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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

APPELLANT/DEFENDANT BELOW VANDERBILT MINERALS, LLC FKA R.T. VANDERBILT COMPANY, INC.'S OPENING BRIEF

AKIN GUMP STRAUSS HAUER & FELD LLP

Pratik A. Shah (admitted *pro hac vice*)
Patricia A. Millett (admitted *pro hac vice*)
Ruthanne M. Deutsch (admitted *pro hac vice*)
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 887-4000

SWARTZ CAMPBELL LLC

Nicholas E. Skiles (DE Bar ID No. 3777)
Joseph S. Naylor (DE Bar ID No. 3886)
300 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 656-5935

Attorneys for Appellant/Defendant Below Vanderbilt Minerals, LLC fka R.T. Vanderbilt Company, Inc.

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TABLE OF CONTENTS

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

I. Asbestos Mineralogy and Content of Vanderbilt's Talc 4

II. Vanderbilt's Knowledge 7

III. Galliher's Exposures at Borg Warner 8

IV. Key Trial Court Rulings 10

A. Improper Evidence 10

B. Jury Instructions and Verdict 11

C. Post-Trial Rulings 12

ARGUMENT 14

I. THE CUMULATIVE PREJUDICIAL EFFECT OF THE JURY'S REPEATED EXPOSURE TO EXCLUDED EVIDENCE WARRANTS A NEW TRIAL 14

A. Question Presented 14

B. Scope of Review 14

C. Merits 14

1. The Improper Testimony Was Central To A Close Case 16

2. Specific Curative Instructions Were Insufficient To Remedy The Testimony's Cumulative Prejudicial Effect 19

3. Vanderbilt's Role Does Not Excuse Plaintiff's Improper Testimony 25

II. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ABOUT BORG WARNER'S DUTY TO GALLIHER PREVENTED THE JURY FROM PROPERLY ASSESSING BORG WARNER'S FAULT. 27

A. Question Presented 27

B. Scope of Review 27

C. Merits 27

CONCLUSION 33

TABLE OF AUTHORITIES

CASES:

Beck v. Haley
239 A.2d 699 (Del. 1968) 28

Capital Mgmt. Co. v. Brown,
813 A.3d 1094 (Del. 2002) 24

Chilson v. Allstate Ins. Co.,
979 A.2d 1078 (Del. 2009) 24

Dawson. v. State,
673 A.2d 1186 (Del. 1996) 14

DeAngelis v. Harrison,
628 A.2d 77 (Del. 1993) 14, 16

Franklin v. Salminen,
222 A.2d 261 (Del. 1966) 29

Gomez v. State,
25 A.3d 786 (Del. 2011) 26

Grand Ventures, Inc. v. Whaley,
622 A.2d 655 (Del. Super. Ct. 1992) 29

Green v. Alfred A.I. DuPont Inst. of Nemours Found.,
759 A.2d 1060 (Del. 2000) 3, 14, 19

Hughes v. State,
437 A.2d 559 (Del. 1981) 22

Island Express v. Frederick,
171 A. 181 (Del. 1934) 28

Itek Corp. v. Chicago Aerial Indus., Inc.,
274 A.3d 141 (Del. 1971) 26

Koutoufaris v. Dick,
604 A.2d 390 (Del. 1992) 22, 26, 28

Lang v. Morant,
867 A.2d 182 (Del. 2005) 24

Lutzkovitz v. Murray,
339 A.2d 64 (Del. 1975) 31

Minneapolis, St. P. & S.S. M. Ry. Co. v. Moquin,
283 U.S. 520 (1931) 23

Newnam v. Swetland,
338 A.2d 560 (Del. 1975) ..... *passim*

North v. Owens-Corning Fiberglas Corp.,
704 A.2d 835 (Del. 1997) 29

Pennsylvania R.R. Co. v. Goldenbaum,
269 A.2d 229 (Del. 1970) 29

Robelen Piano Co. v. DiFonzo,
169 A.2d 240 (Del. 1961) 20, 28

Sammons v. Doctors for Emergency Servs., P.A.,
913 A.2d 519 (Del. 2006) ..... *passim*

Stilwell v. Parsons,
51 Del. 342 (Del. 1958) 30

Strauss v. Biggs,
525 A.2d 992 (Del. 1987) 19

Universal Products Co. v. Emerson,
179 A. 387 (Del. 1935) 29

Wainright v. State,
504 A.2d 1096 (Del. 1986) 26

STATUTES:

OHIO REV. CODE
§ 4101.11 ..... 29, 31
§ 4101.12 ..... 29, 31

NATURE OF PROCEEDINGS

In February 2011, Michael Galliher died from mesothelioma. In an amended complaint filed July 6, 2011, his wife Darcel Galliher brought suit individually and as special administrator of his estate (C.A. No. 10C-10-315). She alleged that 16 defendants were liable for his death, including Appellant R.T. Vanderbilt Minerals, LLC, f/k/a R.T. Vanderbilt Company, Inc. ("Vanderbilt"), an industrial talc producer. This appeal arises from a jury verdict against Vanderbilt for nearly $3 million in damages.

Vanderbilt was the only defendant to appear at trial. During trial, Vanderbilt moved for a mistrial based on the jury's repeated exposure to excluded evidence, *e.g.*, A235-237,[1] and sought judgment as a matter of law, *see* A756-767. The trial court deferred ruling on those motions, except to dismiss plaintiff's request for punitive damages. A303.

On July 27, 2012, the jury awarded $1,500,000 to Darcel Galliher and $1,364,583.33 to the estate. Add5. The jury found that Michael Galliher had been exposed to a Vanderbilt talc product containing "asbestos or asbestiform materials" of which Vanderbilt failed to warn adequately, Add1-2, and that the exposure substantially contributed to his mesothelioma, Add3. The jury found Borg Warner,

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[1] Citations to A### are to the appendix. Citations to Add### are to the addendum included at the back of this brief, which contains the trial court's judgment and rationale.

Galliher's employer, not at fault.[2] Add3-4.

On August 10, 2012, Vanderbilt renewed its motions for judgment as a matter of law and for a new trial. *See* A768-787, A788-807. Vanderbilt reasserted its request for a new trial based on the cumulative effect of the jury's exposure to prejudicial evidence and on the jury's allocation of *no* fault to Borg Warner. A790-807. That same day, plaintiff requested an award of costs and interest, *see* A808, a request which Vanderbilt partially opposed, *see* A811-820.

On July 31, 2013, more than a year after the jury's verdict, the trial court denied Vanderbilt's motions. A day later, it partially granted and partially denied plaintiff's request for interest and costs. *See* A877-888; A889-900. On August 8, 2013, Vanderbilt asked the court to reconsider its post-judgment interest award, A901-903, and, on August 27, 2013, the court issued a corrected opinion and entered final judgment, Add30-33; *see also* Add6-29. On September 25, 2013, Vanderbilt timely filed its notice of appeal seeking review of, *inter alia*, the court's refusal to inform the jury of Borg Warner's duties to Galliher, A312, and the court's denial of Vanderbilt's mistrial motions, Add25; Add33; A904-1128. Plaintiff cross-appealed the court's post-judgment interest calculation. A1129.

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[2] Borg Warner became Artesian Industries in the 1970s and Crane Plumbing in the early 1990s. A206-207. This brief refers to the entities collectively as "Borg Warner."

SUMMARY OF ARGUMENT

1. The cumulative prejudicial effect of the jury's repeated exposure to excluded evidence denied Vanderbilt a fair and reliable trial. Three of plaintiff's witnesses, on four separate occasions, exposed the jury to highly prejudicial evidence that bore directly on central and closely contested liability issues. At the time, the trial court was rightfully concerned that its curative instructions were too little, too late. A295. Because these testimonial violations targeted "the very heart" of Vanderbilt's case, and necessarily skewed the jury's deliberations, Vanderbilt is entitled to a new trial. *Green v. Alfred A.I. DuPont Inst. of Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000).

2. The trial court's failure to instruct the jury about Borg Warner's specific legal duties to protect Galliher, its employee, "undermined the jury's ability to intelligently" assess Borg Warner's fault. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006). In light of the substantial evidence that Borg Warner had breached those duties, *e.g.*, A318-320, and thus at least shared in any fault, the court's refusal to instruct on Borg Warner's duty independently warrants a new trial. *See Newnam v. Swetland*, 338 A.2d 560, 561-562 (Del. 1975).

STATEMENT OF FACTS

Michael Galliher, a long-time employee of ceramics manufacturer Borg Warner, died from mesothelioma. This suit alleges that Vanderbilt failed to warn about workplace exposures to industrial talc that allegedly caused Galliher's disease. After multiple references by plaintiff's witnesses to evidence that the trial court had previously excluded, the jury awarded $2.8 million in damages to Galliher's wife and his estate. After the trial court refused to instruct the jurors about an employer's duties under Ohio law to provide a safe working environment, the jury allocated no fault to Borg Warner. Vanderbilt now seeks a new trial.

I. Asbestos Mineralogy and Content of Vanderbilt's Talc

A central liability question litigated before the jury in this case was whether Vanderbilt's NYTAL-branded industrial talc contained "asbestos" or "asbestiform fibers" that caused Galliher's mesothelioma. Vanderbilt presented significant scientific evidence that its industrial talc did not contain asbestos and that other asbestiform fibers in its talc did not cause mesothelioma. Plaintiff sought to paint with a broader brush, characterizing *all* asbestiform fibers (including those in pure mineral talc) as causing mesothelioma.

As a scientific or "mineralogical" matter, several witnesses for both plaintiff and defendant defined "asbestos" based on a mineral's *type* and *habit*. Jurors heard that only minerals of a certain type qualify as asbestos. Six are used commercially

and are listed in the Federal Register: chrysotile, actinolite, amosite, anthophyllite, crocidolite, and tremolite. A114-115; A191; A244; A145. Substantial evidence demonstrated that pure mineral talc—which is one component of industrial talc (a composite mixture)—is not one of those six types and does not constitute asbestos as a mineralogical matter. A269; A202, A204.

Jurors also heard that, within those enumerated mineral types, only minerals of an "asbestiform" habit can qualify as asbestos. Conversely, they heard that the asbestiform habit of a non-asbestos mineral type does not make the material asbestos. A245; A250 ("The mineral brucite *** is a nonasbestos mineral that exhibits the asbestiform habit."). Habit refers to the nature of the formation of the particular mineral: "asbestiform" (fibrous) or "non-asbestiform" (crystalline). A120-121; A272. In the "asbestiform" habit, the mineral has grown "lengthwise separable into fibers," often with splayed ends. A246-247. A mineral is not asbestiform merely because it has been crushed during industrial processing into long and slender "cleavage fragments"; the mineral must have "formed [that way] in nature." A121-122.

Of particular relevance here, the non-asbestiform varieties of anthophyllite and tremolite—the only two of the enumerated mineral types known to be in Vanderbilt's talc—are not "asbestos"; they are the right type, but exhibit the wrong habit. A244, A112; *cf.* A229-230; A541 (2011 National Institute for Occupational

Safety and Health (NIOSH) report stating although "[e]pidemiological evidence clearly indicates a causal relationship between exposure to fibers from the asbestos minerals and *** mesothelioma[,] NIOSH has viewed as inconclusive the results from epidemiological studies of workers exposed to *** nonasbestiform analogs of the asbestos materials."); A149 (1992 OSHA finding "that the evidence is insufficient to regulate non-asbestiform [anthophyllite, tremolite, and actinolite] as presenting a significant health risk to employees other than as a physical irritant)."

