COURT OF APPEALS
STATE OF GEORGIA

BECTON, DICKINSON AND COMPANY, and C. R. BARD, INC.

Appellants-Defendants,

v.

GARY WALKER,

Appellee-Plaintiff.

Ct. App. No.
A26A1118

Appellee-Plaintiff Gary Walker's Brief

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Introduction

This interlocutory appeal before the Court is brought by Appellant-Defendant Becton, Dickinson and Company and Appellant-Defendant C. R. Bard, Inc. (collectively, "BD") against Appellee-Plaintiff Gary Walker.

Walker asserts negligence and nuisance claims against BD for his forty-seven years of exposure to ethylene oxide ("EtO") from BD's medical-equipment sterilization facilities in Covington, Georgia. *See, e.g.*, V133-76 (Pl.'s Opening); V2-7-8 (Post-Trial Order). Walker was exposed to EtO from BD's facilities as a short-haul truck driver from 1970 through 1999, during which time Walker was transported cargo to and from BD's facilities, "regularly" and often "every day." V139-76 (G. Walker). Walker was also exposed because, from 1996 until 2017, he lived less than two miles from BD's facilities. *See*, *e.g.*, V133-79; V139-69; V2-7-8.

"[T]here is abundant evidence that EtO is a known carcinogen and that EtO has been classified as a known carcinogen by multiple regulatory agencies." V30-276 (Daubert Order on Salem); *see* V134-61-62, 65 (Salem) (Pl.'s Expert) (testifying that "American Cancer Society," "National Cancer Institute," and "Environmental Protection Agency" have concluded that "ethylene oxide is a carcinogen"); V150-39-41 (Chodosh) (Defs.' Expert) (testifying that "the National Toxicology Program [at HHS]" and "the International Agency for Research on Cancer [at WHO]" have decided that "it is a Class I carcinogen").

After forty-seven years of near-daily exposure to a class-one carcinogen, Walker was diagnosed in June 2017 with "diffuse large B-cell lymphoma," which is an "aggressive type of lymphoma." V150-82, 94 (Hamlin) (Pl.'s Expert); V140-26, 33 (G. Walker). Walker's "decades of exposure to ethylene oxide was medically highly likely, simply more likely than not, to be a meaningful contributing cause of his lymphoma." V138-48 (Felsher) (Pl.'s Expert); *see* V138-64-65 (same).

Although Walker had only a "one in four chance[] of surviving," V143-39 (S. Walker), he beat the odds and is alive today. "Gary Walker went through hell to get better." V154-212 (Pl.'s Closing). For seven weeks during September 2017 through December 2017, Walker had "round-the-clock chemo" treatment. V143-39. Walker also had multiple "bone marrow biopsies," where doctors would "drill into [his back] and draw fluid over, and over, and over." V143-40-41. After chemo and bone marrow biopsies, Walker required "a stem cell transplant" in February 2018. V143-41. Walker "was on 23 medications" just before the transplant. V143-43. After the chemo, biopsies, and transplant, Walker required "100 days of isolation following the transplant." V143-26-29 (Bellamy). Only after "Mr. Walker's one year of hell," V154-97, did his primary cancer go into remission. *See, e.g.*, V138-49-50. And with his decades of exposure, Walker remains at "risk of recurrence." V138-51.

After a four-week trial beginning on April 14, 2025 and ending on May 6, 2025, *see* V130–V159 (Trial Tr. Volumes), V160–V174 (Trial Ex. Volumes), the

jury unanimously returned a phase-one verdict finding BD liable based on negligence and separately based on nuisance; finding compensatory damages of $20 million; and finding that BD is liable for punitive damages, *see* V121-74-75 (Phase One Verdict). The jury also unanimously returned a phase-two verdict finding punitive damages of $50 million. *See* V122-1 (Phase Two Verdict).

However, the jury was unable to reach a unanimous verdict as to whether BD acted with specific intent to cause harm and, thus, the trial court didn't enter final judgment on the jury's verdict. *See* V2-7-20. Instead, the trial court ordered a retrial limited solely to "question of specific intent to harm" and denied BD's motion for a retrial of all issues. V2-13-14 (formatting altered). The trial court also "issue[d] [a] Certificate of Immediate Review only as to the question of ... whether the Court properly [ordered] ... [a] Retrial on Specific Intent Only." V2-20.

After BD filed an application for interlocutory appeal, this Court granted the application, *see* V2-21, and BD brought this appeal, *see* V2-1-6. Although the trial court intended for this Court's review "to be limited" to the scope of retrial, V175-49, and BD persuaded this Court to grant interlocutory appeal by arguing *only* the scope of retrial, *see* Ct. App. No. A26I0048, App. for Interlocutory Appeal, BD now raises *five* alleged errors. None of BD's enumerations of error have any merit.

Response to Statement of the Case

Walker objects to BD's statement as materially incorrect, incomplete, and

containing legal argument. *See, e.g.*, Appellants' Br. at 11 (arguing that an "error was particularly harmful"). Walker also specifically objects as follows.

BD says that a "juror disavowed the punitive damages verdict." *Id.* at 2; *see id.* at 15, 17. But what BD fails to mention is that juror 1 disagreed *only* with the second specific-intent-to-cause harm finding and *not* any other part of the punitive-damages verdict. *See* V159-37 ("JUROR 1: .... 2(b) is what we had a disagreement about specifically."); V159-38 ("THE COURT: ... the amount, did you dispute that as well? JUROR 1: No. THE COURT: It was just that? JUROR 1: We took a – we took a vote on all the other. And I was in dispute about the last item."); V122-1.

BD also says that "the trial court rejected the established two-tier approach of *McClain v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Cir. 2005)," to decide general causation. Appellants' Br. at 8; *see id.* at 9, 13, 27-30. However, in deciding BD's motion to exclude Dr. Aliasger Salem's opinions, the trial court *expressly* applied *McClain* and found that Salem's testimony "**satisfies the rule set forth in** In re Deepwater Horizon and **McClain**." V30-294 (emphasis added).

