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Dec 19 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2022-001574

Steven R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfern Steward,……Respondent

v.

Scapa Waycross, Inc.,……...…….Petitioner

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Scapa Waycross, Inc. petitions the Court for a writ of certiorari to review the Court of Appeals' opinion issued August 3, 2022, affirming the trial court's rulings in favor of Respondent Stewart. *Edwards v. Scapa Waycross, Inc.*, Op. No. 5931 (S.C. Ct. App. filed August 3, 2022). The Court of Appeals' rulings conflict with prior decisions of this Court, as well as courts around the nation, and certiorari should be granted.

In analyzing whether Stewart presented legally sufficient evidence to prove substantial factor causation, the Court of Appeals relied on Pennsylvania law—which differs from South Carolina law. The general consensus among courts throughout the United States is that the "cumulative exposure" theory Stewart's experts relied on in this matter cannot properly be used to establish either general or specific causation in cases of this nature. The theory is plainly inconsistent with South Carolina law on substantial factor causation in toxic tort cases.

The Court should grant certiorari and make clear its adherence to the position taken by most courts concerning proof required to establish substantial factor causation in cases involving asbestos-related mesothelioma. The Court should specifically reject the Pennsylvania Supreme Court's decision in *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016)—not adopt it as the Court of Appeals has done.

The Court of Appeals also erred in affirming the trial court's additur ruling, effectively granting the trial court unfettered discretion to grant additur whenever it seems fitting according to the trial judge, regardless of whether a compelling reason exists for additur. Additur was improper here because the damage awards here were not "unduly conservative." *Riley v. Ford Motor Co*., 414 S.C. 185, 192 (2015). South Carolina courts need additional guidance from this Court on the issue of additur.

Finally, the Court of Appeals erred in affirming the trial court's ruling on the issue of allocating settlement proceeds. South Carolina practitioners and courts need this Court's guidance on this issue as well. As a matter of law, Respondent's 80% wrongful-death-claim/20% survival-claim allocation was not reasonable under the facts. Respondent allocated 80% of the settlement proceeds to the wrongful death claim even though the trial court found no reason to increase the jury's award of $100,000 for the wrongful death damages, given Stewart's limited relationship with his children. Only 20% of the proceeds were allocated to the survival claim even though the trial court believed the evidence concerning the Stewart's survival damages warranted a 67% increase in survival damages—from $600,000 to $1,000,000.

In short, the trial court was of the view that the evidence supported a finding that it was reasonable and appropriate for 10% of the total damages to be awarded for the wrongful death claim and reasonable and appropriate for 90% of the total damages to be awarded for the survival claim. Given the trial court's findings concerning the damages evidence, allocating just 20% of the settlement proceeds to the survival claim is not reasonable. On the contrary, the allocation should have been 10% for the wrongful death claim and 90% for the survival claim for set off purposes.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the trial court's ruling denying Petitioner's motion for judgment n.o.v. because Respondent did not introduce any legally sufficient evidence of causation.

2. Whether the Court of Appeals erred in affirming the trial court's order granting additur because the jury's damage awards were not actuated by passion, caprice, or prejudice, and the trial court failed to pay substantial deference to the jury's awards.

3. Whether the Court of Appeals erred in affirming the trial court's abuse of discretion in accepting Respondent's allocation of settlement proceeds.

STATEMENT OF THE CASE

1. Procedural history.

Steven Stewart initiated this asbestos products liability matter by a Complaint filed in February 2013. Complaint, Record on Appeal ("R"), pp. 30–56. Stewart filed an Amended Complaint in May 2013 adding Defendant-Appellant Scapa Waycross, Inc. (Amended Complaint, R. 57-71).

Stewart died in August 2013. (Suggestion of Party's Death, R. 72-75). Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart, filed a Motion to Substitute Party and Motion to File a Second Amended Complaint, which was granted, (Order, R. 1-5), and Stewart filed a Second Amended Complaint in November 2013, (Second Amended Complaint, R. 76-92). Scapa filed an Answer to the Second Amended Complaint. (Scapa Answer, R. 93-102).

Stewart settled with all other defendants before trial. Trial was conducted from January 29, 2018 to February 2, 2018 and then continued from February 7, 2018 to February 9, 2018 against Scapa alone. (Trial Transcripts, R. 408-1646).

The jury returned a verdict in favor of Stewart on his negligence claim, and awarded actual damages of $600,000 for Stewart's survival claim and $100,000 for Stewart's wrongful death claim for total damages of $700,000. (Verdict Form, R. 26-29). The jury did not find that Scapa's conduct was willful, wanton or reckless. *Id.*

Following the verdict, Scapa filed a Motion for Setoff, (R. 141-45), a Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors, (R. 164-

70), and a Motion for Judgment Notwithstanding the Verdict on liability issues, but did not ask for a new trial, (R. 171-74).