Ample evidence demonstrated that Vanderbilt's talc contained only the non-asbestiform habits of the enumerated minerals. A707-736; A248-249, A251, A258-259.[3] Although evidence suggested that the talc also contained other "asbestiform fibers," the evidence showed no scientific link between asbestiform habit of non-asbestos minerals (such as pure talc) and mesothelioma. A263-265, A270.

Based on that scientific evidence, Vanderbilt argued that its talc did not contain asbestos (*i.e.*, the absestiform habit of the enumerated asbestos minerals) and that any other fibrous materials in its talc (including the asbestiform habit of pure mineral talc) had not been shown to cause mesothelioma. *E.g.* A321-376. Plaintiff, by contrast, asserted categorically that any fibrous mineral is equivalent to asbestos and thus must cause mesothelioma, *i.e.*, that "asbestiform, essentially,

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[3] Scientific evidence demonstrated to the jury that plaintiff's witnesses mistakenly believed that they had found asbestiform tremolite or anthophyllite in Vanderbilt's talc. *See, e.g.*, A231-232 (cleavage fragments); A252-257; A127 (transitional fibers).

means it's asbestos, it's fibrous." A193; A313 (Plaintiff's closing argument: "[A]ll agreed that it was fibers, asbestos, asbestiform, *whatever you want to call it,* in the Vanderbilt talc that caused Michael Galliher's cancer.") (emphasis added).

II. Vanderbilt's Knowledge

Another central (and related) liability question was whether Vanderbilt knew (or should have known) that its talc caused mesothelioma, so as to trigger its duty to warn about that risk. Based on testimony from its expert, Dr. Barry Castleman, whom the court described as "a regular on the asbestos circuit," Add15, plaintiff contended that Vanderbilt knew of asbestos in its talc and that it caused mesothelioma, A161-162, A181; A173; *see also* A175-176; A177; A163-169. But the evidence demonstrated Vanderbilt's consistent view—grounded in science—to the contrary. For example, sometime after 1979, in response to an inquiry by a Borg Warner employee, Vanderbilt explained that the tremolite in its talc was "clearly nonasbestiform in nature." A83. Vanderbilt likewise informed the Secretary of Labor, in 1975, that its "'talc products are essentially free of true asbestos fiber forms of the minerals listed in the federal register.'" A174.

Although Vanderbilt may have heard allegations that some New York talc miners had developed mesothelioma, A126,[4] it knew that controlled, scientific

[4] As one witness explained, absent more information about other exposure sources, "[a] case series can be extremely misleading" because "you don't really know enough to *** infer cause and effect." A286.

testing on animals suggested that its talc did not contain asbestos or cause mesothelioma, A275-285. Vanderbilt also knew that, in 1986, government microscopist Dan Crane found that Vanderbilt talc did *not* contain asbestos. A148; A290. As Vanderbilt explained at trial, the flawed regulatory definition of asbestos then in effect—based on a mineral particle's length and width rather than its habit—risked mistaking cleavage fragments for asbestiform fibers. A110-111; *see also* A229-230, A541. At the same time, Vanderbilt had long acknowledged—and, as discussed below, warned its customers including Borg Warner—that inhalation of industrial talc dust could cause other respiratory problems. A289.

III. Galliher's Exposures at Borg Warner

Vanderbilt sold industrial talc to Borg Warner, a ceramic toilet and sink manufacturer, primarily from 1981 to 1992. *See* A387-478; A170; A484. No later than 1978, a warning on Vanderbilt's talc stated: "caution, contains industrial talc. Do not breathe dust. Prolonged inhalation may cause lung injury." A286.

Borg Warner employed Galliher at its factory from 1966 through 2005, except for two years of military service (1968-1970). A76-81. For 30 of those 37 years, Galliher worked in the "cast shop." A81; *see also* A209. Employees there filled molds for ceramics, and dusted those molds with talc. A210-217.

Galliher described Borg Warner as "dirty[]" and "hot." A308. Earl Hardy, Galliher's coworker in the cast shop, testified that he would sometimes "just be

covered. [My] arms would be white with the dust and [my] clothes would be white." A220. "[S]hop talk" in 1974 or 1975, he added, "was about the talc *** having asbestos." A222. Also in 1974, OSHA cited Borg Warner for asbestos in its talc. A73-74. And while Hardy's testimony on the point varied, he twice said that Borg Warner did not require employees to wear masks until the mid to late 1980s. A220, A222-223; *see also* A498 (1988 report stating that "[r]espirator use in the casting areas was up to the discretion of the worker"); A307-308.

In 1984, at the request of Borg Warner employees, NIOSH investigated "possible hazardous working conditions" at the facility. A481. NIOSH found a "serious, extensive problem" and recommended several remedial steps, including "improvements in respirator policy" and "air cleaning devices." *Id.* "The dust exposure in the cast shop was predominantly to the talc used to dust the molds." A498. According to NIOSH, Borg Warner had previously used Vanderbilt talc for mold dusting, but, "at the time of the survey," was instead using Montana Treasure Talc. *Id.*; A187.

The evidence also demonstrated Galliher's exposure to sources of true asbestos at Borg Warner and elsewhere. Plaintiff's own evidence showed chrysotile in Galliher's lungs, A116—an asbestos mineral that *always* has an asbestiform habit, A244. As one of defendant's experts explained, "people who have demonstrated that they know how to do these analyses," including

government and university labs, consistently find that there is *not* "chrysotile asbestos in the [Vanderbilt] talc." A257-258.[5] Moreover, evidence showed that Borg Warner's pipe insulation may have contained "asbestos." A188. Beyond Borg Warner, Galliher performed brake jobs on his and his immediate family's vehicles—exposing himself to asbestos. A309; *see also* A739. Indeed, Dr. James Millette, plaintiff's own expert, acknowledged that both the insulation and the friction materials may have contained chrysotile. *See* A141-143.

IV. Key Trial Court Rulings

A. Improper Evidence: Three of plaintiff's witnesses referenced previously excluded evidence on critical issues of whether Vanderbilt's talc contained asbestos (or mesothelioma-causing asbestiform fibers) and Vanderbilt's knowledge thereof:

- Castleman, plaintiff's expert, *twice* referred to excluded evidence that: (1) Johns-Manville, a rival talc producer, was "calling *** Vanderbilt liars" about whether Vanderbilt's talc contained asbestos, A182; and (2) Vanderbilt allegedly had spent "16 million dollars" "buying senators and lobbying the government," A183. The trial court had ruled that evidence to be unfairly prejudicial to Vanderbilt, *see* A293; A383; *cf.* A99, and found Castleman intent on getting the latter testimony before the jury. Add16; A383. Vanderbilt immediately

[5] At least two of plaintiff's experts did not identify chrysotile in Vanderbilt's talc. A123-125; A147. Another claimed that talc from upstate New York "occasional[ly]" had "chrysotile," A225, but confessed that his testimony was not based on any talc he had seen, A227.

objected, A183, and later moved for a mistrial, A235, A237; A294.

- Sean Fitzgerald, a geologist/mineralogist who had not done a lung-tissue analysis in 15 years, A224, A239-240, tried to "fingerprint" the material in Galliher's lungs (as Vanderbilt talc), and in discussing his summary findings at trial, referred to an excluded expert report. A233-234. The court had described the "fingerprints" evidence as "not case dispositive," but "perhaps close." A86. Vanderbilt objected and moved for a mistrial. A235-236.[6]
- Thomas Rogers, a Vanderbilt employee, testified that a Vanderbilt foreman told him that "he knew there was asbestos in the mine." Add12; *see also* A13. Vanderbilt objected to introduction of that excluded hearsay. A150.

Before closing, the trial court reiterated its fear that "no amount of curative instructions" could make the jury forget Castleman's improper remarks. A295. The court postponed its ruling on the mistrial motion as well as on Vanderbilt's motion for a directed verdict, but ruled that insufficient evidence that Vanderbilt knew its talc would cause death or serious harm precluded punitive damages. A301-303.

B. Jury Instructions and Verdict: The trial court submitted the case to the jury on a failure-to-warn theory of products liability. A306; A1047, A1050. Over

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[6] Vanderbilt also complained of testimony that had not previously been excluded: while Fitzgerald admitted in his deposition that he had never tested a Vanderbilt talc product, he testified at trial—without notice to Vanderbilt—that he had since conducted testing. A226.

Vanderbilt's objection, A130-131; A192, A194-198; A200; A774; A297-298, the court asked the jury to assess whether Vanderbilt's talc contained harmful "asbestos or asbestiform materials" (of which Vanderbilt negligently failed to warn), but did *not* ask the jury to identify which "asbestos" or "asbestiform materials" caused Galliher's injury or whether Vanderbilt failed to warn about the particular material that caused the mesothelioma. Add2-3. The court asked the jury to assess whether Borg Warner shared any fault, but also over Vanderbilt's objection, A312, refused to instruct the jury about Borg Warner's duties to provide a safe working environment under applicable Ohio law. Add3, A312. So instructed, the jury found Vanderbilt 100% (and Borg Warner 0%) responsible for Galliher's injuries, and awarded over $2.8 million in damages. *See* Add3-5.

C. Post-Trial Rulings: Approximately one year after the post-trial motions were filed, the trial court denied Vanderbilt relief. *See generally* A850-876; Add6-29. The court first considered Vanderbilt's renewed motion for a mistrial. Although the court recognized that Vanderbilt challenged "the *cumulative* impact of four instances at trial where Plaintiffs' witnesses provided inadmissible testimony," Add9 (emphasis added), it determined principally that, "[t]aken *individually*, the alleged improper comments do not require a new trial," Add11 (emphasis added). *See* Add11-20. The court also acknowledged that in each of the four instances it was *plaintiff's* witness who wrongly introduced the excluded

testimony over Vanderbilt's objections, but then ruled that Vanderbilt was at fault for not preventing the error (Rogers, Add14-15) or for inviting the testimony (Castleman "liars", Add19) or for not objecting to the specific curative instruction the court ultimately issued (Castleman "Senators," Add17). The court addressed the cumulative prejudicial impact—separate and apart from the individual curative instructions—only by referencing the amount of damages as "reasonable." Add21.

The court next evaluated whether the jury's decision to assign Borg Warner *no* fault was against the great weight of the evidence. Add22. The court rejected Vanderbilt's claim because "Vanderbilt failed to introduce evidence that Mr. Galliher's disease was proximately caused by exposure occurring *after* Borg Warner allegedly became aware of the hazards of Vanderbilt's talc," Add23.

Finally, the court denied Vanderbilt's motion for judgment as a matter of law. Although recognizing that "it is unclear whether the jury found Mr. Galliher was exposed to asbestiform [fibers] or asbestos (or both)," it did not resolve that question. Add28. The court simply concluded that sufficient evidence supported the verdict that "Defendant's product," whatever its contents, "was a substantial factor in causing Mr. Galliher's injuries" and that "Defendant failed to adequately warn Mr. Galliher." Add27-29.

ARGUMENT

I. THE CUMULATIVE PREJUDICIAL EFFECT OF THE JURY'S REPEATED EXPOSURE TO EXCLUDED EVIDENCE WARRANTS A NEW TRIAL

A. Question Presented

Whether the trial court erred in denying a new trial based on cumulative prejudice, where three of plaintiff's witnesses repeatedly put in front of the jury excluded, unreliable, and inflammatory testimony suggesting that Vanderbilt knew its talc contained asbestos and where individual curative instructions were incapable of remedying the cumulative prejudice. A904-905, A908-1010.

B. Scope of Review

Refusal to order a new trial is reviewed for abuse of discretion. *Green,* 759 A.2d at 1063. A court abuses its discretion when it commits an error of law or makes factual findings unsupported by competent evidence. *See Dawson v. State,* 673 A.2d 1186, 1196 (Del. 1996).

