Plotkin v. Johnson & Johnson

Superior Court of Connecticut, Judicial District of Bridgeport

October 1, 2025, Decided

DOCKET NO.: FBT-CV-21-6109520-S

Reporter
2025 Conn. Super. LEXIS 2680 *; 2025 LX 464363

EVAN PLOTKIN v. JOHNSON & JOHNSON, ET AL

Core Terms

asbestos, mesothelioma, consumer, talc, new trial, cross-examination, causation, personal knowledge, baby, prejudicial, cancer, comprehensive review, exposure, expert opinion, successor liability, scientific, corporate representative, quotation, disease, instruct a jury, expert witness, powder, mistrial, mineral, warn, cleavage, fragment, fiber, porter, deposition

Judges: [*1] REED, J.

Opinion by: REED

Opinion

MEMORANDUM OF DECISION RE J&J DEFENDANTS' MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL (DOCKET NO. 836.00)

INTRODUCTION

In this product liability action—arising from the plaintiff, Evan Plotkin's, lifelong use of talc-based body powder marketed by the defendants under the brand name, "Johnson's Baby Powder" (JBP)—the jury returned a verdict for the plaintiff in the amount of fifteen million dollars, together with an award of punitive damages. The trial of this case spanned five weeks, during which the parties contested vigorously all issues pertaining to liability, causation, and damages.

Following the jury's verdict, the defendants—Johnson & Johnson (J&J), LLT Management LLC (formerly known as LTL Management LLC) (LLT), Johnson & Johnson Holdco (NA) Inc. (Holdco), Kenvue Inc. (Kenvue), and Pecos River Talc LLC (Pecos River) (collectively, the J&J defendants)—filed a motion to set aside the verdict and for a new trial (Docket No. 836.00), to which the plaintiff objected (Docket No. 861.00). This motion was argued, along with several other post-verdict motions that will be addressed in separate memoranda, on March 18, 2025 and again on July 29, 2025.

In support of their [*2] motion to set aside and for a new trial, the J&J defendants contend that the court should have precluded, in whole or part, the opinions of the plaintiff's expert witnesses, on the ground that those opinions failed to meet the threshold test for admissibility under *State v. Porter*, 241 Conn. 57, 87, 698 A.2d 739 (1997) (en

banc), cert, denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). They also argue that the court made erroneous rulings—regarding the scope of testimony from one of their fact witnesses, Edwin Kuffner, M.D., and their expert witness, Richard Attanoos, M.D.—which they claim were prejudicial. The J&J defendants further claim that the court's jury charge and verdict forms were erroneous as a matter of law. They contend that the court made several other evidentiary rulings that were erroneous and prejudicial, warranting a mistrial. They also claim that a new trial is required because the plaintiff stated, in remarks to a journalist after the trial, that he is cancer free, contrary to the evidence and the plaintiffs claim at trial. Lastly, they argue for a new trial based on certain statements made by the plaintiffs lawyer during closing argument.

The plaintiff characterizes the arguments of the J&J defendants as "scattershot" in nature and responds that "[t]hey raise [*3] the same issues the Court has already heard and rejected. The Court certainly did not err and did not abuse its discretion in the oversight of this trial." Docket No. 861.00 at 1.

For the reasons set forth below, the motion to set aside the verdict and for a new trial is denied.

DISCUSSION

"[A] trial court may set aside a verdict on a finding that the verdict is manifestly unjust because the jury, on the basis of the evidence presented, mistakenly applied a legal principle or because there is no evidence to which the legal principles of the case can be applied. . . . Under the general verdict rule, the jury is presumed to have found all issues in favor of the defendants. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality. . . . Ultimately, [t]he decision to set [*4] aside a verdict entails the exercise of a broad legal discretion . . . ." (Citations omitted; internal quotation marks omitted.) *Melendez v. Spin Cycle Laundromat, LLC*, 188 Conn. App. 807, 811, 205 A.3d 759 (2019). "A jury's verdict should not be set aside and a new trial ordered unless it is apparent that injustice either was, or might have been, done [at] trial. . . . The verdict's manifest injustice [must be] so plain as to clearly indicate that the jury has disregarded the rules of law applicable to the case, or were influenced by prejudice, corruption, or partiality in reaching a decision." (Citation omitted; internal quotation marks omitted.) Id., 813. "[T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as a seventh juror, but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did. . . . A verdict is not defective as a matter of law as long as it contains an intelligible finding so that its meaning is clear. . . . A verdict will be deemed intelligible if it clearly manifests the intent of the jury." (Internal quotation marks omitted.) *Weihing v. Preto-Rodas*, 170 Conn. App. 880, 884, 155 A.3d 1278 (2017).

I

EVIDENTIARY CLAIMS

A

Expert Witness Opinions

"Expert testimony should be admitted when: (1) [*5] the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." *Weaver v. McKnight*, 313 Conn. 393, 405-406, 97 A.3d 920 (2014) (quoting *Sullivan v. Metro-North Commuter R.R. Co.*, 292 Conn. 150, 158, 971 A.2d 676 [2009]).

Connecticut law follows the federal *Daubert* standard and applies a two part test to determine the admissibility of scientific evidence. *State v. Haughey*, 124 Conn. App. 58, 71, 3 A.3d 980, cert, denied, 299 Conn. 912, 10 A.3d 529 (2010). First, "the subject of the testimony must be scientifically valid, meaning that it is scientific knowledge rooted

in the methods and procedures of science . . . and is more than subjective belief or unsupported speculation." Id. (quoting *State v. Porter*, supra, 241 Conn. at 64. Second, "the scientific evidence must fit the case in which it is presented." (Internal quotation marks omitted.) Id. (quoting *State v. Porter*, supra, 241 Conn. at 65).

"[Q]uestions about the methodological validity of proffered scientific testimony will generally go to the *weight* of such evidence, not to its admissibility." (Emphasis in original; internal quotation marks omitted.) Id., 72. "[O]nce the validity of a scientific principle has been satisfactorily established, [*6] any remaining questions regarding the manner in which that technique was *applied* in a particular case is generally an issue of fact that goes to weight, and not admissibility." (Emphasis in original; internal quotation marks omitted.) Id.

"'The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law.'" *State v. Williams*, 350 Conn. 363, 379, 324 A.3d 760 (2024) (quoting *State v. Bruny*, 342 Conn. 169, 187, 269 A.3d 38 [2022]).

1

Testimony of Stephen Haber, M.D.

a

Reliance Materials

The J&J defendants first claim that the court erred in permitting the plaintiff's medical causation expert, Stephen Haber, M.D., to testify, over objection, to matters purportedly outside the scope of his medical expertise. Dr. Haber is a pulmonologist, not an expert on the mineralogy of asbestos,[1] microscopy, geology, mineral science, or industrial hygiene. See Ex. 3, 9/13/2024 Tr. Part 5 at 31-33, Ex. 4, 9/17/2024 Tr. Part 4 at 11; Docket No. 534.00 at 3 (motion in limine). However, Dr. Haber, as a pulmonologist, treats patients with asbestos-related disease; Tr. 9/12/24 11:47-12:52, at 4; and was accepted, [*7] without objection, as an expert in pulmonology, internal medicine, and causation of asbestos-related diseases, including mesothelioma. Tr. 9/12/24 11:47-12:52, at 14.

The first general category of testimony from Dr. Haber challenged by the J&J defendants involve testing and contamination, including his responses to questions based on the contents of a PowerPoint ("Decades of Evidence") presentation used by the plaintiffs counsel. Docket No. 836.00 at 3-4. He also testified about the need for warnings on JBP; see, e.g., Ex. 7, 9/12/2024 Tr. Part 5 at 26-27; and J&J's advertising practices. Id., at 26-27; Ex. 8, 9/13/2024 Tr. Part 2 at 7. The plaintiff argued at trial that Dr. Haber's reference to these matters formed part of his causation testimony and, thus, were admissible, and that the issues raised by the defendants were properly matters for cross-examination, not exclusion. The J&J defendants contend that an expert who merely familiarizes himself with scientific literature in other fields does not become an expert in those fields. See, e.g., *State v. Collin*, 154 Conn. App. 102, 116, 105 A.3d 309 (2014), cert, denied, 315 Conn. 924, 109 A.3d 480 (2015) (affirming exclusion of forensic psychologist who had reviewed literature on false confessions but lacked specific training). [*8] They argue that a pulmonologist who claims to have familiarized himself with asbestos testing does not become an expert in those tests and their results, and because the issues—from contamination to warnings to testing—were at the heart of this case, they argue that admitting this evidence was prejudicial error and requires a new trial.

The J&J defendants also challenge Dr. Haber's testimony about J&J corporate documents, claiming that he is not an expert in reviewing corporate documents and that it was improper for him to rely on these documents to support his causation testimony. They argue that he "impermissibly invaded the province of the jury in interpreting these documents with the false air of legitimacy and with the imprimatur of an expert." Docket No. 836.00 at 5.

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[1] Asbestos is a group of six naturally occurring fibrous minerals (amphiboles): chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite.

In reaching his opinions, Dr. Haber relied on information that indisputably is outside of his medical expertise as a pulmonologist. By his own admission, he is not an expert in minerology, geology, or corporate documentation. The plaintiff argues, however, that these are appropriate reliance materials for Dr. Haber's opinion. "[A]n expert's testimony may be based on reports of others if the reports are those customarily [*9] relied on by such an expert in formulating an opinion." *State v. Cosgrove*, 181 Conn. 562, 584, 436 A.2d 33 (1980). Thus, by way of example, Dr. Haber explained that he and other physicians regularly rely on testing that they do not personally perform. He compared it to a physician's reliance on radiological studies: "I'm familiar with the strengths and weakness of the test. And just like if I do a CAT - order a CAT scan, I don't do the CAT scan, but I have to understand the strengths and weaknesses of a test in order to be able to interpret the result." Tr. 9/12/2024 1:59-3:30, at 28. Dr. Haber testified that it was important to him, in attributing cause to Mr. Plotkin's mesothelioma, to understand the minerology of asbestos and the results of testing on JBP. He had to be satisfied that "the testing that had been done for me to be able to say that it contained asbestos." Tr. 9/12/24 1:59-3:30, at 24. He reviewed documents concerning how J&J defined asbestos, what testing was done and the methods used, the results, how it was reported, and how asbestos was defined. Id., at 25.

As the court noted at trial, "he's simply predicating his opinion on documents that appear to admit or reference the presence of asbestos," and this information is "something [*10] he's incorporating into his opinion." Tr. 9/12/2024 1:59-3:30, at 32, 36. By definition, any medical causation expert in an asbestos exposure case relies on information showing that the product at issue contained asbestos before he or she can offer an opinion that the product was a substantial factor in causing the plaintiffs asbestos-related disease. See Tr. 9/12/24 1:59-3:30, at 34-35. At trial, the court reasoned that this information was a necessary predicate to Dr. Haber's causation opinion, which the J&J defendants do not argue that he was unqualified to offer. He testified that he needed to understand and apply these facts in forming his opinion. Accordingly, he could testify to these facts because "sufficient facts [we]re shown as the foundation for the expert's opinion." Conn. Code Evid. § 7-4 (a). Those facts were admissible as substantive evidence because the documents on which he relied were admitted into evidence. See Conn. Code Evid. § 7-4 (b).

Moreover, as noted above, "[a]n expert may testify in the form of an opinion *and give reasons therefor*, provided sufficient facts are shown as the foundation for the expert's opinion." (Emphasis added.) Conn. Code Evid. §7-4 (a). The court believes that Dr. Haber was able to give reasons for reaching his [*11] opinions, which included testing information from other experts and from J&J's own documents. Such testimony, on both direct and cross-examination, provided the jury information to evaluate his opinion.

At trial, the court was not—and is not now—persuaded that Dr. Haber's testimony about corporate documents and the "Decades of Evidence" PowerPoint presented an undue risk of confusion that outweighed any probative value the evidence otherwise possessed. See Conn. Evid. Code § 4-3; *Deegan v. Simmons*, 100 Conn. App. 524, 538, 918 A.2d 998 (2007). Although the "Decades of Evidence" chart was a framework for the plaintiffs presentation about the content of asbestos in JBP, any errors or ambiguities therein were brought out in the lengthy cross-examination of Dr. Haber, and the court does not believe, as it expressed at the time, that admission of this testimony constituted prejudicial error that requires a new trial. It is guesswork to assume that Dr. Haber's status as an expert elevated the PowerPoint presentation beyond what was warranted by the evidence.

Similarly, as to warnings, Dr. Haber testified that a warning was needed when a product contained asbestos. The plaintiff relies on the fact that Dr. Haber is a pulmonologist and specialist in occupational and environmental [*12] lung disease. Tr. 9/12/24 11:47-12:52, at 7. In that capacity, he works frequently with patients suffering from asbestos-related diseases, which calls upon him to determine the causation of a person's injury or illness and available treatment options. Tr. 9/12/24 112:47-12:52, at 9. The plaintiff argues that studies show that consumers and workers need to be educated about the products they are using so they are not injured by them. Tr. 9/12/24 3:46-4:55, at 27. Thus, according to the plaintiff, it follows that patients need to be warned to avoid asbestos. Dr. Haber was qualified to offer this opinion.

b

Causation Testimony

Dr. Haber opined at trial that the plaintiffs exposure to JBP increased his risk of mesothelioma. Ex. 11, 9/12/2024 Tr. Part 3 at 17. The J&J defendants have argued, before and during trial, that this opinion should have been excluded. Docket No. 534.00 at 2; Ex. 11, 9/12/2024 Tr. Part 3 at 16-17; Ex. 12, 9/17/2024 Tr. Part 1 at 2; Ex. 2, 9/20/2024 Tr. Part 1 at 3. First, the J&J defendants argue that Dr. Haber's causation testimony relied on contamination data that he lacked the expertise to evaluate. See Ex. 11, 9/12/2024 Tr. Part 3 at 17 (causation opinion based [*13] on "information that I've reviewed"); see supra at 3-4 (discussing contamination testimony that lacked sufficient basis); Docket No. 534.00 at 10-11. Thus, they argue that the opinion was inadmissible, citing *DiNapoli v. Regenstein*, 175 Conn. App. 383, 393, 167 A.3d 1041 (2017) (expert may provide opinion based on out-of-court sources "[w]hen the expert ... uses [the] information, *together with his own professional knowledge and experience*, to arrive at his opinion . . . ." [emphasis added]).

Further, the J&J defendants assert that Dr. Haber could not offer an opinion about causation based on their contention that no expert witness, including Dr. Haber, assessed the specific level of Mr. Plotkin's asbestos exposure from his use of JBP. See Docket No. 820.00 (motion for directed verdict) at 8-9; Docket No 834.00 (JNOV motion) at 5-8. Absent that testimony, they claim that Dr. Haber's causation opinion lacked a sufficient foundation, as required under *Bagley v. Adel Wiggins Group*, 327 Conn. 89, 103-104, 171 A.3d 432 (2017) (to prove proximate causation, plaintiff must submit "expert testimony to prove . . . that respirable asbestos fibers in a quantity sufficient to cause mesothelioma were released" when the product was used in the way the plaintiff allegedly used it).

At trial, Dr. Haber testified: "After reviewing the information [*14] that I've reviewed, I've found that there was evidence of asbestos in Johnson and Johnson's baby powder and that the use of that powder on and around his body, Mr. Plotkin's body, over five decades' worth, was a contributing factor to increasing his risk of mesothelioma." Tr. 9/12/24 11:47-12:52, at 17. The J&J defendants have not argued that Dr. Haber is unqualified generally to offer opinions on medical causation. Instead, they argue Dr. Haber's causation opinion should have been excluded because it was based on testing data that he "lacked the expertise to evaluate." Mtn. at 6.

However, experts may rely on the reports of other experts. *State v. Cosgrove*, supra, 181 Conn. at 584. The plaintiff argues that Dr. Haber had experience and knowledge that allowed him to evaluate and rely on the work of other experts and on J&J's documents. He argues that Dr. Haber was using that data, along with "his own professional knowledge and experience, to arrive at his opinion." *DiNapoli v. Regenstein*, supra, 175 Conn. App. at 393. The court agrees.

Citing *Bagley v. Adel Wiggins Group*, supra, 327 Conn. at 103-104, the J&J defendants suggest that the plaintiff was required to provide a "dose" for Mr. Plotkin's exposure to asbestos from their product.[2] Docket No. 836.00 at 6-7. *Bagley* involved an asbestos-containing coating product that only shed respirable [*15] asbestos fibers when it was sanded. In *Bagley*, the plaintiff did not present evidence that "respirable asbestos fibers in a quantity sufficient to cause mesothelioma were released from [the product] when it was used in the manner that it was in the . . . shop during the decedent's tenure there." Id., 103-104. The plaintiff argues that an encapsulated product, such as a coating, is very different from a powdered product such as JBP. Dr. Haber thus differentiated JBP, describing that the "powder form is obviously the most dangerous when it comes to an asbestos product," and stating that the home is the most dangerous exposure environment. Tr. 9/12/24 3:46-4:55, at 22-25.