Stewart filed a Motion for a New Trial *Nisi Additur*, (R. 175-83), arguing that the verdict should be raised to $2,630,000 for Stewart's survival claim and $600,000 for Stewart's wrongful death claim, for a total verdict of $3,230,000, more than six times the jury's verdict. Scapa filed its Brief in Support of Motion for JNOV. (R. 184-93). Scapa also filed a response to Plaintiff's Motion for New Trial *Nisi Additur*. (R. 194-98).

The Circuit Court held a hearing on the parties' post-trial motions and heard arguments on Stewart's Motion for New Trial *Nisi Additur* and granted an added $400,000 to the jury's survival award of $600,000 to bring it to $1,000,000, (7/11/18 Post-Trial Motions Transcript, pp. 25-27, R. 1671-73), but did not alter the wrongful death damages awarded by the jury. (7/11/18 Post-Trial Motions Transcript, pp. 24-25, R. 1670-71).

The Circuit Court also heard argument on Scapa's Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors or, in the alternative, Scapa asked that the Court review the settlements *in camera*. (7/11/18 Post-Trial Motions Transcript, pp. 27-29, R. 1673-75). Scapa's counsel acknowledged that Stewart had produced the settlement numbers just before the hearing, but not the settlement documents. (7/11/18 Post-Trial Motions Transcript, p. 32, R. 1678).

The disclosure revealed that Stewart had received or would receive $1,036,000 in prior settlements, and that Stewart had uniformly allocated the previous settlement amounts by putting 80% on the wrongful death claim and 20% on the survival claim. (7/11/18 Post-Trial Motions Transcript, pp. 32, 36-37, R. 1678, 1682-83). Due to that recent disclosure,

counsel for Scapa asked for time to move to reallocate those settlements, which the Circuit Court granted. (7/11/18 Post-Trial Motions Transcript, pp. 33, 35, R. 1679, 1681).

Scapa filed a Motion to Reallocate Settlement Proceeds and a Brief in Support of same. (R. 199-204). The Court held a hearing on Scapa's Motion to Reallocate Settlement Proceeds. (10/10/18 Motion Transcript, R. 1687-1708).

On March 25, 2019, the Court issued its Order on Post-Trial Motions, granting Stewart's Motion for New Trial *Nisi Additur*, denying Scapa's Motion for JNOV, denying Scapa's Motion for Production of Plaintiff's Settlements and Payments with all Third-Party Tortfeasors, granting Scapa's Motion for Setoff, and denying Scapa's Motion to Reallocate Settlement Proceeds. (Order Re: Post-Trial Motions, R. 6-25).

Scapa timely appealed. (Notice of Appeal, R. 210-32).

2. Facts

Mr. Stewart was employed at the Bowater Paper Mill in Catawba, South Carolina, from 1963 to 2002. (2/18/13 Stewart Depo., p. 25, R. 2102).[1] He was originally hired as a utility man performing clean up on Paper Machine 1. (2/18/13 Stewart Depo., pp. 25-27, R. 2102-04). He was promoted to several different positions at Bowater, but he worked his entire career on Paper Machine Number 1. (2/18/13 Stewart Depo., pp. 27-30, R. 2104-07).

The paper machines used dryer felts to keep the paper against the dryer drums, which dried the paper, and the felts would also absorb moisture from the paper sheets. (1 Tr. 269-270, R. 676-77; 2 Tr. 84-85, R. 1236-37). Bowater purchased dryer felts from Scapa from 1963 until around 1981. *See* (Plaintiff's Trial Exhibit No. 56, R. 2095-96) (showing the first purchase of Scapa felt in 1963, installed in 1964). During Mr. Stewart's career, Bowater

[1] Mr. Stewart's discovery deposition taken on February 18, 2013 was read into the record at trial on February 2, 2018. (1 Tr. 570-571, R. 977-78).

used 288 dryer felts on Paper Machine 1, but only 3.8% of those dryer felts were Scapa asbestos-containing dryer felts. (2 Tr. 92-93, R. 1244-45).

Mr. Stewart did not know which dryer felts contained asbestos and could not tell from looking at the dryer felts. (2/18/13 Stewart Depo. pp. 168-71, 179, 181, R. 2114-19). Similarly, Mr. Stewart's co-workers were unable to identify asbestos-containing Scapa dryer felts that Stewart worked with. (7/13/13 Hegler Depo., pp. 68-69, R. 2205-06);[2] (1 Tr. 337-38, R. 744-45) (testimony of co-worker Steele).

