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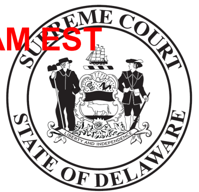

IN THE SUPREME COURT OF THE STATE OF DELAWARE

R.T. VANDERBILT COMPANY, INC., Defendant Below, Appellant, v. DARCEL GALLIHER, Individually and as Special Administrator of the Estate of Michael Galliher, Deceased, Plaintiff Below, Appellee.	)	No. 510,2013 On appeal from: Superior Court No. N10C-10-315

REPLY/CROSS-APPELLEE BRIEF OF APPELLANT/DEFENDANT BELOW/CROSS-APPELLEE VANDERBILT MINERALS, LLC FKA R.T. VANDERBILT COMPANY, INC.

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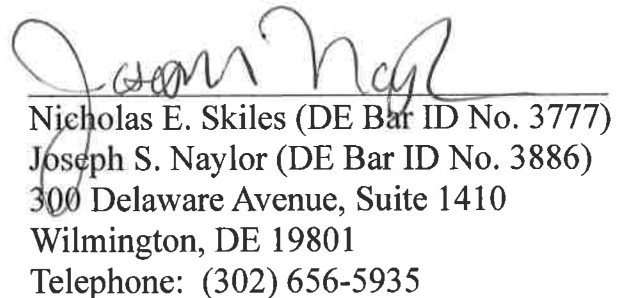

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Dated: January 27, 2013

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INTRODUCTION

Appellant Vanderbilt Minerals, LLC is entitled to a new trial for two reasons. First, the Superior Court asked the jury to assess whether Michael Galliher's employer (Borg Warner and its successor Artesian Industries)[1] shared responsibility for his injuries, but, despite Vanderbilt's request, *never* informed the jury what duties that employer owed to him. As explained in Vanderbilt's opening brief, that omission "undermined the jury's ability to intelligently" assess the employer's fault. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.3d 519, 540 (Del. 2006). Second, throughout trial, plaintiff's witnesses repeatedly presented improper testimony that the trial court had already excluded. The trial court was right to fear that "no amount of curative instructions" could adequately and fairly "erase" some of that highly prejudicial testimony from the minds of the jurors. A295. Plaintiff's response, premised in significant part on meritless waiver and invited-error arguments, fails to salvage either set of errors independently requiring a new trial.

1. Plaintiff does not dispute that the trial court gave the jury no explanation of how Galliher's employer might be "at fault." Rather, plaintiff asserts that (i) Vanderbilt was not entitled to *any* explanatory instruction; (ii) any instructional

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[1] Unless otherwise noted, this brief uses "Borg Warner" to refer to both Borg Warner and Artesian. Borg Warner became Artesian in the mid-late 1970s. RTV Br. 2 n.2.; Gal. Br. 4. ("Gal. Br." refers to Galliher's second amended brief. "RTV Br." refers to Vanderbilt's opening brief.)

error did not impair the jury's functioning; and (iii) Vanderbilt waived this claim. But, as explained below, those assertions ignore Ohio law, the ample record evidence from which a properly instructed jury could infer fault, and caselaw confirming that the jury's standardless "fault" inquiry deprives a defendant of fair process. Plaintiff's last-ditch waiver claim is likewise belied by the record, which includes Vanderbilt's multiple efforts to supplement the jury instructions *and* the district court's assurance that no further preservation effort was necessary.

2. Nor does plaintiff dispute that her witnesses on no less than four separate occasions put evidence before the jury that the trial court had deemed so infirm as to have excluded it *in advance*. Rather, plaintiff seeks to minimize the prejudicial impact of those multiple errors by arguing that (i) the critical liability issues were not closely contested; (ii) the testimony did not bear on those issues; (iii) the court's instructions cured any prejudice; and (iv) Vanderbilt was to blame for the errors. As explained below, none of those assertions finds support in the record.[2]

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[2] Plaintiff earlier moved to dismiss this appeal as untimely. This Court denied that motion "without prejudice to [plaintiff]'s right to raise the issue *** in her answering brief on appeal." Order 1, Oct. 15, 2013. Plaintiff failed to do so, instead "stand[ing] on [her] motion" in a single footnote. Gal. Br. 1 n.1. Plaintiff has thus waived the timeliness issue. *See* DEL. S. CT. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived ***."); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012) ("Arguments in footnotes do not [raise] an issue in the 'body' of the opening brief."). Regardless, for the reasons stated in its response to plaintiff's motion, Vanderbilt's appeal was timely under controlling Delaware law. *See* Opposition to Plaintiff-Appellee's Motion to Dismiss 1-4, Oct. 4, 2013; *infra* 31 n.9.

SUMMARY OF ARGUMENT: CROSS-APPEAL

3. Denied. Plaintiff is not entitled to post-judgment interest for a *portion* of the period between the jury's verdict and the court's entry of final judgment, *i.e.*, March 8, 2013 and August 27, 2013, that the trial court excluded due to its own acknowledged delay. *Contra* Gal. Br. 38–39. First, plaintiff is entitled to no interest at all, since the judgment below is infirm and a new trial is required. Second, even if plaintiff were ultimately entitled to interest, the date of final judgment below—here, August 27, 2013—is the legally operative trigger date. Third, the trial court was well within its discretion to toll the accrual of interest caused by the court's own delay.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO GIVE ANY EMPLOYER-DUTY INSTRUCTION WAS REVERSIBLE ERROR.

