IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-TS-01465

PHILLIPS 66 COMPANY et al. — APPELLANTS

VS.

TROY LOFTON — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Defendant/Appellant, Chevron Phillips Chemical Company LP, successor-in-interest to ConocoPhillips Company f/k/a Phillips Petroleum Company and Phillips 66 Company formerly d/b/a Drilling Specialties Company ("CPChem").

2. Mr. Troy Lofton – Plaintiff/Appellee

3. Mr. Gregory N. Jones – Counsel for Mr. Lofton

4. Mr. J. Robert Sullivan – Counsel for Mr. Lofton

5. Mr. S. Robert Hammond, Jr. – Counsel for Mr. Lofton

6. Mr. J. Jeffrey Trotter – Counsel for CPChem

7. Mr. Holmes S. Adams – Counsel for CPChem

8. Mr. Alex E. Cosculluela – Counsel for CPChem

9. Mr. Bernard H. Booth IV – Counsel for CPChem

10. Mr. Terry L. Caves – Counsel for CPChem

11. Honorable Billy Joe Landrum – Circuit Court Judge, 18th Judicial District

THIS the 21st day of June, 2011.

J. Jeffrey Trotter
Attorney for Appellant

STATEMENT REGARDING ORAL ARGUMENT

CPChem submits oral argument is not necessary if the Court applies *Lincoln Electric Co. v. McLemore*, 54 So.3d 833 (Miss. 2010), and *Angle v. Koppers, Inc.*, 42 So.3d 1 (Miss. 2010). Plaintiff Lofton knew, or reasonably should have known, about his alleged injury no later than 1996 but did not file suit until 2004. The statute of limitations bars his claim. If the Court wishes to examine the case further, oral argument would be helpful because of the important questions of Mississippi product liability law and procedure this case presents.

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STATEMENT OF THE ISSUES

1. The Court should reverse and render judgment in favor of CPChem because Lofton's claim accrued no later than 1996 when he knew, or reasonably should have known, of his injury. Lofton did not file suit until May 10, 2004. His claims are time-barred by the three-year statute of limitations. *Lincoln Elec. Co. v. McLemore*, 54 So.3d 833 (Miss. 2010); *Angle v. Koppers, Inc.*, 42 So.3d 1 (Miss. 2010).

2. The Court should reverse and render judgment in favor of CPChem on the design defect claim for any of the following reasons:

   A. The Mississippi Product Liability Act's ("MPLA") inherent characteristic defense protects CPChem from liability. Miss. Code Ann. §11-1-63(b). Asbestos was the inherent characteristic of the product that allegedly caused injury. Asbestos could not be eliminated from the product without substantially compromising the product's usefulness or desirability, and the hazardous nature of asbestos was common knowledge in the community.

   B. Lofton did not prove the product failed to function as expected. Miss. Code Ann. §11-1-63(f)(ii). The failure to function as expected element requires more than product use coupled with injury.

   C. Lofton did not prove a feasible design alternative for Flosal. Miss. Code Ann. §11-1-63(f)(ii). Non-asbestos viscosifiers are not alternative designs for Flosal. They are different products.

   D. Lofton failed to prove the frequency, regularity and proximity of his exposure to the product. *Monsanto Co. v. Hall*, 912 So.2d 134 (Miss. 2005); *Gorman-Rupp Company v. Hall*, 908 So.2d 749 (Miss. 2005).

3. The Court should reverse and render judgment in favor of CPChem on the negligent infliction of emotional distress claim because the claim is subsumed by the MPLA. If not subsumed by the MPLA, Lofton's testimony that he worried about who will take care of his wife when he dies and about developing cancer is legally insufficient. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736 (Miss. 1999); *Morrison v. Means*, 680 So.2d 803 (Miss. 1996).

4. Alternatively, the Court should order a new trial for any of the following reasons:

   A. The circuit court abused its discretion when it denied a change of venue where the evidence of bias in Jones County was greater than that in *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004).

   B. The circuit court abused its discretion when it admitted testimony of Lofton's industrial hygiene witness Kenneth Cohen. Cohen's testimony from an unrelated

trial should not have been read to the jury. Cohen's opinion that a worker's exposure to asbestos is substantial if it is one fiber above ambient has no reliable foundation in science; he never explained his methodology; and he is not qualified by education or experience as an expert industrial hygienist. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003); Mississippi Rule of Evidence 702.

C. The circuit court permitted Lofton's counsel to "testify" about irrelevant and unfairly prejudicial drilling records (Exhibit 950) under the guise of cross-examining CPChem's expert pulmonologist when (1) the drilling records were outside the scope of the pulmonologist's expertise and not relevant to his medical opinions, and (2) the records did not correspond to any well where Lofton worked.

D. The jury's failure to allocate liability against responsible third parties is against the overwhelming weight of the evidence and demonstrates bias, prejudice, and passion. The jury ignored undisputed evidence that Lofton's employers were required under OSHA to provide him with a safe workplace, yet failed even to provide him respiratory protection while he worked with asbestos mud additives. And, despite Lofton's testimony of simultaneous use of multiple asbestos products and his failure to differentiate his alleged exposures, the jury allocated all liability against CPChem, the only trial defendant.

5. In the further alternative, if the Court does not reverse and render or grant a new trial, substantial remittitur of the judgment is warranted. The jury's allocation of all liability against CPChem and the $15.2 million verdict evidences the jury's bias, prejudice, and passion. The allocation of liability and the damages awarded are not supported by credible evidence.

STANDARDS OF REVIEW

Reverse and Render

The Court's decision to reverse and render is governed by the following standard:

> [T]his Court will consider the evidence in light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render.

Coho Res., Inc. v. Chapman, 913 So.2d 899, 904 (Miss. 2005) (citations omitted).

New Trial

The Court's decision to grant a new trial is governed by the following standard:

> A new trial may be granted where the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice.

Coho Res., Inc., 913 So.2d at 908.

Change of Venue

Abuse of discretion governs the Court's review of denial of CPChem's motion for change of venue. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004).

Remittitur

Miss. Code Ann. §11-1-55 authorizes remittitur where the Court finds the jury's award of damages is excessive as the result of bias, prejudice, or passion. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985).

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Lofton alleges he suffers asbestosis resulting from exposure to various asbestos drilling mud viscosifiers. Asbestosis is defined as diffuse pulmonary fibrosis caused by the inhalation of excessive amounts of asbestos fibers; although increasingly rare, asbestosis typically occurs in individuals with prolonged and heavy exposure to asbestos. Roggli, *et al.*, *Pathology of Asbestosis—An Update of the Diagnostic Criteria*, Arch. Pathol. *Lab. Med.*, Vol. 134, p. 462, 467 (March 2010).

This case began as one of twenty-three separate "placeholder" lawsuits involving 825 individual asbestosis claimants, all represented by the same lawyers. The claimants, including

Lofton, alleged they were exposed to asbestos drilling mud additives they worked with or around on drilling rigs from the mid-1960s through the mid-1980s. CPChem's predecessor, Drilling Specialties Company ("DSC"), distributed its asbestos viscosifier, Flosal, from 1963 through 1984. Defendants Union Carbide Corporation ("UCC") and Montello continued distribution of their asbestos viscosifiers through 1985.

On May 19, 2004, the "placeholder" case styled *Howard Lambert, et al. v. Phillips 66 Co., et al., Civil* Action No. 2004-85-CV5 was filed in Jones County, Mississippi. The circuit court severed the misjoined claims of the *Lambert* claimants, including Lofton's claim. On March 8, 2006, Lofton filed his individual complaint in Jones County, Mississippi. R.181-188.[1]

Before trial, all other defendants, including UCC and Montello, who marketed and sold their own asbestos viscosifiers, Visbestos and SuperVisbestos, settled with Lofton and were dismissed.

The trial took place from March 29, 2010, through April 8, 2010, with CPChem as the sole trial defendant. Lofton's case proceeded on two product liability theories (design defect and inadequate warning), as well as claims for intentional and negligent infliction of emotional distress. The jury found for Lofton on his design defect and negligent infliction of emotional distress claims. The jury awarded Lofton economic damages of $200,000 and *non*-economic damages of $15 million, for total damages of $15.2 million. The jury assessed all liability against CPChem. RE 4, 10350-10355.

The circuit court denied CPChem's pre-trial evidentiary and dispositive motions. The circuit court also denied CPChem's motions to change venue. During trial, the circuit court

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[1] Citations to the Record are designated "R.__." Citations to the Record Excerpts are designated "RE__." Citations to the trial transcript are designated "Tr.__."

denied CPChem's motions for directed verdict and overruled numerous evidentiary objections. After trial, the circuit court denied CPChem's motions for judgment notwithstanding the verdict and for new trial. CPChem timely filed this appeal.

II. Statement of Facts

A. Drilling Specialties sold asbestos as a drilling mud additive named Flosal.

Flosal is the product at issue. Flosal was a drilling mud additive composed of 5-15% water (for binding purposes) and 85-95% chrysotile asbestos. Flosal was a "viscosifier" whose function was to increase the viscosity of, or thicken, drilling mud fluids. Tr. 918. Flosal was a specialty-use product, used on only 5-10% of wells drilled in Mississippi. Ex. 2003, 242:10-243:4. Every witness testified Flosal was an excellent viscosifier that increased the viscosity of drilling mud. *See* Section I.C below.

DSC distributed Flosal from November 1963 through August 1984 to drilling mud service companies. These companies were sophisticated intermediaries who, in turn, re-sold Flosal, other mud products, and additives to well operators or drilling contractors and then daily directed the products' use on a rig-by-rig basis.[2] Tr. 354-361; R. 2530.

"Drilling mud" refers to the fluids used on a drilling rig to lift cuttings—the dirt, rock or shale drilled—from the bottom of the well bore to the surface. Drilling mud is pumped down the well bore, through the drill pipe, through the drill bit, and back to the surface, carrying the cuttings to the surface. The drilling mud is then routed through equipment on the surface where

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[2] During this time, DSC rebranded Flosal for sale by third party drilling mud service companies under the trade names Visquick, Shurlift and Imcobest. For purposes of this brief, these products are referred to collectively as "Flosal." UCC mined, milled and packaged, and Montello distributed, competing asbestos viscosifiers under the trade names Visbestos and SuperVisbestos, as well as others, from which Lofton also claimed exposure to asbestos.

cuttings are removed, and the mud is re-circulated to the bottom of the well bore. Typically, fresh or salt water is the primary drilling fluid used when drilling is commenced. After reaching a certain depth, the drilling crew "muds up," by adding various bulk products and chemicals to the water to conform the drilling mud to the prescribed drilling mud program adopted by the well operator. Depending on the characteristics sought, drilling mud additives are added during different stages of the drilling process. Drilling mud engineers who work for drilling mud service companies create the prescribed drilling mud program, or "recipe," for the mud on a particular well and specify the general-use and specialty-use additives to be used. Tr. 245-247; 356-359.

