted with multiple claims against a defendant "are substantially more likely to draw the inference that the defendant" has a propensity to commit bad acts and therefore demand a lesser showing of proof on the elements of the plaintiffs' claims, "even though there is no logical basis for concluding that the evidence is stronger." *See* (App. 310-11). The relevant academic studies demonstrate not only that consolidation of claims for trial increases the likelihood that a jury would find a defendant liable but also that it "generally increases the amount of the damage award." (App. 305); *see also* (App. 302).

Limiting jury instructions are not a reliable cure for this effect. Studies show that "judicial instructions are not effective in mitigating the prejudicial effect of consolidating" multiple claims. (App. 318). In fact, such instructions can actually have the opposite effect, increasing the likelihood that a defendant will be held liable by highlighting the issue for the jury.

J&J deserves a fair trial, not one unfairly skewed by trying multiple unrelated plaintiffs' claims at the same time.

II. The Highly Individualized Factual And Legal Questions Presented By Each Plaintiff's Claims Render Consolidation Improper.

Consolidation of cases for trial with substantial material factual differences is especially prejudicial. It enables a jury to fill gaps in one plaintiff's case with evidence relevant only to the other's. "[B]y trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016); *see also Goodman v. H. Hentz & Co.*, 265 F. Supp. 440, 443 (N.D. Ill. 1967) (separate trials required when "a jury may be inclined to find in favor of all plaintiffs on the liability issue because of the stronger case made by only some of the plaintiffs").

This phenomenon has a name: the "perfect plaintiff"—i.e., a composite plaintiff "pieced together for litigation" based on "the most dramatic" features of each individual case. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). This can occur because when faced with multiple plaintiffs, juries are often unable to "compartmentaliz[e] certain evidence that applies to one case but not the other." *Minter v. Wells Fargo Bank, N.A.*, 2012 WL 1963347, at *1 (D. Md. May 30, 2012).[4]

The nuances of each case—which are critical to J&J's different defenses—could easily get lost given the inevitable difficulty in differentiating between the two plaintiffs and their

[4] *See also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (noting that "the potential for prejudice resulting from a possible spill-over effect of evidence" in a joint trial is "obvious"); *Leeds v. Matrixx Initiatives, Inc.*, 2012 WL 1119220, at *3 (D. Utah Apr. 2, 2012) ("[I]f the unique details of each case were consolidated during a single 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.'"); *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447 (noting the plaintiffs had diverse medical histories and that consolidating cases for trial "would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself").

evidence. The evidence and arguments pertaining to each are different. Moreover, the jury could be swayed by sympathy for a particular plaintiff, or particular aspects of an individual plaintiff's case, and hold a defendant liable to all plaintiffs based on factors that apply to only one or even none of them.[5]

The risks of confusion are especially potent in cases, like these, involving complex and unfamiliar theories of scientific causation. Understanding the science is made exponentially harder when the jurors are forced to grapple with different scientific theories and evidence for multiple plaintiffs simultaneously. As discussed below, the jury will hear about two different types of cancer with different causation theories applied to plaintiffs with different asbestos exposures and different medical histories. But absent consolidation, the jurors would never need to hear about these potentially confusing differences that are only relevant to one of the two plaintiffs.

These differences also mean little efficiency is gained in trying these distinct cases together before the same jury, at the expense of injecting confusion and unfairness into the trial. "The desire for judicial efficiency would not be served, since the unique details of each case would still need to be presented to the jury." *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460 (E.D. Mich. 1985).

[5] *See 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."); *Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954) (due process was not "possible in the circumstances under which these consolidated cases were tried" where there was "so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times").

The differences in the cases makes consolidation for a joint trial here improper and prejudicial.

A. The two plaintiffs have different diseases, which will lead to different causation evidence and defenses.

The two plaintiffs raise claims involving different types of mesothelioma. Ms. Dupree was diagnosed with peritoneal mesothelioma (cancer in the lining of the abdomen). Mr. Devey was diagnosed with pleural mesothelioma (cancer in the lining of the lung). These are materially different diseases implicating different scientific studies and proof. Evidence and defenses for each of the two plaintiffs will be very different.

As one J&J expert has testified, "asbestos exposure is much more strongly associated with the risk of pleural mesothelioma than the risk of peritoneal mesothelioma. One has to make a very clear distinction between the two." (App. 240). Consolidating the two trials risks causing the jury to overlook this critical distinction. The distinction is important because epidemiological evidence "shows very strongly that [the] vast majority of peritoneal mesothelioma" in the United States, "and perhaps better than 95 to 99 percent of all peritoneal mesothelioma among women in the United States are occurring without exposure to any environmental agents, specifically cannot be attributed to any asbestos exposure and occur spontaneously as a consequence of the naturally occurring biological processes." (App. 241).