A. Vanderbilt Was Entitled To An Employer-Duty Instruction.

1. Plaintiff contends that Vanderbilt failed to cite "Ohio authority" for its proposed employer-duty jury instructions. Gal. Br. 32. But Ohio statutes *are* "Ohio authority" on Ohio law. Vanderbilt's proposed employer-duty instructions quoted from two governing Ohio statutes, *compare* A1025, *with* OHIO REV. CODE §§ 4101.11, 4101.12, and Vanderbilt told the trial court that they did so, *see* A299.[3]

Plaintiff does not dispute that those statutes applied or that the duties set forth therein were omitted from the jury charge. Instead, relying solely on *Haas v. United Technologies Corp.*, 450 A.2d 1173 (Del. 1982), plaintiff appears to contend that Vanderbilt should have cited Ohio precedent "allowing or requiring" Vanderbilt's specific proposed instructions. Gal. Br. 32. That level of particularity is unnecessary, for two reasons. First, the issue is not whether the trial court erred by not giving the precise instructions Vanderbilt proposed; it is whether the court erred by not giving *any* employer-duty instruction at all, after Vanderbilt requested a charge on the subject. *See* RTV Br. 27–33.

[3] Appendix citations correspond with Del. S. Ct. Rule 13(a)(iii): "A###" refers to Vanderbilt's opening brief's appendix; "B###" refers to Galliher's amended appendix; and "AR###" refers to the appendix to this reply. "Add#" refers to the addendum at the back of Vanderbilt's opening brief.

Second, plaintiff's view of *Haas* is mistaken. To be sure, non-Delaware law may provide the substantive law on which a jury must base its decision, as Ohio law did here. *See Haas*, 450 A.2d at 1175–1176 (considering Maryland law). But whether that jury was adequately instructed based on substantive non-Delaware law is a procedural question on which Delaware law controls. *See id.* at 1179–1180 (court "[could] []not" reverse "under the Delaware authorities cited above"); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 30 & n.69, 37 & n.90 (Del. 2005) (applying Delaware caselaw to a claim under Saudi law). Were the rule otherwise, this Court would have no uniform way to review alleged instructional errors—such as the level of specificity required—arising from different substantive law. And plaintiff does not appear to dispute that Delaware law provides the governing standard here: whether the instructions, as given, "undermined the jury's ability to intelligently" assess Borg Warner's fault. *Sammons*, 913 A.3d at 540. Indeed, this Court has treated *Haas* as authority on *Delaware* instructional law. *See Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993).

In short, whether the trial court adequately communicated Ohio duty law, as reflected in the Ohio statutes, turns on Delaware jury-instruction principles. Under those principles, Vanderbilt was entitled to at least *some* employer-duty instruction. *See* RTV Br. 27-33.

2. In any event, an Ohio court would have informed the jury of Borg Warner's duties under Ohio law. *See, e.g., Stark Cnty. Agr. Soc'y v. Brenner*, 122 Ohio St. 560, 561 (1930) ("In an action upon a liability for tort it is reversible error to fail to instruct the jury upon the legal duty owing by the defendant to the plaintiff."); *Justice v. Shelby Ice & Fuel Co.*, 18 Ohio App. 2d 197, 198 (Ct. App. 1969) ("In a personal injury case where liability is an issue, the trial court must, without special request, correctly tell the jury what duty defendant owed plaintiff."); *see also id.* at 206-207 ("The court failed to tell the jury about these duties owed by the plaintiff. The plaintiff had a right to have his claim *** considered in light of the defendant's duty 'to do every other thing reasonably necessary[,]' [OHIO REV. CODE § 4101.11,] to protect his 'safety' *** ."). Even plaintiff's cited authority confirms that the statutes quoted by Vanderbilt "require employers to provide employees *** with a safe place to work," *Frost v. Dayton Power & Light Co.*, 138 Ohio App. 3d 182, 189 (Ct. App. 2000), and "set forth" an employer's duties, *id.* at 190, 191. Plaintiff provides no affirmative reason why a trial court need not inform a jury of such basic duties before expecting it to resolve whether an employer violated its duty of care. Neither law nor logic countenances such a result.

Plaintiff's reliance on an unpublished table opinion does not prove the contrary. *See* Gal. Br. 32-33 (citing *Kingham v. Gypum Interiors, Inc.*, No. 11780,

1991 WL 214246 (Ohio Ct. App. Sept. 24, 1991)). In *Kingham*, the court considered a different argument: that the trial court should have instructed the jurors that the same Ohio statutes imposed a heightened duty of care. *See* 1991 WL 214246, at *3. The appellate court found no reversible error because the statutes did not impose a *heightened* duty. Here, by contrast, Vanderbilt contends that the trial court did not even communicate the employer's *ordinary* duty of care, as set forth in the Ohio statutes, because it never informed the jury how to assess Borg Warner's fault.

3. In a single sentence, plaintiff suggests that Vanderbilt was not entitled to its proposed instruction because Vanderbilt "fail[ed] to plead" Borg Warner's negligence with sufficient specificity. Gal. Br. 33. But the sole case on which plaintiff relies, *Shively v. Klein*, does not establish such a sweeping rule. *See* 551 A.2d 41, 44 (Del. 1988) (plaintiff not entitled to instruction on unpleaded theory that would have worked "a drastic departure from the causation standards consistently applied in Delaware"). And it would be doubly erroneous to apply that purported rule here, where *plaintiff's* complaint alleged that Borg Warner was negligent. *See* A751-754.

Regardless, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." DEL. SUPER. CT. R. CIV. P. 15(b); *see also* A85

(Plaintiffs "are fine with" Vanderbilt presenting evidence of Borg Warner's fault). Perhaps that explains plaintiff's focus on the opening statement, rather than the evidence and arguments actually presented during the course of the trial. As explained next, the record amply demonstrates that the issue of Borg Warner's fault was squarely at issue.

