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Case Number 510,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

R.T. VANDERBILT COMPANY, INC.,	)	
	)	
Defendant (below)-Appellant,	)	
	)	No. 510, 2013
vs.	)	
	)	*On appeal from*:
DARCEL GALLIHER, Individually	)	Superior Court No.
and as Special Administrator for the	)	N10C-10-315
Estate of MICHAEL GALLIHER, Deceased,	)	Judge John A. Parkins, Jr.
	)	presiding
Plaintiff (below)-Appellee.	)	

PLAINTIFF-APPELLEE'S AMENDED ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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Dated: January 2, 2014

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NATURE OF THE CASE

This appeal is from a judgment on a jury verdict in a personal injury / wrongful death case in the amount of $2,864,583.33 in favor of plaintiff Darcel Galliher and the Estate of Michael Galliher and against defendant R.T. Vanderbilt Co., Inc. ("RTV") (A1079). The decedent Mr. Galliher contracted and died from mesothelioma as a result of his exposure to asbestos or asbestiform material in RTV's NYTAL industrial talc. Ohio law applied to all substantive issues. The jury found RTV 100% at fault and declined to allocate fault to decedent or his non-party employers (A1077-78). The court below denied RTV's post-trial motions by Order dated July 31, 2013 (B279-305). The court allowed plaintiff costs in the amount of $45,313.08 and post-judgment interest from the date of verdict at 6.00% per annum (A0897, A0899-902). Upon RTV's motion to reconsider, the court reduced the interest rate to 5.75% and *sua sponte* suspended post-judgment interest from March 8, 2013 to August 27, 2013 (A1108). The trial court re-issued a "corrected" opinion denying post-trial relief on August 27, 2013. RTV appeals from the opinion and order denying its motion for a new trial.[1] Plaintiff cross-appeals the suspending of post-judgment interest for over five months (A1129).

[1] Appellee moved to dismiss RTV's appeal as untimely. This Court denied the motion without prejudice. Appellee stands on that motion as filed.

SUMMARY OF ARGUMENT

1. Appellee denies that the cumulative effect of the evidence at issue denied RTV a fair trial. *General Motors Corp. v. Grenier*, 981 A.2d 531, 540-41 (Del. 2009). Appellee denies that the four references to excluded evidence were highly prejudicial or bore directly on closely contested issues. *DeAngelis v. Harrison*, 628 A.2d 77, 81 (Del. 1993). Appellee denies that the trial court had reason for concern about the effectiveness of its curative instructions. *See Joseph v. Monroe*, 419 A.2d 927, 930 (Del. 1980). Appellee denies that the testimony at issue: went to the heart of RTV's case; skewed the jury's deliberations; and/or entitles RTV to a new trial. Additionally, RTV invited the errors at issue. *Itek Corp. v. Chicago Aerial Industries, Inc.*, 274 A.2d 141, 144 (Del. 1971).

2. Appellee denies that the failure to instruct on employer duties undermined the jury's ability to intelligently assess the employers' possible fault. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006). Appellee denies that evidence as to the employers' fault was substantial and that declining the instruction warrants a new trial. *Newnam v. Swetland*, 338 A.2d 560, 561-562 (Del. 1975); *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993); Additionally, RTV waived the alleged instructional error by failing to present any argument or authority in support of its suggested instructions. *See Beebe Medical Center, Inc. v. Bailey*, 913 A.2d 543, 556 (Del. 2006).

3. Post-judgment interest is a matter of right belonging to a prevailing plaintiff, and the trial court had no discretion to suspend post-judgment interest. *See Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000). Therefore, respectfully, this Court should reverse the trial court's decision suspending post-judgment interest from March 8, 2013 to August 27, 2013.

STATEMENT OF FACTS

(A)
Michael Galliher's Exposure To R.T. Vanderbilt's NYTAL Industrial Talc

RTV mined and sold industrial talc from upstate New York under the name "NYTAL." Decedent Mr. Galliher worked at a bathroom fixtures facility in Mansfield, Ohio from 1966 to 2005, except for military service in 1968-70 (A76-81). The facility was owned by Borg Warner until the mid-late 1970s, when it became Artesian Industries. Mr. Galliher was exposed to RTV's talc, while Borg Warner owned the facility, when he and co-workers used NYTAL to dust molds in the cast shop (A210-217). He was exposed again from the mid-1980s into 1992, when Artesian used NYTAL to make glaze in the slip house adjacent to Mr. Galliher's work area. (A170; A484; A387-478; B112-140). It was agreed that Mr. Galliher was not exposed to NYTAL after 1992.

(B)
Evidence And Rulings Regarding Alleged Evidentiary Errors

RTV asserts that certain evidentiary errors prejudicially affected the jury's determination of two issues: that NYTAL contains asbestos or asbestiform fibers capable of causing mesothelioma; and, that RTV "knew" of such hazard.

(1)
Medical Causation Evidence

New York talc, including NYTAL, contains asbestiform material (B79; B16; B173; B176-177). Plaintiff's medical experts, Dr. Arthur Frank and Dr. Jerold

Abraham, testified that talc with asbestiform fibers causes mesothelioma (B101-102; B108; B66-69). Both attributed Mr. Galliher's mesothelioma to NYTAL (B103-105; B64-65; B67; B75). Dr. Victor Roggli, RTV's only medical expert, agreed that Mr. Galliher had mesothelioma caused "by something he would call asbestos" (B184). Dr. Roggli testified as to his prior published article discussing what he calls "asbestos" as follows: "asbestos fibers were classified as amosite, crocidolite, tremolite, anthophyllite, actinolite, chrysotile or talc *** " (B191-193). When asked to confirm that he had "published an article" in which he "classif[ies] talc as asbestos," Dr. Roggli responded : "Wow. That's what it says" (B193).

Dr. Roggli agreed that Mr. Galliher's lung tissue showed a highly elevated count of asbestos bodies. (B184-185). Per Dr. Roggli's book, "[p]eople exposed to talc are more likely to have the noncommercial kind of amphiboles in their lungs *** " (B188). According to Dr. Roggli, non-commercial amphiboles, such as tremolite and anthophyllite, are likely at the core of the asbestos bodies in Mr. Galliher's lungs. *Id.* There are asbestiform fibers in the RTV talc that meet Dr. Roggli's definition of fibers that cause asbestos disease (B194).[2] He agreed that, if Mr. Galliher was exposed to RTV talc, he was exposed to asbestiform fibers. (B195). Decedent's lungs had elevated levels of fibrous talc (B70).