Dr. Haber testified that talc use creates exposures in the range of 0.1 to 4 fibers/cc. Tr. 9/13/24 10:33-11:32, at 30-31. He further testified to published articles that address asbestos exposure from talc usage and cite multiple epidemiological studies showing a substantially increased risk of mesothelioma from exposure to talc.. Tr. 9/13/24 10:33-11:32, at 29-30. Dr. Haber also discussed case reports attributing cases of mesothelioma to talc use. Tr. 9/13/24 10:33-11:32, at 4-5. Dr. Haber testified that the OSHA permissible exposure [*16] limit (PEL), even the current PEL of 0.1 fibers per cubic centimeter (fibers/cc), is not protective against asbestos-induced cancers. Tr. 9/12/24 3:46-4:55, at 29-33. He further testified that the use of talc with more than trace amounts of asbestos can result in exposures above the 5 fibers/cc PEL in effect in 1972. Tr. 9/12/24 3:46-4:55, at 33. The plaintiff's materials

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[2] The J&J defendants also rely on *Buist v. Bromley Co., LLC*, 226 A.D.3d 740, 742, 209 N.Y.S.3d 98 (2024). That reliance is misplaced, as New York law differs from Connecticut law, and, of course, that case is not binding on this court. See Mtn. at 6-7.

science expert, William Longo, Ph.D, estimated that the plaintiff used approximately 400 containers of JBP over more than five decades involving 15,000 to 20,000 talc applications. Tr. 9/20/24 12:05-12:58, at 6-7. The court concludes that the foregoing evidence was sufficient to meet the *Bagley* standard for purposes of Dr. Haber's causation opinion.[3]

c

Redefinition of Non-Asbestiform Particles as Asbestos

The J&J defendants argue that Dr. Haber attempted to redefine non asbestiform particles as asbestos, carrying with them the same health risks as asbestos, thereby encouraging the jury to find causation. They contend that—because Dr. Haber failed to establish that non-asbestiform cleavage fragments have the same health effects as asbestos—simply calling those particles "asbestos" did not meet the plaintiff's burden [*17] of establishing that they are dangerous. They claim that Dr. Haber's causation opinion thus lacks a foundation and lacks any admissible methodology. The court does not see it that way.

According to the plaintiff, Dr. Haber testified about asbestos "strictly from the medical perspective." Tr. 9/12/24 1:59-3:30, at 22. Dr. Haber testified that it is well understood that the *fibrous* types of the six asbestos minerals cause mesothelioma, and this fact is reflected in the published literature and medical textbooks. Tr. 9/12/24 1:59-3:30, at 19. The morphology of the mineral is very important in how asbestos causes disease. Tr. 9/12/24 1:59-3:30, at 20-21. Non-asbestos cleavage fragments, meaning *non-fibrous* minerals, do not cause disease because, "if they're blocky or chunky, they're not respirable and . . . do not pose a health hazard." Tr. 9/12/24 1:59-3:30, at 20-21.

Dr. Haber testified that, in the medical community, it is almost universally accepted that asbestos is one of the six asbestos minerals in fibrous form: "Medical textbooks, medical journals that talk about asbestos-related disease, almost always, the — very often, the first sentence is, asbestos is the fibrous form of these [*18] six minerals." Tr. 9/12/24 1:59-3:30, at 19. Dr. Haber testified that he defines asbestos the same way he believes that J&J did in its own documents, which also acknowledges the shape of the particle is what defines the health hazard. Tr. 9/12/24 1:59-3:30, at 40-42, 51-53. Dr. Haber also acknowledged policy and governmental documents defining asbestos in the same way. Tr. 9/12/24 1:59-3:30, at 45-46, 49-51.

The J&J defendants contend that fibrous asbestos minerals are often cleavage fragments, formed when slivers of the mineral separate from chunky forms of the minerals—and because they cannot be shown to have grown in "an asbestiform habit"—they are not asbestos. Dr. Haber explained simply that "if you've got a fiber and one of these six minerals, then that is asbestos. It didn't come from something that was not asbestos" because "you can't make fibers out of a non-fibrous material." Tr. 9/12/24 1:59-3:30, at 46-48. In the court's estimation, the J&J defendants' argument regarding cleavage fragments misses the mark, because the issue in this case is one of respirable asbestos fibers causing disease. Dr. Haber did not testify that non-respirable cleavage fragments cause mesothelioma [*19] or were responsible for the plaintiff's illness, an opinion shared by the plaintiff's molecular biology expert, Arnold Brody, PhD.

The court finds that sufficient evidence supported Dr. Haber's testimony concerning the definition of asbestos in the medical context, and the J&J defendants' disagreements with Dr. Haber, as highlighted during cross-examination, were for the jury's determination. In fact, Dr. Haber has been recognized as an expert, and allowed to testify over *Daubert-type* objections, in many of the asbestos and talc product liability cases in which he has testified.[4]

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[3] See Memorandum of Decision re J&J defendants' JNOV motion (Docket No. 834.00) for further analysis of *Bagley* and the sufficiency of proof of causation.

[4] See Docket No. 614.00, Ex. 3 (transcript of proceedings in *Laosd Asbestos Litig. Chapman v. Avon Products, Inc.*, in the superior court of California, Case No. 22STCV05968, 2022 Cal. Super. LEXIS 69405 [October 27, 2022, *Riff, J.]*, in which the court heard testimony from Dr. Haber about asbestos in talc); Docket No. 614.00, Ex. 4 (transcript of proceedings in *Hirshberg v. Johnson & Johnson*, in the superior court of Washington, Case No. 20-2-05603-1 SEA [May 10, 2021, *Parisien, J.]*, in which the court heard testimony from Dr. Haber about asbestos exposure from talc); Docket No. 614.00, Ex. 5 (transcript of proceedings in *Chatfield v. Avon Products, Inc.*, in the circuit court of the state of Oregon, Case No. 21CV40522 [February 6, 2023, *Russell, J.]*,

2

Testimony of Mark Bailey

The J&J defendants claim that the court erred in allowing Mark Bailey, P.G. a geologist and minerologist, to testify about the health effects of non-asbestiform particles. The plaintiff contends that Mr. Bailey only offered opinions about the geological definition of asbestos and asbestiform, which he is qualified to offer, and did not offer a medical opinion. The J&J defendants construed [*20] Bailey's testimony as stating that cleavage fragments cause mesothelioma, which is inconsistent with the opinions of the plaintiff's medical experts, who testified that the medical definition of asbestos is the fibrous form of the six regulated asbestos minerals. The evidence at trial established that non-respirable cleavage fragments do not cause mesothelioma.

J&J defendants contend that Mr. Bailey did not have "the expertise necessary to evaluate Meeker's claim that 'flexibility and high tensile strength . . . have never been directly linked to disease.'" Docket No. 836.00 at 10. Greg Meeker was a U.S. Geological Survey geologist; Tr. 9/27/24 11:46-2:02, at 9; and Mr. Bailey relied on Meeker's statements in drawing his opinions. Tr. 9/27/24 11:46-2:02, at 8. Speaking as a geologist, Mr. Bailey explained that the term asbestiform means different things in different fields. Tr. 9/27/24 9:35-10:03, at 14. The plaintiff argues that Mr. Baliey is qualified to testify that the definition used in a geological setting is not intended to speak to health effects and is therefore not the equivalent of a medical opinion.

The J&J defendants argued at trial that this was an undisclosed opinion, [*21] but the record indicates that the plaintiff disclosed that Mr. Bailey would testify "about the dangers of classifying an asbestos fiber using the geological definition versus a regulatory or health definition." See Docket No. 201.00 (Plaintiffs' Amended Expert Witness Disclosure, R. Mark Bailey, PG, 3/16/23). Although possibly a broadly worded expert witness designation, this was not an undisclosed opinion.

The J&J defendants take the position that there is no scientific basis for the position that "non-asbestiform cleavage fragments are hazardous," and, as such, Mr. Bailey should not have been permitted to offer this opinion. Importantly, he testified that a geological definition is not the same as a health-based definition. The J&J defendants complain that, through Mr. Bailey's testimony, the Meeker statements were shared directly with the jury, citing *Johnson v. Sourignamath*, 75 Conn. App. 403, 405, 816 A.2d 631 (2003). The plaintiff distinguishes *Johnson*, where the expert read the contents of deeds on which the claim relied without placing those deeds in evidence. That is a very different case from discussing non-case-specific documents on which the expert relies, as Mr. Bailey did here. When Mr. Bailey discussed Meeker's statements, the J&J defendants [*22] objected solely that this was an undisclosed opinion, not that the statements were being shared with the jury. The J&J defendants did not challenge the reliability of the Meeker piece which, as the court noted, they were free to do. Tr. 9/27/24 9:35-10:03, at 13-14.

The J&J defendants contend that this statement was the equivalent of saying that cleavage fragments cause mesothelioma, but the plaintiff's medical experts, Dr. Haber and Dr. Brody, testified that the medical definition of asbestos is the *fibrous* form of the six regulated asbestos minerals. As noted above, Dr. Haber described cleavage fragments as "blocky or chunky" so that "they're not respirable and . . . do not pose a health hazard." Tr. 9/12/24

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including Dr. Haber's opinion testimony about causation); Docket No. 614.00, Ex. 6 (transcript of proceedings in *Plant v. Avon Products, Inc.*, in the court of common pleas in South Carolina, Case No. 2022-CP-40-01265 [February 27, 2023, *Toal, J.]*, including Dr. Haber's testimony at trial about asbestos testing); Docket No. 614.00, Ex. 7 (judgment in *Roy v. Colgate-Palmolive Co.*, in the civil district court of the state of Louisiana, No. 2020-02718 [May 4, 2023, *Hazeur, J.*], granting in part and denying in part a motion in limine to preclude Dr. Haber's opinions, holding that Dr. Haber could not provide opinions as to the contamination of talcum powder product, but could opine on causation); see Docket No. 614.00, Ex. 8 (reasons for judgment in *Roy v. Colgate-Palmolive Co.*, in the civil district court of the state of Louisiana, No. 2020-02718 [May 4, 2023, *Hazeur, J.]*, granting in part and denying in part a motion in limine to preclude Dr. Haber's opinions, holding that Dr. Haber could not provide opinions as to the contamination of talcum powder product, but could opine on causation); Docket No. 614.00, Ex. 9 (transcript of proceedings in *Salcedo v. Avon Products, Inc.*, in the circuit court of Cook County, Illinois, Case 20 L 4505 [March 25, 2024, *Sherlock, J.*], including Dr. Haber's testimony about causation).

1:59-3:30, at 20-21. Dr. Haber, Dr. Brody and Mr. Bailey did not testify that "blocky or chunky" particles cause mesothelioma.

As the foregoing discussion illustrates, an important issue in this case involves the disagreement between the plaintiff's experts and the defense experts on what constitutes a cleavage fragment in the medical context, versus the testing context. For example, when evaluating a particular slide where an outside consultant for J&J, Dr. Matt Sanchez, identified [*23] the particles as cleavage fragments, Mr. Bailey explained: "These fibers meet all the definitions [for fibrous asbestos] of basically any test method out there." Tr. 9/27/24 11:46-1:01, at 13-14. The J&J defendants assert that Mr. Bailey would count a non-asbestiform mineral with the "right dimensions as asbestos"—however, Mr. Bailey testified that he simply follows the counting protocol applicable to the testing he performs. Tr. 9/27/24 3:50-4:09, at 9-10. As plaintiffs materials science expert, William Longo, Ph.D, testified, the testing protocols do not involve determining whether a fiber developed in an asbestiform habit. Tr. 9/19/24 3:33-4:40, at 20. The National Institute of Standards and Technology ("NIST") provides reference samples of asbestos that also identify particles, fitting these counting criteria, as asbestos. Tr. 9/27/24 11:46-1:01, at 3-4. In addition, Mr. Bailey noted that it has been found to be very unusual for cleavage fragments to meet the counting criteria for asbestos. Tr. 9/27/24 3:50-4:09, at 9. These issues were properly left to the jury to decide.

3

Testimony of Arnold Brody, Ph.D

The J&J defendants claim that the court should have excluded Dr. Brody's opinions [*24] in which he purportedly defined non-asbestiform cleavage fragments as asbestos. See Docket No. 510 (motion in limine) at 4-6. At trial, Dr. Brody defined certain minerals as "asbestos" provided they had certain dimensions. See Ex. 27, 9/11/2024 Tr. Part 3 at 27-28. The J&J defendants argue that his definition did not depend on whether a mineral grew in an asbestiform habit. However, Dr. Brody conceded that he was "not aware of any scientific literature that says the non asbestiform version of amphiboles can cause mesothelioma." Ex. 13, 9/12/2024 Tr. Part 1 at 16. Although Dr. Brody did not testify to the adverse health effects of non asbestiform particles, the J&J defendants believe his testimony should have been excluded.

The plaintiff responds that, as with Dr. Haber, Dr. Brody is a medical expert who has studied asbestos diseases for decades, discussed the definition of asbestos from a medical perspective, and was not redefining non-asbestiform cleavage fragments as asbestos. The plaintiff contends that Dr. Brody was using the health-based definition of asbestos as the fibrous form of the asbestos minerals:

> Q. And you're not aware of any scientific literature that says the non-asbestiform [*25] version of amphiboles can cause mesothelioma, correct?
>
> A. I agree. *If it's not a fiber form, it will not*. That's right.

Tr. 9/12/24 9:56-10:35, at 16 (emphasis added).

The court concludes that these matters were properly put to the jury for determination. This is consistent with rulings of other courts that have addressed the admissibility of Dr. Brody's testimony.[5]

The J&J defendants also claim that the court should have precluded Dr. Brody from testifying about certain corporate documents, on the grounds that, as a cell biologist, he is not qualified to address the corporate documents at issue and that he testified to matters without foundation. The plaintiff points out that the J&J defendants focus solely on one piece of testimony—Dr. Brody's criticism of a scientific study—based on corporate documents that show the talc studied was not a normal production lot as claimed in the study. Dr. Brody discussed a scientific article, the type of literature he regularly relies on, and examined documents that reflect on the validity of

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[5] See Docket No. 644.00, Ex. 3 (transcript of proceedings in *Salcedo v. Avon Products, Inc.*, in the circuit court of Cook County, Illinois, Case 20 L 4505 [March 20, 2024, *Sherlock, J.]*, in which the court heard testimony from Dr. Brody about the difference between tremolite containing and not containing asbestos); Docket No. 569.00, Ex. 2 (judgment in *Roy v. Colgate-Palmolive Co.*, in the civil district court of the state of Louisiana, No. 2020-02718 [May 4, 2023, *Hazeur, J.*], ruling that the court would not

the study's conclusions. Dr. Brody testified that he serves regularly as a peer reviewer of scientific articles, and as plaintiff's [*26] counsel argued at trial, "[T]his is the exact kind of information that if it were in his hands as a peer reviewer and he's reading a study and he's looking at this information and says this doesn't add up, we cannot print this." Tr. 9/11/24 2:08-3:29, at 18-19; Tr. 9/11/24 3:46-4:55, at 21. The court concludes that Dr. Brody, based on his experience as a researcher and a peer reviewer, had the expertise to address this evidence and that it was properly admitted for the jury's consideration.

4

Testimony from William Longo, Ph.D

The J&J defendants argue that Dr. Longo's testimony concerning his chrysotile[6] testing should have been precluded under *Porter*, in that: (1) his techniques purportedly do not follow the methodology of another expert in the field, Dr. Shu-Chun Su (who was not a disclosed expert and did not testify at trial); (2) he misidentified chrysotile by color; (3) he used invalid birefringence calculations; and (4) his techniques were not published or subject to peer review. The J&J defendants claim that allowing this testimony was prejudicial error, given that Dr. Longo was the only testifying expert who tested JBP; Drs. Haber and Bailey relied on testing of JBP done by others. [*27] They therefore assume that the jury must have assigned particular weight to the testimony of Dr. Longo that unduly influenced the verdict.

At trial, the court determined that Dr. Longo's "testimony was sufficient to meet the requirements of the law and that the issues that were of concern to the defendants were appropriately raised and thoroughly developed in cross-examination and so the issues are before the jury. Both the direct testimony and also some of the issues that were capably brought up on cross-examination that will be before the jury and they'll have to figure it out." Tr. 9/25/24 9:33-10:55, at 8. The court's decision to permit Dr. Longo to offer opinions over the defendants' objections and their *Porter* motion is consistent with many courts that have addressed the admissibility of his testimony.[7]

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[6] Chrysotile is a form of asbestos.

[7] See Docket No. 625.00 Ex. 26 (transcript of proceedings in *Lee v. Bi-Mart Corp.*, in the circuit court for the state of Oregon, Docket No. 23CV40369 [May 6, 2024, *von Ter Stegge, J.*], in which the court denied a motion seeking to exclude Dr. Longo); *Ingham v. Johnson & Johnson*, in the circuit court for the state of Missouri, Docket No. 1522-CC10417-01 2018 WL 7021725, *3 (Mo. Cir. Ct. June 4, 2018) (denying a motion to exclude the opinions of Dr. Longo); Docket No. 622.00, Ex. 7 (transcript of proceedings in *Henry v. Brenntag North America, Inc.*, in the superior court of New Jersey, Docket No. MID-1784-17AS [September 14, 2018, *Viscomi*, J.S.C.], in which the court denied a motion to preclude the testimony of Dr. Longo); Docket No. 622.00, Ex. 8 (notice of ruling on defendant's motion in limine in *Blinkinsop v. Albertsons Companies Inc.*, in the superior court of California, Case No. JCCP 4674 / BC677764 [February 26, 2019, *Cunningham, J.*], denying a motion to exclude testimony from Dr. Longo, ruling that challenges to Dr. Longo's testing methodology go to the weight, and not the admissibility, of the evidence); Docket No. 622.00, Ex.9 (transcript of the proceedings in *Zimmerman v. Whittaker Clark & Daniels*, in the superior court of California, Case No. BC 720153 [April 22, 2021, *Cunningham, J.*], allowing Dr. Longo to testify over a motion in limine filed against his testimony); *Bader v. Johnson & Johnson*, 86 Cal. App. 5th 1094, 303 Cal. Rptr. 3d 162 (2022) (affirming lower court's judgment that Dr. Longo's exposure opinions should not have been excluded); Docket No. 622.00, Ex. 10 (transcript of proceedings in *Chapman v. Avon Products, Inc.*, in the superior court of California, Case No. 22STCV05968 [December 12, 2022, *Riff, J.*], in which the court ruled that it found Dr. Longo's opinion testimony to be admissible against a challenge under *Sargon* and evidence code sections 801, 802, and 803); Docket No. 625.00, Ex. 14 (transcript of proceedings in *Payne v. 3M Co.*, in the court of common pleas in South Carolina, Case No. 2020-CP-40-01597 [February 15, 2023, *Toal, J.*] and *Plant v. Avon Products, Inc.*, in the court of common pleas in South Carolina, Case No. 2022-CP-40-01265 [February 27, 2023, *Toal, J.*], in which the court ruled that it was not going to exclude Dr. Longo's testimony); but see Docket No. 508.00, Ex. D (order on a motion to suppress the testimony of Dr. Long in *In re Lamar County Asbestos Litigation Cases*, in Texas state district court, No. 2000-3559 [July 5, 2001, *Lovett, J.*] granting a motion to suppress the testimony of Dr. Longo, holding that his methods were not scientifically reliable); Docket No. 508.00, Ex. E (order from *Weiss v. Albertsons Cos.*, superior court of Arizona, Docket No. CV 2021-090946, 2023 Ariz. Super. LEXIS 204 [June 20, 2023, *Thomason, J.*] ruling that Dr. Longo provided a sufficiently reliable basis for his conclusion, but did not allow him to testify because he provided no meaningful or reliable opinion as to the asbestos exposure the plaintiff was subjected to); *In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Litigation*, 509 F. Supp. 3d 116 (D. N. J. 2020) (limiting Dr. Longo's testimony to a finding that the defendant's talc products contained asbestos, and not including his opinions that talc users were exposed to asbestos).