Mud additives include hundreds of material and chemicals, such as, to name a few, clay, bentonite, attapulgite, gel, glycol, cellulose polymers, lime, paper, walnut shells, pecan hulls, starch, caustic soda, and barite. Ex. 2003, 165, 201, 239-240. Asbestos was one specialty-use mud additive—used as a viscosifier or thickener. Several different asbestos viscosifiers were marketed during the period from the mid-1960s through the mid-1980s, including, for example, Visbestos, SuperVisbestos, IMCO Shurlift, IMCO Superbest, Visquick and Flosal. Tr. 367-372.

B. Lofton knew, or reasonably should have known, of his injury by 1996 but did not file suit until 2004.

Lofton knew throughout the 1960s, 1970s, and 1980s he was working with asbestos. RE 3, 372:3-19. Despite printed warnings on the Flosal bags, Lofton testified it was not until the 1980s he learned excessive exposure to asbestos could cause serious injury. RE 3, 306:15–307:1; 307:10-15; 373:15-29.

Lofton's doctors document his alleged lung injury as early as 1983. As detailed at pp.11-15 below, by the mid-1990s, Lofton was complaining to his doctors of symptoms associated with asbestosis—*i.e.,* shortness of breath and "smothering." This was a decade after he knew asbestos

exposure could injure his lungs and almost a decade before he filed his lawsuit. Lofton's doctors documented his injury variously as pulmonary interstitial stranding, scarring, pleural and parenchymal changes, and fibrosis—all recognized and unmistakable markers of asbestos-related injury.

C. Lofton's product identification and exposure testimony is too vague to establish liability against CPChem.

Lofton worked for various drilling contractors from 1964 to 2006 as a floorhand and a motorman. Lofton testified he had various responsibilities as a floorhand—mixing drilling mud, maintaining the mud pumps, and relieving the motorman. Tr. 273-274; 248; 405. As a motorman, Lofton was responsible for maintaining all of the motors on the drilling rig. Tr. 350:19-25.

Lofton claims he was injured by exposure to asbestos viscosifiers while working as a floorhand and motorman. During his deposition, however, Lofton testified that as a motorman, his primary occupation after 1975, he mixed drilling mud "very seldom." When questioned whether he could remember which of the nine different asbestos viscosifiers he worked with between 1964 and 1983, at which rig site, or in which field, Lofton admitted he could not:

> No sir. It's been - 20, 30 years ago, and I like I say, it's - it was mandatory that we [had] one of them on there. I can't tell you which one of them was on there. I can't tell you what job it was on. It's been a long time.

R. 7192, 64 (emphasis added).

At trial, Lofton's testimony changed but was no less deficient. Although he testified he used drilling mud additives, including Flosal, sometime during 1964 to 1967 and again during the 1970s, he failed to specify which products he used on which locations, or how often or how much he may have used on any location. Instead, Lofton testified generally that he recalled using

various asbestos viscosifiers while working for different employers. Most often, when Lofton testified about using asbestos viscosifiers, he testified to his simultaneous use of Flosal, Visbestos (mined, milled and packaged by UCC and distributed by Montello) and other asbestos viscosifiers. At other times, Lofton did not identify any particular product, claiming only that he was exposed to unspecified asbestos drilling mud additives.

Additionally, in an attempt to bolster his alleged exposure, Lofton testified at trial he mixed drilling mud while working as a motorman but that he had "fibbed" during his deposition when he testified motormen "very seldom" mix mud. Tr. 353:5–354:8. ("Q. So you were wrong? A. I fibbed."). Although his lawyers enrolled over 700 other former oilfield workers as claimants through their asbestos screenings at Jackson and Hattiesburg, Mississippi, motels, not a single co-worker or any other witness corroborated Lofton's claims he was exposed to asbestos from Flosal or any other asbestos drilling mud additive.

SUMMARY OF THE ARGUMENT

The Court should reverse and render judgment in favor of CPChem. Lofton's claims accrued by 1996 when he knew, or reasonably should have known, of his injury. He did not file suit until May 10, 2004. Consequently, the three-year statute of limitations bars his claim. Miss. Code Ann. §15-1-49; *Lincoln Electric Co. v. McLemore*, 54 So.3d 833 (Miss. 2010); *Angle v. Koppers, Inc.*, 42 So.3d 1 (Miss. 2010). *See* Section I.A below.

Lofton's design defect claim fails for several reasons. The MPLA's inherent characteristic defense protects CPChem from liability because the design defect alleged is the presence of asbestos in Flosal. This claim fails because asbestos was the inherent characteristic of Flosal (Flosal was 85-95% asbestos, the remainder water), asbestos could not be eliminated from Flosal without substantially compromising the product's usefulness or desirability, and the

hazardous potential of asbestos was common knowledge in the community. Miss. Code Ann. §11-1-63(b). *See* Section I.B below. Lofton's design defect claim also fails because he did not prove Flosal failed to function as expected. Miss. Code Ann. §11-1-63(f)(ii). *See* Section I.C below. And Lofton failed to prove a feasible alternative design for Flosal. *See* Section I.D below.

Lofton failed to prove the frequency, regularity and proximity of his exposure to asbestos from Flosal. *Monsanto Co. v. Hall*, 912 So.2d 134 (Miss. 2005); *Gorman-Rupp Company v. Hall*, 908 So.2d 749 (Miss. 2005). *See* Section I.E below.

Lofton failed to prove negligent infliction of emotional distress. CPChem submits this cause of action is subsumed by the MPLA. If not subsumed by the MPLA, Lofton's evidence that he worried about who will take care of his wife after his death and about developing cancer from asbestos is factually and legally insufficient. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736 (Miss. 1999); *Morrison v. Means*, 680 So.2d 803(Miss. 1996). *See* Section I.F below.

In the alternative, this case should be remanded for new trial because CPChem did not receive a fair trial by an impartial jury. The circuit court abused its discretion by denying CPChem's motions for change of venue where the evidence of bias in Jones County exceeds that presented in *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004). *See* Section II.A below.

The circuit court abused its discretion during jury voir dire, qualification, and selection, exacerbating the pre-existing bias and prejudice of the venue. *See* Section II.B below.

The circuit court abused its discretion by permitting Lofton's counsel to read testimony from Lofton's expert, Kenneth Cohen, from an unrelated trial. Cohen's opinion—that a worker's exposure to asbestos is substantial if it is one fiber above ambient levels—has no reliable basis,

Cohen never explained his methodology, and Cohen is not qualified by education or experience as an expert in industrial hygiene. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003); Mississippi Rule of Evidence 702. *See* Section II.C below.

The circuit court abused its discretion by permitting Lofton's counsel to "testify" from irrelevant and prejudicial drilling records (Plaintiff Ex. 950) under the guise of cross-examining CPChem's expert pulmonologist. The drilling records were beyond the scope of the pulmonologist's expertise and not relevant to his medical opinions, and the drilling records do not correspond to any drill site where Lofton worked. *See* Section II.D below

CPChem denies Lofton was injured by exposure to asbestos from Flosal. However, because the jury found Lofton was injured by exposure to asbestos from drilling mud additives, the jury erroneously failed to allocate liability against responsible third parties, including Lofton's employers, drilling mud service companies and well operators (for failing to provide him respiratory protection and necessary instruction or training) and the manufacturers and sellers of asbestos viscosifiers Lofton claimed caused him injury (including JM, UCC, and Montello). There are myriad responsible third parties, but the jury illogically elected to assess all liability against the only trial defendant CPChem. *See* Section II.E below.

If the Court does not reverse and render or, in the alternative, grant a new trial, CPChem requests remittitur because the $15 million verdict for *non*-economic damages—which is 75 times Lofton's stipulated economic damages—is against the overwhelming weight of the evidence, shocks the conscience, and further demonstrates the jury's bias, prejudice, and passion. *See* Section III below.

ARGUMENT

I. The judgment should be reversed and rendered.

A. Lofton's claims are time-barred because he knew, or reasonably should have known, of his injury by 1996 but did not file suit until 2004.

Lofton's claims accrued, and the three-year limitation began to run, when he discovered, or by reasonable diligence should have discovered, his injury. Miss. Code Ann. §15-1-49(2); *Lincoln Electric Co. v. McLemore,* 54 So.3d 833 (Miss. 2010) (cause of action accrued at time of injury; knowledge of cause is irrelevant); *Angle v. Koppers, Inc.*, 42 So.3d 1, 5 (Miss. 2010) ("cause of action accrued upon discovery of the injury, not discovery of the injury and its cause."); *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 51 (Miss. 2005) (statute of limitations began to run when claimant knew she had been injured by exposure to paint fumes, not a later date when she had medical certainty that paint fumes caused her neurological problems). As this Court held in *Lincoln Electric*, a claim accrues under §15-1-49 upon the claimant's discovery of the injury, not upon the claimant's discovery of the injury's cause. 54 So.3d at 836 (citing *Koppers,* 42 So.3d at 5.)

The record demonstrates Lofton discovered, or reasonably should have discovered, his lung injury no later than 1996.[3] Lofton began complaining to his doctors in the 1990s about the

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[3] Although unnecessary for the accrual of his claim, Lofton understood the causative relationship between asbestos exposure and lung injury many years before he learned of his injury in 1996. Lofton admitted he knew the viscosifiers he used in the 1960s, 1970s, and 1980s were asbestos. RE 3, 372:3-19. He further testified he learned in the 1980s asbestos was "dangerous" and exposure to asbestos could cause serious injury and increased risk of lung cancer. RE 3, 373:15-29; RE 3, 306:15-307:1; RE 3, 373:23-29; RE 3, 307:10-15.

In addition, the Flosal bags which Lofton claims he handled included printed warnings. Beginning in 1968, Flosal's packaging contained the following warning: "**CAUTION** THIS BAG CONTAINS CHRYSOTILE ASBESTOS FIBER. PERSONS EXPOSED TO THIS MATERIAL SHOULD USE ADEQUATE PROTECTIVE DEVICES AS INHALATION OF THIS MATERIAL OVER LONG PERIODS MAY BE HARMFUL." Upon OSHA's adoption in 1972, Flosal's packaging was amended to

characteristic symptoms of asbestosis—a decade after he admittedly knew asbestos could injure his lungs and a decade before he filed his lawsuit.[4]

In June 1995, Lofton sought medical attention from South Central Regional Medical Center where a CT scan demonstrates "above the diaphragm there is some chronic appearing interstitial stranding at the lung bases." Ex. 1, CPChem00515. His pulmonologist, Dr. Steven Stogner, testified asbestos exposure caused this interstitial stranding. Tr. 794:9 – 795:23. Dr. Stogner also testified Lofton was suffering from pulmonary fibrosis or scarring in his lungs as early as 1991. Tr. 801:14-20. Asbestosis, the signature disease of excessive exposure to asbestos, is interstitial pulmonary fibrosis.