Because there were no fact witnesses tying Mr. Stewart to exposure to asbestos-containing Scapa dryer felts, Plaintiff relied on so-called "Mastercards," which Scapa maintained to track the manufacture, sale, shipment, and use of Scapa dryer felts at Bowater, to demonstrate theoretical exposure. (1 Tr. 661-662, R. 1068-69). According to the Mastercards introduced at trial, Bowater started purchasing dryer felts from Scapa in 1964. *See* (Plaintiff's Trial Exhibit No. 56, R. 2095-96). However, the Mastercards also show that Scapa did not send any asbestos-containing dryer felts to Bowater until 1969. (Plaintiff's Trial Exhibit No. 26, R. 2051-52) (earliest Mastercard referencing asbestos).

Before 1968 and the introduction of asbestos-containing Scapa dryer felts, Mr. Stewart had worked as a utility man, a fifth hand, and a fourth hand. In 1968, Mr. Stewart was promoted from fourth hand to third hand. (1 Tr. 262, 267, R. 669, 674) (Co-Worker Fred Steele testified that he started working with Stewart in 1968 at which time Stewart was a third hand). After 1968, Mr. Stewart only worked as a third hand, a backtender, and a machine tender. (2/28/13 Stewart Depo., p. 30, R. 2107).

[2] Mr. Hegler's deposition testimony was read into the record. (1 Tr. 158, R. 565).

Significantly, those higher level, more senior positions did not involve cutting the dryer felt or cleaning the paper machine by blowing out the dryer. (1 Tr. 278, R. 685; 2/28/13 Stewart Depo. pp. 59-62, R. 2109-12). The third hand's primary job was to watch the paper machine and supervise other workers. (1 Tr. 266, 334, R. 673, 741; 2/28/13 Stewart Depo., p. 59, R. 2109). In fact, a machine tender did not have regular contact with dryer felts in any capacity. (3/4/13 Stewart Depo. p. 54, R. 2173). It was primarily up to the utility man and fifth hand to clean out the machine. (1 Tr. 278, R. 685). Fifth hands and fourth hands were primarily involved in cutting the dryer felt. (1 Tr. 289, R. 696).

Mr. Stewart's transition from fourth hand to third hand in 1968 is important because Plaintiff's own experts recognized that the dryer felt would not release any fibers unless it was being cut or otherwise manipulated by the worker. Testimony of Plaintiff's expert Christopher DePasquale, (1 Tr. 470-471, R. 877-78). Thus, by the time that Scapa was shipping asbestos-containing dryer felt to Bowater in 1969, Mr. Stewart's positions no longer directly involved cutting or manipulating the dryer felts. Consequently, Plaintiff presented no evidence that Mr. Stewart worked closely enough to others cutting or manipulating asbestos-containing Scapa dryer felts to be exposed to asbestos from those dryer felts after becoming a third hand in 1968.

Mr. Stewart was diagnosed with malignant pleural mesothelioma on October 24, 2012. (1 Tr. 168, R. 575). He incurred $241,822.70 in medical costs associated with that diagnosis. *Id.*

ARGUMENT

1. The Court of Appeals erred in affirming the trial court's finding that Stewart established specific causation.

In affirming the trial court's causation ruling, the Court of Appeals relied on its prior holding in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021), now pending before this Court on a petition for writ of certiorari. The Court of Appeal's causation ruling in *Jolly* is erroneous for the reasons stated in the certiorari petition in that case, incorporated herein by reference. Among other things, the court in *Jolly* erred by (i) relying on *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), and (ii) overlooking the differences between South Carolina law and Pennsylvania law. In short, the Court of Appeals' decision conflicts with prior rulings by this Court and most courts elsewhere.

A. The "cumulative dose" theory is indistinguishable from the junk science "every exposure" theory rejected by dozens of jurisdictions.

Here, as in *Jolly*, the Court of Appeals failed to appreciate that the "cumulative dose" theory does not differ from the "each and every exposure" theory. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (rejecting cumulative exposure theory of causation because it is effectively the same as an each and every exposure theory); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar seeks to base his causation opinion not on the thin reed that he cannot rule any exposure out, but on the opposite: he rules all exposures 'in,' boldly stating that Mr. Smith's mesothelioma 'was caused by his total and cumulative exposure to asbestos, with all exposures and all products playing a contributing role.' This asks too much from too little evidence as far as the law is concerned.").

