No. A26A1118

In the

Court of Appeals of Georgia

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

Appellants,

v.

GARY WALKER,

Appellee,

On Certificate of Immediate Review from the State Court of Gwinnett County, No. 21-C-08201-S1

BRIEF OF BECTON, DICKINSON AND COMPANY AND C. R. BARD, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Appellants Becton, Dickinson and Company ("Becton, Dickinson") and C. R. Bard, Inc. ("Bard") (collectively, "BD") seek reversal of the trial court on the following grounds:

INTRODUCTION

In this bifurcated trial, a jury initially awarded Gary Walker ("Walker") a $20 million compensatory verdict, but the trial court declared a mistrial as to an incomplete $50 million punitive damages verdict. Walker claims he developed Diffuse Large B-Cell Lymphoma ("DLBCL") from exposure to ethylene oxide ("EtO") purportedly emitted from BD's facility in Covington, Georgia ("the Facility"), and has at various times stored sterilized devices at nearby warehouses (collectively "the Facilities"). But each of the five enumerated errors in this appeal independently warrants, at minimum, an entire new trial. Moreover, though any of these errors alone would require that relief, BD seeks guidance on all to avoid further errors on remand.[1] *See* O.C.G.A. § 5-6-34(d); *Baldwin v. Vineyard*, 275 Ga. 134, 135 (2002).

[1] Beyond this case, hundreds of additional alleged EtO exposure cases before the same judge will benefit from the Court's direction.

First, after a juror disavowed the punitive damages verdict, the court declared a mistrial as to Phase II of the trial but later limited the scope of retrial solely to whether BD acted with specific intent to cause harm. That ruling, however, violates Georgia statutory law, controlling judicial precedents, and constitutional mandate, all of which require on these facts for the same jury to decide all aspects of Walker's claims in the same trial.

Second, as to admissibility of Walker's expert evidence—which impacts whether BD is entitled to judgment as a matter of law—the trial court committed reversible error when it failed to apply the controlling general causation standard that this Court adopted in *Sterigenics US LLC v. Mutz*, 923 S.E.2d 176, 184 (Ga. Ct. App. 2025) (directing that, in toxic tort cases, trial courts must apply the test described in *McClain v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Cir. 2005)).

Third, the court side-stepped substantial similarity analysis and admitted without the requisite foundation for purported other similar incident ("OSI") evidence from non-party witnesses who had various cancers without proof of diagnostic traits similar to Walker. There must be a showing of "substantial similarity" before evidence of other incidents

is allowed, and this is particularly important in cases claiming harm from environmental exposure. Without that showing, evidence is deemed irrelevant as a matter of law. The faulty "opening the door" rationale used by the trial court does not cure this highly prejudicial legal error.

Fourth, over BD's objection, the court permitted a statutorily prohibited "anchoring" argument, urging jurors to determine the amount of Walker's Phase I non-economic compensatory damages by combining his claimed $2.3 million in medical expenses with a wholly unrelated 1992 revenue projection for the Facility. Further, the court took none of the remedial measures dictated by Georgia's new tort reform statute O.C.G.A. § 9-10-184 to cure the improper argument, leading to a patently excessive verdict.

Finally, the trial court committed harmful error when it excluded certain material non-cumulative EtO evidence that was central to BD's defense—evidence that EtO is present in the human body ("endogenous EtO") and independent of any external source. This error deprived jurors of key facts needed for a meaningful causation determination. Further, the trial court selectively chose to admit some evidence regarding EtO

present in the environment ("background EtO"), while excluding others, without any clear indication of why.

JURISDICTIONAL STATEMENT

Jurisdiction exists under O.C.G.A. § 5-6-34(b). BD timely filed a Notice of Appeal on October 27, 2025, following authorization. The Georgia Supreme Court's exclusive jurisdiction does not apply. See Ga. Const. Art. VI, § VI, ¶ 2; O.C.G.A. § 15-3-3.1(a)(2), (a)(4).

ENUMERATION OF ERRORS

The trial court committed reversible error when:

(1) After a juror disavowed the specific intent portion of the punitive damages verdict, instead of requiring an entire new trial, it limited retrial to the non-severable issue of whether BD acted with specific intent to harm;

(2) In ruling on Walker's expert evidence admissibility, which impacts whether BD is entitled to judgment as a matter of law, it failed to apply the *McClain* standard for proving causation in toxic tort cases that this Court adopted in *Mutz*;

(3) It admitted purported other similar incidents evidence without the requisite foundational showing of "substantial similarity;"

(4) It overruled BD's objection to Walker's improper "anchoring" remarks during closing argument, and failed to take the remedial action that O.C.G.A. § 9-10-184 mandates;

(5) It excluded material non-cumulative evidence regarding "background" and "endogenous" EtO that was critical to an accurate assessment of causation.

STATEMENT OF THE CASE

Walker's Claims

BD is a medical device manufacturer that uses EtO to sterilize certain products at the Facility, and also has at various times stored sterilized devices at nearby warehouses. EtO is widely known within the scientific community as the most effective (and for some devices the only) sterilant for protecting patients from pathogens on medical devices. R144:2049:06-2051:22.

Walker drove a truck carrying products from the Facility, among other places. In 2017, Walker was diagnosed with DLBCL. Walker then sued BD for negligence and public nuisance, seeking both compensatory and punitive damages, alleging that EtO emissions from the Facilities from 1970 to 2017 were a meaningful contributing cause of his disease. In the April 2025 jury trial, the jury initially returned a $20 million compensatory verdict, but the court declared a mistrial as to the punitive damages verdict. The Court duly authorized an interlocutory appeal.

The Rulings on Appeal

Without waiving numerous other errors that may be subsumed in the eventual final judgment,[2] BD appeals the following five rulings now.