The J&J defendants filed a motion in limine relative to Dr. Longo's chrysotile opinions. Docket No. 545.00. They declined the opportunity to argue the motion or offer testimony in support of it, Tr. 9/5/24, at 5. The court ultimately concluded that it could not rule on the *Porter* issues without hearing testimony from Dr. Longo, and it was decided that the testimony [*28] at trial would serve as hearing testimony for purposes of the *Porter* motions. Tr. 9/20/24 9:44-11:48, at 6-8. However, the court made clear more than once that it would revisit the defendants' *Porter* motion at any point necessary:

> Just let it be clear that if there's a moment in time when you say look, we have a witness, we filed a *Porter*, a Motion in Limine, and have a *Porter* hearing, the ball is in your court to pop up and say at this juncture we need to send the jury out. We need to examine the doctor or the witness, or whoever it might be, on these issues and we'll do that. No problem.

Tr. 9/20/24 9:44-11:48, at 9. The plaintiff points out that the J&J defendants never made such a request. In addition, during Dr. Longo's testimony, the J&J defendants did not cross-examine Dr. Longo on the issues about which they now complain, and they did not bring an expert to challenge his opinions. The only attempt that the J&J defendants made to challenge Dr. Longo was with the criticisms of Dr. Su, an undisclosed expert who did not testify at trial. Tr. 9/20/24 2:05-3:34, at 26-29, 31-34.

The issues pertaining to Dr. Longo's chrysotile testing are highly technical in nature and hotly contested. [*29] The J&J defendants challenge the admissibility of his chrysotile testing opinions under *Porter*, but having heard his testimony, the court was and remains of the view that the issues raised by the J&J defendants go to the weight to be accorded to his testimony, not its admissibility. The fact that there are competing techniques and interpretations regarding the presence of chrysotile does not render his opinions and testimony inadmissible under *Porter*,

Moreover, the fact that some of his techniques have not been published or peer-reviewed is not conclusive of the admissibility of his opinions. "Peer review and publication is . . . only one of several nonexclusive factors" in the *Porter* analysis. *Hayes v. Decker*, 263 Conn. 677, 685 n.2, 822 A.2d 228 (2003). Dr. Longo has published many times on various aspects of his work. He testified that his PLM[8] analysis for chrysotile in talc is being validated by TEM[9] and is not yet ready for publication. Tr. 9/20/24 2:05-3:34, at 34-35. The court did not consider a lack of publication alone to constitute a basis for excluding his opinion.

"'[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The [*30] harmless error standard in a civil case is whether the improper ruling would likely affect the result'" *Urich v. Fish*, 261 Conn. 575, 580-81, 804 A.2d 795 (2002) (quoting *George v. Ericson*, 250 Conn. 312, 327, 736 A.2d 889 [1999]). The court concludes that the J&J defendants have not made this showing.

5

Testimony of David Madigan, Ph.D

The J&J defendants contend that the court erred by admitting the testimony of plaintiff's expert in biostatistics and epidemiology, David Madigan, Ph.D, concerning the probability that the plaintiff used JBP contaminated with asbestos. Docket No. 484.00 (*Porter* motion); Ex. 34, 10/04/2024 Tr. Part 1 at 13-14. They contend that Dr. Madigan's opinions were based on an unreliable scientific foundation, namely, the purportedly flawed testing performed by Dr. Longo's laboratory, Materials Analytical Services (MAS), upon which he relied. It is certainly true that Dr. Madigan admitted that his statistical model relied exclusively on Longo's testing; Ex. 35, 10/04/2024 Tr. Part 2 at 17-18, 44-51; and, thus, that his opinions would be invalid if Longo's testing data were unreliable. They argue that, because Longo's opinions about the number of allegedly contaminated containers rested in part on his purportedly inadmissible chrysotile testing; Docket No. 545.00 (motion in limine) [*31] at 5-6; Dr. Madigan's derivative testimony concerning the probability of exposure lacked sufficient foundation and should have been excluded.

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[8] Polarized light microscopy.

[9] Transmission electron microscopy.

The J&J defendants argue that Dr. Madigan's analysis should have been excluded because it was based on the unsupported assumption that Dr. Longo's tested containers were representative of the JBP the plaintiff used. Docket No. 484.00 at 5-6; Ex. 35, 10/04/2024 Tr. Part 2 at 21-22 (Dr. Madigan asserting that his analysis *assumes* that Longo's samples were "representative of the population of all containers ever produced"). In addition, they allege that Dr. Madigan's methodology was unreliable because he ignored numerous other testing results conducted by independent labs in favor of Longo's purportedly flawed tests. See Docket No. 484.00 at 6-7; Ex. 35, 10/04/2024 Tr. Part 2 at 45. Lastly, they claim that Dr. Madigan's testimony was more prejudicial than probative, and it was prejudicial error for the court to admit it.

The plaintiff contends that the testimony of Dr. Madigan was properly admitted. The J&J defendants do not contest Dr. Madigan's methodology, but rather the subsidiary facts upon which he relied on in performing his calculations. As [*32] the court found, J&J defendants' concerns about Dr. Madigan's testimony "go classically to the weight and not to the admissibility of the opinions." Tr. 10/4/24 9:35-10:10, at 14. In a variety of product liability cases, including asbestos and talc, Dr. Madigan generally has been allowed to testify, over objection, as an expert at trial.[10]

The J&J defendants make three complaints about Dr. Madigan's testimony: (1) he relied on Dr. Longo's testing; (2) he did not verify that the samples tested were representative; and (3) he did not consider other testing. Docket No. 836.00 at 17-19. To do his calculations, Dr. Madigan needs the input of testing data. Tr. 10/4/24 10:17-11:32, at 17, 44. Under Connecticut law, "'[a]n expert's testimony may be based on reports of others if the reports are those

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[10] See Docket No. 569.00, Ex. 2 (judgment in *Roy v. Colgate-Palmolive Co.*, in the civil district court of the state of Louisiana, No. 2020-02718 [May 4, 2023, *Hazeur, J.*], denying motions in limine to preclude Dr. Madigan's opinion testimony); Docket No. 569.00, Ex. 3 (transcript of *Daubert* hearings as to Dr. Madigan in *Eggers v. Colgate-Palmolive Co.*, in the district court of Oklahoma City, Case No. CJ-2018-4739 [May 2, 2022, *Ogden, J.*] in which the court ruled that it would permit Dr. Madigan to testify at trial); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 707 (Mo. App. 2020), cert, denied, 141 S. Ct. 2716, 210 L. Ed. 2d 879 (2021) (holding that Dr. Madigan's testimony did not violate the state rule governing the admissibility of expert testimony); Docket No. 569.00, Ex. 5 (transcript index of witnesses in *Cabibi v. Johnson & Johnson*, in the superior court of California, Case No. BC665257 [September 9, 2019, *Ongkeko, J.*], including Dr. Madigan as a witness); Docket No. 569.00, Ex. 6 (transcript index of witnesses in *Weirick v. Brenntag North America, Inc.*, in the superior court of California, Case No. BC656425 [September 30, 2019, *Nishimoto, J.*], including Dr. Madigan as a witness); Docket No. 569.00, Ex. 7 (transcript index of witnesses in *Grudge v. Johnson & Johnson*, in the superior court of California, Case No. BC685901 [October 4, 2019, *Flurer, J.*], including Dr. Madigan as a witness); Docket No. 569.00, Ex. 8 (transcript index of witnesses in *Fong v. Johnson & Johnson*, in the superior court of California, Case No. BC675449 [November 18, 2019, *Cunningham, J.*], including Dr. Madigan as a witness); Docket No. 569.00, Ex. 9 (transcript index of witnesses in *McNeal v. Autozone Inc.*, in the superior court of California, Case No. BC698965 [April 6, 2021, *Moloney, J.*], including Dr. Madigan as a witness); Docket No. 569.00, Ex. 10 (transcript index of witnesses in *Johnson v. Johnson & Johnson*, in the superior court of California, Case No. JCCP 4674/20STCV17335 [September 16, 2021, *Moloney, J.*], including Dr. Madigan as a witness]; Docket No. 569.00, Ex. 11 (transcript index of witnesses in *Chapman v. Avon Products, Inc.*, in the superior court of California, Case No. 22STCV05968 [October 31, 2022, *Riff, J.*), including Dr. Madigan as a witness); Docket No. 569.00, Ex. 12 (transcript of proceedings in *Chatfield v. Avon Products, Inc.*, in the circuit court of the state of Oregon, Case No. 21CV40522 [January 27, 2023, *Russell, J.*], including Dr. Madigan's testimony at trial concerning causation based on asbestos exposure); Docket No. 569.00, Ex. 13 (transcript index of witnesses in *Plant v. Avon Products, Inc.*, in the court of common pleas in South Carolina, Case No. 2022-CP-40-01265 [February 27, 2023, *Tool, J.*], including Dr. Madigan as a witness); Docket No. 569.00, Ex. 14 (transcript of proceedings in *Salcedo v. Avon Products, Inc.*, in the circuit court of Cook County, Illinois, Case 20 L 4505 [March 27, 2024, *Sherlock, J.*], including Dr. Madigan's testimony opining about asbestos exposure); Docket No. 569.00, Ex. 15 (transcript of proceedings in *Lee v. Bi-Mart Corp.*, in the circuit court for the state of Oregon [May 14, 2024, *von Terr Stegge, J.*] in which the court heard testimony from Dr. Madigan addressing trends in rates of mesothelioma in the United States); but see *In re Abilify (Aripiprazole) Products Liability Litigation*, 299 F. Supp. 3d 1291 (N.D. Fla. 2018) (granting in part and denying in part a defendant's motion to exclude the general causation opinion of Dr. Madigan, ruling that Dr. Madigan can testify as to his expert opinion, except on medical causation and five statistically insignificant p-values calculated from clinical trial data); *In re Accutane Litigation*, 234 N.J. 340, 191 A.3d 560 (2018) (concluding that trial court correctly ruled when it excluded expert testimony, including the decision that Dr. Madigan would not provide causation opinion between the use of Accutane and Crohn's disease); *In re Incretin-Based Therapies Products Liability Litigation*, 524 F. Supp. 3d 1007 (S.D. Cal. 2021), aff'd, Docket No. 21-55342 (SRT/MMM), 2022 WL 898595 [9th Cir. March 28, 2022], granting a motion to exclude Dr. Madigan's expert testimony because he did not employ "good science" under the *Daubert I* standard).

customarily [*33] relied on by such an expert in formulating an opinion.'" *Chebro v. Audette*, 138 Conn. App. 278, 288, 50 A.3d 978 (2012) (quoting *State v. Cosgrove*, supra, 181 Conn. at 584). As Dr. Madigan testified, a statistician must rely on data derived from laboratory testing like that done by MAS to perform these calculations; thus, it was appropriate for Dr. Madigan to rely on Dr. Longo's testing.

Relying on the results of MAS testing, Dr. Madigan concluded that the sample MAS tested is representative. At trial, he explained that the assumption that a sample is representative cannot be tested mathematically, but it can be assessed to determine whether it is a reasonable assumption. Tr. 10/4/24 10:17-11:32, at 21-22. Dr. Madigan found this assumption reasonable because "[t]he sample covers a broad swathe of time from the 1920's to the present day, and includes, for example, every single year from 1962 to 1986; [t]he sample includes talc from all of the sources used by J&J during this time period; J&J provided the majority of the containers; [n]o rational basis exists to preferentially select containers that are more likely to contain asbestos than other containers." Docket No. 662.00, Ex. 16, Madigan Report, Talc and Asbestos - J&J (9/21/2021) at ¶ 62.

Finally, the plaintiff argues that Dr. Madigan's [*34] statistical principles, based on binomial predictive distribution, can be applied to any testing data and to any number of bottles used. Ex. 3, Madigan Transcript 7/10/24, at 806:9-25, 807:19-808:4, 808:23-809:4, 811:14-23. The plaintiff posed hypotheticals about the number of bottles found to contain asbestos to provide context for his statistical analysis, and he would have been able to do the same if the J&J defendants posed their own hypothetical with their own data. However, the J&J defendants did not provide any other testing data for Dr. Madigan's consideration; ostensibly, they made a strategic decision to rely on cross-examination to reveal any shortcomings in his opinions.

The court remains of the view that there was a sufficient basis for Dr. Madigan's opinions and rejects the arguments that Dr. Madigan's testimony was more prejudicial than probative or that its admission constituted prejudicial error.

B

Evidentiary Rulings Regarding Defense Witnesses

1

Testimony of Edwin Kuffner, M.D.

At trial, the court precluded J&J Chief Medical Officer, Edwin Kuffner, M.D. from offering expert opinions, which the J&J defendants claim was erroneous and prejudicial. Specifically, the court [*35] held that Dr. Kuffner—a company medical officer and corporate representative who was not disclosed as an expert witness under Practice Book § 13-4—was "precluded from offering any opinions of an expert nature," and was therefore limited to offering factual testimony. Ex. 37, 9/26/2024 Tr. Part 1 at 6-7. The court reasoned that certain business records admitted through his testimony must therefore be "redacted of any all references to opinions, conclusions, statements of the safety of the product in question, any causation any causation opinions with regard to diseases that may be or may not be connected with or causally related to the use of asbestos-containing talcum powder" that were not formally disclosed in accordance with the rules of practice. See id.

This issue revolves around two sets of documents: (1) J&J's "Comprehensive Review;" and (2) J&J's Health Hazard Evaluation (HHE). At trial, the court conditionally admitted these documents as business records but ordered that "any opinion" therein be redacted. Ex. 38, 9/25/2024 Tr. Part 3 at 61-62; Ex. 41, 9/25/2024 Tr. Part 4 at 13; Ex. 37, 9/26/2024 Tr. Part 1 at 6-7.

To begin, the J&J defendants admit that Dr. Kuffner was not disclosed as an expert [*36] witness, pursuant to Practice Book § 13-4. Thus, as the court held, his testimony was necessarily limited to that of a fact witness, requiring personal knowledge. He could not be used as a conduit for expert opinions appearing in J&J's own Comprehensive Review or HHE. The court observed:

> Dr. Kuffner who is not a disclosed expert witness, not disclosing of 13-4 is offered explicitly as a fact witness was pursuant to the Court's order precluded from offering any opinions of an expert nature and his testimony was strictly limited to matters of a factual nature. And in sync with that or consistent with that the documents

> that the Court did conditionally admit as business records which were the two documents that Attorney Kelly just mentioned 8929 [HHE] and 7334 [Comprehensive Review] would be redacted of any and all references to opinions, conclusions, statements of the safety of the product in question, any causation opinions with regard to diseases that may be or may not be connected with or causally related to the use of asbestos-containing talcum powder. And that would include of course the many references in those documents to ovarian cancer.

Tr. 9/26/24 10:09-10:21, at 6-7.

It appears that the J&J defendants [*37] believe that Dr. Kuffner should have been able to offer expert opinions based on the Comprehensive Review or the HHE because he "was leading," "pulled together," and provided much of the funding "for the review and evaluation from his safety budget." Docket No. 836.00 at 20 (quoting Tr. 9/25/24 2:00-3:31, at 56). The J&J defendants admit that there were scientific conclusions in the documents that they intended to have Dr. Kuffner testify to, although he was not a disclosed expert witness and the opinions were not the result of his work, but that of other experts in the relevant fields. The J&J defendants acknowledged at trial that Dr. Kuffner "brought in internal experts and external experts" and "he wanted a summary of what they concluded." 9/25/24 9:33-10:55, at 14. The evidence indicated that, despite his oversight role, he did not personally perform the underlying work and lacks the necessary degree of personal knowledge. Even if he did, however, he was not disclosed as an expert entitled to offer expert opinions on the subject. Had Dr. Kuffner been deposed as an expert, the plaintiff would have had the opportunity to depose him about the foundation of the opinions found in the [*38] Comprehensive Review or HHE and challenge the conclusions in the documents.

The court concluded that Dr. Kuffner "as a witness here, can testify to the processes, facts about processes, procedures and the like. But he's not going to give an opinion from his mouth about any of these topics." Tr. 9/25/24 2:00-3:31, at 45. The court permitted Dr. Kuffner to testify about the processes and procedures through which the Comprehensive Review and HHE were prepared, which was the appropriate limit given his level of knowledge.

a

The Comprehensive Review

The Comprehensive Review is a 255-page report, with over four-thousand pages of attached reference materials, containing expert opinions on a multitude of topics requiring specialized knowledge of science and medicine, including the risk of lung effects, risk of ovarian cancer, mineralogy and chemistry, the differences between talc and asbestos, the sourcing and quality of J&J talc, global regulatory and public health agency positions on talc, toxicology, and occupational epidemiology. See Def. Ex. 39; Tr. 9/25/24 9:33-10:55, at 18-19. It is a report by a group of experts working to create what could fairly be viewed as a self-serving and strategic [*39] business record for purposes of, among other things, defending talc-related litigation brought against J&J. As part of his work leading this study group, Dr. Kuffner reviewed the report and asked questions of the subject area experts. Tr. 9/25/24 2:00-3:31, at 59-60.