[2] RTV refers to NYTAL as containing "pure" mineral talc. It actually contains little pure platy talc and is mostly fibrous (B80). According to RTV's own experts, "industrial talc from New York is not pure talc" (B196-197; B182).

(2)
Lobbying

The court excluded evidence of improper attempts to influence NIOSH—specifically, internal discipline of NIOSH employees for improper contact with RTV (B36-38). It did not exclude all evidence of lobbying by RTV and the talc industry (B37-38; B46-48). RTV planned to offer evidence of its "battle" with NIOSH and industry efforts to lobby the government (B35; B43; B45). Counsel for RTV stated that he intended to cover that issue with plaintiff's expert, Dr. Castleman, which he did (B44; B94-95). Both parties presented evidence that RTV funded studies and lobbied NIOSH and OSHA. RTV's opening statement mentioned the industry's efforts to challenge OSHA's definition of asbestos (B59-60). John Kelse, RTV's witness, testified that there have been numerous articles about New York talc and that RTV has funded many of them (B201-203). The jury heard that RTV funded animal studies (B10), complained about OSHA's asbestos definition (B11), and hired people to testify at hearings (B21-22). The trial court offered to give a cautionary instruction advising that RTV had a right to lobby the government, if RTV drafted such instruction (B37-38). RTV never did so.

(3)
Information Communicated by RTV to Its Customers in General

No copy of any warning, Material Safety Data Sheet ("MSDS"), or memo about warnings was offered as an exhibit. RTV's only evidence concerning

warnings to customers and end users was the testimony of Mr. Kelse, who has reviewed RTV files (B198-199; B200-201; B206). The earliest reference he claims to have found is a memo from 1978 about a warning that said only: "Caution, contains industrial talc. Do not breathe dust. Prolonged inhalation may cause lung injury" (B201). Mr. Kelse testified that RTV issued MSDS's to inform end users and customers of the risks associated with NYTAL (B204). He and Paul Vanderbilt admitted that no warning on NYTAL mentioned asbestos or cancer (B206; B16). Mr. Kelse admitted that no MSDS for NYTAL mentioned asbestos, cancer or mesothelioma, or that NYTAL contained asbestiform material (B207-208). In fact, the NYTAL MSDS's "affirmatively stated non-asbestiform" (B208).

RTV did not put an asbestos warning NYTAL following NIOSH's 1980 determination that it contains asbestos (B17). Instead, RTV protested NIOSH's findings and funded lobbying efforts. *Id.* RTV did not advise customers that there were findings of asbestos in NYTAL—at least Mr. Vanderbilt could not state when or how (B17-18). RTV's sales force was told to avoid discussing health issues with customers (B2). If a customer did raise questions, they were referred to Mr. Kelse or his predecessors. *Id.* When an Artesian engineer did raise questions, he was assured by RTV representatives that the material was non-asbestiform (B6-8).

The jury requested a copy of Mr. Kelse's testimony "with regards to the verbiage of the MSDS sheets or a copy of the MSDS sheets" (B248). The

requested portions of that testimony were read to the jury (B249-252) (no mention of asbestos, cancer or mesothelioma; affirmatively stated "non-asbestiform").

(4)
Allegedly Prejudicial Testimony at Issue

RTV asserts that the cumulative effect of four—and only four—occasions when the jury heard excluded evidence prejudiced the jury's decision-making.

(a) *Thomas Rogers*

Thomas Rogers is a former mine employee whose video deposition was taken in a prior case. RTV did not object to the testimony at issue until after it was played. It did not include this item in its motion for mistrial. (A980, A998).

RTV's objections to plaintiff's page and line designations were taken-up at a pretrial conference. Counsel for RTV then stated that he had adequately reviewed plaintiff's designations for the Rogers transcript (B51). There was no assertion of any specific objection to page 21, lines 16 through 25, which is where the testimony at issue appears (B51-54; B4). Later, the court ruled that Mr. Rogers' testimony that he was shown a NYTAL bag that said "asbestos" was admissible, but testimony that coworkers told him that the talc contained asbestos was not (A1128). The testimony at issue comingles references to both topics (A4).

Plaintiff made a good faith effort to edit the deposition according to the trial court's directions (A999). Plaintiff did not edit out the portion at issue because (a) it seemed to focus more on the bag than what anyone told Mr. Rogers, and (b) it

had not been objected-to. *Id.* Plaintiff provided RTV with a verbatim printout of what would be played to the jury the day before it was played (B258). RTV did not take exception to the testimony at issue. *Id.* RTV initially moved for a mistrial on this issue on the theory that plaintiff had deliberately inserted the testimony in question after providing RTV with a printout of what would be played (B86-90). Later, after having accused plaintiff of such misconduct, RTV acknowledged that the testimony was designated all along (7/18/12 email (B275-278) (A0998). It has now acknowledged that its counsel simply missed the designation (B258-259).

(b) *Sean Fitzgerald*

Sean Fitzgerald was engaged by plaintiff to provide general opinions on geology and case-specific testimony comparing the minerals in Mr. Galliher's lungs to published reports on the composition of New York talc. The latter opinions, which have been referred to as the "fingerprint evidence," went to proving that Mr. Galliher was exposed to (i.e. inhaled) NYTAL—not whether it causes mesothelioma or what RTV should have known about such risks. Mr. Fitzgerqald was added as a late witness by agreement (B25). At the May 2012 pretrial, RTV objected to his use of a report from Dr. Rigler because it had not agreed to Dr. Rigler's late involvement (B26-31). The court precluded any use of the Rigler report on that basis (B29). The court continued trial to July 2012, so that RTV could find an expert to refute Mr. Fitzgerald (B32-33).

Mr. Fitzgerald's report included a chart comparing what he found in Mr. Galliher's lungs to findings by Dr. Abraham and Dr. Rigler. The chart included a line averaging those findings. In creating a slide for trial, counsel inadvertently deleted only the direct reference to Dr. Rigler, but not the averages. The only testimony about that chart \on direct examination was that it compared what Mr. Fitzgerald and Dr. Abraham had found in decedent's lungs (B144-145). Mr. Fitzgerald did not refer to the averages. The error with the averages was discovered on cross-examination. Mr. Fitzgerald did not discuss the substance of Dr. Rigler's work, but stated that the math was incorrect because it included an analysis that he "was told could not be a part of this" (B146-148). The mistake was clarified during an immediate break (B148-163). Per RTV's agreement, the jury was told that plaintiff's counsel had made a clerical error (B160-161). RTV did not request a stronger curative instruction and consented to the court's corrective measures. *Id.* ("if someone wants to stand up and say: He [the witness] didn't make this mistake, but plaintiff's counsel did, I'm okay with that"). RTV was then allowed to recalculate the averages with Mr. Fitzgerald for the jury. *Id.* Any negative impression from this error was more likely felt by plaintiff's side (Add20).