That evidence is relevant only to Ms. Dupree's case, not Mr. Devey's. A jury in a trial solely on Ms. Dupree's claims would ordinarily hear nothing about pleural mesothelioma or its causes. And a jury in a trial solely on Mr. Devey's claim would ordinarily hear nothing about peritoneal mesothelioma or its causes. But in a combined trial, a jury will hear about both at the same time. This can be expected to both confuse the jury, and to prejudice defendants. For

example, the jury may very well attribute "mesothelioma" generally to asbestos exposure without keeping track of which evidence goes to which type of mesothelioma for which plaintiff.

Trying a plaintiff who developed a type of mesothelioma linked to asbestos exposure with a plaintiff who developed a type of mesothelioma *not* linked to asbestos exposure in the same way will be very confusing for the jury and unfairly prejudicial to J&J.

B. The plaintiffs' different exposures to asbestos lead to different causation evidence and defenses.

Critical to J&J's arguments for why Johnson's Baby Powder did not cause the diseases of these two plaintiffs is demonstrating to the jury what *did* cause each plaintiff's disease. The answer to that question—along with the evidence relevant to presenting that defense—is different for each plaintiff.

As discussed above, Mr. Devey's pleural mesothelioma is associated with asbestos exposure. Mr. Devey worked at a facility that handled raw asbestos and manufactured asbestos-containing products. (App. 253). Mr. Devey by his own admission "worked with asbestos" there and suspected he breathed it in during the course of his employment. (App. 236, 254). In fact, Mr. Devey's own oncologist told him that exposure to asbestos in products or manufacturing facilities caused his pleural mesothelioma. (App. 255). None of his treating physicians even suggested to him that talc or Johnson's Baby Powder contributed to his mesothelioma. (*Id.*). As a result, Mr. Devey's pleural mesothelioma was most likely caused by his work with asbestos—not Johnson's Baby Powder.

J&J's alternative causation defense with respect to Ms. Dupree is entirely different. Ms. Dupree does not appear, at this stage in discovery, to have been exposed to asbestos. But as discussed above, approximately 95%-99% of female peritoneal mesotheliomas in the United States occur through natural biological processes due to genetic errors during cell replications,

without any exposure to asbestos. (App. 241). J&J will show that such errors are most likely the cause of Ms. Dupree's peritoneal mesothelioma—not Johnson's Baby Powder. And not asbestos, like Mr. Devey.

If tried separately, the trials of the two plaintiffs would look very different, focusing on different medical theories and different evidence. Combining them into one will serve only to confuse the jury and prejudice the defendants.

C. The plaintiffs' different medical histories lead to different causation evidence and defenses.

The two plaintiffs are materially distinct in other important ways as well. They have unique medical histories. Most importantly, *Devey* is brought on behalf of a decedent, while Ms. Dupree is living and cancer-free. This risk is plain: deceased plaintiffs "may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living." *Malcolm*, 995 F.2d 351–52. Plaintiffs' motion below demonstrates how this distinction can be exploited to the jury. They argued that both individuals "suffered or will suffer[] the same fate: death." (App. 165). That statement is not accurate, as Ms. Dupree is currently cancer-free. It is simply not appropriate to tell the jury that Ms. Dupree will suffer the same fate as Mr. Devey. *See In re New York City Asbestos Litig.*, 22 Misc. 3d 1109(A), 880 N.Y.S.2d 225 (Sup. Ct. 2009) (refusing to consolidate living plaintiffs with deceased plaintiff "because of the possibility that a jury will attribute the fate of the deceased to the living plaintiffs").

Along the same lines, Mr. Devey has a lengthy history of cancer, prejudicing defendants. In particular, he had developed various skin cancers and melanomas and—at the time of his death—ependymoma (a brain or spinal cord cancer). His doctor told him that chemotherapy for the ependymoma would do "more harm than good." (App. 237). This history of cancers suggests that Mr. Devey may possess a genetic susceptibility to cancer.

Mr. Devey's medical history and medical treatment are completely irrelevant to Ms. Dupree's claims. Ms. Dupree, who was diagnosed with peritoneal mesothelioma only at age 14, has no similar history of cancer. Her treatment was also quite different. She underwent surgery and chemotherapy, and she is currently cancer free. The jury may misinterpret Mr. Devey's lengthy history of cancer as prescient of Ms. Dupree's medical future, prejudicing defendants.