A few months later, during November 1995, Lofton complained to his doctor that if he slept a couple of hours, "he wakes up smothering." Ex. 1, CPChem 00742 (11/16/1995). His lung injury was again confirmed by chest x-rays dated November 26, 1995, showing "generalized . . . fibrosis . . . evident[,] as noted[,] on old studies." Ex. 1, CPChem00751.

Two months later, during January 1996, Lofton again sought medical attention for shortness of breath. Ex. 1, CPChem 00169 and CPChem00252. His symptoms were confirmed by x-rays at Jasper General Hospital later that same year demonstrating "pleural and

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set out the OSHA-mandated warning: "**CAUTION** CONTAINS ASBESTOS FIBER. AVOID CREATING DUST. BREATHING ASBESTOS DUST MAY CAUSE SERIOUS BODILY INJURY." R. 2669-2670.

Lofton knew, decades before he filed suit, the causative relationship between asbestos exposure and lung injury because he knew: (1) he had worked with asbestos over the course of twenty years, and (2) asbestos exposure could cause serious lung injury.

[4] Lofton's medical records document lung injury as far back as 1983. In May 1983, Lofton presented at Jasper General Hospital with pneumonia and bronchial secretions obstructing his airway. His chest x-ray of May 5, 1983, demonstrated "some old scarring in the apices [of the lungs], seen on prior studies." Ex. 1, CPChem00721. Lung scarring or fibrosis is the telltale radiographic marker of asbestos-related lung injury. Tr. 1095:10-14.

parenchymal changes" (Ex. 1, CPChem00674) and "interstitial pulmonary fibrosis and linear scarring" (Ex. 1, CPChem00196). Pleural and parenchymal changes are radiographic markers of asbestos-related injury. Tr. 1094.

In November 1996, Lofton sought medical attention from Hattiesburg Clinic where another chest x-ray showed "extensive areas of interstitial pulmonary fibrosis and linear scarring." Ex. 1, CPChem00196.

In addition to evidence of his shortness of breath, his reports of "smothering," his serial chest x-rays and the findings and reports by treating physicians and radiologists, perhaps the most telling evidence Lofton's claims are time-barred came from Dr. Stogner, who testified Lofton suffered asbestos-related injury before 1996. Dr. Stogner explained Lofton also suffers from atrial fibrillation—an irregular heartbeat. Doctors at both Forrest General Hospital and Hattiesburg Clinic treated Lofton's atrial fibrillation with a medication, Cordarone®, which is known to cause pulmonary fibrosis. Although Lofton's treatment included a decade-long course of Cordarone®, Dr. Stogner testified Cordarone® could not have caused Lofton's pulmonary fibrosis because Lofton's 1995 CT scan demonstrated conclusively Lofton suffered pulmonary fibrosis before he began the course of Cordarone® in January 1996. Tr. 789:27 – 790:2; 791:11-20; 801:14-24. That is, to avoid any implication Lofton's pulmonary fibrosis was caused by his extraordinary ten-year course of Cordarone®, Dr. Stogner testified Lofton's *pre*-Cordarone® 1995 CT scan proved Lofton already had asbestosis in 1995. Tr. 794-795.

Dr. Stogner also testified about his initial consultation with Lofton on September 8, 2003, when Lofton furnished a medical history. Dr. Stogner documented Lofton "had been told that he [Lofton] . . . has been known to have scarring in the lungs. As I [Dr. Stogner] review old film

reports there is mention of this fibrotic process, as far back as 1996." Ex. 1, CPChem 00154-00156.

The testimony of Lofton's retained medical experts further demonstrates his claims are time-barred. Dr. Holstein, Lofton's causation expert, admitted Lofton suffered from pulmonary fibrosis as far back as 1995:

> Q: My understanding, Doctor Holstein, is from the medical records that you have, the first evidence you have of fibrosis in Mr. Lofton's chest is 1995?
> A: Yes, sir, that's correct.

Tr. 738:2-6 (emphasis added).

Dr. Arnold Brody, another of Lofton's retained medical experts, agreed that "going back all the way to the '90s" Lofton had lung injury evidenced by CT scans, x-rays, and Lofton's own "complaints of pulmonary problems." Tr. 591:8-14 ("we were seeing CT scans and chest x-rays and complaints of pulmonary problems going back all the way to the '90s.").

Even with all reasonable inferences in his favor, Lofton knew, or reasonably should have known, of his lung injury no later than 1996. Moreover, even assuming for the sake of argument Lofton's claims did not accrue by 1996, the record demonstrates that only two years later, by 1998, Lofton had lost thirty-one pounds, suffered from "weak spells," and complained of "shortness of breath[,] chest discomfort" and fatigue. Ex. 1, CPChem00244 and CPChem00160. With any diligence, Lofton could not have ignored his significant weight loss and the shortness of breath that continued through 1998 and beyond. Even assuming Lofton's claim did not accrue until 1998, Mississippi law afforded him three additional years, until 2001, to file suit. Because Lofton did not file suit until 2004, his claims are time-barred, and the Court should reverse and render judgment in CPChem's favor.

B. The MPLA's inherent characteristic defense protects CPChem from liability.

Lofton cannot prevail on his design defect claim because he does not identify a specific, cognizable defect that is not an inherent characteristic of Flosal. *See Coleman v. Danek Med.*, 43 F. Supp. 2d 637 (S.D. Miss. 1999); Miss. Code Ann. §11-1-63(b) (Supp. 2008). Where the alleged design defect is an inherent characteristic of the product, the MPLA protects defendants from liability:

> a product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

Miss. Code Ann. §11-1-63(b)(Supp. 2008).[5]

The inherent characteristic defense[6] is satisfied here. Lofton alleges injury from exposure to asbestos from Flosal. R. 4350. Flosal was composed of 85-95% chrysotile asbestos; the balance was water. Apart from water, asbestos was the only constituent of Flosal. Lofton's petroleum engineer, Edward Ziegler, admitted removal of asbestos from Flosal would leave only an empty bag. R. 4010, 237-38 ("there would be nothing in the bag" and, not surprisingly, that

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[5] Miss. Code Ann. § 11-1-63(b) incorporates the principles of § 402A, Restatement (Second) of Torts. *Lane v. R.J. Reynolds Tobacco Company*, 853 So.2d 1144, 1148 (Miss. 2003) (citing *Sperry-New Holland v. Prestage*, 617 So.2d 248, 254 (Miss. 1993)). Tobacco, for example, is an inherent characteristic of cigarettes, and the inherent characteristic defense is available in products liability actions against tobacco companies for their cigarettes. *R. J. Reynolds Tobacco Company v. King*, 921 So.2d 268, 272 (Miss. 2005) (limiting the holding of *Lane v. R. J. Reynolds Tobacco Co.*)

[6] In *King*, 921 So.2d at 273, this Court noted that to prevail on an inherent characteristic defense, "Some of the questions that must be answered . . .include: (1) whether the plaintiff was harmed; (2) if harmed, was such harm caused by an inherent characteristic of the product; (3) if so, whether the inherent characteristic is a generic aspect of the product; (4) if generic, could the inherent characteristic have been eliminated without substantially compromising the product's usefulness or desirability; and (5) whether the inherent characteristic is recognized by the ordinary person with the ordinary knowledge common to the community."

"[i]f you want to [sell] a viscosifier you have to put something in the bag."). Asbestos, a potentially hazardous mineral, was not only an inherent characteristic and generic aspect of Flosal, Flosal was asbestos. Without asbestos, there would have been no Flosal product. Lofton's complaint satisfies the first element—"the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product."

The next inquiry is whether asbestos could have been "eliminated without substantially compromising the product's usefulness or desirability." Ziegler provides the answer—the removal of asbestos from Flosal would leave only an empty bag. An empty bag cannot function as a viscosifier and would have impeded the "utility, usefulness, practicality or desirability" of Flosal.

The last inquiry is "whether the inherent characteristic is recognized by the ordinary person with the ordinary knowledge common to the community." At trial, Lofton's retained experts addressed this issue. Dr. Arnold Brody testified "the world was generally aware" that asbestos was toxic by 1963:

> Q. Tell me . . . , in 1963 whether or not the world was generally aware as to whether or not chrysotile asbestos was or was not toxic.
> A. Oh, it was toxic. It was known it was toxic by that time, certainly.

Tr. 535:19-23.

Dr. Ned Holstein testified similarly. Tr. 740-746. Dr. Holstein explained that by 1964 "[t]here were hundreds—by that time there were hundreds of articles on the health effects of asbestos in medical publications. There also had been stories in major newspapers, in Newsweek magazine, to a certain extent on television, and also in books that were written for people to have in their homes to be home medical advisers." Tr. 746:13-20.

The Wisconsin Supreme Court recently applied the inherent characteristic defense to a design defect claim against manufacturers of white lead carbonate pigment used in paint. *Godoy v. E.I. DuPont de Nemours & Co.*, 768 N.W.2d 674 (Wis. 2009). The claimants alleged white lead carbonate pigment was defective because it contained lead, just as Lofton alleges asbestos viscosifiers are defective because they contained asbestos. The *Godoy* court explained lead was a characteristic ingredient of the allegedly defectively designed product, because removing lead from the pigment would make it a totally different product:

> Lead is a characteristic ingredient of white lead carbonate pigment. By definition, white lead carbonate pigment contains lead. Removing lead from white lead carbonate pigment would transform it into a different product. Under these circumstances, we conclude that the design of white lead carbonate pigment is not defective.
>
> An analogy illustrates the distinction. Foil can be made using ingredients other than aluminum -- gold, for example -- but aluminum foil cannot be made without aluminum. The presence of aluminum is characteristic of aluminum foil.

Godoy, 768 N.W.2d at 684. Just as aluminum foil cannot be made without aluminum, and lead pigment cannot be made without lead, an asbestos viscosifier cannot be made without asbestos. The *Godoy* court correctly held "the complaint failed to state claims of defective design. A claim for defective design cannot be maintained here where the presence of lead is the alleged defect in design, and its very presence is a characteristic of the product itself. Without lead, there can be no white lead carbonate pigment." *Id.* at 685.

Lofton's design defect claim fails. The presence of asbestos is the alleged defect in Flosal's "design." Asbestos was an inherent characteristic of Flosal that could not have been eliminated without substantially compromising Flosal's usefulness or desirability. And as demonstrated, without contradiction, by Lofton's retained experts, Dr. Brody and Dr. Holstein,

the potential dangers of asbestos were common knowledge in the community, if not "the world," by the time Lofton entered the oilfield in 1964. The MPLA's inherent characteristic defense applies here, and the Court should render judgment in favor of CPChem on the design defect claim.