The order limiting the scope of retrial to specific intent. During Phase II deliberations to determine punitive damages, the jurors told the court they could not all agree as to whether BD specifically intended to cause harm. R158:3907:03-20; R174:13952. After the court instructed them to continue deliberating, the jurors returned a verdict finding that BD acted with specific intent and awarded $50 million in punitive damages. R158:3914:04-3915:08; R122:64233. But, when polled, a juror recanted, saying "I defer to the group" because "[w]e were told to be unanimous." R159:3949:11-3950:06, 3956:01-3958:07. More specifically, the juror disavowed the jury's finding that BD acted with specific intent to cause harm. R159:3956:08-3958:05. The court then dismissed the jury and declared a Phase II mistrial. R159:3963:12-3964:08. Later, however, the court held that the retrial would be solely on the specific intent portion of the Phase II verdict. R2:19-20.

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[2] All errors not litigated and decided in this interlocutory appeal are expressly reserved. *See Hall v. Hill*, 366 Ga. App. 285, 292 (2022).

The rejection of the McClain/Mutz framework for assessing causation in toxic tort cases. When deciding BD's expert, summary judgment, and directed verdict motions, the trial court rejected the established two-tier approach of *McClain v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Cir. 2005) and incorrectly found Georgia does not require a threshold level of EtO exposure to prove causation. *McClain* recognized two alternative categories for satisfying *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) ("Daubert")* in toxic tort cases. In the first, the plaintiff avoids additional rigor in the *Daubert* analysis by establishing that the scientific community generally recognizes the chemical at issue as causing the type of injuries a plaintiff alleges. In the second, as applicable here where there is no general consensus, a full *Daubert* analysis is required, and a plaintiff must through expert testimony further establish that the chemical at issue actually caused the injuries plaintiff alleges. In the second category, the *Daubert* analysis covers not only the expert's methodology for the plaintiff-specific questions about individual causation but also the general question of whether the drug or chemical can cause the harm plaintiff alleges. *Id.* at 1239.

McClain favors using dose-response analysis, i.e., the threshold level of exposure beyond which the chemical could cause harm. This Court's recent decision in *Sterigenics US LLC v. Mutz* confirms the trial court employed committed error by rejecting *McClain*. 923 S.E.2d at 184 (directing trial courts to follow *McClain* in toxic tort cases).

The admission of legally irrelevant and highly prejudicial evidence of dissimilar other incidents. BD moved *in limine* to exclude evidence of other individuals' cancer testimony as irrelevant and prejudicial as a matter of law because they were not substantially similar to Walker's cancer diagnosis, absent evidence how and to what extent EtO caused, or even contributed to, their diagnosis. An agreed-upon jury instruction barring consideration of cancers experienced by other individuals resolved that motion. *See* R93:50320; R133:468:25-469:05.

Three non-parties from the community at-large offered rebuttal testimony even though they had different diagnoses from Walker, lived varying distances from the Facility, had vastly different contact with the Facility, and had unique familial histories of cancer and other risk factors. Crucially, no evidence exists these individuals' cancer was caused by EtO exposure, nor was any evidence presented as to the amount of any EtO

exposure. See id. Absent substantial similarity, the evidence should never have been admitted. But the court rationalized its ruling using an "opening the door" theory. R141:1655:22-1656:06, 1656:18-24 (noting the basis for admission was to "address any misunderstanding the jury may have gotten from that cross-examination"). An "opening the door" theory is irrelevant where substantial similarity was not shown.

Moreover, BD's cross-examination of one of Walker's experts, Dr. Sahu, did not open any door to inadmissible evidence. BD questioned Sahu about his reliance upon badge-data of other BD employees to form his opinion about Walker's exposure to EtO. *See* R136:941:14-943:21; R137:1191:20-1200:16. The trial court interpreted the questions from BD as a broad suggestion to the jury that other employees in the Facility did not develop cancer.

BD explained, but to no avail, that this cross-examination merely challenged the accuracy of Sahu's opinion on exposure by showing that the badge-data included much lower exposure levels for a number of other BD employees who worked at various locations around the Facility. R140:1601:17-1604:15. At no point did cross examination invite consideration of whether these other employees had cancer. If anything,

the cross-examination established that certain employees' data were *not* similar—a showing that could not possibly relieve Walker of his burden of showing substantial similarity of those other experiences as needed for them to qualify as admissible OSIs. BD vigorously protested this mid-trial OSI ruling as grounds for a mistrial. R141:1662:07-1681:06. The court was unwavering, however, and allowed rebuttal evidence of certain BD employees' and Covington residents' cancers without proving substantial similarity between their conditions and Walker's diagnosis. R152:3178:17-3208:06.

This error was particularly harmful because it admitted the evidence as "rebuttal"—the last evidence the jury heard—even though it went to evidence elicited in Walker's case-in-chief.

The refusal to remedy Walker's statutorily prohibited "anchoring" of non-economic damages. In his closing, Walker urged the jury to calculate the amount of noneconomic compensatory damages using a projection of BD's potential revenues from the Facility:

> You may remember when they were planning to build their facility, completed in approximately [ ] 1992, they discussed what the expected extra revenue would be from one customer. And for one year alone, it was $25 to $30 million. We submit that [is] an appropriate verdict in this case -- . . . .

R154:3429:16-3430:18. BD contemporaneously objected that this violated Georgia's newly enacted statutory prohibition against anchoring non-economic damages with a measure entirely unrelated to the plaintiff. R154:3430:09-12, 3432:08-23, 3437:18-3438:09 (citing O.C.G.A. §§ 9-10-184, 9-10-185). But the trial court refused to apply the statute, and neither rebuked counsel, nor removed any improper impression by the jury. R154:3439:02-3440:25. The jury then returned a Phase I verdict for Walker in his requested range—$20 million.

Dr. Salem's general causation opinions depend on background EtO.

Walker retained Dr. Aliasger Salem, a pharmacologist, who opined "any exposure of [EtO] above background increases the risk of cancer." R51:29513:12-16. Dr. Salem conceded no literature or evidence demonstrates that "background" or endogenous EtO causes cancer. R51:29512:06-29515:10. Dr. Salem testified background EtO levels (EtO that exists naturally in the surrounding environment) vary from location to location even in areas far from a facility using EtO. R51:29564:11-19, 29569:13-29570:01; *Mutz*, 923 S.E.2d at 182. This admission was critical, given background EtO levels were key to BD's defense, discussed *infra*.

