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STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF  
COUNTY OF COLLETON ) COMMON PLEAS  
  
DAVID D. ROLLINS, )  
Plaintiff, )  
Vs ) CASE NO. 2019-DP-25-00118  
AIR & LIQUID SYSTEMS)  
CORPORATION, et al. )  
Defendants )

MARCH 13, 2020  
RICHLAND, SOUTH CAROLINA

HONORABLE CHIEF JUSTICE JEAN H. TOAL

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

BY: THEILE B. MCVEY, ESQUIRE

ETHAN A. HORN, ESQUIRE

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KATHERINE A. SPIRES

REGISTERED PROFESSIONAL REPORTER

1 STATE OF SOUTH CAROLINA )  
 2 ) IN THE COURT OF  
 3 COUNTY OF COLLETON ) COMMON PLEAS  
 4  
 5 NELL ASHWORTH, Individually )  
 6 and as Personal )  
 7 Representative of the )  
 8 Estate of ROBERT J. ASHWORTH,) )  
 9 Plaintiff, )  
 10 Vs ) CASE NO. 2019-CP-25-325  
 11 FISHER CONTROLS INTERNATIONAL)  
 12 INC., et al, )  
 13 Defendants )

MARCH 13, 2020  
 RICHLAND, SOUTH CAROLINA

HONORABLE CHIEF JUSTICE JEAN H. TOAL

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

BY: THEILE B. MCVEY, ESQUIRE  
 Attorney for the Plaintiff

BY: YANCEY A. MCLEOD, III, ESQUIRE  
 Attorney for the Defendant Waste Management

KATHERINE A. SPIRES  
 REGISTERED PROFESSIONAL REPORTER

**E X H I B I T S**

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EX</u>
C-1	Plaintiff's Motions in Limine		136
C-2	Defendant's Motions in Limine		136

1           THE COURT: This hearing is convened for the purpose  
2 of hearing motions in several asbestos cases. There is  
3 Rollins against Air & Liquid and many others; C/A  
4 2019-CP-25-118. Motions in Ashworth against Fisher  
5 Controls International and many others; 2019-CP-25-325.  
6 And motions in Barbara San Nicolas against Borg-Warner  
7 Morse Tech LLC and many others; 2017-CP-40-05764.

8           In addition -- at the conclusion of these  
9 proceedings, we will try to discuss certain scheduling  
10 matters and other matters related to other pending  
11 asbestos cases. So we'll begin with motions for summary  
12 judgement in Rollins. The remaining defendants in  
13 Rollins are Gardner Denver, John Crane and Waste  
14 Management. The Motion for summary judgement is on  
15 behalf of Waste Management.

16           MS. MCVEY: Good morning, Your Honor, Theile McVey  
17 for the Plaintiffs in this case before you. Before we  
18 get started, I want to introduce Ethan Horn who is --  
19 flew in from California last night. We have not  
20 officially formally finished his pro hac, but it is in  
21 the process of getting done. I just wanted to introduce  
22 him and make sure you were okay with him arguing for  
23 motions in limine.

24           THE COURT: I'm okay with you presenting without  
25 objection.

1 MR. MCLEOD: No objection, Your Honor. However, I  
2 would suggest that we start with Ashworth's motion for  
3 summary judgement. I think it flows a little smoother.

4 THE COURT: Sure.

5 MR. MCLEOD: Waste Management is the only defendant  
6 left.

7 THE COURT: I'm happy to do that and without  
8 objection, Ms. McVey. Mr. Horn, you may argue at the  
9 appropriate moments as if your pro hac vice had been  
10 granted. And I will grant it on an emergency basis  
11 given some of the matters that we are facing scheduling  
12 wise with the coronavirus situation. So you're approved  
13 to make these arguments. Mr. McLeod's request to start  
14 with Ashworth is granted and we'll move to that.  
15 Mr. Elliott?

16 MR. ELLIOTT: Yes, ma'am. Thank you. James Elliott  
17 for John Crane, madam court reporter. Thurman  
18 Zollicoffer is here on behalf of John Crane as well.  
19 His pro hac has not been finalized, so we would ask  
20 similarly if Your Honor would allow him to argue in this  
21 matter as well.

22 THE COURT: Well, Mr. Zollicoffer, and you will be  
23 afforded the same consideration as Mr. Horn. You will  
24 be emergency basis granted pro hac vice status and I'm  
25 sure we'll bet the rest of the paperwork done at the

1 appropriate time. But welcome and we'll be glad to hear  
2 from you at the appropriate time.

3 MR. ELLIOTT: Thank you, Your Honor.

4 THE COURT: All right. Mr. McLeod?

5 MR. MCLEOD: Thank you, Your Honor.

6 THE COURT: Mr. McLeod presenting motions for  
7 summary judgement in Ashworth on behalf of Waste  
8 Management.

9 MR. MCLEOD: Your Honor, I just want to make sure  
10 before I get started you have the correct notebook.

11 THE COURT: Sure. Take your time and get set up if  
12 you need to.

13 MR. MCLEOD: Sure.

14 THE COURT: I'm in complete sympathy with all that  
15 trying to manage this myself. Mr. McLeod?

16 MR. MCLEOD: So, Your Honor, you have the correct  
17 notebook, I just want to -- so, direct you to Waste  
18 Management -- excuse me. Yancey McLeod here from Womble  
19 Bond Dickinson on behalf of Waste Management of South  
20 Carolina Inc.

21 I wanted to -- I think this will go smoother if I  
22 can direct your attention to Waste Management's reply  
23 rather than the summary judgement --

24 THE COURT: All right.

25 MR. MCLEOD: -- memorandum.

1 THE COURT: Let me just look and be sure. I got  
2 Waste Management, a motion for summary judgement. I've  
3 got plaintiff's amended response. I've got -- the reply  
4 is not in this notebook, but wait. Wait. Wait. All  
5 right. If you've got an extra copy that would be well,  
6 Mr. McLeod.

7 MR. MCLEOD: Your Honor, I don't have an extra copy,  
8 but I think I can hand you mine.

9 THE COURT: Are you sure?

10 MR. MCLEOD: I know this pretty well.

11 THE COURT: All right. Ms. McVey, I don't have the  
12 reply in this notebook.

13 MS. MCVEY: That's because when the replies were  
14 filed -- we give you notice before the replies were  
15 filed. So I told Mr. McLeod that. We only had the --  
16 their motion, our response.

17 THE COURT: I got you.

18 MR. MCLEOD: I sent it to you. It's somewhere up  
19 there. But I'm happy to hand you up mine, Your Honor.

20 THE COURT: Most of this stuff is San Nicolas. I am  
21 sure it may be somewhere in my office, but, Mr. McLeod,  
22 I appreciate very much if you let me look at it and I  
23 promise I won't peek at your notes.

24 MR. MCLEOD: There shouldn't be any notes in there,  
25 Your Honor. And just to clarify, the reason I wanted to

1 do that is because the exhibits to the reply are  
2 highlighted.

3 THE COURT: I see them. I see them there. Great.

4 MR. MCLEOD: Your Honor --

5 THE COURT: And much of this is just put forward in  
6 a different fashion. But much of this has been covered  
7 in the other materials you originally sent particularly  
8 the assertion that Mr. Ashworth worked at the Hampton  
9 facility after the operative day.

10 MR. MCLEOD: He worked there before --

11 THE COURT: Or before the operating day.

12 MR. MCLEOD: Yes, Your Honor.

13 THE COURT: All right, sir. You may proceed.

14 MR. MCLEOD: So, Your Honor, you're familiar with  
15 this site, I'll call it. As you recall, it was subject  
16 of the Sizemore case --

17 THE COURT: Yes.

18 MR. MCLEOD: -- previously. And this is a similar  
19 situation. Waste Management of South Carolina is being  
20 sued as a premises defendant and the allegations are in  
21 the complaint are that Mr. Ashworth worked at this  
22 facility in Hampton County. Okay.

23 Now, as you may recall, Waste Management never owned  
24 the facility. They are sued because -- they are  
25 successor to Chambers Medical Technologies of South



1 Carolina Inc. Okay. And so the important thing there  
2 is that before Chambers, of course, Waste Management has  
3 nothing to do with this property and certainly has no  
4 liabilities.

5 So that being said, we've done been through  
6 discovery. We've taken two depositions of two fact  
7 witnesses. The first witness was Smitty Montgomery.  
8 The second witness was Nell Ashworth who's the plaintiff  
9 in this case and who was, of course, the wife of  
10 Mr. Ashworth.

11 Now, Mr. Montgomery testified that he went to  
12 Hampton County with Mr. Ashworth. They worked at the  
13 Westinghouse facility which is across the street. And  
14 then at least once went over and worked at the facility  
15 across the street. Okay. Now, we asked Mr. Montgomery  
16 repeatedly when that took place. And by my count, and  
17 for the Court's convenience, Mr. Smitty Montgomery is  
18 Exhibit C to the reply.

19 Now, by my count, again, we asked him repeatedly  
20 when were you there with Mr. Ashworth? When were you  
21 there? By my count, he testified five times that he was  
22 there in the early 1980s. Okay. I pressed him again.  
23 I said, was your daughter born? When was your daughter  
24 born in relation? He said, we were there before my  
25 daughter was born in 1989. Okay.

1 Not only that, he repeatedly said by my count four  
2 or five times throughout his deposition that he was  
3 employed by BE&K during the time he was in Hampton  
4 County. Okay. And so didn't just say it once, this is  
5 repeated throughout his testimony.

6 Now, then we depose Ms. Ashworth. Okay. Now,  
7 Ms. Ashworth did recall her husband going to the low  
8 country of South Carolina. She couldn't recall when.  
9 She couldn't recall exactly where. But she did recall  
10 him going to the low country of South Carolina. Of  
11 course, Hampton County is in the low country.

12 But what's interesting is that Ms. Ashworth said  
13 that when her husband took the position and started  
14 working at Bowater which you're familiar, he started  
15 working at Bowater in 1985. He was there continuously  
16 until 2000. Okay. So --

17 THE COURT: Of course, other exposures is not going  
18 to set the stage for this argument, is it?

19 MR. MCLEOD: No, Your Honor. However, what's  
20 important here, and I'm not even really talking about  
21 exposures. I'm talking about a timeline.

22 THE COURT: Yeah.

23 MR. MCLEOD: So, and to step back, Chambers did not  
24 buy this -- purchase this property or facility until  
25 May, 1991.

1 THE COURT: May, 1991. Right.

2 MR. MCLEOD: So Ms. Ashworth said that when her  
3 husband took that position with Bowater and we'll talk  
4 about her -- his employers in a second, it was from 1985  
5 to 2000 and he was there continuously.

6 Now, Ms. Ashworth --

7 THE COURT: Now, the men worked there said that the  
8 general time they would be at this facility was in a  
9 September/October framework; correct?

10 MR. MCLEOD: I believe so. Sure. Are you talking  
11 about the Hampton facility?

12 THE COURT: Yes.

13 MR. MCLEOD: Yes, ma'am.

14 THE COURT: All right. For shutdown type activities  
15 with the balls and the tubes and this kind of thing?

16 MR. MCLEOD: Your Honor, and, of course, that was in  
17 relation --

18 THE COURT: They were shutdowns at SCE&G and they  
19 were shutdowns at Hampton County including the Hampton  
20 incinerator; correct?

21 MR. MCLEOD: And it's not including the Hampton  
22 incinerator. That testimony relates to the Westinghouse  
23 facility that made my card of asbestos board.

24 THE COURT: All right.

25 MR. MCLEOD: And I can point you that to the record

1 in just a little while. So we have this testimony from  
2 Mr. Montgomery over five times they were there in the  
3 early '80s. He was employed by BE&K. And then  
4 Ms. Ashworth says that when her husband started at  
5 Bowater in 1985, he was there continuously until 2000.  
6 Okay. So that's the testimony that we have. Sworn  
7 testimony.

8 But guess -- here's the thing. The records back  
9 this up. We don't usually get this in these types of  
10 cases. But here in this case, Mr. Ashworth's Social  
11 Security records corroborate and completely back up this  
12 testimony time in the timeline. And what I mean by  
13 that, and -- so Exhibit J is Mr. Ashworth's Social  
14 Security records.

15 THE COURT: I got J, KBR Building Group.

16 MR. MCLEOD: You know what, I apologize. That is  
17 the -- a relevant exhibit to this point. Let me see  
18 what his Social Security records -- well, I'm not  
19 looking at it and I'm not sure. Is it -- if you can  
20 find his Social Security records, I'm not sure.

21 THE COURT: Yeah. I think it's E is itemized  
22 statement of earnings with Social Security numbers.

23 MR. MCLEOD: Yes.

24 THE COURT: Okay. I got it. It's E.

25 MR. MCLEOD: Yes, ma'am. Okay. So if you look at

1 Exhibit E, now, again, Mr. Smitty Montgomery repeatedly  
2 said in his deposition that at the time they were in  
3 Hampton County in the early '80s they were employed by  
4 BE&K. And we questioned Mr. Montgomery pretty good on  
5 this. Because nowhere in Mr. Ashworth's Social Security  
6 records did it show he was employed by BE&K. But guess  
7 what? At the end of the deposition, plaintiff's counsel  
8 had found an article that showed that you just referred  
9 to, Exhibit J, that actually BE&K had merged or was  
10 having an association with the company called KBR  
11 Construction.

12 And once the plaintiff's counsel did that it all  
13 made sense. Because if you look at Mr. Ashworth's  
14 Social Security printout, he was employed by KBR  
15 Construction Company 1981, 1982, 1983, '84, and '86.  
16 And so this document supports Mr. Montgomery's testimony  
17 that they were employed by BE&K and were there in the  
18 early 1980s.

19 Now, let's turn a few pages in the Social Security  
20 records. We know from Smitty Montgomery's deposition  
21 that at the time Mr. Ashworth was employed by Bowater in  
22 '85 -- from '85 to 2000, he was employed first by Beta  
23 Construction and second by Power Plant Maintenance  
24 Company. Okay.

25 Now, remember Ms. Nell Ashworth said that from the

1 time from '85 until 2000, her husband was continuously  
2 at Bowater. And so if you look at the Beta Construction  
3 time on the Social Security printout, sure enough, he  
4 was employed by Beta Construction from '86, '87, '88.  
5 Beta Construction was bought out by PPM, Power Plant  
6 Maintenance, and he worked for them from 1988 straight  
7 through 2000.

8 THE COURT: And -- all right.

9 MR. MCLEOD: And so --

10 THE COURT: PPM was an independent shutdown  
11 operation or maintenance operation?

12 MR. MCLEOD: A contractor.

13 THE COURT: Did PPM ever have any contracts with the  
14 Chambers slash by whatever name now known facility?

15 MR. MCLEOD: There's no evidence of that, Your  
16 Honor. And, again, Ms. Ashworth testified that her  
17 husband was at Bowater continuously.

18 THE COURT: Well, I don't understand why that is --  
19 is the end of the story. He could have worked several  
20 different jobs, could he not?

21 MR. MCLEOD: Not according to her -- Ms. Ashworth's  
22 testimony.

23 THE COURT: Okay.

24 MR. MCLEOD: So, and more importantly, there is zero  
25 evidence that he worked at any Hampton facility while

1 working for PPM. On the contrary, Mr. Montgomery stated  
2 four or five times, BE&K. BE&K. And Mr. Ashworth was  
3 only employed by this company in the early '80s. This  
4 is the evidence.

5 THE COURT: Okay. I think I got it.

6 MR. MCLEOD: Ma'am?

7 THE COURT: I think I have your point on that.

8 MR. MCLEOD: Okay. So for once, I have documents  
9 that back up the testimony. Okay.

10 THE COURT: Right.

11 MR. MCLEOD: There's no testimony whatsoever that  
12 Mr. Ashworth was ever in Hampton County past 1991. May  
13 of '91 which is the magic date when my client possibly  
14 has liabilities for this facility. Okay.

15 THE COURT: All right, sir.

16 MR. MCLEOD: There's no evidence of that. So I  
17 filed a motion for summary judgement based primarily on  
18 that fact. Okay.

19 THE COURT: Right.

20 MR. MCLEOD: Well, then plaintiffs, of course, filed  
21 their response. Now, in plaintiff's response, the best  
22 I can tell, their argument is that, well, some of the  
23 testimony suggested that they were there in Hampton  
24 County five to six years. Okay. And Smitty Montgomery  
25 did testify to that.

1           But if you look at the transcript cited where he  
2 testified about that, he was talking about the  
3 Westinghouse facility. And I even got their expert, Dr.  
4 Holstein to admit that. Okay. But even that's not  
5 really that important.

6           So he wasn't talking -- so anyway, plaintiff's  
7 argument is that because they were there, the testimony  
8 was there, that they were there for five to six years.  
9 And because, as I argue, the incinerator was not built  
10 until 1985. That means, it must mean, that the first  
11 shutdown wouldn't have occurred until 1986 because  
12 you're not going to have a shutdown if it was built in  
13 '85 -- in '85; right? A year later they have a shutdown  
14 in '86. And then they take that five to six years  
15 testimony and calculate, well, that must mean that there  
16 was a shutdown -- they were there for '86 shutdown, '87  
17 shutdown, '88 shutdown, '89 shutdown, '90 shutdown, and  
18 boom, that last six year would have been in 1991. And  
19 that overlaps with the time period. Okay. That is the  
20 argument. And the response.

21           The problem is, Your Honor, is that that argument  
22 assumes that there was nothing there prior to 1985. In  
23 other words, they're saying that because we argue based  
24 on the documents and the facts, we know this incinerator  
25 was built in 1985. And so plaintiff's position is that,



1 well, that must mean that the testimony was all wrong  
2 and they actually were there in 1985.

3 Now, the Social Security records and the testimony  
4 don't say that, this is plaintiff's argument. But that  
5 whole argument is premised on the fact that there was  
6 nothing at this site prior to the incinerator. And so  
7 when I got their response, I said, wait a minute. The  
8 testimony, the Social Security records say early '80s,  
9 let me figure out what's going on.

10 And we -- I did some digging. And, of course, we  
11 already knew this from the Sizemore case, this facility,  
12 this site, was owned by Reichhold Chemicals from 1952 to  
13 1985 -- '84 when -- in '84 when they sold it to  
14 Southland Exchange. Southland Exchange is the one who  
15 built the incinerator.

16 So wait a minute. All the testimony says early  
17 '80s, the Social Security records say early '80s, where  
18 were they going if there incinerator wasn't built until  
19 '85? So we did some digging and it turns out that  
20 Reichhold Chemical had a facility there manufacturing  
21 formaldehyde.

22 Now, let me be clear. It is not my burden to prove  
23 anything about the formaldehyde facility. Okay. We're  
24 not sure what was there. But we do know there was a  
25 boiler there because Mr. Smitty Montgomery testified

1 they were working on a boiler. Okay. And now we know,  
2 based on the evidence, that there was a formaldehyde  
3 plant on this site. And why is that important? It's  
4 important because plaintiff's whole argument is that,  
5 well, they must have had to be there starting in '85  
6 because there wasn't anything else there. Well, yeah,  
7 there was. There was.

8 And so not only does the testimony, the documents  
9 support that they were there in the early '80s, but now  
10 we know there was a formaldehyde facility there. And  
11 guess what else? Mr. --

12 THE COURT: A formaldehyde hide facility was there  
13 for what span of time?

14 MR. MCLEOD: Well, Reichhold Chemical -- I'm not  
15 sure. But Reichhold Chemical owned this property from  
16 1952 until 1985. Okay. And here's the other thing,  
17 Your Honor. And it just occurred to me recently about  
18 this. I was also puzzled when I asked Mr. Montgomery,  
19 and I urge the Court to read this testimony. I asked  
20 Mr. Montgomery, okay, well --

21 THE COURT: I have read Smitty Montgomery's  
22 testimony many, many times in several different cases.

23 MR. MCLEOD: Well, this is the only case to my  
24 knowledge he's been in, but you may recall --

25 THE COURT: No. He is submitted in connection with

1 several different cases.

2 MR. MCLEOD: Oh, understood. Maybe I'm not aware of  
3 those. But he also said that the boiler they were  
4 working with, he told me this, was old. He said it was  
5 old. It was an old boiler. And I thought, you know,  
6 well, wait a minute. Because I know --

7 THE COURT: Okay. I get the argument, Mr. McLeod.

8 MR. MCLEOD: And so in other words, and the reason  
9 why this is important is because their argument that,  
10 well, they had to of been there in '85 --

11 THE COURT: I understand.

12 MR. MCLEOD: So it just doesn't hold up. Okay.

13 THE COURT: I understand.

14 MR. MCLEOD: The only other possibility -- there are  
15 really two more possibilities. Okay. The only other  
16 two possibilities is, one, at the very end of the  
17 deposition, Mr. Holder asked Mr. Montgomery if he knew  
18 Mr. Sizemore. And Mr. Montgomery said, yes, I know  
19 Mr. Sizemore. He had a brother and was he at some of  
20 y'all's facilities? Yes. That's the only other thing  
21 that could possibly create an issue of fact in this  
22 case. And I submit to you that it absolutely does not.  
23 That testimony --

24 THE COURT: Well, Sizemore is a different timeframe  
25 from Ashworth. So -- and, frankly, the last time I

1 visited this thing on any detail basis was in venue  
2 issues with respect to Sizemore.

3 MR. MCLEOD: Exactly. And so Mr. Sizemore, the  
4 testimony there is he was there in '95 or '96.

5 THE COURT: Exactly.

6 MR. MCLEOD: And there is no testimony that  
7 Mr. Ashworth was there from May of '91 through '96. And  
8 I'm almost done. One other thing. One other thing.

9 After I got the plaintiff's response that  
10 essentially says the testimony of Ms. Ashworth and  
11 Mr. Montgomery was wrong and that the Social Security  
12 records were wrong, you know, I can't go to  
13 Mr. Montgomery and say, hey, wait a minute. I can't go  
14 to Ms. Ashworth and say, hey, were you mistaken. They  
15 made a point of telling us that these are their clients.  
16 Mr. Montgomery is their client. Okay. So I can't go to  
17 them.

18 And the testimony is what it is. The documents say  
19 what they say. Okay. There is no evidence to the  
20 contrary, but where is the affidavit?

21 THE COURT: I got you. I got you.

22 MR. MCLEOD: And the only other thing is that  
23 Mr. Montgomery did refer to this facility as Chambers.  
24 Okay. Now, I don't know what to think about that. The  
25 records, his own testimony say that he was there in the

1 early '80s. And, Your Honor, I just want to remind the  
2 Court that this is a premises liability case. Okay. If  
3 I walk in -- if somebody walks in to what they thought  
4 and called was an Eckerd's Drugs, okay, and sued  
5 Eckerd's for premise liability case, and the only  
6 evidence that it was Eckerd's is the plaintiff said it  
7 was, that doesn't make it so.

8 THE COURT: I've been down that road many times in a  
9 particular case. Very familiar with your argument about  
10 premise liability.

11 MR. MCLEOD: You know, I was thinking when they  
12 growing up here in Columbia that Amoco on the corner of  
13 Forest -- it is Beltline and Trenholm, growing up we  
14 used to always go to this Amoco. And the truth is, it  
15 changed names at some point pretty early, but to this  
16 day, we refer to that gas station as Amoco.

17 THE COURT: I got you.

18 MR. MCLEOD: My point is, that just because  
19 Mr. Montgomery referred to it as Chambers does not  
20 create an issue of fact as to whether or not he was  
21 there in 1991.

22 THE COURT: I understand.

23 MR. MCLEOD: And that's my argument.

24 THE COURT: Okay. All right. You've got other  
25 arguments --

1 MR. MCLEOD: Oh, you're correct.

2 THE COURT: -- which frankly, most of the rest of  
3 them fall in the category of arguments I've heard many  
4 times before.

5 MR. MCLEOD: And I would agree with that, Your  
6 Honor. I think the main issue here --

7 THE COURT: The main issue here is did he actually  
8 work at the time that your client owned this property?

9 MR. MCLEOD: Is there any evidence of that. And,  
10 you know --

11 THE COURT: I'm not asking you to give up on the  
12 others, but --

13 MR. MCLEOD: Well, they apply to Rollins as well.  
14 But with all due respect --

15 THE COURT: So the premises liability thing, the  
16 other things about are ancillary to that like take-home  
17 exposure and some of these other arguments. The main,  
18 the biggie, biggie is was he there when your client was?