Evidence regarding Ms. Dupree's and Mr. Devey's medical histories, diagnoses, and medical treatments are all essential to the claims in the respective matters. This evidence must be considered separately.

D. The plaintiffs' different exposures to Johnson's Baby Powder lead to different causation evidence and defenses.

Mr. Devey alleges he used baby powder for over 55 years from the 1960s until 2017. By contrast, Ms. Dupree alleges she used baby powder for 12 years from 1999 until 2011. This is not just a minor difference. It is highly material to the issue of alleged exposure to asbestos from the use of J&J's products.

An important aspect of J&J's defense is dose: Even if plaintiffs are correct that trace levels of asbestos are present in Johnson's Baby Powder (which J&J of course denies), the levels would be so low as to not cause harm. "One of toxicology's central tenets is that the dose makes the poison." *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 352 (Tex. 2014). Exposure to asbestos "fortunately does not always result in disease"—an individual must have a sufficiently high dose. *Id.* "Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." *Id.* at 338; *see also id.* (requiring "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff

was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease").

Ms. Dupree used Johnson's Baby Powder significantly less than Mr. Devey. Accordingly, her alleged exposure to asbestos would be lower as well. The jury may not be able to keep track of these different exposure levels, particularly with all the other differences between the two plaintiffs. This adds additional confusion and represents another example of the "perfect plaintiff" problem. The jury may overlook Ms. Dupree's lower exposure and "fill that gap" with Mr. Devey's higher exposure in the same trial. *Cf.* Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 Judicature 292, 295 (1989) ("[M]any jurors are unable to comprehend the principle that exposure to a toxic chemical dosage of one part-per-billion produces a different biological effect than exposure to the same chemical at one part-per-million.").

The different use periods also create complexity and confusion regarding which defendant is responsible for the claimed harms. Both cases name two defendants: Johnson & Johnson and Johnson & Johnson Consumer Inc. But "[s]ince January 2, 1979, JJCI [Johnson & Johnson Consumer Inc.] has been the sole responsible entity for the design, production, and sale of Johnson's Baby Powder." *Smith v. Avon Prod., Inc.*, 2019 WL 921461, at *7 (N.D. Ala. Feb. 25, 2019) (dismissing Johnson & Johnson in a case where pre-1979 exposures were barred by the statute of limitations). Since Ms. Dupree started using Johnson's Baby Powder in 1999, Johnson & Johnson Consumer Inc. is the only relevant entity in her case. But Mr. Devey used Johnson's Baby Powder from the 1960s until 2017, so both entities are relevant in his case. That further adds to the complication of the trial. In addition, J&J's talc was sourced from different mines at different time periods: mines in Italy, Vermont, and China. *Id.* at *5; *see also* (App. 6, 221). The plaintiffs' different years of use mean J&J will argue and present evidence that

particular mines are not contaminated with asbestos in a joint trial which it would not necessarily need to present in each plaintiff's individual trial.

Consolidation of these two plaintiffs where their use of the product is so different further prejudices J&J.

E. Different fact and expert witnesses will be necessary to resolve each plaintiff's claims, which involve different damages.

Consolidation is also inappropriate because each case will require a variety of different fact and expert witnesses whose testimony will be plaintiff-specific. The circuit court's consolidation ruling failed to address the considerable amount of time and expense dedicated to each plaintiff's individual fact witnesses that will have no bearing on the other's case.

The expert witness testimony will also differ. Each plaintiff's case will turn on testimony from different experts based on the plaintiff's/decedent's medical history, the type of mesothelioma at issue, and the different asbestos and/or asbestos-containing products the plaintiff/decedent has been exposed to throughout his or her life.

The different available legal remedies represents another important distinction between the cases. In *Devey*, the plaintiff is the decedent's heir, and she brings claims for wrongful death and loss of consortium. (App. 43-44). In contrast, Ms. Dupree claims damages for personal injury. (App. 408). Because the damages available in *Devey* and *Dupree* are distinct, the two cases will require presentation and consideration of different evidence. The *Devey* plaintiff seeks damages for pecuniary losses as a result of Mr. Devey's death, funeral expenses, damages Mr. Devey incurred between the time of his alleged injury and his death, and the loss of consortium and companionship she has been deprived of as a result of Mr. Devey's death. In contrast, Ms. Dupree is living and cancer-free.

The differences between these two cases render consolidation improper.