Unlike the Pennsylvania Supreme Court in *Rost*—relied on by the Court of Appeals in *Jolly*—this Court has never rejected the principle that the substantial factor causation test

requires a comparative analysis of different exposures. *See Rost*, 151 A.3d at 1051 n.13. South Carolina's substantial factor causation test derives from the test in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), which this Court adopted in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179 (2007). Pennsylvania's substantial factor causation standard, in contrast, has a different origin and, thus, Pennsylvania law differs from South Carolina law. The Pennsylvania Supreme Court adopted the substantial factor causation test set forth by the Seventh Circuit in *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992). *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 226 (Pa. 2007) (adopting the *Tragarz* test). In *Tragarz*, the Seventh Circuit applied Illinois proximate cause law, which allows for a "less rigid" frequency, regularity, and proximity test in cases of mesothelioma. 980 F.2d at 420–21. The majority in *Rost* rejected any need for a comparative assessment of differing exposures on the ground that "[i]n *Tragarz*, the Seventh Circuit specifically rejected any notion that its test requires a comparative analysis of different exposures to asbestos, and instead made clear that the focus must be on the level of exposure to the defendant's product." *Rost*, 151 A.3d at 1051 n.13.

Notably, according to two members of the Pennsylvania Supreme Court, the rejection of a comparative assessment by the four-justice majority in *Rost* was in direct conflict with the Pennsylvania Supreme Court's unanimous holding in *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 57 (Pa. 2012). *See Rost*, 151 A.3d at 1066-67 (Baer, J., dissenting) (highlighting that the unanimous *Betz* court's "criticism of the each and every exposure theory of substantial causation hinged on recognition of the significance of comparative assessments" and noting that "the unanimous decision of the Court in *Betz* is precedent binding the current members of this Court, absent an explanation of why the legal principle of *stare decisis*

should not be followed"). The majority in *Rost,* however, effectively stated it was not rejecting its prior *Betz* decision, but instead following its earlier adoption of the *Tragarz* Illinois decision which recognizes a weakened substantial factor causation test in mesothelioma cases. However, this Court in *Henderson,* which itself involved a mesothelioma plaintiff, did ***not*** adopt a different substantial factor causation test for mesothelioma cases. Therefore, our Court of Appeals, instead of following this Court's binding precedent in *Henderson,* has erroneously adopted the *Rost* case, which (and there were dissents) follows and adopts Illinois law that differs from *Henderson*.

Courts in the Fourth Circuit applying South Carolina law have found substantial factor causation requires more than proof a decedent had "occupational" or "above background" exposures from a defendant's product. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) ("[T]he mere fact that 'occupational' or 'above-background' exposures contribute to the total cumulative dose fails to explain why [a plaintiff's expert] views them as more causative than non-occupational or below-background exposures."). It also requires a *contextual analysis*—causation experts must evaluate the relative significance of a decedent's exposures. *See Haskins*, 2017 WL 3118017, at *8 ("[A] robust concept of 'substantial causation' should account for the broader context in which a particular exposure occurs—including the defendant's relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract."). Thus, although short exposures *might* satisfy the standard if they are the *only* exposures, it is not enough to show "above background" exposure to a particular product if significant evidence of other exposures exists. *See id.*

Scapa does not contend Stewart must exclude every possible cause of Mr. Stewart's mesothelioma or that a precise quantification of asbestos fibers Mr. Stewart was exposed to from Scapa dryer felts is required. Rather, Scapa has argued, consistent with Fourth Circuit law from which the substantial factor causation test derives, that some qualitative analysis comparing Mr. Stewart's exposures from Scapa with his exposures from other sources is necessary to determine whether Scapa exposures were a substantial factor contributing to Mr. Stewart's disease. Stewart's experts cannot reliably opine that exposure to Scapa dryer felts was a substantial factor in causing Mr. Stewart's disease by pretending the Scapa exposures were Mr. Stewart's only exposures and ignoring context. The Court of Appeals' ruling accepting Stewart's expert testimony, in effect, creates strict liability for any above-background exposures. The substantial factor test was designed to avoid this unbounded liability. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016).

Rost, *Tragarz*, and the Pennsylvania and Illinois law on which they are based are contrary to core principles of substantial factor causation under South Carolina law. Thus, by applying *Rost*, the Court of Appeals applied a different standard than that adopted by this Court, and the Court of Appeals' holdings in this case and in *Jolly* therefore conflict with binding precedent.

Further, *Lohrmann*, adopted by *Henderson*, is a product-specific test, asking whether the evidence would permit a reasonable jury to conclude a manufacturer's product was a substantial cause of the plaintiff's disease. *Lohrmann*, 782 F.2d at 1162–63. A plaintiff cannot meet his burden by showing general asbestos exposure cumulatively caused his disease. *See, e.g.*, *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 482 (Ohio 2018) (collecting cases from across jurisdictions); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443

(6th Cir. 2009) (rejecting the "any exposure" test as contrary to principles of substantial factor causation); *Yates v. Ford Motor Co.*, 115 F. Supp. 3d 841, 847 (E.D.N.C. 2015); Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479, 480 (2008).