BD next says that its "cross-examination of one of Walker's experts, Dr. Sahu, did not open any door" to other-similar-incidents evidence. Appellants' Br. at 10. Yet, BD omits that the trial court also relied on testimony from at least three other witnesses—two former BD employees, Elizabeth Bruette and Richard Bliss, and its general-causation expert, Lewis Chodosh. *See, e.g.*, V145-37-40; V150-144, 149.

BD also says that, after Walker's counsel suggested a range of non-economic damages, "[t]he jury then returned a Phase I verdict for Walker in his requested range—$20 million." Appellants' Br. at 12. Yet, that's not true. Walker's counsel suggested a range of "$25 to $30 million" for non-economic damages, V154-94, and the jury *rejected* that range. The jury, instead, found $20 million in *total* compensatory damages. V121-74-75. With $2.3 million in medical expenses, V154-93, the remaining $17.3 million is well *below* Walker's suggested range.

And BD says that, "[t]o effectively evaluate overall EtO exposure jurors must understand all exposures to put Walker's exposure ... in context." Appellants' Br. at 15. However, the trial court allowed BD to introduce evidence of all background exposures, including endogenous *and* environmental exposure. The trial court precluded, as unfairly prejudicial and confusing, BD from trying to differentiate between specific types of background exposure. As the trial court explained, BD "can sufficiently support opinions on non-sterilization-facility exposure—Background Exposure—without teasing out whatever independent impact may be attributable to endogenous, but not environmental, exposure in the Background." V49-74.

Argument

1. The trial court correctly limited any retrial to "specific intent to cause harm."

As the trial court here explained, "[t]h[e] principle that claims may be retried if they are separable from other claims reflects Georgia's strong policy favoring the

preservation of lawfully returned verdicts, recognizing that 'verdicts shall not be avoided unless from necessity.'" V2-12 (quoting O.C.G.A. § 9-12-14). Indeed, based on binding precedent for more than 100 years, the rule in Georgia is that "[l]imiting the scope of retrial to only those distinct portions of the judgment that are infirm serves the dual objectives of judicial economy and respect for the jury's verdict." *Martin v. Six Flags Over Ga. II, L.P.*, 301 Ga. 323, 337 (2017).

"This principle has been applied in a variety of circumstances." *Id.* (citing *Chicago Bldg. & Mfg. Co. v. Butler*, 139 Ga. 816, 819 (1913) ("affirming verdicts as to some defendants but reversing as to others"); *Cowart v. Strickland*, 149 Ga. 397, 400 (1919) ("affirming judgment as to plaintiff's claim for ejectment and ordering retrial only on plaintiff's claim for ejectment and ordering retrial only on plaintiff's claim for recovery of mesne profits"); *Central R. & Banking Co. v. Raiford*, 82 Ga. 400, 405-06 (1889) ("ordering retrial only as to whether plaintiff was contributorily negligent"); *Schriever v. Maddox*, 259 Ga.App. 558, 561 (2003) ("error in jury instructions warranted retrial on damages only"); *Petty v. Barrett*, 187 Ga.App. 83, 83 (1988) ("error in admission of certain evidence required retrial only as to specific category of damages to which improper evidence related"); *Clark v. Wright*, 137 Ga.App. 720, 722 (1976) ("inconsistency in verdicts between husband and wife plaintiffs warranted retrial only as to ... damages to be awarded husband")).

In this case, the trial court correctly found that "there is no question but that

the jury unanimous decided the questions [i.e., liability and compensatory damages] present[ed] to it during Phase 1 of the trial" and "the Phase 1 verdict was valid." V2-13. "Likewise, the jury unanimously decided the amount of punitive damages to be awarded," and "this unanimous verdict of the jury in Phase 2 as to the amount of punitive damages is a valid verdict." V2-14, 18.

Because "the jury failed to return a unanimous verdict on the question of specific intent to harm only," V2-19, and the jury's unanimous verdict on liability, compensatory damages, and the amount of punitive damages are "severable from the issue of specific intent—an issue that relates only to the damages cap," V2-16, the trial court correctly ordered that only "specific intent to harm be retried," V2-19.

A. Code Section 9-12-1 doesn't prohibit a limited retrial.

BD says that "an entire new trial is required under O.C.G.A. § 9-12-1 when, as here, the verdict did not 'cover' all the issues submitted to the jury." Appellants' Br. at 18 (quoting O.C.G.A. § 9-12-1).

But, if that were a correct reading of Code Section 9-12-1, then *Martin* and every case cited by *Martin* were all wrongly decided. In each of those cases, the Supreme Court and this Court accepted the jury's verdict that properly decided *some*, but not all, issues made by the pleadings and then ordered a limited retrial of the undecided issues before a *different* jury. For example, in *Martin*, the jury's verdict did *not* cover the fault of "two non-parties—Ander Cowart and 'Mr. Black.'" 301

Ga. at 337. Yet, the Supreme Court ordered only "a partial trial limited to apportionment" with a different jury. *Id.* "[T]here is no sound reason to disturb the jury's findings on liability or its calculation of damages sustained by the plaintiff." *Id.*

The trial court's order is also consistent with Code Section 9-12-1's actual language—not the contrived meaning BD tries to give that statute. It says only that "[t]he verdict shall cover the issues made by the pleadings." O.C.G.A. § 9-12-1. It does *not* say that the verdict must be produced in the *same* trial by the *same* jurors. For that reason, a trial followed by a limited re-trial to resolve any issues not fully decided by the initial trial satisfies Code Section 9-12-1. *Id.* And that Code Section 9-12-1 "refers to 'the [verdict]' ... in the singular does not mean that only one [verdict]" is allowed "under this [statute]." *Reid v. Morris*, 309 Ga. 230, 237 n.3 (2020).