19 MR. MCLEOD: That's right.

20 THE COURT: I got you.

21 MR. MCLEOD: Thank you, Your Honor.

22 THE COURT: All right. Mr. Holder?

23 MR. HOLDER: Thank you, Your Honor.

24 THE COURT: This is Jonathan Holder on behalf of the  
25 plaintiff. Would you mind, Mr. McLeod if I had these --

1 I obviously want to talk to Mr. Holder about these  
2 documents.

3 MR. MCLEOD: Of course, Your Honor.

4 THE COURT: I won't disturb the integrity of your  
5 notebook, but if I can have it up here for this.

6 MR. MCLEOD: No. You're welcome to keep it, Your  
7 Honor.

8 THE COURT: Thank you, sir. I'll give it back to  
9 you. All right. Mr. Holder?

10 MR. HOLDER: Thank you, Your Honor. Jonathan Holder  
11 on behalf of the plaintiffs and the Ashworth's --

12 THE COURT: You have a gentle voice, Mr. Holder.  
13 Speak up.

14 MR. HOLDER: Jonathan Holder on behalf of the  
15 plaintiffs and the Ashworth as well as Rollins matters.

16 I want to start off -- just start off right where  
17 Mr. McLeod ended. Talking about Amoco on the corner.  
18 That's a good example. Because a lot of times after  
19 names change, people refer to it as what they remembered  
20 it as. I'm pretty sure though people weren't calling it  
21 the Amoco years before --

22 THE COURT: Let's not talk about his example and get  
23 into that. There's a very specific point that's being  
24 made here. And that is based on the Social Security  
25 records --

1 MR. HOLDER: Yes, Your Honor.

2 THE COURT: Very centrally. And then on the  
3 research about what other facilities were there that had  
4 boilers upon which your client could have been working  
5 at a time that is consistent with the Social Security  
6 records about when he worked for companies that serviced  
7 that area.

8 And I'll be honest with you, Mr. Holder, but, you  
9 know, these records were not a part of what was  
10 presented before nor was it something you all have  
11 reacted to. But if the only thing you can say is that  
12 one witness called it Chambers, that's not going to do  
13 it for me. I'm going to need you to talk about the  
14 Social Security records and other records in that  
15 connection.

16 MR. HOLDER: Sure. And I first start out with as I  
17 always like to do it with the standard that this motion  
18 must be viewed in the like most favorable --

19 THE COURT: I know the standard review everything  
20 has to be construed in the like most favorable to the  
21 nonmoving party. I think I got that.

22 MR. HOLDER: Thank you, Your Honor. I'm just trying  
23 to make my record. I apologize.

24 THE COURT: Yes, sir.

25 MR. HOLDER: First, I do want to address the point



1 of quickly that he was at Bowater from 1985 to 2015  
2 based on Nell Ashworth's testimony. She did say that he  
3 was there continuously. However, David Rollins  
4 testified that he worked with his father at many sites  
5 during 1990s other than Bowater. Smitty --

6 THE COURT: That was my recollection was that he  
7 worked for Bowater, but he also had side jobs with other  
8 companies. That's what you're arguing; right?

9 MR. HOLDER: Yes, Your Honor.

10 THE COURT: All right.

11 MR. HOLDER: As to Smitty Montgomery's testimony,  
12 it's just -- as you know, it's just not as clean cut as  
13 everyone would like it to be. He does say early '80s  
14 sometimes and does say mid '80s sometimes. He changes  
15 his testimony, not sure of exactly the year when they  
16 started. But he also says when being asked about these  
17 jobs, he said that was our little routine. We go down  
18 in the fall, started SCE&G and then go over to the  
19 Hampton facilities. He went over to the Hampton and  
20 when he's asked, did y'all go anywhere after the  
21 Westinghouse in Hampton? Yes. Went across the street  
22 over to the -- he called it Chambers. I know that  
23 doesn't matter. And we would do two or three week  
24 shutdown there.

25 The reason we believe that it would have -- couldn't

1 have started before '85-'86, is because as was proved up  
2 in the Sizemore case and I was just looking back at the  
3 exhibits that were submitted in that case, their  
4 property or title search of that property prior to 1985  
5 only had it as a parcel of property. So I had no clue  
6 about the formaldehyde plant that had previously been  
7 there.

8 This exhibit that they have shown is the -- from the  
9 EPA, it does say that there was a formaldehyde plant  
10 there. However, it has no mention of there being any  
11 type of powerhouse or any type of production of steam  
12 being needed for this formaldehyde or anything like  
13 that. Quite honestly, I have no clue --

14 THE COURT: But if you assume for a minute that the  
15 Reichhold formaldehyde plant did have boilers, and if  
16 you assume for a minute that the boilers in the so  
17 called Chambers facility, would the ones -- the ones  
18 that were installed in 1985 would not have had a first  
19 shutdown until '86.

20 MR. HOLDER: Yes, Your Honor.

21 THE COURT: And you line that fact up with what the  
22 records show about the working history of Mr. Ashworth,  
23 I am at a loss to see how you tie him to work on the  
24 Waste Management owned facility prior to -- I mean,  
25 after May of 1991. That's the focal point date. And

1 the discussion of Reichhold is an attempt to explain  
2 Mr. Montgomery's testimony about working on boilers  
3 across the street. And it certainly makes a lot of  
4 sense. Because it couldn't be that the Chambers's  
5 boilers were being worked on in 1995 because they had  
6 just been installed.

7 MR. HOLDER: In 1985, yes.

8 THE COURT: Right. '85. Right.

9 MR. HOLDER: Right. And that's why we believe that  
10 that first trip would likely have been in '86. He  
11 didn't --

12 THE COURT: Even if it were in '86, that it doesn't  
13 explain how Mr. Ashworth could have been there after May  
14 of 1991. That's the problem.

15 MR. HOLDER: And I would --

16 THE COURT: And his Social Security records do not  
17 in any way support that.

18 MR. HOLDER: I would just say that because we  
19 believe that the boilers -- there is no evidence of the  
20 boilers and to assume that there were boilers there  
21 prior to 1985 --

22 THE COURT: I'm going to ask Mr. McLeod again. But  
23 I want you to assume for purposes of these arguments  
24 that they were boilers. If it turns out they're not  
25 then that's a big argument in your favor. But if you

1 assume that there were boilers there, and quite  
2 honestly, that's not a hard reach for me in a plant that  
3 was there for many years. That would be -- has been a  
4 very typical way of powering the plant.

5 MR. HOLDER: I would say that in the like most  
6 favorable to the plaintiff that the testimony of  
7 Mr. Smitty saying that they worked on the boilers there  
8 and remembering the name Chambers that it's most likely  
9 that they would have had their first shutdown in likely  
10 '86. And then going five to six years, yearly shutdowns  
11 --

12 THE COURT: But the five to six years is not  
13 supported in any way by something that is really not  
14 able to be quibbled with and that's Social Security  
15 records.

16 MR. HOLDER: In terms of his employer?

17 THE COURT: Yes. There's no employer listed for  
18 Mr. Ashworth that can line up with work at the Chambers  
19 facility post May of 1991. In fact, there's no record  
20 in here that supports anything past either '88 if you  
21 think Beta had anything to do with it.

22 MR. HOLDER: I do not believe that, Your Honor.

23 THE COURT: Or past an earlier time than that for  
24 BE&K.

25 MR. HOLDER: I agree, Your Honor. I would point --

1           THE COURT: And you don't claim that Power Plant  
2 Maintenance had anything to do with the Hampton plant?

3           MR. HOLDER: No, Your Honor.

4           THE COURT: They did not.

5           MR. HOLDER: I'm not sure what employer he would  
6 have had or if it would have been the same employer  
7 every year. And to be honest, while --

8           THE COURT: But it's your duty to identify to prove  
9 that -- that he worked at that facility past 1991. And  
10 his Social Security records, he didn't work for  
11 fly-by-nights that didn't file employer itemized  
12 statements of earnings. He's got an unbroken history of  
13 itemized statements for earnings. So --

14          MR. HOLDER: There is testimony in the record that  
15 he did get paid off the books as well. Joe Dog paid him  
16 and his father during shutdowns in spring starting in  
17 '88.

18          THE COURT: Yeah, but that shutdown was not a  
19 Chambers's shutdown.

20          MR. HOLDER: No, ma'am, it was not. I would just  
21 that there is evidence there. And I agree that it  
22 absolutely does not line up. And I don't know who the  
23 employer is. All that I'm saying is --

24          THE COURT: But we do know that the people that  
25 worked -- that he worked for that worked shutdowns for

1 Hampton were BE&K primarily; isn't that correct?

2 MR. HOLDER: He said BE&K. But also said he wasn't  
3 positive --

4 THE COURT: And then three years worth of BE&K  
5 statement of earnings here; right?

6 MR. HOLDER: We do have years that he worked through  
7 BE&K, Your Honor.

8 THE COURT: So whether or not Mr. Smitty Montgomery  
9 said six years -- five or six years, who would he have  
10 been working for that's on this statement of earnings to  
11 have serviced the Chambers plant past the BE&K entries  
12 -- excuse me. Or even the KBR interest? Who would he  
13 have been working for? Because the last entry on KBR is  
14 1986. So who would he have been working for that's  
15 listed in these statement of earnings?

16 MR. HOLDER: As I stated, Your Honor, I do not know  
17 and I do not know if it is reflected there. Because the  
18 name of the employers that he had in 1991, he was never  
19 -- well, one, he was never asked about it because we're  
20 talking about a coworker here. But I simply don't know,  
21 Your Honor.

22 All I'm saying is that I believe there is a  
23 scintilla of evidence by him identifying.

24 THE COURT: And what is that scintilla that  
25 Mr. Smitty Montgomery's five or six years?

1 MR. HOLDER: His five or six years and the name  
2 Chambers. Him saying that Mr. Sizemore and his brother  
3 worked pretty much every site that they worked. I just  
4 don't know if he has the correct years because they  
5 changed. I don't know if he has the correct employer  
6 because they changed. He said that they worked for  
7 Daniel when first asked by Mr. McLeod. Then -- but he  
8 worked for Daniel in '80 and '81. So it doesn't still  
9 line up to '91. But I'm just saying he wasn't positive  
10 of who Mr. Ashworth's employer was.

11 THE COURT: Okay. I understand your argument.  
12 Anything else on that point?

13 MR. HOLDER: No, Your Honor. I do believe that that  
14 evidence is not as strong as we would like it to be, but  
15 I do believe that it raises to a scintilla and I would  
16 submit with that.

17 THE COURT: Thank you, sir. All right. Briefly in  
18 reply, Mr. McLeod?

19 MR. MCLEOD: Your Honor, I really don't have  
20 anything in reply unless you have a question for me.

21 THE COURT: No, I don't have any questions. All  
22 right. I am going to grant summary judgement of Waste  
23 Management. I do not think that the random  
24 recollections of Mr. Montgomery are sufficient to call  
25 into question the itemized statement of earnings from

1 the Social Security administration for Mr. Robert  
2 Ashworth's work. And I do that reluctantly because we  
3 have plowed this ground many times and the record is  
4 rather confusing on this Chambers/Waste  
5 Management/Southland facility.

6 But the only logical conclusion I can come to  
7 looking at the evidence in the like most favorable to  
8 the nonmoving party which is the plaintiff is that there  
9 is not even a scintilla of evidence that can contradict  
10 the Social Security records with respect to this matter.  
11 Which is primarily what I am relying on.

12 The other supporting information that Mr. McLeod  
13 puts forward about Reichhold and its formaldehyde plant  
14 is interesting. And if there were a question of fact in  
15 my mind, that might help support it in placing the issue  
16 before the jury. But I don't consider that at this  
17 point. Because to me, the records of the Social  
18 Security Administration and it's clear that for a number  
19 of years surrounding this controversy, very detailed  
20 Social Security itemized earnings were had for this --  
21 from Mr. Ashworth, and, therefore, I am going to grant  
22 summary judgement motion of Waste Management.

23 MR. MCLEOD: Thank you, Your Honor.

24 THE COURT: All right. Now, next thing we got is  
25 the motion for summary judgement on Rollins for Waste



1 Management; isn't that correct? Don't we go back to  
2 that? Is there anything left to say that hasn't been  
3 said in connection with the Ashworth matter?

4 MR. MCLEOD: I think that -- no, Your Honor. And I  
5 think that the allegations that's against Waste  
6 Management --

7 THE COURT: All right. Same argument. Mr. Holder?

8 MR. HOLDER: Nothing further to add.

9 THE COURT: Very good.

10 MR. HOLDER: I believe there's still a scintilla.

11 THE COURT: For the reasons indicated in the  
12 Ashworth ruling, I will grant summary judgement for  
13 Waste Management in the Rollins matter as well. Finding  
14 that looking at the evidence in the like most favorable  
15 to the nonmoving party there is no credible evidence,  
16 not a scintilla of credible evidence, that supports the  
17 contention that Mr. Ashworth worked at Chambers/Waste  
18 Management facility after May of 1991.

19 And, in fact, the records that the Social Security  
20 Administration puts forth, stopped his work history at  
21 the -- at that facility at either 1986 or 1988. All  
22 right.

23 MR. MCLEOD: Thank you, Your Honor.

24 THE COURT: Ruling on plaintiff's motion to  
25 consolidate Ashworth and Rollins. And the ancillary

1 reconsideration of venue motion. Ms. McVey?

2 MS. MCVEY: Your Honor, I think that's a  
3 consolidation it's now mute. Because the only remaining  
4 defendant in Ashworth was Waste Management.

5 THE COURT: That's right. So that matter is mute;  
6 correct?

7 MS. MCVEY: Yes, ma'am.

8 THE COURT: Now, we've got John Crane's motion to  
9 reconsider the venue order in --

10 MR. ELLIOTT: Rollins.

11 THE COURT: Well, that's mute, too, isn't it?

12 MR. ELLIOTT: Only if you're changing it to your  
13 thing.

14 THE COURT: Sir? I don't need to change a thing.  
15 It doesn't make any difference now there's only one  
16 defendant left; right?

17 MS. MCVEY: Your Honor, so in -- there's nobody left  
18 in Ashworth. So that case is over now everybody else is  
19 settled. And Rollins we have Gardner Denver and John  
20 Crane left. I have a feeling what Mr. Elliott is going  
21 to argue is that because Waste Management is now out  
22 which is a Hampton County defendant, what I would say to  
23 that is that's not when you look at this; right. You  
24 look at whether venue is proper at the time the case is  
25 filed.

1 THE COURT: Oh, I understand.

2 MS. MCVEY: So --

3 THE COURT: I understand. And while I'm going to  
4 hear him on that point, but that is -- I mean, I've  
5 already ruled on the motion to change venue.

6 MS. MCVEY: You have and you denied their motion.  
7 He's filed a motion to reconsider.

8 THE COURT: All right.

9 MR. ELLIOTT: I did, Your Honor.

10 THE COURT: Mr. Elliott?

11 MR. ELLIOTT: James Elliott for John Crane, Your  
12 Honor. Thank you. Good to see you again. I hope you  
13 are doing well.

14 We did file a motion to reconsider the previous  
15 ruling. However, in light of the fact that Waste  
16 Management is no longer in the case, we no longer have  
17 any defendant that has any connection with Hampton  
18 County. We would like to add that issue to our motion  
19 to reconsider.

20 And I don't believe Ms. McVey is correct just  
21 because at some point in time there was a defendant in  
22 the case with whom maybe venue was correct in one of the  
23 counties sets the venue for the balance of the case;  
24 right?

25 THE COURT: Well, I think you are completely wrong

1 about that, Mr. Elliott. I think the rule is that venue  
2 is evaluated at the time that the motion is made. It  
3 often happens in trial. Particularly in these kind of  
4 cases where you have a multiplicity of defendants that  
5 either before or during the trial defendants drop out.  
6 Unless I reconsidered what I did at the time that I did  
7 it, I would not simply hair off in a different direction  
8 because I've now got different information.

9 I wasn't presented information that has been  
10 presented to me today at the time these motions were  
11 heard before. Not by you or anybody else. They were  
12 certainly available, but they weren't presented to me.  
13 And I had to rule on the basis of what I had. And that  
14 was primarily Mr. Smitty Montgomery's testimony, et  
15 cetera, et cetera.

16 If there was nothing else in the record, that's all  
17 you had. And that's all y'all did have then. But  
18 that's not the situation now, but it doesn't mean I can  
19 go back and revisit every ruling that's been made.

20 MR. ELLIOTT: Understood, Your Honor. If I can just  
21 make the record.

22 THE COURT: Sure.

23 MR. ELLIOTT: My argument is that venue is just a  
24 snapshot in time. It is a decision made based on the  
25 facts that exist whenever the issue comes up. If that

1 wasn't the case, the issue would be immediately  
2 appealable. Which that is not the case here. Excuse  
3 me. You can't appeal venue immediately. And I would  
4 give Your Honor the opposite --

5 THE COURT: I think that supports what I'm telling  
6 you, not the other way around.

7 MR. ELLIOTT: I'll give Your Honor the opposite --  
8 the opposite example of some defendant is sued initially  
9 and then a month into the case you grant summary  
10 judgement on that defendant; right. And at that point,  
11 a month into the case, no other defendant has any other  
12 connection to that venue, but yet they are stuck in the  
13 venue because of one defendant who really shouldn't have  
14 been in the case in the beginning.

15 THE COURT: Your right to venue is a right depending  
16 on what happens at the time that is considered.

17 MR. ELLIOTT: That's our argument, Your Honor.  
18 Thank you for hearing it.

19 THE COURT: All right, sir.

20 MR. ELLIOTT: An example -- removal, for example, to  
21 Federal Court, Your Honor. If -- when you have no more  
22 state related defendants; right, and state related  
23 defendants that reside in the same state as the  
24 plaintiff, you can then within a year remove the case to  
25 Federal Court. Similar situation, similar analogy.

1           THE COURT: Well, as you can tell, and I'm just  
2 trying to move this along, I have great respect for you,  
3 your scholarship, and your argument, and I think you've  
4 done an effective job for your client, Mr. Elliott, so  
5 this isn't to criticize, but rather praise what you've  
6 done for your client.

7           But it's my feeling that removal is completely an  
8 absent example. That is based on the fed's approach and  
9 their rules of the road with respect to all of that.  
10 Looking at a snapshot and a point of time when the fed's  
11 have the case. That's what removal in that situation is  
12 all about.

13           But this is venue and venue is not some kind of  
14 shifting sand that you keep remaking a ruling you've  
15 already made. If you've made the ruling at the point in  
16 time when the case -- when that ruling must be made, you  
17 do it in the light of the information you have. And the  
18 fact that that information turns out to be completely at  
19 odds with government records about his earnings history  
20 is something that was not brought to my attention when I  
21 heard the venue motion. Not brought to my attention  
22 when I heard things in the Sizemore case. Not brought  
23 to my attention in the many other times that Smitty  
24 Montgomery's testimony has been argued in this matter.  
25 I am not hesitant to change venue.

1           And I think my rulings indicate that if I think  
2 there's anything unlikely. And that's certainly why I  
3 made the ruling I made today. But I'm not going to go  
4 back and revisit rulings I made in the light of the  
5 information I had at the time. So I deny your motion.

6           MR. ELLIOTT: Your Honor, if I may. There was a  
7 motion to reconsider, alter, or amend your previous  
8 ruling. I have a couple of other points that we made in  
9 our brief.

10          THE COURT: Do you want to argue more things now  
11 that I made the ruling denying your motion to  
12 reconsider?

13          MR. ELLIOTT: Your Honor, I would like to make a  
14 couple other points. Everything that we argued and have  
15 in support of our motion to alter or amend your ruling  
16 is in our brief. If Your Honor is telling me I need to  
17 stand on the brief and you've made your ruling and it's  
18 denied --

19          THE COURT: I think your position is completely  
20 protected for appellate purposes if you choose to do it.  
21 And I am making this ruling in the light of having read  
22 in detail the other things that you just referred to.

23          I wouldn't even consider amending until I first  
24 consider the main motion which is the motion to  
25 reconsider. Having denied the motion to reconsider, I,

1 of course, will not allow an amendment and decline to  
2 amend my order. But it's done in the light of your  
3 arguments about the reconsideration itself as well as  
4 your very well put arguments on the motion to asking me  
5 to amend my order. I see them as one -- as one in the  
6 same.

7 MR. ELLIOTT: Fair enough, Your Honor. Thank you.

8 THE COURT: Yes, sir. Ms. McVey?

9 MS. MCVEY: Your Honor, just for the record, venue  
10 is also based not just on Waste Management. You will  
11 recall it was also based on the Westinghouse plant.

12 THE COURT: That's correct.

13 MS. MCVEY: Westinghouse has since settled out, but  
14 that was also the basis for venue in Hampton County.

15 THE COURT: That's correct. And Westinghouse having  
16 settled out does not change the venue for the remaining  
17 codefendants.

18 MS. MCVEY: Yes, ma'am.

19 THE COURT: It was determined at the time when the  
20 case is brought.

21 MS. MCVEY: Thank you, Your Honor.

22 THE COURT: Okay. Motions in limine on  
23 Rollins/Ashworth, are they -- we still got Rollins left?

24 MS. MCVEY: Your Honor, so who we have left in  
25 Rollins now is simply Gardner Denver and John Crane. So



1 we've got two defendants left in Rollins, Ashworth is  
2 completely taken care of.

3 THE COURT: Right.

4 MS. MCVEY: So that's it.

5 MR. ELLIOTT: Your Honor, if I may. James Elliott  
6 for John Crane, again. This is something that's not on  
7 your agenda and I'll tell you why. We filed -- John  
8 Crane filed a motion and it's been consented to by  
9 plaintiff's counsel to allow one of our experts to  
10 participate or testify at trial by way of video  
11 conference live.

12 THE COURT: Sure. I would certainly grant that.  
13 And if you need any kind of written order of that with  
14 regard to do it, but I grant the motion to have experts  
15 testify by video -- live video or in any other kind of  
16 video setting that you wish to present.

17 MR. ELLIOTT: Thank you, Your Honor.

18 MS. MCVEY: And that's without objection, of course.  
19 Yes.

20 THE COURT: And without objection by plaintiff,  
21 consented to.

22 So what we got left is motions in limine in Rollins  
23 only by Gardner Denver and John Crane; am I right?

24 MR. ZOLLICOFFER: Yes, Your Honor.

25 THE COURT: All right. Well, let me get to those.

1 Mr. McLeod, let me give you your notebook back before I  
2 lose it in the sea of all these notebooks.

3 MR. MCLEOD: Thank you, Your Honor.

4 THE COURT: All right. And then be patient for a  
5 minute, Mr. Elliott, and let me get to -- okay. All  
6 right.

7 The first part of the motions in limine is  
8 plaintiff's motions in limine in Rollins; correct?

9 MS. MCVEY: Yes, ma'am. And we can do anyway you'd  
10 like. Mr. Elliott just suggested we do the omnibus one,  
11 you've ruled on it a million times last because I think  
12 it addresses a bunch of --

13 THE COURT: Yeah. I am sure not going to reargue  
14 things that have been argued many times before. But I  
15 certainly want Mr. Elliott to be able to place upon the  
16 record his grounds and so forth. So I get that. We'll  
17 do it anyway you suggest. So what do you want to start  
18 with?

19 MS. MCVEY: So then we would start with --

20 THE COURT: Lack of knowledge?

21 MS. MCVEY: Yes, ma'am.

22 MR. HOLDER: Both of those are the same ones that  
23 we've ruled on since Jolly.

24 THE COURT: Well, I understand, but I got to make a  
25 record. Number 1, is plaintiff's motion in limine

1 omnibus, we are deferring that for the moment.

2 Number 2, is --

3 MR. HOLDER: Knowledge of a specific --

4 THE COURT: Hang on, let me just get to it here. Is  
5 plaintiff's motion in limine. Number 2, to exclude  
6 evidence defendants like knowledge that asbestos caused  
7 mesothelioma. Mr. Holder?

8 MR. HOLDER: Thank you, Your Honor. Plaintiff's  
9 made this motion before. At its root it is that the  
10 standard for what is known by corporation cannot be  
11 limited if they try to stick their head in the sand, for  
12 example. It is what's known and knowable within the  
13 industry. Whether they can point to a document that  
14 says they knew that asbestos caused mesothelioma would  
15 not escape them from liability saying that even though  
16 they knew that asbestos called asbestosis.