The Court of Appeals' reliance on *Rost* improperly lowers the causation standard in mesothelioma cases. Because a plaintiff might never recover under a traditional but-for test, the substantial factor causation standard was adopted as a compromise which lowered the causation standard below the but-for standard but maintained an appropriate balance of fairness between plaintiffs and defendants. *See, e.g.*, David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008). The Court of Appeals' opinions here and in *Jolly*, improperly relying on *Rost*, may be argued to allow an asbestos plaintiff to meet his causation burden by showing only that his exposure from a particular defendant's products was "above background," and regardless of any other exposures. The Court of Appeals thus appears to remove the requirement that an exposure be "substantial" from the "substantial contributing factor" standard, creating a risk that all defendants who exposed a plaintiff to any amount of asbestos will be automatically liable. This result would effectively eliminate the plaintiff's burden to prove that exposures attributable to a particular defendant were a *probable* cause of his mesothelioma, rather than a *possible* cause. *See McIndoe*, 817 F.3d at 1177.

The Court of Appeals' weakening of the causation standard is inconsistent with *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727, and *Lohrmann*, 782 F.2d at 1162–63, and allows plaintiffs to evade the required proof via evidence that a plaintiff was generally exposed to asbestos and that the defendant's products were a component of the exposures

.

The Court of Appeals emphasized Dr. Frank's testimony that mesothelioma is caused by a person's cumulative dose. The question for Dr. Frank at trial, therefore, was which exposures were *substantial* contributors and which exposures were ***in****substantial* contributors. But Dr. Frank admitted he made no effort to distinguish the two:

> Q. And you certainly didn't make any calculation as to – or reach any opinion with respect to a specific dose of asbestos that Mr. Stewart might have inhaled solely from Scapa asbestos felts?
>
> A. I made no such calculation.
>
> Q. And again, I apologize if this was asked. But you have not made any efforts to quantify Mr. Stewart's asbestos exposure, have you?
>
> A. That is correct.
>
> Q. [I]s it your opinion that every exposure that contributes to a person's cumulative dose contributes to the development of a mesothelioma?
>
> A. It is the cumulative dose which is clearly made up of all the exposures they've had over their lifetime. And yes, they all contribute. That doesn't mean that each exposure was the one that caused the mesothelioma, because we never know which fiber on which day from which product did it. But they all certainly increase the risk and ultimately have to be said to be contributory to that individual getting the disease.
>
> Q. Does it matter to you if any particular exposure is above background or not?
>
> A. Well, any exposure has to be at least at background level; and it doesn't matter how much above background that any additional exposures are. Some will clearly contribute more, some will contribute less. Scientifically that's how you look at it. Obviously there are jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that. That said, scientifically, you can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

(4/9/15 Dr. Arthur Frank Depo., p. 35, R. 2210-11; R. 2212; R. 2212-13).

In short, Dr. Frank testified *every* exposure to asbestos was a substantial contributing factor in causing Mr. Stewart's disease, no matter the extent, dose, or quantity of the exposure. He thus offered the unreliable "each and every exposure" opinion under the moniker "cumulative exposure."

As Dr. Frank admitted, "Obviously there are some jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that." Among those jurisdictions, until *Jolly* was decided, Scapa submits, was South Carolina. Now this case is added to *Jolly* as endorsing what even Dr. Frank admits jurisdictions decline, for legal reasons, to permit by way of exposure testimony. Simply put, Dr. Frank makes no effort to distinguish between any exposures whatsoever. This eliminates "substantial factor" causation as a principle, which this Court has never sanctioned. As a result, the Court of Appeals erred in failing to reverse the trial court's judgment, and this Court should grant certiorari.

B. The notion that "every exposure" contributes to a person's mesothelioma is not a "scientific fact," as the Court of Appeals seemed to believe.