Mr. Van Orden, RTV's expert, found "transition fibers" in decedent's lung tissue. He agreed that such finding meant that decedent was exposed to something

that contains such fibers (B179-180).[3] Montana talc is platy and contains no transition fibers (B180). RTV talc is fibrous and contains transition fibers (B180-181). There was no evidence of a source of transition fibers other than NYTAL.

(c) *Dr. Barry Castleman—Reference to Johns Manville*

The trial court did not completely prohibit referencing documents from Johns Manville ("JM") (B39). It commented that plaintiff would *risk* a mistrial by referencing JM documents without evidence that RTV had received them, but did not indicate that a mistrial would inevitably result from any mention of JM (B41).

Dr. Castleman authors a book on the history of industry knowledge of asbestos. His book contains two sentences about RTV, one of which states that JM accused RTV of not telling the truth. RTV planned to question Dr. Castleman about JM regardless of the scope of his direct examination (B40). When counsel for RTV, who had a copy, asked Dr. Castleman what his book said about RTV, he replied: "[t]he paragraph where Johns-Manville people are calling RTV liars" (B92-93). Dr. Castleman did not reference or display a JM document. He did not indicate that JM was a competitor of RTV or that it had accused RTV of being untruthful about anything in particular. There was no contemporaneous objection (B93). The trial court found that, given the brevity of the reference to RTV in Dr. Castleman's book and its obvious content, RTV had invited the error (Add19).

[3] Transition fibers are anthophyllite turning to fibrous talc—anthophyllite on one end and talc on the other (B174-175).

According to RTV, Dr. Castleman's brief reference to JM required it to play portions of Dr. Thompson's deposition discussing JM and its accusations about RTV at length. The jury had no idea why JM mattered until RTV provided the additional testimony on that subject (B13-14).RTV's post-trial motion asserts any prejudice resulted from its needing to play Dr. Thompson's testimony, not directly from Dr. Castleman's testimony (A800-801).

(d) *Dr. Barry Castleman—Reference to $16 Million and Buying Senators*

The trial court excluded only the "senator in my pocket" testimony (B50) and the testimony that RTV had specifically spent $16 million to resist regulation (B56-57). It did not exclude evidence that RTV funded particular studies or that it generally spent money for studies and lobbying provided no overall amount was suggested (B57). RTV made clear that it intended to elicit testimony from Dr. Castleman explaining the chronology of events involving its efforts to challenge federal regulations (B40; B44).

During cross-examination, Dr. Castleman responded to RTV's question about talc studies in the 1970's by stating generally that RTV had spent "millions" to fund research (B96). That statement related only to funding research not lobbying, but was objectionable because it suggested an overall amount. RTV did not object, ask for a break, or change its line of questioning. Rather, it purposely chose to continue along the same line by asking, "[h]ow do you know they spent

millions of dollars?" (B96; B261). Dr. Castleman then mentioned the specific figure of "16 million dollars," which he had seen in researching testimony on the matter" (B97). When asked whose testimony, Dr. Castleman replied, "a worker at Vanderbilt talking about [what] one of the Vanderbilt family told the workers." *Id.*

At this point, after several exchanges had occurred, there had been no mention of a senator. There was no objection by RTV or motion to strike any response. After further questioning, Dr. Castleman made one remark about "buying senators and lobbying the government" (B97). Only then did RTV "object and move to strike *that last comment.*" *Id.* (*emphasis added*). RTV did not otherwise take exception to Dr. Castleman's statements until a later break, at which time it declined to have the court give any curative instructions (B98-99).

(C)
RTV's Lack of Evidence and Efforts
To Prove Fault on the Part of Michael Galliher's Employers

As its second ground for a new trial, RTV asserts that the failure to include an instruction on the general duties of employers prevented the jury from allocating any fault to Borg Warner / Artesian. There are two ways in which those employers might have contributed to Mr. Galliher's mesothelioma: (1) exposing him to asbestos from something other than NYTAL; or (2) having the requisite notice of the risks involved, yet culpably failing to protect him from exposure to NYTAL. They had no responsibility for exposure from personal auto repairs.

RTV offered little evidence but relied on cross-examining plaintiff's witnesses. It admitted during openings that it was "not clear where or how" decedent was exposed to asbestos from other sources (B58). It did not offer any colorable evidence that Mr. Galliher's employers knew or should have known that NYTAL posed an asbestos-disease risk. The trial court directed a verdict and declined to instruct on RTV's sophisticated purchaser defense for precisely that reason (B218-223). Prior to trial, it granted summary judgment dismissing RTV's product-misuse defense (B271-274). RTV has not appealed either ruling.

(1)

RTV Failed to Prove that Mr. Galliher was Exposed to Asbestos at Work from Any Source other than Its NYTAL Industrial Talc

There was evidence at trial that Montana Treasure Talc was used at decedent's work in the 1980s. Prior to trial, the court granted plaintiff's motion precluding RTV from attributing causation to Treasure Talc because it is non-fibrous (B271-274). RTV has not appealed that ruling.

Mr. Galliher testified that "warm" (not hot) clay was pumped through a pipe above his head (B239-240). He could not "swear" that the pipes were insulated, but merely assumed so. *Id.* He testified that the facility was generally "dirty, hot and muddy," but did not associate such conditions with asbestos (B242-243). Mr. Hardy, a co-worker, also described conditions as dusty in places—such as where NYTAL was used in the glaze (B139-140). He did not testify about insulation on

pipes. The only other witnesses from the facility were Ronald Thomas and Dallas Mauk, neither of whom was asked about insulation or source of asbestos.

RTV asserts that Mr. Galliher must have been exposed to asbestos from another source because the experts found chrysotile in his lungs and, according to RTV, there is no evidence that NYTAL contains chrysotile. Chrysotile has been reported in the deposits where RTV mines NYTAL (B76). Mr. Fitzgerald noted that RTV's 50th anniversary publication from 1966 stated that NYTAL contains chrysotile. (B164-167). There was no evidence that any chrysotile in Mr. Galliher's lungs came from his work, as opposed to non-work brake repairs.