17 That's pretty much the extent of the motion. That  
18 they can't rely simply saying we didn't know that  
19 mesothelioma was caused by asbestos when they knew all  
20 of these other things. That since the 1930s has  
21 asbestosis, knew a mnemonic cheilosis from (inaudible)  
22 University Center --

23 THE COURT: I understand the argument. That's been  
24 made in many other cases. I have granted this motion  
25 many times before, but I want -- the defense to go on

1 and say for the record whatever they would like to say  
2 about it. Mr. Elliott, are you speaking for --

3 MR. ELLIOTT: Yes, ma'am. James Elliott on behalf  
4 of John Crane. And, Your Honor, again, we adopt and for  
5 the record make reference to our memo in opposition to  
6 this, and, of course, any arguments that we make here,  
7 oral arguments in this case. And, of course -- and,  
8 Your Honor, we've argued in the past this is a jury  
9 question, nothing in South Carolina precludes John Crane  
10 from putting up witnesses that testify about his product  
11 whether it's safe and all knowledge about its product.

12 The witness -- our witnesses, our experts can say  
13 there's no evidence that chrysotile asbestos at a  
14 certain level of exposure causes mesothelioma. Our  
15 experts are going to testify to that. We shouldn't be  
16 prevented from testifying about that. There in fact  
17 will be testimony that exposure to John Crane products  
18 in the case couldn't have caused the disease based on  
19 what the exposure was of Mr. Rollins.

20 And so there's evidence that we will put in the  
21 record that we actually have knowledge that it would not  
22 have caused the disease. There's overwhelming  
23 scientific evidence that exposure to low dose of  
24 chrysotile which is going to be the product and the  
25 fiber at issue in this case does not increase the risk,

1 Your Honor.

2 THE COURT: All right. Mr. Holder?

3 MR. HOLDER: Do you want further on that motion or

4 --

5 THE COURT: Yes. I want you to respond to what he  
6 said. He's making a record and so are you.

7 MR. HOLDER: Yes, Your Honor. In response,  
8 plaintiff, our position is that the information that was  
9 openly known and knowable not only through specific --

10 THE COURT: Mr. Holder, let's get real focused.  
11 What he argues is a smokescreen. All this motion says  
12 is that they can't argue that they don't have any  
13 knowledge that asbestos exposure can specifically cause  
14 mesothelioma during the periods of time that your client  
15 had exposure. They didn't know that. All this debate  
16 about chrysotile and whether its low levels caused  
17 mesothelioma is not what this motion is directed at.

18 Your motion is directed towards making the blanket  
19 statement that asbestos can -- that they didn't know  
20 that asbestos can cause mesothelioma; isn't that right?

21 MR. HOLDER: Yes, Your Honor.

22 THE COURT: All right. And I've granted that many  
23 times and despite the very well made arguments of Mr.  
24 Elliott, I'm going to grant it again.

25 All right. Number 3.

1 MR. HOLDER: I think I have the next one as well.

2 THE COURT: OSHA compliance.

3 MR. HOLDER: Yes, Your Honor. Jonathan Holder again  
4 for the plaintiff. Plaintiff's move in limine to  
5 exclude any mention or reference that defendants'  
6 compliance with OSHA standards somehow absolves them  
7 from liability in this case. We know that these  
8 regulatory measures were put in place to protect  
9 workers, but was not set to avoid or to set any safe  
10 level and it's not the standard that the jury will be  
11 instructed on by Your Honor.

12 THE COURT: Right. All right. And your contention  
13 is that it is not an absolute defense to say we complied  
14 with OSHA standards. There is a good deal of debate  
15 about how the OSHA standards evolve. And what is now  
16 known about what exposures meant during a period when  
17 OSHA standards did not direct themselves towards that.  
18 And that's the battle of the scientists and the battle  
19 of the experts; correct?

20 MR. HOLDER: Exactly, Your Honor.

21 THE COURT: All right. And all the narrow matter  
22 that you are addressing in this is the ability of  
23 defendant to say is an absolute defense to any liability  
24 we might have for asbestos exposure that we complied  
25 with OSHA standards as they existed at the time; right?

1 MR. HOLDER: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. HOLDER: Thank you, Your Honor.

4 THE COURT: Mr. Elliott?

5 MR. ELLIOTT: Your Honor, James Elliott for John  
6 Crane. My recollection is that you've denied this  
7 motion in the past. Because what we do is that we point  
8 to industry standards such as OSHA standards in order to  
9 create and establish for the jury the customs and  
10 practices of the industry; right. And were --

11 THE COURT: No question. And let me just make it  
12 clear, there's a narrow point here and it's the only  
13 point that's legitimate about what he's arguing which is  
14 you can't stand in front of a jury and say it is an  
15 absolute defense to any exposure liability we might have  
16 that we complied with OSHA standards.

17 These OSHA standards, I admit that material in  
18 evidence and have before because it goes to knowledge.  
19 And you use it to indicate what the knowledge that you  
20 think you have. They put in scientists that say, oh,  
21 no, from the '30s forward they're mute. It's the battle  
22 of the experts about what was known and knowable about  
23 it. And OSHA standards are one piece of that puzzle.  
24 You will be able to do that as you always have.

25 All about his motion in limine that I have preserved

1 always is the blanket statement it's an absolute bar to  
2 liability. And I don't think -- I have not heard any of  
3 you argue that in the many asbestos cases I've tried.  
4 So is my ruling clear?

5 MR. ELLIOTT: It is. That's exactly the way I  
6 recall your ruling. And, thank you, Your Honor.

7 THE COURT: All right, Mr. Elliott. Number 4. This  
8 is the Golden Rule. Have we got any real fuss about  
9 that?

10 MS. MCVEY: I thought they agreed to it, but maybe  
11 not.

12 THE COURT: His Golden Rule motion, number 4, is you  
13 can't say jurors are now breathing asbestos. There is  
14 asbestos in the courtroom. The jurors have asbestos in  
15 their lungs. The jurors are at risk or not because  
16 they're breathing asbestos. The jurors all have  
17 millions of fibers in their lungs. The common household  
18 products used by the jurors contain asbestos.

19 None of y'all have ever argued any of that. It  
20 would be totally improper. You can't put the jurors in  
21 the position of an argument about what is going to  
22 happen to them personally. That's a violation of the  
23 Golden Rule. So this is -- I would grant this and I  
24 don't think y'all have really fussed about that.

25 MR. ELLIOTT: James Elliott for John Crane. What



1 we've done in the past is make sure we get clarification  
2 on the record, Your Honor, that we were able to talk --  
3 our experts are able to talk about low dose exposure.  
4 In order to do that --

5 THE COURT: Low dose exposure you can talk about,  
6 just don't put the jurors in the middle of it.

7 MR. ELLIOTT: But our experts can talk about  
8 background and asbestos in the air and what folks who --

9 THE COURT: That's correct. They go over the line  
10 if they make any discussion of in this courtroom or the  
11 jurors or anything else. They can talk generally about  
12 low dose exposure. And that's the battle of the experts  
13 as well.

14 Their experts have different view of what  
15 constitutes low dose exposure than your experts do. And  
16 that's the battle of the experts.

17 MR. ELLIOTT: And what we do is our experts use that  
18 information to help explain our argument about greater  
19 the dose, greater the risk --

20 THE COURT: Exactly. And they got -- that y'all  
21 minimize the risk because of your baseline discussion of  
22 low dose and they have a different viewpoint on that.

23 MR. ELLIOTT: Yes, ma'am.

24 THE COURT: Very good. So number 4 is granted.  
25 Number 5.

1 MS. MCVEY: Your Honor, this is a -- Theile McVey  
2 for the plaintiff. This is another motion in limine  
3 that you've granted many times. And if I can just hand  
4 this to Mr. Elliott, but here's a copy of the transcript  
5 I think the last time you granted that motion in the  
6 Crawford case. And I've tabbed out your ruling.

7 But essentially, Your Honor, this relates to a  
8 corporate witness coming for John Crane or Gardner  
9 Denver. And when John Crane is asking their corporate  
10 rep questions, the witnesses have to testify from their  
11 own personal knowledge. That there is no hearsay  
12 exception when their own lawyer is asking them  
13 questions.

14 And the way I kind of think of this is the same way  
15 if -- how we can ask our plaintiffs questions. So, for  
16 example, if we were to put Mr. Rollins on the stand and  
17 ask him, did your coworker tell you that Covil was  
18 insulation supplier for Bowater. That would be hearsay.  
19 You would not let that information in. And it's the  
20 same thing as if their witness were doing it.

21 Now, they could ask Mr. Rollins, did Bowater ever  
22 warn you? Did you -- did somebody tell you this X, Y,  
23 and Z? They could do that because that's an admission  
24 by a party opponent. But we couldn't ask the same  
25 question on direct. We're just asking that the same

1 rules to apply to the corporate witness.

2 THE COURT: Hang on for a minute.

3 MS. MCVEY: Okay.

4 THE COURT: Okay. All right. Mr. Elliott?

5 MR. ELLIOTT: Your Honor, James Elliott for John  
6 Crane, again. My recollection, again, we're relying on  
7 the briefs that we've submitted in this case, Your  
8 Honor, and obviously the arguments that we're going to  
9 make in this case.

10 My recollection on this motion is, number one,  
11 you've in the past delayed the ruling until it comes up  
12 at trial. Because you've often said it never comes up,  
13 this issue is sort of making a mountain out of a mole  
14 hill. So that's my recollection of how you've ruled. I  
15 also think that it's wrong with the ruling. I think  
16 that a corporate representative can provide testimony  
17 that is based on information he's gained through his  
18 position with the company and he can talk on behalf of  
19 the corporation at trial. We know we can do it as a  
20 corporate representative in the 30(b)(6) deposition.  
21 And there's no case in South Carolina that says that  
22 person can't do that at trial. They cite to the Brazo  
23 case. And Your Honor can stop me if I'm going too far.

24 But in the Brazo case, it says, "If a certain fact  
25 is within the collective knowledge or subjective belief

1 of the company, the representative should be and is  
2 allowed to testify to it as it is -- is allowed to  
3 testify to it. It's not within his direct personal  
4 knowledge provided the testimony is otherwise  
5 permissible lay testimony. Thus if it was within the  
6 corporation's knowledge of the company, the witness  
7 should be allowed to testify as to it even if he did not  
8 have direct knowledge of it."

9 The Brazo case they were talking about it was  
10 information that a corporate witness was trying to  
11 provide regarding another corporation. Not a  
12 corporation that he was working -- he or she was working  
13 for. Again, no South Carolina law to support it.

14 The plaintiff's argument has always in my belief  
15 confused foundation verses hearsay. If John Crane lays  
16 the foundation for its witness testimony such that it  
17 meets the rules of evidence otherwise permissible by --  
18 in lay testimony then it should come in. And I cited to  
19 Your Honor Rule 701 which I think applies. A lay  
20 witness can give opinion or inferences if the testimony  
21 meets the requirements of 701(a)(b) and (c) of our  
22 rules.

23 THE COURT: Well, we're not in any of that. We're  
24 not in opinions. We're in something that's much more  
25 focused than that. We are in the question of whether

1 30(b)(6) witness can offer hearsay information. It  
2 almost never comes up in the reality of how these cases  
3 are tried. Because you take these 30(b)(6) witnesses'  
4 depositions and you generally agree on what's going to  
5 go in. You want to designate part of it. They want to  
6 designate part of it. That information comes in.

7 In addition, the 30(b)(6) witnesses often the  
8 vehicle as the corporate representative at trial for the  
9 introduction of many records in the communications and  
10 business records and letters and documents and material  
11 out of their files relating to knowledge about their  
12 membership in societies and what the societies knew at  
13 the time.

14 All that generally comes in through the corporate  
15 representative. And I've never seen it be an actual  
16 problem at trial. Frankly, because after making the  
17 record that y'all always like to make so you'll have a  
18 record for appeal, you always operate these cases in a  
19 pretty sensible manner in terms of how these come in.  
20 There are a few that I'm going to pay some particular  
21 attention to in the San Nicolas case this time and  
22 that's when corporate representatives are going to say  
23 -- go on to say things like my grandchildren all use  
24 Johnson Baby Powder, we're not going to get into that  
25 anymore. That's beyond the pail.

1           But normal corporate rep testimony doesn't really  
2 present this as a problem. What I have done is to  
3 reserve any problematic hearsay matters until trial.  
4 But I have generally said that in this state as an  
5 abstract matter, 30(b)(6) witnesses can only testify  
6 about things of which they have direct knowledge.

7           But as to vicarious representatives of the company,  
8 the 30(b)(6) witness can many times be the vehicle for  
9 the introduction of material that would otherwise be  
10 hearsay either because it comes in as admission by a  
11 party opponent or because the parties agree to let it in  
12 because it's a more efficient way of putting the  
13 material in.

14           So I reserve my right to look at this issue if it  
15 really becomes a problem. I am mindful of the general  
16 proposition of the 30(b)(6) witnesses shouldn't just be  
17 able to give raw hearsay. That became a problem in  
18 Crawford because of Covil who didn't have a corporate  
19 representative there but did try to bring somebody at  
20 the last minute that didn't know anything. That was a  
21 very difficult problem.

22           Because they also wanted to say what people told  
23 them about whether Covil was at a particular site and  
24 that kind of thing. You can't kind of have your cake  
25 and eat it, too. Not obey the rules and then try to

1 interpose information that could only have been picked  
2 up by hearsay.

3 So the bottom line is, I'm not going to let in rank  
4 hearsay, but I am going to let you folks work it out in  
5 terms of the actual way this thing operates at trial.

6 MR. ELLIOTT: Thank you, Your Honor.

7 THE COURT: All right. Ms. McVey, number 6. This  
8 is David Rollins's criminal history.

9 MR. HORN: Yes. Good morning, Your Honor. Ethan  
10 Horn on behalf of Mr. Rollins.

11 THE COURT: Now wait a minute. Hang on, Mr. Horn.  
12 Eric Horn?

13 MR. HORN: Ethan, E-T-H-A-N.

14 THE COURT: Ethan Horn.

15 MR. HORN: Yes, ma'am.

16 THE COURT: Okay.

17 MR. HORN: Your Honor, after poking around we  
18 realize that Mr. Rollins had about six criminal  
19 convictions and we filed this motion in an effort to  
20 obviously not have those come in. I can represent to  
21 the Court that four of those are DUI's. One of those is  
22 a disorderly conduct. And the other this one is a  
23 criminal domestic violence matter. Four of the six are  
24 over ten years old. But nevertheless less, obviously,  
25 these --

1 THE COURT: Now, four DUI's, one CDV over ten years  
2 old, and what's the other one?

3 MR. HORN: Criminal domestic violence. So the  
4 criminal domestic violence is from 2001. The disorderly  
5 conduct is from 2000.

6 THE COURT: What kind of conduct?

7 MR. HORN: Disorderly conduct.

8 THE COURT: Disorderly.

9 MR. HORN: Yes, ma'am.

10 THE COURT: Disorderly carries more than a year?

11 MR. HORN: I don't know if it does or not. The four  
12 DUI's, one of them is from 2003, the other is 2008. The  
13 remaining two DUI's are from 2012 and 2016 respectively.

14 THE COURT: Okay.

15 MR. HORN: Obviously, they're depending on his  
16 credibility in any fashion which really be much more  
17 prejudicial and probative in that respect.

18 THE COURT: Right.

19 MR. HORN: And that's why we're seeking to --

20 THE COURT: Understood.

21 MR. HORN: Thank you.

22 THE COURT: Mr. Elliott?

23 MR. ELLIOTT: James Elliott for John Crane, again,  
24 Your Honor. I didn't even know what his criminal record  
25 was when they filed the motion. And --



1 THE COURT: One of you did because somewhere in this  
2 sea of papers, one defendant who's probably gone now did  
3 have these things lined out.

4 MR. ELLIOTT: We know Smitty's didn't, but didn't  
5 know Rollins. But anyway, Your Honor, the rules says  
6 that if it's a conviction punishable by more than a year  
7 then it can come in and you'll be able to weigh whether  
8 or not the prejudicial effect would impact the probative  
9 value and that some sort of charge of dishonesty. Based  
10 on what he said, I don't think that's going to be an  
11 issue.

12 I would reserve the right and this is, again, be a  
13 trial objection that if we find something in his history  
14 that causes us to be suspicious or indicates that it  
15 might impact or sway the jury with regard to his  
16 credibility, we would reserve the right to bring that up  
17 because his credibility is obviously at issue when he's  
18 testifying in this case.

19 THE COURT: All right. That -- don't blame me for  
20 that reservation, but based on what I've heard, we have  
21 the one year thing, of course, but we also look at what  
22 the relationship is between the charge and your capacity  
23 of the truth telling, and in the light of that standard  
24 as well as the standard of probative verses prejudicial,  
25 I would grant the motion reserving to you, Mr. Elliott,

1 the right to argue it again if there are other  
2 convictions that come up that we don't know about.

3 MR. HORN: Your Honor, just relative to that issue.  
4 If they do unearth something, could we have some advance  
5 warning of that so they just sort of --

6 THE COURT: They'll afford you that privilege, of  
7 course. All right. Seven.

8 MS. MCVEY: We withdrew that one, Your Honor.

9 THE COURT: All right. You're withdrawn?

10 MS. MCVEY: Yes, ma'am.

11 THE COURT: Withdrawn. All right. Eight.

12 MR. HOLDER: This is criminal record of --

13 THE COURT: This is excluded reference to Smitty  
14 Montgomery's criminal history.

15 MR. HOLDER: A little more of a checkered past here  
16 -- sorry, Jonathan Holder on behalf of the plaintiffs to  
17 argue this MIL.

18 Mr. Montgomery, he was cross examined at his  
19 deposition at length about his criminal history. He  
20 didn't try to hide it. We didn't try to hide it. In  
21 fact, Exhibit One to his deposition was the -- his rap  
22 sheet. The only -- the only two convictions that John  
23 Crane raises in its response that we would like to  
24 possibly cross examine on is a 2012 shoplifting charge  
25 and a 2013 petty larceny. But appears that it was a

1 felony, so it would be over a year.

2 The plaintiff's would say that neither of these is  
3 relevant. They have been several years since he has  
4 done those. And when asked about them at his deposition  
5 as well as all those other charges, he was very honest  
6 even though it was very embarrassing to him and nothing  
7 that he's proud of and he said that.

8 And he went further to say that -- which was backed  
9 up by Nell Ashworth is that she never had any idea of  
10 like his drug use or anything like that when he was in  
11 the house because she would never allow it. And she  
12 reiterated that at her deposition.

13 THE COURT: All right.

14 MR. HOLDER: And, anyway, it will be too prejudicial  
15 to the plaintiff given this is a coworker to place on  
16 him.

17 THE COURT: Thank you. Mr. Elliott?

18 MR. ELLIOTT: James Elliott for John Crane. And,  
19 Your Honor, again, we rely on our briefs in this case  
20 and, of course, argument about to make. You know, the  
21 rules with regard to obviously 609 and when criminal  
22 convictions come in. Mr. Montgomery has convictions  
23 within the ten years that would reflect upon his  
24 credibility as a witness.

25 When Mr. Montgomery gave a deposition, tell you the

1 truth, I don't think any of it had much to do with John  
2 Crane. However, Your Honor, there will be parts of this  
3 trial where Mr. Montgomery perhaps is talking about  
4 seeing John Crane in a plant or how dusty something was  
5 and we will have evidence contrary to that. So his  
6 credibility will be directly at issue and those  
7 convictions, Your Honor, would be relevant for the jury  
8 to know when they are assessing our witnesses in their  
9 truthfulness verses Mr. Montgomery's testimony and his  
10 truthfulness, Your Honor.

11 And I'm not clear on all of Mr. Montgomery's  
12 conviction record. It's a long record, Your Honor. I  
13 don't know if you've seen it or not. There are some  
14 relatively recent charges that I'm not positive right  
15 now, I'll have to determine how they were disposed of.  
16 Because there are -- and I'm not going to, you know, be  
17 in trial to poke at Mr. Montgomery or, you know, just  
18 bring up issues just to embarrass him or something like  
19 that. Right. But there are issues with Mr. Montgomery  
20 with selling meth, making methamphetamine, that sort of  
21 thing. That it's fair game under our rules as Your  
22 Honor weighs the impact from a prejudicial standpoint.

23 And so at this stage, we believe the motion as to  
24 Mr. Montgomery should be denied.

25 THE COURT: All right. All right. I'll grant the

1 motion with respect to Mr. Montgomery and it's based on  
2 what I now know shoplifting and petty larceny. If the  
3 motion is removed, I'll deal with it at that time. But  
4 my general inclination even if it's drug matters and  
5 things of that nature is that the prejudicial value  
6 outweighs the probative value of such materials with  
7 respect to the capacity for truth telling of the witness  
8 and, therefore, I'll grant the motion as is presently  
9 presented and reserve on matters that I haven't seen yet  
10 in terms of his record.

11 All right. Number 9.

12 MS. MCVEY: Your Honor, the next one deals with  
13 Mr. Rollins's divorce and after speaking with Mr.  
14 Elliott, I understand they're not planning to bring that  
15 up for any reason.

16 THE COURT: All right. Withdrawn. This is the  
17 divorce?

18 MS. MCVEY: Yes, ma'am. And the next, the end of  
19 the plaintiff's motions in limine, Your Honor.

20 THE COURT: All right. Now we come to Defendant's  
21 motions in limine. And let me -- hang on. Hang on a  
22 minute.

23 MS. MCVEY: Your Honor, the first one I think is  
24 each and every -- oh, you know what it is --

25 THE COURT: Just a second. All right. I've got --

1 MS. MCVEY: Your Honor, I'm sorry to interrupt you.

2 THE COURT: Yeah. I've got each and every -- I've  
3 also got the catalog of how I ruled in a whole lot of  
4 other cases.

5 MS. MCVEY: Sometimes we think that's helpful, I  
6 don't know if it is.

7 THE COURT: It is helpful. Let me pull that out to  
8 the side here. All right. This is defendant's motion  
9 in limine to exclude each and every exposure; really?

10 MR. ZOLLICOFFER: Your Honor, that's been withdrawn.

11 MS. MCVEY: They're withdrawing.

12 THE COURT: This is the battle of the experts. You  
13 know I'm not going to grant this.

14 MR. ELLIOTT: We withdrew it.

15 MR. ZOLLICOFFER: Your Honor, just to state for the  
16 record, that's withdrawn.

17 THE COURT: Withdrawn?

18 MR. ZOLLICOFFER: Yes, ma'am.

19 THE COURT: Very good. Withdrawn. Now we come to  
20 twelve. This is motion to limit the testimony of expert  
21 Charles Ay. Now that was submitted by Ingersol-Rand who  
22 is no longer this the case. So --

23 MS. MCVEY: That don't need to be heard, I guess,  
24 Your Honor, now. I don't think that needs to be heard  
25 at this point. John Crane and Gardner Denver did not

1 make that motion.

2 MR. ELLIOTT: Correct, Your Honor.

3 THE COURT: Right. Are y'all going to object to  
4 Mr. Ay?

5 MR. ELLIOTT: We are not making a motion in limine  
6 at this time, Your Honor.

7 THE COURT: Okay. Very good. So this -- I'm not  
8 going to say withdrawn, but --

9 MR. ELLIOTT: Mute.

10 THE COURT: -- mute.

11 MS. MCVEY: Your Honor, let me go through a couple  
12 of those, too. The next one is Starr Davis motion in  
13 limine, that's --

14 THE COURT: Hang on. That's Starr Davis's motion in  
15 limine is --

16 MS. MCVEY: Tab 13.

17 THE COURT: To preclude evidence of the presence of  
18 products associated with Starr Davis, they have settled?

19 MS. MCVEY: Yes, ma'am.

20 THE COURT: So this is mute?

21 MS. MCVEY: Correct.

22 THE COURT: All right. Just hang on and let me get  
23 to the next one. All right. This is Waste Management's  
24 --

25 MS. MCVEY: So that one is mute as well.

1 THE COURT: And that's mute. That's number 14.  
2 Number 15 is Starr Davis preclude lay witnesses'  
3 opinions related to causation, that is mute?

4 MS. MCVEY: Yes, ma'am.

5 THE COURT: 16. All right. This is John Crane's  
6 motion to exclude plaintiff's speculative or irrelevant  
7 exposure elements. Mr. Elliott?