The Court of Appeals has adopted the *Rost* majority's view that it is an "irrefutable scientific fact" that persons have a "cumulative dose" of all exposures which, cumulatively increase the likelihood of disease. *Jolly,* 435 S.C. 607, 634, 869 S.E.2d 819, 834 (2021) This is ***not*** an "irrefutable fact." Pennsylvania Court of Common Pleas Judge Robert J. Colville has given one of the most compelling rebuttals of the notion that it is a "scientific fact" that "every exposure" necessarily contributes to a person's mesothelioma. *See In re Toxic Substance Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006), *affirmed sub nom.*, *Betz*

v. Pneumon Abex LLC, 44 A.3d 27 (Pa. 2012).[3] *Betz* involved a group of auto mechanic cases in which the plaintiffs' experts declared that the specific exposure facts of each mechanic were essentially irrelevant because any exposure was sufficient to support causation. *Id.* at *1. The experts thus shrugged off the need for any sort of dose assessment and opined that any level of mechanic work, regardless of duration, was sufficient to cause disease. *Id.* Judge Colville precluded this testimony, and in the process, addressed the any-exposure theory's key underpinnings and found each one illogical and unsupported. *Id.* at *11-12. The Pennsylvania Supreme Court unanimously affirmed Judge Colville's opinion in its *Betz* opinion. *See generally Betz*, 44 A.3d 27.

First, Judge Colville focused on the serious inconsistency between the claim that any exposure to an asbestos fiber in an occupational setting causes disease, and the experts' candid, albeit incongruent, admission that a lifetime of background exposures to asbestos fibers does not cause disease. *Id*. In modern industrial society, urban and often even rural air has historically contained asbestos at low levels (some of this from natural asbestos outcrops), and thus most individuals over fifty will have millions of "background" fibers in their lungs even without any known occupational or other direct exposure to asbestos. *Id*. at *3.

These levels have never been known to cause disease, mainly because the body is capable of ejecting, absorbing, or otherwise dealing with these low exposures. *Id.* Plaintiff

[3] Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479 (2008). Ironically, this *Betz* analysis was affirmed unanimously, as stated, by the Pennsylvania Supreme Court. However, that same Court in *Rost,* in a split decision, while stating it was not overruling *Betz*, has differentiated mesothelioma cases and followed Illinois law which represents a weakened substantial factor causation test never adopted by this Court.

experts almost always readily admit this and exclude background exposures from their cumulative dose opinions. *Id.*

The fibers involved in these two types of exposures, however, are no different—only the dose distinguishes background exposures from occupational exposures, and even then a low occupational exposure can easily overlap or not exceed a higher background exposure. *Id.* Thus, there is no logic permitting these experts to categorically exclude background exposure, yet, at the same time, categorically include all occupational exposures as causative. *Id*. at *12.

Given the admission by plaintiff's experts that background exposures were too *de minimus* to cause disease, Judge Colville recognized it was incumbent on the experts to identify what dose would be sufficient to cause disease:

> For instance, experts suggest that the average ambient exposure in Pittsburgh is approximately .0001 fibers per milliliter of air … . No one, including the plaintiff's experts, proffers an opinion that this level of exposure creates an increased risk of the development of any asbestos-related disease … . [The question is], how much greater quantity of exposure is necessary to permit the causal attribution of an asbestos-related disease to a particular asbestos-related exposure[?]

Id. at *3.

Plaintiff's experts made no attempt to measure or even roughly quantify the mechanics' occupational doses or show how they were sufficient to cause disease when background exposures clearly are not. *Id*. at *6-7. Judge Colville rejected the experts' failure to quantify or assess the mechanic's dose in any way because the lack of any measurement made it impossible for them to accurately distinguish low level occupational exposures from background exposures. *Id*. at *6, *9, *11-13.

Second, Judge Colville rejected the experts' attempt to "extrapolate down" from high-dose asbestos studies to prove that occupational exposures at low doses, above

background or not, also must cause disease. *Id*. at *6-7. The amphibole form of asbestos is widely recognized to cause disease at significant doses (*e.g*., in the shipyard, insulator, and asbestos factory professions), but there are no low-dose response curves for asbestos exposure and no studies demonstrating an increase in actual disease at very low doses, particularly for chrysotile. *Id*. at *6, *8

The experts in *Betz* used the "extrapolate down" methodology to assume, based on high-dose studies, that low-dose studies would also cause disease in a linear fashion. *Id.* at *7. Judge Colville rejected this approach, explaining that the fallacy of the "extrapolation down" argument is plainly illustrated by common sense and common experience with seemingly harmless substances, including water:

> Large amounts of alcohol can intoxicate, larger amounts can kill; a very small amount, however, can do neither. Large amounts of nitroglycerine or arsenic can injure, larger amounts can kill; small amounts, however, are medicinal. Great volumes of water may be harmful, … moderate amounts of water, however, are healthful. In short, the poison is in the dose.

Id.

Judge Colville recognized that when experts attempt this kind of extrapolation downward, they are engaged in both a logical falsehood and scientific error:

> Plaintiffs have not proffered any generally accepted methodology to support the contention that a single exposure or an otherwise vanishingly small exposure has, in fact, in any case, ever caused or contributed to any specific individual's disease, or even less so, that in this case such a small exposure did, in fact, contribute to this specific plaintiff's disease.