BD cannot reconcile *Martin* with its arguments about Code Section 9-12-1. BD says that, "[i]n *Martin*, the jury did resolve all the submitted issues, and a partial retrial was approved only because it involved a severable ruling governed by the specific text of the apportionment statute." Appellants' Br. at 25.

However, Code Section 9-12-1 doesn't refer to issues "submitted" to the jury. *Id.* Instead, it plainly says that "[t]he verdict shall cover the issues **made by the pleadings**." O.C.G.A. § 9-12-1 (emphasis added). And "it is undisputed" that Six Flags made the issue of apportionment in its pleadings and "requested that these individuals be included on the verdict form for apportionment of fault." *Six Flags*

Over Ga. II, L.P. v. Martin, 335 Ga.App. 350, 363 (2015). As such, Code Section 9-12-1 applied in *Martin* just as much as it applies here. But that's no obstacle to a limited retrial in either case because, again, nothing in Code Section 9-12-1 requires that the verdict or verdicts must be rendered in the same trial by the same jurors.

There's also no "apportionment" exception to Code Section 9-12-1 that would allow one set of rules to apply to apportionment, but not to punitive damages. Indeed, *Martin* rejected any argument that the apportionment statute's specific text is unique. "[T]he natural presumption that a single fact-finder will make the determination of liability, damages sustained, and apportionment upon the initial trial in an apportionment case is no different than the presumption that a single fact-finder will make liability and damages determinations in other contexts in which our courts have permitted retrial of less than the whole of the case." 301 Ga. at 339.

Ultimately, BD must concede that, "where an entirely severable issue exists," the trial court should order a retrial on *only* that severable issue, not an entire retrial. Appellants' Br. at 19. The relevant question is severability—not whether the verdict covered all the issues in the initial trial. To be sure, BD also disputes severability. It says that "specific intent to harm necessarily depends upon the same evidence claimed to support liability and grounds for punitive damages." *Id.* at 26.

Yet, evidentiary overlap doesn't mean that specific intent cannot be severed. Once again, *Martin* rejects BD's exact argument. As the Supreme Court explained

there, "a retrial on apportionment may require the presentation of much (if not all) of the **same evidence** as was presented at the first trial on the question of liability. That the issues of liability and apportionment are distinct does not mean that the proof relevant to those issues is substantially different." 301 Ga. at 341 n.13 (emphasis added). The same is true here regarding liability and specific intent.

B. Code Section 51-12-5.1 doesn't prohibit a limited retrial.

BD says that "our punitive damages statute ... requires that the same jury deciding liability and punitive damages must decide the amount of punitive damages." Appellants' Br. at 20; *see* O.C.G.A. § 51-12-5.1 (d)(1) ("If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced ... [for] a decision regarding what amount of damages will be sufficient ....").

But, like with the apportionment statute in *Martin*, the punitive-damages statute in this case merely reflects "the natural presumption" that a single jury will make those determinations in "the initial trial." 301 Ga. at 339. But that *presumption* doesn't "require[] a single trier of fact" to make those determinations in that initial trial, nor does it prohibit a "retrial of less than the whole of the case." *Id.*

Indeed, "recommence" means only "to begin"; it doesn't require that the trial be *finished* by the same jury in the same trial. Merriam-Webster, https://www.merriam-webster.com/dictionary/recommence. Here, the trial was immediately recommenced after the jury decided compensatory damages. That the trial may not *finish*

until after a limited retrial doesn't violate Code Section 51-12-5.1's language.

C. Code Section 51-12-15 doesn't prohibit a limited retrial.

BD says that "[t]he legislature's recent clarification of the procedure for determining punitive damages reaffirmed O.C.G.A. § 51-12-5.1's mandatory language. Section 51-12-15 states that after liability is determined, 'the trial shall be recommenced immediately with the same judge and the same jury' to decide punitive damages.'" Appellants' Br. at 21-22 (emphasis omitted). But, for at least two reasons, Code Section 51-12-15 doesn't prohibit a limited retrial here.

i. Code Section 51-12-15 doesn't apply here.

Even if Code Section 51-12-15 could apply to this trial that started *before* its effective date of April 21, 2025, it still wouldn't apply here. Code Section 51-12-15 applies only where a party makes a "written demand prior to the entry of the pretrial order, to have fault and any award of damages determined at trial in the following manner [in this Code section]." O.C.G.A. § 51-12-15 (a). However, BD didn't make, and couldn't have made, a proper "written demand prior to the entry of the pretrial order" to have fault and damages decided under Code Section 51-12-15. *Id.* When the PTO was entered, Code Section 51-12-15 didn't exist. For that reason alone, Code Section 51-12-15 doesn't apply here.

BD also has no basis to say that "[t]he General Assembly's clarification of the process in subsequent legislation [i.e., Code Section 51-12-15] confirms its intent

that a single jury conduct both evidentiary phases [under Code Section 51-12-5.1]." Appellants' Br. at 22. Nothing in Code Section 51-12-15 suggests that the General Assembly was engaged in "clarification." The General Assembly enacted a *new* law. Regardless, "[o]ne legislature has no power to declare the intent of a prior General Assembly in enacting a law, this being a legislative attempt to perform a judicial function." *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga.App. 372, 374 (2006).

ii. Even if it did, Code Section 51-12-15 doesn't prohibit a limited retrial.

Even if Code Section 51-12-15 could apply here, it still wouldn't prohibit a limited retrial. Like with the apportionment statute in *Martin*, Code Section 51-12-15 merely reflects "the natural presumption" that a single jury will make those determinations in "the initial trial." 301 Ga. at 339. But that *presumption* doesn't "require[] a single trier of fact" to make those determinations in that initial trial, nor does it prohibit a "retrial of less than the whole of the case." *Id.*

Again, "recommence" means only "to begin"; it doesn't require that the trial be *finished* by the same jury in the same trial. Merriam-Webster, https://www.merriam-webster.com/dictionary/recommence. Here, the trial was "recommenced immediately with the same judge and the same jury" after the jury decided compensatory damages. O.C.G.A. § 51-12-15 (a)(3). That the trial may not *finish* until after a limited retrial doesn't violate Code Section 51-12-15's language.