8 MR. ELLIOTT: Thank you, Your Honor. My numbers are  
9 a little bit different.

10 THE COURT: The reason I say 16, that's a tab I've  
11 got in the plaintiff's notebook. I'm sorry. I'm just  
12 -- I've organized it that way.

13 MR. ELLIOTT: Your Honor, we're having a little bit  
14 of confusion on what motions it is. We filed a motion  
15 to exclude plaintiff's irrelevant or speculative  
16 exposure.

17 THE COURT: That's right. And that's the one I'm  
18 looking at right now. All right. It's marked in your  
19 notebook as --

20 MR. ELLIOTT: Number 8.

21 THE COURT: Number 8 and it's marked in her notebook  
22 as number 16.

23 MR. ELLIOTT: Yes. Sorry for the confusion.

24 THE COURT: Yeah. Go right ahead.

25 MR. ELLIOTT: Again, James Elliott for John Crane,



1 madam court reporter. This motion is particularly  
2 important in this case. I know you've heard it in  
3 previous cases at least in part and, again, we're going  
4 to be relying on our briefs in this case.

5 It's particularly important in this case because the  
6 evidence is that Mr. Rollins through his own exposure  
7 did not start his work of life until 1988 at best when  
8 he was doing some labor cleaning up at one of the  
9 plants. Both the evidence is -- there is not even a  
10 guess as to whether or not he worked with John Crane  
11 products, packing, and gaskets until maybe in the 1990s.

12 And the purpose of the motion is this, Your Honor.  
13 In depositions when the plaintiff's counsel take the  
14 lead, there will basically be questions about, did you  
15 work with packing and gaskets? What did you do with  
16 packing and gaskets? Did packing and gaskets contain  
17 asbestos? And did you remove packing and gaskets?

18 In reality, when the questioning by the defense  
19 attorneys takes place, for example, with John Crane,  
20 okay. You saw John Crane gaskets and packing on the  
21 site; right? Okay. Well, that's fine. Did you know  
22 what type of -- who were the manufacturers of the  
23 gaskets and packing that you were removing from the --  
24 from the equipment? The answer is, no. He doesn't  
25 know. Then, do you know whether or not the John Crane

1 packing and gaskets contained asbestos? No. Do you  
2 know how long it had been there? No.

3 And so the point of the motion and why we're saying  
4 speculative and irrelevant testimony is they need to lay  
5 the foundation which they haven't done so in the  
6 depositions. We don't believe they have the evidence  
7 that, for example, a little bit -- let me back up just a  
8 little bit. John Crane stopped selling gaskets and  
9 packing containing asbestos in 1985. We put warnings on  
10 the product in 1983. This fellow's not worked until --  
11 in some stances almost a decade later, Your Honor.

12 So they have to prove that, number one, if it was an  
13 asbestos containing gasket it was somehow in the plant.  
14 Knew in the 1990s even though we stopped selling in  
15 1985. And it didn't have a warning which would mean it  
16 had to of been sold prior to 1983.

17 So all that comes back to the point of we don't  
18 think they should be able to just put Mr. Rollins up on  
19 the stand and say the questions like I just described to  
20 you which would only be speculation on his part. They  
21 have to lay the foundation for how he knows it was a  
22 John Crane product he was removing. Because in light of  
23 the fact that he said he doesn't know. And how does he  
24 know when it was installed, in light of the fact he  
25 doesn't know. And how does he know it contained

1 asbestos in light of the fact he's testified. He  
2 doesn't know that it was asbestos contained. So that's  
3 part of that -- several parts of that motion, but that's  
4 sort of the broad first part.

5 We don't think we should have to battle with them in  
6 giving the jury information that lacks foundation at  
7 least until they put in some other information that  
8 makes that so. Because right now he doesn't know it.

9 The other part of this case as Your Honor knows has  
10 to do with Mr. Ashworth's work; right. And the  
11 take-home exposure that Mr. Rollins allegedly  
12 experienced as a result of that exposure.

13 Now, John Crane was dismissed without prejudice my  
14 understanding from the Ashworth case when it was  
15 originally filed in Delaware. Just a matter of  
16 background. But what I -- it's again, it's a foundation  
17 issue. We don't believe that the plaintiffs should be  
18 able to make the jury speculate with evidence like this.  
19 Where they put in Mr. Ashworth's deposition and he says,  
20 you know, yes, at some point I worked with John Crane  
21 gaskets and packing whenever -- whenever that occurred.

22 And, you know, he worked with all sorts of different  
23 products and the guy -- he got dust on his clothes and  
24 from whatever source and he went home and played with  
25 Mr. Rollins and he was exposed causing the jury to

1 speculate that that was John Crane related fibers;  
2 right. We believe that they have to be able to lay the  
3 foundation in order to get that sort of evidence in.  
4 They've got to show that Mr. Ashworth worked with the  
5 John Crane asbestos containing product; right. On the  
6 day or the days that occurred that he worked with the  
7 product. He had the John Crane asbestos fibers on his  
8 clothing. And when he went home, he had those fibers  
9 and they were admitted in the presence of Mr. Rollins.

10 We're trying -- we have enough to fight about and  
11 argue about in the case without having to deal with the  
12 issue of information getting in the juries' mind that  
13 it's speculative. And it would be speculative just for  
14 them to say, Ashworth at some point worked with John  
15 Crane and sometimes he brought home dust from somewhere.  
16 And sometimes when he brought home that dust,  
17 Mr. Rollins was exposed to it. They have to lay the  
18 foundation, Your Honor, and I don't --

19 THE COURT: Okay. I got that argument.

20 MR. ELLIOTT: One more. Last one. We don't think  
21 they should be able to put in any evidence of  
22 Mr. Ashworth's exposure prior to 1980 or after like  
23 1991. Because Rollins didn't live with Mr. Ashworth at  
24 that time. Okay.

25 And those are the three broad arguments and then we

1 would still rely on all the arguments as made in our  
2 brief, Your Honor. Thank you.

3 THE COURT: All right. Mr. Holder?

4 MR. HOLDER: Jonathan Holder on behalf of the  
5 plaintiff in the Rollins matter. Your Honor, in  
6 response, the plaintiff's --

7 THE COURT: Speak up.

8 MR. HOLDER: Jonathan Holder on behalf of the  
9 plaintiff's in the Rollins matter. In response,  
10 plaintiff's do not intend to put on speculative  
11 evidence. There is clear ID by Mr. Ashworth of working  
12 with John Crane gaskets and John Crane packing. And  
13 multiple sites including Bowater, Celanese, and Springs.

14 THE COURT: And it will be during the period of 1980  
15 to 1991?

16 MR. HOLDER: It didn't start until '80, yes. '80,  
17 all the way through. And so I just --

18 THE COURT: I get that. And respect to -- so the  
19 first one you're saying is that 1988 is not dispositive  
20 because that's when Rollins began to work. But he also  
21 claims take-home exposure during the 11 years that he  
22 lived with Mr. Ashworth; correct?

23 MR. HOLDER: Exactly, Your Honor.

24 THE COURT: So part of that was before his working  
25 years when he was a child?

1 MR. HOLDER: Exactly. And living in the same house.  
2 And so the allegation of that if Mr. Ashworth is  
3 bringing it home and exposing Mr. Rollins including from  
4 the sites where he identified working with John Crane  
5 gaskets and John Crane packing.

6 THE COURT: Right.

7 MR. HOLDER: Specifically at the Springs site. But  
8 then to go on, the point about Mr. Rollins, I mean, he's  
9 given sworn testimony in his deposition about what he  
10 remembers about John Crane. I feel like what they're --  
11 the plaintiff, their motion, it will be great cross  
12 examination. If he were to come in here and say, yes,  
13 John Crane gaskets and there was asbestos containing,  
14 yep, I remember that, that would be perfect cross  
15 examination and say, you literally said at your  
16 deposition the opposite under sworn testimony. What's  
17 the difference now? We have no intention of doing that  
18 --

19 THE COURT: I got you.

20 MR. HOLDER: But it just seems odd for MIL and with  
21 that plaintiff submits unless there's any other points  
22 you have questions about.

23 THE COURT: All right. Well, I'm not going allow  
24 any speculative evidence. And I'm not precluding John  
25 Crane from making an objection as to the speculative

1 nature of the evidence. So if some speculative evidence  
2 comes in, but based on what I've been told there's  
3 plenty of information that can be discussed in terms of  
4 take-home exposure from Mr. Ashworth during the period  
5 1980 to 1991 that encompasses a period before Crane  
6 stopped selling asbestos contained gaskets. And even  
7 goes before the warning labels that they allege were put  
8 on.

9 The -- it does not preclude that the dates that  
10 Mr. Elliott gave for Crane do not include testimony that  
11 these companies used a stockpile of John Crane Gaskets  
12 well after the time when John Crane quit selling them.  
13 All that is subject to factual exploration. But I  
14 certainly am not going to allow testimony that does not  
15 have an adequate foundation.

16 So I grant the motion to exclude speculative  
17 evidence, but I have not heard so far any evidence the  
18 plaintiff's intend to offer that is speculative. If  
19 that comes up, we'll revisit it. But so far, I don't  
20 think they will violate the rules with regard to  
21 speculative evidence.

22 MR. ELLIOTT: One other part to that and I think  
23 Jonathan may have hit on it. We had ask that they not  
24 put into evidence prior to Mr. Ashworth living with  
25 Mr. Rollins --

1 THE COURT: I get all that. And they say they're  
2 not going to do that, Mr. Elliott. But if that comes up  
3 again, we'll visit it at the time. But they say they're  
4 not going to do that. All right.

5 MS. MCVEY: Your Honor, the next one Number 17 in  
6 our book was just filed by Ingersoll-Rand and Foster  
7 Wheeler, so that's mute.

8 THE COURT: The next one in my book is 17, Viacom,  
9 Foster Wheeler, Spirax, judicial notice of OSHA  
10 regulations mute?

11 MS. MCVEY: Yes, ma'am.

12 THE COURT: All right. Then 18 is this is John  
13 Crane's motion on material safety data sheets?

14 MR. ZOLLICOFFER: Good morning, Your Honor. Thurman  
15 Zollicoffer for John Crane. Your Honor, the -- this  
16 motion is to preclude plaintiffs from entering into  
17 evidence or commenting about material safety data sheets  
18 from John Crane which they are going to attempt to use  
19 as admissions, but it is in fact not an admission, Your  
20 Honor. As the Court probably well knows, materials  
21 safety data sheets are reports that were provided  
22 regarding hazardous materials and chemicals created by  
23 OSHA under the hazardous communications standard.

24 One of the things that we find problematic with  
25 this, Your Honor, is that if you look at the act, if a



1 material is one percent or more as a constituent product  
2 of the overall product, you have to then basically  
3 assume that that product is one hundred percent of that  
4 constituent hazardous products. So if one percent  
5 asbestos, it would assume what the worst case scenario  
6 is for one hundred percent asbestos and state that on  
7 the material safety data sheet in order to avoid those  
8 issues.

9 So it is not in fact even close to what a John Crane  
10 packing or gasket may contain, but it gives simply the  
11 worst case scenario if a product was one hundred percent  
12 of that constituent product.

13 THE COURT: All right, sir. All right. Ms. McVey  
14 or Mr. Horn?

15 MR. HORN: Yes, thank you, Your Honor. The amnesty  
16 issues, our issues, admission by party opponents that  
17 contain very significant information such as the  
18 asbestos contents. And, of course, on the second page  
19 of the material safety data sheets are also the  
20 potential injuries one can sustain from exposure to the  
21 hazardous material.

22 There's really -- I mean, it's a clear admission by  
23 party opponent in that respect. The hazardous  
24 communication act opponent of the argument that counsel  
25 made really isn't relevant. They're saying that

1 essentially you have to assume that for purposes of the  
2 MSDS sheet that the asbestos content would be one  
3 hundred percent.

4 THE COURT: Well, I have never seen that be a  
5 problem. But I routinely admit MSDS data sheets in  
6 asbestos cases and I ruled that way in the chemical  
7 exposure fire case that I had as an appellate judge.  
8 The MSDS sheets go to knowledge and they go to  
9 admission. And they can certainly -- defense can  
10 certainly explain them in the ways that Mr. -- counsel  
11 for the John Crane has just eloquently outlined. They  
12 are explanations about it, but they are going to be  
13 admitted. So I would deny the motion.

14 All right. That brings us to John Crane's motion,  
15 this is 19 in your notebook, Ms. McVey. Motion in  
16 limine to exclude any reference to the US Environmental  
17 Protection Agency's proposed ban on asbestos containing  
18 products or foreign bans of asbestos.

19 MR. ZOLLICOFFER: Yes, Your Honor. Once again,  
20 Thurman Zollicoffer. Your Honor, John Crane  
21 respectfully requests this Court to ask plaintiffs or  
22 order plaintiffs not to make reference to the EPA  
23 proposed ban of July 12, 1989 for asbestos. And for  
24 rational, Your Honor, A, it was never implemented. B,  
25 it was thoroughly trashed by the Fifth Circuit for the

1 EPA not doing appropriate protocols and following some  
2 of their own policies such as advertising and comment  
3 stage. C, Your Honor, John Crane stopped selling  
4 asbestos gaskets and packing in 1985.

5 And manufacturing and sale of those products  
6 wouldn't even be prohibited today by today's standards,  
7 Your Honor. So to bring that up, A, a ruling that was  
8 never actually codified would give the jury a -- an  
9 inappropriate nexus that somehow those products were  
10 illegal. It's inappropriate. It's overly prejudicial.  
11 And so we would ask the Court to -- and we adopt our  
12 papers as well, Your Honor.

13 THE COURT: Sure. Mr. Horn?

14 MR. HORN: Thank you, Your Honor. The asbestos ban,  
15 Your Honor, is highly relevant to the issues in this  
16 case. The ban itself is overturned on technical issues  
17 about some of the rule making process. The science  
18 behind the ban stays. Besides, behind it it says  
19 there's no known safe level as I'm sure the Court's  
20 aware. OSHA goes on to say that, you know, we ban and  
21 protect the workers. New uses of asbestos remain  
22 banned. Of course, some of the items that were banned  
23 under ban remain banned. Like flooring felts, roll  
24 board, corrugated board, and some kind of commercial and  
25 paper and such like that.

1           John Crane's argument is going to be that there --  
2           the asbestos in their gaskets is essentially harmless.  
3           They're going to have expert testimony that says the  
4           chrysotile in their gaskets, for lack of a better word,  
5           is harmless. In fact, one of the fellows will say it  
6           will take at least 250 fiber years at a bear minimum  
7           before exposure to the asbestos in their gaskets can  
8           cause mesothelioma.

9           The ban directly refused all of it as does the ban  
10          of the other 40 European countries. And we do contend  
11          that the science that we present in these cases is  
12          consistent with the world's literature pertaining to  
13          asbestos. And not only does the EPA ban is that  
14          consistent with it, but the bans of the foreign  
15          countries that have banned asbestos including the  
16          chrysotile and asbestos it's also consistent with our  
17          viewpoint. And that's it.

18          THE COURT: All right. All right. I am of two  
19          minds about this thing. The Fifth Circuit's decision in  
20          corrosion proof fittings doesn't ameliorate a notion  
21          that asbestos is carcinogenic and it doesn't say  
22          asbestos is safe or diminish the EPA's findings about  
23          the toxic affect of airborne asbestos. It does  
24          criticize the EPA's ban for failing to demonstrate that  
25          it was the least burdensome alternative and that kind of

1 thing.

2 The findings with respect to the dangers posed by  
3 asbestos, it seems to be appurtenant. So I will grant  
4 the motion to prevent plaintiff from talking about EPA  
5 ban in 1991. But I will not prevent plaintiff from  
6 discussing EPA studies and findings and that kind of  
7 thing. So that's the ruling I make on that.

8 MR. ZOLLICOFFER: Thank you, Your Honor.

9 THE COURT: 20 in the Plaintiff's notebook. This is  
10 John Crane's motion to exclude evidence regarding  
11 asbestos monitoring programs, station analysis records,  
12 and conditions at the JCI manufacturing facilities.  
13 Really?

14 MR. HORN: Your Honor, there's a second component to  
15 that motion which is 40 plus countries that have ban.

16 THE COURT: The what now?

17 MR. HORN: To the John Crane motion that was just  
18 granted in part by Your Honor. There was a second  
19 component that wasn't addressed and part of that motion  
20 also talks about the international sort of 40 plus  
21 country ban on all forms of asbestos.

22 THE COURT: I wasn't going to do anything with that.  
23 You can refer to that if the legitimacy of that has not  
24 been criticized in any opinion I know about. I will,  
25 you know, whether it's relevant may be visited at the

1 time, but I'm not going to exclude it as I excluded the  
2 EPA ban because of some criticism of its basic  
3 methodology under the laws of the United States which  
4 includes a requirement that regulations be look at the  
5 least burdensome alternative. And that's the only  
6 reason I'm not to going to allow the ban to be referred  
7 to the ban itself. The studies, yes.

8 With respect to these internationals, if y'all want  
9 to travel down that road which I suspect would only be  
10 done in passing reference by experts or the materials  
11 upon which they rely, you might be putting something in  
12 the record that my bettors would reverse me on. But I'm  
13 not going to direct no mention can be made of that. I  
14 don't know what the context is going to be, so I don't  
15 have enough information to say one way or the other at  
16 this moment.

17 MR. HORN: Okay. Thank you, Your Honor.

18 THE COURT: This is the motion to exclude asbestos  
19 monitoring program, Mr. Elliott?

20 MR. ELLIOTT: Thank you, Your Honor. James Elliott  
21 for John Crane, again. Your Honor, so the evidence that  
22 we suspect that the plaintiff's may want to use are some  
23 reports and findings of asbestos monitoring of John  
24 Crane workers at its facility where they were using  
25 asbestos or all asbestos in order to manufacture

1 packings, Your Honor, not gaskets.

2 And the findings are, number one, irrelevant. But,  
3 Your Honor, they're also prejudicial. They're confusing  
4 and to the extent somehow they're irrelevant,  
5 prejudicial effect outweighs its probative value. And  
6 why is all that so you may ask. You're saying, well  
7 you're monitoring asbestos exposure in your own plant.  
8 It's -- the reason that it's completely irrelevant is  
9 that what's being monitored has nothing to do with what  
10 Mr. Rollins was doing in his work practices.

11 These folks by requirement of the government, we  
12 were doing the right thing. We were doing what the  
13 government tells us to do. We were monitoring our  
14 employees to make sure their exposure to asbestos from  
15 raw asbestos fibers was not below a certain level. And  
16 in some instances the findings were a little bit above  
17 what the OSHA levels allowed.

18 There was no monitoring of the type of work that  
19 Mr. Rollins was doing, manipulating gaskets and packing.  
20 And what -- from our prospective, what happens and why  
21 this information is prejudicial, Your Honor, is so they  
22 put in the results and the fiber count is higher than  
23 what you would have when you compare it to the fiber  
24 count that Mr. Rollins was exposed to right when he was  
25 doing his work.

1           But the jury just seeing the monitoring results and  
2 they're getting confused. It happens. They get  
3 confused, they can't differentiate or it's difficult to  
4 differentiate the realities of what Mr. Rollins was  
5 being exposed to verses what these folks were doing as  
6 they were required, you know, by government regulations.

7           Mr. Rollins worked for national corporations in the  
8 industrial contracting field. They should have been  
9 doing the monitoring of him when he was in the field by  
10 what his exposure was when he was using gaskets and  
11 packing. The jury couldn't -- should not be allowed to  
12 see the results from our packing -- excuse me, from our  
13 plants, say, hey, these guys were monitoring their own  
14 employees, but they were doing nothing for these outside  
15 guys, you know, and John Crane's bad.

16           And reality is, we were doing exactly what we should  
17 have done, following government requirements and  
18 regulations. When in fact, apparently, Mr. Rollins's  
19 own employers were not doing the exact same thing.

20           So, Your Honor, as I've explained, it is irrelevant.  
21 But the information to the jury, these findings, reports  
22 will be confusing, misleading, unnecessary, irrelevant,  
23 and highly prejudicial, Your Honor.

24           THE COURT: All right. Mr. Horn?

25           MR. HORN: Thank you, Your Honor. Ethan Horn once



1 again. I think the motion is a bit premature because  
2 they don't attach the documents to which they're  
3 referring.

4 THE COURT: Yeah, I agree. I mean, we don't know if  
5 they're specifically going to exclude. But I can tell  
6 you, you know, Fifth Circuit cases, there are a variety  
7 of cases that discuss this issue. There are two things  
8 going on here. Number one, protecting your workers is a  
9 knowledge component. Its elements of knowledge are quite  
10 independent of what happened with the exposure Ashworth  
11 or Rollins in this case had. So demonstration of  
12 knowledge is one thing for which this kind of  
13 information would probably come in.

14 The Fifth Circuit has said that plant worker  
15 exposure is admissible in cases involving in user  
16 exposure and the distinction between the volume of  
17 exposure, raw asbestos as opposed to asbestos  
18 incorporated into gaskets, some of which are high  
19 percentages of asbestos in the '90s and that kind of  
20 thing. So not a huge amount of difference there. But  
21 it goes to the weight and not the admissibility of the  
22 evidence.

23 So I decline and will deny the motion to exclude  
24 this evidence as the matter now stands. If there's  
25 something that comes up at trial that pertains to

1 specific documents, we can take a look at and see  
2 exactly what we're going to do. But on the basis of  
3 what I now know, I deny the motion to exclude this  
4 evidence.

5 MR. HORN: Thank you.

6 THE COURT: All right. We're into 20 which is John  
7 Crane's motion to exclude a JCI internal memorandum  
8 regarding disposal of its asbestos inventory.  
9 Mr. Elliott, come on. Really?

10 MR. ELLIOTT: Yes, Your Honor.

11 THE COURT: You got an internal memo that talks  
12 about how -- you want to introduce evidence we label in  
13 '83 and we absolutely quit making it in '85 and now if  
14 there is an internal memo that talks about how you  
15 dispose of inventory, you want to exclude that? I'm not  
16 going to do that.

17 MR. ELLIOTT: May I?

18 THE COURT: I mean --

19 MR. ELLIOTT: May I approach?

20 THE COURT: Very briefly.

21 MR. ELLIOTT: Your Honor --

22 THE COURT: You know, the fact that something's  
23 going to hurt you is not a proper basis for excluding  
24 it. There isn't a rule of evidence I can think of that  
25 would preclude this.

1 MR. ELLIOTT: Yes, Your Honor.

2 THE COURT: It is relevant to all the issues in this  
3 case. Because your contention is a cornerstone of your  
4 defense which is you can't do anything past '85 because  
5 that's when we quit selling it. And their contention is  
6 a lot of this material in inventory stayed around for  
7 years and years and your own internal memo addresses  
8 that.

9 MR. ELLIOTT: Thank you, Your Honor. Again, we'll  
10 adopt our arguments in our brief. But the main argument  
11 is the memo is not true. It's not accurate.

12 THE COURT: Well, that's something you can show by  
13 other evidence. But it's your internal memo. They get  
14 to put that in front of the jury and you can explain it  
15 or say it's not true, anything you want to.

16 MR. ELLIOTT: Your Honor, it was written by a fellow  
17 named Mr. Dean. Mr. Dean was a packing manager. He  
18 went to some meeting and he came up with this idea that,  
19 hey, we're not going to be putting asbestos in our  
20 packing anymore, so let's sell it or ship it off to a  
21 foreign country where the ban is not -- but it didn't  
22 happen. It is untrue. It never ever happened.

23 THE COURT: That's all you need to say and you can  
24 prove that. But that's not going to -- this is a worker  
25 for y'all that had this kind of proposal and that's what

1 he proposed to be done.

2 MR. ELLIOTT: If I may, Your Honor. And I'm not  
3 trying to argue once you've already made your ruling. I  
4 don't want to upset you. But this one to me is  
5 exceptionally important because the fact that just  
6 because some guy writes a memo, he puts it in writing,  
7 and years later plaintiff's counsel gets it. It can now  
8 be used when everybody in the country in this litigation  
9 knows that that memo is not true. It is not accurate.

10 George Springs, our corporate representative has  
11 testified many, many times. He's put in declarations of  
12 --

13 THE COURT: It is not proposed for the truth of the  
14 matter asserted. This is Evidence 101. It is proposed  
15 because it was written by someone who was then in the  
16 employ of John Crane who made a proposal that was  
17 founded on his concern or his understanding that  
18 asbestos is dangerous and we're going to quit using  
19 asbestos in gaskets. And his solution to all the  
20 leftover products was to send them -- to sell them some  
21 place where asbestos was not banned.