C. Lofton did not prove Flosal failed to function as expected.

The MPLA requires Lofton to prove a design defect prevented Flosal from "function[ing] as expected." Miss. Code Ann. § 11-1-63(f)(ii). Flosal was a viscosifier, and its expected function was to increase the viscosity of drilling mud. Ziegler admitted Flosal performed this function—it increased the viscosity of drilling mud, and "it worked well." Tr. 972:10–973:2; *see also* Tr. 891:2-3 ("Flosal worked effectively as a viscosifier."). Lofton himself admitted "[w]e used [F]losal on account of how well it worked in the hole." R. 363:13-14; *see also* Tr. 343:13-15 (asbestos was an "excellent viscosifier."). CPChem's witness, J. C. Floyd, testified Flosal performed as expected. Ex. 2003, 236:1-14. Floyd also described how Flosal, as well as similar competing asbestos viscosifiers, enabled operators and drilling contractors to drill faster and more cost-effectively, without the disadvantages of non-asbestos viscosifiers. *Id.* at 205:24-206:9; 233:6-234:15. That Flosal functioned as expected was never contradicted.

Lofton argued the "failed to function-as-expected" element means function "without causing asbestos-related disease." R. 10603. The plain language of the statute, however, does not permit Lofton to avoid his evidentiary burden through circular reasoning. If, as Lofton argued, the occurrence of injury means a product failed to function as expected, then necessarily every product involved in an injury must have a design defect. That is not the law in Mississippi. To the contrary, Mississippi law recognizes certain products (*e.g.*, chemicals, paints, guns, cigarettes, to name just a few) can be potentially hazardous but not defective. In such instances,

design defect is not the focus of the product liability inquiry. Rather, the inquiry focuses on the manufacturers' duty to warn of the potential hazards of their products. *See* Restatement (Second) of Torts §402A cmts, h., i. (manufacturers have an obligation to warn consumers about the dangers of their products); *Godoy v. E. I. du Pont de Nemours & Co.,* 768 N.W.2d 674 (Wis. 2009).

Flosal's design is not defective because there is no evidence Flosal "failed to function [as a viscosifier] as expected." *Guy v. Crown Equipment Corporation*, 394 F.3d 320, 330-31 (5th Cir. 2004) (affirming summary judgment for defendant in design defect case, the court noted the MPLA "unambiguously precludes recovery on the basis of design defect unless the product failed to function as expected"); *Walters v. Trail King Indus., Inc.*, 2006 U.S. Dist. LEXIS 84448 (S.D. Miss. Nov. 20, 2006) (granting defendant summary judgment because no proof trailer did not function as expected) (citing *Austin v. Will-Burt Co.*, 361 F.3d 862, 874 (5th Cir. 2004) (affirming summary judgment for defendant in part on grounds that crane functioned properly for its intended purpose)); *Wolf v. Stanley Works*, 757 So.2d 316, 321 (Miss. Ct. App. 2000).

D. Lofton did not prove a feasible design alternative for Flosal.

The MPLA also requires Lofton prove "there existed a feasible design alternative that would have to a reasonable probability prevented the harm" "without impairing the utility, usefulness, practicality or desirability of the product to users or consumers." Miss. Code Ann. §11-1-63(f)(ii). *See also, Williams v. Bennett,* 921 So.2d 1269, 1277 (Miss. 2006) (feasible design alternative is "elemental to a claimant's *prima facie* case.") (citing *Clark v. Brass Eagle, Inc.*, 866 So.2d 456 (Miss. 2004) (expert opinion that "unless better design alternative is used, . . . [product] was too dangerous is 'well-short' of the statute")); *Jordan v. Isle of Capri Casinos, Inc.*, 2005 WL 1421758 (S.D. Miss. 2005) (summary judgment granted because claimant offered

no proof design defect existed in escalator, and expert offered no feasible design alternative to escalator). Lofton did not prove this element of his claim.

Instead, Ziegler testified *non-asbestos* viscosifiers available at the same time as Flosal were feasible design alternatives to Flosal. Tr. 892:10-21; 917:3-18. That evidence falls short of the MPLA requirement. A *non-asbestos* viscosifier is not an alternative design for an asbestos viscosifier. It is a different product, as Ziegler acknowledged. ("They're different products; they're alternative products"). R. 3983, 141 (emphasis added). *See Godoy,* 768 N.W.2d at 684 ("By definition, white lead carbonate pigment contains lead. Removing lead from white lead carbonate pigment would transform it into a different product").

The failure of Lofton's argument is evident. Consider the range of available headache medications—aspirin, acetaminophen, and ibuprofen. The MPLA requires a design defect claimant suing Pfizer, the maker of Motrin®, to prove a feasible design alternative that does not impair the usefulness and desirability of its ibuprofen product. Using Lofton's rationale, that claimant would argue the "feasible design alternative" for Motrin® is either (a) Pfizer remove ibuprofen from the product (leaving an empty bottle), or (b) Pfizer sell acetaminophen or aspirin instead of ibuprofen. Either argument fails to satisfy the MPLA's feasible alternative design requirement.[7] *Watkins v. Telsmith, Inc.,* 121 F.3d 984 (5th Cir. 1997) ("An alternative design is by definition a different method of configuring the product.") (emphasis added).

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[7] Because Lofton did not propose an alternative *design* for Flosal, but only alternative *products*, he did not prove the second aspect of this MPLA element, which is to demonstrate a feasible design alternative which would not impair Flosal's "utility, usefulness, practicality or desirability . . . ." Miss. Code Ann. §11-1-63(f)(ii).

E. Lofton did not prove Flosal caused him injury because he failed to prove the frequency, regularity and proximity of his exposure to asbestos from CPChem's product.

The MPLA requires claimants prove proximate causation. In the context of a latent injury claim, like Lofton's for injury from exposure to asbestos from Flosal, Mississippi law requires Lofton prove: (1) he was exposed to asbestos from Flosal, (2) his exposure to asbestos from Flosal occurred with sufficient frequency and regularity, (3) that asbestos from Flosal was in proximity to where he worked, and (4) all such that it is probable that Lofton's exposure to asbestos from Flosal caused him harm. *Monsanto Co. v. Hall*, 912 So.2d 134, 137 (Miss. 2005) (adding product identification to the *Lohrmann* standard); *Gorman-Rupp Company v. Hall*, 908 So.2d 749, 754-57 (Miss. 2005) (following the Fifth Circuit and other jurisdictions in adopting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986)). Lofton must prove more than *de minimis* contact with Flosal. It is not enough that asbestos viscosifiers, other "chemicals" or vaguely described "products" may have been present at drill sites while Lofton was present. *Gorman-Rupp*, 908 So.2d at 756. The standard is product specific.

Lofton did not prove causation. Evidence that Flosal was on the market for twenty years from 1963 to 1984 is irrelevant because it proves nothing about the frequency, regularity and proximity of Lofton's exposure to asbestos from Flosal. Similarly, that Lofton worked on many rigs for different oil and gas operators over a period of years does not satisfy *Gorman-Rupp*. The only evidence Lofton offered to demonstrate causation was his own vague and indefinite testimony.

Examination of Lofton's trial testimony demonstrates its factual and legal insufficiency under *Gorman-Rupp*. Although he testified he used drilling mud additives, including Flosal, sometime during 1964 to 1967 and again during the 1970s, he did not specify which product he

allegedly used on which locations, or how often or how much he may have used on any location. Instead, Lofton testified generally only that he recalled using products while employed for various drilling contractors. Tr. 327-336. This is not sufficient evidence of frequency, regularity and proximity. *Gorman-Rupp* requires more.

More often than not, Lofton's trial testimony referred to "asbestos drilling mud additives" in general, not to Flosal specifically. And Lofton testified repeatedly to his simultaneous use of Flosal and other asbestos viscosifiers, such as Visbestos and SuperVisbestos, the products manufactured and distributed by defendants UCC and Montello. Tr. 298:20-24; Tr. 305:18-306:2; Tr. 368:2-7; Tr. 308:20-369:19; Tr. 405:19-22. At other times, Lofton did not identify any particular products, testifying he was exposed to unspecified asbestos viscosifiers. Tr. 334:19-335:6. Lofton's exposure testimony amounts to nothing but indefinite or amorphous statements that he used "a lot" of asbestos viscosifiers over the years. This is insufficient to prove the frequency, regularity and proximity of his exposure to asbestos from Flosal. *Gorman Rupp* requires more.

Despite the deficiencies in his own recollection and testimony, Lofton did not call any corroborating co-worker/product identification witnesses. This is remarkable because Lofton's counsel, through their motel room screenings in Hattiesburg and Jackson enrolled more than 700 claimants. Not one of these claimants appeared at trial to corroborate Lofton's insufficient evidence concerning the frequency, regularity and proximity of his claimed exposure to asbestos from Flosal.

Moreover, the critical factual gaps in Lofton's testimony cannot be filled by testimony from expert witnesses lacking personal knowledge of the underlying exposure. Dr. Holstein, for example, lacks personal knowledge Lofton ever worked with Flosal, and he cannot testify to the

frequency, regularity or proximity of Lofton's alleged exposure to asbestos from Flosal. Dr. Holstein's opinion is, by his own admission, based solely on Lofton's vague deposition testimony, not personal knowledge. Tr. 721:3 – 722:4. Further, there is no evidence Kenneth Cohen, Lofton's industrial hygiene witness, has any awareness whatsoever of Lofton, much less Lofton's alleged exposure to asbestos from Flosal. *See* Section II.C below.

F. The MPLA subsumes Lofton's negligence claim. If not, Lofton failed to prove negligent infliction of emotional distress.

The MPLA subsumes, abrogates, or makes redundant common law negligence claims grounded in product liability. *Jowers v. BOC Group, Inc.*, 2009 U.S. Dist. LEXIS 53126 (S.D. Miss. Apr. 14, 2009); *see also Elliot v. Amadas Industries, Inc., et al.*, 2011 U.S. Dist. LEXIS 26662, *46-47 (S.D. Miss. March 1, 2011) (common law negligence claims were "mere restatements of the MPLA claims"). The circuit court erred by instructing the jury on Lofton's common law negligent infliction of emotional distress claim when the bases of that claim were identical to the bases of his MPLA causes of action. R. 10757-58.

Negligent infliction of emotional distress requires the claimant prove: (1) demonstrative harm or injury resulting from the defendant's conduct, and (2) the harm was foreseeable to the defendant. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 742 (Miss. 1999). Although physical injury is not required to demonstrate infliction of emotional distress, the claimant must prove a mental or emotional injury. *Paz v. Brush Engineered Materials*, 949 So.2d 1 (Miss. 2007); *see also Brooks v. Stone Architecture, P.A.*, 934 So.2d 350 (Miss. Ct. App. 2006).

Evidence concerning a claimant's mere worry, emotional upset, or loss of sleep is legally insufficient to support a claim for negligent infliction of emotional distress. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d at 744 (citing *Morrison v. Means*, 680 So.2d 803, 807 (Miss.

1996)); *Strickland v. Rossini*, 589 So.2d 1268, 1275-76 (Miss. 1991); *see also Community Bank v. Courtney*, 884 So.2d 767, 775-76 (Miss. 2004). In *Adams*, this Court concluded the claimants' proof of emotional distress was insufficient to support recovery where the claimants testified they "stayed up for nights" and "worr[ied] real bad." *Id.* at 743-744. Similarly, in *Morrison,* this Court found that "two sentences out of the entire transcript offered in support of this claim are hardly enough evidence to support a verdict . . . for mental anguish." 680 So.2d at 807.