4. Plaintiff suggests that insufficient evidence supported Vanderbilt's request for a duty instruction. Gal. Br. 34. An instruction may be rejected on that ground only when the evidence is so lacking as to warrant judgment as a matter of law. *See Wyatt v. Clendaniel*, 320 A.2d 738, 740 (Del. 1974) (triable fact question is enough for instruction); *see also Robelen Piano Co. v. Di Fonzo*, 53 Del. 346, 355 (1961). Plaintiff misunderstands that standard. The cases on which plaintiff relies either have no apparent relationship to this issue, *see Grand Ventures*, 632 A.2d at 71 (instructions on agency and damages were sufficient), or concern an argument that a verdict was against the great weight of the evidence, *see Reinco, Inc. v. Thompson*, 906 A.2d 103, 111 (Del. 2006); *In re Asbestos Litig. (Henderson)*, No. 09C-07-188, 2011 WL 684164 (Del. Super. Ct. Feb. 2, 2011), *aff'd sub nom. Dana Cos. v. Crawford*, 35 A.3d 1110 (Del. 2011).[4]

Vanderbilt makes no such sufficiency-of-the-evidence challenge. To the contrary, the question here presents a much lower threshold for Vanderbilt:

[4] This very different legal footing of the *Henderson* case renders inapposite each of plaintiff's *Henderson* citations. *See* Gal. Br. 32-33, 37.

whether the evidence supported a jury instruction on employer duty—*i.e.*, whether a properly instructed jury *could* have concluded that Borg Warner was at fault—where nobody disputes that the court permissibly submitted to the jury the overall question of Borg Warner's fault. And, as set forth in the opening brief, that answer is plainly yes. *See* RTV Br. 31-33.

Plaintiff's contrary position rests on an incomplete description of the record. Plaintiff contends, for example, that "[t]he only evidence" of Borg Warner's 1974 OSHA citation for asbestos in the talc was the testimony of Dr. Thompson. Gal Br. 16. But at trial, plaintiff never seriously questioned that such a citation was issued. *See* AR11. Nor did she ever suggest that the citation was a mystery to Artesian—or that any failure of Borg Warner to provide that information to Artesian would not itself be negligent.

Plaintiff likewise claims that "[t]here was no evidence that management was aware[]" of shop-talk concerning asbestos. Gal. Br. 16. At the very least, the record permits a contrary inference. *See* AR10 ("[Q:] Do you know if *** anybody ever made a grievance about the use of the talc ***? [A:] *** [T]he union was all the time complaining about it."); *see also* A186. And plaintiff's insinuation that the court found no "colorable evidence" of Borg Warner's fault is inaccurate. Gal. Br. 14 (discussing defense not at issue on appeal); B223 (rejecting defense based on whether *Vanderbilt could rely* on Borg Warner's knowledge); *see also*

Add24 (trial court acknowledging "evidence from which the jury *could* have concluded that Borg Warner was at fault").

More fundamentally, plaintiff mistakenly emphasizes (Gal. Br. 34-35) what Vanderbilt did or did not disclose, rather than what *Borg Warner*—an independently responsible actor—knew or should have known. Plaintiff's focus (Gal. Br. 16-18) on Borg Warner's supposed lack of knowledge (actual or constructive) that Vanderbilt's talc specifically caused *mesothelioma* is misplaced: even if Borg Warner lacked notice that Vanderbilt's talc might contain "asbestos," it was at least on notice that exposure to that talc posed health risks—including lung injury. A289. And yet Borg Warner failed to take adequate steps to prevent those risks. The relevant question encompasses not only whether Borg Warner failed to satisfy its duty to employees (including Galliher) based on actual or constructive knowledge that Vanderbilt's talc caused mesothelioma, but also whether it failed to do so based on its own broader knowledge of health risks from talc exposure.

As noted in the opening brief, the record evidence included (i) a 1978 warning advising that inhalation of talc could cause lung injury; (ii) the fog of dust in the cast shop; (iii) Borg Warner's lackadaisical mask policy, which permitted employees *not* to use safety masks for many years; (v) Borg Warner's persistent inaction even in the face of union complaints and "shop talk" about asbestos; (v) a

1974 OSHA citation for using industrial talc that supposedly contained asbestos, RTV Br. 32; and (vi) a 1984 National Institute for Occupational Safety and Health investigation finding a "serious, extensive" safety problem at the facility, RTV Br. 9.

A properly instructed jury could easily have found that Borg Warner violated its duty to Galliher by failing to prevent or minimize his exposure to talc, *see, e.g.*, A498 (mask policy), thereby causing a lung injury (such as mesothelioma) in this case. That is particularly so here, where Vanderbilt emphasized that very point during its closing argument. A318-320. At a minimum, as the trial court correctly found—but failed to enable the jury to implement—Borg Warner's fault was a question for the jury.

B. The Trial Court's Failure To Give Any Employer-Duty Instruction Materially Impaired The Jury's Functioning.

1. This Court has consistently held that it "'*will* reverse if the alleged deficiency *** undermined the jury's ability to intelligently perform its duty in returning a verdict.'" *Sammons*, 913 A.2d at 540 (emphasis added). A jury's functioning is impaired when it is faced with a triable fact question on a critical defense, but is inadequately instructed about how to resolve that question. *See* RTV Br. 31 (citing *Newnam v. Swetland,* 338 A.2d 560, 561 (Del. 1975), and *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975)).