Dr. Millette testified that most friction material (brakes) contained chrysotile asbestos between the 1950s and 1980s (B81-82). He did not agree that most insulation contained asbestos but only that some would have, especially insulation on steam lines (B82-85). There was no evidence that Mr. Galliher worked around steam lines (B239-240). Dr. Abraham testified that, in theory, chrysotile in the lungs of one with mesothelioma could be attributed to brake work or insulation (B76-77). He expressly declined to attribute the chrysotile in Mr. Galliher's lungs to any particular source (B78). Dr. Abraham also testified that all of the fibers in Mr. Galliher's lungs could be accounted-for by exposure to NYTAL (B71-72).

Dr. Frank testified that all exposures to asbestos contribute to causing a person's mesothelioma, assuming they are proved (B103-105). He opined that Mr.

Galliher's mesothelioma was caused by exposure to RTV talc. *Id.* No medical expert was asked to specifically link Mr. Galliher's mesothelioma to anything else.

None of the experts, who examined Mr. Galliher's lung tissue, found evidence of commercial amphiboles, the types of asbestos most associated with insulation (B186-187). Dr. Roggli agreed that it was "very unlikely" that Mr. Galliher was exposed to asbestos from insulation (B189-191). He stated that the most likely cause of the asbestos bodies in Mr. Galliher's lungs was "non-commercial amphiboles actinolite, tremolite, anthophyllite" (B186-187).

(2)

Evidence that any Employer was at Fault for Mr. Galliher's Exposure to NYTAL

RTV asserts that OSHA cited Borg Warner in 1974 for asbestos in its talc. The citation itself was not in evidence. The only evidence about this event came from Dr. Thompson, RTV's mineralogist. He recalled that Borg Warner was cited for asbestos in talc supplied by RTV (B11-12). Dr. Thompson appeared as a witness to defend the citation and told OSHA that what it found was not true asbestos. According to Dr. Thompson, OSHA adhered to its finding that the talc contained asbestos, but dismissed the citation as to Borg Warner because Borg Warner "didn't know about it, or they hadn't been notified." *Id.* RTV offered no evidence that any knowledge Borg Warner might have gained was passed on or attributable to Artesian. Mr. Hardy testified to shop-talk about asbestos in the talc in 1974-75 (B141). There was no evidence that management was aware.

Mr. Thomas, the Artesian engineer in charge of formulating the glaze, raised questions about RTV talc to RTV representatives Konrad Rieger and Randy Johnson (B6). He "had some concerns because [he] wanted to make sure that [he was not] introducing an unsafe material in [his] workplace" (B7-8). Therefore, he "more vigorously questioned Mr. Rieger and Mr. Johnson about the hazards associated with the Nytal talc." *Id.* "[T]hey gave [him] a brochure of some kind and gave [him] their assurances that the tremolite that was in the Nytal talc was nonasbestiform." *Id.* They neglected to mention the asbestiform talc in NYTAL.

RTV points to the Health Hazard Evaluation ("HHE") that NIOSH conducted at Artesian in 1984 as evidence of employer fault. As the HHE report states, NIOSH was primarily concerned with silica and reported no excess asbestos exposures (A481). NIOSH did report that fibrous NYTAL was being used in the glaze and had been previously used to dust molds in the cast shop (A497-498). It reported excess talc dust in the cast shop in 1984; however, then, non-fibrous Treasure Talc was used there (A498). NIOSH made a number of recommendations for improving conditions, which Dr. Frank agreed were sound advice. (B110-111). There was no evidence that Artesian failed to adopt such recommendations. The trial court sustained plaintiff's objection when RTV asked Dr. Frank if Borg Warner should have required respirators as beyond the scope of direct (B109-110).

Mr. Hardy testified that masks became mandatory in the mid-late 1980s, or maybe as early as the late 1970's (B142-143). Mr. Galliher testified that he did not wear a mask until they became mandatory, which he thought was in the 1980s or 1990s (B241-242). The focus of this testimony was on RTV's attempt to show that Mr. Galliher failed to follow company guidelines for respiratory protection. RTV has not appealed the jury's determination that Mr. Galliher was not at fault.

(3)

RTV's Efforts to Make a Case Against Decedent's Employers

RTV's answer to plaintiff's complaint does not plead any theory as to the fault of Mr. Galliher's employers (B263-270). The trial court granted summary judgment and struck RTV's plea for allocation under Delaware law (B271-274). RTV did not inform the jury in its opening that employer fault was an issue. It admitted that Mr. Galliher had not testified to working around asbestos insulation or other asbestos products (B58; B61-62).

Jury instructions were generally discussed at a conference on July 22, 2012 (B169-171). The parties' initial suggestions are not part of the record. RTV suggested a general instruction that employers had a non-delegable duty to provide a safe workplace. Plaintiff objected to the term "nondelegable" and because the suggestion was not an Ohio pattern instruction. RTV represented that Ohio courts gave such instructions but, upon "double check[ing] something," did not "see that in the instructions that were given" in an Ohio asbestos case (B171).

At the July 25, 2012 conference on, RTV posited that the instructions being considered were inconsistent with those given in Ohio product liability cases (B210-211). The court postponed closing arguments so that RTV could prepare a new set of proposed instructions (B214-216). At first, the proposal provided by RTV did not include any employer duty instructions. RTV added the instructions at issue at the next conference (B224). Those instructions merely recited two general Ohio statutes verbatim and included extraneous matter unrelated to this case. *Id.* Plaintiff objected. Other than unverified assertions that such instructions are given in Ohio, RTV made no argument and cited no authority in support of its proposal, particularly no Ohio authority. RTV's counsel continued to claim that he could provide Ohio cases in which such instructions were given, but never did so (B224).

The trial court provided the parties with copies the final jury charge prior to closing arguments. The final charge did not include any instruction on employer duties. RTV did not object (B226-238). Just prior to closing arguments and after the charge had been finalized, RTV asked why its proposed instructions were not included (B244-245). The court advised that it had removed them. *Id.* RTV's response was "[t]hank you." *Id.* Later, after the jury was charged, the court asked for exceptions. RTV requested that the court give a sophisticated user instruction, but made no argument in support of instructing on employer duties (B247).