Dr. Salem purported to use dose-response analysis for his opinion that "any exposure above background" causes cancer. *See* R30:19824-19825. But Dr. Salem refused to "identify a harmful level at which [EtO] could cause the harm alleged," as required by *Mutz*. 923 S.E.2d at 185. BD, citing *McClain*, sought to exclude these opinions as unreliable under O.C.G.A. § 24-7-702. *See* R6:1652-1719. The trial court denied BD's motion, holding "Georgia law imposes no such requirement" to "establish a 'dose' or 'threshold range' at which EtO is hazardous." R30:19825.[3] The trial court refused to apply *McClain*'s requirements. R30:19816 n.7.

Worse, Dr. Salem never quantified "background," making his opinion unhelpful. R134:694:4-20. Dr. Salem testified "ethylene oxide increases the incidence of cancer in a dose-and-duration-dependent manner," but again refused to identify a harmful exposure level. R134:626:10-17. BD moved for a directed verdict partly on these insufficient opinions, which the trial court denied. R143:1977:03-1978:09.

[3] The trial court denied BD's summary judgment motion for lack of general causation holding Georgia requires no threshold range. *See* R102:55343-55346.

Endogenous and background EtO are central to the issue of general causation and Dr. Chodosh's opinions.

BD retained cancer biologist Dr. Lewis Chodosh to address EtO science. Dr. Chodosh opines the human body naturally creates endogenous EtO in most, if not all, cells ("endogenous EtO") and background EtO naturally exists everywhere in the ambient air. *See* R69:41827; R49:26422-26427. Dr. Chodosh explained these two categories of EtO are essential to identifying a harmful level at which EtO could cause the harm alleged.

Dr. Chodosh explained "endogenously produced ethylene oxide represents the predominant source of exposure," and "[t]here is no difference on a molecular basis between a molecule of ethylene oxide produced by the human body versus a molecule of ethylene oxide from an exogenous [i.e. outside of the body] source (including a manufacturer)." R69:41829. Endogenous and inhaled/exogenous EtO generate identical chemical reactions in humans. R49:26425. Dr. Chodosh further explained how levels of endogenous and background EtO exposure impact the level of exogenous EtO exposure required for a detectable increase in DNA mutations. R49:26426. To effectively evaluate overall EtO exposure jurors

must understand all exposures to put Walker's exposure to endogenous and background EtO, and other sources in context.

PRESERVATION OF ERROR

The first enumeration of error is preserved by BD's motion for mistrial when the juror disavowed the punitive damages verdict and its motion and briefing requesting an entire new trial. R159:3951:23-3952:05. R122:64253-64271.

The second enumeration is preserved by BD's motion in limine to exclude Walker's causation expert, its motion for summary judgment as to causation, and its corresponding motion for directed verdict, all citing the *McClain* test. *See* R6:1356-1636, 1652-1719; R143:1977:03-1978:09.

The third enumeration is preserved by BD's motion *in limine* to exclude evidence as to Walker's purported OSI evidence and its multiple objections to such evidence at trial. *See* R27:18605-18626; R141:1661:16-1673:05, R152:3222:2-3230:20.

The fourth enumeration is preserved by BD's contemporaneous and renewed objections and request to rebuke counsel for an improper closing, and its motion for mistrial on this issue. R154:3430:09-12; R154:3432:08-3440:25.

The fifth enumeration is preserved by BD's opposition to Walker's motion *in limine* to exclude BD's evidence of background and endogenous EtO, its motion for reconsideration of endogenous evidence, and its proffer of the background and endogenous EtO evidence the court disallowed. *See* R127:75:01-14; R49:26410-26427; R148:2655:23-2657:24.

STANDARD OF REVIEW

While this Court generally reviews the denial of a mistrial for abuse of discretion, *Georgia Comm. Corp. v. Horne*, 174 Ga. App. 69, 70 (1985), it reviews *de novo* questions of law. *Bank of Ozarks v. DKK Dev. Co.*, 315 Ga. App. 539, 540 (2012). With mixed questions of law and fact, factual findings are subject to clear-error review, but legal conclusions are reviewed *de novo*. *Countryman v. State*, 355 Ga. App. 573, 577-78 (2020). Thus, BD's first four enumerations of error are reviewed *de novo*, while the fifth is reviewed for abuse of discretion, which BD submits is shown here.

ARGUMENT

I. A JUROR'S DISAVOWAL OF THE PUNITIVE DAMAGES VERDICT REQUIRES AN ENTIRE NEW TRIAL.

A. O.C.G.A. § 9-12-1 Requires An Entire New Trial If A Verdict Does Not Resolve All Issues Submitted To The Jury.

Under O.C.G.A. § 9-12-1, "[a] verdict shall cover the issues made by the pleadings and shall be for the plaintiff or for the defendant." And it must be unanimous. *See, e.g.*, *Ratcliff v. Ratcliff*, 219 Ga. 545, 549 (1964). If a trial court learns the jury is struggling to reach agreement, it may insist that the jury deliberate further. *Id.* But when the jury has already been discharged, the only remedy for a non-unanimous and incomplete verdict in a civil case is an entire new trial, not acceptance of a partial verdict. *See, e.g.*, *Kane v. Cohen,* 182 Ga. App. 485 (1987). When the jury was polled, a juror destroyed unanimity; she did not independently agree to the finding of punitive damages based on a specific intent to harm but rather deferred to the will of other jurors. The trial court correctly recognized that a mistrial was required but erred in holding that a retrial would be limited to specific intent. *See id.*

In *Kane*, after deciding liability and compensatory damages, the jurors agreed to award punitive damages but could not reach a consensus

on amount. 182 Ga. App. at 485. As in this case, the trial court then tried to split the verdict. It entered judgment on liability and compensatory damages and declared a mistrial as to punitive damages only. *Id.* at 485-86. This Court, however, reversed because 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, such as an issue going to the amount of punitive damages. *Id.* at 485. And the Court explained: O.C.G.A. § 9-12-1 is the "the codification of a well settled common-law rule under which a verdict which fails to resolve all of the issues submitted to the jury must be set aside" *Id.* at 486 (citing over a hundred years of Georgia precedents rooted in English common law requiring an entire new trial when there is an imperfect verdict).