In *Newnam*, as more fully described in the opening brief (RTV Br. 31 n.8), this Court reversed the judgment of a trial court that failed to inform the jury of a plaintiff's duty of care when driving through an intersection. 338 A.2d at 561. Putting aside a conclusory claim concerning error preservation, Gal. Br. 36, plaintiff's response is simply to assert that *Newnam* is not about products liability, Gal. Br. 35. True enough. But while Delaware jurors surely have a background understanding of driving (or at least riding) through intersections, their day-to-day experience with Ohio ceramics manufacturers is likely more limited. If a detailed duty instruction is required for an area of such common knowledge as driving, the jury *a fortiori* was entitled to hear the precise contours of Borg Warner's duty here. Plaintiff's unwillingness to address *Newnam* is telling, as is her failure to cite, let alone distinguish, *Lutzkovitz*, 339 A.2d at 67 ("Plaintiffs' proof specifically raised the factual issue ***. Therefore, in order to enable the jury intelligently to perform its duty, it was entitled to an instruction *** .").

This is not to say that a failure to instruct can never be harmless. If a defense requires proof of two elements, for example, clear failure to prove one makes instructional error on the other—no matter how much it hinders jury consideration of that element—immaterial to the verdict. But that is not this case.

2. All but one of the cases on which plaintiff relies found no instructional error at all, and thus had no occasion to reach the ultimate question of whether that

error "undermines the jury's ability to intelligently" render a verdict. Gal Br. 34–35; *see Sammons*, 913 A.2d at 540-541 (no error in refusing *plaintiff's* request for instruction giving "specific information" about a *cross*-claim, an instruction that would have "confus[ed] the jury by overburdening them with unnecessary information"); *Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 557 (Del. 2006) (no plain error in giving "legally adequate" charge); *Whittaker v. Houston*, 888 A.2d 219, 225 (Del. 2005) (no error when trial judge "included the testimony of the chiropractor within the broad category of a medical expert"); *Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003) (no error in withholding question of law from the jury); *Corbitt v. Tatagari*, 804 A.2d 1057, 1059 (Del. 2002) (no error where "challenged language gave the jury a helpful, informative and accurate explanation of the standard of care"). The other case held that an *over*-inclusive charge was harmless, not that a jury left in the dark was able to function unimpaired. *See Balan v. Horner*, 706 A.2d 518, 522 (Del. 1998).[5]

Failing to cite any countervailing authority to *Newnam*, plaintiff provides this Court no basis to excuse the trial court's refusal to instruct the jury—consistent with both Vanderbilt's request and the record evidence—on the relevant employer

[5] Plaintiff also mentions, but does not rely on, some of the cases cited in Vanderbilt's opening brief. *See* Gal. Br. 35. One of those cases involved a harmless instructional error, and it too is inapposite. *See Koutoufaris v. Dick*, 604 A.2d 390, 399 (Del. 1992) (any error in *giving* a charge possibly unsupported by evidence was harmless; the jury was "not called upon to *** apply the instruction" on an exception to a contributory negligence defense because it "specifically determined that *no* contributory negligence existed").

duties. Without any such instruction, the jury lacked adequate legal guidance to determine whether the employer was "at fault."

C. Vanderbilt Preserved Its Objection.

1. A litigant preserves a claim of instructional error when its request for an instruction is "made, overruled, and not abandoned." *Stilwell v. Parsons*, 145 A.2d 397, 401 (1958); *cf.* FED. R. CIV. P. 51(d)(1)(B) (Where court definitively rejects a proposed instruction, "[a] party may assign as error *** a failure to give an instruction, if that party properly requested it"); A312 (court "deliberately *** removed" the proposed employer-duty instructions). Vanderbilt did that and more: it (i) proposed instructions quoting from two governing Ohio statutes, A1025; (ii) informed the court that its instructions were derived from those statutes, A299; (iii) objected to the court's refusal to give the instructions, *see* A1017 ("[B]efore the deadline that the Court imposed, *** I had submitted two charges on the Employer's Duty and there is no charge"); (iv) attempted to object again, *see* A381; and (v) confirmed with the trial court that the alleged error had been preserved, *see* A384–385.

2. Plaintiff nevertheless suggests that Vanderbilt neither provided the basis for its proffered instructions nor objected to the district court's denial of those instructions. Gal Br. 37. But, as just described, the record contradicts those contentions. Vanderbilt made clear that its instructions were based on the

applicable Ohio statutes and unequivocally objected to their omission from the jury charge.

Plaintiff also suggests that Vanderbilt waived its request by saying "thank you" when the trial court ruled that it would not give the requested instructions. Gal. Br. 37. But being polite does not effect a waiver. *Cf. Stillwell*, 145 A.2d at 400 ("[Court:] [U]nder my ruling they would be out, wouldn't they? [Counsel:] Yes, Sir."). That is especially so here, where the trial court expressly acknowledged that the claim of error was preserved. *See* A381 ("The ones you've already requested. You need not repeat those."); *see also* A384-385. Indeed, even if Vanderbilt *had* waived this claim under normal rules—and it did not—its reliance on the court's instructions would itself excuse a failure to otherwise preserve the error. *See Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 541 & n.27 (Del. 2009) (counsel's late objection to closing argument did not require plain-error review, even though a late objection "waives any claim of error," where trial court instructed counsel not to interrupt closing arguments absent extreme circumstances).

Relying on *Grand Ventures*, plaintiff lastly asserts that error preservation requires tender of a "reasonably proper" instruction. Gal. Br. 37. But *Grand Ventures* does not recite any such standard; rather it states only that a party must "'tender at least the substance of further instructions.'" 632 A.2d at 71. And

Vanderbilt did just that, drawing from two governing statutes. That was enough. *See Robelen Piano*, 169 A.2d at 247 (no obligation to "attempt *** to tailor the statement of law to the particular facts of the case"); *cf.* 9C CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2556 (3d ed. 2010) ("The court must instruct the jury properly on the controlling issues in the case even though *** the instruction requested is defective."); *Pennsylvania R.R. Co. v. Goldenbaum*, 269 A.2d 229 (Del. 1970). In any event, the touchstone of the waiver inquiry is whether the issue was "fairly presented" to the trial court. DEL. S. CT. R. 8. The trial court here indisputably had an opportunity to consider inclusion of a duty instruction.

