The State of South Carolina
In the Court of Appeals

Appeal from York County
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

Estate of Steven R. Stewart,.....Respondent

v.

Scapa Waycross, Inc.,.....Defendant/Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Steven Redfearn Stewart initiated this asbestos products liability matter by a Complaint filed in February 2013 against a number of defendants. (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. pp. 57-71).

Stewart died in August 2013. (Suggestion of Party's Death, R. pp. 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. This was granted, (Order, R. pp. 1-5), and Stewart filed a Second Amended Complaint in November 2013. (Second Amended Complaint, R. pp. 76-92). Scapa filed an Answer to the Second Amended Complaint. (Scapa Answer, R. pp. 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. pp. 408-1646).

The jury returned a verdict in favor of Stewart on his negligence claim, but found for Scapa on Stewart's strict liability and implied warranty claims. (Verdict Form, R. pp. 26-29). The jury 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. (*Id.*) 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. pp. 141-145), a Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors, (R. pp. 164-170), and a Motion for Judgment Notwithstanding the Verdict on liability issues, but did not ask for a new trial. (R. pp. 171-174).

Stewart filed a Motion for a New Trial *Nisi Additur*, (R. pp. 175-183), 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. pp. 184-193). Scapa also filed a response to Plaintiff's Motion for New Trial *Nisi Additur*. (R. pp. 194-198).

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 it, adding $400,000 to the jury's survival award of $600,000 to bring the total survival award to $1,000,000. (7/11/18 Post-Trial Motions Transcript, p. 25, l. 7 – p. 27, l. 1, R. pp.1671-1673). The Circuit Court did not alter the wrongful death damages awarded by the jury. (7/11/18 Post-Trial Motions Transcript, p. 24, l. 22 – p. 25, l. 6, R. pp. 1670-1671).

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, p. 27, l. 2 – p. 29, l. 12, R. pp. 1673-1675). 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, l. 11–25, R. p. 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, p. 32, l. 11–25, R. p. 1678; p. 36, l. 21 – p. 37, l. 16, R. p. 1682-1683). 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, p. 33, l. 1-6, R. p. 1679; p. 35, l. 9-11, R. p. 1681).

Scapa filed a Motion to Reallocate Settlement Proceeds and a Brief in Support of same. (R. pp. 199-204). The Court held a hearing on Scapa's Motion to Reallocate Settlement Proceeds. (10/10/18 Post-Trial Motions Transcript, R. pp. 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. pp. 6-25).

Scapa timely appealed. (Notice of Appeal, R. pp. 210-232).

STATEMENT OF FACTS

Mr. Stewart was employed at the Bowater Paper Mill in Catawba, South Carolina from 1963 to 2002. (2/28/13 Stewart Depo., p. 25, l. 1-7, R. p. 2102).[1] He was originally hired as a utility man performing clean up on Paper Machine 1. (2/28/13 Stewart Depo., p. 25, l. 24 – p. 27, l. 16, R. p. 2102-2104). He was promoted to several different positions at Bowater, but Mr. Stewart testified that he worked his entire career on Paper Machine Number 1. (2/28/13 Stewart Depo., p. 27, l. 23 – p. 30, l. 20, R. pp. 2104-2107).

The paper machines at Bowater used dryer felts to keep the paper against the dryer drums, which dried the paper, and the felts would also

[1] Mr. Stewart's discovery deposition taken on February 28, 2013 was read into the record at trial on February 2, 2018. (1 Tr. 570-571, R. pp. 977-978).

absorb moisture from the paper sheets. (1 Tr. 269-270, R. pp. 676-677; 2 Tr. 84-85, R. pp. 1236-1237). Bowater purchased dryer felts from Scapa from 1963 until around 1981. (*See* Plaintiff's Trial Exhibit No. 56, R. pp. 2095-2096(showing the first purchase of Scapa felt in 1963, installed in 1964)). During Mr. Stewart's career, Bowater 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. pp. 1244-1245).