D. *Kane v. Cohen* doesn't prohibit a limited retrial.

Nothing in *Kane v. Cohen*, 182 Ga.App. 485 (1987), prohibits a limited retrial here. The error in *Kane* was that "[d]efendant's motion to set aside the **judgment** entered upon the jury's incomplete verdict was denied." *Id.* at 485; *see id.* at 486 (the trial court "erred" by "denying defendant's motion to set aside **the judgment** entered upon the jury's incomplete verdict") (emphasis added in both).

As the trial court explained here, "[r]ather than insisting that the jury deliberate further or finding that the jury was deadlocked and ordering a [retrial] as to the amount of punitive damages, the trial court entered a final judgment on the incomplete verdict. That was the error." V2-14. *Kane* doesn't say, let alone hold, that retrial on all issues was required. The error was only entry of *judgment*.

Also, *Kane* was decided *before* Code Section 51-12-5.1's mandatory bifurcation. *Compare* Ga. Laws 1987, p. 922, § 9 ("Approved April 8, 1987") *with Kane*, 182 Ga.App. at 485 (decided on "March 19, 1987"). As such, even if *Kane* had decided any scope of retrial, it couldn't apply here, where liability for and the amount of compensatory damages were decided in an entirely separate phase.

Moreover, even if *Kane* could be read to require a retrial on all issues here, that would conflict with the Supreme Court's binding precedent in *Martin* and more than 100 years of precedent. This Court is bound to follow its own prior precedent and the Supreme Court's precedent over any conflicting precedent.

E. *Southeastern Pain Specialists, P.C. v. Brown* doesn't prohibit a limited retrial.

Similarly, nothing in *Southeastern Pain Specialists, P.C. v. Brown*, 303 Ga. 265 (2018), prohibits a limited retrial here. To start, the Supreme Court in *Southeastern Pain* held that "***[a] full retrial is necessary, but only as to appellants***." *Id.* at 274. In other words, the Supreme Court ordered a full retrial of Brown's claims against Southeastern Pain and Dr. Doherty—but *no* retrial of Brown's claims against "nursing director Mary Hardwick." *Id.* at 267.

That retrial for only *some*, but not all, defendants in *Southeastern Pain* confirms that BD's reading of both Code Sections 9-12-1 and 51-12-5.1 is wrong. Those statutes don't require that the same jury decide all issues in the same trial; otherwise, the Supreme Court would've had to order a full retrial against all defendants—not just against Southeastern Pain and Doherty.

Moreover, the *reason* the Supreme Court ordered a full retrial against Southeastern Pain and Doherty had nothing to do with Code Sections 9-12-1 and 51-12-5.1. Rather, the error was that "the **ordinary negligence charge** was harmful to the defendants." 303 Ga. at 270 (emphasis added). That charge infected *both* liability for compensatory and punitive damages, and that's why a full retrial was necessary. "[W]hether liability is established" was "now an open question." *Id.* at 275.

That's nothing like this case. The trial court here didn't order a retrial based on any error it or the parties committed. The limited retrial is *solely* because of the jury's inability to reach a verdict on specific intent. Without a finding of error in any

other aspect of the trial, there's no basis for ordering a full retrial.

F. A limited retrial doesn't violate BD's constitutional rights.

For at least two reasons, this Court should easily reject BD's argument that a limited retrial would violate "BD's constitutional rights." Appellants' Br. at 23-25.

i. There's no constitutional ruling to review.

As an initial matter, the trial court didn't decide *any* constitutional question—whether raised by Walker or BD. *See* V2-19; V2-7-20. As such, there's no constitutional ruling to review, and this Court should dismiss BD's constitutional objections on this basis alone. "Like the Supreme Court of Georgia, this Court 'will not rule on a constitutional question unless it clearly appears in the record that the trial court distinctly ruled on the point.'" *Regan v. State*, 361 Ga.App. 156, 158 (2021). "While we cannot address the [issues] in this appeal," this Court can "remand this case to the trial court for a ruling on the constitutional questions." *Id.*

ii. Even if there were, a limited retrial doesn't violate BD's constitutional rights.

In any event, BD's constitutional objections are meritless. BD doesn't provide any explanation for why due process prohibits a limited retrial here, and the only due-process case BD cites is easily distinguished. In *In re Bradle*, 83 S.W.3d 923 (Tex. App. 2002), the trial court discharged, "without objection" from the plaintiff, the jury after its phase-one verdict. *Id.* at 926. The appellate court held that "it was [the plaintiff's] burden to raise the remaining assessment of punitive damages before

the jury was discharged," and her failure to do so prohibited the trial court from later ordering a second trial—not a retrial—on punitive damages. *Id.* at 927.

As for the right to jury trial, BD's cited cases *reject* its argument under the U.S. Constitution. "[T]he Seventh Amendment does not .... require that an issue once correctly determined ... be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury." *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931).

Under the Georgia Constitution, BD provides no English or Georgia common-law precedent that prohibits limited retrials. "Although it is true that no cases can be found in the early common law of England where a partial new trial was ordered, yet neither are there early cases which hold such a new trial is improper." Note, "New Trial—Constitutionality of Partial New Trial," 69 U. Pa. L. Rev. 71, 72 (1920). "And several cases strenuously oppose the conclusion ... that the common law was opposed to partial new trials." *Id.*; *see, e.g.*, *Butler*, 139 Ga. at 819.