3. Other authorities reinforce the conclusion that a trial court, once asked, is obliged to instruct a jury on an evidence-supported issue. In both *Newnam* and *Pennsylvania R.R.*, this Court reversed based on the trial court's failure to give an appropriate instruction. Plaintiff contends that neither addressed whether "trial courts must give a proper instruction even if a party submits a flawed one." Gal. Br. 36. But as even plaintiff acknowledges, *id.*, the *Newnam* opinion takes no position on whether the proffered instruction was proper. Such appellate impartiality was possible only because the propriety of the underlying instruction was irrelevant; whether the "substance or form" of the proposed instruction was

proper did not affect whether failure to give a proper instruction was reversible error. *See Newnam*, 338 A.2d at 562 & n.3.

Likewise, in *Pennsylvania R.R.*, this Court reversed where the trial court failed to instruct after it was "alerted *** to the [instructional] problem," 269 A.2d at 234, by proposed instructions, *id.* at 231–233, and a "general objection to the charge," *id.* at 233. This Court did not, as plaintiff claims, "stat[e] only that the defendant could have objected more specifically." Gal. Br. 36. Rather, it described a "proper jury instruction" as one including a general rule (of duty) included in a proposed instruction *and* an exception omitted from that instruction. *See Pennsylvania R.R.*, 269 A.2d at 232–234. Thus, at a minimum, this Court cast doubt on the propriety of the instruction proposed, never held that the instruction was acceptable, and still reversed for "[f]ailure to give" "a proper jury instruction." *Id.* at 234.

In sum, whether a proposed instruction was perfect did not matter in *Newnam*, it did not matter in *Pennsylvania R.R.*, and it does not matter here. Because a triable fact question surrounded Borg Warner's fault (as the court expressly recognized, Add24), the trial court was obligated to inform the jury of Borg Warner's duty to Galliher. Vanderbilt did not waive its objection to this reversible error: a failure to provide *any* instruction on Borg Warner's duty, let

alone an instruction tailored to the facts of the case. For that reason alone, a new trial is required.

II. THE CUMULATIVE PREJUDICIAL EFFECT OF THE JURY'S REPEATED EXPOSURE TO EXCLUDED EVIDENCE ALSO REQUIRES A NEW TRIAL.

Plaintiff's witnesses repeatedly exposed the jury to material and inflammatory evidence—suggesting that Vanderbilt knew its talc caused mesothelioma and tried to hide that fact for decades—that the trial court had already excluded. Those evidentiary violations struck at the heart of a close case and, taken together, tainted the jury in a way that no instruction could cure.

A. The Record Belies Plaintiff's Suggestion That The Key Issues Were Not Close.

1. As plaintiff must to save the verdict, plaintiff contends that two key issues at trial—whether Vanderbilt's talc caused mesothelioma, and whether Vanderbilt knew or had reason to know that—were not even close. The record, however, leaves plaintiff far short of that high hurdle.

As set forth in Vanderbilt's opening brief, a reasonable jury could—and should—have found that Vanderbilt's composite talc did not cause mesothelioma. RTV Br. 5-6 & n.3. That talc contained, among other minerals, the minerals tremolite and anthophyllite. But ample evidence demonstrated that those minerals occurred in a *non*-asbestiform habit—and that, consequently, the minerals were not "asbestos" and did not cause Mr. Galliher's injury. RTV. Br. 4-7.

The jury might also have inquired whether the mineral talc, another component of Vanderbilt's talc product, causes mesothelioma. But as Vanderbilt

explained when describing the evidence presented at trial (RTV Br. 4-7), the jury heard "no scientific link between the asbestiform habit of *** pure talc[] and mesothelioma," RTV Br. 6. Plaintiff attempts to rebut that observation by drawing on the testimony of Dr. Roggli, one of Vanderbilt's scientific experts. To be sure, Dr. Roggli acknowledged one article out of his large body of work in which he classified pure talc as an asbestos mineral. Gal. Br. 5. But Dr. Roggli himself, in further testimony not quoted by plaintiff, made crystal clear that was a mistake: "Q. *** [Y]ou would *** regard talc as asbestos ***? A. No, I can't do that. I don't know how that [portion of the article] got past me because the chapter on mineralogy in my book clearly does not indicate talc as being asbestos." A269. Moreover, whether Vanderbilt's talc was "pure platy talc," Gal. Br. 5 n.2, is beside the point: a reasonable *untainted* jury could easily have found that pure mineral talc, even if not platy, does not cause mesothelioma.

Given the dearth of evidence that pure mineral talc causes mesothelioma, even in an asbestiform (or fibrous) habit, the jury did not need to decide whether Vanderbilt had notice of that supposed hazard. Regardless, the question of notice was at least "close." Plaintiff identifies only one fact—coupled with several inferential leaps—purportedly suggesting notice on Vanderbilt's part that asbestiform habit of pure mineral talc causes mesothelioma: Vanderbilt informed customers that its talc was "'non-asbestiform.'" Gal. Br. 24. Even on its face, that

evidence does not support plaintiff's supposition. And, as with the Dr. Roggli testimony, reading more of the transcript makes it all but meaningless. The evidence, in context, reveals that Vanderbilt's "non-asbestiform" notation referred to other minerals in Vanderbilt's talc, *i.e.*, tremolite and anthophyllite—not to the pure mineral talc. *See* A291 ("Q. Mr. Kelse, the material safety data sheets that said non-asbestiform[, to] what minerals did they refer? A. To the amphibole, to the tremolite, and to the smaller amount of anthophyllite ***."); *see also* RTV Br. 5. In all events, Vanderbilt's "non-asbestiform" comment is a slender reed on which to infer its knowledge that its talc caused mesothelioma—the requisite finding to support the $2.8 million damages award.