ARGUMENT

(I)
The Trial Court Did Not Abuse Its Discretion By Denying A New Trial On The Basis Of Isolated And Invited References To Excluded Evidence

A. Question Presented

Whether defendant has shown that the cumulative effects of excluded testimony, which was tangentially related to medical causation and what defendant should have known about the risks of its talc, was sufficiently prejudicial so as to deny defendant a fair trial, and where defendant invited much of the testimony?

B. Scope of Review

This Court reviews decisions denying a motion for new trial for abuse of discretion. *See General Motors Corp. v. Grenier*, 981 A.2d 531, 542 (Del. 2009).

C. Merits

Isolated mistakes do not warrant a new trial unless they are significantly prejudicial "so as to have denied [defendant] a fair trial." *Grenier*, 981 A.2d at 540-41. "A new trial is warranted only if the jury's verdict is clearly the result of passion, prejudice, partiality, corruption, [or confusion,] ***." *Reinco v. Thompson*, 906 A.2d 103, 110-11 (Del. 2006) (*citations and internal quotes omitted*). Courts do not grant a new trial based upon speculation. Prejudice must be "clearly" shown. 906 A.2d at 111-12. The question on appeal is whether or not the trial court abused its discretion in denying a new trial. *See Grenier*, 981 A.2d at

542. The "determination of whether a mistrial will be granted by reason of the improper comments *** is within the discretion of the trial judge who is best suited to gauge the impact and setting of the statement and question." *Koutoufaris v. Dick*, 604 A.2d 390, 400 (Del. 1992). Establishing abuse of discretion requires showing that the comments were "significantly prejudicial so as to deny [appellant] a fair trial." *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993) (*quoting Shively v. Klein*, 551 A.2d 41, 44 (Del. 1988)). RTV has failed to make such a showing.

The testimony at issue was insignificant in light of the evidence as a whole and only tangentially related to the issues RTV claims were affected. The size of the verdict is not shocking and is consistent with awards for serious injury, including mesothelioma. *See e.g. Grenier*, 981 A.2d at 535 ($2 million in mesothelioma case); *Delaware Electric Coop., Inc. v. Duphily*, 703 A.2d 1202 (Del. 1997) ($3 million in electrocution case). The court here provided curative instructions when requested and RTV had no objection to their content (B255). The fact, that the trial court separately discussed each alleged error in its post-trial order, does not mean that it failed to consider their cumulative impact. *See Adams v. Luciani*, 846 A.2d 237 (table), 2003 WL 2273038, *4-5 (Del., Dec. 2, 2003) (errors in post-trial order do not warrant reversal where evidence supports verdict). In addition to the lack of prejudice, RTV invited much of the testimony in question or admittedly aggravated the possibility for prejudice by its own strategic choices.

(1)

The Testimony at Issue Was Not so Prejudicial as to Deny Defendant a Fair Trial

In gauging the effects of improper comments, Delaware courts consider: "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the error." *DeAngelis*, 628 A.2d at 81. RTV asserts that the testimony in question affected two issues: whether NYTAL contains asbestos or asbestiform fibers capable of causing mesothelioma; and, whether RTV "knew" that NYTAL either contained asbestos or asbestiform fibers capable of causing mesothelioma. As to the second issue, the question was whether RTV knew or *should have known* that NYTAL posed such risk (A1047, A1049, A1050).

(a)

Neither Issue was Closely-Contested on the Evidence Presented

Considering the evidence as a whole, eliminating any or all of the alleged errors "would not have changed the result." *Grenier*, 981 A.2d at 539.

Causation is a medical issue. *See Money v. Manville Corp. Asb. Disease Comp. Trust*, 596 A.2d 1372, 1377 (Del. 1991). The jury was s instructed that "[p]roximate cause *must* be proved by expert medical testimony *** " (A1054). None of the witnesses in question was a medical expert. Both of plaintiff's medical experts opined that the minerals in NYTAL cause mesothelioma and, in fact, caused decedent's mesothelioma (B64-69; B75; B101-105; B108). Defendant's only medical expert could not attribute decedent's disease to any other source. He

agreed that it was caused by something that he would call "asbestos," and, acknowledged his peer-reviewed article classifying fibrous talc as asbestos (B184; B191-193). He testified that non-commercial amphiboles of types found in New York talc were likely at the cores of the asbestos bodies in decedent's lungs (B184-185; B188). The jury heard that mesothelioma caused the deaths of as many as seven people who worked for RTV (B205-206). Dr. Abraham discussed his peer-reviewed article that identified five New York talc miners with mesothelioma and concluded that mineral fibers in the talc caused their diseases (B73-74).

Hotly-contested is not the equivalent of closely-contested. The fact, that RTV was adamant about its position and presented a large volume of mineralogy and regulatory evidence, does not make medical causation a close call. Most of RTV's voluminous evidence had little to do with medical causation. The only government publication that RTV includes in its appendix on appeal is the 174-page so-called 'NIOSH Roadmap' (A0533-706). RTV's expert and former NIOSH official Dr. Bryan Hardin testified that the Roadmap is inconclusive and simply a statement that more research is needed (B197.1). Even if the jury had taken the time to read the "hundreds and hundreds" of pages of exhibits that RTV offered *en masse* (B260) (which it was under no obligation to do), there has been no showing that doing so would "have changed the result." *Grenier*, 981 A.2d at 539.

The issue of whether RTV should have known that its talc posed an asbestos risk was not a close call. It was subject to findings by NIOSH in 1980 that its talc contained asbestos (B17). RTV's own evidence of its "battle with NIOSH" shows that it had *notice* of such risks (B35; B43; B45). RTV presented evidence that it *disagreed* with the view that its talc contains asbestos or was capable of causing asbestos disease, but disagreeing is different than having no notice. RTV knew that NYTAL contained asbestiform talc and was sufficiently aware of the implications to avoid mentioning that fact to customers. It is difficult for RTV to claim that it had no idea that asbestiform materials posed a risk, when it went out of its way to *falsely* assure customers that its talc was "non-asbestiform" (B205-208; B6-8).

The trial court's directing a verdict on punitive damages does not indicate that any issue was closely contested. The court simply concluded that plaintiff could not establish a higher level of misconduct under a higher standard of proof and questioned the efficacy of punishing RTV for decades-old misconduct.