Dr. Kuffner testified at length about the process by which the Comprehensive Review was created, the types of experts involved, and his role in the process. See, e.g., Tr. 9/25/24 2:00-3:31, at 52-61. Although the court allowed this factual testimony, it precluded him from restating undisclosed expert opinions contained in the Comprehensive Review. However, he was able to testify, if "at the end of the day our team and me determined that a product wasn't safe, I certainly could have that product recalled from the market and have the company not sell that product anymore." Id., 64-65. Thus, J&J defendants elicited testimony that Dr. Kuffner did not believe anything in the Comprehensive Review required that the product be recalled. The Comprehensive Report was conditionally admitted into evidence subject to the required redactions. Tr. 9/25/24 2:00-3:31, at 62. Thus, while the J&J defendants apparently chose not to offer [*40] the redacted Comprehensive Review into evidence, they questioned Dr. Kuffner about it at some length.

b

The Health Hazard Evaluation

As with Comprehensive Review, the court permitted Dr. Kuffner to testify about factual matters concerning the HHE, including:

> [T]he process and procedure that the company went through to address and evaluate these concerns. I'm also allowing conditionally, as business records, the reports that were generated in connection with that work effort about which Dr. Kuffner has testified in a factual manner. But the conclusions of either the study group that Dr. Kuffner would otherwise testify about and the opinions set forth in these document I'm not going to allow because they are undisclosed expert opinions.

Tr. 9/25/24 3:46-4:31, at 15. There was substantial testimony about the HHE, including how and what was done.

Dr. Kuffer spoke about the context of the HHE. "People started looking at potentially, could there have been some contamination. Were the processes that were used to analyze this, were they the correct processes. And so, this was just the beginning of the company's full investigation." See, e.g., Tr. 9/25/24 2:00-3:31, at 72. Dr. Kuffner described the [*41] HHE as follows:

> [I]f there's a quality situation across the board within the company, not just related to talc, but if there's a quality situation, then the safety team - and we're considering a potential recall, the safety team is asked to complete a health hazard evaluation. And, essentially, it's a templated document and a specific process that we would go through to understand what's the risk of that quality issue. And so it's -- it's a formal process that we - we have. It's documented in a formal document. It's signed off by members of the safety team. And so it's a formal process to understand what is the risk.

Tr. 9/25/24 3:46-4:31, at 9-10. He also testified that there was an HHE done after the FDA's finding of chrysotile in JBP in 2019. Id., at 11. This document was also conditionally admitted with required redactions. Tr. 9/25/24 3:46-4:31, at 13.

Dr. Kuffner testified specifically that, as part of the JBP HHE, J&J calculated a hypothetical exposure level for an individual who used that product containing asbestos at the level found by the FDA, and it compared that result to the OSHA permissible exposure levels and the levels an FDA employee noted as dangerous in response to [*42] the 1986 Citizen's Petition. Tr. 9/25/24 3:46-4:31, at 19-21. Dr. Kuffner testified that J&J requires its talc suppliers to test talc for quality, including for the presence of asbestos. Tr. 9/25/24 3:46-4:31, at 24. Dr. Kuffner was able to testify that the supplier's testing of this lot of talc showed no asbestos (which was also considered in the HHE), as did J&J's own testing from the same bottle and the same lot. Tr. 9/25/24 3:46-4:31, at 24-25, 30-31. Dr. Kuffner testified that J&J recalled the specific lot of JBP that had been tested by the FDA pending the HHE. Id., at 26-27. And Dr. Kuffner testified that, after conducting the health hazard evaluation, he made the determination that talc-containing Johnson's Baby Powder could still be sold. Tr. 9/25/24 3:46-4:31, at 26.

The court's limitation on Dr. Ruffner's ability to express undisclosed expert opinions did not prevent him from providing relevant factual testimony about the HHE and thus was not prejudicial to the J&J defendants.

c

Testimony within Dr. Ruffner's Personal Rnowledge

The J&J defendants argue that Dr. Ruffner should have been permitted to offer lay opinion testimony. Connecticut Code of Evidence § 7-1 provides in relevant part, a lay "witness may not [*43] testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness . . . ." "To render opinions of common witnesses admissible it is indispensable that they be founded on their own personal observation and not on the testimony of others or any hypothetical statement of facts, as is permitted in the case of experts." *Sydleman v. Beckwith*, 43 Conn. 9, 9 (1875).

"The general rule is that witnesses must state facts and not their individual opinions . . . ." *Johnson v. Newell*, 160 Conn. 269, 277, 278 A.2d 776 (1971) (citing *Sydleman v. Beckwith*, supra, 43 Conn. at 11). There are limited exceptions to this rule, which do not apply to the situation here. See, e.g., *Johnson v. Newell*, supra, 160 Conn. at 277-78 (sounds can be testified about by fact witnesses); *Mack v. LaValley*, 55 Conn. App. 150, 154-58, 738 A.2d 718, cert, denied, 251 Conn. 928, 251 Conn. 928, 742 A.2d 363 (1999) (the steepness of a step); *State v. Lamme*, 19 Conn. App. 594, 605, 563 A.2d 1372 (1989), aff'd, 216 Conn. 172, 579 A.2d 484 (1999) (whether an individual was too intoxicated to drive safely); see also Conn. Code Evid. § 7-1. "Whether nonexpert opinion testimony is admissible is a preliminary question for the court." Conn. Code Evid. § 7-1, Commentary.

The J&J defendants respond that Dr. Kuffner's proposed testimony was based on his "personal observations." They proposed to ask Dr. Kuffner if he wrote the report, suggesting that he would say he did and that he "made" it, when in fact, he merely coordinated work on the project. See Tr. 9/25/24 9:33-10:55, at 14, 19. However, the evidence indicates that [*44] Dr. Kuffner did not do the scientific research on which the expert opinions in the Comprehensive Review and HHE are based, and simply reviewing drafts or meeting with the research scientists does not give him the requisite personal knowledge. Dr. Kuffner's proposed "lay opinion testimony" is not based on personal knowledge. Lay opinions must be based on the witness's "own personal observation, and not on the testimony of others . . . ." *Sydleman*, supra, 43 Conn. at 13.

The J&J defendants assert that, because the documents at issue are business records, Dr. Kuffner should have been permitted to testify about them: "Because these documents were admitted as business records, any witness with personal knowledge should have been free to testify about them." Docket No. 836.00 at 35. However, Dr. Kuffner did not necessarily have personal knowledge about information underlying the statements in the reports. Expert opinions are not admissible without the testimony of an expert, and the documents contain such expert opinions. Dr. Kuffner was not an expert who . could offer or discuss such opinions. The J&J defendants argue that "Kuffner did not prepare these documents as an expert," Docket No. 836.00 at 25, but Dr. Kuffner [*45] did not prepare these documents. The evidence is that he "convened" the team working on the documents, that he "reviewed" the documents, and that he "signed off' on the documents. Tr. 9/25/24 2:00-3:31, at 52, 60-61. This participation gave him knowledge of the processes used in creating the documents, about which he was able to testify. See *Arnone v. Town of Enfield*, 79 Conn. App. 501, 527-29, 831 A.2d 260, cert, denied, 266 Conn. 932, 837 A.2d 804 (2003) (lay witness was not providing impermissible opinion testimony when he testified as to procedures about which he had personal knowledge). It did not give him personal knowledge concerning the expert opinions contained therein.

The J&J defendants argue that Dr. Kuffner had personal knowledge of the Comprehensive Review because "he reviewed each section of the report and personally signed off on it." Docket No. 836.00 at 26. Again, reviewing the work of other scientists, and even signing off on the report, does not give Dr. Kuffner personal knowledge of the basis for the conclusions of the report.

Even if Dr. Kuffner possessed the requisite personal knowledge of the conclusions in the reports, and even if they had been his own conclusions, he could not have testified about those expert opinions without being a disclosed expert. See [*46] *Arnone*, supra, 79 Conn. App. 528-29 (trial court did not abuse its discretion when it "precluded any opinion testimony by [engineer] while still permitting factual testimony"). These scientific conclusions are not within the purview of lay opinion testimony. In *Arnone*, the court distinguished fact testimony by a knowledgeable witness and opinion testimony:

> Despite the fact that agency reporting procedures may be beyond the knowledge of ordinary jurors, that, in and of itself, did not make the substance of Hogan's testimony, expert opinion testimony. Instead, we conclude that Hogan, an expert in the field of reporting procedures, offered only fact testimony. To become expert opinion testimony, Hogan's testimony would have to have expressed an opinion about the defendant's reporting methods in light of the procedures normally employed by the agency.

Id., 527. Dr. Kuffner testified about the processes and procedures used in creating the Comprehensive Review (and the HHE), but he could not go further and offer opinions based on that work, or, for example, testify explicitly that JBP was safe.

The plaintiff contends that the HHE also contains expert opinions outside Dr. Kuffner's personal knowledge. For example, J&J defendants elicited testimony [*47] that certain exposure calculations were performed as part of the HHE. Dr. Kuffner, however, has no personal knowledge of how the calculation to reach this conclusion was conducted. Here, Dr. Kuffner conceded that Dr. Tim McCarthy made the calculation. Tr. 9/25/24 3:46-4:31, at 12.[11]

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[11] In deposition, he was unable to recall ever specifically seeing the calculation that Dr. McCarthy used. Docket No. 541, Ex. 12, Deposition of Dr. Edwin Kuffner 2/23/24, at 617. When pressed, he could not recreate the calculation and could not relate how weight percentages of asbestos in baby powder were converted to an exposure amount to compare with the time-weighted average limitations contained in the occupational OSHA requirements. Id., at 618-20. When asked specific questions about the

The court concludes that these matters are not within his personal knowledge; and even if they were, they would constitute impermissible opinion testimony.

d

Testimony of Dr. Kuffner as a Corporate Representative

The J&J defendants argue that, regardless of Dr. Kuffner's personal involvement, his testimony and the unredacted versions of the related documents were independently admissible because Dr. Kuffner was a corporate representative. See Dkt. 627 at 9-12; Ex. 31, 9/25/2024 Tr. Part 1 at 12, 23. At trial, Dr. Kuffner made clear that he was testifying not just as J&J's Chief Medical Officer but also as J&J's corporate representative, a role that he has held since 2021. Ex. 38, 9/25/2024 Tr. Part 3 at 27. Dr. Kuffner further testified that he agreed to be a corporate representative for J&J because, when there are "allegations that the product is not safe" he feels "like it's [his] responsibility [as Chief [*48] Medical Officer] to come and talk to [the jury] and explain what [J&J] did to keep patients and consumers safe." Id. In addition, Dr. Kuffner detailed his preparation as a corporate representative. He worked with other members of the safety team and other departments to understand "the safety of the company's products," specifically JBP, and "the scientific data." Id., at 28-29. He also reviewed J&J documents "on that journey of totally understanding the product." Id., at 28.

The J&J defendants argue that the conclusions in both the Comprehensive Review and the HHE were critical pieces of Dr. Kuffner's corporate representative testimony. They point out that these conclusions covered what J&J believed at the relevant times, which, they argue, ultimately contributed to the actions that J&J took. For example, as to the Comprehensive Review, the jury would have received conclusions from the J&J defendants that they sold talc because they believed it was safe and that it did not contain asbestos. Ex. 39 at 13-14. Further, as to the HHE, Kuffner would have explained that even accepting the FDA's testing results at face value, J&J believed that it was unlikely that use of the product would [*49] result in adverse health consequences. Ex. 40 at 9-11. The J&J defendants thus argue that these points were critical to defeating the plaintiff's punitive damages and negligence arguments.

In essence, the J&J defendants argue that, because Dr. Kuffner was their corporate representative, he should be able to testify to conclusions made in the Comprehensive Review and HHE, because those conclusions were within the corporation's personal knowledge. In their argument, they cite Practice Book § 13-27 (h)[12] and Fed. R. Civ. P. 30 (b) (6),[13] which they assert support the proposition that Connecticut and federal rules allow for a corporate representative to testify on behalf of a corporation. Both rules, however, concern testifying at a discovery deposition, not at trial. There is no controlling Connecticut law discussing whether Practice Book § 13-27 (h) is applicable to witnesses testifying at trial; however, there is federal case law discussing the issue under the similarly

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calculations, Dr. Kuffner suggested asking Dr. McCarthy. Id., at 620, 622-623; Docket No. 541, Ex. 7, Excerpts of the Deposition of Dr. Edwin Kuffner (3/12/2024) at 547.

[12] Practice Book § 13-27 (h) provides, in relevant part, that: "A party may in the notice and in the subpoena name as the deponent a public or private corporation . . . in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude the taking of a deposition by any other procedure authorized by the rules of practice."

[13] Fed. R. Civ. P. 30 (b) (6) provides: "In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules."

written Fed. R. Civ. P. 30 (b) (6). See *Torres v. White*, Superior Court, judicial district of Hartford, Docket No. CV-20-6122576-S, 2022 Conn. Super. LEXIS 446 (April 14, 2022, *Sicilian, J.*) ("[W]hile there is scant Connecticut precedent interpreting § 13-27 (h), the more substantial body of federal law provides useful guidance."); *DGG Properties Co. v. Konover Construction Corp.*, Superior Court, judicial district of New Britain, Complex Litigation Docket, Docket No. X03-CV-99-0501534-S, 2000 Conn. Super. LEXIS 2543 (September 19, 2000, *Aurigemma, J.*) ("Due to the absence of Connecticut authority construing Conn. Prac. Book § 13-27 (h) or its predecessor, § 244 (g), the Court should look to Fed. R. Civ. P. 30 (b) (6) for guidance, which contains a similar provision [*50] addressing designee depositions.").

In *Union Pump Co. v. Centrifugal Technology Inc.*, 404 Fed. Appx. 899, 907 (5th Cir. 2010), the plaintiff argued that a corporate representative was improperly allowed to testify at trial on matters not within his own personal knowledge, but within the knowledge of the corporation. The Fifth Circuit disagreed with this argument, reasoning that "Federal Rule of Civil Procedure 30 (b) (6) allows corporate representatives to testify to matters within the corporation's knowledge during deposition, and Rule 32 (a) (3) permits an *adverse* party to use that deposition testimony during trial. . . . However, a corporate representative may not testify to matters outside his own personal knowledge to the extent that information [is] hearsay not falling within one of the authorized exceptions." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 907-908.[14]

Other federal cases have ruled similarly. See *Adams v. Eagle, Inc.* Docket No. CV-21-694 (DSM), 2022 U.S. Dist. LEXIS 155731, 2022 WL 3903642, *1 (E.D. La. August 30, 2022) (the court stated that "Rule 30 [b] [6] is inapplicable to the testimony of a corporate representative at trial, and such testimony is instead governed by the Federal Rules of Evidence," when it ruled that testimony was inadmissible when the witness would testify that the defendant was within safe exposure limits for asbestos by discussing a conversation he had with inspectors); *Reuther v. Gardner Realtors*, Docket No. CV-15-2850 (NJB), 2016 U.S. Dist. LEXIS 130347, 2016 WL 5337839, *3 (E.D. La. September 23, 2016) (holding that the court [*51] "will exclude [the witness] or any other witness from testifying as a corporate representative to matters outside his or her own personal knowledge to the extent that such testimony is hearsay not falling within one of the authorized hearsay exceptions."); *TIG Ins. Co. v. Tyco Int'l Ltd.*, 919 F. Supp. 2d 439, 454 (M.D. Pa. 2013), amended April 8, 2012, ("Although Rule 30 [b] [6] allows a corporate designee to testify to matters within the corporation's knowledge during deposition, at trial the designee may not testify to matters outside his own knowledge to the extent that information [is] hearsay not falling within one of the authorized exceptions." [Internal quotation marks omitted.]). While no court in Connecticut has addressed this issue, this court finds the foregoing federal authorities persuasive. The status of a witness as a corporate representative does not give him the ability to speak to facts of which he lacks personal knowledge. Therefore, the witness could not testify to matters within the corporation's knowledge if they were not also in his own personal knowledge, and were hearsay not falling within an authorized exception.

The J&J defendants cite to two Connecticut cases, *SFP Tisca v. Robin Hill Farm, Inc.*, 244 Conn. 721, 711 A.2d 1175 (1998), and *Torres v. White*, supra, Superior Court, Docket No. CV-20-6122576-S, for the [*52] proposition that corporate representative testimony is appropriate, even if it is beyond the witness's personal knowledge, as long as the representative is sufficiently familiar with the relevant documents. Neither of these cases, however, supports the proposition for which they are cited. In *SFP Tisca*, the court ruled that deposition testimony offered to identify and admit a business record should not have been excluded from evidence when the witness was no longer employed by the company at the time the record was created. *SFP Tisca v. Robin Hill Farm, Inc.*, supra, 244 Conn. at 730-31. The court found that this singular ground for attacking credibility was insufficient to exclude the deposition and mandate live testimony. Id. Moreover, *SFP Tisca* concerns the admission of deposition testimony as evidence, not live testimony offered at trial.

The second case, *Torres v. White*, addressed the issue of selecting an individual to testify in a deposition as a corporate representative. In *Torres*, Judge Sicilian stated that a "designee selected to testify in response to a § 13-27 (h) notice need not be the most knowledgeable person in the organization concerning the specified subjects."

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[14] Although the court determined that the testimony should not have been permitted, it held that any error the trial court made in allowing the testimony was harmless. Id., 908.

Torres v. White, supra, Superior Court, Docket No. CV-20-6122576-S. But, as the [*53] court further observed, "[i]t is not sufficient that the entity's designee does the best she can based on her own, personal knowledge. [T]he duty to present and prepare a . . . designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved." (Internal quotation marks omitted.) Id. This analysis, however, applies to a designee selected to testify in a *discovery deposition*, not at trial, as is the situation in the present case. As discussed above, the testimony of a corporate representative must be based on his personal knowledge.