2. Plaintiff's argument that the notice and causation questions were not "close[]," Gal. Br. 22, also fails to identify the evidentiary path or paths the jury followed to arrive at its verdict—hearkening back to plaintiff's "whatever you want to call it" theory of liability. A313. Nor is it possible to specify a single coherent theory where the evidence is not close, if not insufficient as a matter of law. As explained above, slim evidence supported liability based on the presence in Vanderbilt's talc of certain minerals in their non-asbestiform habit, and even less evidence supported liability based on the asbestiform habit of pure mineral talc. Likewise, evidence that "more research is needed" on the effects of cleavage fragments, Gal. Br. 23, made it difficult if not impossible for the jury to find, by a

preponderance of the medical evidence, that cleavage fragments caused mesothelioma, *see also* RTV Br. at 5–6.

Perhaps plaintiff meant to suggest that Vanderbilt's talc contained certain minerals in an asbestiform habit, *e.g.*, asbestiform tremolite. If so, her discussion of "medical causation" is irrelevant. Gal. Br. 22. Vanderbilt does not dispute that asbestiform tremolite causes mesothelioma; instead, it disputes the contention that its talc *contains* asbestiform tremolite. On that point, too, the evidence was, at the very least, close. *See* RTV Br. at 6 & n.3. Plaintiff's brief fails to engage that record evidence.[6]

B. The Excluded Evidence Bore Directly On The Close Questions Of Notice And Causation.

1. Plaintiff makes no serious effort to dispute that the testimony of either Dr. Barry Castleman, plaintiff's expert, or Thomas Rogers, a Vanderbilt employee, bore directly on the crucial disputed questions of Vanderbilt's liability. As set forth in the opening brief, Dr. Castleman testified that a rival talc producer was "calling *** Vanderbilt liars" about whether Vanderbilt's talc contained asbestos, and that Vanderbilt had spent millions of dollars "buying senators and lobbying the

[6] Likewise, plaintiff's discussion of talc workers, Gal. Br. 23, ignores evidence undermining the probative value of those anecdotes, RTV Br. 7 n.4, and plaintiff's allegation that Vanderbilt claimed its talc contained chrysotile, Gal. Br. 15, overlooks contrary evidence, AR6; *cf.* A257–258. Plaintiff's brief reference to transitional fibers as evidence of exposure, Gal. Br. 11 n.3; *but see, e.g.*, AR2, does not establish that those fibers (should have been known to) cause mesothelioma, *see, e.g.*, AR4 (transitional fibers are "not regulated as asbestos. OSHA's been very clear about that.").

government." RTV Br. 10. Rogers testified that a Vanderbilt foreman told him "he knew there was asbestos in the mine." *Id*. at 11. All that impermissible testimony, in an inflammatory way, bolstered plaintiff's otherwise unfounded assertion that Vanderbilt knew its talc contained mesothelioma-causing asbestos and affirmatively acted to conceal that knowledge.

In particular, plaintiff significantly understates the significance of Castleman's comment about buying senators. She suggests that the trial court never "conclusively stated" that Castleman's remark was prejudicial. Gal. Br. 28. Here is what the trial court did say at the time: "[A]t least one of the things that makes me worry [is] that no amount of curative instructions will erase from the minds of the jury now that they heard it." A295. Plaintiff further claims that the court "later clarified that it might have over-spoken in that regard." Gal. Br. 28 (citing B256-257). But that clarification concerned how eager Castleman was to put that testimony in front of the jury, *not* whether the testimony, once uttered, indelibly influenced the jury's perception of the case. *See* B256-257. Rather than repudiate the comment in its opinion, the court simply found that Castleman's remark, "although regrettable, does not, *by itself*, warrant a new trial." Add17 (emphasis added).

Likewise, the trial court was clear that Fitzgerald's testimony spoke not only to exposure, but also to whether Vanderbilt's talc "contain[ed] materials that caused

asbestos." B32; *see also* RTV Br. 11 n.6. Although Fitzgerald's excluded testimony went nominally to exposure, the aftermath of the colloquy on the missing study—like the Castleman and Rogers testimony—yet again gave jurors the impression that Vanderbilt was hiding the truth, this time by invoking technical rules of legal procedure.

2. Plaintiff is correct that the question of Vanderbilt's knowledge is one of what Vanderbilt knew "or *should have known*." Gal. Br. 22; *see also* RTV Br. 7. But while plaintiff needed to prove only what should have been known, her witnesses repeatedly injected already-excluded testimony indicating that Vanderbilt *knew* its talc contained asbestos. The jury's improper exposure to this evidence allowed it to impose liability without fairly grappling with a complex scientific inquiry: whether Vanderbilt's talc actually caused, and should have been known to cause, mesothelioma. Vanderbilt is entitled to a trial at which those questions are answered by an untainted jury.

3. Contrary to plaintiff's suggestion, Vanderbilt's argument about the brevity of the jury's deliberation does not ask this court to "consider the volume of [Vanderbilt's] evidence as opposed to its quality." Gal. Br. 26. Rather, the point is that the jury's apparent decision to forgo review of the scientific evidence makes clear that the quality of that evidence was not considered. *Cf. Chilson v. Allstate Ins. Co.*, 979 A.2d 1078, 1084 (Del. 2009) ("brevity of the deliberations" is

"significant"). And while an excessive award may imply juror prejudice, Gal. Br. 27–28, the absence of such an award does not imply juror neutrality—particularly where, as here, other indicators of prejudice exist. *See* RTV Br. 23-24. Notably, plaintiff still fails to cite a single case for its illogical proposition.