Moreover, a limited retrial doesn't *take away* BD's right to jury trial on specific intent. At most, it changes the *procedure* in which the jury trial is conducted, and BD cites no precedent that parties are entitled to a jury trial in the exact procedure as existed at common law. *See, e.g.*, *Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 58 (2023) ("[I]t did not freeze the law completely."). If that were true, Code Section 51-12-5.1's bifurcation procedure itself would be unconstitutional.

2. The trial court applied *McClain v. Metabolife Int'l, Inc.* in using its discretion to admit Salem's general-causation opinions.

In *Sterigenics US LLC v. Mutz*, 377 Ga.App. 624 (2025), this Court held that, "in determining the admissibility of expert testimony on general causation in toxic tort cases," "Georgia courts should apply the Eleventh Circuit standard as enunciated in *McClain v. Metabolife Int'l, Inc.* and its progeny." *Id.* at 625 (citation omitted).

In *McClain*, the Eleventh Circuit "delineat[ed] between two categories of alleged toxins with different standards applicable to each." *Id.* at 627. "In cases that fall within the first category, where the medical community 'routinely and widely' recognizes that the drug or chemical 'causes the type of harm a plaintiff alleges,' courts 'need not undertake an extensive *Daubert* analysis on the general toxicity question' and the focus instead is on specific causation." *Id.* at 627-28.

Otherwise, "when evaluating an expert's opinion on general causation, courts 'should pay careful attention to the expert's testimony about the dose-response relationship.'" *Id.* at 628. "'[T]he dose-response relationship is a relationship in which a change in amount, intensity, or duration of exposure to an agent is associated with a change – either an increase or decrease – in risk of disease,' and that 'the relationship between dose and effect ... is the hallmark of basic toxicology.'" *Id.*

Here, contrary to BD's assertion that "it failed to apply the *McClain* standard," Appellants' Br. at 5, the trial court expressly applied *McClain* in using its discretion to admit Salem's general-causation opinions about EtO. Thus, BD cannot establish

that the trial court *abused* its discretion in admitting Salem's opinions.

A. The trial court expressly applied *McClain*, treated EtO as a category-two toxin, and considered dose-response.

BD says that "the trial court did the opposite of what [*McClain*] requires," by "refus[ing] to classify EtO as a Category I or II toxin," and by "finding Georgia does not require a dose-response relationship." Appellants' Br. at 29. However, in its twenty-nine-page written order denying BD's motion to exclude Salem's general-causation opinions, the trial court expressly applied *McClain*, treated EtO as a category-two toxin, and considered dose-response. *See* V30-267-95.

The trial court recognized that "McClain specifically holds that Daubert does not require an expert to give 'precise numbers about a dose-response relationship. Some ambiguity about individual responses is expected. However, the link between an expert's opinions and the dose-response relationship is a key element of reliability in toxic tort cases.'" V30-294 n.16 (quoting *McClain*, 401 F.3d at 1241 n.6).

The trial court then found that Salem analyzed "human population studies" and "animal studies as well." V30-283. "Collectively, these studies showed that with increased exposure relative to [a] control group, which was 'no exposure or background,' there is an increased incidence of chromosomal aberrations and cancer as a function of the exposure, and it is dependent on both dose and duration." V30-283-84. "These studies support Dr. Salem's opinions that there is a dose-related relationship between EtO exposure and cancer." V30-284. Specifically, "Dr. Salem testified

to peer-reviewed studies that firmly establish increased cancer risk at specific increased concentrations of EtO—less than 1 PPM, 1 PPM, 25 PPM, 50 PPM, and 100 PPM—on a dose-response basis." V30-294.

The trial court also recognized that "Salem's Bradford-Hill analysis lends further reliability." V30-285. "Salem thoroughly examined a variety of factors across the Bradford-Hill criteria," including "before and after exposure" and "dose-dependent response." *Id.*; *compare In re Deepwater Horizon Belo Cases*, 119 F.4th 937, 946-47 (11th Cir. 2024) (affirming exclusion where district court found that the expert "failed to provide more than a hasty discussion of the Bradford Hill factors").

For those reasons, the trial court held that Salem's testimony "satisfies the rule set forth in In re Deepwater Horizon and McClain." V30-294 (emphasis added). Salem "opines that EtO exposure **above background** increases cancer risk in a dose-related manner," V30-290, which shows "a harmful level at which EtO could cause the harms alleged," *Sterigenics*, 377 Ga.App. at 634. The trial court simply didn't reject "a dose-response relationship," as BD asserts it did. Appellants' Br. at 29.

B. The trial court found it unnecessary to decide whether EtO is a category-one toxin.

Because it found that "the references relied upon by Dr. Salem, together with his testimony, at a minimum support the conclusion that EtO causes cancer on a dose-response basis," the trial court made "no finding" on whether EtO is a category-one toxin. V30-277 n.7. In other words, the trial court found it unnecessary—it

didn't *refuse* to decide—whether EtO was a category-one toxin. And this Court should affirm the trial court's exercise of discretion in finding that Salem satisfied *McClain*'s standard for a category-two toxin.

However, if it became necessary to decide whether EtO is a category-one toxin, this Court should remand for the trial court to decide in the first instance, since the trial court made "no finding." *Id.* That's especially true given that, while it made no finding, the trial court still recognized that, "[h]ere, there is abundant evidence that EtO is a known carcinogen and that EtO has been classified as a known carcinogen by multiple regulatory agencies." V30-276 n.6; *see* V134-61-62, 65 (Salem); V150-39-41 (Chodosh). On remand, the trial court would almost certainly find that EtO is a category-one toxin, which would provide an independent basis for the trial court's exercise of discretion to admit Salem's testimony. Thus, there's no basis for this Court to grant "judgment in BD's favor." Appellants' Br. at 30.