C. Merits

In assessing the need for a new trial, Delaware courts consider "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken in mitigation." *DeAngelis v. Harrison*, 628 A.2d 77, 81 (Del. 1993). Each factor supports a new trial here. This case involved hotly contested differences of opinion on the absence of asbestos in Vanderbilt's talc and

Vanderbilt's knowledge thereof. Precisely because those issues were central to the jury's liability determination, the trial court *in advance* ordered the exclusion of improper testimony on those subjects. A293; A383; *cf.* A99; A942; A85a. Yet on no fewer than four occasions, Galliher's witnesses presented to the jury that same excluded testimony:

- Castleman's testimony that (1) a competitor had called Vanderbilt "liars" about Vanderbilt talc's asbestos content, A182; and (2) Vanderbilt had spent $16 million dollars on lobbying and "buying senators," A183;
- Fitzgerald's reliance on an excluded expert report to "fingerprint" the material in Galliher's lungs as Vanderbilt talc, A233-234; and
- Rogers' hearsay testimony that a Vanderbilt foreman told him that the minerals in Vanderbilt's mines were asbestos, *see* Add12-13.

Because this forbidden testimony bore so directly on the centrally disputed issues in the case, its introduction materially and unfairly overrode the credibility of Vanderbilt's position and foreclosed fair jury deliberations on core liability issues. The trial court's individual curative instructions—which even it acknowledged might not suffice, A295—could not undo the cumulative jury exposure to provocative inadmissible evidence. The court's failure to address the cumulative impact of those reinforcing testimonial errors requires a new trial.

1. The Improper Testimony Was Central To A Close Case.

The trial court's first legal error was its failure to analyze the impact of the concededly improper evidence in relation to the "closeness of the case" and the "centrality of the issues affected." *DeAngelis*, 628 A.2d at 81. Each of Galliher's statements—prejudicial testimony on "buying senators" and "liars," improper reference to an excluded expert report, and injection of unreliable hearsay on Vanderbilt's knowledge of asbestos in its talc—materially skewed the jury's determination of whether Vanderbilt's talc contained asbestos or asbestiform fibers; whether that could have caused plaintiff's mesothelioma; and whether Vanderbilt knew that. Those were the central issues in the case on which the jury's fair and balanced deliberation was critical to affording Vanderbilt a fair judicial process.

First, the plain objective of Castleman's testimony that Vanderbilt spent $16 million "buying senators and lobbying the government" was to distract the jury from balanced and unprejudiced consideration of the multiple independent government studies, A244; A112; *cf.* A229-230, supporting Vanderbilt's long-held view that its talc did not contain asbestos and could not cause mesothelioma. Plaintiff, conscious of the force of this independent evidence, had argued that it be permitted to undermine the credibility of the government evidence. A87. But the trial court expressed a "real concern," about, *e.g.*, the comment on "buying Senators," A104, and excluded evidence on Vanderbilt's lobbying efforts as

irrelevant and prejudicial. *See, e.g.*, A92; A99; A106-109.

Second, Castleman's assertion that a corporate competitor called Vanderbilt "liars" was designed to induce the jury to make its decision based on unsubstantiated and baseless allegations by business competitors rather than the facts and science presented to the jury in the record concerning both the composition of the talc and Vanderbilt's knowledge.

Third, prior to trial, the trial court recognized Fitzgerald's attempted fingerprinting of the materials in Galliher's lungs to be "a critical issue," verging on "case dispositive." A89. Indeed, that testimonial issue was so important that it warranted a continuance so that Vanderbilt could adequately respond. A90. Plaintiff chose, however, to inject into the testimony erroneous fingerprinting ratios that incorporated results that had been *excluded* from the trial. As a consequence, when Vanderbilt questioned Fitzgerald about the rationale for his fingerprinting, Fitzgerald testified that "[t]he math isn't going to work because the math that [he] used included an analysis that [he] was *** told could not be a part of this," A233-235. That left Vanderbilt with "no effective way to cross examine a witness on evidence that was never admitted but that the witness was permitted to state supported his opinions." A844. In short, the jury was left to conclude that any flaw in Fitzgerald's "critical" and likely "case dispositive" analysis was attributable to technical rules invoked by Vanderbilt, rather than flaws in plaintiff's

proof.

Fourth, inadmissible hearsay testimony that a Vanderbilt foreman acknowledged that the minerals Vanderbilt was mining were asbestos obviously undercuts significantly Vanderbilt's contentions that its talc did not contain asbestos and that it had no such knowledge. As the trial court observed, that testimony "pertained to a conversation *** involving the alleged asbestos composition of [Vanderbilt's] talc." Add12.

The court's own rulings confirm the closeness of the case and the impact of these errors. Vanderbilt presented an extensive scientific case, supported by independent and objective government reports, that its talc does not contain asbestos and that the material in its talc, *i.e.*, cleavage fragments or asbestiform of the pure mineral talc, had not been scientifically shown to cause mesothelioma. *See, e.g.*, A229-230; A148, A149; A707-736; A248-249, A251, A258-259; A275-285, A290. Indeed, in granting Vanderbilt's motion to deny punitive damages, the court acknowledged the "significant evidence that Vanderbilt reasonably could have believed that its material did not contain materials that would cause injury to persons exposed to it." A302a. Plaintiff's main strategy was to ignore that science and persuade the jury to conflate asbestos (*i.e.*, the asbestiform habit of asbestos minerals) with *all* asbestiform fibers, even those in non-asbestos minerals such as pure mineral talc that have *not* been proven to cause mesothelioma. A263-265,

A270. The court's tolerance of Galliher's injection of inadmissible evidence that falsely skewed the scientific record before the jury and aimed to induce reliance on non-record assumptions thus infected core liability issues.

This Court has ruled that a mistrial is warranted when improperly excluded evidence goes to "the very heart" of a party's case and "'might well have affected the outcome' of the trial." *Green*, 759 A.2d at 1063. The need for a mistrial or new trial remains regardless of whether there was other evidence "'of the same general character' or the 'the rejected evidence was cumulative.'" *Id.* Here, the improper testimony at issue struck at the heart of Vanderbilt's theory of the case and the most closely contested issues the jury had to resolve. Unlike cases where prejudicial evidence has been admitted over objection, yet can still be tempered by other evidence, *see, e.g.*, *Strauss v. Biggs*, 525 A.2d 992, 1000 (Del. 1987), the effect of the errors here, both individually and certainly cumulatively, was to make the most important and strongest evidence in Vanderbilt's case suspect. Worse, the wrongly admitted evidence did so by encouraging the jury to rely on the very types of insubstantial, unreliable, and tainted evidence that the evidentiary rules are designed to exclude to ensure fairness and reliability in the trial process.

2. Specific Curative Instructions Were Insufficient To Remedy The Testimony's Cumulative Prejudicial Effect.

While curative instructions can play an important role in trials, this Court, like other courts, has long recognized that certain types of evidentiary wrongs

bearing on key issues cannot be cured because the jurors cannot reasonably be expected to unhear what they heard. In this case, the severe prejudice from any one of the instances of improper testimony, standing alone, warrants a new trial.

Even more so, the collectively material prejudice that arose from the repeated wrongful admissions requires reversal. Thus, while each error "standing alone [could] carr[y] with it sufficient prejudice to require the award of a new trial," the repeated introduction of such evidence "cumulatively *** amount[ed] to prejudice, and consequently a new trial must be awarded." *Robelen Piano Co. v. DiFonzo*, 169 A.2d 240, 248 (Del. 1961). The trial court committed legal error in failing to address the *cumulative* prejudice caused by the tainted evidence, as *Robelen* requires. Instead, the court considered only its curative instructions for each error "[t]aken *individually*." Add11 (emphasis added); Add11-23. And even that analysis falls short.

First, the trial court's contemporaneous assessment of the impact of Castleman's wrongful testimony about "buying senators and lobbying the government" confesses the acuteness and incurability of the prejudice it caused. After finding that "Dr. Castleman was intent on getting that [evidence] to the jury and seized upon the moment that he could to put it before the jury," the court explained its "worry that *no amount of curative instructions will erase from the minds of the jury now that they heard it*." A295 (emphasis added).

A year later, the trial court tried to brush away that finding. Add17. But that contemporaneous assessment, made during the thick of trial when the evidence was put before the jury, is the best assessment of the error's prejudice. The inflammatory force of testimony is most reliably and accurately measured at the time of trial, especially where, as here, the evidence relates directly to the dispute over whether Vanderbilt's talc caused mesothelioma, given Vanderbilt's reliance on government reports to substantiate its scientific case.

Moreover, the court was simply wrong to characterize such testimony as a "stray comment" that was "not repeated." Add17. That is because the court itself mistakenly repeated the comment to the jury in response to the jury's unrelated query about the Rogers testimony. *See* pp. 22-23, *infra*. In addition, plaintiff's counsel reminded the jury in closing argument that Vanderbilt "spen[t] its time and money fighting about what to call the fibers in its product because it [didn't] want to be regulated," A315, and called government agency studies less than independent because the agencies were "lobbied by regulated companies," A316. In sum, the prejudicial impact of an error that the court had acknowledged might not be curable was magnified, not cabined, by the subsequent course of the trial.

Second, as to Castleman's testimony referring to Vanderbilt as "liars," the trial court made no suggestion that the curative instruction adequately mitigated the testimony's prejudicial effect. *See* Add18-19. That is unsurprising. Before trial,

the court recognized that improper introduction of Johns-Mansville documents would "run the risk of a mistrial." A96. Use of the term "liars" created an "indelible inference which taint[ed] the fairness of the trial." *Koutoufaris v. Dick*, 604 A.2d 390, 400 (Del. 1992); *cf. Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

Third, with respect to the Fitzgerald testimony, the trial court's curative instruction made things worse, not better. Rather than tell the jury to disregard what Fitzgerald said, and to not credit his reliance on an excluded foundation for his analysis, the court merely told the jury that the math "mistake was not made by the witness." Add20. That instruction enhanced Fitzgerald's testimony by excusing the arithmetical flaw and nowhere telling the jury that it was forbidden to weigh Fitzgerald's summary ratios that referenced the excluded report.

Fourth, in discussing the improper Rogers testimony of asbestos rumors at the mine, the court's one-sentence explanation was that advising the jury to disregard the hearsay, A157-158, was "adequate," Add14. But asserting that a Vanderbilt foreman said there was asbestos in its talc is not a genie so easily put back in the bottle. Excluded evidence with such natural appeal to lay jurors requires a more forceful instruction from the court, if curable at all.

In addition, a few days after the Rogers testimony, the jury asked the court what it should disregard from the Rogers video. In response, the trial court revived the jury's recollection of the highly prejudicial testimony from Castleman, *not*

Rogers: "You saw a video in which there was some testimony about money that was spent allegedly to convince regulatory authorities that the talc did not contain asbestos. There was some other remarks in there about politicians and things of that nature. That you should disregard." A241-242. While the court later acknowledged that the prohibited Rogers testimony was "the rumors at the mine" about absebstos, A244, the damage had already been done. Far from curing any prejudicial effect of the Rogers hearsay, the court's reinforcing reminder compounded the prejudicial effect by reviving Castleman's provocative testimony.

In any event, the trial court's analysis of each individual error in isolation—however flawed—provides no basis to conclude that their cumulative prejudice did not render the trial unfair. The court provided only one rationale—comprising two sentences of its 24-page opinion—that even arguably addresses the cumulative prejudice to Vanderbilt: because the jury's damages award was "consistent with other asbestos-related actions," the court reasoned, the "jury was not inflamed" by the improper witness statements. Add21. That is a non-sequitur. "[A]ppeals to passion and prejudice, *** may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." *Minneapolis, St. P. & S.S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931). Unsurprisingly, the trial court cited no authority supporting its reliance on the size of a *damages* verdict to infer the lack of prejudice or a fair trial on *liability*. As the trial court itself had earlier

acknowledged, A386, a jury's liability determination may be motivated by prejudice even if the damages award is reasonable.