III. Numerous Jurisdictions Have Banned Or Placed Strict Restrictions On The Consolidation Of Asbestos Cases.

Numerous jurisdictions have all but ended the practice of consolidated asbestos trials because such trials are unfair and fuel the filing of more claims. For example, and without limitation, the following states have adopted reforms in this area:

- **Delaware.** Standing Order No. 1 at ¶ 4, *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super Ct. New Castle County Oct 10, 2013), *available at* https://bit.ly/2BHC6q4 ("Each asbestos action filed hereafter shall consist of one plaintiff.").

- **Georgia.** Ga. Code Ann. § 51-14-11 (prohibiting consolidation of asbestos claims for trial absent consent unless the plaintiffs are members of the same household).

- **Iowa.** Iowa Code Ann. § 686B.7(4)(a) (prohibiting consolidation of asbestos claims for trial absent consent unless the plaintiffs are members of the same household).

- **Kansas.** Kan. Stat. Ann. § 60-4902(j) (prohibiting consolidation of asbestos claims for trial absent consent unless the plaintiffs are members of the same household).

- **Michigan.** *Prohibition on "Bundling" Cases*, Admin. Order No. 2006-6 (Mich. Aug. 9, 2006), *available on Westlaw as*: MI R ADMIN Order 2006-6 ("[N]o 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.").

- **Mississippi.** The Mississippi Supreme Court issued a series of decisions severing joint asbestos claims. *See Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004); *3M Co. v. Johnson*, 895 So. 2d 151, 158-60 (Miss. 2005); *Illinois Cent. R.R. Co. v. Gregory*, 912 So. 2d 829, 831 (Miss. 2005); *Amchem Prod., Inc. v. Rogers*, 912 So. 2d 853, 858 (Miss. 2005); *Albert v. Allied Glove Corp*., 944 So. 2d 1, 3 (Miss. 2006).

- **Ohio.** Ohio Civ. R. 42(A)(2) (prohibiting consolidation of asbestos claims for trial absent consent unless the plaintiffs are members of the same household).

- **Tennessee.** Tenn. Code Ann. § 29-34-306(b) (prohibiting consolidation of asbestos claims for trial absent consent unless the plaintiffs are members of the same household).

- **Texas.** Tex. Civ. Prac. & Rem. Code Ann. § 90.009 (for asbestos claims: "Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial.").

- **West Virginia.** W. Va. Code Ann. § 55-7G-8(d)(1) (prohibiting consolidation of asbestos claims for trial absent consent unless the plaintiffs are members of the same household).

Below, Plaintiffs cited a consolidated trial in Missouri of 22 different plaintiffs' claims that talcum powder contained asbestos that caused them to develop ovarian cancer. *See Ingham v. Johnson & Johnson*, 2020 WL 3422114, at *1 (Mo. Ct. App. June 23, 2020). However, the Missouri legislature has enacted a statute that prohibits joinders like that trial going forward. *See* Mo. Rev. Stat. § 507.040 ("[C]laims arising out of separate purchases of the same product or service, or separate incidents involving the same product or services shall not satisfy this [joinder] section.").

Further, the *Ingham* trial merely proves how prejudicial consolidation is. That jury returned a uniform verdict, finding the defendants liable to all 22 plaintiffs and awarding each plaintiff an *identical* $25 million compensatory award—regardless of whether she was in remission for 33 years or had passed away. *See id.* at *39. The trial also shows how consolidated trials inflate damages. The jury awarded $4.14 *billion* dollars in punitive damages on top of $550 million in compensatory damages. *Id.* at *3. The supposed "efficiency" of the *Ingham* trial was purchased at the expense of any semblance of fairness or rationality in the final verdict, which is currently on appeal (J&J is seeking Supreme Court review of the appellate court's decision).

Notably, after *Ingham*, the same judge attempted to consolidate the claims of 13 talcum-powder plaintiffs for a subsequent joint trial. The Missouri Supreme Court granted a Preliminary Writ of Prohibition to halt the proceedings so that the appellate court could review the propriety of consolidation. *See* (App. 215) (Preliminary Writ of Prohibition, *State ex rel. Johnson & Johnson, et al., v. The Hon. Rex M. Burlison*, No. SC97637 (Mo. Jan. 14, 2019)). The Missouri Supreme Court has not yet weighed in on the propriety of the consolidation in *Ingham* itself.