Mr. Stewart did not know which dryer felts contained asbestos and could not tell from looking at the dryer felts. (2/28/13 Stewart Depo. p. 168, l. 20 – p. 169, l. 7, R. pp. 2114-2115; p. 169, l. 21 – p. 170, l. 2, R. pp. 2115-2116; p. 171, l. 16-23, R. p. 2117; p. 179, l. 9-18, R. p. 2118; p. 181, l. 5-10, R. p. 2119). Similarly, Mr. Stewart's co-workers were unable to identify asbestos-containing Scapa dryer felts that Stewart worked with. (7/17/13 George Hegler Depo., p. 68, l. 20 – p. 69, l. 18, R. pp. 2205-2206;[2] 1 Tr. 337-38, R. pp.744-745 (testimony of co-worker Fred 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 to the Scapa felts. (1 Tr. 661-662, R. pp. 1068-1069). According to the Mastercards introduced at trial, Bowater started receiving dryer felts

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

from Scapa in 1964. (*See* Plaintiff's Trial Exhibit No. 56, R. pp. 2095-2096). However, the Mastercards also show that Scapa did not send any asbestos-containing dryer felts to Bowater until 1969. (Plaintiff's Trial Exhibits No. 26, R. pp. 2051-2052 (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. pp. 669, 647 (Co-Worker Fred Steele testified that he started working with Mr. Stewart in 1968 at which time Mr. 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, l. 5–16, R. p. 2107).

Significantly, those more senior positions did not involve cutting the dryer felt or cleaning the paper machine by blowing out the dryer. (1 Tr. 278, R. p. 685; 2/28/13 Stewart Depo. p. 59, l. 14 – p. 62, l. 18, R. pp. 2109-2112). The third hand's primary job was to watch the paper machine and supervise other workers. (1 Tr. 266, 334, R. p. 673, 741; 2/28/13 Stewart Depo., p. 59, l. 1-10, R. p. 2109). In fact, Mr. Stewart admitted that a machine tender did not have regular contact with dryer felts in any capacity. (3/4/13 Stewart Depo., p. 54, l. 13-20, R. p. 2173). Rather, it was primarily up to the utility man and fifth hand to clean out the machine. (1 Tr. 278, R. p. 685). Fifth

hands and fourth hands were primarily involved in cutting the dryer felt. (1 Tr. 289, R. p. 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. pp. 877-878). 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. As such, Mr. Stewart was never exposed to fibers from an asbestos-containing Scapa dryer felt.

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

ARGUMENT

Introduction

The trial and post-trial proceedings in this case were palpably unfair to Scapa. During trial, the lower court permitted the Plaintiff's experts—over Scapa's objections—to base their specific-causation opinions on a theory that has been widely condemned, by courts around the nation, as utter junk science. The court also excluded relevant, admissible evidence of Plaintiff's claims for compensation from bankrupt entities that he insisted were re-

sponsible for exposing Mr. Stewart to asbestos and causing his disease. Excluding this evidence was extremely harmful to Scapa's defense that if Stewart was exposed to any asbestos from its dryer felts, the exposure was *de minimus* and incapable of causing his disease.

This Court has admonished that compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages. Yet following trial, the court, acting as a thirteenth juror, decided the jury had not awarded enough money. Without any compelling reason to do so, the court took the extraordinary step of increasing the already-sizeable award of $600,000 in survival damages to $1,000,000.

Compounding her error in unjustifiably invading the province of the jury to grant additur, the court then deprived Scapa of its right to a just and fair reduction in the amount of its liability based on Plaintiff's pre-trial settlements. The court did so by rejecting Scapa's request for a reallocation of settlement proceeds. Despite the survival damages representing 90% of the recovery, Plaintiff allocated only 20% of the settlement proceeds to the survival claim. The trial court was fine with this allocation of 80% of the settlement proceeds to the wrongful death claim even though, on the one hand, it found no reason to increase the jury's award of $100,000 for the wrongful death damages, while on the other hand, it concluded that the evidence warranted a 67% increase in the amount of survival damages.

For the reasons set forth below, this Court should reverse the trial court's judgment.

1. The trial court erred in denying Scapa's motion for J.N.O.V.

The trial court should have granted Scapa's motion for judgment n.o.v. because Plaintiff failed to prove causation in compliance with South Carolina law. On a motion for judgment n.o.v., the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmovant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). If, however, no reasonable jury could have reached the challenged verdict, the court must grant a motion for judgment n.o.v. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). On appeal, this Court applies the same standard. *RFT Mgmt. Co.*, 399 S.C. at 331-32, 732 S.E.2d at 171.