The circumstances here are consistent with that observation. Because the question of Vanderbilt's liability absent the prejudicial testimony was at least close (if not strongly in Vanderbilt's favor), the prejudice was more likely to manifest itself in liability than in an inflated damages award. Indeed, the prejudicial testimony at issue ultimately bears on the key issues of notice and causation, not compensatory damages. And despite the hundreds of pages of scientific exhibits to review, the jury returned a verdict within three hours. Such "brevity of the deliberations" raises a red flag about jury bias. *Chilson v. Allstate Ins. Co.*, 979 A.2d 1078, 1084 (Del. 2009). Finally, the jury's failure to allocate *any* fault to Borg Warner (see Part II, *infra*)—which would have had the effect of reducing the damages award (since Borg Warner was not a defendant at trial)—also suggests a verdict shaped by prejudice or bias. *Cf. Capital Mgmt. Co. v. Brown*, 813 A.3d 1094, 1101 (Del. 2002) (admitted error did not result in prejudice when the jury reasonably apportioned liability to third party in any event). Accordingly, in concluding that the jury could not have been biased or inflamed because the damages awarded seemed reasonably comparable to similar cases, the trial court ignored the cumulative prejudicial effect of the improper testimony on the jury's "crucial liability determination." *Lang v. Morant*, 867 A.2d 182, 187 (Del. 2005).

3. Vanderbilt's Role Does Not Excuse Plaintiff's Improper Testimony.

The trial court sought to excuse three of the prejudicial errors by faulting Vanderbilt for Rogers's and Castleman's undisputedly improper testimony, Add14-15; Add19, and for not objecting to each and every curative instruction, Add17; Add22. That is a perverse result here, where Vanderbilt had previously obtained rulings excluding the specific testimony at issue, and where Vanderbilt objected to each instance of improper testimony and moved for mistrial based on that testimony.

First, Vanderbilt had sought and obtained pre-trial rulings excluding the evidence at issue specifically to protect it from plaintiff's witnesses' inflammatory remarks. As to Rogers, the court itself thought it "extraordinarily clear" that plaintiff was to omit the hearsay about asbestos in the mines from its designations of videotape testimony for trial. A152. Whether or not Vanderbilt might have done more to ensure plaintiff's compliance with the court's evidentiary orders, Vanderbilt was certainly not "at least as much at fault" as the party that selected and played the excluded evidence for the jury. Add14.

Second, contrary to the court's reasoning, Add17, Vanderbilt was entitled to a mistrial even though it did not request a curative instruction following Castleman's testimony. It makes no sense to fault Vanderbilt for declining to request an instruction that even the court thought might do more harm than good.

See A189 ("Are you sure you want me to reinforce in the jury's mind—"). Doubly so here, where Vanderbilt argued that only a mistrial could remedy the serious prejudice attending Castleman's remarks. *Cf. Gomez v. State*, 25 A.3d 786, 791, 794-795 (Del. 2011). Indeed, the court recognized that any apparent endorsement by Vanderbilt of a curative instruction would not waive the fundamental objection that "nothing I say will cure the problem." A154-155. And any curative instruction could have sufficed only in "the absence of evidence of bad faith." *Koutoufaris*, 604 A.2d at 400. But the court twice deemed Castleman, a "regular on the asbestos circuit" Add15, to have been intent on getting highly prejudicial evidence before the jury, Add16; A383.

Finally, the trial court invoked the invited-error doctrine to excuse Castleman's "liars" comment. Add19. Although the invited-error doctrine may sometimes permit the admission of new prejudicial evidence elicited during cross-examination, *Itek Corp. v. Chicago Aerial Indus., Inc.*, 274 A.3d 141, 144 (Del. 1971), it does not sweep so far as to allow a witness's knowing introduction of already-excluded evidence. The court had already deemed Castleman precisely such a witness, ready to exploit any opening Vanderbilt gave him (however unintended). In any event, Delaware courts recognize that invited errors may be the basis for reversal where, as here, they jeopardize the fairness and integrity of the trial process. *Wainright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

II. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ABOUT BORG WARNER'S DUTY TO GALLIHER PREVENTED THE JURY FROM PROPERLY ASSESSING BORG WARNER'S FAULT.

A. Question Presented

Whether the trial court reversibly erred by refusing to inform the jury of the parameters of Borg Warner's duty to Galliher, even though Vanderbilt proposed two employer-duty instructions central to the jury's assessment of whether Borg Warner was "at fault." A905, A1011-1029, A1065-1079.

B. Scope of Review

This Court reviews *de novo* the denial of a requested jury instruction and "'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.

C. Merits

Before trial, plaintiff acknowledged that Borg Warner, as Galliher's employer, was "fair game" to be proven responsible for Galliher's injuries. A85. At trial, the court permitted the jury to hear evidence—including evidence on Galliher's workplace conditions and unprotected exposure to industrial talc notwithstanding safety warnings from Vanderbilt—that related to whether Borg Warner shared in any fault for Galliher's injuries. And after the close of evidence, the court charged the jury (assuming it found liability) to "allocate the total fault among the parties and Borg Warner." Add4. But despite Vanderbilt's request,

A299-300, the court never informed the jury what specific duties Borg Warner owed to Galliher. *See* A1055; *see also* A378-380, A377.

As a result, the jury was asked to consider whether Borg Warner breached a legal duty—that is, whether Borg Warner was "at fault," Add4—without any guidance on how to assess whether Borg Warner's safety practices (or lack thereof) fell short of the established standard of care for an employer. In other words, the jury was left to decide Borg Warner's "fault" untethered to its legal duties to Galliher, thereby "'undermin[ing] the jury's ability to intelligently perform its duty in returning a verdict.'" *Sammons,* 913 A.2d at 540. That failure to guide the jury's deliberations entitles Vanderbilt to a new trial.

1. "A party *** [has] the unqualified right to have the jury instructed on a correct statement of the substance of the law." *Koutoufaris*, 604 A.2d at 399. The mere "statement of the abstract rule of law is inadequate." *Beck v. Haley* 239 A.2d 699, 702 (Del. 1968). Rather, the trial court has a "duty *** to submit all the issues" to the jury, including "the defense, *** with such application of the law to the evidence as will enable the jury intelligently to perform its duty." *Island Express v. Frederick*, 171 A. 181, 183 (Del. 1934). That duty to instruct specifically arises even if there is "no attempt in [the defendant's] prayer to tailor the statement of law to the particular facts of the case," *Robelen*, 169 A.2d at 246-247, and even if the defendant submits an instruction flawed in "substance or

form," *Newnam v. Swetland*, 338 A.2d 560, 562 n.3 (Del. 1975); *see Pennsylvania R.R. Co. v. Goldenbaum*, 269 A.2d 229 (Del. 1970).

To be sure, a party has no right to dictate the precise sequence or language used in the charge. *Franklin v. Salminen*, 222 A.2d 261, 263 (Del. 1966); *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. Ct. 1992) *aff'd*, 632 A.2d 63 (Del. 1993). And a court may decline to give a proposed instruction if the substance of that instruction is otherwise "sufficiently covered by the charge of the court." *Universal Products Co. v. Emerson*, 179 A. 387, 397 (Del. 1935). But a court's discretion about *how* to submit an issue to the jury cannot excuse a complete failure to instruct on an issue. Simply put, a court "*must* 'submit all issues affirmatively to the jury' and must not ignore a requested jury instruction applicable to the facts and law of the case." *North v. Owens-Corning Fiberglas Corp.*, 704 A.2d 835, 838 (Del. 1997) (emphasis added).

2. The trial court failed to fulfill that obligation here. Vanderbilt proposed two possible employer-duty instructions—each a direct quotation of governing Ohio law, A299-300; *compare* A1025 *with* OHIO REV. CODE §§ 4101.11, 4101.12—designed to explain the contours of Borg Warner's duty to Galliher.[7] The court

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[7] Proposed instruction 26 read:

Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably

suggested the instructions were too long, and initially advised that it would "narrow [them] down" and "think of something for you." A300; *see also* A304. On the day it charged the jury, however, the court informed counsel that it had "deliberately *** removed those [instructions] from the charge"—without offering any reason for the deletion. A312. The court assured counsel that further objection was unnecessary: "The [instructions] you've already requested[,] [y]ou need not repeat those." A381; *see also* A384-385; *cf. Stilwell v. Parsons*, 51 Del. 342, 345–347 (Del. 1958) (error preservation).

As a result of the court's refusal, the jury received inadequate guidance concerning whether Borg Warner was "at fault." The court, when discussing *Vanderbilt's* duty, gave four paragraphs of instruction, A1050, followed by five more about what Vanderbilt knew or should have known, A1051-1052. But with respect to Borg Warner, the court limited its explication to the following:

Defendant claims that non-party [Borg Warner] was at fault and that

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adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters.

Proposed instruction 27 read:

No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe. A1025.

> its fault caused or contributed to causing Michael Galliher's mesothelioma and death. *** Defendant, not Plaintiff, bears the burden of proof to show, by a preponderance of the evidence *** that [Borg Warner] was at fault and that its fault caused or contributed to causing Mr. Galliher's mesothelioma and death ***.

A1055; *see also* A378-380 (same), A377 (substantively same). The court gave the jury no explanation of how Borg Warner might be "at fault." The court failed to mention, for example, that "[e]very employer shall furnish *** and use safety devices and safeguards ***," OHIO REV. CODE § 4101.11, or that "[n]o employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of [its] employees ***," OHIO REV. CODE § 4101.12. The court reversibly erred when it failed to give *any* instruction on these principles—let alone the specific, tailored instructions to which Vanderbilt was entitled. *See, e.g.*, *Newnam*, 338 A.2d at 561-562 (reversible error to instruct jury to apply "general principles of negligence" in traffic-accident case without sufficient guidance). 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 id.* at 562; *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975).[8]

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[8] This case presents an even stronger basis for reversal than that in *Newnam*. In *Newnam*, plaintiff was driving straight through a green light in an intersection when defendant's car hit him from the opposite direction while making a left turn. Defendant argued contributory negligence at trial and requested a jury charge on plaintiff's duty of care in the intersection. The court denied the charge but still told the jury: "'A green traffic signal is not a command to go; it is a qualified permission to proceed. One having a green traffic signal must proceed in a manner consistent with the general principles of negligence and obey all applicable statutes.'" 338 A.2d at 561. Because that instruction did not provide guidance as to precisely what "general

The evidence in this case plainly lent itself to the type of instructions Vanderbilt sought as the trial court itself acknowledged "evidence from which the jury *could* have concluded that Borg Warner was at fault." Add24. And the jury may well have so concluded if it had been given the adequate (or even any) information on Borg Warner's duty to Galliher as his employer. Although Vanderbilt communicated to Borg Warner that its talc did not contain asbestos, it did *not* endorse the product as safe to use without precautions. Rather, at least as of 1978, Vanderbilt had placed warnings on its talc that cautioned against exposure and advised that inhalation could cause lung injury. A289. Other trial evidence included: (i) the "fog" of dust in the cast shop, A318; (ii) BorgWarner's lackadaisical mask policy, which permitted employees *not* to use safety masks for many years, A318-319; (iii) Borg Warner's persistent inaction even in the face of union complaints, "shop talk" about asbestos, warnings about dust inhalation, A318-320; and (iv) a 1974 OSHA citation for using industrial talc that supposedly contained asbestos, A73-74.