Under the rules of evidence, Dr. Kuffner could only testify to facts in his own personal knowledge. Under Conn. Code Evid. § 7-1, "[i]f a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." "As a general rule, a lay witness may not give opinion testimony and may testify only as to observed facts." *State v. Watson*, 50 Conn. App. 591, 600, 718 A.2d 497, cert, denied, 247 Conn. 939, 723 A.2d 319, A.2d 319, cert, denied, 526 U.S. 1058, 119 S. Ct. 1373, 143 L. Ed. 2d 532 (1998). "An opinion, by definition, consists of evidence of what the witness [*54] thinks, believes, or infers in regard to facts in dispute. . . . An opinion is . . . an interpretation of facts . . . ." (Citation omitted; internal quotation marks omitted.) *Hayes v. Decker*, 66 Conn. App. 293, 301, 784 A.2d 417 (2001), affd, 263 Conn. 677, 822 A.2d 228 (2003).

In *Pickel v. Automated Waste Disposal, Inc.*, 65 Conn. App. 176, 189-90, 782 A.2d 231 (2001), the Appellate Court analyzed whether a report that qualified as a business record was improperly excluded when, within the report, the witness stated a conclusion as to the cause of an accident. In *Pickel*, the court stated that "[a]n opinion included within an otherwise admissible business record is admissible if the entrant would be qualified to give that opinion in oral testimony." (Internal quotation marks omitted.) Id., 190. It held that, because the witness did not observe the accident and he was not qualified to give his opinion as to the cause of the accident, the lower court did not abuse its discretion in excluding the report. Id.

In this case, the excluded testimony was not based on the witness' personal knowledge; therefore, the court was required to exclude the witness from testifying about conclusions that were beyond the scope of a lay witness. The conclusions that were proffered by the defendant were not based on the perception of the witness. The witness merely reviewed and signed off on the Comprehensive [*55] Review—he did not draft the review nor did he conduct the scientific literature reviews. Dr. Kuffner testified that he pulled together different people from six different departments to conduct the scientific hterature review and that he would attend weekly meetings, where he would review the document. These facts indicate that the witness did not have sufficient personal knowledge about the creation of the contents of the comprehensive review to testify to the conclusions stated within it. He also did not have any personal knowledge about how the HHE was calculated and had no knowledge about the method of calculations used to reach the conclusions to which the defendants sought to have him testify. Therefore, the court properly limited Dr. Kuffner's testimony to exclude conclusions stated within the Comprehensive Review and HHE.

Even though Dr. Kuffner was presented as a corporate representative, his role at trial was, at least in part, to express expert opinions self-serving to the interests of J&J about matters central to the issues in the case, and his opinion testimony was not disclosed as required under the rules for expert testimony. The court made it very clear that Dr. Kuffner [*56] would be allowed to testify about factual matters involving the study group and its work; but it would not allow the conclusions reached by that body to be expressed by Dr. Kuffner in the form of expert opinions that were not disclosed. Thus, the court fashioned a ruling that preserved the J&J defendants' ability to offer evidence about the working group and allowed the Comprehensive Review and HHE to be admitted as business records—redacted of opinions regarding the safety of JBP and its propensity to cause disease—but the J&J defendants ultimately chose not to offer the redacted exhibits as trial.

e

The court does not credit the J&J defendants' claim that the exclusion of opinion testimony from Dr. Kuffner was prejudicial, which is their burden. *Kalams v. Giacchetto*, 268 Conn. 244, 249-50, 842 A.2d 1100 (2004) (burden to show "whether the improper ruling would likely affect the result."). As to the Comprehensive Review, Dr. Kuffner testified that if "at the end of the day our team and me determined that a product wasn't safe, I certainly could have

that product recalled from the market and have the company not sell that product anymore." See, e.g., Tr. 9/25/24 2:00-3:31, at 64-65. Thus, it was certainly suggested to the jury that Dr. Kuffner and [*57] his team determined that the product was safe because he did not recall it or stop sales of the product. See also id., at 24 (testifying that Dr. Kuffner was involved in product recalls for safety issues).

As to the HHE, Dr. Kuffner testified to concerns about contamination, about supplier testing showing no asbestos in its talc, its own testing, and calculations done to evaluate the exposure risk from JBP. Again, Dr. Kuffner testified that, after conducting the health hazard evaluation, he made the determination that talc-containing JBP could still be sold. Tr.' 9/25/24 3:46-4:31, at 26. Such a conclusion suggested that the HHE showed the product to be safe. Therefore, even if the J&J defendants could show some error, they cannot show, given the extent of the testimony offered by Dr. Kuffner, that admitting the specific additional opinion statements it sought "would likely affect the result." *Kalams*, 268 Conn. at 249. There is no prejudicial error requiring a new trial.

2

Cross-Examination of Richard Attanoos, M.D.

During cross-examination, the plaintiff's counsel extensively questioned defense expert, Richard Attanoos, M.D. regarding his causation opinions in other cases. See Ex. 47, 10/9/2024 Tr. Part 2 at [*58] 42-58. The J&J defendants objected contemporaneously and moved orally for a mistrial once the jury was excused, on the grounds that this evidence was irrelevant, unduly prejudicial, and violated their due process rights. Id., at 45-46, 48; Ex. 48, 10/9/2024 Tr. Part 4 at 36. The objections were overruled and the motion denied. Ex. 48, 10/9/2024 Tr. Part 4 at 37. The J&J defendants also filed a written motion for a mistrial. (Docket No. 825.00), which the court denied. They now renew their arguments that this line of questioning was prejudicial and requires a new trial.

"'While the remedy of a mistrial is permitted under the rules of practice, it is not favored. . . . The decision whether to grant a mistrial is within the sound discretion of the trial court.'" *Modaffari v. Greenwich Hospital*, 157 Conn. App. 777, 783, 117 A.3d 508, 512 (2015) (quoting *Froom Development Corp. v. Developers Realty, Inc.*, 114 Conn. App. 618, 638-39, 972 A.2d 239, cert, denied, 293 Conn. 922, 980 A.2d 909 [2009]). When a mistrial is denied, the complaining party must show "irreparable prejudice" that "denied [it] a fair trial." Id., 784 (quoting *State v. Luther*, 114 Conn. App. 799, 805-806, 971 A.2d 781, cert, denied, 293 Conn. 907, 978 A.2d 1112, [2009]). In reviewing whether the complaining party received a fair trial, "[e]very reasonable presumption will be given in favor of the trial court's ruling . . . ." Id.

The plaintiff's attorney cross-examined Dr. Attanoos on his prior litigation opinions that demonstrated [*59] potential bias impacting this case, which is unquestionably a proper area for cross-examination. In fact, in their motion in limine concerning other lawsuits, the J&J defendants argued that they "d[id] not seek to bar either side from cross-examining expert witnesses with prior testimony from other cases, including cases involving talc, or *with analyses conducted or reports written in those cases*." (Emphasis added.) Docket No. 539.00 at 2 n.2. Consequently, the plaintiff argues that he did exactly what the J&J defendants recognized was permissible: he cross-examined Dr. Attanoos about his opinions in other cases.

The court addressed the propriety of this area of inquiry, observing:

> The thrust of Dr. Attanoos' opinion was that this is a cancer in this plaintiff that is not caused by asbestos. It's alleged — in his opinion, it's caused by or it's associated with, you know, idiopathic or spontaneous process or a process related to genetic susceptibility. And to the extent that he's given seemingly similar if not identical opinions in many, many cases and has been well paid for that as an expert witness seems to me to be just absolute classic cross-examination material. . . .

Tr. 10/9/24 [*60] 3:57-4:55, at 37.

The plaintiff's attorney questioned Dr. Attanoos on whether he had ever previously attributed mesothelioma to exposure to anthophyllite or tremolite asbestos and then went through some prior expert opinions of his to confirm that he had never done so, at least to the best of his recollection. Tr. 10/9/24 11:45-1:00, at 44-45. In connection

with this aspect of the cross-examination, the J&J defendants particularly objected to certain additional details from these lawsuits elicited by the plaintiff's lawyer. For instance, he brought out two points about all the lawsuits discussed: the plaintiff's name and disease to identify them. He also tried to jog the witness' memory of the case by mentioning the name of the plaintiff's counsel, date, or location of the prior case. Dr. Attanoos himself mentioned some of these facts, including the names of three judges, although counsel did not ask about them. Id., at 42, 52. The cases included some alleging brake exposure rather than talc exposure. Id., at 52-54. As to only four of the cases did counsel mention that Dr. Attanoos was testifying for J&J; id., at 50, 55, 58; which could have led the jury to believe that, in most cases, [*61] he was not testifying for J&J.

The J&J defendants argue that the cross-examination of Dr. Attanoos required a mistrial because questioning about these other lawsuits was so prejudicial that it denied them their right to a fair trial. Docket No. 836.00 at 30-31. As it did during the trial, the court still believes that the plaintiff had the right to cross-examine Dr. Attanoos on matters relevant to bias and credibility. "It is well established that '[c]ross-examination is an indispensable means of eliciting facts that may raise questions about the credibility of witnesses and, as a substantial legal right, it may not be abrogated or abridged at the discretion of the court to the prejudice of the party conducting that cross-examination.'" *Tiplady v. Maryles*, 158 Conn. App. 680, 696-97, 120 A.3d 528 (2015) (quoting *Hayes v. Manchester Memorial Hospital*, 38 Conn. App. 471, 474, 661 A.2d 123, cert, denied, 235 Conn. 922, 666 A.2d 1185 [1995]). Moreover, "[t]he exercise of discretion to omit evidence in a civil case should be viewed more critically than the exercise of discretion to include evidence." *Hayes v. Manchester Memorial Hospital*, supra, 38 Conn. App. at 474 (quoting *Martins v. Connecticut Light & Power Co.*, 35 Conn. App. 212, 217, 645 A.2d 557, cert, denied, 231 Conn. 915, 648 A.2d 154 [1994]).

The plaintiff's cross-examination brought out that Dr. Attanoos frequently, if not always, testifies as an expert witness that mesothelioma is spontaneous or naturally occurring, rather than arising from a history of exposure to asbestos. [*62] This information is relevant because it is probative of his bias and credibility and appropriate for the jury's consideration. The plaintiff points out that the J&J defendants admitted this principle when they argued that it did not seek to bar "cross-examining expert witnesses with prior testimony from other cases, including cases involving talc, or with analyses conducted or reports written in those cases." Dkt. 539 at 2 n.2. "[T]he credibility of an expert witness is a matter to be determined by the trier of fact." *Hayes v. Manchester Memorial Hospital*, supra, 38 Conn. App. at 474.

There is no reason to believe that this line of questioning was inflammatory or unfair to the J&J defendants such that an injustice occurred. "The burden of showing that the evidence may unduly arouse the jurors' emotions of hostility or sympathy rests with the party claiming prejudice." Id., 475. The J&J defendants contend that "[t]he testimony incorrectly suggested that the J&J Defendants must have caused all of those injuries—and the injuries in this case—because so many plaintiffs brought suit claiming that its cosmetic talc causes mesothelioma. And the J&J Defendants were left without an adequate defense because none of those plaintiffs were present in this case—there was [*63] no way to disprove those other claims." Docket No. 836.00 at 31. The court is not concerned about any prejudice to the J&J defendants, given that J&J was referenced in just a few instances among more than a dozen cases, contrary to the J&J defendants' assertion that the testimony suggested they caused all the injuries referenced.

The court believes that this evidence was probative of the witness's bias and credibility, and, further, that it would have been error to exclude it. In *Hayes*, the Appellate Court found the trial court had abused its discretion by *not* allowing the plaintiff to question the defense expert witness about a lawsuit against him involving similar allegations because it was relevant to the expert's motive in testifying. *Hayes v. Manchester Memorial Hospital*, supra, 38 Conn. App. at 475. "The plaintiff was deprived of the right to have the jury, as trier of fact, weigh the credibility of the expert witness by assessing his motives for testifying as he did." Id. The cross-examination in this case was equally relevant to the expert's bias in testifying as he did.

Concerning the balancing test of Conn. Code Evid. § 4-3, the J&J defendants have not attempted to argue that the evidence was irrelevant or not probative of Dr. Attanoos's bias and credibility. [*64] In fact, they admit as much in arguing that plaintiffs counsel could have "questioned Dr. Attanoos regarding his opinions in these prior cases without eliciting this degree of detail." Dkt. 825 at 6. The plaintiff distinguishes *Stubblefield v. Suzuki Motor Corp.*,

cited by the J&J defendants, where the trial court found, in its discretion, that the probative value of the proposed evidence was "proportionately miniscule" because the incidents were not sufficiently similar. Docket No. 3:15-CV-18-HTW-LRA (HTW), 2018 U.S. Dist. LEXIS 168643, 2018 WL 4762739, at *4, *6 (S.D. Miss. Sept. 30, 2018), affd, 826 Fed. Appx. 309 (5th Cir. 2020). Here, the J&J defendants have not established that the evidence is of "miniscule" relevance. The trial court in *Stubblefield* also found "[t]he danger of overwhelming the jury with the facts in each of the various accidents would be substantial." 2018 U.S. Dist. LEXIS 168643 [WL] at *6. There is no evidence that the jury was overwhelmed by hearing about Dr. Attanoos's opinions in these other cases. The Fifth Circuit found no abuse of discretion in the trial court's ruling but also noted that another court might have admitted some of this evidence without abusing its discretion as well. *Stubblefield v. Suzuki Motor Corp.*, 826 Fed. Appx. 309, 320 (5th Cir. 2020). As argued by the plaintiff, this federal district court's exercise of discretion does not demonstrate that the court abused its discretion in the present case.

Moreover, there is no basis to argue that the [*65] jury improperly awarded punitive damages based on this evidence, and the jury is presumed to have followed the court's instructions. *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 335, 838 A.2d 135 (2004). As the court ruled at trial, the plaintiff's cross-examination of Dr. Attanoos was appropriate, and the J&J defendants have shown no abuse of discretion or prejudicial error.

II

Jury Charge and Verdict Forms

"[J]ury instructions are to be read as a whole, and instructions claimed to be improper are read in the context of the entire charge. ... A jury charge is to be considered from the standpoint of its effect on the jury in guiding it to a correct verdict. . . . The test is to determine if a jury charge is proper is whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . [Instructions to the jury need not be in the precise language of a request. . . . Moreover, [j]ury instructions need not be exhaustive, perfect or technically accurate, so long as they are correct in law, adapted to the issues and sufficient for the guidance of the jury." (Citations omitted; internal quotation marks omitted.) *McDermott v. Calvary Baptist Church* 263 Conn. 378, 383-84, 819 A.2d 795 (2003).

A

Spoliation Instruction Regarding Julian Plotkin's Notes

The J&J defendants [*66] contend that a new trial is warranted because, in their view, the court prevented counsel from questioning Julian Plotkin about the loss of certain handwritten notes he took while he attended his father's doctors' appointments, and, further, that it erroneously declined to give a spoliation instruction. See Docket No. 721.00 (motion for adverse inference); Docket No. 721.10 (order denying adverse inference); Ex. 49, 9/26/2024 Tr. Part 4 at 42-43 (issue of cross-examination on this issue).

"Intentional spoliation of evidence is defined as 'the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action.'" *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 243, 905 A.2d 1165, 1178 (2006) (quoting *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 [2003]). "'Disruption of a party's case is a critical element of the intentional spoliation tort.'" Id., 230 (quoting M.M. Koesel & T.L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* (2d Ed. 2006), p. 93). Accordingly, to establish spoliation, it must be shown that "the spoliated evidence was vital to a party's ability to prevail in [a] pending or potential civil action." Id. (Citation omitted; internal quotation marks omitted). The [*67] J&J defendants fail to demonstrate that they were entitled to have a spoliation instruction at trial on the basis of the possible destruction of Julian Plotkin's handwritten notes.

First, as to whether the handwritten notes taken by Julian Plotkin were intentionally destroyed, the witness testified at his deposition that the notes were "probably in the garbage." Docket No. 749.00, Ex. 1, Julian Plotkin Dep., 5/30/24, at 28. This alone is insufficient to indicate that there was an intentional or purposeful loss or destruction of the document. Second, there certainly is no evidence that the notes were destroyed "for the purpose of defeating another person's recovery in a civil action." *Rizzuto v. Davidson Ladders, Inc*, supra, 280 Conn. at 243. The court

can discern no reasonable basis to conclude that the handwritten notes about Mr. Plotkin's medical care were intentionally destroyed in order to thwart defense efforts.

Third, the court concludes that the J&J defendants have failed to demonstrate that the handwritten notes or anything in the notes were "vital to [the J&J defendants'] ability to prevail" in this action. Id., 230. At trial, Julian, after noting that he had "no medical expertise whatsoever," testified that he took notes in the "beginning [*68] stages" of his father's diagnosis and that the notes were "proposed options" for his father's treatment and to "cure, or at least extend" his father's life. Tr. 9/26/24 2:14-3:15, at 38. When asked what those options were and what he remembered writing down, Julian testified:

> A. The one I specifically can recall was basically open stomach surgery where they would, you know, mechanically remove any larger, you know, malignant tissue from his stomach. But that ultimately wouldn't actually, you know, get rid of all of it. And that what was more invasive was the fact that once his stomach was split open, he would have a chemo bath.
>
> So, I remember writing down things like that and specifically, you know, names of the treatment, you know, learning about what the peritoneum was, which is the lining of the abdomen where my dad's -- which is, you know, where my dad had massive amounts of cancer that he didn't even know were there. And ultimately the chemo bath, we were told would never actually get rid of it entirely.
>
> And I just remember writing down terminology like any good son would to just kind of notate, like, I don't know if my uncle or my dad even know what this means, maybe we can investigate [*69] it after.

Id., at 38-39. Julian Plotkin's notes were not the only source of information regarding what his father was told by doctors about his treatment options or whether his cancer is curable. There has been no medically competent evidence that the plaintiff's peritoneal mesothelioma is curable. Moreover, presuming that the plaintiff's medical records would have reflected treatment options and success rates, the J&J defendants did not claim that they did not receive and/or have access to the plaintiff's complete medical records, thereby necessitating access to his son's notes. Additionally, it is the plaintiff's testimony, along with his medical records, that would offer the most probative evidence regarding the options and their efficacy presented to the plaintiff by his treating physicians.