Id. at *8.

Finally, Judge Colville rejected the experts' reliance on the "no safe threshold" position. *Id*. He noted the very large difference between stating that the threshold is not known and claiming that there is no threshold at all. *Id.* at *8-9. He observed that such testimony improperly shifted the burden of proof to defendants when it is plaintiff's burden to establish

the known toxic level of a substance and that plaintiff experienced a dose consistent with that level. *Id.* at *8.

In addition to Judge Colville's dismantling of the "every exposure/cumulative exposure" theory, scientific studies confirm its unreliability. Studies cited in support of the theory are demonstrably unreliable. *See* Mark G. Zellmer, *No Validity to No Safe Dose: Part II—The LNOT Model and 'Low Dose' Epidemiology,* Harris Martin Asbestos Reporter at p.4 (April 2021). And among other things, the theory fails to account for the phenomenon of DNA repair. *See* Mark G. Zellmer, *No Validity to No Safe Dose: Part III—Mechanisms of Repair*, 22 Harris Martin Asbestos Reporter No. 3 at p.4 (March 2022). Further, while the older view of the pathogenesis of mesothelioma posited that asbestos penetrated the mesothelial cell causing genetic damage, which led to the uncontrolled cellular proliferation of mesothelioma, more recent work has called this theory into question. *Id*. at 7.

Studies show that human mesothelial cells invariably die 2-10 days after exposure. Considering mesothelioma's long latency, cells that die a short time after exposure cannot become malignant cells 20-50 years later. The answer is the occurrence of chronic inflammation due to the exposure to asbestos. A sufficient dose of asbestos, depending on type and fiber dimension, will cause oxidant creation and thereby chronic inflammation. If sustained long enough and severely enough, the inflammation will cause damage to DNA that is irreparable. *Id.* In other words, as Judge Colville explained, just as with water, alcohol, and arsenic, the dose is the key.

In sum, the notion that every exposure is a substantial factor in causing a person's mesothelioma "would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." *Moeller v. Garlock Sealing Techs.,*

LLC, 660 F.3d 950, 955 (6th Cir. 2011). It is not a scientific fact that "every exposure is causative," as the Court of Appeals seemed to believe. This Court should align South Carolina with the multitude of jurisdictions rejecting the notion that a plaintiff need not provide some quantification of his or her exposure to asbestos from the defendant's product to establish substantial factor causation.

2. The Court of Appeals' *additur* ruling improperly afforded the trial court unfettered discretion.

The Court of Appeals should have reversed the trial court's *additur* ruling. Had the award of survival damages been less than Mr. Stewart's medical expenses or failed to account for pain and suffering at all, then the trial court would have been justified. *See Nestler v. Fields*, 426 S.C. 34, 41, 824 S.E.2d 461, 465 (Ct. App. 2019). For example, in *Waring v. Johnson*, the court approved additur in a car-wreck case where the damage award was in the exact amount of the medical bills and there was evidence the plaintiff suffered pain and her lifestyle was changed post-accident. 341 S.C. 248, 261, 533 S.E.2d 906, 913 (Ct. App. 2000). But when, as here, the original damage award exceeds the medical expenses by nearly three times, there is no compelling reason for a trial court to "impose its will on the parties and invade the jury's domain." *Nestler*, 426 S.C. at 41, 824 S.E.2d at 465.

Further, "if inapplicable grounds are given for granting additur, the order fails by error of law." *Green v. Fritz*, 356 S.C. 566, 570 (Ct. App. 2003). Here, at the additur hearing, the trial court—while effusively praising the jury for its attentiveness—speculated its damage awards may have been affected by the "empty chair" evidence presented at trial:

> Ladies and gentlemen, I have struggled mightily with this issue of additur. This was a very discerning jury, and I stand by the observations that were made at the time. I haven't seen a more attentive jury in my very lengthy time in practice, both as a trial practitioner as well as an appellate judge and now a trial judge.

> But one thing that presents some difficulty in this case is the empty chair, which was argued very, very heavily in this case. And, really, the empty chair, and I charged the jury this way, is not a doctrine that has any impact on the award of damages.
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> * * *
>
> I attempted to make a distinction between the empty chair as a function of liability and damages. And I tried to stick very close to what our court has said in that regard, and the charges that I gave are charges that reflect the language that the court has given us to use as trial judges.

(R. 1669-70).

Speculation that a jury's award may have been higher absent a defendant invoking an "empty chair" defense is not a compelling reason for invading the jury's province. *See ClearOne Commc'n, Inc. v. Biamp Sys.,* 653 F.3d 1163, 1179 (10th Cir. 2011) (observing that courts have refused to indulge speculation that jury improperly apportioned damages).