Thus, under O.C.G.A. § 9-12-1 as interpreted by *Kane*, an entire new trial is the only way to cure the incomplete verdict returned by the jury. The trial court, however, disregarded *Kane*'s reliance on the "well-settled common-law rule" under which the same jury must determine all the issues submitted to the jury. According to the trial court, *Kane* prohibited only entry of a ***judgment*** on an incomplete verdict. *See* R2:14. But that is not what *Kane* said. *Kane* and the authorities it cited held

that, when the jury does not resolve all submitted issues, the "verdict" must be "set aside." *Kane*, 182 Ga. App. at 486. That means the whole verdict. *See id.*; *see also infra* at § I.C (addressing this remedy as constitutionally required); *cf. Chapman v. Clark*, 313 Ga. App. 820, 823-24 (2012) (distinguishing *Kane* where, unlike this case, the court "granted a mistrial with regard to issues of liability as well as damages," thus allowing the jury to resolve all issues for each defendant).

This Court, therefore, should reverse the trial court for refusing to honor Georgia's established precedents requiring an entire new trial where an incomplete verdict has been returned. This result cannot be avoided by rewriting the language of the statute or of the *Kane* opinion as Walker invited the trial court to do, arguing that O.C.G.A. § 9-12-1 allows a partial retrial as to a separate "phase" of the case. This statute does not speak in terms of "phases" of a trial. This is not a case where an entirely severable issue exists to allow an incomplete verdict and partial retrial. Here, the verdict is invalid because the jury did not resolve all the issues presented to it and O.C.G.A. § 9-12-1 requires a full retrial.

B. O.C.G.A. § 51-12-5.1 Directs That Liability And Punitive Damages Be Resolved Together.

Putting aside prohibitions on accepting piecemeal verdicts, our punitive damages statute, O.C.G.A. § 51-12-5.1, requires that the same jury deciding liability and punitive damages must decide the amount of punitive damages.

> If it is found that punitive damages are to be awarded, the trial **shall *immediately be recommenced*** in order to receive such evidence as is relevant to a decision ***regarding what*** amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It ***shall then*** be the duty of the trier of fact to set the amount to be awarded ***according to subsection . . . (f) . . ., as applicable*** [upon a finding of specific intent to cause harm].

O.C.G.A. § 51-12-5.1(d)(1) and (2), (f) (emphasis added); *see also Baylis v. Daryani*, 294 Ga. App. 729, 730 (2008) ("The general rule is that 'shall' is recognized as a command and is mandatory."). Subsection (f) creates the "specific intent to cause harm" finding the jury must make to surpass the statutory cap on punitive damages under subsection (g). Reading the subsections together, the statute requires the same jury to make the findings as to punitive liability, specific intent, and the amount of punitive damages. Georgia courts presume the legislature "meant what

it said, and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172-73 (2013).

In *Southeastern Pain Specialists*, an inverse consequence occurred. After the compensatory award was set aside, a defendant sought to preserve a jury's decision not to award punitive damages. 303 Ga. at 275. The Court, however, did not allow that because compensatory and punitive awards are inextricably linked. *Id.*

> [T]he jury's decisions on punitive damages are too related to the questions of liability and compensatory damages. Whether punitive damages are available at all depends on whether liability is established, now an open question to be resolved a new on retrial. [Internal citations omitted]. Moreover, the proper amount of punitive damages may depend upon a number of factors, including the amount of compensatory damages awarded by the jury and the reprehensibility of the defendant's conduct.

Id. (distinguishing the severable apportionment issue that warranted only a partial retrial in *Martin v. Six Flags Over Georgia II, LP*, 301 Ga. 323 (2017)).

The 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. (emphases added). Section 51-12-15(a)(3) was adopted and became effective on April 21, 2025, before Phase II began, and "appl[ies] to causes of action pending on the effective date." 2025 Georgia Laws Act 9(b) (S.B. 68). This amendment is in *pari materia* with the punitive damages statute, and the two statutes must be construed together. *U.S. Bank Nat. Ass'n v. Gordon*, 289 Ga. 12, 15 (2011). The General Assembly's clarification of the process in subsequent legislation further confirms its intent that a single jury conduct both evidentiary phases. Finally, civil pattern jury charges on punitive damages, §§ 66.711 and 66.740, contemplate that the same jury should decide liability, entitlement to punitive damages, amount, and specific intent.[4] These instructions, read together, implement O.C.G.A. § 51-12-5.1(d)(2)'s intent for the ***same*** jury to decide liability, compensatory damages, and all aspects of punitive damages. Georgia law consistently demands the same jury resolve all submitted questions of these intertwined issues. An entire new trial must occur

[4] The trial court gave these pattern instructions without modification. R157:3817:14-21, 3818:11-20.

because the liability, compensatory and punitive damages issues are so intertwined.

C. A Retrial Solely On The Specific Intent Issue Would Violate BD's Constitutional Rights.

The U.S. Constitution secures due process rights under the Fifth and Fourteenth Amendments. See U.S. Const. Amend. V, Amend. XIV; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996); *Cooper Indus v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (compensatory and punitive damages usually awarded at the same time by the same factfinder). The trial court violated BD's constitutional rights to due process[5] and a trial by jury under the U.S. and Georgia Constitutions. The Georgia Constitution states the "right to trial by jury shall remain inviolate." Ga. Const. Art. I, § I, ¶ XI. This right includes "hav[ing] a jury determine the amount of . . . damages, if any, awarded to the [plaintiff]." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010); *Reheis v. Baxley Creosoting & Osmose Wood Preserving*

[5] Texas, with a materially similar punitive damages statute, agrees the same jury must decide both liability and punitive damages to meet constitutional standards. *See In re Bradle*, 83 S.W.3d 923, 928 (Tex. App. 2002) ("[P]roportionality is achieved by having punitive damages assessed based on a totality of the evidence from both Phases of the bifurcated trial.").