Like the claimants in *Adams* and *Morrison,* Lofton presented insufficient evidence. Only Lofton testified about his emotional distress. Lofton's entire trial testimony spanned two days, almost 200 pages and 5,100 lines of the trial record, but his testimony concerning emotional distress was limited to two points—who will take care of his wife following his death and his fear of cancer. This evidence, individually or collectively, is insufficient.

Lofton testified he worries at night about who will take care of his wife when he dies. Tr. 316:18-22 ("Especially when you go to bed at night and laying there when it's quiet. You think about that all the time. Who's going to be here to take care of the wife, you know."). Lofton's wife did not corroborate his alleged emotional or mental distress. Nor did anyone else. Lofton did not introduce evidence he suffers any type of mental illness, including depression or anxiety disorder or that he sought treatment by any medical or mental healthcare professional because of his alleged asbestos exposure. To the contrary, Dr. Stogner, his pulmonologist and the only treating physician to appear at trial, testified he neither referred Lofton to a mental healthcare professional nor prescribed anti-depressants because Lofton was not depressed. Tr. 834:4-17.

Lofton also testified he fears developing cancer from asbestos, worrying about that "all the time." Tr. 316:9-28. Lofton, however, does not have cancer and has never been diagnosed with cancer. Tr. 573:24-29. His fear of developing cancer in the future is unfounded and irrational because his doctors and retained medical experts alike testified he is not likely ever to develop cancer. Tr. 574:6-9; 576:1-5 (Dr. Brody); Tr. 599:20 – 600:8; 600:18-19; 621:11-29 (Dr. Katz); Tr. 752:28 – 753:19 (Dr. Holstein); Tr. 832:4-9; 834:4-12 (Dr. Stogner). *South Central Regional Medical Center v. Pickering*, 749 So.2d 95, 99 (Miss. 1999) (emotional distress based on future illness must be supported by medical or scientific evidence of rational basis for emotional fear). *See also Leaf River Forest Prods. v. Ferguson*, 662 So.2d 648 (Miss. 1995). Just as important, since Lofton did not prove the frequency, regularity and proximity of his alleged exposure to asbestos from Flosal, as contrasted with all asbestos drilling mud additives (see Section I.E above), he failed to prove the substantial exposure required to support a claim for negligent infliction of emotional distress. *South Central Regional Medical Center*, 749 So.2d at 99.

II. Alternatively, the case should be remanded for a new trial because CPChem did not receive a fair and impartial trial and jury.

Mississippi guarantees defendants the right to a fair and impartial trial and jury. Miss. Const. Art. 3, §§14, 31; *Hudson v. Taleff*, 546 So.2d 359, 363 (Miss. 1989). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).[8]

[8] Mississippi courts have the duty "to see that a competent, fair, and impartial jury is impaneled." *Hudson,* 546 So.2d at 363 (citing *Marshall Durbin, Inc. v. Tew*, 381 So.2d 152,154 (Miss. 1980) and *Mississippi Power Company v. Stribling*, 3 So.2d 807, 810 (Miss. 1941)). The duty includes a right to trial "in an atmosphere in which public opinion is not saturated with bias and hatred and prejudice against the defendant; where jurors do not have to overcome that atmosphere, nor the later silent condemnation of their fellow citizens . . . ." *King v. Kelly*, 137 So.2d 808, 813-14 (Miss. 1962) (quoting *Seals v. State*, 44 So.2d 61, 68 (Miss. 1950)). A defendant "is entitled [to a trial] in a county where a fair proportion of the

CPChem did not receive a fair and impartial trial and jury. Some of the more egregious abuses of discretion are addressed below.

A. The circuit court erred by denying a transfer of venue. [9]

The circuit court abused its discretion when it ignored proof of actual bias and prejudice in Jones County against asbestos defendants generally and CPChem specifically. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004). In *Bailey*, the Court explained that change of venue is necessary to ensure a fair trial where, for example, there is substantial risk of prejudice and bias due to a large number of similar lawsuits, such as mass tort actions, pending in a county against a defendant such that prospective jurors risk "silent condemnation" if they find in favor of the defendant. *Id.* at 50, 52-53 (quoting *Seals v. State*, 44 So.2d 61, 68 (Miss. 1950)). Other factors supporting change of venue include: (1) community connections to asbestos generally and asbestos litigation in particular, including over 450 pending asbestos drilling mud lawsuits filed in Jones County against CPChem, (2) negative publicity in Jones County, including direct mail attorney advertising and solicitations for asbestos claimants, and motel room screenings for potential claimants, and (3) prominent local public officials and their family members prosecuting their own asbestos lawsuits. *See Bailey*, 878 So.2d at 52-53.

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people qualified for jury service may be used as a venire from which a jury may be secured to try [its] case fairly and impartially." *Magness v. State*, 60 So. 8, 10 (Miss. 1912). These tenets apply with equal force to civil cases. *King*, 137 So.2d at 813.

[9] Under Miss. Code Ann. §11-11-51, CPChem moved to transfer venue, incorporating by reference arguments raised by UCC through its motion for a change of venue, and at oral argument. R. 9873-9875; Tr. 4-8. The circuit court denied a change of venue. Tr. 10-11.

1. Jones County's history demonstrates an undeniable community connection to asbestos and to asbestos litigation as manifested in the jury venire.

For decades, Jones County residents worked with or around asbestos at the Masonite International Corporation plant in Laurel, Mississippi.[10] As a result, an astonishing 21,617 Masonite claimants filed asbestos lawsuits in Jones County. R. 8295. Using census figures for Jones County, if all these claimants were residents of Jones County, they would account for 42% of Jones County residents over age eighteen. Conversely, if they are not all Jones County residents, their selection confirms Jones County is a "asbestos plaintiff-friendly" venue. Those claimants filed a staggering 3,510 asbestos lawsuits in Jones County during just the six years preceding this trial—over 3,200 of which were filed against co-defendant UCC. R. 8294.

Specific bias against CPChem is evident from the number of identical drilling mud asbestos claims filed against it in Jones County. Lofton's counsel originally filed more than 700 drilling mud asbestos claims against CPChem, UCC and Montello—64% in Jones County. R. 8287, 8299. When compared to other Mississippi counties, the number of cases filed by Lofton's counsel in Jones County against CPChem makes the point: 458 lawsuits in Jones County—double the total for all other counties combined (168 in Smith County, 54 in Jasper County, 31 in Jefferson County, and 2 in Claiborne County). R. 8294. In *Bailey*, this Court determined 114 local litigants were an indicator of unacceptable bias. *Bailey*, 878 So.2d at 51-53. That four times more asbestos drilling mud cases (458) are currently pending against

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[10] William H. Mason invented Masonite in Laurel, Mississippi, in 1924. Mass production of Masonite products commenced five years later. During the decades that followed, Masonite produced building and construction materials that reportedly incorporated asbestos, including siding, flooring, doors and roofing materials. The reported use of asbestos in Masonite products spawned thousands of asbestos claims, most of which were filed in Jones County. *Laurel Leader-Call*, "Masonite to file for Chapter 11," March 4, 2009.

CPChem in Jones County is an unmistakable indicator of bias and prejudice. *Bailey*, 878 So.2d at 53.

These numbers, however, only scratch the surface of bias against asbestos defendants in Jones County because they do not capture the intricate web of the connections between asbestos claimants to family members, co-workers, friends, and others in their communities. *Beech v. Leaf River Forest Prods.*, 691 So.2d 446 (Miss. 1997) (venue transfer affirmed in part because of large number of potentially affected jurors). Analysis of 78 pre-trial jury questionnaires reveals that of the members of the venire and their families:

- 28% worked in the drilling industry;
- 41% worked at Masonite;
- 29.5 % received or responded to advertisements about exposure to asbestos, free screenings, or asbestos or silica lawsuits;
- 38% had been tested or screened for an asbestos-related disease; and
- 32% had been involved in asbestos litigation, made a claim for asbestos injury, or received an asbestos settlement.

A full one-third (33%) of the respondents came to court with negative opinions about asbestos products and the companies that made or sold those products. R. 10580.

2. Jones County public officials and their family members have filed asbestos lawsuits.

Another telling indicator, particularly in mass tort cases, is the role of influential families or public officials as litigants. *Bailey*, 878 So.2d at 52- 53 (citing *Johnson v. State*, 476 So.2d 1195, 1215 (Miss. 1985). Asbestos lawsuits filed by Jones County public officials and their

family members are pending or formerly pending before the circuit court.[11] Lawsuits by public officials seal with approval all asbestos lawsuits, including Lofton's and the other 450+ drilling mud lawsuits pending against CPChem in Jones County.

3. Lofton's counsel solicited Jones County residents for asbestos drilling mud claimants via advertising and direct mail solicitation.

Attorney advertising and solicitation can send a "deeply rooted negative message" that becomes "so pervasive in the community, a fair trial could not be had." *Bailey*, 878 So.2d at 51. In 2003, Lofton's counsel issued direct mail advertisements designed to solicit clients for asbestos drilling mud claims like Lofton's. R. 8299, 8305-8308. The advertisements contained inflammatory language. *Id.* Such advertising has both an immediate and latent impact. Jurors may not understand how bias has been created in them, or they may be unlikely to reveal any bias, even if they recognize it. National polls demonstrate a significant bias against companies that manufactured or sold asbestos or asbestos-containing products. *See* R. 8310-8314, Affidavit of Ronald J. Matlon, Ph.D. In *Bailey,* the Court acknowledged voir dire is ineffective in detecting this kind of juror bias created by pre-trial publicity because jurors, knowing they are supposed to be impartial, "are unlikely to reveal any bias, even if they recognize it in themselves." *Bailey*, 878 So.2d at 52 (citing *Beech,* 691 So.2d at 450).

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[11] Local public official asbestos claimants include Jones County Justice Court Judge David Lyons, City of Laurel Councilman Manual L. Jones, and City of Laurel Fire Chief Jimmie E. Bunch. *See* R. 8316-8476. Other public officials have immediate family members who filed asbestos complaints, including: City of Laurel Councilman George Carmichael, City of Laurel Councilwoman Willie Lavonne Evans, and City of Laurel Planning and Development Department employee Lula Cooley. *See* R. 8478-8767.

4. Public policy favors venue change to promote judicial economy and efficiency.

In light of these facts, a change of venue is the favored mechanism to ensure CPChem a fair venire and trial because "judicial efficiency and economy [are] better served by a change of venue prior to trial, than by trial, reversal and retrial . . . Justice would be better served by a fair trial initially." *Bailey*, 878 So.2d at 53 (quoting *Johnson*, 476 So.2d at 1215 (citing *Hill v. State*, 72 Miss. 527, 534, 17 So. 375, 377 (1895)). The circuit court should have been particularly sensitive to CPChem's motion for change of venue given the combination of *Bailey* factors presented—*particularly that over 450 identical asbestos drilling mud suits are pending against CPChem and UCC in Jones County.* Instead, Judge Landrum based his denial, at least in part, on his personal recollection that of the more than 21,000 asbestos cases filed in Jones County, no defendant was unhappy with the venue and few moved for change of venue. Tr. 10:13–11:17. Judge Landrum also based his ruling, in part, on a non-existent report and recommendation from the Special Master. Apparently confused, Judge Landrum reported he intended to adopt the Special Master's report and recommendation, when, in fact, the Special Master had never considered the pending motions for change of venue. Tr. 11:8-11.