(b)

None of the Testimony was Directly or Clearly Related to the Issues Raised by RTV

Speculative theories as to how testimony indirectly affected the case do show "clear" prejudice. *See Reinco,* 906 A.2d at 110-11. Even if the issues were close, RTV has not shown any serious, unfair prejudice. *Grenier*, 981 A.2d at 542.

Mr. Rogers' stray comment about what a coworker told him was insignificant in the context of the evidence as a whole. Experts on both sides

analyzed the talc and opined as to its contents. The jury was permitted to hear Mr. Rogers' testify that he saw a NYTAL bag that said "asbestos." His admissible testimony went more to the heart of what RTV should have known than what a coworker may have said while showing Mr. Rogers the bag. It has not been shown that the brief reference in question clearly made a difference in the outcome.

Mr. Fitzgerald's "fingerprint" testimony went to exposure, not medical causation or what RTV should have known. The averages (which were displayed but not discussed on direct) were not critical to his opinions or their foundation. The fact that the trial court, in May 2012, felt that Mr. Fitzgerald's *overall* testimony was sufficiently important to continue trial does not mean that one miscalculated chart was case-dispositive. Hearing that Mr. Fitzgerald had reviewed something that he could not discuss was not specific to any issue. The jury was told that the court might strike or exclude evidence and instructed not to be concerned with why (A1038). *See Beebe Medical Center, Inc. v. Bailey*, 913 A.2d 543, 556 (Del. 2006). Nothing in the record suggests that the jury ignored that instruction or attached particular significance to the reference in question.

RTV's suggestion that Mr. Fitzgerald referenced scientifically unreliable information is incorrect. The court excluded reference to Dr. Rigler's work was for its untimeliness (B31). Such difference distinguishes this case from *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 246 (Del. 1961), where the erroneous expert

testimony was substantively improper. Mr. Fitzgerald did not testify as to anything that was out-of-bounds for experts as a matter of law. He did not base his opinions on information held to be unreliable. He simply indicated that he could not discuss a matter that had been excluded for procedural reasons. Finally, as the trial court observed, plaintiff's side likely got the worst of any negative impression (Add20).

Defendant's primary argument is that Dr. Castleman's remarks caused the jury to ignore the government studies that it offered *en masse*. RTV asserts that this must be so because the jury deliberated for just three hours. In essence, RTV is asking this Court to do what the jury was told was improper—consider the volume of its evidence as opposed to its quality (A1039). RTV has consistently touted the quantity of government studies, but rarely argued their quality. Moreover, accepting RTV's position would require indulging several unproven assumptions that even its counsel conceded are speculative (B260). There is no basis to conclude that Dr. Castleman's "senator" comment was the reason that the jury likely did not read that mass of documents in detail. There is no basis to conclude that not reading those documents means that the jury ignored RTV's position. There is no reason to conclude that reading those documents would have made a difference, particularly given that lobbying in general was fair game to both sides.

RTV suggestion that the 'brevity' of the jury's deliberations indicates prejudice is also speculative. The time it took the jury to deliberate could just as

easily, if not more reasonably, be interpreted as indicating that the issues were not closely contested. In the case RTV cites, *Chilson v. Allstate Insurance Co.*, 979 A.2d 1078 (Del. 2009), the jury deliberated for only 75 minutes and, then, returned a verdict for $2 million on a wrongful denial of coverage claim where the policy had a $100,000 limit. *See* 979 A.2d at 1082. The Court in *Chilson* found the shocking size of that award to be as much or more of an indication of prejudice. *See* 979 A.2d at 1084. Here, the trial court found that the damages were not excessive or shocking (B262). RTV has not contended otherwise. Delaware Courts often look to the amount of damages as a reliable barometer of prejudice. *See e.g. Duphily*, 703 A.2d 1202 ($3M not shocking in light of severe injuries); *DeAngelis*, 628 A.2d 77 (new trial where damages were grossly inadequate). Although the Court did not expressly rule on the excessiveness of the award in *Robelen Piano*, its concerns that the award was "quite high" factored into to granting a new trial. 169 A.2d at 248. Overall, *Robelen Piano* stands for the unexceptional proposition that cumulative errors can sometimes necessitate a new trial. That case does not suggest the mix of errors alleged here warrants such a drastic remedy.

The Court, in *Lang v Morant*, 867 A.2d 182, 187 (Del. 2005), did not hold that it was improper to rely on the reasonableness of damages as a test of prejudice. That jury did not reach damages because it found for defendants. Likewise, in *Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520 (1931), the Court

did not hold that the size of the damage award was an unreliable test of prejudice. The Court held that remittitur was an insufficient remedy precisely because the excessive damages indicated that the liability verdict was likely tainted too.

RTV notes the trial court's concerns about Dr. Castleman's senator comment. Musings by a trial judge about the seriousness of an error do not prove that it was unfairly prejudicial. *See Reinco*, 906 A.2d at 108-09. The trial court here never conclusively stated that Dr. Castleman's testimony was prejudicial and later clarified that it might have over-spoken in that regard (B256-257). It ultimately denied RTV's motion for a new trial. *See Koutoufaris*, 604 A.2d at 400.

(c)

The Court Gave Curatives, When Asked, which Obviated any Possible Prejudice

Curative instructions can obviate the need for a new trial even as to egregious errors and are the preferred remedy. *See Joseph v. Monroe*, 419 A.2d 927, 930 (Del. 1980); *Shively*, 551 A.2d at 44-45. Here, the trial court provided every curative that was requested. It found and RTV agreed that plaintiff's counsel did not expressly allude to any of the testimony at issue in closing argument (B257; B260). On appeal, RTV asserts that counsel reinforced Dr. Castleman's testimony by arguing that the government's conclusions were unreliable because it was subject to industry lobbying. As noted, evidence of general lobbying was not excluded. Also, counsel's remark was that certain international health organizations were not subject to lobbying (A316).

RTV agreed to the manner in which Mr. Fitzgerald's testimony was handled and never requested any stronger curative instructions. *See Beebe Med. Cent.*, 913 A.2d at 555. Its declining a curative instruction as to Dr. Castleman is not proof or evidence that one would have been ineffective. In this regard, RTV's citation to *Green v. Alfred A.I. duPont Institute of the Nemours Foundation*, 759 A.2d 1060, 1063 (Del. 2000) is misplaced. *Green* did not involve the jury hearing brief items of excluded evidence; rather, it involved improperly excluding an expert's entire testimony. A jury can be instructed to disregard improper comments, but cannot consider admissible testimony that it never heard. The Court in *Koutoufaris* did not hold that bad faith renders a curative ineffective. Rather, the Court held that asking an improper question in good faith can usually be cured. *See* 604 A.2d at 400.