Co., 268 Ga. App. 256, 261-62 (2004) (discussing Ga. Const. Art. I, § I, ¶ XI and its relation to punitive damages in general and holding "it is for a jury to determine whether, if any," punitive damages should be assessed in a suit brought under O.C.G.A. § 12-8-96.1(a)); *Taylor v. Devereux Found.*, 316 Ga. 44, 65-68 (2023) (noting the constitutional right to a jury trial requires the jury to decide punitive damages in cases involving intentional misconduct).

The Georgia Supreme Court has concluded that, with its guarantee, the Georgia Constitution preserved the right to trial by jury as it existed in English common law at the time of Georgia's founding. *Taylor v. Devereux Found.*, 316 Ga. at 44. At that time, it was understood that the right to trial by jury required the same jury to determine all issues—absent which the remand had to be for an entire new trial. *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 497 (1931); *see also State of Ala. v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978) (finding that the "guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact"); *Spence v. Board of Educ. of Christina School Dist.*, 806 F.2d 1198 (3d Cir. 1986) (applying the rule specifically in the punitive damages context).

To satisfy due process, a jury must consider all admitted evidence and decide using the same evidence, not simply accept a prior jury's partial determinations.

D. The Trial Court Relied On Distinguishable Cases.

Walker convinced the trial court to order a limited trial citing inapposite cases with severable issues none of which involved an incomplete verdict with unresolved issues. Walker relied heavily on *Martin*, 301 Ga. 323 (2017), which did not involve a partial retrial as to punitive damages or an incomplete verdict. In *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, which is not in play here. *Martin*, 301 Ga. at 324, 337-38. As the Court ruled in *Southeastern Pain*, *Martin* is not relevant.

The trial court, at Walker's suggestion, also relied on criminal cases such as *Johnson v. State*, 256 Ga. App. 730, 732 (2002), and *McKinney v. State*, 218 Ga. App. 633, 636 (1995). But those decisions merely held that unanimous verdicts on distinct criminal charges did not need to be retried just because there was a hung jury on a severable count. Trying distinct criminal charges separately is not at all analogous to

compensatory and punitive damages, which are irrefutably interconnected.

None of the trial court's cited cases approved a partial retrial where the jury was unable to reach a verdict on all the issues submitted to it. The issue of specific intent to harm necessarily depends upon the same evidence claimed to support liability and grounds for punitive damages. *See* R2:12, 15 (citing *Swindell v. Swindell*, 231 Ga. 167 (1973) (stating the general principle that severable issues can be separately tried but refusing to sever a divorce from the division of property); *Anthony v. Anthony*, 143 Ga. App. 691 (1977) (remanding case solely on severable apportionment issue); and *Lyman v. Cellchem Int'l, LLC*, 342 Ga. App. 446 (2017) (not addressing the scope of retrial when an incomplete verdict is returned or any of the arguments raised here)). The exception is where the jury returns a complete verdict. *See Martin, 301 Ga. at 323.*

The trial court's directive to retry only specific intent goes even further. It would require a retrial solely whether the statutory prerequisite necessary to exceed the statutory cap on punitive damages exists. Specific intent is part of the punitive damages calculus, not a separate issue. So it is here. Compensatory and punitive damages are

inextricably fused, and specific intent is not a severable issue. O.C.G.A. § 51-12-5.1(f),(g).

II. AT MINIMUM, AN ENTIRE NEW TRIAL IS REQUIRED DUE TO THE TRIAL COURT'S FAILURE TO APPLY THE *MCCLAIN/MUTZ* TEST TO DETERMINE THE SUFFICIENCY OF WALKER'S CAUSATION EVIDENCE.

This Court's recent decision in *Mutz* leaves no doubt: Georgia courts must apply the Eleventh Circuit's general causation test in environmental exposure cases. *Mutz*, 923 S.E.2d at 179-183, 184. This Court held the trial court abused its discretion by applying the wrong legal standard. *Id.* (citing *State v. Brinkley*, 316 Ga. 689, 690 (2023)). According to *Mutz*:

> [B]ecause [O.C.G.A. § 24-7-702(b)] is materially identical to Federal Rule 702 and Georgia courts have not addressed how to apply the reliability requirement of Rule 702(b) to general causation opinions in toxic tort cases, we look to federal decisions for guidance, particularly the decisions of the Eleventh Circuit. [Citations omitted] Accordingly, we conclude that Georgia courts should be guided by and apply the standard announced by the Eleventh Circuit in *McClain* and its progeny when evaluating the reliability and admissibility of opinion testimony on general causation in toxic tort cases.

923 S.e.2d at 184. This framework enforces the hallmark of toxicology: *the dose makes the poison*. *Id.* at 181-82.

Under *McClain*, a plaintiff cannot establish general causation without the required rigor that *Daubert* requires. And *Mutz* expressly rejected the notion that Georgia law allows causation opinions untethered from dose, holding that O.C.G.A. § 24-7-702(b)'s reliability requirement demands this analysis. As *McClain* concluded: "[i]n toxic tort cases, scientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden . . . ." *McClain*, 401 F.3d at 1241 (citation and quotations omitted).

Regardless of whether EtO is classified as Category I or Category II chemical for purposes of general causation, a plaintiff still must show that its expert reliably demonstrated the amount of exposure needed to harm an individual. *Williams v. Mosaic Fertilizer, LLC,* 889 F.3d 1239, 1245 n.2 (11th Cir. 2018) ("Setting general causation aside, to establish specific causation, [an expert] would still have to reliably calculate whether [a plaintiff" was 'exposed to enough of the toxin to cause the alleged injury,'"); *see McClain*, 401 F.3d at 1241. Just as the *Mutz* defendants, BD sought to exclude Dr. Salem, citing his opinion that "any exposure of ethylene oxide above background increases the risk of

cancer." R6:1652-1719. This opinion lacked a scientific basis and should have been excluded under O.C.G.A. § 24-7-702 and *McClain*.