22 That is a -- is evidence of knowledge and  
23 affirmative activity that might be considered by the  
24 jury to underscore negligence. That is not offered for  
25 the truth of whether that's what happened. It's offered

1 to discuss the state of mind of John Crane through its  
2 employees about how it was going to handle this product.

3 MR. ELLIOTT: If I may, Your Honor. Again,  
4 Mr. Dean, he wasn't an officer. He wasn't a director.  
5 He wasn't a corporate --

6 THE COURT: That doesn't make any difference. We  
7 know that. You can say those things, but as we know,  
8 that does not go to anything about admissibility. It  
9 may go to the weight to be given it and you all are  
10 certainly entitled to explore that.

11 MR. ELLIOTT: If I may. To argue that it's not  
12 relevant, number one. I would argue that to the extent  
13 there is some scintilla of relevancy, it is highly  
14 prejudicial. And it's highly inflammatory. And we will  
15 be able to explain it away during the trial.

16 But jurors, get it stuck in their head and they  
17 can't get it out. We have proof of that. There has  
18 been questionnaires from jurors in cases in Kentucky  
19 where we did everything that you say we needed to do and  
20 that Dean memo came in. And the juror writes a  
21 questionnaire or a letter that says, I can't believe  
22 John Crane sold this stuff to a foreign country when  
23 they knew it was bad when it didn't happen. We know it  
24 went to a landfill. We know it was properly disposed  
25 of.

1 I understand about the hearsay. I understand you  
2 can cross examine and you can put in other evidence.  
3 But this is exactly why Rule 403 was put into place.  
4 This memo is the exact reason why we have 403 and why it  
5 shouldn't come in. It's inflammatory. Highly  
6 prejudicial. And we know in cases that jurors get  
7 confused and they think we did it when we didn't.

8 THE COURT: Understood. All right. Denied.

9 MS. MCVEY: Your Honor, the last individual one is a  
10 MOR PPM motion in limine that's -- they've settled.

11 THE COURT: So that's mute?

12 MS. MCVEY: That's mute.

13 THE COURT: That's your 23?

14 MS. MCVEY: 22.

15 THE COURT: 22?

16 MS. MCVEY: Yes, ma'am. And then Ashworth starts  
17 with 23 and those are finished.

18 THE COURT: And Ashworth's mute?

19 MS. MCVEY: Yes, ma'am.

20 THE COURT: All right.

21 MS. MCVEY: Your Honor, so -- go ahead.

22 THE COURT: What's that?

23 MS. MCVEY: I think they made a motion on post-sale  
24 duty to warn. That South Carolina doesn't have a  
25 post-sale duty to warn. And, you know, our argument to

1 that case is the case law says you don't have a  
2 post-sale duty to warn if the product wasn't defective  
3 at the time it left the manufacturer's hands. And what  
4 we would say is the product was in fact defective,  
5 contained asbestos component parts that had to be  
6 replaced and so there is a continuing duty to warn.

7 THE COURT: All right.

8 MR. ELLIOTT: Sorry. I know we're getting a little  
9 cattywampus here.

10 THE COURT: This is in the abstract big time. What  
11 is this addressed to? You just want me to kind of sit  
12 up here and rule that you had no post-sale duty to warn?

13 MR. ELLIOTT: If I may, Your Honor.

14 THE COURT: All right, sir.

15 MR. ELLIOTT: James Elliott for John Crane. And we  
16 will also rely on our briefs. The issue in this case  
17 different than almost all the other cases we have with  
18 this post-sale duty to warn issue is that Mr. Rollins  
19 wasn't exposed until 1988 into the '90s, Your Honor.  
20 And, number one, South Carolina law does not require  
21 post-sale duty to warn, number one. And, yes, when the  
22 product was not defective when it was sold which this  
23 was not.

24 However, in this case, we have warnings in 1983;  
25 right. And then we have nonasbestos containing products

1 in 1985. There's no evidence this guy is using a  
2 product before 1983. And so there is no duty to warn  
3 about the material that he was using. But think about  
4 this. If he is using -- if he's removing a gasket in  
5 packing that was put on a valve in 1982, how in the  
6 world would any warning have ever gotten to that guy  
7 when he's doing it, Mr. Rollins in 1992.

8 There's case law that says when a warning is not  
9 feasible to get to the guy and to warn the guy then you  
10 don't have to do it. That's why we made this motion in  
11 a separate motion sometimes we put it in just the  
12 omnibus point. Because this case is different. Because  
13 this fellow wasn't exposed until way down the road.

14 And there is -- he would not have been -- he  
15 wouldn't have gotten a warning; right. He wouldn't --  
16 there would have been no reason to warn if it was a  
17 product after 1985. And so that's where the real issue  
18 of post-sale duty to warn comes in. It's a case like  
19 this when this guy is saying I used some product you  
20 sold, you know, 15, 20 years ago. That's why we made  
21 the motion and that's why we would ask that it be  
22 granted, Your Honor.

23 THE COURT: As I understand what they intend to  
24 suggest is that, let's put your warning in '83 aside.  
25 Their contention is that long after 1985 there was John



1 Crane gasketing out there that was asbestos contained.  
2 And that this worker and many other workers were exposed  
3 to asbestos containing fibers from this gasketing that  
4 had been -- that was still out there and being used  
5 despite the fact that you quit selling it at an earlier  
6 time.

7 That's going to be up to them to connect those dots.  
8 But -- because they're not relying on some post-sale  
9 duty to warn. They're saying you knew many, many years  
10 before you finally decided to quit selling it. That  
11 this stuff was dangerous. And it's -- that knowledge,  
12 and the fact that your material was dangerous because it  
13 had asbestos in it when it left your plant and came into  
14 the stream of commerce and ended up in gaskets to which  
15 Mr. Rollins was exposed or take-home exposure.

16 So that's their case and they're not premising  
17 anything on your post-sale duty to warn. That's not  
18 going to come up in this case unless it's tried  
19 differently from the way they've all been tried so far.

20 But what they're going to say is your material --  
21 asbestos containing materials continue to be in stream  
22 of commerce well after you say you quit manufacturing  
23 asbestos containing products and selling them.

24 MR. ELLIOTT: And my point is, if they had -- if  
25 Bowater had product from 1980, there would be no -- and

1 it was installed in gaskets --

2 THE COURT: Right. And your records are going to  
3 disclose that you knew when you sold them in 1980 that  
4 they contained asbestos and that you sold them or your  
5 outlet sold them to Bowater. And they're going to say  
6 at that time you should have told them these are  
7 asbestos containing, you're going to have to put up  
8 labels or you should have quit selling them at that time  
9 or a much earlier time than you did. That's their  
10 liability contention.

11 MR. ELLIOTT: And our point is, at that time when  
12 Mr. Rollins -- when the product was sold in 1980, for  
13 example, Mr. Rollins is replacing it in 1990, there's no  
14 way we could -- anything that came with that product in  
15 1990 --

16 THE COURT: Well, that's just a factually  
17 disagreement. They're going to say there is a way.  
18 Because, number one, Mr. Rollins's exposure began in  
19 1980 when he was a child. And Ashworth brought into the  
20 home John Crane material in the dust on his clothing. A  
21 great deal of your liability in the Rollins case is  
22 based on take-home exposure.

23 MR. ELLIOTT: Right. And on that point which is a  
24 little bit different in my mind, it goes to the  
25 feasibility of the warning argument. It wasn't feasible

1 for us to warn Mr. Rollins. I know what you're going to  
2 say, you had to warn Mr. Ashworth and he could have  
3 warned Mr. Rollins.

4 THE COURT: That's what they're going to contend.

5 MR. ELLIOTT: But our case, and I think there's case  
6 law that supports it, that goes to the feasibility  
7 argument of whether or not --

8 THE COURT: It's not a feasibility at all. They're  
9 not saying you had a duty to warn Rollins, they said you  
10 should have stopped it at the source with Ashworth who  
11 took it home. And that is very well -- very solid and  
12 well-known law that the bystander gets to step into the  
13 shoes of the person who exposed him and has the same  
14 rights as the -- and you had the same responsibility.

15 Your responsibility is not to put the stuff out  
16 there where it can hurt the worker or those with whom  
17 the worker comes in contact with when he has asbestos.  
18 That's their contention. And I am not going to grant  
19 the motions that prohibit them from doing that.

20 MR. ELLIOTT: Thank you.

21 THE COURT: All right. Motion is denied. All  
22 right. What else?

23 MR. ZOLLICOFFER: Your Honor, Thurman Zollicoffer  
24 for John Crane. We had one other motion in limine to  
25 which I'm not sure plaintiff's actually have received.

1 MS. MCVEY: I don't think we did.

2 THE COURT: What is that?

3 MS. MCVEY: Your Honor, there was a motion in limine  
4 that I'm not sure that we received from John Crane. It  
5 may have been our fault. So we can certainly argue it  
6 today, but we may need --

7 THE COURT: What is it?

8 MR. ZOLLICOFFER: It's a motion to ask the Court to  
9 preclude the studies of William Longo and --

10 THE COURT: You can put that on the record. Longo  
11 has been admitted as a witness in every case I've tried.  
12 So you can -- this is the battle of the experts. And  
13 Longo -- your attack on Longo is an attack you make very  
14 effectively when you cross examine. But I'm not going  
15 to preclude him from testifying, just like I'm not going  
16 to preclude your witness. But you can put that on the  
17 record if you like it's just not worth a whole lot of  
18 time.

19 MR. ZOLLICOFFER: Well, with that in mind, Your  
20 Honor, I'll be succinct and I won't put it on the  
21 record. I will adopt our papers. But, Your Honor, I  
22 would ask this Court to revisit that ruling in light of  
23 the actual studies themselves. If the Court's had the  
24 opportunity to actually see the Bill Longo and MAS  
25 studies, they are highly prejudicial. As the Court --

1           THE COURT: Prejudicial is not going to make a piece  
2 of difference. All of the information on the other side  
3 is very prejudicial when it's offered against you. The  
4 question is whether it has scientific reliability.

5           MR. ZOLLICOFFER: Your Honor, and if I may add -- if  
6 I may address that. I don't believe it has scientific  
7 reliability and it's not whether it's prejudicial  
8 against us. It's the fact that it's going to be highly  
9 prejudicial in the minds of the jurors to the fact that  
10 it confuses them. You know, it's not --

11           THE COURT: Am I suppose to try a case based on,  
12 hey, your experts I determine right to begin with all  
13 right and their experts are wrong, and, therefore, it's  
14 highly prejudicial to you to have experts that don't  
15 agree with your expert, is that what you're asking me to  
16 do?

17           MR. ZOLLICOFFER: No, Your Honor. And I am just  
18 going to ask --

19           THE COURT: Well then don't argue prejudicial affect  
20 to me. Argue to me scientific reliability because  
21 that's the only basis upon which I would exclude  
22 Mr. Longo.

23           MR. ZOLLICOFFER: And let me address that.

24           THE COURT: All right.

25           MR. ZOLLICOFFER: As the Court in Dugan did. The

1 problem with the Longo studies is that they're not  
2 scientific. They're not based on the actual experiences  
3 of the plaintiff. As addressed in the Court's opinion  
4 which is attached to our motion in limine, the Court  
5 takes issue with, A, it looks like it's a simulated  
6 study, it looks like they're using the same grade, but  
7 they're not. It looks like he is actually trying to  
8 show fiber release.

9 But if you look at those Tyndall studies of the  
10 backlighting, it lights all of the material, all of the  
11 dust. The jury will look at that and think that that is  
12 asbestos. That is not scientific, Your Honor. That is  
13 not a fiber release. Not to mention the fact that this  
14 was done for litigation. It is meant to show not how  
15 fiber releases, not what Mr. Ashworth -- Mr. Rollins  
16 actually may have taken home or what Mr. Ashworth took  
17 home which then got somehow transferred to the clothing  
18 which then somehow got transferred to Mr. Rollins. It  
19 is a deliberate opportunity to release as much dust as  
20 possible and capture it on film.

21 With that, I would submit, Your Honor, and I would  
22 thank Your Honor for allowing me to appear before you --

23 THE COURT: Yes, sir. I will not preclude Mr. Longo  
24 from -- expert Longo from testifying. This is a battle  
25 of the experts. We kind of mixed together two different

1 things that defense generally objects to about Longo.  
2 One is his bridge studies and how he counts. They have  
3 a certain -- he has a certain way of measuring. Their  
4 experts have another way of measuring. That also gets  
5 into this old business of the fact asbestos form verses  
6 cleavage and all that kind of thing that sometimes it's  
7 more dramatic in the talc cases than it is in this.

8 But fiber release has got many different approaches  
9 depending on whose expert you talk about. The other  
10 thing that's been mixed into this is the backlighting  
11 studies, do I have the darkroom and by backlighting and  
12 the show of release of fibers and the defendants think  
13 that is not accurate and that it lights up more than  
14 just the fibers and that's what you were referring to in  
15 the fiber backlighting.

16 Those objections go to the weight of the evidence  
17 and not to its admissibility. The scientist disagree  
18 very strongly in this area about what the -- what sort  
19 of scientific verification is appropriate in deciding  
20 about the nature or fibers, the release of asbestos  
21 fibers and their toxicity. Both sides will present  
22 viewpoints that differ strongly from each other.

23 I deny the request to exclude Dr. Longo just like I  
24 will deny most likely as I have before, the attempt to  
25 exclude defense experts. So at the present time though

1 I'm not ruling on anything but Longo and I deny the  
2 motion to exclude his testimony.

3 MR. ZOLLICOFFER: Thank you, Your Honor.

4 THE COURT: All right. Now, what else we got?

5 MS. MCVEY: Your Honor, I think that's -- the only  
6 thing that's left is plaintiff's omnibus and defense  
7 omnibus. Mr. Elliott and I were just talking, a lot of  
8 it I think we agree on. You've ruled on it many times.

9 THE COURT: All right. Well, let's get back to it.  
10 I weary of hearing these because I have ruled on them so  
11 many times that it seems to me people could get together  
12 in a group to disagree and put it on the record in a  
13 written form and not have me have to rule on these  
14 things every time.

15 I don't know another judge that deals with this who  
16 goes through these every single time and rules on them.  
17 So I guess I'm creating a monster of my own invention.

18 MS. MCVEY: Your Honor, the only one I think I need  
19 to argue and James can tell me if he disagrees with the  
20 other ones --

21 THE COURT: Let me find them first.

22 MS. MCVEY: Okay. I'm sorry. It's Tab 1 in the  
23 book.

24 THE COURT: I got plaintiff's --

25 MS. MCVEY: And, Your Honor, it feels --



1 THE COURT: All right. Let's just go down quickly  
2 and you tell me whether there's some kind of -- I mean  
3 --

4 MS. MCVEY: I think I can save some time. I don't  
5 think he has an objection until you get to Number 10.

6 THE COURT: All right. So collateral source; grant.  
7 Settlements with other defendants; grant. That's 2.  
8 3, American Tort System references; grant.

9 4, Effect of claims on insurance premiums; grant.

10 5, Any corporations that made, mined, or  
11 manufactured, sold or distributed are in bankruptcy;  
12 grant.

13 Any reference to any rulings by another court;  
14 grant.

15 Any questions of experts to define causation. They  
16 never have, but it does not preclude asking them about  
17 what their opinion on causation is; so, grant.

18 Felonies and convictions not involving dishonesty;  
19 grant.

20 9, past alcohol or drug use; grant.

21 Now we go to 10 which is tobacco use or smoking.

22 MS. MCVEY: That's right. And, Your Honor, this is  
23 Mr. Rollins did smoke, but he has mesothelioma.

24 THE COURT: That's correct. And mesothelioma is not  
25 caused by smoking.

1 MS. MCVEY: Yes, Your Honor. So we would --

2 THE COURT: And all they do is they talk about it in  
3 terms of the life expectancy.

4 MR. MCVEY: And, Your Honor, they have no expert  
5 testimony to connect the smoking to a shortened life  
6 expectancy in Mr. Rollins. So we argue that there's no  
7 relevance to this and it shouldn't come in.

8 THE COURT: Very good. All right. Mr. Elliott?

9 MR. ELLIOTT: That's true, Your Honor. If we have  
10 an expert that can testify about the lowering of the  
11 life expectancy, we believe it would be relevant and --

12 THE COURT: All right. Well, so far you haven't got  
13 any experts, so based on that I will grant the motion  
14 with respect to tobacco use. If you come up with an  
15 expert, we will revisit it.

16 All right. 11, Other non-life-threatening medical  
17 conditions.

18 MR. ELLIOTT: We don't have any.

19 MS. MCVEY: No objection. We can grant that.

20 THE COURT: All right. Granted.

21 12, Asbestos generally as the cause of Mr. Rollins's  
22 mesothelioma.

23 MS. MCVEY: Your Honor, this just goes to they have  
24 no other cause for Mr. Rollins's mesothelioma other than  
25 exposure to asbestos. There's no radiation testimony or

1 anything else like that. Or that this is idiopathic.

2 THE COURT: Right.

3 MS. MCVEY: So we would ask that they be precluded  
4 from speculating about some other cause.

5 THE COURT: All right. Mr. Elliott, you don't have  
6 anything on those lines, do you?

7 MR. ELLIOTT: We're fine with that, Your Honor. We  
8 agree.

9 THE COURT: Yes, sir.

10 MR. ELLIOTT: We have nothing to indicate that meso  
11 was caused by anything other than the asbestos.

12 THE COURT: All right. Very good. Granted.

13 13, Any mention of asbestos use being patriotic,  
14 "winning the war," this kind of thing. I have never  
15 seen anybody try that.

16 MS. MCVEY: I've seen it a couple of times, but not  
17 lately.

18 MR. ELLIOTT: Yeah, I've never done it.

19 THE COURT: All right. Granted.

20 14, Any mention of any asbestos-related lawsuit  
21 filed by the plaintiff. *Machin vs. Carus Corp.; Smith*  
22 *vs. Tiffany*; grant. All right.

23 MS. MCVEY: That's it.

24 MR. ELLIOTT: Our --

25 THE COURT: What's that?

1 MR. ELLIOTT: We had an omnibus one, too.

2 THE COURT: Yes. Just a second. Let me see if I  
3 can find it.

4 Where is defendant's omnibus in your notebook?

5 MS. MCVEY: I didn't have it.

6 MR. ELLIOTT: Number 10 in my motions if you have my  
7 notebook, Your Honor. Sorry.

8 THE COURT: If I did, I can't put my hand on it  
9 quickly, Mr. Elliott. Mr. Elliott, help me out here.  
10 I'm sorry, I can't find it right now. Although, I  
11 remember marking on something. Have you got a copy you  
12 can let me look at?

13 MR. ELLIOTT: It's going to be tough. Can I go back  
14 to one thing, Your Honor, with regard to mesothelioma  
15 and the cause of asbestos? I'm sorry. It was there --  
16 I apologize. The plaintiff's last item in their omnibus  
17 motion. We do have a Dr. Feingold who's issued a report  
18 and he's testified that Mr. Rollins's mesothelioma was  
19 idiopathic.

20 THE COURT: I will have to look at that. I am very,  
21 very leery of those kinds of pieces of evidence, so I  
22 will look at that. I'm not ruling on something I don't  
23 have in front of me, but I will certainly at this point  
24 not agree that that is something that's proper. I'll  
25 have to see it and decide.

1 MR. ELLIOTT: Fair enough. Though Counsel has just  
2 reminded me not to agree to something that I shouldn't  
3 have and I just want to make sure it was clear.

4 THE COURT: I got you. I got you. Don't worry,  
5 Mr. Elliott is very experienced, he knows what he's  
6 doing.

7 MR. ZOLLICOFFER: I'm aware, Your Honor. Thank you.

8 THE COURT: All right. On your motion in limine,  
9 Mr. Elliott, any chance you can throw it up here for me?

10 Theile, you haven't got it?

11 MS. MCVEY: I don't have it. I'm sure they filed  
12 it. I just may have missed it. So I don't -- but you  
13 can give -- why don't we give to it the Judge.

14 THE COURT: Thank you so much.

15 MR. ELLIOTT: We have electronically. Sorry. Thank  
16 you.

17 THE COURT: Okay. This is John Crane's motion in  
18 limine. The first is the use of asbestos victims or  
19 similar terms in front of a jury.

20 MR. ELLIOTT: Yes, Your Honor.

21 MS. MCVEY: Your Honor, we do use some terminology,  
22 you know, killed by asbestos, that kind of stuff. But I  
23 think we've been really cognisant in not using  
24 defamatory language and don't intend to do that, Your  
25 Honor.

1 THE COURT: What I cattle that is killed by  
2 asbestos, murdered by asbestos, or anything like that.  
3 But asbestos victims is ironically referred to sometimes  
4 in both the defense and the plaintiff's correspondence  
5 and literature and whatnot, so asbestos victims is --  
6 I'm not inclined to limit that one, Mr. Elliott.

7 MR. ELLIOTT: Yeah, Your Honor. I know that you've  
8 ruled that way in the past. We do find that it's  
9 prejudicial. But we also collaterally always bring up  
10 that we don't want them to testify -- or excuse me,  
11 argue about killing the people and all those sort --

12 THE COURT: I think it's perilously close to the  
13 Golden Rule because it tries to draw the jurors into  
14 that. I agree with you that shouldn't be done. And  
15 it's also more prejudicial and probative, so I will  
16 protect you on that big time. But I'm not going to  
17 knockout asbestos victims because it just appears in too  
18 much material.

19 MR. ELLIOTT: Thank you, Your Honor. Number two was  
20 lack of information. I don't think that they have any  
21 problem with that.

22 THE COURT: Yes. That's granted routinely.

23 MR. ELLIOTT: And amount of money spent defending  
24 the case, I think they --

25 THE COURT: I grant that big time. They don't ever

1 do that.

2 MR. HOLDER: The last sentence, Your Honor, says as  
3 well as those spent on experts and defendant's wealth.

4 THE COURT: Well, the defendant's worth you're going  
5 to refer to if you get to punitive damages. So nothing  
6 I rule about on this is going to preclude evidence with  
7 respect to worth if you got into the punitive damages  
8 phase and I always bifurcate these trials as you know.  
9 So...

10 MR. HOLDER: As well as the experts for bias.

11 THE COURT: Well, the experts --

12 MR. ELLIOTT: Well, just this case.

13 THE COURT: The experts can be asked about how much  
14 they're paid. He's not talking about that.

15 MR. ELLIOTT: I'm not. I'm taking --

16 THE COURT: He's talking about legal fees and I'm  
17 not going to let anybody ask about that.

18 MR. ELLIOTT: Well, I'm talking about how much John  
19 Crane spends on experts nationwide.

20 THE COURT: That's fine.

21 MS. MCVEY: That's fair.

22 THE COURT: That's fine. We're not going to allow  
23 that.

24 MR. ELLIOTT: That's what that was directed to.

25 MS. MCVEY: Your Honor, I think we do need go into

1 how much John Crane is paid a particular expert over the  
2 course of asbestos --

3 THE COURT: A particular expert that's testifying in  
4 the case is -- you're going to be able to ask about it.  
5 I just finished saying that. But what they're spending  
6 overall with all the other cases they have and all the  
7 other experts they have, no.

8 MR. ELLIOTT: Thank you, Your Honor.

9 THE COURT: I'm not going to allow that. It hasn't  
10 ever come up before. I've never seen y'all try to do  
11 that.

12 MR. ELLIOTT: Lack of corporate rep, I think we're  
13 going to have one.

14 MS. MCVEY: That's mute.

15 THE COURT: Well, 4, I'm just going on your list.  
16 Other cases involving counsel. We're not going to allow  
17 that. Never do.

18 5, Lack of corporate representative. The presence  
19 or absence is not going to be commented on. I grant  
20 that.

21 6, Precluding the writings or actions or knowledge  
22 of a trade association, I always deny that. That's part  
23 of knowledge. If you're a member of a trade association  
24 that's going to be allowed.

25 7, Trading places. Absolutely granted. We won't



1 allow any Golden Rule trading places type arguments to  
2 be made. Improper appeal to passions and sympathies of  
3 the jury.