Given that evidence, an appropriately instructed jury would not likely have concluded that Borg Warner satisfied its duty "to furnish and use safety"

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principles of negligence" were applicable under Delaware law, this Court deemed the omission "prejudicial and reversible error." *Id.* at 562. In this case, the trial court provided less elaboration (*i.e.*, none) about the applicable duty than the trial court had in *Newnam*, and the scope of Borg Warner's duty to Galliher under Ohio law is less intuitive than the plaintiff's basic traffic-law duty in *Newnam*. *Newnam* thus compels reversal here.

equipment and do "every other thing reasonably necessary" to protect Galliher's health. At the very least, the court's inexplicable failure to instruct on Borg Warner's specific duties under Ohio law "'undermined the jury's ability to intelligently perform its duty in returning a verdict'" on Borg Warner's relative fault. *Sammons,* 913 A.2d at 540. That failure requires a new trial.

CONCLUSION

For the reasons set forth above, the order of the Superior Court should be reversed and a new trial should be ordered on all issues.

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

Pratik A. Shah (admitted *pro hac vice*)
Patricia A. Millett (admitted *pro hac vice*)
Ruthanne M. Deutsch (admitted *pro hac vice*)
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 887-4000

SWARTZ CAMPBELL LLC

By: *s/Joseph S. Naylor*
Nicholas E. Skiles (DE Bar ID No. 3777)
Joseph S. Naylor (DE Bar ID No. 3886)
300 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 656-5935

Attorneys for Appellant/Defendant Below
Vanderbilt Minerals, LLC fka R.T. Vanderbilt Company, Inc.

Dated: November 12, 2013

ADDENDUM

***See* Rule 14(b)(vii)**

TABLE OF CONTENTS

Page:

Special Verdict Form (7/27/2012)..... Add1

Corrected Opinion re: Renewed Motion for Judgment as a Matter of Law (8/27/2013) Add6

Corrected Opinion re: Interest Award (8/27/2013) Add30

Order of Final Judgment (8/27/2013)..... Add33

EFiled: Jul 27 2012 8:07PM
Transaction ID 45600786
Case No. N10C-10-315 ASB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	)	
	)	
DARCEL GALLIHER, Individually And as Personal Representative For the Estate of MICHAEL GALLIHER	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N10C-10-315 ASB
	)	
R.T. VANDERBILT CO. INC.	)	
	)	
Defendant.	)	

SPECIAL VERDICT FORM

JURY INTERROGATORY NO. 1

Has Plaintiff proven by a preponderance of the evidence that Michael Galliher was exposed to an R.T. Vanderbilt talc product?

X YES _____ NO

If the answer to this question is "Yes," proceed to Jury Interrogatory No. 2.

If the answer to this question is "No," you are finished, the Foreperson should sign the verdict form and notify the Bailiff.

JURY INTERROGATORY NO. 2

Has Plaintiff proven by a preponderance of the evidence that the R.T. Vanderbilt talc to which Michael Galliher was exposed contained asbestos or asbestiform materials?

X YES _____ NO

If the answer to this question is "Yes," proceed to Jury Interrogatory No. 3.

If the answer to this question is "No," you are finished, the Foreperson should sign the verdict form and notify the Bailiff.

JURY INTERROGATORY NO. 3

Has Plaintiff proven by a preponderance of the evidence that R.T. Vanderbilt failed to provide an adequate warning for the dangers resulting from the asbestos or asbestiform minerals in its product and therefore, it rendered the product defective?

X YES _____ NO

If the answer to this question is "Yes," proceed to Jury Interrogatory No. 4.

If the answer to this question is "No," you are finished, the Foreperson should sign the verdict form and notify the Bailiff.

JURY INTERROGATORY NO. 4

Has Plaintiff proven by a preponderance of the evidence that the defect in R.T. Vanderbilt's talc products was a proximate cause of Mr. Galliher's malignant mesothelioma?

X YES _____ NO

If the answer to this question is "Yes," proceed to Jury Interrogatory No. 5.

If the answer to this question is "No," you are finished, the Foreperson should sign the verdict form and notify the Bailiff.

JURY INTERROGATORY NO. 5

Has Plaintiff proven by a preponderance of the evidence that Mr. Galliher's exposure to asbestos or asbestiform fibers from R.T. Vanderbilt talc products was a substantial factor in causing his malignant mesothelioma?

X YES _____ NO

If the answer to this question is "Yes," proceed to Jury Interrogatory No. 6.

If the answer to this question is "No," you are finished, the Foreperson should sign the verdict form and notify the Bailiff.

JURY INTERROGATORY NO. 6

Has R.T. Vanderbilt proven by a preponderance of the evidence that Borg Warner / Artesian was at fault and that its fault was a proximate cause of Michael Galliher's malignant mesothelioma?

_____ YES X NO

Proceed to Jury Interrogatory No. 7.

JURY INTERROGATORY NO. 7

Has R.T. Vanderbilt proven by a preponderance of the evidence that Michael Galliher was at fault and that his fault was a proximate cause of his malignant mesothelioma?

_____ YES _X_ NO

Proceed to Jury Interrogatory No. 8.

If you have answered "No" to both Jury Interrogatories 7 and 8, go directly to Jury Interrogatory 9.

JURY INTERROGATORY NO. 8

If you have reached this question, you must allocate the total fault among the parties and Borg Warner / Artesian. If you find that Mr. Galliher was not at fault enter "0" by his name. If you find that Borg Warner / Artesian was not at fault enter a "0" by its name. You may not allocate fault to anyone not listed below. Your allocations must add up to 100%.

Entity at Fault	**Percentage of Fault**
R.T. Vanderbilt	_____
Borg Warner / Artesian	_____
Michael Galliher	_____
Total	**100%**

Proceed to Jury Interrogatory No. 9.

JURY INTERROGATORY NO. 9

State the total amount of compensatory damages that you award to compensate Plaintiff. You should not adjust the damages you award for any of the percentages listed by you in Jury Interrogatory 8.

A. Claims on behalf of Michael Galliher

Medical expenses $114,583.33

Pain and suffering, mental anguish, and emotional distress $1,250,000

B. Claims by Darcel Galliher $1,500,000

C. **TOTAL** $2,864,583.33

Your verdicts must be unanimous. The Foreperson should sign the verdict form and notify the Bailiff.

7/27/12
Date

Jury Foreperson

EFiled: Aug 27 2013 04:40PM EDT
Transaction ID 53925140
Case No. N10C-10-315 ASB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
MICHAEL GALLIHER	)	C.A. No. N10C-10-315 ASB
	)	
Limited to: RT Vanderbilt	)	

CORRECTED MEMORANDUM OPINION

Appearances:

David W. deBruin, Esquire
Bifferato, LLC
Wilmington, Delaware
-and-
William A. Kohlburn, Esquire
The Simmons Firm
Attorneys for Plaintiff Michael Galliher

Nicholas E. Skiles, Esquire
Swartz Campbell, LLC
Wilmington, Delaware
-and-
R. Thomas Radcliffe, Jr., Esquire
Dehay & Elliston, L.L.P.
Baltimore, Maryland
Attorneys for the Defendant R.T. Vanderbilt

JOHN A. PARKINS, JR., JUDGE

Plaintiffs filed a wrongful death action against multiple defendants alleging Michael Galliher was exposed to asbestos while working in a variety of jobs during his career, and that exposure caused him to develop malignant mesothelioma from which he died. At trial, the sole remaining defendant was R.T. Vanderbilt. The jury found R.T. Vanderbilt liable for Mr. Galliher's injuries and awarded Plaintiffs $2,864,583.33. The jury concluded Mr. Galliher's exposure to asbestos fibers from the Defendant's talc products was a substantial factor in causing his malignant mesothelioma and that the Defendant failed to adequately warn Mr. Galliher of the dangers of asbestos contained in its products.

During trial, Defendant moved for a new trial based upon references to inadmissible evidence throughout the trial. The court denied that motion. After the jury returned its verdict, Defendant filed a Renewed Motion for a New Trial, citing as the basis for the motion the cumulative impact of four instances in which plaintiff counsel or witnesses referenced inadmissible evidence, or in the alternative, the jury's failure to assess fault against Borg Warner, Mr. Galliher's employer. The Defendant also filed a Renewed Motion for a Judgment as a Matter of Law on the grounds that there was insufficient evidence to support a finding of failure to warn and causation on behalf of Defendant and its products. Finally, Plaintiffs filed a post-trial Motion for Costs and Interest. The court held argument on this issue on March 8, 2013 where the court reserved decision. This opinion constitutes the court's rulings on the reserved issues for Defendants' motions.

Facts

Darcel Galliher brought this personal injury action against various defendants on behalf of herself and the estate of her late husband, Michael

Galliher. Mr. Galliher died of mesothelioma, an asbestos-related cancer, on February 3, 2011. Plaintiffs alleged Mr. Galliher contracted mesothelioma from his exposure to asbestos while working at a plant that manufactured bathroom fixtures in Mansfield, Ohio. More specifically, Plaintiffs allege Mr. Galliher became exposed to dust at work from NYTAL brand industrial talc. Plaintiffs allege R.T. Vanderbilt, the sole remaining defendant at trial, mined and sold NYTAL industrial talc and distributed it to the plant at which Mr. Galliher worked.

Plaintiffs proceeded to trial against R.T. Vanderbilt. Plaintiffs' theory of the case was that Defendant's NYTAL industrial talc contained asbestiform fibrous materials which caused Mr. Galliher's mesothelioma. Thus, Defendant was negligent in selling the asbestos-containing NYTAL industrial talc and failed to warn of the dangers caused by the talc. Ohio substantive law governed this case. Plaintiffs sought both compensatory damages and punitive damages.

Defendant conceded that industrial talc contained minerals which included asbestiform minerals, but it denied that NYTAL industrial talc contained asbestos and more importantly, denied that the minerals in its own industrial talc were capable of causing mesothelioma. Therefore, Defendant's talc could not have caused Mr. Galliher's mesothelioma. Instead, Defendant contends Borg Warner Corporation and CertainTeed Corporation are responsible, at least in part, for Mr. Galliher's disease. Defendant further argued that Mr. Galliher was negligent in failing to protect himself from being exposed to industrial talc.

At trial, Defendant moved for a mistrial under Superior Court Civil Rule 59 based on statements made by multiple Plaintiffs' witnesses referencing evidence

previously deemed inadmissible by the court. In addition, Defendant moved for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(a), arguing Plaintiff failed to prove its causation and failure to warn claims against the Defendant. The court deferred ruling on Defendant's motions[1] until after the jury returned its verdict. On July 27, 2012, the jury decided in favor of Plaintiffs in awarding $2,864,583.33 in damages. The jury found Mr. Galliher was exposed to asbestos or asbestiform fibers from Defendant's products and that that exposure was a substantial factor in causing his mesothelioma. The jury also found that Defendant failed to provide adequate warning to users of its products. Shortly thereafter, Defendants renewed its previous Motion for a New Trial and Motion for Judgment as a Matter of Law. Plaintiffs moved for costs and interests.

I. DEFENDANT'S RENEWED MOTION FOR A MISTRIAL AND A NEW TRIAL

In its Motion for a New Trial, Defendant sets forth two reasons why the court should grant its motion. First, Defendant argues the cumulative impact of four instances at trial where Plaintiffs' witnesses provided inadmissible testimony caused such prejudice to Defendant so as to require a new trial. In the alternative, Defendant argues the jury failed to consider fault on behalf of Mr. Galliher's employer, Borg Warner.

When considering a Motion for a New Trial, the court begins with the presumption that the jury's verdict is correct.[2] The court "will not disturb a jury's verdict unless it is against the great weight of the evidence, resulted from the

[1] The court did, however, grant Defendant's Motion for Judgment as a Matter of Law with respect to the punitive damages claim only.