The J&J defendants contend that Julian Plotkin's handwritten notes may be relevant to their failure to mitigate defense. That defense, however, was the subject of extensive testimony at trial. The J&J defendants' counsel questioned the plaintiff about his initial pursuit of holistic medicine and decision to seek multiple opinions from leading mesothelioma experts before he ultimately opted for [*70] surgery and heated intraoperative chemotherapy. Similarly, the plaintiff was also asked about the option of immunotherapy, which he admittedly has not pursued to date. This line of questioning certainly suggested that the plaintiff initially delayed his treatment, and put off other treatments, yet there is nothing more than speculation that this approach compromised the plaintiffs life expectancy or prospects for a cure. Ultimately, the testimony and medical records support the conclusion that the plaintiff followed advice that all the consultants recommended, namely invasive abdominal surgery and heated intraoperative chemotherapy. That he has not yet undergone immunotherapy is of little significance, given the uncertain benefits of such treatment and the inarguably dire prognosis. In the face of this evidence, allowing further inquiry about a few handwritten notes—which would have allowed the jury to speculate and would have been more prejudicial than probative—and charging on spoliation, was not appropriate.

For these reasons, the court limited the cross-examination of Julian Plotkin concerning the whereabouts of the disputed handwritten notes, in order to limit ungrounded speculation [*71] on a collateral matter. "In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *Rousseau v. Perricone*, 148 Conn. App. .837, 844, 88 A.3d 559 (2014).

Here, the J&J defendants' right to cross-examine Julian Plotkin was not unduly restricted. They were only prohibited from asking Julian about the whereabouts of the handwritten notes, which, if allowed, would have let the jury speculate about them, and thus would have been more prejudicial than probative of anything. This prohibition stemmed from the court's ruling that there was insufficient evidence to support a spoliation instruction. Other lines of questioning remained open to the J&J defendants. Also, the J&J defendants' stated intent—exploration of Evan

Plotkin's failure to mitigate-—was adequately developed in the J&J defendants' questioning of the plaintiff himself and Dr. Haber.

Because the J&J defendants were not entitled to a spoliation instruction, the court continues to believe [*72] that it was appropriate to prohibit them from cross-examining Julian Plotkin about the whereabouts of his handwritten notes. Consequently, the J&J defendants have failed to identify any error in the failure to give a spoliation instruction which would entitle them to a new trial.

B

Court's Strict Liability Charge: Consumer Expectation Test

The court instructed the jury that it could find a defendant strictly liable under the consumer expectation test. See Ex. 52, 10/11/2024 Tr. Part 2 at 29. The court overruled the J&J defendants' objections. See Ex. 53, 10/10/2024 Tr. Part 2 at 8-16 (charge conference); Docket No. 821.00 at 46 (written objections); Docket No. 790.00 at 7-8 (pretrial memorandum); Ex. 54 (court email rejecting application of consumer expectation test).

Specifically, the court instructed the jury, in relevant part, as follows:

> Consumer expectation test. The plaintiff first claims that the defendants are subject to strict liability because they manufactured or sold products with defective conditions that made the products unreasonably dangerous. To explain further, a product is unreasonably dangerous to the consumer or user only if it is dangerous to an extent beyond that [*73] which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. The product must fail to meet legitimate, commonly held minimum safety expectations of that product when used in an intended or reasonably foreseeable manner. Those expectations may be informed by consumers' experience and reasonable expectations regarding the product, product safety laws, and the seller's express representations, if any.
> Risk utility test. Additionally, the plaintiff claims that the design or formulation of the defendants' product was manifestly unreasonable in that the risk of harm so clearly exceeds the products utility that a reasonable consumer, informed of those risks and utility, would not purchase the product.
>
> Relevant factors that you may consider include, but are not limited, the magnitude and probability of the risk of harm, the instructions and warnings accompanying the product or lack thereof, or the utility of the product in relation to the range of consumer choices among products. You may also consider evidence, if any, regarding the nature and strength of consumer expectations regarding the product, including [*74] expectations arising from the product's portrayal and marketing.
> Tr. 10/11/24, at 29:12-30:14.

According to the J&J defendants, the consumer expectation test applies only in certain limited circumstances not applicable here. Under the "secondary" consumer expectation test, "a product is in a defective condition unreasonably dangerous to the consumer or user only if it is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Bifolck v. Philip Morris*, Inc., 324 Conn. 402, 436, 152 A.3d 1183 (2016) (citing 2 Restatement [Second], Torts, § 402A, comment [i], p. 352 [1965]). This test "is appropriate when the everyday experience of the particular product's users permits the inference that the product did not meet minimum safety expectations." *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 222, 694 A.2d 1319 (1997). That occurs only when "[e]xpert testimony on product design is not needed to prove the product's defect...." *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 203, 136 A.3d 1232 (2016), cert, denied, 583 U.S. 1156, 138 S. Ct. 1165, 200 L. Ed. 2d 314 (2018). The J&J defendants contend that, given the complexity of the scientific questions of geology, biology, and testing at issue, expert testimony was required. See *Estate of LePage v. Horne*, 262 Conn. 116, 125, 809 A.2d 505 (2002). Because of the position that this case revolved around expert testimony, the J&J defendants maintain that only the risk-utility test governs the plaintiff's [*75] strict liability claims.

"All [product liability] claims, whether alleging a design defect, manufacturing defect or failure to warn defect, are governed by the same elements that this court has applied since it adopted § 402A [of the Restatement (Second) of Torts]: (1) the defendant was engaged in the business of selling the product; (2) *the product was in a defective condition unreasonably dangerous to the consumer or user*, (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of sale; and (5) the product was expected to and did reach the consumer without substantial change in condition." (Emphasis added.) *Ferrari v. Johnson & Johnson, Inc.*, Superior Court, Judicial District of Hartford, Docket No. CV-16-6067308-S, 2017 Conn. Super. LEXIS 5047 (November 28, 2017, *Noble, J.*), aff d, 190 Conn. App. 152, 210 A.3d 115 [2019]) (quoting *Bifolck v. Philip Morris, Inc.*, 324 Conn. 402, 434, 152 A.3d 1183 [2016]).

The Connecticut Supreme Court has established dual tests for proving that a product was in a defective condition unreasonably dangerous to the consumer: the ordinary consumer expectation test and the modified consumer expectation test which incorporates risk-utility factors. *Potter v. Chicago Pneumatic Tool Co.*, supra, 241 Conn. at 220-22. In *Izzarelli v. R.J. Reynolds Tobacco Co.*, supra, 321 Conn. at 194, the Supreme Court revisited its decision in *Potter* to delineate when each test should be used. Although recognizing that *Potter* could be read to support the interpretation that the modified consumer expectation test is reserved exclusively for complex product designs for which [*76] an ordinary consumer could not form safety expectations, the court declined to impose a binary choice between simple and complex. Id., 195-96. Ultimately, the *Izzarelli* court held that, under Connecticut's product liability law, "the ordinary consumer expectation test is reserved for those . . . cases in which a product fails to meet a consumer's legitimate, commonly accepted minimum safety expectations. Expert testimony on product design is not needed to prove the product's defect, nor is the utility of the product's design an excuse for the undisclosed defect." Id., 202-203. Importantly, in *Bifolck v. Philip Morris, Inc.*, supra, 324 Conn. at 442, the Connecticut Supreme Court stated that "[f]or purposes of strict liability, a product may be unreasonably dangerous if it fails to meet consumers' minimum safety expectations *or* if its risks exceed its utility, because the consumer may know of the risk of danger but fail to fully appreciate that danger or know how safe the product could be made." (Emphasis added).

The plaintiff argues that, contrary to the J&J defendants' characterization of the issues before the jury in this case, the product's design was not complex. As the J&J defendants testified through their corporate representative, "the company did not want asbestos [*77] in the product[.]" Tr. 9/25/24 11:40-1:00, at 8-9. Thus, any lay person on the jury could reasonably conclude that the presence in JBP of asbestos, which causes cancer, failed to meet "a consumer's legitimate, commonly accepted minimum safety expectations." See *Izzarelli*, supra, 202-203. The expert testimony presented to the jury did not focus on the design of JBP, other than it being a talc-based product. Instead, the expert testimony focused on how talc and asbestos naturally grow alongside each other, how asbestos causes disease, how much asbestos is sufficient to cause mesothelioma, and the repeated presence of asbestos in JBP. None of those issues involved the alleged complex design of JBP. As such, the court found that the ordinary consumer expectation test was proper.

Further, the plaintiff argues that he met the necessary burden as to both the consumer expectations test and the requested risk-utility test. The jury heard testimony from J&J witness, John Hopkins, M.D., that the J&J defendants have never contended that asbestos should be in baby powder; in fact, the product should be "free of asbestos." Ex. 6, As Played Hopkins, 4/11/18, at 75:11-19. The jury also heard that J&J has a zero-tolerance policy [*78] for the presence of asbestos in its talc and that, because asbestos is a known carcinogen and can cause mesothelioma, it should never be in JBP. Id., at 108:9-109:6. Moreover, cornstarch was always available as a safe alternative to talc. Id., at 241:09-14.

Additionally, and as the J&J defendants requested, the court instructed the jury on the risk-utility test. Doing so gave the jury both tests under which they could find the J&J defendants strictly liable. In the absence of an indication to the contrary, a jury is presumed to have followed the court's instructions. *State v. Outlaw*, 350 Conn. 251, 284, 324 A.3d 107 (2024); *State v. Dearborn*, 82 Conn. App. 734, 743, 846 A.2d 894, cert, denied, 270 Conn. 904, 853 A.2d 523 (2004). There was no suggestion through the court's jury instructions that expert testimony was not needed to resolve the strict liability issue. The J&J defendants are not entitled to a new trial on this issue and their motion as to this issue is denied.

C

Jury Instruction Regarding Negligence

The court instructed the jury as follows on the plaintiff's negligence claim:

> Negligence involves doing something which a reasonably prudent person would not do under the circumstances, or the failure to do what a reasonably prudent person would do under the circumstances. Stated differently, the use of proper care in a given [*79] situation is the care which an ordinarily prudent person would use in view of the surrounding circumstances. Negligence is the breach of a legal duty owed by one person to another, and this legal duty involves the exercise of reasonable care.

Ex. 52, 10/11/2024 Tr. Part 2 at 31-32; see also id., at 32-33 (providing additional detail about the elements of a negligence claim). It did so over the J&J defendants' objections. See Ex. 53, 10/10/24 Tr. Part 2 at 24 (overruling objections).

The J&J defendants contend that the court's instruction treated negligence and strict liability as distinct theories of recovery, thereby possibly confusing the jury, because it purportedly created two separate but functionally identical claims. They argue that the differing instructions may have created confusion for the jury as to how to evaluate CPLA liability for a defectively designed product. They believe that the jury was left with the false impression that it could resolve the negligence claim on some basis other than the risk-utility test, which could somehow yield a different outcome. This, they claim, prejudiced the J&J defendants, giving the plaintiff a broadly-defined negligence theory of recovery [*80] for which the jury lacked the necessary guidance.

As the Connecticut Supreme Court noted in *Bifolck v. Philip Morris, Inc.*, supra, 324 Conn. at 437, under the CPLA, a product liability claim may be brought under theories of strict liability and/or negligence. Consequently, the plaintiff was entitled to have the jury instructed as to both strict liability and negligence. The *Bifolck* Court also explained that there is no single definition of "unreasonably dangerous" that governs all product liability claims. Id. 442. Unlike strict liability, "it is the defendant's actual or imputed knowledge of the danger . . . that is an essential element of negligence, which in turn gives rise to the defendant's duty to exercise reasonable care to protect product users from that danger." (Emphasis omitted.) Id. 443.

The portion of the instruction to which the J&J defendants object simply defines negligence and clarifies that negligence involves examining what a "reasonably prudent person" would or would not do under the circumstances. Importantly, the court gave the jury the elements of the risk-utility test and it cannot be said that the jury did not incorporate those elements into their consideration of the plaintiff's negligence claim. As the Connecticut Supreme Court [*81] has made clear, the charge is to be read as a whole, and individual instructions are not to be judged in artificial isolation from the overall charge. *State v. Blaine*, 334 Conn. 298, 308, 221 A.3d 798 (2019).

D

Instruction Regarding Failure to Warn

The court instructed the jury, over the J&J defendants' objection, that it could find them liable for a failure to warn "that the defendants' products may cause injury, cancer or death." See Ex. 52, 10/11/2024 Tr. Part 2 at 32-35. The J&J defendants contend that this instruction was too broad; See Ex. 53, 10/10/2024 Tr. Part 2 at 33-34 (objections); Ex. 54; Docket No. 821.00 at 56; and that it should have been specific to the risks of *peritoneal mesothelioma*. Citing *Bifolck*, supra, 324 Conn. at 434, they claim that a plaintiff may recover only for the failure to warn about the specific injury for which that plaintiff is seeking compensation.

The premise of the plaintiff's claims against the J&J defendants is that JBP contained asbestos which caused his cancer. Throughout the trial, the jury repeatedly heard that the plaintiff developed mesothelioma, a form of cancer, because of his use of JBP. They also were told that mesothelioma meant cancer. In the failure to warn instruction, the court instructed the jury that the plaintiff [*82] alleged that the J&J defendants failed to warn that its product could cause injury *or cancer*. Tr. 10/11/24, at 34:23-26. The court disagrees that the charge was required to mention a warning about the specific risk of *peritoneal mesothelioma*, indisputably a form of cancer.

E

Compensatory Damages Instruction

The court instructed the jury over objection that it could award damages for "fear of an increased risk of future medical treatment and disability" and "increased risk of injury." Ex. 52, 10/11/2024 Tr. Part 2 at 41-42. The J&J defendants claim that this was improper because they believe that these categories of damages are already covered by the noneconomic damages instruction. See Docket No. 821.00 at 68-70; Ex. 53, 10/10/2024 Tr. Part 2 at 61-63. They contend that including these additional instructions prejudiced the J&J defendants by creating a likelihood that the jury would award double compensation for the same alleged harm.

This argument is without merit. An increased risk of injury and an increased fear of future injury are related but distinct forms of non-economic damage for which a plaintiff properly may be compensated. See Connecticut Civil Jury Instructions, § 3.4-5, available at https://jud.ct.gov/Ji/Civil/Civil.pdf); [*83] *Petriello v. Kalman*, 215 Conn. 377, 389-91, 576 A.2d 474 (1990); *Barrett v. Danbury Hosp.*, 232 Conn. 242, 256, 654 A.2d 748 (1995). The instruction was proper, and the J&J defendants are not entitled to a new trial as a result.

F

Causation Instruction and Related Portion of Jury Verdict Form

The court's causation instruction stated that a jury must find that the "defendant's *defective product or conduct* . . . was a substantial factor in causing the *damages* as claimed by the plaintiff in this case." Ex. 52, 10/11/2024 Tr. Part 2 at 35-36 (emphasis added). The J&J defendants claim that it should have asked "if the *defect* actually and proximately caused plaintiff's *peritoneal mesothelioma and resulting damages*" Ex. 53, 10/10/2024 Tr. Part 2 at 43-44 (charge conference). Because the verdict form tracked the court's charge, they claim that it was defective. See Dkt. 827.

First, the J&J defendants claim that the "defective product or conduct" language was confusing as to how the specific theory of harm (strict liability, negligence, or failure to warn) factored into the analysis. Under *Bifolck v. Philip Morris, Inc.*, each theory of liability under the CPLA is simply a type of product defect. *Bifolck v. Philip Morris, Inc.*, supra, 324 Conn. at 434. They claim that the court's language as given was confusing. Second, they contend that the instruction should have focused on [*84] whether the defect caused the specific injury—peritoneal mesothelioma—and any damages resulting from that injury. See Ex. 53, 10/10/2024 Tr. Part 2 at 3-4 (standing objection to failure to state "peritoneal mesothelioma"), 43-44; see also *Bifolck v. Philip Morris, Inc.*, supra, 324 Conn. at 434 (the CPLA requires proof that "the defect caused *the injury* for which compensation was sought." [emphasis added]); *Bagley v. Adel Wiggins Group*, supra, 327 Conn. at 112-13 ("[P]laintiff bore the burden of proving that the defendant's failure to test or conduct research on FM-37 or to remove it from the marketplace was unreasonable and was a legal cause of the decedent's mesothelioma.").

The J&J defendants claim that this instruction prejudiced their defense, which was premised on the plaintiff's failure to prove causation of the plaintiff's specific injury. See Ex. 46, 10/11/2024 Tr. Part 1 at 43-44. According to them, listing that particular injury was important given that peritoneal mesothelioma requires a greater degree of asbestos exposure than other types of mesothelioma—a key factor in the jury's deliberations. Ex. 13, 9/12/2024 Tr. Part 1 at 21, 28-29. They maintain that, by simply referring to "damages," without linking it to the injury, the plaintiff was able to short-circuit his burden of proof. [*85]

In instructing the jury on causation, the court stated:

> If you find that the plaintiff has proven any one of these theories based on strict liability, negligence, or failure to warn, as well as all the other four factors that are necessary to establish liability under the Products Liability Act, then you should go on to evaluate causation.

Tr. 10/11/24, at 35:12-16. The court also charged the jury that if it found the J&J defendants liable under either of the three theories, it also had to decide "if the defendant's defective product or conduct legally caused injury or losses to the plaintiff." Id., at 35:21-25. The court continued to state that the jury must answer "whether the plaintiff actually or in fact suffered damages" and "were those damages proximately caused by the defective product or

conduct of a defendant." Id., at 35:24-36:1. Even with the benefit of hindsight, the court does not believe that the language of the instruction was confusing.

First, "defective product" focused on the plaintiff's strict liability claims, where the defendants' conduct was not a factor. Second, "conduct" focused on the plaintiff's negligence and failure to warn claims, where the defendants' conduct [*86] was an essential element. Third, in order to prove causation, the plaintiff must demonstrate both cause-in-fact or actual cause and proximate cause. *Burton v. City of Stamford*, 115 Conn. App. 47, 76, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009). The jury was instructed on both, and both were correct and accurate statements of the law.