4 8, Illnesses. Mentioning or referring to alleged  
5 exposure of family members to asbestos-containing  
6 products. What I'm not going to allow is just some kind  
7 of random other kind of illnesses of family members.  
8 But anything that has to do with the take-home part of  
9 this case is going to be allowed.

10 So if you can understand it's a qualified grant and  
11 qualified denied and the dividing line is evidence of  
12 take-home is going to be allowed. Other kind of family  
13 illnesses of other asbestos exposures that don't have  
14 anything to do with this case is not going to be  
15 allowed.

16 MS. MCVEY: Thank you, Your Honor.

17 THE COURT: All right. Illnesses, 8. Mentioning or  
18 referring to -- I just did that one.

19 9, Non-Party witnesses. Excludeing all nonparty  
20 witnesses. What I do is exclude people who are going to  
21 testify until they've testified. So that's what I'm  
22 going to do. Like I always do.

23 MS. MCVEY: Your Honor, except for the plaintiffs  
24 and their family.

25 THE COURT: The plaintiffs and the family get to be

1 there. They're an exception to that.

2 Absent witnesses. Making -- failure to call  
3 witnesses equally available to all parties.

4 MR. ELLIOTT: Right. So if we -- supposedly there's  
5 some witness that they think we should maybe has had  
6 testimony for us, but yet it's in the subpoena power of  
7 the plaintiff to bring them in just as well as it is for  
8 us. And they shouldn't be allowed to make a point that  
9 we didn't bring them in when it was just they had the  
10 same ability to bring the witness in as well.

11 THE COURT: I disagree with that. I would deny that  
12 motion. All right. Both sides get to say if the other  
13 side doesn't bring a witness that would be helpful to  
14 them. I would deny that. All right.

15 11, Probable testimony. Mentioning probable  
16 testimony of a witness who's absent or unavailable.  
17 What are we talking about there? Mr. Elliott?

18 MR. ELLIOTT: I was just reading over it, it's been  
19 a while since we talked about that one. If it's some  
20 witness -- and I don't have a specific example, Your  
21 Honor. But if it's some witness that we just can't get  
22 here by way of, you know, agreement or by way of  
23 subpoena or something along those lines then we would  
24 ask that information about that witness be excluded.

25 THE COURT: Ms. McVey?

1 MS. MCVEY: Your Honor, I don't know that we need to  
2 take that up right this second. I think we can deal  
3 with it if it comes --

4 THE COURT: I'll reserve a ruling on that. I don't  
5 really know in the abstract what we're talking about  
6 there, so 11 is reserved.

7 12, Depositions which JCI was not present. Let me  
8 tell you something. Both sides in these cases use all  
9 kinds of materials from old cases, depositions, you use  
10 them, half of the Smitty Montgomery stuff is depositions  
11 and statements in other cases. I mean, I'll look at  
12 specific things, but I'm not going to make some blanket  
13 exclusion just because you weren't present.

14 MR. ELLIOTT: That's fair, Your Honor. And it's got  
15 -- the reason this is becoming more and more important,  
16 and you're correct, sometimes I will use depositions,  
17 but it's becoming more and more -- and I'm not faulting  
18 anybody, but we just get long lists of witnesses from  
19 cases that I don't even know who they are and we weren't  
20 in the deposition --

21 THE COURT: It just doesn't happen much here. I  
22 know that happens in other places in the country. But  
23 generally here, people know what the list of witnesses  
24 is and pretty much know that the material that they seek  
25 to be -- sought to be presented is because of some

1 discovery that are some documents they have.

2 MR. ELLIOTT: I think it's fair to take it up on a  
3 case by case basis.

4 THE COURT: Yeah, I'm going to take it up if it  
5 really comes up.

6 13, Personal beliefs or opinions of counsel for the  
7 plaintiff; granted. We don't allow either side to state  
8 their personal beliefs or the lawyers.

9 14, Asbestos industry. Referring to JCI as an  
10 "asbestos company" and part of the "asbestos industry"

11 --

12 MR. ELLIOTT: Your Honor, we weren't an asbestos  
13 company. We made packing and gaskets and we shouldn't

14 --

15 THE COURT: Got it. I understand.

16 MS. MCVEY: Your Honor, I think that the literature  
17 deals with the asbestos industry. Some of which John  
18 Crane was a part of.

19 THE COURT: I'm going to deny this. We'll see what  
20 -- how it comes up in a specific context. But it's not  
21 just John Crane's bill that's going to be noted as  
22 something somebody in the asbestos industry -- I mean,  
23 asbestos company.

24 15, Improper or prejudicial comparisons. Making  
25 prejudice comparisons between JCI and Pintos, we don't

1 allow that. I grant that.

2 16, Concert of actions among defendants.

3 MS. MCVEY: Your Honor, I think that's -- again, I  
4 don't imagine it coming up.

5 THE COURT: I don't know what that is. We'll deal  
6 with it at the time, but there's -- sometimes there is  
7 concert facts particularly in these trade associations  
8 and that's going to come out. But -- so I'm not going  
9 to make some overall ruling that knocks out things I  
10 don't really understand. I'll reserve ruling on that.

11 MR. ELLIOTT: It does show a larger thing about  
12 conspiracy and there's some evidence of that which I  
13 don't think --

14 THE COURT: That doesn't happen. I don't allow a  
15 majority of terms to be used. And I -- please be  
16 assured, Mr. Elliott, you know that because you've been  
17 in this courtroom many times, I certainly wouldn't allow  
18 any reference to any -- even if there is some unity of  
19 action about it, I would not allow the use of the  
20 terminology like conspirators or anything that's got a  
21 majority of context to it, no.

22 19, Inflammatory photographs and videotapes.  
23 Everything that comes in in videotapes and photographs  
24 is presented to the other side first. That's the  
25 touchstone of this. We don't need to rule on that right

1 now. Y'all can identify what you think is really  
2 prejudicial and go from there. But I don't allow  
3 anything just come popping up before both sides have had  
4 a chance to look at it.

5 20, Pain and suffering. Statements other than the  
6 plaintiff or medical experts regarding mental condition  
7 of physical condition. The family sometimes makes  
8 observations about the suffering and they get to do  
9 that. I'm denying.

10 MR. ELLIOTT: Your Honor, if I may just one thing  
11 about this case in particular. Mr. Rollins is very  
12 young. I mean, he's very bright. He's very with it.  
13 And I think, my recollection is during -- well, we can  
14 probably deal with it when it comes up. But when he  
15 testifies, he sort of talks about the surgery and what  
16 it was and how it was done and he's not qualified to do  
17 that.

18 THE COURT: He can testify about his condition in  
19 any way that he chooses, Mr. Elliott. I'm not going to  
20 preclude that.

21 MR. ELLIOTT: But can he talk about how the surgery  
22 is conducted --

23 THE COURT: Yes. He can talk about anything that  
24 deals with his condition and the surgery. If he -- if  
25 you want to jump on him and cross examine him about the

1 accuracy of what he says, that's fine. But I'm not  
2 going to on the front end exclude it under the rubric  
3 that mental and physical condition is inadmissible  
4 hearsay. I disagree with that.

5 MR. ELLIOTT: Just for the record, I get worried  
6 about the inflammatory part of it when he puts it and  
7 he's not describing what actually happened.

8 THE COURT: Well, I understand all that. But I am  
9 denying that motion as it stands.

10 Religious beliefs. Testimony or any references to  
11 the party's religious beliefs; I grant that.

12 MS. MCVEY: Your Honor, the only caveat is and I'm  
13 not sure if it will even come up, but sometimes the  
14 plaintiffs testify about their faith getting them  
15 through what they've been through.

16 THE COURT: I know. And I've never seen a defendant  
17 object to that kind of thing. I think y'all know what  
18 the limits are, playing on religious -- they don't want  
19 you all to be saying things like, you know, god wants me  
20 to have some recovery in this because of what I suffered  
21 and I've never seen y'all do anything like that.

22 So -- but some kind of basic thing about getting  
23 through this because of a faith. There's nothing  
24 harmful about that. Just don't claim that the Almighty  
25 is taking sides in this dispute.

1 MS. MCVEY: I agree.

2 MR. ELLIOTT: Thank you, Your Honor.

3 THE COURT: 22, Sumner Simpson papers and documents  
4 from other companies.

5 MS. MCVEY: I don't know what that is.

6 THE COURT: Denied. Denied. Evidence of comp  
7 claims; denied. *Machin vs. Carus*.

8 24, Evidence or exhibits not included within the  
9 produced discovery or exhibit lists. I never allow  
10 evidence to be put in unless it's been shared with the  
11 other side. Sometimes these lists get updated as you  
12 get close to trial by defense or plaintiffs, so I'm not  
13 going to make any ruling like this that precludes. But  
14 I'm going to say this, I'll preclude anything that  
15 hasn't been shown to the other side and is popped on  
16 them in the middle of an examination. You deserve to  
17 have this material shown to you before it's being used  
18 so you can decide outside the presence of the jury what  
19 you want to do about it and I would protect both sides  
20 in that regard.

21 MR. ELLIOTT: Thank you, Your Honor.

22 MS. MCVEY: And we agree, absolutely one hundred  
23 percent and we'll agree to exchange everything ahead of  
24 time. The only thing that may come up sometimes there's  
25 impeachment information that comes up that we don't



1 realize we're going to need until they're on direct  
2 examination --

3 THE COURT: I understand. Impeachment is a little  
4 bit different thing because it's got limits in terms of  
5 what kind of documents can be used to impeach. And  
6 those documents, you know, we'll just have to be in  
7 battlefield circumstances and decide as the issue  
8 presents itself.

9 MR. ELLIOTT: I think the rules govern us on that.

10 THE COURT: Pretrial matters. Mentioning any action  
11 by the Court in pretrial; granted.

12 Post-trial matters. Mentioning or commenting that  
13 the judge has a right to alter verdict. That can't be  
14 done. I grant that motion.

15 This motion, meaning the motion in limine. No  
16 reference to the jury about that; granted.

17 The Reptile Theory. I'm tired of this Reptile  
18 Theory. I thank the lord the Reptile Theory and other  
19 things like that that violate the Golden Rule. Too bad  
20 for that guy that wrote that article in some plaintiff's  
21 literature, it was a number of years ago about Reptile  
22 Theory. I've never seen it used in my courtroom. I  
23 grant that motion.

24 Any reference to the wealth, corporate size or  
25 assets of JCI that suggest to the jury that it ought to

1 compare the relative wealth of plaintiff to JCI. I  
2 grant that. I make a specific instruction to the jury  
3 that everybody stands before the jury on an equal  
4 footing. That is not going to prevent the plaintiff  
5 from projecting size, corporate size, assets in the  
6 proper context.

7 Two contexts that occur to me are, one, punitive  
8 damages; and, two, what resources can be brought to bear  
9 to borne. Can't say we're too small to -- it was too  
10 expensive for us to warn stuff like that. You can't do  
11 that and they can't beat you over the head with your  
12 size and suggest to the jury that they ought to take  
13 that into account.

14 Suggestion -- 30, that the plaintiff was exposed to  
15 crocidolite asbestos fibers from his work with products.  
16 I don't ever grant that kind of stuff on the front end.  
17 That's going to depend on what the experts say at the  
18 time. But I'm not going to grant this on the front end.  
19 This is the good asbestos and the bad asbestos argument.  
20 That's something for the experts to, you know, the blue  
21 asbestos and the other kind of asbestos. I'm not going  
22 to rule on that in a pretrial context like this. That  
23 is something that will be argued at the time. So I deny  
24 the motion at the present moment.

25 MR. ELLIOTT: If I may. The only caveat is bringing

1 that before it comes up through the experts or what have  
2 you. I know --

3 THE COURT: (Talking over Mr. Elliott) -- that's a  
4 prejudicial thing. Go in front of the jury before we  
5 have a chance to iron them out.

6 MR. ELLIOTT: Thank you.

7 THE COURT: That will be up to what happens when it  
8 presents itself.

9 MR. ELLIOTT: Thank you.

10 THE COURT: 31, any reference or arguments that the  
11 jury should attempt to send the message. We don't let  
12 them send messages. That will be granted.

13 None of the rest of this stuff I think I have to  
14 rule on; isn't that right?

15 MR. ELLIOTT: That is true, Your Honor.

16 THE COURT: Mr. Elliott, let me hand you back this  
17 material with my thanks for you allowing me to look at  
18 it. I probable got it a little mixed up in here now.  
19 You can keep it. I got it online.

20 THE COURT: Now, what else we got?

21 MS. MCVEY: Your Honor, that totally --

22 MR. ELLIOTT: It's going to be quick and I just have  
23 to do it because I forgot to. Your Honor, James Elliott  
24 for the record. We filed a motion in limine with Number  
25 4, we skipped over it. It was the motion we filed on

1 the paths about excludeing information in John Crane  
2 catalogs as to products that not -- that are not at  
3 issue in this case. Gad packing and maybe gaskets,  
4 those are the only products that should be at issue.  
5 Nothing else in our catalogs has nothing to do with  
6 Mr. Rollins or Mr. Ashworth should be put into evidence.  
7 And I rely on my papers in that argument.

8 THE COURT: Right.

9 MS. MCVEY: Your Honor, I think we need to rule on  
10 that on a case by case basis. But a lot of what's in  
11 their catalog goes to knowledge and notice and  
12 information.

13 THE COURT: I understand. I've always allowed the  
14 catalogs in generally for knowledge. But if we want to  
15 revisit some specific document as it comes up, we can.  
16 But I will deny that motion as it stands right now.

17 MS. MCVEY: Thank you, Your Honor.

18 THE COURT: All right. What else?

19 MS. MCVEY: I think that resolves -- that's Rollins  
20 and Ashworth are now taken care of.

21 THE COURT: Now, we haven't gotten to J&J cases yet,  
22 Mr. Swett.

23 MS. MCVEY: Right. So what's on for the rest of the  
24 day is San Nicolas. And what Louis and I and national  
25 counsel were able to do last night and I'm going to hand

1       it up to you -- let me ask you this, do you want to take  
2       a break?

3           THE COURT: Well, I am, but I don't want to have a  
4       little forewarning so as I eat my sandwich I can look at  
5       what you all are proposing to me.

6           MS. MCVEY: Perfect. So what we did is we went  
7       through all the plaintiff and defendant's motion in  
8       limine. And what -- we made notes on the indexes.  
9       We've essentially agreed on everything -- nothing will  
10      need to be ruled on before openings. We've agreed.

11          There are a couple of things that may come up  
12      depending on who's actually coming and not. But I think  
13      you can rule on that the day before or the morning of  
14      like we normally do. So in other words, for motions in  
15      limine, there's nothing that needs to be heard today. I  
16      think we've agreed on it.

17          THE COURT: All right. Of course, you do have --  
18      where is my cheat sheet. You do have a motion to  
19      continue by J&J?

20          MR. HERNS: Yes, ma'am.

21          THE COURT: You've got the motion to consolidate by  
22      Mr. Swett?

23          MR. SWETT: And that may be all, Your Honor.

24          MS. MCVEY: And that's it.

25          THE COURT: Yeah. This is the motion to continue

1 trial. Thank you very much, Mr. HERNs. Okay.

2 Y'all, it's a quarter of one, I think we should take  
3 a break. Just a second. Don't all jump at one time.  
4 I'm not going to dismiss you until everybody gets a  
5 chance to say what they are burning to say. But let's  
6 talk about -- how about two o'clock.

7 MS. MCVEY: That's fine.

8 THE COURT: It doesn't sound like we've got -- and,  
9 you know, somebody has to go first and somebody gets  
10 stuck in going last. And, Mr. HERNs, you're coming from  
11 afar and I hate that you've got to have to listen to  
12 everything else before you were heard. But --

13 MR. HERNs: It's quite all right, Your Honor.

14 THE COURT: We'll treat your matter with expedition  
15 as I always try to do. Now, before I get gone here --  
16 back there, yes, sir.

17 MR. MOSEN: Your Honor, Ben Mosen (phonetic) here  
18 for SOS International. Just to clarify, this is in the  
19 Ashworth case. We have a consent order of dismissal  
20 that's pending before the Court.

21 THE COURT: Good. You hand it up here and I'll sign  
22 it.

23 (The Court signs the order)

24 THE COURT: That's one. Then, Mr. Swett.

25 MR. SWETT: Yes, Your Honor. That's all. I was

1 just standing up. I think I gave you the briefing  
2 earlier this morning on our motion to -- I think it may  
3 be over to the left over there.

4 THE COURT: Yes. Okay. Very good. Hang on for one  
5 minute. I'll give this to you right now.

6 What else, Mr. Elliott?

7 MR. ELLIOTT: Question. Are we still trying our  
8 case March 23rd in Hampton County?

9 THE COURT: Oh, let's talk about that for a minute  
10 before you get gone. Here's what has happened. As you  
11 know we'll now be trying a case here in Richland County;  
12 right. And the 23rd, we have had this coronavirus issue  
13 come up with regard to Richland County courthouse that  
14 you all are aware of.

15 At this point, it is a minor issue in the sense that  
16 nothing is minor about this and I don't mean to make  
17 light of it at all. But the Chief Justice has looked at  
18 this situation in detail and has had a meeting with the  
19 various chief judges for administrative purposes for  
20 General Sessions, Common Pleas, Family, and me asbestos  
21 to talk about how we move forward.

22 The biggest thing he is concerned about is jury  
23 trials. Because -- and access to the courthouse is also  
24 being limited at this time. Nonjury matters are being  
25 allowed to take place. And people that are involved in

1 those proceedings, lawyers, staff, et cetera are allowed  
2 to attend. He wants a 14 day period based on the issue  
3 of possible no exposure here in this courthouse, but  
4 exposure of someone who was in this courthouse  
5 potentially to someone who may or may not end up being  
6 positively tested.

7 So the 14 day window would go -- would be lifted on  
8 March 26th. At the moment, what I have chosen to do and  
9 this is in consultation with the Chief and the judges  
10 and with the clerk's office here is our venire has  
11 already been notified and they were scheduled to be here  
12 on March 23rd. I will delay the trial until March 26th  
13 and the venire will report on March 26th and a jury will  
14 be impaneled on March 26th. And then -- and we will  
15 discuss at that time how to stage those days in after  
16 that to deal with the trial if we need to.

17 I think that maybe this matter will be composed  
18 before that time. And I'll be honest with you, what I  
19 am very much hoping is that I will be able to  
20 concentrate my efforts on the other jury trial that is  
21 scheduled for that very same period of time which is the  
22 Johnson & Johnson case. And it is scheduled for here in  
23 Richland. And the J&J case is going to be discussed in  
24 terms of the motion to continue.

25 So I say all that by means of saying this to you,



1 Mr. Elliott. I want to wait and make determinations  
2 about whether I have any jury trials here based on what  
3 happens this afternoon with Mr. HERN'S motion to  
4 continue the Johnson & Johnson case. So I'm sorry to  
5 not give you a completely definite answer at this  
6 moment.

7 MS. MCVEY: Your Honor, just a reminder that Rollins  
8 and Ashworth are pending in Hampton County.

9 THE COURT: Oh, that's right. That's right.  
10 They're Hampton. Let me reverse course on that and just  
11 say this. We are not able to try the case in Hampton.  
12 So this case will be rescheduled for a later time. And  
13 part of it has to do with the health crisis and part of  
14 it has to do with some other issues in Hampton.

15 So we are not able to try the case in Hampton, and I  
16 frankly, just did not want to announce that until we  
17 teed this thing up and gotten it as close to resolution  
18 as we can. So you will pardon me that I didn't  
19 broadcast that to the world. But I have checked again  
20 with Hampton as of yesterday and for reasons that I deem  
21 sufficient, we will postpone the trial of the Rollins  
22 case.

23 And that doesn't mean to put any pressure on you to  
24 settle or not settle or anything else, Mr. Elliott. We  
25 will give you and the plaintiff a full trial on this

1 matter at another time and will consult with you all to  
2 jointly make a decision on what you wish me to ask  
3 Hampton County for by way of a rescheduling. But they  
4 got some issues to deal with.

5 MS. MCVEY: And, Your Honor, we would just take the  
6 earliest trial date that you can make work --

7 THE COURT: Exactly. And they are willing to  
8 consider that. I have talked with the clerk there and  
9 they are apologetic about the issue and willing to work  
10 with us, so I think we can get a fairly soon time. And  
11 I will get a menu of times and communicate them to you  
12 all as soon as I have a chance. And then you all can  
13 decide and corporate counsel and so forth can decide how  
14 y'all want to deal with when you can get your experts in  
15 and that kind of thing.

16 MS. MCVEY: Yes, ma'am. Thank you so much.

17 THE COURT: So, again, the trial issue resolves,  
18 Ms. McVey and Mr. Hearn, to y'all's case. And we will  
19 try to get all other matters teed up and then we will  
20 tee up this motion to continue. And please let me  
21 assure you that I don't have any preconceived  
22 disposition in this regard. I want to hear fully from  
23 everybody about the considerations. Because it don't  
24 just involve this courthouse, they involve issues of  
25 witnesses and all these other things and I understand

1 that. And I want to completely hear you all before I  
2 make any kind of ruling on that.

3 MS. MCVEY: Yes, ma'am.

4 THE COURT: So with that said, and it also has to do  
5 with whether we consolidate this case and Mr. Swett's  
6 case. So there are a number of considerations that are  
7 at play here that need to be discussed this afternoon.  
8 That said, be back here at five minutes after two.

9 MS. MCVEY: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (Court was in recess)

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1 STATE OF SOUTH CAROLINA )  
 2 ) IN THE COURT OF  
 3 COUNTY OF RICHLAND ) COMMON PLEAS  
 4  
 5 BARBARA SAN NICOLAS, )  
 6 Plaintiff, )  
 7 Vs ) CASE NO. 2017-CP-40-05764  
 8 BORG-WARNER MORSE )  
 9 TEC LLC, et al, )  
 10 Defendants )

11  
 12 MARCH 13, 2020  
 13 COLUMBIA, SOUTH CAROLINA  
 14

15 HONORABLE JEAN TOAL, JUDGE  
 16

17 A P P E A R A N C E S :  
 18 BY: THEILE B. MCVEY, ESQUIRE  
 19 Attorney for the Plaintiff  
 20 BY: LOUIS P. HERNS, ESQUIRE  
 21 Attorney for the Defendant Johnson & Johnson  
 22

23 KATHERINE A. SPIRES  
 24 REGISTERED PROFESSIONAL REPORTER  
 25

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STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF  
 COUNTY OF CHARLESTON ) COMMON PLEAS  
 TERRAN DUPREE, )  
 Plaintiff, )  
 Vs ) CASE NO. 2018-CP-10-2899  
 JOHNSON & JOHNSON, et al,) )  
Defendants )

MARCH 13, 2020  
 COLUMBIA, SOUTH CAROLINA

HONORABLE JEAN TOAL, JUDGE

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

BY: W. CHRISTOPHER SWEET, ESQUIRE

Attorney for the Plaintiff

BY: LOUIS P. HERNS, ESQUIRE

Attorney for the Defendants

KATHERINE A. SPIRES  
 REGISTERED PROFESSIONAL REPORTER

1 STATE OF SOUTH CAROLINA )  
 2 ) IN THE COURT OF  
 3 COUNTY OF CHARLESTON ) COMMON PLEAS  
 4  
 5 MARY MARGARET DEVEY, )  
 6 Individually and as Personal)  
 7 Representative of the Estate)  
 8 of ROBERT L. DEVEY, )  
 9 Plaintiffs, )  
 10 Vs ) CASE NO. 2018-CP-10-710  
 11 JOHNSON & JOHNSON, et al, )  
 12 Defendants )

13  
 14 MARCH 13, 2020  
 15 COLUMBIA, SOUTH CAROLINA  
 16

17 HONORABLE JEAN TOAL, JUDGE

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

19 BY: W. CHRISTOPHER SWEET, ESQUIRE

20 Attorney for the Plaintiff

21 BY: LOUIS P. HERNS, ESQUIRE

22 Attorney for the Defendants  
 23

24 KATHERINE A. SPIRES

25 REGISTERED PROFESSIONAL REPORTER

1 THE COURT: Let me place upon the record that the  
2 first matter to be considered this afternoon is in the  
3 case of San Nicolas against Borg-Warner Morse Tec LLC  
4 and many others, 2017-CP-40-05764. This is defendant  
5 Johnson & Johnson and Johnson & Johnson Consumer Inc.'s  
6 motion to continue the trial. Mr. HERNs?