B. The circuit court abused its discretion during jury voir dire, qualification, and selection, thereby intensifying the pre-existing bias and prejudice of the venue.

Against the backdrop of the Jones County venue, the circuit court aggravated the bias by serial abuses of discretion during voir dire, juror qualification, and juror selection.

1. It was error to deny CPChem the opportunity to voir dire potential jurors who indicated possible bias.

Having read the responses to the pre-trial questionnaire, CPChem expressed concern about bias demonstrated by the venire and requested an opportunity to follow-up on certain of

those responses during voir dire. Judge Landrum refused CPChem's request and advised the parties that he would ask the venire about their reported connections to asbestos litigation and other bias. Tr. 75:6-12. Judge Landrum never made the inquiry. When CPChem again raised the issue, Judge Landrum, again apparently confused, stated he never prevented CPChem from conducting that examination during voir dire. Tr. 204:11–205:12.

2. The circuit court erred when it overruled CPChem's motion for mistrial because of prejudicial statements the circuit court made during venire qualification and voir dire.

Venire members are "very susceptible" to a trial judge's influence such that a judge "cannot be too careful and guarded in language and conduct" in presence of those from whom the jury will be selected. *Green v. State of Mississippi*, 53 So. 415, 416 (Miss. 1910). In fact, in Mississippi there is a conclusive presumption that inappropriate remarks and conduct by the circuit court expose the venire to improper influence, and there need be no inquiry whether the jury was, in fact, influenced. *Id.*; *Weatherly v. Welker*, 943 So.2d 665, 668 (Miss. 2006).

Upon excusing venire member McKenzie, who verbally reported he had worked with drilling fluids in the oilfield, Judge Landrum remarked in the presence of the venire, "Well, I don't want to take a chance of you being on the jury and you might wind up with a claim yourself so I'm going to let you go." Tr. 94:13-16. This comment from the bench had the effect of legitimizing to the venire Lofton's allegations in that McKenzie's work with drilling fluids, without more, might result in a claim.

To compound the error, the circuit court overruled CPChem's motion for mistrial. Tr. 192:20. Instead, the circuit court instructed the venire that a juror must "decide whether [CPChem] did something wrong, and if you decide that then you've got decide [*sic*] what you want to do about it, if you want to give them any money or not. It's just that simple." Tr.

101:15-19. CPChem submits neither Mississippi product liability law nor this case is "just that simple." Judge Landrum's comment misstated Mississippi law and, further, predisposed the jury to ignore instructions on requisite elements of Lofton's claims upon which he carried the burden of proof, including, without limitation, design defect, negligence and proximate causation. Judge Landrum further aggravated the unfair prejudice when he stated to the venire: "I've always told the jury the reason they're up here is to decide if these people are entitled to any money." Tr. 191:18-20. Judge Landrum's statements improperly fixed the jury against CPChem from the outset.

Further, the circuit court, over CPChem's objection, allowed Lofton's counsel to improperly instruct the venire against allocating liability to responsible third parties, *i.e.*, Lofton's former employers, the drilling mud service companies, well operators, as well as JM, UCC and Montello. Lofton's counsel instructed the venire as follows: "[T]his [case] doesn't go beyond [CPChem] as far as any finger pointing is concerned" (Tr. 122:8-10); "this [is] not a lawsuit against any defendant except [CPChem] and it didn't involve or impact any of the oilfield service companies in this area?" (Tr. 122:16-19); and "[d]o all of you understand that this is not a claim or suit against any of the oilfield service areas [sic] in area . . . [t]he only defendant is [CPChem]. Do all of you understand that?" (Tr. 122:24-27). This is not voir dire. These are legal misstatements and improper instructions. The circuit court abused its discretion by allowing this improper voir dire.

With regard to responsible third parties, CPChem presented uncontroverted evidence concerning the negligence and legal liability of Lofton's employers, of drilling mud service companies and of the well operators who decided which drilling mud additives would be used. Just as important, these statements by Lofton's counsel improperly instructed the venire to ignore

that evidence and to allocate liability only against CPChem and not against the miners, millers and sellers of other asbestos viscosifiers to which Lofton claimed exposure, including JM and the settling defendants UCC and Montello. By permitting Lofton's counsel's "instructions" during voir dire, the circuit court failed to protect CPChem's constitutionally guaranteed right to a fair trial in a fair tribunal and ensured the jury would disregard CPChem's defenses and the evidence concerning the liability of responsible third parties. *See* Section II.E below.

3. The circuit court erred by overruling (a) CPChem's motions to strike certain jurors for cause, (b) CPChem's motions to issue additional summons for jurors, and (c) CPChem's motion for additional peremptory strikes.[12]

Although the circuit court properly excused some members of the venire who had family members with asbestos claims,[13] the circuit court overruled CPChem's motion to strike for cause Juror Coleman, whose son has his own asbestos claim. Tr. 201:29–202:7. The circuit court also overruled CPChem's motion to excuse for cause Juror Lewis despite evidence both Lewis' son and her husband were likely asbestos claimants. Tr. 203:5-19.

CPChem was forced to use three of its four peremptory challenges on members of the venire who should have been excused for cause: (a) venire member Wyndham, who was challenged for cause because Lofton's counsel represented her parents, and also under *Bailey* (Tr. 197:20-24); (b) venire member McKenzie, who was challenged for cause because of her

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12 Tr. 75:26-29; 212:8-12.

13 For example, venire member Knotts failed to disclose his father is represented by Lofton's counsel and has filed his own lawsuit against CPChem. He was excused for cause. Tr. 192:5-17.

answer to Question No. 30 from the pre-trial questionnaire,[14] which demonstrated bias and because the circuit court prohibited CPChem's counsel from asking necessary follow-up questions during voir dire (Tr. 204:11–205:12); and (c) venire member Jenkins, who was challenged for cause because of his father's employment at Masonite International Corporation, the large number of Masonite asbestos claimants in Jones County, and the *Bailey* factors (Tr. 205:19-24).

Of the 12-person jury seated, CPChem reasonably believes one has a son with an asbestos case (Juror Coleman; CPChem's motion to strike for cause was overruled (Tr. 201:29–202:7)). At least three jury members have family members with longtime employment at Masonite or Howard Industries, spawning grounds for thousands of asbestos claims in Jones County (Jurors Allison (Tr. 196:12–197:16), Hosey (198:12-22), and Jones (Tr. 201:5-9)). And, at least, two of the four alternate jurors were employed at Masonite or Howard Industries (Alt. Juror Woodard (Tr. 197:25–198:11) and Alt. Juror Newall (Tr. 202:16-26)). The circuit court erroneously overruled CPChem's challenges for cause as to all these jurors and alternates.

C. The circuit court should have excluded the testimony from Lofton's industrial hygienist under *Daubert*, *McLemore*, and Rule 702.

The circuit court abused its discretion by permitting Lofton's counsel to read to the jury Kenneth Cohen's testimony from another trial. Tr. 641:17-18; Ex. 2002. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003); Mississippi Rule of Evidence 702. Cohen's methodology, if any, is not demonstrated

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[14] Q: "Do you have an opinion about asbestos, or products that contained asbestos, or companies that made or sold products that contained asbestos? If so, what is that opinion?" A: "I think that it is not right knowing it can lead up to lung cancer." Tr. 204.

through that testimony and, therefore, unreliable. And his opinion—exposure to even one fiber over background or ambient levels is "substantial and significant"—is neither generally accepted nor applicable under any circumstance to cases of asbestosis. *See* Roggli, *et al.*, *Pathology of Asbestosis—An Update of the Diagnostic Criteria*, Arch. Pathol. *Lab. Med.*, Vol. 134, March 2010 ("Roggli").

1. There is no foundation for Cohen's testimony.

Cohen testified at the *Smith* trial.[15] But there is no foundation for Cohen's opinion testimony from *Smith* to have been read to Lofton's jury where Cohen's testimony from *Smith* contains no reference to Lofton or his work history. *Dedeaux Util. Co. v. City of Gulfport*, 938 So.2d 838 (Miss. 2006) ("testimony was not based on sufficient facts and data and was therefore unreliable"); *Janssen Pharmaceutica, Inc., v. Bailey*, 878 So.2d 31 (Miss. 2004), *as modified on denial of reh'g.*) ("These [foundational] facts must afford a 'reasonably accurate basis' for the expert's conclusion."). Moreover, *Smith* involves death and survival claims stemming from the death of Larry D. Smith, who died from lung cancer at 73 years of age, following a 60-87 pack-year smoking history. Smith did not suffer asbestosis, the *non*-malignancy alleged by Lofton. *Smith* is a smoking/lung cancer case, while Lofton's is an asbestosis case. Cohen's "one fiber" opinion is not relevant to Lofton's *non*-malignancy case.

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[15] *Smith v. Phillips 66 Company, et al.*, Circuit Court, Smith County (May 20, 2009). Following trial, the late Judge Robert Evans granted CPChem's motion for judgment notwithstanding the verdict. Smith's counsel are appealing Judge Evans' j.n.o.v., and that appeal is pending before this Court under docket number 2010-TS-00455.

2. The circuit court abdicated its gate-keeping responsibility.

The circuit court abdicated its gate-keeping responsibility and made no effort to determine whether Cohen's proffered testimony was relevant and reliable. In advance of trial, Lofton designated portions of Cohen's testimony from *Smith* in the event he was unable to appear, and in response, CPChem moved to exclude that testimony. R. 2938-2960. Through his Report and Recommendation in *Smith*, the Special Master expressed concern over Cohen's qualifications and testimony, and he recommended the trial court conduct its own examination of the witness, leading Judge Evans to conclude admission of Cohen's testimony provided the defendants with grounds for reversible error in *Smith*. R. 2955. Foreshadowing reversible error, Judge Evans reluctantly allowed Cohen to testify, stating "the Supreme Court is going to fuss at me . . . I want the record to clearly reflect that I will probably be giving the defendant[s] a second bite at the apple." R. 2987, p. 114. Despite the factual development surrounding Cohen's testimony in *Smith*, the circuit court here: (a) declined to consider the relevance and reliability of Cohen's testimony, (b) failed to exclude Cohen's testimony—ignoring its gate-keeping responsibility—and (c) permitted Lofton's counsel to read Cohen's trial testimony from *Smith* to Lofton's jury. R. 9895; Tr. 641.