C. BD makes no argument about Felsher's specific-causation opinions.

In a single sentence, BD asserts that, "because the Salem/**Felsher** opinions unquestionably fail *McClain* and *Daubert*, they should be excluded outright." *Id.* (emphasis added). But that reference to "Felsher"—the *only* reference to Felsher in BD's entire brief—doesn't constitute any argument this Court can consider.

Dr. Dean Felsher offered opinions on *specific* causation and BD presents no arguments for why the trial court erred on *specific* causation. Indeed, BD doesn't

even cite—let alone address—the trial court's order on Felsher. *See* V30-233-66. Because "'mere conclusory statements are not the type of meaningful argument contemplated' by our rules," BD's request to exclude Felsher's specific-causation opinions has "been abandoned." *Brittain v. State*, 329 Ga.App. 689, 704 (2014).

3. The trial court didn't abuse its discretion in admitting other similar incidents.

In "all negligence actions," evidence of other similar incidents may be admissible to show "knowledge of the defect," "the prior existence of a dangerous condition," "causation," or "to rebut a contention that it was impossible for the [incident] to happen in the manner claimed." *Hand v. Pettitt*, 258 Ga.App. 170, 173 (2002). While the other incidents must be "substantially similar," "there is no requirement that [they] be identical." *Ga. DOT v. Brown*, 218 Ga.App. 178, 183 (1995). "'The relevancy of other occurrences and thus the admissibility of such evidence lies within the sound discretion of the trial court.'" *Id.*

Here, the trial court properly exercised its discretion to admit other incidents to *rebut* evidence and inferences BD introduced that Walker's injuries couldn't possibly have been caused by EtO exposure. Before doing so, the trial court repeatedly warned the parties about this possibility. *See* V125-25 (Mots. Hr'g) ("[T]his [would] open[] up the door for OSI[s]."); V129-6-7 (Final Pre-Trial Conference) ("[O]f course, if the door is opened, then everything's different."); *see* V129-102 (same).

During trial, the trial court properly found that BD rendered other incidents

admissible as rebuttal in at least four ways. *First*, BD cross examined Ranajit Sahu, an air-quality expert for Walker, about how BD monitored its employees for EtO exposure. *See, e.g.*, V137-230-44 (going through "monitoring records for [numerous] employees" to show "what kind of levels we were seeing at the facility"). This opened the door for "OSIs in the workplace" because it "suggest[ed] to the jury that employees don't get cancer, and they work in close proximity to the sterilizers and none of them are getting sick." V150-141; *see* V150-147.

Second, BD elicited testimony from Elizabeth Bruette, a thirty-two-year employee of BD who "lived by the plant," that she never felt "unsafe" or like she was "putting the community at risk." V144-32, 154-55. That testimony "open[ed] the door to community exposure." V145-37-40.

Third, BD elicited similar testimony from Richard Bliss, another long-time employee of BD, who testified that "there was nothing we were doing that would put [the community] in risk in any way." V97-62. This also "opened the door for the community, OSIs in the community." V150-149.

Fourth, BD elicited repeated testimony from Lewis Chodosh, a general-causation expert for BD, that "ethylene oxide doesn't cause cancer, except potentially in extremely high levels of exposure to which people probably aren't exposed anymore." V149-48; *see* V149-78, 93-94, 115 ("very" or "extremely high levels"). This further opened the door to rebut the inference that "the amount of exposure that was

present ... in the community is not capable of causing cancer." V150-144.

These instances of BD opening "the door time and time again" led the trial court to exercise its discretion to allow a limited set of other similar incidents. V152-78-82. In its brief, BD addresses only the trial court's ruling that Sahu's cross-examination opened the door, *see* Appellants' Br. at 10, 34, while ignoring the three other witnesses. On that basis alone, BD has "abandoned" this issue by failing to make "meaningful argument." *Brittain*, 329 Ga.App. at 704.

As for the few arguments BD makes about Sahu's cross-examination, they don't establish that the trial court abused its discretion. BD says that it never "invite[d] consideration of whether these other employees had cancer." Appellants' Br. at 10. However, throughout the trial, BD invited the jury to consider other employees, including cross-examining Walker's experts "that OSHA factors into account that [other] employees are healthy," "that they're only exposed for eight hours a day and then they go home," and Walker was only exposed "3.6 percent of a full-time employee." V138-73, 75 (Felsher). Walker was entitled to rebut the inference that BD's employees are healthy, and none have cancer despite higher exposures.

BD also says that "'opening the door'" cannot "supplant the 'substantial similarity' rule." Appellants' Br. at 34. But opening the door for rebuttal evidence doesn't contradict the substantial-similarity rule. It just changes the relevance. The other similar incidents aren't used as direct evidence that BD caused Walker's

injuries, but rather "to rebut a contention that it was **impossible** for [his injuries] to happen in the manner claimed." *Hand*, 258 Ga.App. at 173 (emphasis added); *see Rubio v. State*, 376 Ga.App. 486, 489 (2025) (recognizing a defendant "'opened the door'" to "impeachment by disproving a fact").

Finally, out of an abundance of caution, we note that, even if the trial court erred in relying on BD's opening the door to other similar incidents, the remedy wouldn't be a retrial. In this interlocutory appeal, the Court would have to remand the issue for the trial court to conclude, in its discretion, whether Walker was entitled to admit the other similar incidents on other grounds.

The trial court never issued a definitive ruling on the other grounds for Walker's other similar incidents. *See, e.g.*, V31-1-97 (Pl.'s Not. of OSI). And Walker introduced evidence to establish each "of these individuals me[]t various selective touchstones of substantial similarity," V31-96, including distance, duration, and no family history of similar cancer, V31-3.