A. "Cumulative exposure" testimony does not establish specific causation under South Carolina law.

A plaintiff seeking damages for injuries caused by asbestos exposure must prove he had "actionable exposure" to the specific defendant's product that was a substantial cause of the injuries. *See Henderson v. Allied Signal,* 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To prove actionable exposure, a plaintiff must meet the "frequency, regularity, and proximity" standard (the "*Henderson/Lohrmann* standard") articulated in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). *Henderson,* 373 S.C. at 185, 644 S.E.2d at 727; *see also Pace v. Air & Liquid Sys. Corp.,* 642 Fed. App'x 244 (4th Cir. 2016) (claimant must prove that he or she was (i) exposed with frequency, regularity, and proximity to

(ii) asbestos-containing products (iii) that were placed into the stream of commerce by defendant).

Where medical causation is at issue and is not within common knowledge—such as the relationship between a particular asbestos exposure and mesothelioma—a plaintiff must prove both general and specific causation through expert testimony. *See Fisher v. Pelstring,* 817 F. Supp. 2d 791, 814 (D.S.C. 2011). "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.*

Furthermore, if an expert's testimony is scientific in nature, then the trial court must determine its reliability under the factors set forth in *State v. Council,* 335 S.C. 1, 19, 515 S.E.2d 508,517 (1999). *Graves v. CAS Med. Sys.,* 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012). To determine reliability, the court must look to the following factors: (i) the publications and peer review of the technique; (ii) prior application of the method to the type of evidence involved in the case; (iii) the quality control procedures used to ensure reliability; and (iv) the consistency of the method with recognized scientific laws and procedures. *Id.*; *Council,* 335 S.C. at 19, 515 S.E.2d at 517.

In a toxic tort case, since "the main tenet of toxicology is the 'dose-response' relationship" and "most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." David L. Eaton, *Scientific Judgment and Toxic Torts-A Primer in Toxicology for Judges and Lawyers,* 12 J.L. & POL'Y 5, 39 (2003). More specifically, in mesothelioma cases:

> To prove that a given injury was "caused by exposure to a specified substance," a plaintiff must demonstrate "the levels of exposure that are hazardous to human beings generally," and "the plaintiff's actual level of exposure." [*Westberry v. Gislaved Gummi AB,* 178 F.3d 257, 263 (4th Cir. 1999)] (quotations omitted). Moreover, there must be a showing that the plaintiff's level of exposure is comparable to the levels of exposure that are hazardous as a general matter. *See id.* ("[S]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to *such quantities,* are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case.") (emphasis added) (quoting *Allen v. Pa. Eng'g Corp.,* 102 F.3d 194, 199 (5th Cir. 1996)); *see also Zellars v. NexTech Northeast, LLC,* 895 F. Supp. 2d 734, 742 (E.D. Va. 2012) ("'Ruling in' exposure to a particular substance as a possible cause of a patient's medical condition requires (1) a reliable determination of the level of exposure necessary to cause the condition and (2) a reliable determination that the patient was exposed to the substance at this level.").

Yates v. Ford Motor Co., 113 F. Supp. 3d 841, 850 (E.D.N.C. 2015).

As will be detailed below, at trial Plaintiff employed the "each and every exposure" or "cumulative dose" theory of causation-a theory

rejected by most court that have addressed it. As the court in *Yates* explained:

> The theory that "each and every exposure to asbestos products results in injury to the person so exposed" has made repeat appearances in the realm of asbestos litigation. *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 749-50 (N.D. Ill. 2014); *see* William L. Anderson, "The 'Any Exposure' Theory Round II-Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008," 22 KAN. J.L. & Pus. PoL'Y 1 (2012). Also referred to as "any exposure" theory, or "single fiber" theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury. *See Krik,* 76 F. Supp. 3d at 749-50; *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013). Numerous courts have excluded expert testimony or evidence grounded in this theory, reasoning that it lacks sufficient support in facts and data. *E.g., Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 632-33 (E.D. La. 2015); *Krik,* 76 F. Supp. 3d at 752-53, *Anderson,* 950 F. Supp. 2d at 1225; *Sclafani v. Air & Liquid Sys. Corp.*, No. 2:12-CV-3013, 2013 WL 2477077, at *5 (C.D. Cal. May 9, 2013); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1166 (E.D. Wash. 2009).