[2] *Smith v. Lawson*, 2006 WL 258310 (Del. Super.) (*citing Mills v. Telenczak*, 345 A.2d 424, 426 (Del. Super. 1975)).

jury's disregard for applicable rules of law, or was tainted by legal error during trial."[3] "Barring exceptional circumstances, the trial judge should set aside the jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, [there would be a miscarriage of justice if the verdict were permitted to stand.]"[4]

The court must first determine whether the aforementioned comments caused sufficient prejudice to Defendant so as to warrant a new trial. In determining the prejudicial effect of improper comments during trial, the court considers "(1) [t]he closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the error.[5]

A. The alleged improper comments, taken individually, do not require a new trial

When a Motion for a New Trial is based upon improper comments made during trial, "[t]he question is whether the comments caused sufficient prejudice to the complaining party to warrant reversal."[6] Delaware courts utilize a three-part test to determine the effect of the improper comments.[7] Under that test, the court must consider the following factors: "(1) [t]he closeness of the case, (2) the

[3] *Bullock v. State Farm Mutual Auto. Ins. Co.*, 2012 WL 1980806, at *4 (Del. Super) (quoting *In re Asbestos Litigation*, 2011 WL 684164, at *4 (Del. Super.)).
[4] *Messick v. Star Enterprise*, 1998 WL 110082, *1 (Del. Super.) *aff'd*, 723 A.2d 840 (Del. 1998) (quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).
[5] *Hughes v. State*, 437 A.2d 559.
[6] *Gallo v. Buccini/Pollin Group*, 2008 WL 836020, at *6 (Del. Super.) (quoting *Joseph v. Monroe*, 419 A.2d 927, 930 (Del. 1980)).
[7] *See Hughes v. State*, 437 A.2d 559, 571 (Del. 1980) (adopting three-part test); *see also DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993) (extending three-part test to civil actions).

centrality of the issue affected by the error, and (3) the steps taken to mitigate the error."[8]

1. The alleged improper comments

Defendant argues the following comments were inadmissible or improper and therefore warrant a new trial:

- Plaintiffs failed to remove certain excluded hearsay statements regarding the alleged asbestos composition of R.T. Vanderbilt's talc from the edited video deposition of Thomas Rogers played for the jury.

- Dr. Castleman inappropriately suggested that R.T. Vanderbilt spent $16 million "buying senators and lobbying the government."

- Dr. Castleman made inappropriate reference to Johns-Manville calling R.T. Vanderbilt "liars" in connection with marketing its talc.

- Plaintiffs' expert Sean Fitzgerald inappropriately relied upon ratios derived from the excluded MAS report in opining that the minerals found in Mr. Galliher lung tissue were a fingerprint for New York talc. Mr. Fitzgerald also engaged in subsequent analysis of R.T. Vanderbilt talc inconsistent with his prior case-specific deposition testimony without notice to R.T. Vanderbilt.

Although the court finds the aforementioned comments improper (and found them inadmissible at trial), it holds that the improper statements do not amount to sufficient prejudice to warrant a new trial.

2. Taken individually, the alleged improper comments do not require a new trial

When viewed individually, the purported improper comments do not require a new trial. Those comments are discussed separately below.

a. Thomas Rogers' Deposition Video

[8] *Id.* (citing *Adams v. Luciani*, 2003 WL 22873038, at *3 (Del. Supr.) (internal citations omitted)).

The Defendant first contends that hearsay testimony from Thomas Rogers' deposition video shown to the jury was prejudicial. The excluded testimony pertained to a conversation between Mr. Rogers and George Mullen, two R.T. Vanderbilt employees, involving the alleged asbestos composition of the Defendant's talc. Mr. Rodgers testified as follows:

> Q: And did you know a fellow named Mullin, George Mullin?
>
> A: Yes.
>
> Q: Was he a foreman at the company?
>
> A: He was a foreman, I think over in the mill is where he was located.
>
> Q: And did – as the foreman for the company, did just George Mullin tell you anything about whether or not the minerals in the mines was asbestos?
>
> A: He never told me minerals in there was asbestos until I went out of there and I was trying to get court settlement, compensation and he called me up there on day and told me then that he knew there was asbestos in the mine and he had a bag from when they first started. He said if I need it to produce that he would let me take that to court that said R.T. Vanderbilt, the best asbestos in the world.
>
> Q: And did Mr. Mullin show you that bag?
>
> A: Yes, he did.
>
> Q: And did that bag say R.T. Vanderbilt on it?
>
> A: Yes.
>
> Q: Did it have the words asbestos on it?
>
> A: Oh yes.
>
> Q: And was it printed on the bag itself?
>
> A: Yeah.

> Q: And what was his – you said he was a foreman but what type of foreman was George Mullin; was he in product or –
>
> A: I think he was in production over there; I'm pretty sure he was.

On Sunday July 15, the court conducted a lengthy hearing with counsel during which, according to Vanderbilt's counsel, a "lot of time" was spent discussing deposition testimony one or both of the parties proposed to use. During that hearing the court ruled that it would allow testimony about the bag, which it concluded was not hearsay, but that it would not allow testimony about things told to the witness. Rather than sort through all of the testimony, the court left it to the parties to modify the deposition designations so as to comply with these general rulings. The court told the parties:

> I've heard enough. I'm going to allow – and you can sort out the testimony. I don't want anything here where he was told this or that. But I will allow him to testify that he saw a bag. He was shown a bag that said "best asbestos in the world." You can pick through it what you want and what's not appropriate.

Neither side objected to this procedure.

After the conference, Plaintiffs sent defense counsel a designation of the Rogers testimony they wished to be played to the jury. Unfortunately, the designation did not delete the hearsay testimony about statements purportedly made by George Mullen. Defendant voiced no objection at trial to the designation at trial, so the video tape deposition—which still contained the hearsay statement by Mullen-- was played as designated. Defendant promptly objected once the hearsay was played. The trial day was nearing an end, so the court sent the jury home.

After the jury was excused for the day, the court made the following comment to counsel:

> I think it was extraordinarily clear, I hope it was, that as I wasn't going to allow this hearsay and I wasn't going to allow scuttle butt that was being passed around at the mine about whether the materials contained asbestos ...I distinctly recall that this witness could heavy r [sic] testify that you saw a bag that had R. T. Vanderbilt, the world's best asbestos, or whatever it happened to say. Because to me that was not hearsay. But I distinctly also recall that saying that he and no one else could testify about what the rumors were, what they were told about, the composition of the talc. I don't have a copy of the transcript of Sunday's hearing. I want to look at it.

The next morning, out of the presence of the jury, the parties argued over whether a mistrial was called for. The court settled on a cautionary and limiting instruction which it gave to the jury. Though not waiving its motion for a mistrial, Defendant had no objection to the content of the instruction.

The court reaffirms its earlier conclusion that the hearsay did not warrant a mistrial. First the court was, and remains, convinced that the cautionary instruction was adequate. Second, Defendant was at least as much at fault as was Plaintiff for the introduction of this testimony. There is no question that Plaintiff's counsel erred when they included the hearsay within the designation of the Rogers testimony. Nonetheless Defendant's counsel had the opportunity to review the designation prior to the video being shown to the jury and could easily have prevented that portion of the video from being played. Defense counsel now explains that he was occupied with other matters relating to the trial and simply did not have time to review the designation. While the court is sympathetic and understands the demands placed on trial counsel during trial, Vanderbilt took a calculated risk when it sent only one counsel to try this case. Moreover,

Vanderbilt had capable local counsel, experienced in asbestos matters, present through most of the trial and associated hearings. Even assuming Vanderbilt's lone trial counsel was overwhelmed by matters when the deposition designations were provided to him, Vanderbilt fails to provide why local counsel could not have assisted in the straightforward task of screening the designations for hearsay. Finally, the court notes that Vanderbilt's counsel did not object to the designation procedure when the court announced it during the weekend conference with counsel.

b. Dr. Castleman's Testimony

Barry Castleman, Ph.D. is a regular on the asbestos circuit who testifies about the state of the art of asbestos knowledge at any given time. Vanderbilt contends that two portions of Dr. Castleman's testimony required the court to grant a mistrial. First were his comments that Vanderbilt spent $16 million trying to obtain favorable reports about its talc and that Vanderbilt had politicians in its pocket. Second is his comment that Johns Manville, a Vanderbilt competitor, referred to Vanderbilt as a "liar."

Well before Dr. Castleman's testimony, the court excluded evidence that Vanderbilt spent considerable sums of money trying to get favorable reports and regulatory rulings on its talc. The court also excluded any testimony about Vanderbilt having politicians in its pocket. Yet on cross-examination by Vanderbilt's counsel, Dr. Castleman offered the following:

Q. And RT Vanderbilt has been studying talc since the 1970s; correct?

A. Well, since government regulatory officials started to impose duties on them. Yes, Vanderbilt has reacted by coming forth with studies and statements of various kinds. They spent millions of dollars on that.

Q. How do you know they spent millions of dollars?

A. Just from the volume of studies, as well as testimony that's emerged in the course of this history and unearthing this history. I figure 16 million dollars, I believe, was used in one document.

Q. Who gave the 16 million dollars, who was that testimony by?

A. I think it was by a worker at Vanderbilt talking about one of the Vanderbilt family told the workers.

Q. So a talc worker, a miner or miller; right?

A. Right.

Q. Is reporting how much Vanderbilt spent on this?

A. How much the company owners told him they spent buying senators and lobbying the government, yes.[9]

Defense counsel promptly objected to the last statement and moved to strike it, whereupon the court told the jury to disregard that testimony. Vanderbilt did not ask for any cautionary or limiting instructions, nor did it seek a conference with the court to discuss any further measures to limit the impact of this statement. It appeared at the time that Defendant was content to proceed with only the instruction to disregard Dr. Castleman's statement.

The court expressed serious concerns about this testimony at the prayer conference:

[9] (Emphasis added).

> I will tell you that . . . one of the things that troubles me most is Dr. Castleman's volunteering, what I believe to be volunteering, about the senators in the hip pocket or – I think the words were that he bought senators, plural. I don't think that was invited by the question. I think, frankly, Dr. Castleman was intent on getting that to the jury and seized upon the moment that he could to put it before the jury. And that is one of the things that makes me worry that no amount of curative instructions will erase from the minds of the jury now that they heard it.

Upon further reflection, however, the court finds that Dr. Castleman's comment, although regrettable, does not, by itself, warrant a new trial.

- First, Vanderbilt made the strategic decision not to ask for any limiting or cautionary instruction at the time the statement was made, nor did it request any such instruction in the final instructions given to the jury. Vanderbilt will therefore not be heard to now complain about the absence of any instruction beyond the one it requested—and the court gave—at trial.
- Second, this testimony did not relate directly to the central dispute in this case. Vanderbilt's primary defense was that its talc did not contain toxins which cause mesothelioma. This was a scientific dispute fought by expert witnesses. The credibility of Vanderbilt employees, and whether they had politicians in their pocket, played only a minor role in answering this essentially scientific question.
- Third, this was a stray comment in the context of a two week trial; it was not repeated, nor was there any reference to it in arguments by counsel.

- Fourth, it is evident that the jury took seriously the court's instructions to disregard testimony. During its deliberations the jury sent a note to the court asking about the scope of the court's instructions to disregard a portion of another witness's testimony.