Additionally, the J&J defendants' argument that "peritoneal" should have been included throughout the jury instructions is without merit. Throughout the jury charge, the court referred to "his mesothelioma." Tr. 10/11/24, at 36. Peritoneal mesothelioma was the only mesothelioma claimed by the plaintiff at trial and was the mesothelioma that Dr. Haber testified was the result of the plaintiff's exposure to JBP. There was no danger that the jury would award the plaintiff damages for anything other than peritoneal mesothelioma. In fact, the court instructed the jury that it could only find that the plaintiff satisfied the causation element of his claims was if "the plaintiff . . . submit[ted] expert testimony proving that when Johnson's Baby Powder was used in the manner in which the plaintiff allegedly used it, the plaintiff was exposed to a sufficient quantity of respirable asbestos fibers to cause his mesothelioma." Id., at 36. The [*87] Jury Interrogatories on Causation followed this same pattern and were correct.

G

Instruction on Punitive Damages

The J&J defendants argue that the court's charge on punitive damages was erroneous. The court instructed the jury that "Punitive damages may be awarded for conduct that is outrageous because of the defendant's reckless indifference to the rights of others or an intentional and wanton violation of those rights." Ex. 52, 10/11/2024 Tr. Part 2 at 43-44. They claim that the instruction should have focused instead on the need to find "reckless indifference to the risk of mesothelioma." Ex. 53, 10/10/2024 Tr. Part 2 at 71-72 (overruling objection). They believe that a broad focus was prejudicial error, creating a substantial risk that the award would be improperly based on harm to others—not just the plaintiff—and encompass harms other than those at issue in this case.

General Statutes § 52-240b provides, in relevant part, that "[p]unitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of *product users, consumers or others* who were injured by the product. . . ." (Emphasis added). In accordance with the statute, the [*88] court instructed the jury as follows: "Punitive damages may be awarded for conduct that is outrageous because of the defendant's reckless indifference to the rights of others or an intentional and wanton violation of those rights." Tr. 10/11/24, at 43-44. The punitive damages instruction was a correct statement of the law. If the court had instructed the jury as the J&J defendants now contend it should have, the instruction would have been erroneous because punitive damages does not focus solely on the plaintiff—Evan Plotkin. The court maintains that it charged the jury correctly on punitive damages, and the J&J defendants are not entitled to a new trial on this issue.

H

Successor Liability: Choice of Law

The J&J defendants contend that the court's instruction on successor liability under Connecticut law was in error. First, they argue that Texas law, and not that of Connecticut, governs the successor liability analysis. See Docket No. 820.00 at 10-12; Ex. 53, 10/10/2024 Tr. Part 2 at 73 (charge conference). The basis for their argument is evidence showing that Chenango Two received the assets of Johnson & Johnson Consumer Incorporated (Old JJCI)—not the liabilities, which were transferred [*89] to Chenango One—via a divisional merger done under Texas law in Texas. Docket No. 452.00 at 3, 6-7; Docket No. 790.00 at 29-31; Docket No. Dkt. 797.00, Ex. 1 (Declaration of John Kim) at ¶¶ 8-9. The court incorporates herein its choice of law analysis set forth in its ruling on the J&J defendants' JNOV motion and holds that Connecticut law applies to successor liability in this case.

I

Successor Liability: Product Line Exception

The J&J defendants argue that, because there is no product line exception under Texas or Connecticut law, it was improper for the court to charge on that issue. For the reasons articulated in the court's ruling on the J&J defendants' JNOV motion, the court concludes that Connecticut law, not that of Texas, applies.

Although it is true that the Connecticut appellate courts have not yet adopted the product line exception, the exception has been applied in a number of Connecticut Superior Courts in cases involving strict products liability for personal injury. See *Chamlink Corp. v. Merritt Extruder*, Superior Court, judicial district of New Haven, Docket No. CV-04-4000037-S (April 11, 2005, *Devlin, J.*6 ("this exception has only been applied to strict product liability cases."); see also *Sullivan v. A.W. Flint Co.*, Superior Court, judicial district of New Haven, Docket No. CV-92-0339263-S (August 5, 1996, *Corradino, J.*) (17 Conn. L. Rptr. 331, 1996 Conn. Super. LEXIS 2060) (discussing the potential application of the product line exception in products liability cases but ultimately denying [*90] the defendant's motion for summary judgment as to the application of that exception); *Pastorick v. Lyn-Lad Truck Racks*, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. CV-96-0562426-S (August 3, 1999, *Sullivan, J.*) (24 Conn. L. Rptr. 677, 1999 Conn. Super. LEXIS 2083) (applying the product line exception in a products liability action based on the collapse of a ladder and denying summary judgment); *Strohecker v. Canadian Pacific Express & Transport, Ltd.*, Superior Court, judicial district of Waterbury, Docket No. CV-95-0125123-S (June 24, 1998, *Pellegrino, J.*) (denying summary judgment in products liability action based on genuine issues of material fact regarding the application of the product line exception); *Kennedy v. Oshkosh Truck Corp.*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-92-510394-S (January 18, 1995, *Schimelman, J.*) (13 Conn. L. Rptr. 376, 1995 Conn. Super. LEXIS 165) (same); *Copperthite v. Pytlik*, Superior Court, judicial district of Middlesex, Docket No. 059053 (August 25, 1992, *Arena, J.*12 (same). Under the facts presented at trial, the court concluded that the jury should be charged on the product line exception.

J

Instruction Regarding Continuing Enterprise Exception

The court also instructed the jury that it could find Holdco and Kenvue (J&J Successor Liability Defendants) liable pursuant to a continuity of enterprise exception. See Ex. 52, 10/11/2024 Tr. Part 2 at 24-25; Docket No. 827.00 at 1 (verdict form). In addition to their contention that this exception is not available under Connecticut law, they also argue that the instruction was incorrect under Connecticut law. The J&J defendants do not argue that the court erred in instructing the jury on the elements of the "mere continuation" exception. However, they contend that the court erred in instructing the jury that "[n]ot every single [*91] element must be proven." Tr. 10/11/24, at 25:2. That is not necessarily so. In *JJL Commerical Dev., LLC v. Conn. Stucco, LLC*, Superior Court, judicial district of New Haven at Meriden, Docket No. NNI-CV-19-6016165-S, 2024 Conn. Super. LEXIS 527 (March 4, 2024, *Abrams, J.*), the Superior Court, after hsting the requirements for the mere continuation exception, noted that "[n]ot every one of these indicia must be established[.]" The Superior Court stated the same in *Peglar & Assocs. v. Prof'l Indem. Underwriters Corp.*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X05-CV-97-0160824-S (June 12, 2002, *Rogers, J.*) (32 Conn. L. Rptr. 859, 2002 Conn. Super. LEXIS 2103).

The court properly instructed the jury pursuant to the mere continuation/continuing enterprise exception of successor liability. The J&J defendants' motion on this issue is denied.

K

Presence of J & J on Instructions and Verdict Form

The court instructed the jury over objection that it could find the successor liability defendants liable as successors in interest to Johnson & Johnson. Ex. 52, 10/11/2024 Tr. Part 2 at 21-26; Ex. 54; see Ex. 55, 10/10/2024 Tr. Part 1 at 21-23, 28, 38-39, 42, 52-54 (charge conference); Docket No. 821.00 at 31, 34, 35-36, 38-39; Docket No. 827.00 at 1 (verdict form). Successor liability applies when there has been an asset transfer from a predecessor-in-interest to a successor. See *Robbins ex rel. Martins v. Physicians for Women's, LLC*, 311 Conn. 707, 715-16, 90 A.3d 925

(2014). The J&J defendants argue that the plaintiff did not submit any evidence establishing that the assets of J&J were transferred to the J&J successor liability defendants. Docket No. 452.00 at 2-5; Docket No. [*92] 790.00 at 29-31. The successor liability claims concern the assets and liabilities of Old JJCI only. Id., at 30-31. They claim that this instruction was prejudicial error because it allowed the jury to find successor liability where they believe that there was none.

The court instructed the jury as follows:

> Through a series of corporate transactions, certain assets and liabilities of Johnson and Johnson, and Johnson & Johnson Consumer Incorporated (Old JJCI) were transferred to Johnson & Johnson Holdco (NA) Incorporated, formerly known as Johnson and Johnson Consumer, Inc. (New JJCI) and Kenvue, Incorporated, LLT Management, LLC, formerly known as LTL Management, LLC, and Pecos River Talc, LLC, beginning of October of 2021.

Tr. 10/11/24, at 23. During the jury charge conference, when the J&J defendants objected to the inclusion of J&J in the successor liability instructions and in the successor liability questions on the verdict form, the plaintiff's counsel explained that the plaintiff's allegations from the beginning of this case, in relation to successor liability, have been that post-1979, J&J's liability for JBP has been "peeled off' and moved from entity to entity. Tr. 10/10/24 [*93] 9:28-10:39, at 22-23. Additionally, the plaintiff presented evidence to the jury to support the inclusion of J&J in the questions and instructions to resolve successor liability:

> Section one of this declaration provides an overview of LTL's history and corporate structure. Section one history and corporate structure. LTL traces its roots back to Johnson & Johnson Baby Products Company, a New Jersey company incorporated in 1970 as a fully owned subsidiary of J&J. J&J, a New Jersey company, incorporated in 1887, first began selling Johnson's Baby Powder in 1894, launching its baby care line of products. In 1972, J&J established a formal operating division for its baby products business, which included Johnson's Baby Powder. In 1979, J&J transferred all of its assets associated with the baby products division to J&J Baby Products. In connection with this transfer, J&J Baby Products assumed all liabilities associated with the baby products division. Following this transaction, J&J no longer manufactured or sold baby products, including Johnson's Baby Powder.
>
> In 1981, J&J Baby Products transferred all of its assets except those assets allocated to its diaper program to Omni Educational Corporation, [*94] a wholly owned subsidiary of J&J Baby Products. In turn, Omni assumed all liabilities of J&J baby products except those liabilities related to its diaper program. Immediately following the transactions, J&J Baby Products merged into another subsidiary of J&J and was renamed Personal Products Company, and Omni changed its name to Johnson & Johnson Baby Products Company.
>
> In 1988, Johnson & Johnson Baby Products Company transferred all of its assets with respect to its baby products business to Johnson & Johnson Dental Products Company, which assumed all of its liabilities and was renamed Johnson & Johnson Consumer Products Inc. In 1997, Johnson & Johnson Consumer Products Inc. changed its name to Johnson & Johnson Consumer Companies Inc. In 2015, J&J Consumer Companies merged with and into an affiliate which then merged into McNeil-PPC Inc. The resulting entity was renamed Johnson & Johnson Consumer Inc., including all former names and historical forms, also known as Old JJCI.

Tr. 10/4/24 2, at 17-18; 19. Thus, according to the evidence presented to the jury, the successor liability chain began with J&J as the original holder of liabilities for JBP. The instructions were adapted to the [*95] issues facing the jury in this case. Including J&J in the successor liability instructions and questions on the verdict form was not error, as it was not an incorrect statement of the law, was an accurate statement of the plaintiff's allegations, and was supported by the evidence presented to the jury.

The J&J defendants' challenges to the jury instructions and the verdict form, as discussed at the charge conference, are without merit. The jury instructions, when viewed as a whole, were clear, accurate, complete, and comprehensible with respect to the plaintiff's claims against the J&J defendants. The challenges presented simply reflect the J&J defendants' disagreement with the law and their disagreement with how the trier of fact interpreted the evidence. The J&J defendants are not entitled to a new trial on any of the issues they have raised, and their motion is denied.

III

Evidentiary Rulings

"[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. ... In

77 other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Moreover, an [*96] evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." (Citation omitted; internal quotation marks omitted.) *Klein, v. Norwalk Hospital*, 299 Conn. 241, 254-55, 9 A.3d 364 (2010).

The J&J defendants argue that the court made several errors in its admission of evidence, including (1) admitting documents relating to the Environmental Protection Agency (EPA) Region IX report; (2) admitting a letter from Meeker; (3) failing to grant a mistrial based on a perceived violation of a motion in limine; (3) admitting a 2018 Reuters article; (4) admitting documents relating to successor defendant Kenvue, Inc.; and (5) failing to permit the J&J defendants to read from the plaintiff's complaints at trial.

A

Documents Relating to EPA Region IX Report

The J&J defendants argue that the court erred in admitting two documents about the EPA Region IX report. See Ex. 22, 9/27/2024 Tr. Part 2 at 13-16 (discussing Ex. 56 and Ex. 25). The J&J defendants contend the EPA Region IX Report should have been excluded as irrelevant because "these reports [*97] were not about talc, asbestos in talc, or any mine that J&J had anything to do with." See Docket No. 836.00 at 41. However, the definitions of asbestos and tremolite run through the case. As the plaintiff's counsel explained at trial, the EPA Region IX Report is relevant because it discusses and defines naturally occurring asbestos, including naturally occurring tremolite. Tr. 9/27/24 9:35-10:03, at 6. The plaintiff's counsel also explained:

> ATTY. BRALY: Correct. So the naturally-occurring asbestos that occurs in El Dorado Hills is one of the forms of naturally-occurring asbestos that has been found in Johnson's Baby Powder, this naturally-occurring tremolite. The distinction that is made and the defense that has been presented is that's not really asbestos. Nobody at Johnson & Johnson has ever said that. The only people who say that is their expert, Matt Sanchez who is associated and works with R. J. Lee.
>
> R.J. Lee is also the lab that they send their—their samples to by jet to be evaluated and tested. RJ Lee is their captive testing lab currently. So it is relevant to the idea that this isn't the first time that this particular lab has said that asbestos- naturally-occurring asbestos [*98] isn't really asbestos.

And that's the relevance of it.

Id., at 7. The plaintiff's expert geologist, Mark Bailey, was directly involved in the United States Geological Survey's (USGS) classification and publication of the EPA Region IX Report. Tr. 9/27/24 11:46-1:01, at 20-21.

The EPA Region IX Report was relevant and properly admitted through the proper expert witness. Further, the J&J defendants have failed to identify any prejudice stemming from the discussion and/or admission of this document. Their motion as to this issue is denied.

B

Meeker Letter

The J&J defendants argue that the court should have excluded a piece written by Gregory Meeker from the USGS, Ex. 24, as inadmissible hearsay. See Conn. Code Evid. § 8-2; Ex. 20, 9/27/2024 Tr. Part 1 at 12-14 (argument); Ex. 21, 9/27/2024 Tr. Part 3 at 8-9 (hearsay objection). They claim that this document is simply hearsay reflecting the opinion of a single USGS employee who did not testify at trial. See Ex. 24. However, as argued by the plaintiff's

counsel at trial, Mr. Meeker's article was not offered for the truth of the matter asserted and is therefore not properly classified as hearsay. "An out-of-court statement offered to establish the truth of the matter [*99] asserted is hearsay." (Internal quotation marks omitted.) *State v. Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007); see Conn. Code Evid. § 8-1 (3). "The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay." *State v. Hull*, 210 Conn. 481, 498-99, 556 A.2d 154 (1989).

Moreover, the plaintiff's expert, Mark Bailey, testified that he relied on Mr. Meeker's article in forming his opinions for this case. Tr. 9/27/24 11:46-1:01, at 7-8. Mr. Bailey also testified that the USGS are "geologists and specialize in minerology[.]" Tr. 10/3/24 2-4. The court, over objection from the J&J defendants, admitted Meeker's article as reliance material from Mr. Bailey and "about how the phraseology of what is asbestiform and what isn't kind of depends on whose ox is being pulled. And that is consistent with Mr. Bailey's opinions." Tr. 9/27/24 9:35-10:03, at 13-14. According to the J&J defendants, Mr. Bailey's reliance on Meeker's article was insufficient because the "letter" does not qualify as a "learned treatise" and is not recognized as a standard authority in the field. Mr. Bailey made it clear that he relies not only on the article in forming his opinions, but also on the USGS as they are geologists [*100] specializing in mineralogy. See *Musorofiti v. Vlcek*, 65 Conn. App. 365, 385, 783 A.2d 36, cert. denied, 258 Conn. 938, 786 A.2d 426 (2001) (it is "not an abuse of the trial court's discretion to determine that because [the expert] viewed the journal as authoritative, it made good sense to justify a presumption in favor of admitting the [article] accepted for publication therein." [Internal quotation marks omitted.]) Because Mr. Bailey testified that he relied on the article, and he considers employees and researchers at the USGS as specialists, the plaintiff properly used the article to confirm Mr. Bailey's testimony, and the admission of the article as evidence was appropriate.

C

Denial of J&J's Motion for Mistrial Over Questioning of Dr. Haber re 2024 IARC Report

During Dr. Haber's direct examination, the plaintiffs counsel asked about a 2024 report issued by the International Agency for Research on Cancer (IARC). Ex. 7, 9/12/2024 Tr. Part 5 at 10, 11-12. That report (which will be published in 2025), was not admitted at trial, and concluded that talc can cause ovarian cancer, regardless of whether it contains asbestos. See Ex. 58, at 3-4. It did not draw any conclusions about whether talc not contaminated with asbestos can cause mesothelioma. Id.

The J&J defendants objected [*101] to this line of questioning, noting that evidence purporting to show that talc causes ovarian cancer had been excluded from trial. See Dkt. 519.10 (order granting the J&J defendants' motion); Ex. 7, 9/12/2024 Tr. Part 5 at 12. The plaintiff's counsel represented that he was not going to delve into the topic of ovarian cancer, and J&J's objection to this question was overruled. Ex. 7, 9/12/2024 Tr. Part 5 at 12. However, the plaintiffs counsel asked Dr. Haber, "in the current IARC publication from 2024, what does it say about the ability of talc to cause cancer?" Id. Dr. Haber replied, "Talc is carcinogenic." Id.

The J&J defendants' counsel objected, and the answer was stricken. However, the J&J defendants claim that the damage was done: there was no way to "unring the bell" and argued that a mistrial was required. Id., at 12-13, 41-42. In denying the request for a mistrial, the court stated:

> I have to say I'm not as alarmed, if bothered at all, by what has happened so far because I think I agree with Attorney Braly that he's skirted around the ovarian cancer topic and the document itself, the 2024 IARC study, is not in evidence.

Tr. 9/12/24 3:46-4:55, at 46. The court denied the request for a mistrial and [*102] requested that the J&J defendants prepare a curative statement for the court to read to the jury.[15] Id., at 46:18-24.