Yates, 113 F. Supp. 3d at 846.

Courts reject the "every exposure" or "cumulative dose" theory (by whatever name) because it is irreconcilable with the "substantial factor" causation rule long used in South Carolina and almost all other jurisdictions. *See Schwartz v. Honeywell Int'l Inc.*, No. 2016-1372, 2018 WL 793606, at *3 (Ohio Jan. 24, 2018) (finding it "impossible" to reconcile a requirement of "an individualized finding of substantial causation

for each defendant with a theory that says every defendant that contributed to the overall exposure is a substantial cause."); *Martin v. Cincinnati Gas & Elec. Co.,* 561 F.3d 439, 443 (6th Cir. 2009); *Lindstrom v. A-C Prod. Liab. Trust,* 424 F.3d 488, 493 (6th Cir. 2005). The theory would impose "precisely the sort of unbounded liability that the substantial factor test was developed to limit." *Mcindoe v. Huntington Ingalls, Inc.,* 817 F.3d 1170, 1177 (9th Cir. 2016). It is also irreconcilable with the requirement that a plaintiff prove the amount, duration, and frequency of exposure. *In re New York City Asbestos Litigation,* 48 N.Y.S.3d 365 (N.Y. App. Div. 2017). Thus, the "cumulative dose" theory is inconsistent with the *Henderson/Lohrmann* standard.

B. Plaintiff failed to establish specific causation through relevant, reliable expert testimony that would assist the jury in reaching a verdict.

Plaintiff failed the *Henderson/Lohrmann* standard. His experts employed the misguided "cumulative dose" theory. Further, they did not provide scientifically reliable evidence of either the amount of asbestos Mr. Stewart was exposed to from Scapa dryer felts or the threshold exposure to asbestos above which he had an increased risk of developing mesothelioma.

Plaintiff presented his causation case through three experts. Dr. Arnold Brody, Ph.D limited his testimony to the issue of general causation—whether asbestos is capable of causing mesothelioma. He testified that chrysotile asbestos fibers can cause the disease. (Tr. 242, l. 13-24, R. p. 649).

He did not have any opinions specific to Mr. Stewart (Tr. 244, l. 21-24, R. p. 651), and he did not testify that asbestos fibers from Scapa dryer felts caused Mr. Stewart's disease.

Industrial hygienist Christopher DePasquale testified that Mr. Stewart had significant occupational exposure to asbestos fibers from Scapa dryer felts and that this exposure put Stewart at "a greater risk of developing mesothelioma. (Tr. 456-58, R. pp. 863-865). Mr. DePasquale admitted that he had "not calculated what I would expect his dose of asbestos would be from Scapa dryer felts." (Tr. 478, l. 15-23, R. p. 885).

In his deposition, which was played at trial, Dr. Arthur Frank admitted he made no effort to quantify Mr. Stewart's asbestos exposure and further admitted his causation testimony was based on the cumulative dose theory:

> 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, l. 22 – p. 36, l. 1, R. pp. 2210-2211; p. 52, l. 1-4; R. p. 2212; p. 52, l. 11 - p. 53, l. 11, R. pp. 2212-2213).

Plaintiff's attempt to prove causation through the "cumulative dose" theory requires reversal for several reasons:

First, the *Henderson/Lohrmann* standard requires defendant-specific opinions. The substantial causation test is contradicted by "a theory that says every defendant that contributed to the overall exposure is a substantial cause." *Schwartz,* 2018 WL 793606, at *3. Liability is not imposed

unless the product or conduct of the particular defendant under consideration is itself a substantial contributing factor.

Courts presented with the identical approach Plaintiff used here have rejected it. *See Krik v. Owens-Illinois, Inc.,* 2015 WL 5050143, at* 1 (N.D. Ill. 2015) (barring Dr. Frank's testimony because "To find a defendant liable, plaintiff must prove causation attributable to that defendant. It would be misleading and confusing for an expert to opine—particularly using the legal terminology of 'substantial contributing factor'—that (plaintiff's) cancer was caused by defendants and the foundation for the opinion was that every exposure (without regard to dosage) contributes to cause cancer."); *Moeller v. Garlock Sealing Techs., LLC,* 660 F.3d 950, 955 (6th Cir. 2011) (if Dr. Frank's opinion that every exposure is substantial was "sufficient for plaintiff to meet his burden, the Sixth Circuit's 'substantial factor' test would be meaningless" (citing *Lindstrom,* 424 F.3d at 493). The "cumulative dose" theory makes a mockery of the word "substantial." Plaintiff seeks, in effect, to create a new standard of causation: that *any contribution whatsoever* to a dose of asbestos exposure subjects one to liability. This is simply not the law in South Carolina.