The second portion of Dr. Castleman's testimony to which Defendant objects is his reference to Johns-Manville calling Vanderbilt "liars." This issue too was raised in a pretrial conference. At that conference the parties discussed Plaintiff's desire to introduce Johns-Manville internal documents which indicated R.T. Vanderbilt failed to provide an asbestos warning on its talc and referring to Vanderbilt personnel as "liars" when they contended that Vanderbilt's talc did not contain asbestos. The court ruled the documents were inadmissible unless Plaintiffs provided evidence that "particular documents were [contemporaneously] shared with R.T. Vanderbilt."[10] No such evidence was forthcoming. Still Dr. Castleman testified about the Johns-Manville accusations at trial:

> Q. Does your book mention RT Vanderbilt?
>
> A. Yes.
>
> Q. Is that the one paragraph, there's one paragraph on RT Vanderbilt?
>
> A. The paragraph where Johns-Manville people are calling RT Vanderbilt liars.

[10] At the pretrial conference, the court noted:

> And the plaintiffs walk a tightrope here in the sense if you introduce documents from Johns-Manville and it turns out -- or if you bring to the attention of the jury documents from Johns-Manville and there is no evidence to support the conclusion that R.T. Vanderbilt had received them at the time, you do run the risk of a mistrial, because this is serious enough that I would seriously consider a motion for a mistrial under those circumstances.

To a great extent this testimony was invited. Dr. Castleman's one paragraph reference to Vanderbilt in his book was not the subject of direct examination and the court therefore has difficulty seeing the value of cross-examining about that reference. The book was publicly available, so the court assumes that Vanderbilt knew what was contained in the paragraph about it. Nonetheless for no obvious reason Vanderbilt's counsel decided to venture into the minefield.

c. Sean Fitzgerald's Testimony

Defendant finally objects to Sean Fitzgerald's testimony regarding an inadmissible report authored by Mark Rigler, Ph.D. Plaintiffs called Sean Fitzgerald as an expert on the mineralogical composition and origins of materials found in Mr. Galliher's lung tissue. Mr. Fitzgerald concluded that constituents of the materials found in Mr. Galliher's lung tissue were consistent with Defendant's talc, and that the ratio of the constituents was consistent with NYTAL talc. At the pretrial conference, the court allowed Mr. Fitzgerald to testify, but prohibited him from mentioning or referring to Dr. Rigler's report during his testimony.[11]

At trial, Mr. Fitzgerald used a chart to illustrate for the jury certain studies he reviewed before reaching his conclusions. The chart included findings by Dr. Rigler in his report. Plaintiffs failed to remove these findings after the court deemed use of the Rigler report inadmissible. This mistake surfaced when Defense counsel asked Mr. Fitzgerald on cross-examination about the

[11] The Rigler report was excluded because Plaintiffs failed to disclose to Defendant that they intended to use information contained in the report.

mathematical calculations on his chart and Mr. Fitzgerald testified, "The math isn't going to work because the math that I used included an analysis that I was – I was told could not be a part of this." Defendant objected and the court issued a curative instruction. Plaintiffs claimed the chart was prepared before the court ruled Dr. Rigler's report inadmissible and although they removed any mention of that report in the slides, they forgot to re-calculate the ratios on the chart.

Defendant also alleges prejudice in Mr. Fitzgerald's testimony regarding his testing of Defendant's talc. At the time of his deposition, Mr. Fitzgerald testified he had never tested Defendant's talc. Between his deposition and trial, however, Mr. Fitzgerald had tested Defendant's talc, apparently for another case. Defendant argues this testimony inappropriately bolstered Mr. Fitzgerald's testimony.

Mr. Fitzgerald's testimony undermined the credibility of Plaintiffs' case, and only minimally, if at all, impacted the Defendant's case. If it was not clear to the jury that the error was Plaintiffs' fault, the court clarified the issue through an instruction to the jury.[12] Therefore, any prejudice suffered by Defendant in this instance was corrected upon the curative instruction given by the court.

Defendant also did not suffer prejudice with regard to Mr. Fitzgerald's testimony about his experience with testing Defendant's talc. At side bar, Defense counsel raised his concern as to the inconsistent testimony of Mr. Fitzgerald, that

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[12] The court instructed the jury, as agreed upon by counsel,

> Ladies and gentlemen, shortly before the break you will recall there was some testimony about there was a math error here in the average of 35 and 33. And the average was calculate at 22 which, of course, is not the average between those numbers. This mistake was not made by the witness, but rather this chart was prepared by – for the witness by plaintiff's counsel and it was plaintiff's counsel who has made this mistake; not this witness.

is, at the time of his deposition he had never tested Defendant's talc, but by trial Mr. Fitzgerald had tested Defendant's talc. Defendant argues the fact that Mr. Fitzgerald tested Defendant's product after his deposition inappropriately bolstered the witness' testimony while disadvantaging defense counsel. During the side bar, the court recommended counsel ask the witness if any of his opinions were based on his new testing of Defendant's talc, which counsel agreed to do. When asked this question, the witness responded "No, they have not." The court finds this line of questioning sufficient to cure any prejudice suffered by Defendant.

The court finds that the jury's damages award was reasonable as the amount awarded, $2,864,583.33, is consistent with other asbestos-related disease actions.[13] The reasonable damages award, which the court finds was supported by a sufficient evidentiary basis, demonstrates that the jury was not inflamed by the statements made my Mr. Rogers, Dr. Castleman, and Mr. Fitzgerald.[14]

In addition, the curative instructions provided by the court were sufficient to mitigate any prejudice to the Defendant. In each of the four instances of inappropriate commentary, the court issued a curative instruction or struck the testimony from the record as requested by Defense counsel. In addition, the

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[13] *See Farrall v. AC&S Co., Inc.*, 1989 WL 158512 (Del. Super.) (acknowledging that for asbestos-related pleural disease, range of award between $100,000-$4,000,000 in Delaware cases, and $5,000,000 in Delaware asbestosis cases); *see also Wagner v. Bondex Intern., Inc.*, 368 S.W.3d 340 (Mo. Ct. App. 2012) (jury award against three defendants for plaintiff's exposure to asbestos and subsequent diagnosis of mesothelioma totaling $4.5 million); *Rando v. Anco Insulations Inc.*, 16 So.3d 1065 (La. 2009) (bench trial resulting in $2.8 million award for asbestos exposure resulting in mesothelioma diagnosis); *John Crane v. Scribner*, 800 A.2d 727 (Md. 2002) (jury verdict awarding damages in the amount of $5, 241,500 to the spouse and estate of Mr. Scribner who died of mesothelioma); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759 (Tex. App. 1999) (jury verdict awarding estate, widow, and parents of former serviceman who was diagnosed and died of mesothelioma over $8 million).

[14] *See Young v. Frase*, 702 A.2d 1234, 1237 (Del. 1997) (citing *Del. Elec. Coop., Inc. v. Duphily*, 702 A.2d 1202 (Del. 1997) ("As long as there is a sufficient evidentiary basis for the amount of the award, the jury's verdict should not be disturbed by a grant of additur or a new trial as to damages.")).

Defendant does not challenge, and has not challenged, whether the jury was properly instructed by the court during each curative instruction or the jury instructions at the close of the case. Thus, the issue is whether the prejudice suffered by Defendant as a result of the improper statements was able to be cured by an instruction, to which the court responds in the affirmative.

B. The verdict was not against the great weight of the evidence

Vanderbilt next argues that the jury's failure to assess fault against Plaintiff's employer, Borg Warner, was against the great weight of the evidence, and therefore it is entitled to a new trial. The Delaware Supreme Court set forth the standard for "weight of the evidence motions" in *Storey v. Camper*:[15]

> Thus . . . we hold that a trial judge is only permitted to set aside a jury verdict when in his judgment it is at least against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such ground unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.[16]

At trial, Defendant asserted the affirmative defense that Mr. Galliher's employer, Borg Warner, was at fault and its fault was the proximate cause of Mr. Galliher's malignant mesothelioma. [17] The court instructed the jury on this defense and explained that it was Defendant's burden to prove Borg Warner was at fault and Borg Warner proximately caused Mr. Galliher's mesothelioma and death. On the verdict form, to the question "Has R.T. Vanderbilt proven by a preponderance of the evidence that Borg Warner/Artesian was at fault and that

[15] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[16] (Internal citations omitted).
[17] Defendant also argued Mr. Galliher was at fault, which the jury rejected.

its fault was a proximate cause of his malignant mesothelioma," the jury responded "No."

Defendant provides three arguments for why the jury's verdict was against the great weight of the evidence. First, Vanderbilt argues it warned Borg-Warner of the dangers of asbestos through Material Safety Data Sheets with all talc shipments and by placing warning labels on each bag of NYTAL talc. Second, Defendant argues Borg Warner had an independent duty to warn its employees of the dangers associated with talc. Defendant argues Borg Warner, not the Defendant, was the only party with direct access to its employees and their knowledge of working conditions and therefore, should have warned its employees of the dangers of asbestos exposure. Finally, Defendant argues that Borg Warner was negligent *per se* in failing to warn or protect its employees of or from the dangers of asbestos. Defendant directs the court to a citation from the National Institute for Occupational Safety and Health (NIOSH) as evidence of Borg Warner's negligence *per se.*

Vanderbilt's argument fails because Vanderbilt failed to introduce evidence that Mr. Gallaher's disease was proximately caused by exposure occurring *after* Borg Warner allegedly became aware of the hazards of Vanderbilt's talc. Vanderbilt had the burden of proving that Borg-Warner's conduct was a proximate cause of Mr. Galliher's disease. The Ohio formulation of proximate cause contains a "but for" element, which means that Vanderbilt needed to prove that but for Borg-Warner's conduct Mr. Galliher would not have contracted mesothelioma.

There is ample evidence in the record upon which a reasonable trier of fact could conclude that Borg Warner's conduct was not a proximate cause of Mr. Galliher's disease. The function of the Court in deciding a motion for a new trial is not to challenge the jury's verdict, or substitute its judgment for that of the jury's, simply because the Court may have reached a different conclusion."[18] It should be kept in mind that a reasonable trier of fact could have concluded that for several years during Mr. Galliher's employment Borg Warner was unaware that Vanderbilt's talc contained toxins. Indeed there was evidence that Vanderbilt employees assured Borg Warner that its talc did not contain asbestos. Further there was sufficient evidence in the record for a reasonable trier of fact to conclude that for Mr. Galliher the die was already cast before Borg Warner allegedly learned of the dangerous nature of Vanderbilt's talc. That is, by the time Borg-Warner allegedly learned of the dangers of Vanderbilt's talc it was already inevitable that Mr. Galliher would be afflicted with mesothelioma. It would have been reasonable, therefore, for a trier of fact to conclude that Borg Warner's allegedly wrongful conduct was not a but for cause of Mr. Galliher's disease.

The court finds Plaintiffs presented sufficient evidence from which a jury could conclude that Mr. Galliher died as a result of his exposure to Defendants product. The Defendant has identified evidence from which the jury *could* have concluded that Borg Warner was at fault, but the evidence supporting that conclusion does not amount to such a level that the jury's verdict was against the great weight of

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[18] *Cohen v. Cavalier's Country Club*, 2002 WL 499881, at *1 (Del. Super.).

the evidence in not reaching that conclusion.[19] Plaintiffs presented evidence, and the jury found, that Mr. Galliher was exposed to Defendant's talc product, that Defendant's talc contained asbestos or asbestiform materials, the Defendant failed to warn of the dangers resulting from the asbestos or asbestiform materials in its product, and that the Defendant's talc was a proximate cause and substantial factor in causing his malignant mesothelioma. Therefore, Defendant's Motion for a New Trial on the basis of the jury's failure to assess fault against Borg Warner is also denied.

For the foregoing reasons, Defendant's Renewed Motion for a New Trial is **DENIED**.

II. DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant next moves for Judgment as a Matter of Law under Delaware Superior Court Civil Rule 50. Defendant claims there is no legally sufficient evidentiary basis for finding (1) Defendant's products were a substantial factor in Plaintiff's injury or (2) Defendant failed to adequately warn users of its products. During trial, Defendant moved for a Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(a) before jury deliberations began.[20] The court

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[19] *See In re Asbestos Litigation 112010JR Trial Group*, 2000 WL 684164, at *10 (Del. Super.). Plaintiff analogizes the present cases to *Henderson*. It should be noted that while parallels exist between the two cases, this Defendant deliberately pursued its claim against Borg Warner in its defense and presented evidence in support of that claim, whereas the defendants in *Henderson* relied upon "one or two snippets of evidence" to support its claims against other non-party entities.

[20] Super. Ct. Civ. R. 50(a) states,

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as

granted Defendant's motion with respect to punitive damages, but delayed ruling on the remaining issues until after the jury returned its verdict (if a ruling still proved necessary). Because the jury ultimately returned a verdict in favor of Plaintiffs, Defendant now renews its Motion for Judgment as a Matter of Law under Superior Court Rule 50(b).

Superior Court Civil Rule 50(b) provides, in pertinent part:

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.

In considering a Motion for Judgment as a Matter of law, the court "views the evidence most favorable to the party against whom it is moved, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, he determines whether or not, under the law, a verdict might be found for the party having the burden."[21] In other words, a party is entitled to judgment as a matter of law where the facts support only one reasonable inference adverse to the non-moving party.[22]

Defendant sets forth four reasons why the court should grant its motion:

> a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

[21] *McCloskey v. McKelvey*, 4 Storey 107, 111 (Del. 1961). A Motion for a Judgment as a Matter of Law can be distinguished from a Motion for a New Trial in that in the former, the court does not weigh the evidence but determines if the verdict was properly supported by the evidence, whereas the latter requires the court to "weigh[ ] the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached." *Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997).

[22] *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983) (internal citations omitted).

(1) Plaintiffs failed to offer evidence sufficient to find that Mr. Galliher ever worked with or around R.T. Vanderbilt's NYTAL talc, let alone the frequent, regular and proximate exposure required under Ohio law.

(2) Plaintiffs failed to offer evidence sufficient to find that "asbestiform" fibers caused Mr. Galliher's mesothelioma.

(3) Plaintiffs failed to offer evidence regarding when (if ever) R.T. Vanderbilt was reasonably on notice of a potential link between "asbestiform fibers" in its talc and claims that it causes mesothelioma sufficient to give rise to a duty to warn.

(4) Plaintiffs failed to offer evidence sufficient to find that R.T. Vanderbilt's warning was inadequate.

As with Defendant's Motion for a New Trial, the court finds the jury's verdict reasonable and supported by the evidence. Defendant's arguments pertain to two factual issues at trial: whether Defendant's product was a substantial factor in causing Mr. Galliher's injuries and whether Defendant failed to adequately warn Mr. Galliher. Both of these questions were submitted to the jury, and the jury answered both questions in the affirmative.

The Delaware Supreme Court has expressly provided that "[T]he factual findings of a jury will not be disturbed if there is 'any competent evidence upon which the verdict could reasonably be based.'"[23] The court finds a reasonable review of the evidence shows sufficient support in the record for the jury's verdict.[24] Mr. Galliher worked at a Borg Warner factory that manufactured toilets and bathroom sinks. Mr. Galliher testified he worked in the cast shop, which was located next to the slip-house. In the slip-house, the workers made glaze using

[23] *Mercedes-Benz of N.A., Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1362 (Del. 1991).
[24] *Contra Harrison v. Extreme Nite Club*, 2007 WL 2428477, at *1 (Del. 2007) (internal citations omitted) ("[A] defendant is entitled to judgment as a matter of law if the plaintiff fails to establish a prima facie case of negligence, or under no reasonable view of the evidence could a jury find in favor of the plaintiff.").

NYTAL talc. Mr. Galliher also testified to using talc and that he remembered, albeit vaguely, seeing Defendant's name on bags materials handlers would bring into the area in which he worked. Mr. Galliher worked at the cast shop for multiple decades, working five days a week, forty hours a week, and approximately fifty weeks a year.

Plaintiffs also submitted NIOSH investigative reports that referenced the use of Defendant's talc in the shop where Mr. Galliher worked. The report further indicated the slip-house emitted dust into the cast shop. A reasonable juror could find Mr. Galliher was exposed to Defendant's talc at the factory.

Plaintiffs also called multiple expert witnesses to establish medical causation. Dr. Abraham and Dr. Frank, Plaintiff's exert medical doctors, testified the asbestiform minerals in Defendant's industrial talc caused Mr. Galliher's mesothelioma. In addition, Dr. James Millette testified Defendant's talc contained asbestiform fibers and asbestos. The court ruled prior to jury instructions that Plaintiffs could submit to the jury that Mr. Galliher was exposed to either or both asbestos and asbestiform fibers. While it is unclear whether the jury found Mr. Galliher was exposed to asbestiform or asbestos (or both), it is clear that the jury found Defendant's products contained asbestos in some form, and that asbestos caused Mr. Galliher's injuries. Based on the evidence, there was a reasonable basis for their finding.

The jury's finding of facts with regard to Defendant's failure to adequately warn is also supported by the record. There was testimony at trial that Borg Warner had received citations from OSHA for asbestos violations. Plaintiffs also introduced evidence that Defendant's material safety data sheets on NYTAL never

contained the word asbestos, cancer, or mesothelioma. Finally, Mr. Kelse testified that NYTAL talc warnings contained the phrase "non-asbestiform" on the label.

Defendants argue there was no evidence that Defendant had notice of the harmful effects of asbestos or asbestiform fibers and therefore, it did not have a duty to warn. But the standard under Ohio law, as provided for in the jury instructions, is that Defendant had a duty to warn for dangers it "knew or, in the exercise of reasonable care, should have known."[25] Based on the evidence at trial, a reasonable jury could find Defendant should have known the dangers of asbestos or asbestiform at the time Mr. Galliher worked at Borg Warner, and it should have adequately warned users of its products of those dangers.

Because the court finds the jury's findings are reasonably supported by the evidence, Defendant's Renewed Motion for Judgment as a Matter of Law is **DENIED.**

IT IS SO ORDERED.

Dated: August 27, 2013

Judge John A. Parkins, Jr.

oc: Prothonotary
cc: All counsel via e-file

[25] *See Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1182 (Ohio 1990).

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Case No. N10C-10-315 ASB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
MICHAEL GALLIHER	)	C.A. No. N10C-10-315 ASB
	)	
Limited to: RT Vanderbilt	)	

ORDER

Plaintiffs in the present action filed a wrongful death suit against multiple defendants, including R.T. Vanderbilt. Plaintiffs and R.T. Vanderbilt proceeded to trial in July 2012 and the jury returned a verdict in favor of Plaintiffs, awarding $2,864,583.33 in their favor. After the jury announced its verdict, Plaintiffs timely moved for costs and interests. Defendants moved for judgment as a matter of law and for a new trial, which the court denied on August 1, 2013. The court issued its opinion on the Motion for Costs and Interests on August 2, 2013. On August 8, 2013, Defendant wrote the court requesting reconsideration of the court's ruling on post-judgment interest. Specifically, Defendant argues the court erroneously applied Ohio law to determine the post-judgment interest award.

Both parties agreed in their initial submissions that Delaware law applies to post-judgment interest. In addition, both parties agreed Plaintiffs are entitled to post-judgment interest. In response to Defendant's August 8 letter, Plaintiffs took "no position" on whether the court should reconsider its application of Ohio law to this issue. Accordingly, the court accepts that Delaware law applies to the award of post-judgment interest.

Both parties agree that the Delaware rate of interest to be applied to post-judgment interest is 5.75% from the date of final judgment. The parties do not

agree, however, on what constitutes the "date of final judgment."[1] Plaintiffs argue the date of final judgment is the date upon which the jury returned its verdict. Conversely, Defendant argues the date of final judgment is the date in which the court issues the present order.

With regard to post-judgment interest, the Delaware Supreme Court has held:

> Delaware law provides that Post-Judgment Interest is a right belonging to the prevailing plaintiff and is not dependant upon the trial court's discretion. Interest on a judgment begins to accrue when the judgment is entered as final and determinative of a party's rights.[2]

The underlying reason for awarding post-judgment interest from the date payment is due is because "full compensation requires an allowance of the detention of the compensation awarded and interest is used as a basis for measuring that allowance."[3] This court has found that final judgment occurs upon the date the jury renders its verdict.[4] Defendant fails to demonstrate to the court why it should not do the same here.

Defendant cites two cases in support of its argument that post-judgment interest begins to run from the court's adjudication of the present motion. In *Segovia v. Equities First Holdings, LLC*,[5] the court dealt with cross-motions for summary judgment in which the court issued a ruling and awarded post-judgment interest in that ruling. The court did not expand upon the definition of

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[1] *See* 6 *Del. C.* § 2301.
[2] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000) (finding that because the Superior Court incorrectly granted a new trial, the initial jury verdict "should have been the final, determinative ruling").
[3] *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978).
[4] *See M&G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 2125463, at *3 (Del. Super.) (after denying Defendant's Motion for a New Trial, court awarded post-judgment interest from the date of the jury's verdict).
[5] 2008 WL 2251218, at *23 (Del. Super.).

"final judgment," but merely stated "As to post-judgment interest, this shall begin to accrue when the final judgment is entered and will be assessed at the 'legal rate.'" In a footnote, the court cited *Wilmington Country Club v. Cowee* for the proposition that post-judgment interest belongs to the prevailing plaintiff.

The second case cited by Defendant, *Tyson Foods, Inc. v. Aetos Corp.*,[6] does not involve post-judgment interest. Rather, Defendant cites this case for the proposition that a final judgment is "one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration." The merits of the controversy in this case were determined by the jury when it returned its verdict and this court has upheld that verdict.

Although the court finds final judgment occurred when the jury returned its verdict, the court recognizes its own delay in issuing an opinion in this matter. The costs incurred as a result of the court's delay should not solely fall on the Defendant's shoulders. Therefore, post-judgment interest is awarded at a rate of 5.75% from July 27, 2012. However, Defendants do not owe Plaintiffs post-judgment interest from March 8, 2013 to August 27, 2013.

IT IS SO ORDERED.

Dated: August 27, 2013

Judge John A. Parkins, Jr.

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2013 AUG 27 PM 3:59

oc: Prothonotary
cc: All counsel via e-file

[6] 809 A.2d 575, 579 (Del. 2002).

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Case No. N10C-10-315 ASB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
MICHAEL GALLIHER	)	C.A. No. N10C-10-315 ASB
	)	
Limited to: RT Vanderbilt	)	

ORDER OF FINAL JUDGMENT

Defendant R.T. Vanderbilt seeks an order entering final judgment under Delaware Superior Court Civil Rule 54 with regard to the court's rulings on Defendant's Motion for a New Trial, Defendant's Motion for Judgment as a Matter of Law, and Plaintiff's Motion for Costs and Interests in the above-referenced case. Therefore, it is SO ORDERED that:

1. Defendant's Motion for a New Trial is **DENIED**.
2. Defendant's Motion for Judgment as a Matter of Law is **DENIED**.
3. Plaintiff's Motion for Costs and Interest is **GRANTED IN PART AND DENIED IN PART**. Defendant shall pay Plaintiffs:
   a. $45,313.08 in costs;
   b. Post-judgment interest at a rate of 5.75% from July 27, 2012, less the amount of interest accrued from March 8, 2013 to August 27, 2013.

Defendant does not owe Plaintiffs prejudgment interest.

Dated: August 27, 2013

Judge John A. Parkins, Jr.

oc: Prothonotary
cc: All counsel via e-file

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