3. Cohen's opinions are not supported by any methodology, and his opinion is not scientifically reliable.

Cohen's opinion that exposure to one fiber above ambient levels is "substantial and significant"[16] has no reliable foundation in science. Ex. 2002, 198:5-200:4; 258:3-5. Cohen admits his "one fiber" opinion is not based upon actual air-monitoring of asbestos fibers for

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[16] Ex. 2002, 198:5-200:4; 258:3-5 ("any additional exposure to asbestos in excess of ambient is in my opinion substantial")

either any worker or any oilfield drilling operation. *Id.* at 173:16-18. But even more important, Cohen never explains his methodology, precluding any determination of his opinion's reliability.[17] Cohen does not cite to any supporting scientific or epidemiological studies. R. 2959. Nor does Cohen testify whether the methodology supporting his "one fiber" opinion has been tested, subjected to peer review, has an error rate, or whether it is generally accepted in the scientific or industrial hygiene communities. R. 2980, 88; R. 2987, 117. In fact, Cohen's "methodology" is *non*-existent. Without any "methodology," Cohen's "one fiber" opinion is unreliable, and his testimony should have been excluded. *Brooks v. Stone Architecture, P.A.*, 934 So.2d 350, 355 (Miss. Ct. App. 2006) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) ("Courts are not required to 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' because self-proclaimed accuracy by an expert is an insufficient measure of reliability.")).

Whatever its basis, Cohen's "one-fiber" opinion is demonstrably inapplicable in asbestosis cases. This is true because asbestosis, the disease Lofton alleges, is characterized by a dose-response relationship between the concentration or number of asbestos fibers in the lungs and the severity of the resulting fibrosis or scarring. Roggli at 467. That is why asbestosis typically occurs in persons with prolonged and heavy exposures to asbestos. *Id.* This is also the reason a single fiber above ambient levels will not result in asbestosis. *Id.* Indeed, the consensus scientific opinion is that asbestosis should not occur in persons whose lifetime dose of exposure is less than 25 fiber years/cc, which exposure is orders of magnitude above ambient levels. *See generally,* Roggli at 464 ("[T]he threshold cumulative dose of asbestos necessary for clinical

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[17] R. 2987-2988, 116-119.

manifestations of asbestosis was between 25 and 200 fibers/ml-yrs (fibers/ml x number of years) of cumulative exposure."); Tossavainen A., *Asbestos, Asbestosis, and Cancer: The Helsinki Criteria for Diagnosing and Attribution*, Scand. J. Work Environ. Health, 1997; 23(4): 311-316 ("Helsinki Criteria"); Toxicological Profile for Asbestos, Agency for Toxic Substances and Disease Registry/U.S. Dept. Health and Human Services, Sept. 2001 ("ASTDR") (Figure 3—1).

Other courts have excluded Cohen's testimony based on the absence of any reliable methodology. *See, e.g., De Maria v. American Hawaiian S.S. Co.*, 2006 Cal.App. Unpub. LEXIS 6382 (July 21, 2006) (affirming exclusion of Cohen's opinion concerning seaman's asbestos exposure because it "lacked sufficient factual basis and offers virtually no explanation beyond the most general of statements about his work" and was based on "conjecture."); *Smith v. ACandS, Inc.*, 31 Cal.App. 4th 77 (1994) (reversing jury verdict for asbestos claimant because, in part, of wrongful admission of Cohen's testimony extrapolating asbestos concentration levels from photographs of working conditions); *Andrews v. Foster Wheeler, Inc.*, 138 Cal.App. 4th 96, 113 (2006) (concluding Cohen's testimony "lacks a sufficient factual basis and offers virtually no explanation or reasoning beyond the most general of statements about his work and research. Thus, we are unable to determine how Cohen reached his conclusions. Accordingly, his [testimony] "has no evidentiary value"").

4. Cohen is not qualified as an expert in industrial hygiene.

Cohen's educational qualifications are dubious at best. Cohen "flunked out of a couple of colleges." Ex. 2002, 25:11-12. He took no undergraduate or master's level courses in occupational health. *Id.* at 56-57, 60-61, 67. He failed to obtain a master's degree because his professors did not approve his thesis. *Id.* at 53:2-4; 56:15-57:4; 64:16-22; 66:21-67:9. Applying for a "doctoral" program, Cohen actually misrepresented holding a master's degree. *Id.* at 65:13-

66:3. After a mere nine months, Cohen was given a "Ph.D.," in "occupational health" by a correspondence school the United States General Accounting Office declared a "diploma mill." That "school" had no department of occupational health nor any professors in the field of occupational health. *Id.* at 57:9-58:22. Cohen never defended a dissertation before his professors. *Id.* at 57:12-19; 68:5-17. His "Ph.D.," is a sham.[18]

Cohen is a hired gun who testifies for any claimant needing an "expert."[19] Cohen is not objective, acknowledging testifying experts should be advocates supporting each contention of their client's theory of causation or negligence. *Id.* at 231:11-23. Given Cohen's extraordinary deficiencies in education and his disregard for the integrity and objectivity expected of testifying experts, and the lack of foundation and methodology underpinning his opinion, the circuit court should have disqualified him and not allowed Lofton's counsel to read his testimony to the jury. *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("Application of the *Daubert* factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers").

5. Cohen's "one fiber" opinion misled or confused a jury predisposed against CPChem through bias and prejudice.

Once improperly admitted, Cohen's testimony confused and misled the jury into believing Lofton's exposure to even one fiber of asbestos from Flosal was sufficient to impose liability against CPChem. This testimony effectively relieved Lofton of his burden of proof to

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[18] Cohen's "credentials" and experience are no better. He obtained a "certificate in industrial hygiene," but retired it in 2003, seven years before trial. *Id.* at 39:23-25-40:1-2. He failed the examination for this certificate several times, eventually passing with a "very low" score. *Id.* at 40:18-41:8. He failed one part of the American Board of Industrial Hygiene comprehensive exam twice and another part seven times. *Id.* at 72:16-73:9.

[19] Cohen has testified on subjects as far ranging as rape, safety machines, amputations, carpal tunnel, benzene, air compressors, and maggots in fried chicken. *Id.* at 48:19-49:5.

demonstrate the frequency, regularity and proximity of his exposure to asbestos from Flosal. All Lofton had to prove, according to Cohen, was exposure to one fiber of asbestos from Flosal. Mississippi law requires substantially more. *See* Section I.E above.

D. The circuit court erred when it admitted Exhibit 950 and allowed Lofton's counsel to improperly testify.

Plaintiff's Exhibit 950 is comprised of historical oilfield drilling records showing, among other things, that asbestos viscosifiers including Flosal, Visbestos, SuperVisbestos, and others were used in Mississippi, a fact neither CPChem, nor UCC or Montello has ever disputed.[20] Significantly, none of the drilling records contained within Exhibit 950 corresponds to any of Lofton's drill sites. Consequently, Exhibit 950 is irrelevant and prejudicial.

Lofton's counsel made no attempt to introduce Exhibit 950 during his case-in-chief despite calling a petroleum engineer as an expert witness. Instead, Lofton's counsel waited until the last day of trial and offered Exhibit 950 during his cross-examination of CPChem's final witness, a medical expert—Dr. Robert Ross, a pulmonologist and NIOSH Certified B-reader. It was error to admit these drilling records in the first instance, but more prejudicial still to permit Lofton's counsel to cross-examine Dr. Ross about these drilling records when the records were irrelevant to his expert medical opinions and understandably Dr. Ross had never reviewed the records. *See generally*, RE 6, Tr. 1192-1204.

CPChem repeatedly objected to Exhibit 950 because Lofton's counsel never established Lofton worked at any drill site identified in Exhibit 950. RE 6, Tr. 1193:4-13; 1194:3-4, 16-18; 1195:1-8; 1196:1-7, 19-23; 1197:5-6, 18-19; 1198:14-15; 1198:21; 1201:8-11; 1202:11-18.

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[20] Exhibit 950 is small subset of available drilling records (over 74,000 pages) produced by settling defendant Baker Hughes. Those records demonstrate, consistent with Floyd's testimony, that asbestos drilling mud additives were rarely used on Mississippi drill sites.

Exhibit 950 should have been excluded as irrelevant, lacking foundation, unfairly prejudicial, speculative, and confusing to the jury. *Id.* The circuit court overruled CPChem's repeated objections. *Id.* at 1193:23; 1194:5, 19; 1195:9; 1196:8, 24; 1197:7, 20; 1198:16; 1198:29–1199:18; 1201:12-14; 1202:19.

These drilling records were not relevant to Dr. Ross' testimony on direct examination, they were not relevant to his area of expertise (pulmonology), and they were not relevant to his medical opinions. Dr. Ross was not tendered as a petroleum industry or oilfield expert. *Id.* at 1193:4-13. When Lofton's counsel began cross-examining Dr. Ross from Exhibit 950, CPChem objected that the examination was outside of the fields of expertise in which Dr. Ross was tendered. *Id.* at 1192:29–1193:3. The circuit court overruled CPChem's objection. *Id.* at 1193:23.

When Dr. Ross testified he had not reviewed the drilling records comprising Exhibit 950, the circuit court impermissibly allowed Lofton's counsel to "testify" about their content (*see generally*, RE 6), overruling CPChem's objections and motions to strike counsel's "testimony." RE 6, 1194:3-4, 16-18. When CPChem continued to object to the use of Exhibit 950 because Dr. Ross could not sponsor an exhibit beyond the scope of his expertise and which he had never reviewed, the circuit court again overruled CPChem's objections. RE 6, 1195:1-8; 1196:1-7; 1196:19-23; 1197:5-6; 1197:18-19; 1198:14-15. Finally, the circuit court admonished CPChem's counsel to make no more objections and even denied CPChem a continuing objection. RE 6, 1198:22–1199:18. Given free rein, Lofton's counsel discontinued the pretense of cross-examination, opting instead to simply read to the jury from Exhibit 950, "testifying" Lofton's employers used 111,000 pounds of asbestos drilling mud additives. RE 6, 1203, 6-13.

The circuit court overruled CPChem's continued objections as to Lofton's counsel's improper "testimony." RE 6, 1202:11-18; 1203:14-22.[21]

Throughout this line of "questioning," the circuit court permitted Lofton's counsel to "testify" about Flosal's use in Mississippi despite not one of the drilling records from Exhibit 950 relates to any drill site where Lofton worked. The successful tactic was to convince the jury Exhibit 950 documented actual use of Flosal at drill sites where Lofton worked—when, in fact, they did not.

> Worse still, Judge Landrum—*in the presence of the jury*—commented:
>
> THE COURT: I don't know what [Dr. Ross] knows, let him answer. He's here as an expert, I don't know what he's an expert in. He's presented himself and made statements that he's qualified to respond to the questions that's being asked.