Second, this theory of causation has not only been rejected by other courts, each of Plaintiff's experts' opinions have been excluded in other cases as either unreliable or contrary to the plaintiffs' burden of proof. The "cumulative dose" theory is not reliable scientific evidence as required by South

Carolina law. As set forth above, the court in *Yates, supra,* cited numerous authorities for the proposition the theory "lacks sufficient support in facts and data" and rejected Dr. Brody's opinion that exposure at levels "above background" contribute to the development of mesothelioma. *Yates,* 113 F. Supp. 3d at 846-47. The court further found the "no safe level/every exposure/cumulative exposure" opinion of Dr. Frank did not satisfy the types of factors required by *Council;* there are no quality control procedures or other methods used to ensure its reliability; it is wholly inconsistent with recognized scientific laws and procedures; and it "cannot be tested, has not been published in peer-reviewed works, and has no known error rate." *Yates,* 113 F. Supp. 3d at 846.

Similarly, the court in *Rockman v. Union Carbide Corp.,* 266 F. Supp. 3d 839, 849, 850 (D. Md. 2017), noting that "Dr. Frank's ultimate opinion is not tied to any specific quantum of exposure that is attributable to defendant," concluded it was not based on reliable principles and methods. *See also Haskins v. 3M Company,* 2017 WL 3118017 (D.S.C. 2017) (excluding the "each and every exposure" opinion under Rule 403 because it was directly at odds with substantial causation requirements); *Butler v. Union Carbide Corp.,* 712 S.E.2d 537, 544 (Ga. Ct. App. 2011) (excluding "cumulative dose" opinion for its lack of scientific validity and other factors); *Suoja v. Owens-Illinois, Inc.,* 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (refusing to rely on Frank's testimony, citing its numerous methodological shortcomings).

Third, an aspect of the "cumulative dose" theory that is particularly unfounded is that there is "no safe level" of exposure. This contradicts the fundamental principle of science, often expressed as "the dose makes the poison," that there is a "dose-response" relationship between exposures and disease, and thresholds needed to produce disease. *Eaton, supra.* The concept that there is "no safe level" of asbestos exposure is based on the purported absence of evidence of a "threshold" level of exposure necessary to cause disease, rather than affirmative evidence of a particular hazardous level of exposure. *Yates,* 113 F. Supp. 3d at 857 (rejecting expert's "no safe level" opinions).

Fourth, the cumulative dose approach is also at odds with the requirement that a claimant account for other potential exposures. *Martin,* 56 l F.3d at 443 (explaining that defendant's liability for mesothelioma must be evaluated in the context of other exposures); *Schwartz,* 2018 WL 793606, at *4 (citing 2 Restatement (Second) of the Law of Torts § 433, at 432 (1965)). Because of their adherence to the belief that *any* exposure constituted a "substantial" one, Plaintiff's experts made no effort to address the role played by Mr. Stewart's exposures to other products.

Fifth, even if Plaintiff had offered sufficient expert testimony addressing causation, there was an insufficient factual predicate for expert causation testimony. Mr. Stewart did not testify to having worked with a Scapa asbestos-containing felt. Nor did his co-workers:

Co-worker Hegler

Q. Okay. Do you recall ever seeing a Scapa dryer felt taken out of the box?

A. No.

Q. And if you didn't see a Scapa dryer felt taken out of a box, would you know whether or not you've ever seen anyone replacing a Scapa dryer felt?

A. I would not know.

Q. Okay. So you can't offer any testimony today that you saw Mr. Stewart work with or around a Scapa dryer felt?

A. I cannot.

Q. And you can't offer any testimony that you saw Mr. Stewart cut a Scapa dryer felt?

A. I cannot.

Q. Do you have any knowledge regarding any section of Paper Machine 1 where a Scapa dryer felt would have been used?

A. I don't know where they were used or which section.

Q. Okay. So would it be fair to say that you have a general recollection of seeing boxes of Scapa dryer felts, but you don't recall ever seeing them being used in the plant?