But the trial court did the opposite of what *Mutz* requires. It refused to classify EtO as a Category I or II toxin, relied on inapplicable Georgia precedent, and did not require Walker's experts to identify a threshold exposure level. It instead found Dr. Salem's general causation opinions "reliable" under O.C.G.A. § 24-7-702. R30:19816, n.7, 19825-26. Dr. Salem's opinion, which claimed "any exposure above background increases cancer risk," is precisely the type of speculation *McClain* and *Daubert* forbid. By failing to apply *McClain*'s reliability analysis, the court admitted testimony without scientific basis. *Compare* R30:19825-26 (finding Georgia does not require a dose-response relationship and citing *Fouch v. Bicknell Supply Co.*, 326 Ga. App. 863 (2014) for support) and R102:55343-55344 (same), *with Mutz*, 923 S.E.2d at 184 (rejecting application of this case law).

This error infected the entire trial. BD moved for directed verdict because Dr. Salem could not provide a threshold dose-response range, but the trial court denied this motion. R143:1977:03-1978:09. *Mutz* confirms this was clear error. At a minimum, therefore, this Court should reverse

and remand this case with direction to apply the *McClain/Mutz* test to determine the reliability of Dr. Salem's opinions. Alternatively, because the Salem/Felsher opinions unquestionably fail *McClain* and *Daubert*, they should be excluded outright, warranting judgment in BD's favor. *See Ovation Condominium Ass'n, Inc. v. Cox*, 374 Ga. App. 681, 698 (2025) (holding that defendant was entitled to judgment once causation expert opinion was excluded).

III. THE TRIAL COURT COMMITTED LEGAL ERROR BY ADMITTING EVIDENCE OF OTHER INCIDENTS WITHOUT A SHOWING OF SUBSTANTIAL SIMILARITY.

It was legal error to admit testimony from witnesses in the Covington community who had a cancer diagnosis. Without the required foundational showing of ***substantial*** similarity, the evidence is inadmissible as a matter of law and irrelevant under O.C.G.A. § 24-4-402 and prejudicial under O.C.G.A. § 24-4-403. *See Chrysler Group, LLC v. Walden*, 339 Ga. App. 733, 742 (2016) *overruled on other grounds* 303 Ga. 358 (2018) (affirming exclusion of similar incidents as prejudicial). Likewise, the purported "opening the door" argument cannot override the venerable line of Georgia authorities under which evidence of other incidents is irrelevant as a matter of law unless the incidents are

substantially similar. Neither is it sufficient to rely on an allegation of public nuisance as a basis for admission. Alleging a public nuisance does not eliminate the requirement that substantial similarity be shown before evidence of other injuries can be admitted. Lastly, allowing testimony from rebuttal witnesses who merely had a cancer diagnosis without confirming substantial similarity was patently prejudicial. *See Suzuki Motor of Am., Inc. v. Johns*, 351 Ga. App. 186, 196 (2019) (*quoting Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454 (2001)).

The "rule of substantial similarity ***prohibits*** the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows there is a 'substantial similarity' between the other transactions, occurrences, or claims and the claim at issue in the litigation." *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 455 (2001)[6] (emphasis added). In other words:

> While the relevancy of other occurrences is ordinarily within the sound discretion of the [trial] court, it is necessary that the conditions of the things compared be substantially similar. Without a showing of substantial similarity, the

[6] Although *Cooper* was decided under the pre-2013 Evidence Code, the substantial similarity test laid out in *Cooper* and its reasoning has been carried through to today.

> evidence is irrelevant as a matter of law and there is nothing upon which the court's discretion can operate.

Forest Cove Apartments, LLC v. Wilson, 333 Ga. App. 731, 736 (2015) (internal citations omitted). This has been the law before and since the enactment of the "new" evidence code in 2013. *See Cooper*, 273 Ga. at 455 (reversing this Court's failure to adhere to this rule); *Suzuki Motor of Am., Inc. v. Johns*, 351 Ga. App. 186, 196 (2019) (affirming exclusion of evidence lacking sufficient similarity) (quoting *Cooper*); *Forest Cove*, 333 Ga. App. at 736 (reversing admission of "OSI" evidence that was not substantially similar); *Smith v. Nelson*, 123 Ga. App. 712, 723 (1971) (reversing admission of other incident evidence under similarity rule).

Importantly, "[t]he showing of substantial similarity must include a showing of similarity as to causation." *Cooper*, 273 Ga. 455. While *Cooper* was a products liability case, this rule extends beyond that context; it has been recognized in all types of matters from premises liability (*Forest Cove*) to highway accidents (*Smith v. Nelson*), railroad litigation (*Mills v. Norfolk Southern Ry. Co.*, 242 Ga. App. 324, 324 (1999)), property damage (*Engram v. Sonny Campbell's Gulf, Inc.*, 200 Ga. App. 40, 42 (1991)), among others. Georgia has never exempted toxic

tort cases from this rule, and doing so would make no sense considering the importance of probative causation evidence to this cause of action.

Indeed, the irrelevant OSI witnesses in this case are exactly the kind of anecdotal "case reports" the Eleventh Circuit held unreliable and prejudicial. *See, e.g.*, *McClain*, 401 F.3d at 1250; *Rider v. Sandoz*, 295 F.3d 1194, 1199 (11th Cir. 2002); *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1337-38 (11th Cir. 2010). The Eleventh Circuit in *McClain* explained that "[u]ncontrolled anecdotal information offers one of the least reliable sources to justify opinions about both general and individual causation." 401 F.3d at 1250. Such "reports are anecdotal, meaning that they are 'based on descriptions of unmatched individual cases rather than on controlled studies," and thus "case reports raise questions; they do not answer them." *Id.* at 1253-54.

The six other individuals offered in this case had different risk factors, exposure histories, and even cancer diagnoses. These differences were crucial, as Walker's specific causation and exposure evidence referred to his particular cancer diagnosis, work history, and duration and concentration of EtO exposure. R138:1259:12-1275:2. ***Further, no evidence connected EtO to these witnesses' cancer diagnoses***. None

of the six had evidence EtO caused their cancer, and virtually all disclaimed they had ever been so told. *See, e.g.*, R152:3182:17-19, 3193:20-22, 3199:18-3200:02, 3203:18-20, 3207:24-3208:03. Walker had the burden to prove the admissibility of this evidence, but he failed to do.