4. The trial court didn't abuse its discretion in overruling BD's objections to Walker's closing argument on damages.

"'Counsel is permitted wide latitude in closing argument and any limitation of argument is a matter for the trial court's discretion.'" *Chrysler Grp., LLC v. Walden*, 339 Ga.App. 733, 744 (2016). Moreover, "'[f]lights of oratory and false logic do not call for mistrials or rebuke. It is ... facts not in evidence that requires the application of such remedies.'" *F.D. Wilson Trucking Co. v. Ferneyhough*, 269

Ga.App. 736. 737 (2004) (physical precedent); *Lillard v. Owens*, 281 Ga. 619, 622 (2007). (citing to *F.D. Wilson*). Thus, "'[w]hile counsel should not be permitted in argument to state facts which are not in evidence, it is permissible to draw inferences from the evidence, and the fact that the deductions may be illogical, unreasonable, or even absurd is a matter which may be addressed by opposing counsel in his or her closing argument.'" *Chrysler*, 339 Ga.App. at 744.

For example, in *Chrysler*, the plaintiffs' attorney argued in closing that "'what [defense counsel] said [decedent] Remi's life was worth, [CEO] Marchionne made 43 times as much in one year.'" 339 Ga.App. at 744. He further argued that "[t]he amount is totally up to you," but "[w]e ask that you return a verdict for the full value of Remington's life of at least $120 million," which is "less than two years of what Mr. Marchionne made just last year." *Id.* On appeal, this Court held that, "[i]n light of the permissible admission of evidence of Marchionne's compensation, we cannot say that the trial court abused his discretion in allowing this argument." *Id.*

As another example, in *Hardwick v. Price*, 114 Ga.App. 817 (1966), "plaintiff's closing argument to the jury" suggested that "the hourly worth of the plaintiff's pain and suffering should be as much as the price of a measly bottle of Coca-Cola." *Id.* at 821. On appeal, this Court held that this "was not, under the facts of this case, an unreasonable deduction from the evidence, and the court did not err in overruling the defendant's motion for a mistrial." *Id.* As this Court explained, "it is not improper

for counsel to argue to the jury the per diem, monthly, or yearly value of the plaintiff's pain and suffering." *Id.* at 820. "If the jury must infer from what it sees and hears at the trial that a certain amount of money is warranted as compensation for the plaintiff's pain and suffering, there is no justification for prohibiting counsel from making a similar deduction in argument." *Id.* at 820-21.

Here, like in *Chrysler* and *Hardwick*, the trial court didn't abuse its discretion in overruling BD's objections to Walker's closing argument. *See* V154-94, 103-04; V155-50-52. Walker's counsel told the jury that you "will decide what you think, as you've been charged, is a just and fair amount." V154-92-93. "Our suggestion" for "pain and suffering" is "$25 to $30 million." V154-93-94. Walker's counsel explained that "we looked to Bard's own documents," "they discussed what the expected extra revenue would be from one customer," and "for one year alone, it was $25 to $30 million." *Id.* Adding Walker's medical expenses of "$2,304,292.68" with those pain-and-suffering damages would "give you a reasonable range" of $27 million to $32 million. *Id.* Ultimately, the jury *rejected* Walker's suggested range, and the jury instead found total compensatory damages of $20 million. *See* V121-74.

A. The new Code Section 9-10-184 didn't apply to this trial, which began before its effective date.

BD's *sole* argument on appeal is that the trial court didn't "consider[] the new law" and Walker violated S.B. 68's "amendment to O.C.G.A. § 9-10-184." Appellants' Br. at 39-40. Although Walker didn't violate this new law, BD hasn't

established that it applies to this trial, which began before S.B. 68's effective date.

True, new Code Section 9-10-184 "'appl[ies] to causes of action pending on the effective date.'" *Id.* at 22 (quoting S.B. 68 § 9 (b)). But "to apply a procedural statute retroactively generally does not mean that it applies with respect to prior filings, proceedings, and occurrences." *Murphy v. Murphy*, 295 Ga. 376, 378 (2014). "'The critical issue ... is the relevant activity that the rule regulates. Absent a clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered.'" *Burns v. State*, 313 Ga. 368, 373 (2022) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring)).

Here, the relevant activity that new Code Section 9-10-184 regulates is *the trial*—not just closing. By its repeated plain language, the General Assembly intended to regulate "**the trial** of any action to recover damages for bodily injury or wrongful death." O.C.G.A. § 9-10-184 (b) & (c)(1) (emphasis added). Because the General Assembly intended to regulate the entire trial—not just closing—it applies only to a trial which "occurs *after* the effective date." *Burns*, 313 Ga. at 373.

Because this trial was *ongoing* on—not after—S.B. 68's effective date, new Code Section 9-10-184 doesn't apply. Any other result would violate not only the General Assembly's intent, but it would, as the trial court found, be "quite unfair for that bill to apply to a trial ongoing where we don't have time to read it and understand it." V154-103. And since BD argues only under new Code Section 9-10-184, the

fact that it doesn't apply here is a sufficient basis to affirm the trial court.

B. Regardless, the trial court properly exercised its discretion to overrule BD's objections.

Even if new Code Section 9-10-184 applied here, the trial court properly exercised its discretion to overrule BD's objections. Subsection (c)(1) requires only that "such argument shall be rationally related to the evidence of noneconomic damages and shall not make reference to objects or values having no rational connection to the facts proved by the evidence." O.C.G.A. § 9-10-184 (c)(1).

But this Court has already held that a "plaintiff's closing argument to the jury suggesting that the hourly worth of the plaintiff's pain and suffering should be as much as the price of a measly bottle of Coca-Cola was not, under the facts of this case, an unreasonable deduction from the evidence." *Hardwick*, 114 Ga.App. at 821; *see* O.C.G.A. § 9-10-184 (1960) (requiring "such argument shall conform to the evidence and reasonable deductions from the evidence in case").[1]

If the price of a Coke can be a reasonable deduction for the hourly worth of a plaintiff's pain and suffering, then *a fortiori*, Walker's counsel was entitled to use the profit that BD could generate in one year as a reasonable deduction for the yearly worth of his pain and suffering. It's undisputed that BD's profit-estimate was a

[1] New Code Section 9-10-184 didn't materially change the standard for what's permissible argument on noneconomic damages. It expanded the *remedies* for violations, and it extended the *scope* of its regulation to the entire trial.