Gomez v. State, 25 A.3d 786, 794-95 (Del. 2011) does not excuse a civil litigant from requesting a curative instruction. *See Beebe Med. Cent.*, 913 A.2d at 555 (civil litigant must seek curative). Improper testimony about a prior conviction for a similar offense is presumed prejudicial and objectively incurable. Given the tenuous connection between Dr. Castleman's testimony and any critical issue, declining a curative was a strategic choice for which RTV bears responsibility.

(2)

RTV Either Invited the Testimony at Issue or Aggravated the Possible Prejudice

A "party may not be heard to complain of a responsive answer to a question which he himself asked in cross-examination." *Itek Corp. v. Chicago Aerial*

Industries, Inc., 274 A.2d 141, 144 (Del. 1971). Invited errors and the consequences of ill-advised strategic decisions provide no basis for granting a new trial. *See e.g. Bryan v. Doar*, 918 A.2d 1086, 1090 (Del. 2006); *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 439, n.4 (Del. 1996).

As the trial court held, RTV was at least equally responsible for the jury hearing Mr. Rogers' testimony (Add14). Plaintiff provided RTV with his edited testimony before it was played. After making unfounded accusations, RTV finally admitted that it simply missed the testimony at issue (B275-278). By not objecting in advance, RTV's limited its remedy to the court's agreed-to curative instruction.

Because Dr. Castleman's publically available book contains two sentences about RTV, one of which mentions JM, the trial court correctly held that RTV invited the reference. That statement was also peripheral to any issues in the case and lacked context until RTV decided to offer more evidence concerning JM. *See Bryan*, 918 A.2d at 1090; *Pressman*, 679 A.2d at, 439, n.4. RTV even argued that its playing of Dr. Thompson's testimony caused most of the prejudice (A800-801).

Dr. Castleman's comment concerning the senator and lobbying was invited by RTV's decision to continue questioning him about the meeting at the mine (B261). *See Itek Corp.*, 274 A.2d at 144. It should have been obvious by the first few questions where this line of inquiry might lead. RTV made no objection to the initial reference to "millions of dollars" or to the witness specifying $16 million. It

only asked to have the very last remark stricken. Both this testimony and Dr. Castleman's reference to JM occurred during lines of cross-examination as to which RTV previously stated its intention to use the witness to prove its own case. *See Itek Corp.*, 274 A.2d at 144. Neither plaintiff nor the Superior Court should have to suffer another trial because RTV's attempt to use plaintiff's witness as its own backfired. *See Bryan*, 918 A.2d at 1090; *Pressman*, 679 A.2d at, 439, n.4.

(II)
The Trial Court Did Not Commit Reversible Error
By Declining Defendant's Instructions On Employer Duties

A. Question Presented

Whether it was reversible error for the trial court to decline to give defendant's instruction on employer duties, where there was minimal evidence of employer fault and defendant provides no argument and authority in support?

B. Scope of Review

This Court reviews alleged instructional errors *de novo*. *See Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 540 (Del. 2006).

C. Merits

(1)
The Instructions as a Whole Were Appropriate Given
The Lack of Evidence and Absence of Applicable Supporting Authority

There is no error in declining an instruction where the proponent "present[s] no authority to support the contention that the [instruction] is required ***." *Cox v. Turner*, 663 A.2d 486 (table), 1995 WL 379237, *3 (Del. Apr. 11, 1995). *See also Shively*, 551 A.2d at 44. Ohio substantive law applied here. RTV has yet to cite any Ohio authority allowing or requiring that its instructions be given—here on appeal or below. *See Haas v. United Tech. Corp.*, 450 A.2d 1173 (Del. 1982) (propriety of instructions determined by applicable substantive law). At least one Ohio court has held that there was no error in refusing to recite O.R.C. 4101.11 and 4101.12 to a

jury. *See Kingham v. Gypsum Interiors, Inc.*, 1991 WL 214246, *3 (Ohio App., Sept. 24, 1991). Moreover, those statutes are not specific to employers, but are based upon the general duties of premises owners to any entrant. *See Frost v. Dayton Light and Power Co.*, 740 N.E.2d 734, 740 (Ohio App. 2000).

There is no error in declining a suggested instruction where the proponent fails to plead or articulate its theory of the issue. *See Shively*, 551 A.2d at 44. There is no error where the proponent offers little colorable evidence and makes no real effort to present a case on the subject. *See Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993); *Reinco*, 906 A.2d at 111. *See also Dana Companies, LLC v. Crawford*, 35 A.3d 1110, 1111 (Del. 2011), affirming judgment on basis of trial court's opinion at *In re Asb. Litig. (Henderson)*, 2011 WL 684164 (Del. Super., Feb. 2, 2011). There, as here, "the jury *** culled from the evidence those facts which suggested that [plaintiff and decedent] were exposed to asbestos from [non-parties] while also concluding that there was insufficient evidence of negligence or product defect as to the non-parties." *Henderson, supra* at *9. There, as here, "[t]he verdict accurately reflects the dearth of proof presented ***." *Id.* The court's description of defendants' case in *Henderson* as "an after-the-fact effort to cobble together evidence satisfying their burden," aptly applies to RTV's efforts here. *Id.*

(2)
Defendant was Not Prejudiced by the Court's
Declining to Include Any Instruction on Employer Duties

Not every arguable instructional error requires a new trial. *See Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003); *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002). Deficiencies in the jury charge "will not serve as grounds for reversible error," if the instructions as a whole are "reasonably informative and not misleading." *Sammons*, 913 A.2d at 540 (no prejudice in refusing cross-claim instruction). *See also Beebe Med. Cent.*, 913 A.2d at 556; *Balan v. Horner*, 706 A.2d 518, 522 (Del. 1998). RTV does not allege that the court affirmatively misstated the law. Other than those at issue, RTV either agreed to the instructions given or has not appealed any disagreement. It is unlikely that the jury would have allocated fault to the employers, even with a duty instruction, given RTV's minimal evidence and failure to alert the jury in opening that the employers' fault was an issue. *See Beebe Med. Cent.*, 913 A.2d at 551.