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[15] It is conceivable that a curative instruction would only underscore the testimony at issue. See *State v. Fernandez*, 198 Conn. 1, 17, 501 A.2d 1195 (1985) ("[A] curative instruction is not inevitably sufficient to overcome . . . the impact of prejudice." [Internal quotation marks omitted]).

Although the remedy of a mistrial is permitted under the rules of practice, it is not favored. *Wager v. Moore*, 193 Conn. App. 608, 635, 220 A.3d 48 (2019). "A mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated." (Internal quotation marks omitted.) Id. "*If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided*." (Emphasis Added.) *State v. Coltherst*, 87 Conn. App. 93, 99, 864 A.2d 869, cert. denied, 273 Conn. 919, 871 A.2d 371 (2005). The plaintiff did not object to the giving of a curative instruction, but the J&J defendants failed to prepare the curative instruction requested by the court.

Because Dr. Haber's response was stricken, the IARC 2024 Report was not admitted into evidence, and the J&J defendants did not propose a curative instruction, the court does not believe that Dr. Haber's initial answer to the question—immediately stricken from the record—prejudiced the J&J defendants to such an extent that the court would find that they could not and did not have a fair trial. A mistrial was not warranted [*103] and the motion for a new trial on this issue is denied.

D

Admission of Reuters Article

At trial, the court allowed evidence about a 2018 Reuters article titled, "Johnson & Johnson knew for decades that asbestos lurked in its baby powder." Ex. 59; Ex. 57, 9/19/2024 Tr. Part 2 at 13-14. The J&J defendants argue that this evidence should have been excluded. Ex. 57, 9/19/2024 Tr. Part 2 at 5-7.

During the J&J defendants' cross-examination of Dr. Haber, they questioned him extensively about Dr. Langer's testing of lot 344L for the presence of asbestiform minerals. Tr. 9/18/24 11:48-12:54, at 24-33. Throughout this questioning, the J&J defendants asserted that Dr. Langer had confirmed that his initial findings of asbestos were incorrect. Id., 32-33. Included in the cross-examination of Dr. Haber was a series of questions about a *newspaper article* from 1972. Id. On re-direct, in rebuttal to the J&J defendants' questioning regarding the subsequent withdrawal of Dr. Langer's findings the plaintiff introduced a more recent newspaper article, the 2018 Reuters article, in which Dr. Langer stated that he stood by the *original* results that he reached. Tr. 9/19/24 11:47-12:48, at 13-15. Counsel was clear [*104] that the article was published in 2018 and that as of 2017, J&J and their attorneys were aware that he stood by his results and that J&J had not called him as a witness. Id., at 15.

The plaintiff contends that the J&J defendants opened the door to this line of questioning and to the use of the 2018 Reuters article as rebuttal. "[N]otwithstanding that such evidence may be otherwise inadmissible, if a party opens the door, the court may, in its discretion, permit a party on rebuttal to offer evidence on the same subject if it is responsive to the previously admitted evidence. The purpose is to prevent one party from making unfair use of certain evidence to that party's advantage, thereby creating a misleading impression to the fact finder." *State v. Robles*, 103 Conn. App. 383, 395, 930 A.2d 27 (2007). The plaintiff contends that the J&J defendants attempted to use articles, including newspaper articles, to mislead the jury into believing that Dr. Langer's findings of the presence of asbestos in the J&J defendants' talc and/or finished products had been withdrawn or confirmed to be wrong. The plaintiff argues that this was obviously a tactic by the J&J defendants to suggest to the jury that there had been no positive findings of asbestos in its [*105] talc or in its baby powder. Because the J&J defendants opened the door with this line of questioning during their cross-examination of Dr. Haber, the plaintiff properly was permitted to rebut the J&J defendants' position and did so using the 2018 Reuters newspaper article. Also, contrary to argument from the J&J defendants, it is nothing more than speculation that they jury would and/or could have assumed the dates of Dr. Langer's statements or the dates of the article as the plaintiff's counsel was clear about when the article was published. The J&J defendants' motion on this issue is denied.

E

Admission of Corporate Documents Regarding Kenvue, Inc.

The J&J defendants argue that the admission of documents regarding successor defendant Kenvue, Inc., including Kenvue's S-1 (Ex. 63), was improper because the documents are substantially more prejudicial than probative.

The plaintiff alleged, and the jury agreed, that J&J successor liability defendants (Kenvue and Holdco) were successors in interest to Johnson & Johnson Consumer Inc. ("Old JJCI"). The jury determined that Kenvue was a successor in interest pursuant to the product line rule and the mere continuation/continuity of enterprise [*106] rule. See Ex. 4, Verdict Form, Jury Interrogatories, at pg. 2. Kenvue's S-1 and Prospectus were relevant to several of the factors that the plaintiff needed to demonstrate prior to the jury concluding that Kenuve was a successor in interest to Old JJCI.

"Where a successor corporation is a mere continuation of the predecessor corporation, the mere continuation exception to the general rule in effect takes cognizance of what may be called de facto merger, the requirements for de facto merger being: (1) continuation of the enterprise of the seller corporation so that there is a continuity of management, personnel, physical location, assets and general business operations; (2) continuity of shareholders; (3) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; (4) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the ¡ uninterrupted continuation of normal business operations of the seller corporation. . . . Not every one of these indicia must be established, however, but the court should apply more of a balancing test." (Internal quotation marks omitted) [*107] *Peglar & Associates., Inc. v. Professional Indemnity Underwriters Corp.*, supra, Superior Court, Complex Litigation Docket, Docket No. X05-CV-97-0160824-S. "The issues of whether a purchaser is a mere continuation of the selling corporation is a question of fact." *Chamlink Corp. v. Merritt Extruder Corp.*, 96 Conn. App. 183, 187, 899 A.2d 90 (2006).

In addition, Connecticut trial courts have recognized the "product line" exception for product liability claims, which was first adopted in *Ray v. Alad Corp.*, 19 Cal. 3d 22, 34, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). See *Pastorick v. Lyn-Lad Truck Racks, Inc.*, supra, Superior Court, Docket No. CV-96-0562426-S. Under the product line exception, the inquiry is "whether the successor corporation continues to manufacture the product alleged to have caused injury not whether the successor is a continuation of the seller corporation or business." *Sullivan v. A.W. Flint Co.*, supra, Superior Court, Docket No. CV-92-0339263-S. The factors to consider under the product line exception include: "(1) the transferee has acquired substantially all the transferor's assets, leaving no more than a corporate shell (2) the transferee is holding itself out to the general public as a continuation of the transferor by producing the same product line under a similar name (3) the transferee is benefitting from the Goodwill [*108] of the transferor[.]" (Internal citation marks omitted.) Id. The court charged the jury on these factors. Tr. 10/11/24, at 24-25.

The court determined that the factual issues surrounding successor liability were for the jury to resolve. Kenvue's S-1 and Prospectus were proper evidence for the jury to consider in resolving the factual issues surrounding successor liability. The S-1 detailed that the trademarks, trade names, service marks, and property were being licensed to Kenvue from Johnson & Johnson. Johnson & Johnson, as of January 4, 2023, was transferring "the assets and liabilities of the Consumer Health Business" to Kenvue in exchange for the issue of stock to Johnson & Johnson. Kenvue's "global portfolio" consisted of "brands built over the last 135 years" despite Kenvue only being in existence since February 23, 2022, and "generations of consumers" trusted their brands. The exhibits revealed that Kenvue expected to "continue to use the "Johnson's" brand. Kenvue continued to use the same manufacturing services and continued to manufacture the same products. Additionally, the Prospectus specifically identified Kenvue's Executive Officers and detailed how each of those officers [*109] got their start at Johnson & Johnson and were members of the Consumer Health Leadership Team. These exhibits emphasized Kenvue's liabilities and the corporate transactions leading to its creation. The answers to those questions were vital to the jury's determination that Kenvue was a successor in interest to Old JJCI.

Furthermore, these exhibits were not unduly prejudicial such that they should have been excluded. "To be unfairly prejudicial, evidence must be likely to cause a disproportionate emotional response in the jury, thereby threatening to overwhelm its neutrality and rationality to the detriment of the opposing party. . . . A mere adverse effect on the party opposing admission of the evidence is insufficient." *State v. Miguel C.*, 305 Conn. 562, 575-76, 46 A.3d 126 (2012). The Connecticut Supreme Court has acknowledged that all evidence adverse to an opposing party is inherently prejudicial because it is damaging to that party's case. *State v. Sandoval*, 263 Conn. 524, 545, 821 A.2d 247 (2003). "For exclusion, however, the prejudice must be unfair in the sense that it unduly arouses the [jurors'] emotions of prejudice, hostility or sympathy . . . ." Id. Apart from stating that these exhibits "[have] a tendency to

bias the jury," the J&J defendants have failed to demonstrate unfair prejudice such [*110] that the admission of these exhibits entitled them to a new trial. The J&J defendants' motion on this issue is denied.

F

Prohibition on Reading the Plaintiffs Complaint

The J&J defendants argue that the court erred in prohibiting the reading of the plaintiffs complaints at trial because Connecticut law allows them to do so and because, according to the J&J defendants, "Plaintiffs allegations were highly probative of whether Plaintiffs injury was caused by a non-party." See Docket No. 836.00 at 47. Although pleadings are generally admissible as judicial admissions against the party making them, the court "may be justified in deviating from any such admission if unsupported by the underlying facts in evidence." *Dreier v. Upjohn Co.*, 196 Conn. 242, 248, 492 A.2d 164 (1985).

Before trial, the court, *Stevens, J.T.R.*, concluded that Connecticut General Statutes § 52-216a precluded J&J from using the complaints "as evidence that the plaintiffs claims against them were pursued against other parties." See Docket No. 505.10. The J&J defendants argue that the complaints were permissible evidence of alternative causation. For example, the J&J defendants claim that they intended to submit the plaintiffs allegation that he was "further exposed to asbestos and/or asbestos-containing products, materials [*111] and/or equipment . . . from approximately the 1960s to the present, through his personal use of art and craft supplies as an artist and sculptor." See Docket No. 559.00 at 3 (quoting Docket No. 433.00 [Seventh Amended Complaint] at ¶ 5). The court *(Stevens, J.T.R.)* reasoned that it was appropriate to exclude the plaintiffs complaint, preventing the jury from speculating about the absence of other entities formerly named as defendants in this case and alternate causation theories for which no proof was offered at trial. Moreover, there is no indication, outside of the J&J defendants' conclusory allegations, that the result would have been different had the J&J defendants been permitted to read from the plaintiffs complaints. As mentioned, the plaintiff did not allege that the J&J defendants were solely responsible for his mesothelioma and the J&J defendants could have introduced evidence regarding alternative exposures to asbestos—but they did not do so. The J&J defendants are not entitled to a new trial and their motion on this issue is denied.

G

Demand for New Trial Based on Plaintiffs Statement That He is Cancer-Free

"A new trial will be granted on the basis of newly discovered evidence [*112] only if [the moving party demonstrates]: (1) the newly discovered evidence is in fact newly discovered such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not cumulative; and (4) it is likely to produce a different result in a new trial." *Ginsburg v. Cadle Co.*, 61 Conn. App. 388, 392, 764 A.2d 210, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001).

The J&J defendants contend that a new trial is warranted based on a claim that newly discovered evidence shows that the plaintiff claims to be cancer-free, contrary to the evidence the plaintiff presented at trial. See Conn. Gen. Stat. § 52-270 (a) (a new trial may be ordered based on "the discovery of new evidence."). At trial, the evidence established that the plaintiff has a terminal illness. Dr. Haber testified that he expected the plaintiff to survive two years or less. Ex. 1, 9/12/2024 Tr. Part 4 at 13-14. When the plaintiff took the stand on October 4, he told the jury that his last scan was "concerning," and he was waiting to hear more. Ex. 36, 10/04/2024 Tr. Part 3 at 43. His counsel emphasized this point in closing: though Evan Plotkin "appears healthy," he "is dying. He knows that he's dying." Ex. 46, 10/11/2024 Tr. Part 1 at 37-38. However, in an interview for a newspaper [*113] article published two weeks later—two days after the verdict—the plaintiff apparently told the reporter that "his most recent scan"—possibly the same scan—"was cancer free" and that he "feel[s] very strong." See Ex. 65.

The J&J defendants have failed to carry their burden of demonstrating that the plaintiffs post-trial characterization of his latest scan qualifies as newly discovered evidence. In fact, his most recent pre-trial scan was thoroughly discussed by Dr. Haber during his three-day testimony at trial. Dr. Haber testified that he reviewed the plaintiffs medical records from July 15, 2024, which included an MRI done on July 11, 2024, approximately six weeks before

trial began. Tr. 9/12/24 1:59-3:30, at 17-18. According to Dr. Haber, the plaintiffs recent scans do not show the absence of disease. Id., at 18. Dr. Haber went on to explain further:

> A. All right. So, there are a number of abnormalities that are discussed in this MRI. So, he still has deposits - it's unchanged; so, they're stable — deposits along the right peritoneal liver edge. So, that peritoneum, right by the liver, still has disease that is present, cancer. There's peritoneal thickening that is still present. There [*114] was a trace amount of ascites in a prior MRI. The ascites had disappeared. So, the ascites has come back, but it's at only a trace amount. And this was in the abdomen and in the pelvis. He had a lesion along the right liver edge that was increased in size compared to the prior study. And then, there was a new area in the left kidney, the left renal pelvis. That's part of the kidney. So, there was a new finding that they saw. Four millimeters, so that's — it's small, but there's a small area that was new in the left kidney.

Id., at 18-19. When asked if the statement on the plaintiffs records that there is "no evidence of disease" was true, Dr. Haber responded:

> A. No. I mean, in the spirit - we talk about that it's—you know, things are stable. So, he's not getting — it's not blossoming out where they need to do something about it. They're going to continue surveillance. But there still is visible abnormality by MRI.

Id., at 19.

The court does not consider the plaintiffs public statement concerning his interpretation of his recent MRI scan to constitute new evidence. To begin, the plaintiff is not a medical doctor trained in the interpretation of radiology studies. His subjective and possibly [*115] uninformed belief about the scan is of little weight in determining whether he is cured of what the evidence established is a terminal illness, namely, peritoneal mesothelioma. Moreover, the J&J defendants had access to the plaintiffs medical records, and, along with the jury, they were present for Dr. Haber's testimony concerning the plaintiffs most recent scans. There is no evidence—and the J&J defendants have presented none—that they were prohibited or prevented from asking any medical expert testifying at trial about the meaning of the plaintiffs scans and, they made no effort to rebut Dr. Haber's testimony that "no evidence of disease" does not mean "cancer free" or cured. The jury heard that there were notations in the plaintiffs records that there was "no evidence of disease" and, nevertheless, found the J&J defendants liable for the development of his mesothelioma. The fact that, after trial, the plaintiff, who is not a physician, stated to a reporter that he "is cancer free" is not a medical diagnosis that conflicts with the evidence at trial and does not mandate a new trial.

The J&J defendants are not entitled to a new trial based on alleged newly discovered evidence because [*116] there really is no newly discovered evidence, and there is insufficient proof that the plaintiffs statements about his condition would have made a difference in the jury's verdict. The J&J defendants' motion on this issue is denied.

H

Plaintiff Attorney Statements During Closing Argument

Finally, the J&J defendants argue that, during his closing argument, the plaintiffs counsel referred in closing to matters not in evidence. Initially, the plaintiff notes that closing arguments are not evidence. See *Kos v. Lawrence + Memorial Hospital*, 334 Conn. 823, 225 A.3d 261 (2020). Also, "[t]he trial court is invested with a large discretion with regard to the arguments of counsel . . ." *Tomczuk v. Alvarez*, 184 Conn. 182, 193, 439 A.2d 935 (1981); see also *State v. Herring*, 210 Conn. 78, 102, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989); *Bartholomew v. Schweizer*, 217 Conn. 671, 678, 587 A.2d 1014 (1991). "While its action is subject to review and control, [the Appellate Court] can interfere only where the discretion was clearly exceeded or abused to the manifest injury of some party. . . . In fact, the court must allow counsel . . . a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel. . . ." (Internal quotation marks omitted.) *Skrzypiec v. Noonan*, 228 Conn. 1, 15-16, 633 A.2d 716 (1993) (quoting *State v. Plaza*, 23 Conn. App. 543, 553, 583 A.2d 925 (1990), cert. denied, 217 Conn. 811, 587 A.2d 153 (1991).

At the time, the court construed the comment at issue as an example [*117] of zealous advocacy and noted that the jury had been instructed in the court's introductory remarks—and would be expressly charged in the court's jury

instructions—that arguments of counsel are not evidence and that the jury must decide the case based solely on the evidence introduced at trial. See *Walker v. Commissioner of Correction*, 230 Conn. App. 108, 129, 328 A.3d 665, cert. denied, 351 Conn. 910, 331 A.3d 158 (2025) ("[The trial] court instructed the jury that it could only consider evidence admitted into evidence at trial. . . . The jury is presumed to follow court's instructions."); *State v. Pjura*, 200 Conn. App. 802, 816-17, 240 A.3d 772, cert. denied, 335 Conn. 977, 241 A.3d 131 (2020) (jury is presumed to follow judge's instructions that questions, objections, arguments and statements are not evidence).

In fact, once the J&J defendants voiced their objection to the statement, the plaintiffs counsel moved on and discussed evidence which had been presented to the jury—evidence that supported the plaintiffs claims against the J&J defendants. Moreover, the comment was isolated and not so outrageous that it prejudiced the jury and, finally, any possible harm to the J&J defendants was eliminated by the court's clear and emphatic charge to the jury that its verdict was to be based solely on the evidence and not on the remarks of counsel. See Tr. 10/11/24, at 11:9-11; 12:8-12. [*118] The J&J defendants' motion on this issue is denied.

For all the foregoing reasons, the motion to set aside the verdict and for a new trial (Docket No. 836.00) is denied and the plaintiffs objection thereto (Docket No. 861.00) is sustained.

/s/ Reed

REED, J.