RE 6, 1203:19-22. That pronouncement from the bench was not only untrue, it was directly contrary to any representation made by CPChem, whose counsel repeatedly objected to the introduction and improper use of Exhibit 950 and the impermissible "testimony" from Lofton's counsel. Nor did Dr. Ross make any such representation. Instead, Dr. Ross repeatedly answered he had never before reviewed the drilling records in Exhibit 950. RE 6. When Dr. Ross understandably failed to rebut Lofton's counsel's "testimony" regarding the drilling records,

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[21] The circuit court's leniency with Lofton's counsel's cross-examination of Dr. Ross stands in stark contrast to his treatment of CPChem's counsel during cross-examination of Lofton. When CPChem counsel asked Lofton if Dr. Tannen was one of the lawyer doctors, Lofton's counsel objected to the characterization. Judge Landrum apparently misunderstood the objection and scolded CPChem's counsel, admonishing him that "this court here is not where lawyers come in and testify, they ask questions. . . . And if you don't understand the Rule, . . .and if you violate it again, I'm going to take it up as an issue." Tr. 381:15-21. When objection was made to the repetitiveness of a question, Judge Landrum ignored the stated ground for objection, instead admonishing CPChem's counsel: "But just to keep on testifying about what you want the jury to hear . . . that's just not my rule. And when we have a recess we're going to have an understanding about it." Tr. 399:15-20.

CPChem was further prejudiced because the jury could only draw the incorrect conclusion these drilling records documented the use of Flosal at drill sites where Lofton worked.

E. The jury's failure to allocate liability against responsible third parties was against the overwhelming weight of the evidence and demonstrates its bias, prejudice and passion.

No reasonable juror could ignore uncontroverted evidence of negligence by Lofton's employers and other responsible third parties. For example, OSHA required Lofton's employers to ensure airborne fibers resulting from use of asbestos viscosifiers did not exceed federally regulated permissible exposure levels. Ex. 2002, 259:24-260:3. They were required to monitor the drill site and implement measures to protect Lofton from asbestos exposure by providing, if necessary, ventilation or respiratory protection. Ex. 2002, 181:1-10; Tr. 464:5-465:16. Yet Lofton's employers did nothing to protect him. Tr. 365-367. Because the drilling contractors who employed Lofton were the sole intervening proximate cause of his alleged injury, this evidence alone was sufficient to warrant directed verdict. Lofton would never have experienced the exposure he alleged if his employers had furnished necessary protective equipment.

CPChem also demonstrated the negligence of drilling mud service companies and well operators. Drilling mud service companies specified and delivered the drilling mud products, including asbestos viscosifiers, to the drill sites where Lofton worked. In addition, the drilling mud service companies provided on a daily basis analytical evaluation of the drilling mud and made daily recommendations on adjustments necessary to conform the drilling mud to the program agreed by the drilling mud service company and the well operator. These daily recommendations included the use, when necessary, of asbestos viscosifiers. The well operators, as well as, in most instances, the drilling contractors, had to accept or reject these recommendations, but before any asbestos viscosifier was ever used at the drill sites where

Lofton worked, the drilling mud service company and the well operators had to agree the use of asbestos was appropriate under the circumstances. Tr. 354-361. These drilling mud service companies—Baroid, Magcobar, IMCO and Milchem/Baker Hughes—were large, sophisticated multi-national enterprises. Yet no well operator or drilling mud service companies or drilling mud engineer ever provided Lofton respiratory protection. Tr. 365. This evidence was not disputed. The jury ignored this evidence.

Nor did the jury allocate liability against JM or UCC. JM was the miner, miller and packager of the asbestos sold by DSC. Similarly, UCC was the miner, miller and packager of the Visbestos and SuperVisbestos products sold by Montello. Tr. 368. Although Lofton's testimony was insufficient to demonstrate the frequency, regularity and proximity of his exposure to asbestos from Flosal or any other asbestos viscosifier he identified, that testimony included all of these products, not just Flosal. Tr. 368-371. Nevertheless, the jury did not allocate liability against either JM or UCC, the actual manufacturers of the products Lofton claims caused his injury.

Montello and DSC occupied similar roles in the distribution of the asbestos viscosifiers. Whereas Montello sold UCC's asbestos under the trade names Visbestos and SuperVisbestos, among others, DSC sold JM's asbestos under the trade name Flosal. Both sold asbestos mined, milled and packaged by others. Based on the evidence, no reasonable juror could find CPChem liable for Lofton's alleged injury without also allocating liability against Montello for its sale of Visbestos and SuperVisbestos. This is particularly true since virtually every time Lofton testified about his use of asbestos products, his testimony was not limited to Flosal, but, rather, he testified generally concerning his simultaneous use of the Visbestos products and other asbestos viscosifiers:

Q. And were there times during your career in the oilfield between 1964 and 1984 when you used flosal and visbestos and these other products?
A. Yes, sir.

Tr. 298:20-24

Q. And can you tell us -- can you tell us how many times from 1964 to 1984 that you used flosal or visbestos or Visquik or superbest in a lost circulation event? Can you tell us the number of times?
A. I can't tell you the number of times.
Q. Why not?
A. I've been on so many wells.
Q. A long time ago?
A. Long time ago.
Q. But can you tell us if you used a lot of it?
A. Yes, sir. I used a lot of it in different states.

Tr. 305:18-306:2

Q. Okay. You worked with asbestos a lot, right?
A. It was times we used this. And the ones I remember the most is the flosal and Visquik was the most commonly used. We used visbestos a good bit on loss circulation.

Tr. 368:2-7

Q. And when you were working as a motorman did you have occasion to mix flosal, visbestos and these other asbestos drilling mud additives?
A. Yes, I did.

Tr. 405:19-22

Despite Lofton's testimony of simultaneous use of multiple asbestos viscosifiers and his failure to differentiate his alleged exposures from those different products, the jury allocated all liability against CPChem and no liability against Montello.

The jury's allocation of liability exclusively to CPChem is against the overwhelming weight of the evidence and follows directly from jury bias fueled by the circuit court's prejudicial comments and those of Lofton's counsel during jury selection and during trial. The

jury could only allocate all liability against CPChem if it simultaneously (1) believed Lofton's testimony about using Flosal, and (2) disbelieved Lofton's testimony about using Visbestos and the other asbestos viscosifiers. The verdict is not only against the overwhelming weight of the evidence, but it is illogical and inherently contradictory. *See CertainTeed Corp. v. Dexter*, 330 S.W.3d 64 (Ky. 2010) (new trial granted where jury failed to apportion fault to empty-chair asbestos manufacturer defendants in asbestos products liability suit where evidence established claimant was exposed to asbestos manufactured by or used on premises of companies other than defendants at trial). Short of a reverse and render, the only remedy for this illogical jury finding is a new trial.

III. Should the Court decide not to reverse and render or to remand this case, remittitur of the verdict is warranted. The jury's allocation of all liability against CPChem and the $15.2 million verdict evidence manifest error on the part of the circuit court and bias, prejudice, and passion on the part of the jury, and neither the allocation of liability nor the damages awarded are supported by credible evidence.

The verdict reflects the jury's bias and prejudice exacerbated by the circuit court's prejudice against CPChem. The jury awarded $15 million dollars in *non*-economic damages after hearing Lofton's counsel's inflammatory plea they give him "a dollar on a breath . . . each breath, every time" for 20 years. R. 1236:16-26. That award is excessive—more than 75 times the amount of the stipulated economic damages—and this multiplier shocks the conscience. *Entergy Miss., Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003); *Stringer v. Crowson*, 797 So.2d 368 (Miss. Ct. App. 2001); *see also Jackson Public School Dist. v. Smith*, 875 So.2d 1100 (Miss. Ct. App. 2004); *Wells Fargo Armored Service Corporation v. Turner*, 543 So.2d 154, 155 (Miss. 1989); *Rawson v. Midsouth Rail Corp.*, 738 So.2d 280 (Miss. 1989).

The very basis for the award suggested in Lofton's counsel's closing argument, that Lofton should be paid one dollar for each breath he has taken and will take for the remainder of

his life, is not a reasonable measure of compensatory damages. Tr. 1235:28-29. As this Court has previously held, such inflammatory appeals to passion warrant reversal:

> We have "condemn[ed] the use of inflammatory language calculated to mislead the jury and which has no relation to the issues of fact which are being presented to the jury for determination." "The only legitimate purpose of the argument of counsel in a jury case is to assist the jurors in evaluating the evidence and in understanding the law and in applying it to the facts. Appeals to passion and prejudice are always improper and should never be allowed." Therefore, this issue alone merits reversal.

Bailey, 878 So.2d at 62 (Miss. 2004) (citations omitted).

Lofton stipulated that his economic damages, including medical costs, were $198,407.66. Tr. 1274. Lofton's proof of emotional distress was legally insufficient to merit damages. *See* Section I.F above. The $15 million award for Lofton's *non*-economic damages should be set aside because it is disproportionate to the evidence of injury. *Delta Regional Medical Center v. Venton*, 964 So.2d 500, 506 (Miss. 2007). The award is contrary to the overwhelming weight of evidence, and based on the law and evidence, $15 million is outrageous and extravagant. *Alpha Gulf Coast, Inc., v. Jackson*, 801 So.2d 709, 724 (Miss. 2001). Lofton did not offer proof sufficient to support, much less merit, the award of *non*-economic damages. Accordingly, remittitur is appropriate. *Community Bank v. Courtney*, 884 So.2d 767 (Miss. 2004).

In the event the Court decides not to render judgment for CPChem, or order a new trial for the reasons stated above, CPChem submits the Court should remit Lofton's *non*-economic damages to zero, but in no event, to any more than $1,000,000 (5 times actual damages).

CONCLUSION

For these reasons, CPChem asks the Court to reverse and render the Final Judgment entered by the circuit court. Otherwise, CPChem asks the Court to reverse and remand for a new trial. Alternatively, should the Court not reverse and render or remand for a new trial, CPChem submits the Court should remit the non-economic damages to zero, but in no event, to any more than one million dollars ($1,000,000).

Respectfully submitted, this the 21st day of June 2011.

Chevron Phillips Chemical Company LP

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CERTIFICATE OF SERVICE

I certify that I have caused to be hand-delivered the original and three copies of the Brief of Appellant and a condensed disk of the brief for filing to:

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Mississippi Supreme Court
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Jackson, MS 39201

I certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above Brief of the Appellant to the following:

Honorable Billy Joe Landrum
Circuit Judge
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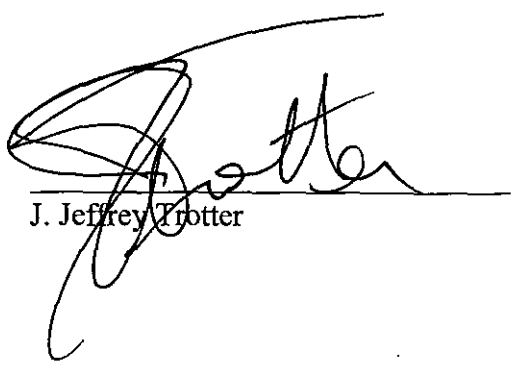
This the 21st day of June, 2011.



J. Jeffrey Trotter