RTV argued that Borg Warner was in charge of the jobsite and all RTV could do was provide information (B246). Mr. Vanderbilt testified that it was RTV's decision as to whether any risk associated with its talc was sufficient to require informing end users (B19). The trial court and jury heard exactly what RTV did and did not tell customers in general and decedent's employers in particular. The court dismissed RTV's sophisticated purchaser defense (B223). The

jury determined that the information provided by RTV was inadequate (A1076). Given that the employers were inadequately informed as to the risks associated with the only identified material capable of causing mesothelioma, it is speculative that an instruction on their general duties would have made a difference.

RTV cites several Delaware cases in arguing that it had an unqualified right to the instructions in question. *E.g. Newnam v. Swetland*, 338 A.2d 560, 561 (Del. 1975); *Koutoufaris*, 604 A.2d at 394; *Robelen*, 169 A.2d at 247; *Island Express, Inc. v. Frederick*, 171 A. 181, 183 (Del. 1934). None of these cases addresses whether a product liability defendant is entitled to an instruction on the duties of a non-party employer under Ohio law or any other law. Even if RTV had some right to the instructions at issue, reversal is not warranted because omitting them did not "undermin[e] either the jury's ability to reach a verdict or [the] confidence in their ability to do so fairly." *Whittaker v. Houston*, 888 A.2d 219, 224-25 (Del. 2005). *North v. Owens-Corning Fiberglas Corp.*, 704 A.2d 835 (Del. 1997) involved a refusal to submit entire theories of recovery. Here, the court submitted the issue of employer fault on instructions to which RTV otherwise agreed.

(3)

Defendant Waived Any Error Regarding its Suggested Instructions

The failure to tender a reasonably proper instruction bars consideration of alleged errors. *See Grand Ventures*, 632 A.2d at 71. The instructions proffered by RTV were not reasonably proper and merely recited two general premises owner

statutes. *See Frost*, 740 N.E.2d at 740; *Kingham*, 1991 WL 214246, *3. They included extraneous material and RTV made no effort to tailor them to this case. *E.g. Beck v. Haley*, 239 A.2d 699, 702 (Del. 1968); *Newnam*, 338 A.2d at 561. RTV presented no argument or authority in support of its suggested instructions.

RTV asserts that trial courts must give a proper instruction even if a party submits a flawed one. *See* RTV's Br., pp. 28-29 (*citing Robelen Piano*, 169 A.2d at 246-47; *Newnam*, 338 A.2d at 562, n. 3; *Pennsylvania RR Co. v. Goldenbaum*, 269 A.2d 229 (Del. 1970)). Two of these cases did not even address such issue. *See Newman*, 338 A.2d at 562, n. 3 (declining to offer any view as to the propriety of instruction submitted"). *Pennsylvania RR*, 269 A.2d at 234 (stating only that the defendant could have objected more specifically). *Robelen* held that failing to tender a perfect instruction does not in itself waive the right to a proper one, but not that any instruction—no matter how deficient—suffices. The defendant in *Robelen* also provided the trial court with references and argument in support its instruction. Here, RTV provided nothing beyond counsel's unfulfilled assurances that he could produce examples from Ohio courts. Neither *Grand Ventures*, 622 A.2d at 664 nor *Franklin v. Salminen*, 222 A.2d 261 (Del. 1966) excuses tendering at least a reasonably proper instruction. No case cited by RTV requires a court to research out-of-state law to fix an improper, unsupported, last-minute instruction.

A waives any error by merely offering an instruction without also advising the trial court as to the "reasons why" it is proper. *See Beebe Med. Cent.*, 913 A.2d at 556. RTV failed to present the trial court with any argument as to why an employer duty instruction was required or allowed, including those pints it now makes on appeal. *See Duphily*, 703 A.2d at 1206 ("[p]arties are not free to advance arguments for the first time on appeal") (*citing* Supr.Ct.R. 8); *Grand Ventures*, 632 A.2d at 71 (*citing Chrysler Corp. v. Quimby*, 144 A.2d 123, 139 (Del. 1958)).

RTV notes that the trial court offered to draft a narrower employer duty instruction. (B244-245). In *Stillwell v. Parson*, 145 A.2d 397 (Del. 1958), no waiver occurred where the trial court said that *further* objections were unnecessary—which assumes there was a prior objection. Upon learning that the final charge excluded it instruction, RTV did not object but said "thank you." The Court in *Stillwell* ultimately held that the instruction error was harmless due to lack of evidence—which is the case here. *See e.g. Henderson*, 2011 WL 684164, *9.

(III)
Cross-Appeal

The Trial Court Erred As A Matter Of Law
In Disallowing Post-Judgment Interest For A Period Of Time

A. Question Presented

Whether it was reversible error for the trial court to suspend post-judgment interest for the period of March 8, 2013 to August 27, 2013 (A1108)?

B. Scope of Review

This Court reviews questions of law *de novo*. *See Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1091 (Del. 2000).

C. Merits

After the trial court allowed post-judgment interest under Ohio law at 6.00% per annum from the date of the verdict, RTV moved for reconsideration. The court agreed (per plaintiff's agreement) that Delaware law applied and reduced the interest rate to 5.75% (Add30-32). The court denied RTV's argument that post-judgment interest under Delaware law does not run from the date of the verdict. The court *sua sponte* determined that post-judgment interest should not run from the date on which it held the hearing on post-trial motions (March 8, 2013) to the date that it issued its corrected opinion (August 27, 2013). The court reasoned that it, rather than RTV was responsible for that delay.

"Delaware law provides Post-Judgment Interest is a right belonging to the prevailing plaintiff and is not dependent upon the trial court's discretion." *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000). Accordingly, the trial court had no authority to suspend post-judgment interest—certainly not where plaintiff caused no delay. As a matter of policy, post-judgment interest is not a punishment. It is simply compensation for the time-value of money owed to a plaintiff as determined by a jury. RTV has had the use of the funds reflected in the verdict. Mrs. Galliher has not. She has an unqualified right to be compensated for what she could have reasonably earned had RTV paid the judgment. Fault is not an issue. RTV is just effectively "borrowing" $2.86 million from Mrs. Galliher at a reasonable rate of 5.75% until the judgment is paid.

CONCLUSION

For the reasons herein stated, Plaintiff-Appellee Darcel Galliher respectfully request this Court to affirm the judgment in her favor and against Defendant-Appellant and to affirm the denial of Defendant-Appellant's motion for new trial, and to reverse the trial court's decision suspending post-judgment interest from March 8, 2013 to August 27, 2013.

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