Further, the discretion to grant additur is not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. The jury's award for survival damages was nearly three times the amount of Mr. Stewart's medical expenses which, because he was deceased, were fixed and no longer accruing. Furthermore, pain and suffering damages are indeterminate in character, are not capable of exact measurement, and there is no fixed standard whereby such damages can be determined. Thus, the trial court should have left the amount of damages for pain and suffering to the judgment of the jury. *See Harper v. Bolton*, 239 S.C. 541, 548 (1962).

Finally, the Court should bear in mind the distinction between remittitur and additur highlighted by the United States Supreme Court. "Where the verdict is excessive, * * * remittitur has the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). On the other hand, "where the verdict is too small, an increase by the court

is a bald addition of something which in no sense can be said to be included in the verdict." *Id.* As such, a court-imposed increase of damages encroaches on the defendant's right to a jury trial. *ClearOne Commc'n*, 653 F.3d at 1179. For that reason, a trial court's decision to invade the jury's province and grant additur should be rare and must be supported by extremely compelling reasons. The trial court's additur here was an abuse of discretion.

3. The Court of Appeals erred in refusing to reverse the trial court's settlement-proceeds allocation ruling.

Finally, the Court of Appeals erred in its analysis of the settlement-proceeds allocation. The court approved Stewart's unilateral allocation in part because South Carolina case law favors a plaintiff's ability to apportion settlement proceeds in the manner most advantageous to it. The plain language of § 15-38-50, however, contradicts the court's holding: "[A] release or a covenant not to sue or not to enforce judgment . . . reduces the claim against the others to the extent of any *amount stipulated by the release* or the covenant, or in the *amount of the consideration paid for it*." S.C. CODE ANN. § 15-38-50 (emphases added). Statutes must be read so that no part shall be rendered surplusage, or superfluous. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

Courts elsewhere applying setoff statutes like § 15-38-50 have held that where a settlement agreement doesn't allocate proceeds among separate claims, the settlement's total amount must be set off from the entire verdict. *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (applying FLA. STAT. ANN. § 768.31(5)); *see also Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980) (applying CAL. CIV. PROC. CODE § 877 and holding, absent good faith allocation of settlement consideration between causes of action in which joint tortfeasor status was alleged, defendants were entitled to setoff of entire settlement figures); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App.

2000) (finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid a full set-off). These cases are consistent with South Carolina law and policy.

In *Dionese*, two plaintiffs—husband and wife—sued various defendants for the wife's personal injuries and the husband's loss of consortium arising from a motor vehicle accident. 500 So. 2d at 1348. The plaintiffs settled with the at-fault driver and his insurer, but the agreement didn't allocate the money between the two plaintiffs. *Id.* at 1348, 1349. The plaintiffs then proceeded to trial and got a verdict against a non-settling defendant. *Id.* at 1348. When the non-settling defendant moved to set off the settlement funds received by the plaintiffs, the plaintiffs "notified the court of a private unilateral agreement to apportion $10,000 of the $45,000 settlement proceeds to [the wife's] claim for personal injuries, and the remaining $35,000 to [the husband's] claim of loss of consortium." *Id.* The Florida Supreme Court held the plaintiffs' private, unilateral allocation of settlement proceeds should be ignored by a court in determining setoff. *Id.*

The court distinguished cases where plaintiffs and defendants agree to an allocation. In cases where a "settlement agreement itself recognize[s] two separate and distinct causes of action and apportion[s] the proceeds accordingly," a non-settling defendant may be entitled to set off only the funds paid in settlement for a specific cause of action. *Id.* at 1349. Private, unilateral allocation agreements, however, "are contrary to all concepts of fairness" and "would often result in a windfall recovery" for the plaintiffs. *Id.* at 1350. Thus,

> The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award. . . . The rights of both the settling and non-settling joint tort-feasors would be adversely affected if we were to allow plaintiffs to privately and unilaterally apportion the proceeds of a settlement agreement containing a general release.

Id.

The same analysis applies here. Stewart entered into general settlement agreements that did not allocate settlement funds and instead provided for "undifferentiated lump sum" payments. *See id.* Stewart then privately and unilaterally allocated the funds to minimize a setoff. This allocation is inconsistent with the controlling statutory mandates. The law does not give plaintiffs a right to unilaterally manipulate settlement allocations to minimize setoff and obtain a double recovery. Rather, to effectuate the policy against double recovery and give meaning to the language of section 15-38-50, the Court should reverse the Court of Appeals' and the trial court's judgments and direct a complete setoff against the total jury award.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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December 19, 2022
Columbia, South Carolina