Moreover, Walker's "opening the door" theory cannot supplant the "substantial similarity" rule, and the trial court reversibly erred in adopting Walker's position. *See* R141:1655:22-1656:06 (finding that BD's cross-examination of Dr. Sahu opened the door to the testimony of these other individuals even though similarity had not been shown); R150:2926:07 (claiming the testimony of these other witnesses was relevant to causation). Worse still, the trial court exacerbated the prejudice from this rule-violation by allowing Walker to introduce these substantially ***dissimilar*** incidents in rebuttal just before closing arguments. *See* R142:1753:01-1755:16.

Of course, BD did not open the door in the first place. *See supra* at p.10. Its cross-examination of Dr. Sahu merely challenged the accuracy of his methodology which relied on certain BD employee badge data for his exposure opinion. Nothing in BD's cross-examination compared Walker to the individuals discussed in that examination.

As the Georgia Supreme Court has clarified:

> "[O]pening the door" is not a freestanding evidence rule allowing a party to present to the jury otherwise inadmissible evidence; the phrase appears nowhere in the new Evidence Code or in the Federal Rules of Evidence on which our new code was largely based. … Thus, litigants and trial courts should take care to identify the precise basis in the evidence rules — the ones in our new Evidence Code — for an argument that one side has "opened the door" to allow the admission of otherwise inadmissible evidence.

Strother v. State, 305 Ga. 838, 845 (2019).

Smith v. Nelson amply illustrates why the trial court's reliance on an "opening door" theory requires a reversal and new trial here. In *Smith*, which involved a truck accident, the court admitted testimony about other incidents, testimony saying other tractor-trailer trucks had pulled off the highway and been able to return without a problem. This Court reversed because, as here, the defendant had objected that this evidence of other incidents was not admissible due to lack of evidence of similarity:

> ***Evidence offered for making comparisons should reveal similar or substantially similar conditions. Unless the essential similarity for comparison appears, the evidence should be excluded, for it may very well be harmful.***

Smith, 123 Ga. App. 712, 723 (1971) (emphasis added).

Moreover, because the plaintiff never showed substantial similarity with respect to those other incidents, the Court rejected the assertion that defendant's objection had been waived by cross-examination. *Id*. The cross-examination was no waiver because there never existed a showing of similarity between the litigated incident and others. *Id.* at 723-24. A different result could be obtained if the plaintiff had established a foundation for true OSI evidence. *Id*. at 724. But where, as here, substantial similarity was not proven, the trial court erred by admitting testimony regarding the other incidents on the ground that the defendant had opened the door to the evidence simply by cross-examining the Walker's witness. *Smith* is binding precedent and must be followed now. This error alone calls for a reversal and remand for a new trial. Collecting cases, the Smith Court noted the harmful nature of such evidence: "Unless the essential similarity for comparison appears, the evidence should be excluded, for it may very well be harmful. [Cit. Om.]." *Id*. at 723.

In order to give meaningful guidance to the bench and bar, BD respectfully asks the Court to give specific direction to trial courts conducting substantial similarity analysis as to what is required to prove

substantial similarity and to recognize that litigants faced with substantial similarity analysis should be afforded an opportunity to conduct adequate discovery on the witnesses who are to testify to make that analysis worthwhile.

IV. AN ENTIRE NEW TRIAL IS REQUIRED BECAUSE WALKER'S CLOSING ARGUMENT ON NONECONOMIC DAMAGES WAS NOT RATIONALLY RELATED TO HIS LOSS.

Georgia's tort reform package became law on April 21, 2025, ten days before closing arguments here.[7] R155:3602:24-3603:02. As relevant here, this legislation amended O.C.G.A. § 9-10-184 to explicitly bar closing arguments asking for noneconomic damages using a measure having "no rational connection" to the plaintiff's personal injury:

> In the trial of any action to recover damages for bodily injury or wrongful death, counsel for any party shall be allowed to argue the worth or monetary value of noneconomic damages . . . , ***provided 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***.

[7] *See* "SB 68," available at www.legis.ga.gov/legislation/69756.

O.C.G.A. § 9-10-184 (c)(1) (emphasis added).

"Noneconomic damages," under Georgia law, include damages for "physical or emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, [or] injury to reputation[.]" O.C.G.A. § 9-10-184(a)(2). Walker's alleged non-economic damages in 2017 have no rational relationship to the 1992 projected profit estimate of the Facility he used as an anchor.

The General Assembly instructed that "[i]f counsel elicits any testimony, or makes any argument or reference, prohibited by this Code section in the hearing of the jury or one or more prospective jurors, the court "shall take remedial measures" including a rebuke of counsel and removal of the improper impression from the minds of the jury. O.C.G.A. §§ 9-10-184(d), 9-10-185 (emphasis added). Remedial judicial action is mandatory. *See Giles v. State*, 362 Ga. App. 237, 237 (2022) (the word 'shall' is 'a word of command'"). A trial court has a "duty" that goes beyond trying to prevent improper closing arguments. *See* O.C.G.A. § 9-10-185. "On objection made, the court *shall* also rebuke counsel and by all needful

and proper instructions to the jury endeavor to remove the improper impression from their minds." *Id.* (emphasis added). A mistrial is authorized "if the plaintiff's attorney is the offender." *Id.*

Here, the plaintiff's attorney was indeed the offender. During closing, Walker's counsel asked the jurors to award him noneconomic damages for his cancer measured solely by BD's potential revenues from its expansion of the Facility in 1992—a full twenty-five years before Walker received treatment for his DLBCL.

> [T]he pain and suffering both physical and mental . . . those are each separate items of damage for your consideration. But we're going to try to make this easy for you with our suggestion as to an appropriate verdict in this case. We believe that Mr. Walker's cancer journey caused him a miserable year. . . . And we looked to Bard's own documents to find a number to submit to you. . . . You may remember when they were planning to build their facility, completed in approximately 1992, they discussed what the expected extra revenue would be from one customer. And for one year alone, it was $25 to $30 million. We submit that an appropriate verdict in this case—
>
> [BD's counsel]: Your Honor, objection.