"fact[] proved by the evidence." O.C.G.A. § 9-10-184 (c)(1). And because "the jury must infer from what it sees and hears at the trial that a certain amount of money is warranted as compensation," "there is no justification for prohibiting counsel from making a similar deduction in argument." *Hardwick*, 114 Ga.App. at 820-21.

In sum, the trial court didn't abuse its discretion in finding that (1) Walker's argument was rationally related to the evidence of *noneconomic damages*, i.e., the evidence that Walker suffered one year of hell; and (2) Walker's argument referred to values proved by *the facts in evidence*, i.e., the evidence of BD's profit.

C. BD also hasn't established material harm requiring a retrial, let alone a full retrial.

Finally, even if new Code Section 9-10-184 applied here and BD could establish that the trial court abused its discretion under this statute, BD hasn't established material harm requiring a retrial, let alone a full retrial.

BD says that the verdict is "patently excessive" and reflects "extreme prejudice." Appellants' Br. at 3, 40. Yet, BD provides absolutely no evidence or argument for why the jury's damages verdict is patently excessive or prejudicial. And because this is an interlocutory appeal, the trial court has yet to exercise its discretion to decide whether the jury's verdict shocks the conscience. To be clear, it doesn't, but only the trial court can make that decision as the "thirteenth juror."

In any event, there's compelling evidence that BD wasn't materially harmed by Walker's closing argument—the jury *rejected* his counsel's $27 to $32 million

range. Instead, the jury found $20 million in compensatory damages, which shows that the jury wasn't persuaded by Walker's suggested range and no remedy from the trial court was needed. And, of course, even if BD could establish harmful error, that would justify only a retrial of *compensatory damages*—not an entire retrial.

5. The trial court didn't abuse its discretion in limiting evidence of background or endogenous exposure to EtO.

"'[T]he application of Rule 403 is a matter committed principally to the discretion of the trial courts,' subject to appellate review only for abuse of that discretion." *State v. Orr*, 305 Ga. 729, 737 (2019); *see* O.C.G.A. § 24-4-403. Rule 403 authorizes "the exclusion of relevant evidence based on the [*trial*] *court's* evaluation" of the "unfair prejudice, confusion of the issues, or misleading the jury." *Id.* It calls for "careful, case-by-case analysis, not a categorical approach." *Id.* at 738.

Here, the trial court didn't abuse its discretion in issuing a detailed sixteen-page written order finding that "evidence of 'endogenous EtO' would lead to confusion; would be cumulative of the ample evidence of 'Background Exposure' adduced by both parties and the opinions based on that evidence; are in part unsupported by the record and speculative in nature, and would be potentially prejudicial ... substantially beyond its probative value." V49-67-82 (Order on Pl.'s MIL #4).

Rather than show how the trial court abused its discretion, BD resorts to a series of mischaracterizations. BD says that, while "[t]he trial court asserted that 'endogenous EtO' is **only** produced in the liver or gut," "[t]his is incorrect:

endogenous EtO is formed in most, if not all, cells in the human body." Appellants' Br. at 42 (emphasis added). But the trial court never said that endogenous EtO is produced *only* in the liver or gut. *See* V49-70. Even if it had, BD never explains how that created any error. As Walker's counsel explained, endogenous EtO is "mainly stored in the liver," but "[i]t can be found in other places." V129-87. "So what"? *Id.* "[T]he defense mechanisms are the same, regardless of the two," and "[e]ndogenous [EtO] has no effect on whatsoever on the body and does not cause cancer." *Id.*

BD also says that, while "[t]he trial court differentiated from endogenous EtO from inhaled EtO to find that endogenous EtO is irrelevant," "that is factually incorrect" and "[h]uman bodies treat endogenous EtO and exogenous EtO the same way." Appellants' Br. at 42. In fact, though, the trial court recognized that "[t]he Parties agree that there is no molecular difference between the [two]," and "the relevant factual disputes do not involve the chemistry of the EtO molecule." V49-78. Instead, the trial court relied on "the nature of the EtO exposure—the amount and duration of exposure above Background Exposure." *Id.*

BD asserts that "[t]he jury was denied knowledge of the significant fact the human body naturally creates EtO." Appellants' Br. at 43. However, the trial court allowed BD to introduce sufficient evidence of background exposure, which includes endogenous *and* environmental exposure. As the trial court explained, BD "can sufficiently support opinions on non-sterilization-facility exposure—

Background Exposure—without teasing out whatever independent impact may be attributable to endogenous, but not environmental, exposure in the Background. And the scientific references cited by Dr. Chodosh ... do just that." V49-74.

BD also asserts that the trial court "excluded BD's evidence of long-term testing by third parties showing much lower EtO levels around the Facility that were ... 'indistinguishable from background.'" Appellants' Br. at 43-44. But the trial court excluded those tests because they "were done later," after Walker's exposure, "like a subsequent remedial measure." V147-93. "Of course, it's going to be lower." *Id.* "They did all these things" to "lower the EtO emissions," including "mov[ing] [sterilized] products out." *Id.* "So, you're not comparing apples to apples." *Id.*

In sum, rather than "arbitrary," the trial court's rulings limiting background and endogenous rulings were well within its discretion and reflect careful determinations based on the evidence and arguments specific to this case. *See* V49-67-82. There's no basis to reverse these rulings, let alone find materially harmful error.

Conclusion

For those reasons, the Court should affirm the trial court's rulings.

Appellee-Plaintiff Gary Walker submits this brief on March 23, 2026, and his counsel certifies that "[t]his submission does not exceed the word count limit imposed by Rule 24 [8,017/8,400]." Ga. Ct. App. R. 24 (f)(1).

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