7 MR. HERNs: May it please the Court, Louis HERNs on  
8 behalf of Johnson & Johnson and Johnson & Johnson  
9 Consumer Inc. I appreciate the opportunity to address  
10 Your Honor and would start off by saying the coronavirus  
11 is the pandemic. It is very serious and we need to take  
12 it serious.

13 The Charleston paper had a picture of a tent outside  
14 of the Lexington Medical Center in West Columbia where  
15 it says the tent is getting ready for people with the  
16 virus to come to the hospital as a protection means for  
17 the hospital.

18 The Wall Street Journal today had a whole section  
19 just totally addressing how to navigate the coronavirus.  
20 They are seeing it as important and it is important and  
21 needs to be treated with respect and reason.

22 There are two reasons why I filed the motion. The  
23 first is the health concern for all that would be in the  
24 courtroom during the trial of the case. That includes  
25 the jury venire, the ultimate jury and the alternates,

1 the bailiffs, the lawyers, the plaintiff, Your Honor,  
2 Hali, court reporter, everybody that would be in here  
3 including the custodial staff that takes care of once  
4 we're gone.

5 The virus is real and it can make one sick and in  
6 some instances it can kill. So far globally there have  
7 been 5,000 deaths due to the virus.

8 Several that would be in the courtroom, myself  
9 included, are in what's called the high risk category.  
10 I get that because I'm over 60 and I'm somewhat  
11 overweight. The older you get, the more risk you have.  
12 So this should not be taken lightly. It should be  
13 addressed with prudence as well as with reasonable and  
14 rational thinking by all.

15 The federal authorities, doctors, and specialists  
16 have stated that we should, one, avoid close contact  
17 with large numbers of people in confined spaces. And,  
18 two, practice social distancing which means stay six  
19 feet or more away from one another. Those recommended  
20 practices could not be implemented in a courtroom  
21 setting such as this. Particularly the social  
22 distancing for a jury when you put 15 or more people in  
23 a jury room behind these doors.

24 The second reason is it would not permit the parties  
25 to have a fair trial. Why is that? The jury would not



1 be focusing on the testimony of the witness on the  
2 witness stand. The jury would be focusing on, ooh, that  
3 person just coughed. Or that person just sneezed. Or  
4 that person just blew their nose. Do they have the  
5 coronavirus? Why am in here? There's a pandemic of  
6 virus spreading out there and I shouldn't be in this  
7 enclosed space. So they wouldn't pay attention to the  
8 testimony of the witnesses. No telling what the verdict  
9 would be, but I promise you it would not be based on the  
10 testimony that is elicited.

11 Expert witnesses will need to attempt to fly from  
12 all over the country. Plaintiffs have experts from  
13 throughout the United States. The defendants have  
14 experts from the -- throughout the United States.

15 Dr. Moolgavkar lives in Washington State. It's in a  
16 state of emergency due to 457 confirmed cases and a  
17 confirmed 31 deaths due to the virus. There's a  
18 plaintiff's expert expected to fly in from New York.  
19 New York has 328 confirmed cases of coronavirus. Dr.  
20 Waldstreicher is at the Stamford University Medical  
21 Center on their pulmonary staff. I have been advised  
22 that he has been told that he is not to fly out of the  
23 state of Texas, not to fly from his hometown until  
24 further notice. So he would need to appear,  
25 unfortunately, by video conference rather than flying

1 here. And there's the extreme potential that other  
2 expert witnesses would be prohibited from flying here to  
3 give their testimony.

4 As you say, this is a battle of experts and the best  
5 way to get the expert's opinion is to get them here so  
6 the jury can see them and hear them in person.

7 The one nasty component about this virus is, I could  
8 have it right now, not have a fever, not have a cough,  
9 not feel bad, and for the next 14 days infect everybody  
10 that I come into. That's just an unfortunate trait that  
11 this virus has. And so for 14 days, the person with no  
12 symptoms, no headache, no fever could go around  
13 infecting everyone he comes into contact with or she  
14 comes into contact with.

15 What are others doing? The Master's Golf Tournament  
16 has been postponed. Clemson and USC have cancelled all  
17 classes -- in person classes except for online classes  
18 after their extended spring break. Canada's House of  
19 Commons will adjourn today until April 20th. The SEC,  
20 men's basketball tournament and women's basketball  
21 tournament has been cancelled and all spring sports have  
22 been suspended.

23 Kentucky, Michigan, Ohio, and Maryland have shut all  
24 schools from K-1 to the 12th grade. The ACC has  
25 suspended all athletic activities. Theme parks like

1 Disney World, Disneyland, Universal Studios are closed  
2 until further notice. EWTN has advised me that,  
3 listening to it, that all masses in Seattle have been  
4 cancelled until further notice.

5 There will be no audience at Sunday's democratic  
6 debate. The NCAA has cancelled the men's basketball  
7 tournament. It just will not take place due to the  
8 risk.

9 President Trump is cancelling campaign events.  
10 Major league baseball has postponed its start of its  
11 season for two weeks. So it will now start mid-April.  
12 Major league baseball spring training games have all  
13 been cancelled. The Carolina Cup has been cancelled.

14 There are to be no live audiences at TV shows. St.  
15 Patrick's Day weekend events in Charleston, Columbia,  
16 and Greenville, and everywhere else have been cancelled.  
17 The production of TV shows such as Grey's Anatomy,  
18 Survivor, and others have all been halted. Don't bring  
19 the actors in. Don't run the risk. The St. Patrick's  
20 Day parade in Charleston has been cancelled. The  
21 National Hockey League has suspended its remaining  
22 games.

23 All travels from Europe per the President except for  
24 the UK is suspended. Golf, The Players Championship  
25 that they thought they would play with just the players

1 that now has been cancelled. The MBA has suspended its  
2 season. The NFL has cancelled its annual league  
3 meeting. Princes Cruise line has suspended its  
4 operations for two months. Its 18 ships will not sail.

5 The XFL has suspended its season. The tennis ATP  
6 Tour has shutdown for six weeks. They'll be no Volvo  
7 classic tennis tournament in Charleston. Major law  
8 firms, large law firms throughout the country have  
9 suspended travels for their associates, partners, and  
10 staff. Broadway in New York is now dark. There'll be  
11 no more plays. Major league soccer has suspended the  
12 season and the premier league in Europe has also  
13 suspended its season.

14 These are all prudent, reasonable, and rational  
15 actions to be taken given the crisis that the country is  
16 facing. We are facing a public health emergency and  
17 smart rational action needs to be taken.

18 Chief Justice Beatty at 3:40 yesterday sent out an  
19 Order stating that all jury trials in Richland County  
20 are suspended until further notice.

21 "It is ordered that until subsequent order by the  
22 Chief Justice, all jury trials in the Richland County  
23 Courthouse are cancelled."

24 The Chief Justice exhibited leadership as well as  
25 prudent, reasonable, and rational thinking and action in

1 taking such action.

2 I was later advised that the San Nicolas trial was  
3 still going to go forward, but not on its scheduled  
4 start day of March 23rd, but it will start three days  
5 later on March 26th. I'm not really sure what is hoped  
6 to be gained from that since we're facing a public  
7 health crisis, but that is what we've been told.

8 As I noted, we are facing a public health crisis.  
9 We are facing a pandemic, a virus that attacks the  
10 health and well-being of all the citizens of the country  
11 that are exposed to it. Other entities throughout the  
12 country have undertaken actions that are prudent,  
13 reasonable, and rational. Those actions are wise and  
14 well-founded given the recommendations of the federal  
15 authorities, the specialists, and the doctors.

16 Based on arguments and the filed opposition, I  
17 request that you do the same, exercise prudence, reason,  
18 and rational thinking and continue the San Nicolas case  
19 until the May trial term. The rest of the country is  
20 not panicking, but are using common sense and following  
21 the reasonable advice of -- advice and recommendations  
22 of qualified health officials and postponing events to  
23 significantly avoid a real public health threat. Thank  
24 you.

25 THE COURT: Ms. McVey?

1 MS. MCVEY: Thank you, Your Honor. Theile McVey for  
2 Ms. San Nicolas. As a reminder, Ms. San Nicolas is a  
3 living plaintiff and she has mesothelioma. If this  
4 trial is to be continued, it likely will be -- mean that  
5 she does not see her day in court. I know that you are  
6 not going to do anything to put any of us or any juror  
7 at harms way. That you will be reasoned and thoughtful  
8 and evaluative. I think that's clear to everybody here.

9 What I would say to you is at this point there is no  
10 need to cancel this trial or to postpone it. That if  
11 the courthouse reopens on March 26th, it will reopen to  
12 jury trials because the Chief Justice and you both feel  
13 like this can go forward safely and for everyone. We  
14 should all be concerned with jurors in how they're  
15 feeling about the situation, but we'll have a big enough  
16 pool, I think, to do that. And I would like the attempt  
17 to try. Because the alternative is that Ms. San Nicolas  
18 probably will not live to see her day in court. The  
19 rest of the docket is booked through 2020 in front of  
20 you. And I'm concerned that without this trial date she  
21 won't live to see it.

22 So we would ask if the need arises and that we can't  
23 do this safely that you of course will have to continue  
24 the case. But now is not that day and we'd ask you not  
25 to deny their motion to continue.

1 THE COURT: Very good. Here's what I propose to do.  
2 I've heard the motion, I propose to go through and deal  
3 with the rest of the motions that we've got.

4 MS. MCVEY: Your Honor, we've actually agreed on  
5 those.

6 THE COURT: That's what I -- before I make any  
7 determination on this, I want to put upon the record  
8 where we are and then I'll decide what I'm going to do.

9 MS. MCVEY: Okay.

10 THE COURT: So --

11 MS. MCVEY: Your Honor, I think I handed up a newer  
12 -- right here. Kind of shows you what we've agreed to  
13 do.

14 THE COURT: All right. Ms. McVey and Mr. HERNs, I  
15 see here two documents. The first of which is  
16 plaintiff's motions in limine index. And in the  
17 columns, you have the motions numbered and then you have  
18 argue, defer, stipulate, withdraw. And I see from this  
19 table that all of these motions have been marked either  
20 to defer, to stipulate, or to withdraw for plaintiffs;  
21 is that correct?

22 MS. MCVEY: That's correct.

23 THE COURT: What I would propose to do is take this  
24 document, mark it as Court's Exhibit Number One and put  
25 -- place it in evidence and then we'll have a permanent

1 memorial of what has been agreed to.

2 MS. MCVEY: That's a great idea. And I think the  
3 same thing with defendant's.

4 THE COURT: And, Mr. HERNs, just kind of project the  
5 record out to this, I have defendant's motion in limine  
6 index and, similarly, there are -- there is a column for  
7 each of the numbered motions in limine. In your case 18  
8 and they are either marked argued, defer, stipulate, or  
9 withdraw. None of the items are marked argument at this  
10 time. They're all marked as either defer or they've  
11 been stipulated with some notations as to what the  
12 stipulation is. And in one case, withdrawn. Am I  
13 correct about that?

14 MR. HERNs: That is correct, Your Honor.

15 THE COURT: Very good. I will place this in the  
16 record as Court's Exhibit Number Two and that will  
17 memorialize where we stand with respect to the motions  
18 in limine for each side.

19 (WHEREUPON, Court's Exhibit Number 1 and 2 was  
20 marked and entered)

21 MR. HERNs: Louis HERNs, again. We still have not  
22 been able to figure out how to get a non South Carolina  
23 Judicial court reporter, and your court --

24 MS. MCVEY: I think we have.

25 THE COURT: Yes, I can order that.



1 MR. HERNS: Okay.

2 THE COURT: I can order that.

3 MS. MCVEY: I have --

4 THE COURT: I can deal with that. And y'all just  
5 have a seat and let me tell you what your options are as  
6 I see them. I have spoken with Chief Justice Beatty  
7 along with my sisters who are the chief judge for the  
8 administrative purposes General Sessions, chief judge  
9 for administrative purposes Common Pleas, and chief  
10 judge for administrative purposes Family Court. And the  
11 three -- those three judges and myself were in  
12 conversation with the Chief about how to proceed with  
13 these matters.

14 As you might imagine, the order that you saw to  
15 begin with talks about nonjury matters proceeding, but  
16 the whole Family Court is nonjury and some of those  
17 gatherings involve, you know, just on routine motions  
18 can involve 300 people. So there have been some  
19 flexibility given to each of us who are chief judges of  
20 any book of business so to speak the ability to make  
21 sensible orders and directions with respect to the cases  
22 we're handling.

23 And with respect to such things as the admission of  
24 non court reporters that the parties have agreed upon  
25 with respect to such matters as staff and other

1 interested individuals in the nonjury setting. We  
2 administrative judges have the complete ability to deal  
3 with that.

4 With respect to the trial, the request that Justice  
5 Beatty had of us yesterday was to provide a 14-day  
6 window because the crisis in this courthouse was focused  
7 around one particular situation and he wanted a 14-day  
8 period during which nonjury matters would take place  
9 along the lines I described, but jury trials would not  
10 take place and full admission of the general public to  
11 the courtroom be -- courthouse would be curtailed.

12 It was determined that March the 26th would be  
13 outside the 14-day window, and, therefore, could be a  
14 time when this case could be tried. And a large venire  
15 that's been summoned as is the case in the asbestos  
16 docket, 300, I think. We generally get a yield of about  
17 200 plus on that. And from that venire qualifications,  
18 dismissals, disqualifications, and finally the selection  
19 of the jury would be made. Pretty familiar territory  
20 for all of us.

21 That is what we've discussed yesterday. But I  
22 explained to my fellow judges and to the Chief that I  
23 had a motion pending to continue on this case and I  
24 wanted to set up the mechanism for what would happen if  
25 the case proceeded to jury trial, but I wanted to fully

1 hear this motion and then I would decide what to do. So  
2 that's where we stand right now.

3 The landscape has continued to change since I spoke  
4 with the Chief yesterday and has continued to change  
5 most of this morning. I am influenced by a couple of  
6 things. The Center for Disease Control, the CDC, has  
7 recommended that attention be paid to limiting  
8 gatherings of older citizens. People in excess of 65 to  
9 70 years old and that impacts my thinking.

10 I am very mindful of what Ms. McVey has discussed  
11 about Ms. San Nicolas. But there are two ways of  
12 looking at that situation. She's a living plaintiff and  
13 deserves if at all possible to have her case heard  
14 during her lifetime and I am most sympathetic to that.  
15 She is also in her mid-70s and has other health issues  
16 besides the very, but nothing like the serious as the  
17 issue, of course, of mesothelioma. But that has  
18 compromised her health situation such that there may be  
19 some questions as to how she would fail if she attended  
20 this trial in a setting that would include certainly a  
21 number of persons in excess of 50 when you consider  
22 lawyers, court personnel, witnesses, and the like. So  
23 that consideration is very much on my mind.

24 I'm not so concerned about expert witnesses because  
25 we have plenty of trials in which experts testimony can

1 be taken live video. I've had that many times in these  
2 asbestos trials or in a recorded video that's played for  
3 the jury. And I don't see any compromise in due process  
4 by using that device. It's very familiar and it's been  
5 used many times before.

6 But the other thing that very much concerns me that  
7 may well compromise due process is the juries' concern  
8 and how that would be manifest. In a setting where I  
9 try to move these trials along, you know, I was told  
10 when I started trying asbestos cases that they took six  
11 weeks to try and so forth, I've never had an asbestos  
12 case take more than three weeks to try and that includes  
13 the several Johnson & Johnson cases where the J&J and  
14 J&J Consumer Inc. is the defendant. I've managed to try  
15 these cases in as a little as a week and a half and as  
16 much as two and a half, approaching three weeks when I  
17 had multiple defendants left.

18 This is essentially a one defendant case with a  
19 landscape of pattern that's familiar to all of us in  
20 this room as to how these cases are tried. So the case,  
21 I don't think would take anything like three weeks to  
22 try. But I am very concerned about what -- how jurors  
23 would react the longer the case took to try and how much  
24 their attention would be diverted from the issues in the  
25 case by their concerns about their own health that their

1 families' health and what they might be bringing back to  
2 their families.

3 So although yesterday my attitude was very  
4 different. I will tell you now that I will postpone  
5 this case. I don't think I can wisely do anything else.  
6 If a decision I made were the vector for even so much as  
7 one person being infected by the coronavirus because of  
8 their attendance at these proceedings as a litigant, as  
9 a lawyer, as a staff personnel, as a personnel of the  
10 court, I would have a hard time looking myself in the  
11 mirror if I were to handmade such an occurrence.

12 So I am going to postpone this trial. And I will  
13 not set a new date for the trial until we receive  
14 further clarification as to what the situation is  
15 generally, but much more importantly since Richland  
16 County is in a little different situation, what the  
17 situation is with respect to Richland County and this  
18 courthouse where this case can be tried.

19 Now what I would like to do is before we conclude  
20 today to hear the motions to consolidate Dupree and  
21 Devey. That is the case that would be tried or cases  
22 that would be tried in November. So the situation is  
23 not as acute in terms of timing, but consolidation issue  
24 is one that ought to be heard and decided one way or  
25 another and I intend to do that today.

1           Now, before I leave this issue, let me see what  
2 other issues are presented by my postponement of this  
3 trial.

4           MS. MCVEY: You know, absolutely understand your  
5 ruling, of course, Your Honor, and think it's  
6 thoughtful. Our concern is we would like to be able --  
7 I know you can't set a date right now, but to strive to  
8 get this case heard in 2020. Even if it's not in one of  
9 the regular scheduled blocks. Because it's a Johnson &  
10 Johnson case, you know, it will take up a whole other  
11 term of court.

12           THE COURT: Well, I think we're all going to have to  
13 be flexible about the block scheduling that I have done  
14 for this year. In the light of this issue we've got  
15 right now with coronavirus, but I will assure you that  
16 rescheduling of the San Nicolas case will be top  
17 priority. And I say that for a couple of reasons.  
18 Number one, it's a living mesothelioma plaintiff. But,  
19 number two, the San Nicolas's trial has gotten to the  
20 brink several times before and been differed for other  
21 reasons. And it is now teed up in a very good way for  
22 trial where I think we've spent the time that was  
23 necessary to get everything we need to get done, done.

24           MS. MCVEY: Yes, ma'am.

25           THE COURT: In that light, it's ready to go. And

1 the biggest thing we would have is a mutually agreeable  
2 time based on experts. But I will tell you that I will  
3 be trying to push the parties to utilize video -- live  
4 vide or video depositions where possible. As an  
5 alternative to postponing because one witness or another  
6 witness can't be there.

7 In other words, I'll ask for cooperation on both  
8 sides to see how we navigate the issue of live verses  
9 non live. The biggest testimony that comes in these  
10 cases is of course from the experts. That's the heart  
11 and soul of the case, that and the cooperate  
12 representative.

13 MS. MCVEY: Thank you. I appreciate it.

14 MR. HERNS: Your Honor, Louis Herns. As much  
15 advance notice would be very much appreciated because we  
16 have to get national trial teams assigned as well as set  
17 up the experts.

18 THE COURT: Sure. I understand and I think the same  
19 is true of the plaintiff. So all parties need some  
20 certainty about this and I think the next few weeks are  
21 going to be pretty crucial. Because I've seen exactly  
22 what happens in South Carolina. But I assure both of  
23 you that this -- the matter of when to set a date will  
24 receive top priority. And I've been assured by the  
25 Chief and Court Administration that they will work with

1 me to be sure that we get this thing as much lead time  
2 as we possibly can.

3 MS. MCVEY: Thank you, Your Honor.

4 MR. HERNS: Thank you, Your Honor.

5 THE COURT: All right. Now, is that -- have we  
6 encompassed everything that needs to be done with San  
7 Nicolas?

8 MS. MCVEY: Yes, ma'am.

9 THE COURT: All right. Let's then move to Devey and  
10 Dupree. And we have plaintiff's motion to consolidate.  
11 Mr. Swett?

12 MR. SWETT: Thank you, Your Honor. May it please  
13 the Court. Chris Swett with Motley Rice on behalf of  
14 the plaintiffs Terran Dupree in the case verses Johnson  
15 & Johnson and Mary Margaret Devey in the case verses  
16 Johnson & Johnson.

17 Consolidation is clearly superior to trying the same  
18 issues over in dozens of cases involving the same  
19 witnesses, same documents, the same testimony from trial  
20 to trial. While consolidation of these cases in other  
21 jurisdiction has aided settlement, I think it's clear we  
22 all recognize, everyone in this courtroom, that Johnson  
23 & Johnson tries most of these cases. Over 90 percent  
24 they go to trial.

25 And so we're starting to see it. And Judge Viscomi



1 in New Jersey has realized this because she has  
2 overwhelmingly more Johnson & Johnson cases than any  
3 other judge in the country and she's realized the only  
4 way to be able to manage the Johnson & Johnson docket is  
5 to consolidate these cases. And I'll get to that in a  
6 few moments because these cases keep coming.

7 So the two cases at issue here, the Devey case and  
8 the Dupree case, each of these cases represents a victim  
9 of mesothelioma. Both plaintiffs used Johnson & Johnson  
10 Baby Powder for over a decade. The years of use  
11 overlap. Each case is venued in the Charleston County,  
12 so it's in same venue. I know that's been a concern  
13 sometimes with consolidating cases if they're in  
14 different venues. We don't have that issue here. Both  
15 of these cases are venued in Charleston County. They've  
16 been operating under the same scheduling order. They  
17 are both set for a date certain trial on November 9,  
18 2020. They involve the same defendants, Johnson &  
19 Johnson and Johnson & Johnson Consumer Inc. are the  
20 defendants. The overlapping nature of the experts  
21 supports consolidation.

22 Dr. William Longo who Your Honor is familiar with.  
23 Dr. Arnold Brody who Your Honor is familiar with and Dr.  
24 Terry Spear who Your Honor is familiar with are experts  
25 for the plaintiff in both cases. Each case also

1 involves a pathologist. And in one case we have Dr.  
2 John Maddox who a has appeared before Your Honor and the  
3 other case we have Dr. Kradin who is also a  
4 pulmonologist and pathologist. The defense experts,  
5 from what has been disclosed to us overlap so the same  
6 defense experts in the cases.

7 If consolidated, we would be able to try two of  
8 these cases in essentially the same amount of time that  
9 we can try one of these cases. You're only going to add  
10 a couple of hours. Because as Your Honor just said a  
11 few moments ago, the heart and soul of any asbestos case  
12 is the expert testimony and the corporate  
13 representative. Yes, we concede that we're going to  
14 have one or two witnesses that are damaged specific  
15 witnesses. You've got a, you know, a plaintiff. But as  
16 Your Honor knows that takes up very little time. Maybe  
17 an hour total out of these trials that we've tried.  
18 Truly the heart and soul on these issues that we can  
19 prevent relitigating are the expert testimony and the  
20 corporate rep testimony.

21 So, Rule 42(a) of our rules, South Carolina Rules of  
22 Civil Procedure allows this court to consolidate actions  
23 involving a common question of law or facts. And our  
24 case law provides that it's at your discretion to do  
25 that, Your Honor. But the purpose is to prevent

1 duplicative litigation to save unnecessary costs,  
2 unnecessary time, clear congested dockets in this case  
3 -- in these cases.

4 So I mentioned earlier, both the plaintiffs  
5 contracted mesothelioma. Both used Johnson & Johnson  
6 for over a decade. The years of use overlap. In both  
7 cases the source minds for the talc overlap. We've got  
8 Vermont minds and China minds in both cases. The common  
9 issue is, did Johnson & Johnson sources talc from minds  
10 containing asbestos. That's one common issue. Another  
11 common issue is, did Johnson's Baby Powder used by these  
12 two plaintiffs contain asbestos. That's an issue that's  
13 common it's going to have to be litigated in both cases  
14 if they're tried separately.

15 The third issue, did Johnson's Baby Powder  
16 containing asbestos was it a substantial contributing  
17 cause of each plaintiff's mesothelioma. The legal  
18 standard is the same.

19 And so we can avoid the massive amount of pretrial  
20 motions that Your Honor has to deal with respect to is  
21 Dr. Longo's testing admissible. Are you going to allow  
22 Dr. Aknos (phonetic) or Dr. Moolgavkar to testify that  
23 it's spontaneous meso. I mean, those are issues that we  
24 deal with every time that you can avoid having to do  
25 over and over if we consolidate these cases.