Following the Missouri Supreme Court's order, a Missouri trial court has since denied consolidation in a J&J talcum powder case. (App. 216-17) (*Schulte, et al. v. Johnson & Johnson,*

et al., No. 1622-CC00536 (Mo. Cir. Ct. Feb. 14, 2019) and *Bhuyan v. Johnson & Johnson, et al*., No. 1822-CC00722 (Mo. Cir. Ct. Feb. 14, 2019) (orders denying consolidation)). Other courts, too, have denied consolidation of claimants alleging asbestos in talc. (App. 230) (*Blinkinsop v. Albertsons Companies Inc, et al*., No. JCCP 4674/BC677764 (Cal. Super. Ct. L.A. Cty., Dec. 15, 2017)); (App. 221) (*Rimondi v. BASF Catalysts, LLC, et al.*, No. MID-L-2912-17AS (N.J. Sup. Ct. Dec. 21, 2018)).

IV. Consolidation Poses Additional, Unique Risks Of Unfair Prejudice With Respect To Punitive Damages.

The consolidation order poses unique fairness and prejudice concerns because both plaintiffs bring claims for punitive damages. The Due Process Clause of the U.S. Constitution "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of a specific plaintiff's individual case. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

In *Philip Morris*, the United States Supreme Court held that Due Process prohibits an award of punitive damages not specifically tied to a defendant's conduct toward that particular plaintiff. As the Court explained, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e*., injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id*. at 353. The Court further held that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation." *Id*. at 354. The Court reiterated that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e*., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id*. at 355.

Here, consolidating two separate personal injury actions involving different exposure histories pursuant to different legal theories and factual allegations would violate the Due Process

Clause. Critically, both plaintiffs are "strangers" to one another's case, as the Court explained in *Phillip Morris*. But the jury is likely to blur the distinctions between the plaintiffs' separate cases and could well return a verdict in each case that awards punitive damages to each plaintiff based on the elements of the other's case. The consolidation order regarding these two separate matters accordingly infringes on and diminishes J&J's due process rights in each matter.

Mr. Devey and Ms. Dupree's different time periods of using the product further exacerbates the Due Process problem. Evidence plaintiffs will use in an attempt to show J&J's allegedly reprehensible conduct in from the 1960s-1998 and 2012-2017 would be relevant only to Mr. Devey's claim for punitive damages but not Ms. Dupree's because Ms. Dupree was not using the product during that time. When the jury evaluates whether and to what extent J&J engaged in wrongful conduct toward Ms. Dupree, it is impossible for the court to ensure that the jury will not consider evidence that relates only to conduct toward Mr. Devey.

A New York trial court recognized a similar problem in *Olson*, ruling that a plaintiff who "stopped using Johnson's Baby Powder in 2015" could "not present evidence of post-2015 conduct or statements" in the punitive damages phase of the trial. *Olson v. Brenntag North America., Inc.*, 64 Misc. 3d 457 (N.Y. Sup. Ct. 2019). It explained, "Permitting plaintiffs to introduce evidence of J & J's allegedly wrongful conduct between 2015 and now will also invite the jury to punish J & J for potential or actual harm inflicted solely on strangers to this litigation." *Id*. at 465. However, "[t]he Supreme Court's decisions in *State Farm* and *Philip Morris* make clear that this is not a permissible basis to award punitive damages." *Id.* at 465. Here too, the Constitution requires courts to ensure that such spillover will not happen: "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." *Philip Morris*, 549 U.S. at 355, 357.

Similarly, if these cases are consolidated, it will enable plaintiffs to paint J&J as having engaged in outrageous misconduct stretching back decades against large groups of people, particularly since Mr. Devey's time period of use stretches from the 1960s to 2017. Indeed, Prof. Penrod describes precisely this phenomenon, explaining that the aggregation of separate claims in a single trial amplifies the risk that the jury will conclude that the defendant has a propensity to commit bad acts. (App. 310-11). This is almost certain to result in "punish[ing J&J] for harm [allegedly] caused [to] strangers." *Philip Morris*, 549 U.S. at 355. For this reason too, consolidation is improper.

J&J is entitled to a fair jury trial in each case. The improper consolidation of these two disparate cases prejudices J&J by depriving it of this right. As noted above, the two cases consolidated for trial involve different injuries, different types of exposure, different durations of exposure, different diagnoses, and different defenses. The consolidation of these two disparate cases into a single trial deprives J&J of a fair trial in each case.

CONCLUSION

This Court should reverse the circuit court's ruling consolidating the two cases for trial.

[*SIGNATURE PAGE ATTACHED*]

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Columbia, South Carolina
August 17, 2020

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.

PROOF OF SERVICE

I hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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August 17, 2020