R154:3429:10-3430:09. Though BD ***immediately*** objected to such a blatant violation of the amendment to O.C.G.A. § 9-10-184, the court overruled the objection. *Id.*

In addition to the contemporaneous objection, BD moved for a mistrial immediately after closing arguments because this was not a minor violation of O.C.G.A. § 9-10-184 but a highly prejudicial "send-a-message" argument. R154:3432:08-23; *see also id.* at 3437:18-3438:17 (pleading for remedial action). But Walker's response still did not and could not connect a profit projection to the noneconomic loss Walker suffered from one year of cancer treatment. *See* R154:3433:11-14. And Walker offered no other measure of noneconomic damages related to his cancer diagnosis and treatment. *See id.* There simply is no "rational connection" between Walker's closing argument and Walker's noneconomic damages. But the court promptly denied the motion without actually considering the new law. R154:3439:02-3440:15. The next day the court reiterated its ruling, adopting Walker's premise entirely:

> So, if Senate Bill 68 does apply to this case, the Court finds it was not violated. Evidence regarding Bard's projected profit for an upcoming year from one client, and I believe it was around 27 to 32 million, is a rational relationship to the plaintiff's one year of non-economic damages.

R155:3603:01-06.

That was reversible error, and the size of the verdict considering special damages reflects the extreme prejudice. *See Stolte v. Fagan*, 291

Ga. 477, 482 (2012) (noting that "a reversal will be required 'if the uncorrected improper argument could have affected the jury's verdict'"), overruled on other grounds in *Williams v. Harvey*, 311 Ga. 439, 449 (2021) (disapproving *Stolte* only where there is no contemporaneous objection); *see also Atlantic Coast Line R. Co. v. McDonald*, 103 Ga. App. 328, 339 (1961) (reversing because trial court refused to remediate in any way the plaintiff's improper closing argument in violation of mandate now codified in § 9-10-185). Accordingly, the compensatory verdict is as flawed as the punitive damages verdict and likewise must be vacated.

V. THE TRIAL COURT ERRED BY EXCLUDING CRITICAL EVIDENCE OF "BACKGROUND" AND "ENDOGENOUS" ETO.

The trial court selectively admitted evidence about background EtO and wholly rejected evidence of endogenous EtO. EtO is a chemical ubiquitous in the environment and naturally occurs in humans. Evidence of background and endogenous EtO was central to BD's defense because it contextualizes the necessary exposure levels of EtO before being at risk of cancer. In particular, the evidence of background and endogenous EtO would have shown that human bodies are exposed to EtO every day both

from inside and outside the body without effect. *See* R49:26422-26427; R147:2514:15-2537:24.

This was harmful error because it deprived the jury of a comparative exposure assessment essential to finding causation. It improperly usurped the jury's role to "sort through the evidence, resolve conflicts, and make findings of fact based on the evidence it finds credible." *Willis v. Cowabunga, Inc.*, 373 Ga. App. 544, 550 (2024), *reconsideration denied* (Nov. 5, 2024), *cert. denied* (Mar. 31, 2025). Though the evidence excluded here is powerful, "even evidence of 'doubtful relevancy or competency should be admitted and its weight left to the jurors.'" *Baker v. Cuthbertson*, 372 Ga. App. 753, 759-60 (2024) (*quoting Byrne v. Fierman*, 256 Ga. App. 443 (2002)). Further, multiple scientific errors tainted the ruling. For example:

- The trial court asserted that "endogenous EtO" is only produced in the liver or gut. *See* R30:19809, 19816 n.7. This is incorrect: endogenous EtO is formed in most, if not all, cells in the human body. R49:26423.

- The trial court differentiated endogenous EtO from inhaled EtO to find that the endogenous EtO evidence is irrelevant. R134:643:10-15, R30:19816 n.7. But that is factually incorrect. Human bodies treat endogenous EtO and exogenous EtO the same way. R49:26424-26425.

The trial court's scientific misstatements were not drawn from Walker's experts or even Walker's briefing; rather, the trial court undertook its own lay review of complex scientific studies that were in the record but called for an expert's explanation. *See* R30:19806-19834. And BD's expert, Dr. Chodosh, offered fulsome science-based testimony on the relevance of endogenous EtO—and Walker never sought to exclude these opinions via O.C.G.A. § 24-4-702.

The trial court improperly resolved factual disputes in Walker's favor rather than letting the jury weigh them. The jury was denied knowledge of the significant fact the human body naturally creates EtO, which Dr. Chodosh explained was critical to understanding harmful EtO levels. R49:26422-26427. Compounding this error, the trial court selectively chose admissible background EtO evidence, without any clear indication why.

For example, the trial court allowed Walker to show a single week of testing in 2019, during which the Facility was experiencing a maintenance issue leading to temporarily higher EtO emissions. But then it excluded BD's evidence of long-term testing by third parties showing much lower EtO levels around the Facility that were, in the

Georgia Environmental Protection Division's words, "indistinguishable from background." R135:723:1-745:12, R147:2514:15-2537:24, 2655:23-2657:24**.** This evidence would have shown similar EtO levels in the air both before and after BD installed additional EtO emissions controls. *See* R147:2514:15-2537:24.

In sum, the court's arbitrary evidentiary rulings limited the jury to only Walker's danger narrative about EtO, while excluding the scientifically established evidence of far lower exposure levels Walker objectively experienced. This deprived the jury of critical evidence it needed to meaningfully assess whether actual EtO exposure levels caused Walker's DLBCL. Even under the abuse of discretion standard, this was reversible error requiring a new trial. See *Dagne v. Schroeder*, 336 Ga. App. 36, 42 (2016) (quoting *United States v. Frazier*, 387 F.3d 1244, 1270 (11th Cir. 2004) ("It is an abuse of discretion to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue.").

CONCLUSION

Multiple errors below undermine the verdicts that were returned, but the harmful errors enumerated in this appeal alone compel an entire

new trial or a reversal and judgment rendered in BD's favor due to fatally insufficient causation evidence.

CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 2nd day of February, 2026.

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I hereby certify that I have this day caused a true and correct copy of the foregoing BRIEF OF APPELLANTS to be served on all parties by email. I certify that there is a prior agreement with Plaintiff/Walker to allow documents in a PDF format sent via email to suffice for service:

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