1           So we have common issues of fact and law at issue in  
2 both of these cases. Now, I read Mr. -- I read Johnson  
3 & Johnson's brief and they're sort of two main arguments  
4 that I'd like to address briefly and then I'd like to  
5 save a little time for reply if needed.

6           The first argument is, well, one plaintiff is living  
7 and one is deceased. Well, Your Honor consolidated and  
8 if you look at Exhibit Three, Your Honor consolidated  
9 the Taylor, Greene, and Hill trials -- cases for trial,  
10 consolidated trial, I'm looking for the date of that  
11 order. Your Honor probably recalls. I don't have the  
12 -- it's somewhere around February 25, 2009.

13           THE COURT: February of 1919 (verbatim). And in  
14 those cases that you consolidated, Your Honor, Greene  
15 and Hill were deceased. Those were wrongful death  
16 cases. Taylor was living, so that was a personal injury  
17 case. So Your Honor has a history of consolidating  
18 cases when you have a living and deceased plaintiff.  
19 And I would suggest, Your Honor, equally as important,  
20 Judge Viscomi in New Jersey who tries by and far the  
21 most of these cases, and I'll speak very frank with you,  
22 in the Barton case is a case of four plaintiffs that she  
23 consolidated that just concluded in the fall. The  
24 compensatory part concluded in the fall and then the  
25 punitive damages just concluded maybe a month ago.

1           She -- very frankly, she was concerned about  
2 consolidating cases. And her concern was would the jury  
3 individualize the damages. Would the jury weigh each  
4 plaintiff's age, each plaintiff's use of the product.  
5 Would they give individual attention to the damages.

6           Well, she consolidated four cases for trial.  
7 Ultimately, three of them went to trial consolidated.  
8 There was -- by the time the compensatory phase went,  
9 there was one deceased, two living. So that didn't  
10 matter. She had living and deceased. She had a wide  
11 age group like 30 to 60. Just like we have in this  
12 case, a wide age group. And what she found, they  
13 rendered a verdict and the jury paid very close  
14 attention. They were -- the compensatory damages were  
15 all different. The jury clearly considered each case in  
16 the damages in each case. And she was so comforted by  
17 that, this fall she is now, this is her new method.  
18 She's going to consolidate all Johnson & Johnson cases  
19 going forward. This all -- she's not only consolidating  
20 four for trial, she's consolidating six to eight cases  
21 for trial this fall. Johnson & Johnson cases because  
22 she had such good experience with the jury giving the  
23 time and the attention needed for the individual cases.

24           So, Your Honor has history of consolidating cases  
25 involving common issues of law and fact. Judge Viscomi

1 specifically has a history now and plans to do so going  
2 forward of consolidating these Johnson & Johnson cases.  
3 And, Your Honor, I would ask that we do the same here in  
4 this case. The only difference and the biggest argument  
5 that Mr. Herns is going to make is the damages issue.  
6 But these plaintiffs both have personal jury damages.

7 Ms. Dupree has personal jury damages and Mr. Devey  
8 through his personal representative, he has a survival  
9 claim. So he has personal injury damages, too. They  
10 both are entitled to pain and suffering, emotional  
11 distress. The only addition the jury would be  
12 instructed on is in the Devey case, after they're done  
13 with all that, they get to consider wrongful death  
14 damages to Ms. Devey. That is the only additional part  
15 that they can clearly be instructed about. This just  
16 applies to the Devey case.

17 Now there was a statement made in there that -- and  
18 I could address this on reply, but I'm going to go ahead  
19 and address it. The statement made in there that  
20 Mr. Herns or Johnson & Johnson's concern is that we're  
21 going to use the fact that Mr. Devey is deceased to try  
22 and get the jury to award damages because Ms. Dupree  
23 might die in the future.

24 Now, that's a totally separate issue. The issue --  
25 we have an expert in the case who can testify who plans

1 to testify, I'm sure Your Honor will deal with this on a  
2 motion in limine, but Dr. Kradin's testimony is going to  
3 be based on his years of experience doing this, more  
4 likely than not, to a reasonable degree of medical  
5 certainty, Ms. Dupree will her mesothelioma will come  
6 back and she will ultimately die from it. But I'm not  
7 going to ask the jury for those damages because I don't  
8 have a wrongful death claim.

9 That testimony is relevant that Your Honor will deal  
10 with by motion in limine, I'm sure, is relevant to her  
11 emotional distress personal injury damages which is the  
12 same thing. They both have those damages. Because in  
13 her deposition she testified, every time she goes back  
14 to get scanned, she has anxiety because she knows that  
15 this can come back at any point in time. And she's got  
16 lots of other personal injury damages, she'll never  
17 birth a child because of meso. I mean, he has her own  
18 personal injury damages.

19 But, you know, to use the fact that I didn't have  
20 the heart to tell this 19 year old woman -- I still  
21 haven't told her that, you know, there's a chance that  
22 your meso's will come back. I mean, to use that as an  
23 argument why these cases shouldn't be consolidated just  
24 misses the mark, Your Honor. And I would ask that Your  
25 Honor use your discretion and consolidate these cases

1 involving common issues of fact and law for a single  
2 trial to begin November 9th in Charleston County. Thank  
3 you, Your Honor.

4 THE COURT: Thank you, Mr. Swett. Mr. HERNs?

5 MR. HERNs: Thank you, Your Honor. May it please  
6 the Court. Louis HERNs on behalf of Johnson & Johnson  
7 and Johnson & Johnson Consumer Inc.

8 The Devey and the Dupree cases are two very  
9 different cases. The one very small common thread that  
10 they have is that they both have Johnson & Johnson as  
11 defendants. There is no doubt that Mr. Swett wants to  
12 capitalize on consolidating these two cases. And  
13 really, when you look at them closely there's very  
14 little remotely in common with the two.

15 I point you, Judge, out to the chart on page 3.  
16 Mr. Devey is deceased. Ms. Dupree is living and  
17 cancer-free. Mr. Devey was 70 at the time of his death.  
18 Ms. Dupree is 20 and living. Going to college.  
19 Mr. Devey was 69 years old when he was diagnosed.  
20 Ms. Dupree was 14. Cause of action in Devey is wrongful  
21 death and the cause of action in Dupree is personal  
22 injury.

23 The two diseases are very different. Mr. Devey has  
24 pleural mesothelioma and Ms. Dupree has peritoneal  
25 mesothelioma of the abdomen. The medical histories vary



1 greatly. Mr. Devey has had skin cancers, melanoma, and  
2 Ependymoma, E-P-E-N-D-Y-M-O-M-A. No other cancers have  
3 been identified in Ms. Dupree. The personal injury use  
4 is of the product was different. Mr. Devey primarily  
5 used it on his body and on his children. Ms. Dupree, it  
6 was applied to her as a child and she for a short time  
7 had personal use.

8 The time of use of the Johnson & Johnson product for  
9 Mr. Devey was over 55 years. When you compare that to  
10 Ms. Dupree who had the use of Johnson & Johnson Baby  
11 Powder of only 12 years. The years of use for Mr. Devey  
12 were the 1960s to 2017. And Ms. Dupree was 1999 to  
13 2011.

14 The exposures are gravely different. Mr. Devey had  
15 occupational exposure to both crocidolite and chrysotile  
16 asbestos when he worked at the Garlock manufacturing  
17 plant in Palmyra, New York. You certainly know from  
18 past cases that crocidolite is a definite cause of  
19 pleural mesothelioma in men. Ms. Dupree has no  
20 identified alternative exposures.

21 Now, the damages sought for Mr. Devey, loss of  
22 consortium and Ms. Dupree, compensatory damages. They  
23 are very different cases when you look at the facts.  
24 Rule 42(a) of the South Carolina Rules of Civil  
25 Procedure does permit consolidation of cases that

1 involve "A common question of law and fact." The facts  
2 in these cases, these two cases are very dissimilar and  
3 there is no common issue.

4 As noted in *Hopper verses Session*, US District Court  
5 case in 2018, "Consolidation is inappropriate if it  
6 leads to inefficient, inconvenient or unfair prejudice  
7 to a party." I submit to you that the unfair prejudice  
8 is what Mr. Swett is looking for when he wants these two  
9 cases consolidated.

10 To address the factual differences. They are as far  
11 as the east is from the west. Mr. Swett has asserted  
12 that they deal with the same disease. They don't. One  
13 is a pleural mesothelioma in elderly gentleman and one  
14 is a peritoneal mesothelioma in Ms. Dupree of the  
15 abdomen. They are very different.

16 Mr. Swett argues that they involve the same asbestos  
17 containing product, Johnson & Johnson Baby Powder.  
18 Well, that don't. Mr. Devey was exposed to crocidolite  
19 and chrysotile asbestos in an occupational manufacturing  
20 setting at the Garlock plant. So from that standpoint,  
21 the exposures are completely different.

22 You know from the trials that you have presided over  
23 that occupational asbestos exposure specifically to  
24 crocidolite is significantly associated with an  
25 increased risk of pleural mesothelioma especially in

1 men.

2 On the other end of the spectrum, the overwhelming  
3 majority, some 99 percent of a peritoneal meso cases of  
4 the abdomen in women in the United States cannot be  
5 attributed to asbestos exposure. They are simply  
6 spontaneous or idiopathic. They merrily occur as a  
7 consequence of a biological process in the body. They  
8 are not caused by any outside manifestation that exists  
9 on the earth.

10 As you know from past trials, pleural mesotheliomas  
11 in men in the United States are strongly associated with  
12 asbestos exposure and that's what Mr. Devey had. In  
13 females, it's different. Particularly for peritoneal  
14 mesothelioma. Just don't occur.

15 Lumping the two different plaintiffs with two  
16 different diseases and two different exposures will be  
17 confusing to the jury and grossly prejudicial to the  
18 defendants. I believe that's what Mr. Swett is looking  
19 for. Mr. Devey is deceased. Ms. Dupree is living and  
20 her cancer is in remission.

21 The Second Circuit in the Malcolm case know that the  
22 notion of trying both claims of wrongful death and  
23 personal injury plaintiffs in a single consolidated  
24 trial is "troublesome." Because "the dead plaintiffs  
25 may present the jury with a powerful demonstration of

1 the fate that awaits those plaintiffs who are still  
2 living." And that's what's being looked for here.  
3 That's what Mr. Swett wants. He has stated that in his  
4 brief that both plaintiffs will suffer -- have or will  
5 suffer the same fate. In his brief "death."

6 We're all going to die. And there's no indication  
7 that Ms. Dupree at this point is going to die of  
8 mesothelioma. The consolidated case would require  
9 different fact in expert witnesses. The fact witnesses  
10 in the Devey case would be mournful and experiencing  
11 grief which can poison the jury with regards to the  
12 defendants with the Dupree case.

13 I mentioned the different exposures. Mr. Devey had  
14 the crocidolite and chrysotile occupation exposure at  
15 Garlock and his own oncologist told him that his  
16 occupational exposure caused his pleural mesothelioma.  
17 That's Exhibit I.

18 In interview in the Charleston newspaper, he pointed  
19 to the Garlock exposure and said that that's what caused  
20 his mesothelioma. And there was not a word of talcum  
21 powder or baby powder or any cosmetic product in the  
22 interview.

23 Ms. Dupree had no established asbestos exposure  
24 which is typical for females with the disease peritoneal  
25 mesothelioma of the abdomen. They have very different

1 medical histories and that's not surprising given the  
2 fact that they are different individuals separated by  
3 many years of age.

4 You got an elderly man with multiple cancers and  
5 you've got a 20 year old female with no significant  
6 medical history. Each claim will involve individualized  
7 medical evidence and expert testimony. Damages are  
8 distinct for the two as well as one seeks for wrongful  
9 death and one seeks compensatory.

10 I'd like to next address prejudice because I think  
11 that is very much present in consolidated cases. As  
12 noted in *Hopper verses Session* on page 4, consolidation  
13 is inappropriate if it results in unfair prejudice to a  
14 party. And as noted in *Malcolm*, 995 F.2nd 350,  
15 "Benefits of efficiency can never be purchased at the  
16 cost of fairness." That's what we're looking for here  
17 from the plaintiffs. They want to throw fairness out  
18 the window. Consolidation of these two cases would  
19 result in that prejudice and deny the defendant -- the  
20 defendants the right to a fair trial.

21 There is so much disparity in the facts and the  
22 allegations that a fair trial would pretty much be  
23 impossible. And that's due to the "evidence spillover"  
24 affect. It would simply confuse the jurors dealing with  
25 a 70 year old deceased male and a 20 year old living

1 female. They're very different cases.

2 What is said in one case may apply in the jurors'  
3 minds to both cases. And the jury can lose track of the  
4 evidence and the case differences and render a verdict  
5 simply by putting both cases in the same bucket. The  
6 verdict may not be based on matters of individual case  
7 merits.

8 I would reference you to in re *Carroll*, 182 F.R.D.  
9 447 in which it was noted that plaintiffs had diverse  
10 medical histories and the consolidating cases for trial  
11 "would compress critical evidence of specific causation  
12 and marketing to a level which would deprive the  
13 defendant of a fair opportunity to defend itself."

14 The lumping blend by the juries that happens in  
15 consolidated cases is very real. Mr. Swett cited 22  
16 consolidated cases in Missouri. Well, what happened to  
17 those 22 consolidated cases? They were consolidated,  
18 claims concerned to talcum powder in ovarian cases and  
19 the jury returned in all 22 cases identical verdicts.  
20 There was no difference. The ones that had been  
21 cancer-free for 30 plus years got the same compensation  
22 monetary amount as those who had died from ovarian  
23 cancer. That is unfair prejudice.

24 I have no doubt that the judge thought that an  
25 effective judicial instruction could be given to the

1 jury to avoid the prejudicial effect of the  
2 consolidation in the Missouri cases. The jury showed  
3 otherwise.

4 Now Mr. Swett mentioned in his brief the Missouri  
5 cases and cited back to you as reason for consolidating  
6 these two cases. But as Paul Harvey would say, you need  
7 the rest of the story. The Missouri Court of Appeals  
8 issued a writ throwing out a consolidation of 13 of the  
9 cases involving Johnson's Baby Powder. Later after the  
10 Court of Appeals order, the trial court denied  
11 consolidation of the cases and that is of the exhibit  
12 noted on page 2 of my opposition.

13 So the 22 cases that were tried to a verdict, all of  
14 a sudden they were -- the case didn't take place. They  
15 were thrown out.

16 Consolidation and punitive damages is a particularly  
17 troublesome issue. The Supreme Court in Philip Morris  
18 USA case cited on page 16 noted the due process clause  
19 of the Constitution "requires states to provide  
20 assurance" that a jury's punitive damages verdict is  
21 tailored to the facts of a specific plaintiff's  
22 individual case. If you put two cases together, you're  
23 not going to get that. Due process will be violated.

24 Further, the Supreme Court noted in Philip Morris  
25 that due process prohibits an award of punitive damages

1 not specifically tied to a defendant's conduct towards  
2 that particular plaintiff.

3 For the reasons articulated in my brief and those  
4 that I presented to the Court, I respectfully request  
5 the Court to deny the motion to consolidate as the facts  
6 of these two cases are far different. And if denied,  
7 Johnson & Johnson and Johnson & Johnson Consumer Inc.  
8 their right to a constitutional fair trial and due  
9 process. Thank you.

10 THE COURT: Thank you, Mr. HERN. Any reply,  
11 Mr. Swett?

12 MR. SWETT: Yes, Your Honor, briefly. May it please  
13 the Court. Your Honor, just like to take a few minutes  
14 just to address some facts, get a little more into the  
15 details. Again, both of these plaintiffs have the same  
16 damages. There are personal injury damages involved in  
17 both. We're not seeking wrongful death damages in  
18 Ms. Dupree's case.

19 There was some mention of occupational exposure. So  
20 when Mr. Devey was deposed and he was literally on  
21 death's doorstep, and if you read the next page from  
22 what Johnson & Johnson cites, his doctor didn't tell him  
23 that occupational exposure caused his mesothelioma.  
24 Doctor told him that asbestos probably caused his  
25 mesothelioma. There's a big difference there. And we



1 can get into that at trial and, you know, he said one  
2 thing that could be read one way, but that's what he  
3 testified to.

4 And even if he did have other exposures, under our  
5 standard it's not the cause, it's whether the certain  
6 defendant's product was a substantial contributing  
7 cause. And I guarantee you -- I know for a fact, so  
8 you've heard today that they're alleging that asbestos  
9 caused Mr. Devey's mesothelioma. They can't argue that  
10 Ms. Dupree's mesothelioma was idiopathic or spontaneous.  
11 Because, one, she's had genetic testing and she doesn't  
12 have BAP1 mutation.

13 Two, in every deposition they've been trying to  
14 prove or their theory of the case is that her father  
15 through his occupational -- his occupation as a  
16 firefighter brought home asbestos and caused her  
17 mesothelioma. So there's going to be indication both of  
18 these cases are going to be the same. It's asbestos  
19 it's just not our talc, not our asbestos. It's the same  
20 case.

21 So you're not going to have, you know, they may  
22 attempt to have Acknose or somebody arguing spontaneous,  
23 but we've got genetic testing in Ms. Dupree's case. She  
24 doesn't have the BAP1 mutation. That's going to be a  
25 nonissue.

1           And, really, I mean, we have the burden as the  
2 plaintiff and the issue -- the common issues that the  
3 judge -- the jury is going to have to decide is did baby  
4 powder have asbestos in it? Did asbestos in the baby  
5 powder cause these individuals or contribute  
6 substantially to their mesotheliomas? Those are common  
7 issues. And Your Honor knows that we see these same  
8 witnesses, same documents, days and days of corporate  
9 representative testimony in the first trial, why would  
10 we repeat that over and over when we can handle these  
11 common issues and spend an extra two hours getting the  
12 damages specific testimony in one other case and really  
13 make an efficient use of our time and resources.

14           And, again, I would point Your Honor to the example  
15 and I can get the verdict sheets from the recent New  
16 Jersey trial and I can file them on the record if  
17 needed, but they have individual verdict sheets for all  
18 four of the consolidated New Jersey plaintiffs and the  
19 jury was very attentive and they individualized the  
20 damages. And there -- and Johnson & Johnson briefed  
21 that.

22           In fact, if you look at page -- I'm not going to  
23 spend a lot of time on this, but there's a page in the  
24 defendant's brief that mentions three plaintiffs.  
25 Because this is the same briefing -- the is the same

1 briefing that Judge Viscomi -- it's the exact same brief  
2 and they just changed it. And she consolidated the  
3 cases. In light of this exact same briefing.

4 On one page of their brief it talks about towards  
5 the end, it talks about these three plaintiffs. And  
6 that was the Barden case up in New Jersey because we  
7 don't have three plaintiffs in this case. So I would  
8 say these arguments have been tried and failed in New  
9 Jersey in front of Judge Viscomi. She consolidated the  
10 cases.

11 Your Honor, I just ask again reiterate, I think it's  
12 appropriate to consolidate these cases. And unless Your  
13 Honor has any questions, I'll rest on that.

14 THE COURT: Very good.

15 MR. HERNS: Thank you.

16 THE COURT: All right. In the case of Mary Margaret  
17 Devey verses Johnson & Johnson and Johnson & Johnson  
18 Consumer Inc., 2018-CP-10-790; and Terran, T-E-R-R-A-N,  
19 Dupree against Johnson & Johnson and Johnson & Johnson  
20 Consumer Inc., 2018-CP-10-2899; both cases pending in  
21 Charleston County, I grant the plaintiff's motion to  
22 consolidate. I find that there are sufficient common  
23 issues of fact and law that judicial economy in the  
24 trial of these lengthy but very similar cases would be  
25 well served by consolidating these cases.

1 I do not consolidate 21 cases as was done in  
2 Missouri. I can understand the confusion that may arise  
3 in such a large consolidation. This is a consolidation  
4 of two cases. And I believe the jury will well be able  
5 to differentiate between the two cases in the areas  
6 where differentiation is needed.

7 Each case is a personal injury case involving the  
8 personal injury damages and no others. There are  
9 certainly factual differences between these two  
10 plaintiffs. And some factual difference between the  
11 exposure in terms of an occupational exposure in  
12 addition to an exposure to baby powder in the case of  
13 Mr. Devey. And a personal exposure to Johnson & Johnson  
14 Baby Powder and allegedly some take-home exposure to  
15 occupational type asbestos exposure in the case of  
16 Ms. Dupree or Miss Dupree. But those differences can be  
17 very easily made in a way that is comprehensible to the  
18 jury.

19 The big issue in this case is whether Johnson &  
20 Johnson Baby Powder contains asbestos. And whether --  
21 and the second issue is whether Johnson & Johnson -- the  
22 use of Johnson & Johnson Baby Powder by Mr. Devey and  
23 Miss Dupree resulted in their contraction of  
24 mesothelioma.

25 The answer to these questions depends on an almost

1 completely common set of facts. Because the big issue  
2 in these type cases and particularly in these baby  
3 powder cases is a clash of experts who are very  
4 well-known and seen time after time in these cases. A  
5 constellation of experts on the plaintiff's side and on  
6 the defendant's side a corporate representative is  
7 always one individual from Johnson & Johnson and other  
8 expert witnesses that are common to everyone of these  
9 cases that I've tried and I've now tried several Johnson  
10 & Johnson cases to verdict or to impasse.

11 So I believe that not only to these cases, but for  
12 what it will teach us as we move through this -- the  
13 other Johnson & Johnson Baby Powder cases or other  
14 defendant baby powder manufacturing cases that are  
15 pending in South Carolina now asbestos docket which I  
16 manage, it behooves us to take some steps towards  
17 judicial economy in the interest of giving both  
18 plaintiffs and defendants their day in court on a basis  
19 that can be as accelerated as possible particularly for  
20 living mesothelioma claimants as is anticipated by the  
21 statutory laws of South Carolina that discuss how to  
22 docket and how to schedule the trial of these cases.

23 So I will acknowledge the very well researched and  
24 well presented arguments of plaintiffs and defendant and  
25 realizing that the matter is not one of -- upon which

1 bright minds can't always agree, I nevertheless think it  
2 is in the best interest of justice generally and for the  
3 participants in these two cases to consolidate them to  
4 trial in November and that is what I have ordered be  
5 done.

6 MR. SWETT: Your Honor, I think I heard you, but I  
7 just want to make sure I heard you correctly. And you  
8 make your ruling, you considered the fact that Ms. Devey  
9 has the small component of wrongful death damages as  
10 well? You considered that and still --

11 THE COURT: Yes. But the -- again, they're just two  
12 cases. And the individualized claims are very easy to  
13 explain in an individualized way to the jury. Frankly,  
14 this is a much easier case to try than cases that have  
15 one plaintiff, but a host of defendants. And I've tried  
16 those cases many times. Those cases sometimes present  
17 more difficult considerations to the jury than does  
18 this.

19 But Johnson & Johnson still has available to it all  
20 kinds of theories that involve other sources of possible  
21 contraction of cancers which it will be free to explore  
22 in each of these cases. And I think can explore in a  
23 way that protects the individual nature of the decision  
24 that must be made.

25 I will tell you with respect to both the actual and

1 punitive damages, separate verdicts will be submitted.  
2 I will bifurcate the punitive damage part of the case as  
3 I always do in asbestos cases and in the punitive part  
4 of the case there won't be any confusion about what is  
5 being asked. It will be asked with respect to each case  
6 individually. And that may vary depending on what the  
7 evidence discloses about the contraction and what the  
8 state of knowledge was of J&J at the various points in  
9 times when the exposure was had.

10 So I think that judicial efficiency is much served  
11 by a consolidation of these very similar expert witness  
12 presentations that take up the vast majority of these  
13 cases and those things which are individualized for the  
14 two plaintiffs and to the various defenses involving  
15 those individual plaintiffs can certainly be explored in  
16 a way that does not inhibit or negatively affect either  
17 plaintiffs or defendant.

18 MR. SWETT: Thank you, Your Honor.

19 THE COURT: All right. What else do I need to do?

20 MS. MCVEY: I don't think there's anything else.

21 THE COURT: Mr. HERNs, anything further?

22 MR. HERNs: No, Your Honor. Nothing further.

23 THE COURT: Very good. Court will be adjourned.

24 - - -END OF REQUESTED TRANSCRIPT OF RECORD- - -  
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

I, KATHERINE A. SPIRES, Registered Professional Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for South Carolina, on the 13th of March, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 28, 2020

Katherine A. Spires

Katherine A. Spires

Registered Professional Reporter