C. The Court's Instructions Exacerbated, Rather Than Cured, The Testimony's Prejudicial Effect.

1. Plaintiff is correct that the effect of jury exposure to improper comments and inadmissible evidence can "usually" be cured. Gal. Br. 29 (citing *Koutoufaris*, 604 A.2d at 400). But this Court has made clear that the "usual[]" rule no longer applies where the improper comment "itself has introduced an indelible inference which taints the fairness of the trial." *Koutoufaris*, 604 A.2d at 400. That is precisely what happened here.

Castleman suggested that Vanderbilt lied and bribed; Rogers suggested that Vanderbilt did so with knowledge of culpability; and Fitzgerald triggered a curative that, far from minimizing the impact of his testimony, made it seem like Vanderbilt was using technical legal rules to hide the truth from the jury. RTV Br. 17–18. Moreover, as explained in Vanderbilt's opening brief and *nowhere* addressed by plaintiff, the trial judge's own "curative" with respect to Rogers's comment mistakenly referenced the extremely prejudicial testimony regarding buying politicians—thereby reinforcing the most prejudicial excluded evidence in the jurors' minds even as it attempted to cure another impermissible reference. *See*

Gal. Br. 22–23. Those errors, cumulatively if not in isolation, left an indelible yet improper inference that Vanderbilt knew its talc caused mesothelioma. That unquestionably speaks to the heart of Vanderbilt's liability.

2. Plaintiff asserts that its counsel did not "expressly allude" to any of the improper and excluded testimony at issue. Gal. Br. 28. But allusion, by definition, does not require an express reference. By seeking to discredit the government reports that increasingly vindicated Vanderbilt's position, through reference to Vanderbilt's lobbying and other actions, plaintiff's closing argument at least implicitly drew attention to excluded evidence that Vanderbilt lied and bought senators. *See, e.g.*, A315 ("Vanderbilt spends its time and money fighting about what to call the fibers in its product because it doesn't want to be regulated."). While general evidence of lobbying was not excluded, it is implausible to suggest that counsel's closing would remind the jury of Vanderbilt's lobbying activities but not of the improper comments conveying unsubstantiated allegations of bribery.

D. Vanderbilt Did Not Invite These Errors Or Otherwise Waive Its Right To A Fair Trial.

Plaintiff attempts to shift the blame to Vanderbilt for the improper testimony, in contravention of the trial court's evidentiary orders, of plaintiff's own witnesses. The invited-error doctrine cannot be stretched so far.

1. Conspicuously, plaintiff backs away from the contention in its original answering brief (rejected on procedural grounds) that Rogers's hearsay testimony

was "clearly invited." Orig. Gal Br. 29. Plaintiff no longer contends that Vanderbilt "invited" the Rogers testimony at all. For good reason: plaintiff, not Vanderbilt, chose to play Rogers's improper testimony for the jury—in direct contravention of the trial court's prior order excluding that hearsay evidence. And contrary to plaintiff's suggestion, Vanderbilt *did* "object[] in advance," Gal. Br. 29, to Rogers's recitation of hearsay; that is why the trial court thought it "extraordinarily clear" that plaintiff was to omit the hearsay from the testimony that it instead played to the jury. A152.

At most, Vanderbilt was responsible for not adequately double-checking *plaintiff's* compliance with the court's "extraordinarily clear" order. But to say that makes Vanderbilt "equally responsible" for *plaintiff's* wrongful decision to play Rogers's excluded testimony to the jury, Gal. Br. 30, defies common sense. In any event, because there is no contention that Vanderbilt invited that error, plaintiff cannot escape the consequences of its conduct.

2. The trial court squarely rejected plaintiff's claim, renewed here (Gal Br. 31), that Castleman's "buying senators" comment was "invited." *See* AR8 ("How is the comment about the senator in the hip pocket invited? The question does not seem to solicit that information, or invite the witness to testify about it."). That is not a close question. As to the "liars" comment, calling Castleman's answer responsive is a stretch. When asked a yes or no question—"Is that the one

paragraph, there's one paragraph on RT Vanderbilt?"—Castleman gave neither a "yes" nor "no" answer: "The paragraph where Johns-Manville people are calling RT Vanderbilt liars." A182. Where a witness knows that certain information is off-limits, the fact that a question is posed by opposing counsel—who had successfully moved to exclude that very information, *see* Add16—to which that information *could* be a responsive answer does not mean counsel is *inviting* that information. So here, given the trial court's finding that Castleman, "a regular on the asbestos circuit," knowingly put highly prejudicial evidence before the jury. RTV Br. 26; see Add15-16; A383. None of the cases on which plaintiff relies suggests that a witnesses' knowing introduction of excluded evidence can be invited error. Gal. Br. 29-31 (citing *Bryan v. Doar*, 918 A.2d 1086, 1090 (Del. 2006); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 439 n.4 (Del. 1996); *Itek Corp. v. Chicago Aerial Indus., Inc.*, 274 A.2d 141, 144 (Del. 1971)).[7]

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[7] *Bryan* considered whether a party had appellate standing. *See* 918 A.2d at 1090. *Pressman* considered whether a party had waived its challenge to a jury instruction, and held that the party had *not* done so when it presented its position to the trial court and the trial court rejected that position. *See* 679 A.2d at 439 & n.4. Finally, *Itek* asserts that "a party may not be heard to complain of a responsive answer to a question which he himself asked in cross-examination," 274 A.2d at 144, but does not speak to the situation at issue here.

III. PLAINTIFF IS NOT ENTITLED TO POST-JUDGMENT INTEREST FOR PART OF THE PERIOD BEFORE FINAL JUDGMENT ATTRIBUTABLE TO THE COURT'S OWN DELAY.

A. Question Presented

Whether the trial court reversibly erred by "recogniz[ing] its own delay in issuing an opinion" and declining to award post-judgment interest for some of the time between the jury's verdict and the court's final judgment order. Add32.

B. Scope of Review

Whether a trial court may consider its own delay when calculating post-judgment interest is a question of law reviewed *de novo*. *See Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1091 (Del. 2000). Whether a trial court weighted that delay appropriately is reviewed for abuse of discretion. *See Maryland Cas. Co. v. Hanby*, 301 A.2d 286 (Del. 1973).[8]

C. Merits

The jury returned a verdict for plaintiff on July 27, 2012. Add5. By August 10, 2012, Vanderbilt had moved for a new trial and renewed its motion for judgment as a matter of law. A756, A768. The trial court did not hold a hearing on those motions until March 8, 2013. A382. It did not issue an opinion concerning those motions until July 31, 2013. A850. And it did not finalize that opinion until

[8] Plaintiff's brief disputes only the existence of discretion; plaintiff does not argue that any existing discretion was abused.

August 27, 2013, when it issued a corrected opinion and simultaneously rendered final judgment. Add6; Add33. The court's final ruling on the merits came a full 13 months (396 days) after the jury's verdict.

The trial court expressly "recognize[d] its own delay in issuing an opinion in this matter." Add32. Rather than permitting the "costs incurred as a result of the court's delay" to fall "solely *** on the Defendant's shoulders," the court declined to award post-judgment interest for about 5.5 months of the 13-month period. Add32. Plaintiff's cross-appeal seeking interest from that excluded period lacks merit.

1. For the reasons described above, a new trial is required. Because the damages award must be vacated, it cannot provide a basis for interest.

2. If a trial court confirms a jury's verdict, post-judgment interest begins to accrue from the date of the trial court's final judgment, *not* the date of the jury's verdict. "Interest on a judgment begins to accrue when the judgment is entered as final and determinative of a party's rights." *Wilmington Country Club*, 747 A.2d at 1097. A verdict is not "final and determinative" until the trial court has entered a final judgment concerning that (possibly infirm) verdict. *See Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002) (order not final unless trial court intends for it to be court's "final act" in the case).

When a trial court *erroneously* rejects a verdict, the court's judgment cannot stand, and reference to the date of that verdict may be made of necessity. *Cf. Wilmington Country Club*, 747 A.2d at 1098; *Moffitt v. Carroll*, 640 A.2d 169, 178 (Del. 1994). But where, as here, the trial court *accepted* a verdict, the date of final judgment should control.

Tellingly, in her prior motion to dismiss the appeal as untimely, plaintiff conceded that the merits of her "judgment against RTV became final" not on the date of the jury verdict, but "on July 31, 2013." Motion to Dismiss 3, ¶ 8, Sept. 27, 2013. Plaintiff is correct that judgment did not "bec[o]me final" on the verdict date. Because final judgment was not entered until August 27, 2013, plaintiff is not entitled to *post*-judgment interest for a period *before* that date.[9]

3. To be sure, a trial court may not categorically refuse to award post-judgment interest. *See Wilmington Country Club*, 747 A.2d at 1097. Yet it is equally well settled that a trial court has discretion to suspend the accrual of that interest. *See Moskowitz v. Mayor of Wilmington*, 391 A.2d 209, 211 (Del. 1978); *Hanby*, 301 A.2d at 288 (considering delay by parties). Because the accrual of

[9] As explained in Vanderbilt's response to the motion to dismiss, plaintiff is mistaken when she states that final judgment was entered on July 31, 2013. The trial court's August 27, 2013 "Order of Final Judgment" issued, properly, only after the court resolved all pending Rule 59 motions and issued its final substantive ruling on the merits. Add33 (Order); Add6 (Corrected Op.); *see also Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 879 A.2d 920, 922 (Del. 2005) ("Finality does not attach to any judgment in a civil proceeding while a timely filed Rule 59 motion for reargument is pending in the Superior Court.").

interest (as opposed to the award of interest) is a matter of discretion, not of right, the trial court had discretion to account for a delay of its own making.

Plaintiff suggests—without citation to *any* legal authority—that this discretion should exist only where a *plaintiff* "cause[s] *** delay." Gal. Br. 39. She asserts, "[a]s a matter of policy," that interest is "simply compensation for the time-value of money." *Id.* Not so. Post-judgment interest serves another purpose: "discourage[ing] unnecessary delay in making payment." *BP Exploration & Oil Co. v. Maint. Servs., Inc.*, 313 F.3d 936, 948 (6th Cir. 2002); *see also Cede & Co. v. Technicolor, Inc.*, No. Civ.A. 7129, 2003 WL 23700218, at *45 (Del. Ch. Dec. 31, 2003) (post-judgment interest "encourages the surviving corporation to promptly pay, eliminating the need for judicial proceedings to enforce the award") (subsequent history omitted). That purpose is not served when the court, rather than the party responsible for payment, is the source of the delay.

Plaintiff is wrong for a further reason: she ignores the basic fact that statutory interest awards are necessarily imprecise. Because such awards do not exactly account for the time value of money, they will always shift resources from one party to another. That reality underscores the need for judicial discretion to suspend accrual in the interests of justice. And where, as here, the legislature has left room for discretion in the face of delay, *cf. Hanby*, 301 A.2d at 288, a trial court need not ignore delays of the court's own making. Otherwise, the burden of

the trial court's delay would fall "solely *** on the Defendant's shoulders," Add32—and presumably would invite mandamus petitions asking this Court to expedite the decision-making processes of the courts below. There is no reason to rob the trial court of the reasonable discretion to avoid such a result.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court and remand for a new trial. In the event this Court affirms the judgment of liability, however, it should affirm the limitation of interest during the period at issue.

Respectfully submitted,

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