A. That's correct.

7/17/13 George Hegler Depo., p. 68, l. 20 – p. 69, l. 18, R. pp. 2205-2206).

Co-worker Steele

Q. So when a felt was installed on a paper machine unless you saw the box that it came out of you wouldn't know who made the felt just by looking at it would you?

A. That's correct.

Q. When a felt is removed from the paper machine you wouldn't be able to tell who manufactured that particular felt that was being removed could you?

A. That's correct.

Q. And you wouldn't be able to tell whether a felt contained asbestos just by looking at it would you?

A. I wouldn't have, no.

* * *

Q. Sir you can't testify that a Scapa felt ever tore off of the paper machine can you?

A. I cannot tell you specifically, no.

(1 Tr. 337, l. 6 – 16, R. p. 744; 1 Tr. 338, l. 4 – 6, R. p. 745).

Similarly, co-worker Harold Ward testified Mr. Stewart was not present in December 1972 when a Scapa dryer felt allegedly ran off the paper machine. He explained that Mr. Stewart was assigned to a different shift and was not on either of the crews that dealt with the situation. (1 Tr. 511-512, R. pp. 918-919).

Additionally, Plaintiff's experts could not and did not provide testimony supporting a finding that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where he actually worked. The evidence showed that by the time Scapa first supplied an asbestos-containing dryer felt to Bowater, Mr. Stewart was no longer serving as a utility man, fifth hand, or fourth hand—the jobs that involved cutting felts. *See supra.,* pp. 5-7. And Plaintiff's expert DePasquale conceded he could not testify that asbestos fibers were released during papermaking operations not involving any cutting of felts:

Q. I talked to Dr. Millette a little bit about this yesterday, but we can agree -- you can agree as an industrial hygienist that it is actually there has to be some interaction of force

on the dryer felt for there to be a potential for fiber release, correct?

A. Yes, I would generally agree with that statement.

Q. You don't have any information that when they're just going through and making paper, nothing else is going on, that there's any fiber release; is that correct?

A. There's a potential for fiber release, but whether it occurs or not, I'm not sure.

(1 Tr. 470, l. 23 – 471, l. 8, R. pp. 877-878).

Likewise, Dr. Millette admitted that his glove-box test did not simulate actual mill conditions. During his test, no paper was being made (1 Tr. 399-400, R. pp. 806-807), no water was involved, there was no movement of the felt, there was no ventilation, and the test did not replicate the humidity of a paper mill. (1 Tr. 397-98, R. pp. 804-805). He also admitted his post-it note and finger test did not cause respirable asbestos to be released into the air. (1 Tr. 409, R. p. 816). Furthermore, each worker testified that during a blow down, he would blow air across the felt, not at the 90 degree angle used in Dr. Millette's test. All of the experts agreed that blowing air across the felt did not cause any fiber release.

In short, there was no direct evidence that Mr. Stewart had a regular, frequent, and proximate exposure to asbestos from Scapa dryer felts. No witness could testify that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where Mr. Stewart actually worked.

Nor was there any circumstantial evidence of regular, frequent, and proximate exposure. Although causation may be established by circumstantial evidence, *Seaside Resorts, Inc. v. Club Car, Inc.,* 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992), and is usually a question for the jury, *Mims v. Florence County Ambulance Service Comm'n,* 296 S.C. 4, 370 S.E.2d 96 (Ct. App. 1988), it nonetheless must be based on probabilities not mere possibilities. *Harris v. Rose's Stores, Inc.,* 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993). Causation based on a possibility rather than a probability is not sufficient for a plaintiff to recover in a products liability case. *Harris* held that because the cause of the plaintiff's injuries could be as reasonably attributed to an act the defendant was not liable for as to one it was liable for, the plaintiff did not meet her burden of proof in establishing her injuries were proximately caused by the defendant's negligence. *Id.*, 315 S.C. at 346-47, 433 S.E.2d at 907.

Here, the evidence established nothing more than a speculative possibility that Mr. Stewart had the requisite degree of exposure to asbestos from a Scapa dryer felt. Again, under *Henderson*, the plaintiff must show "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the Plaintiff actually worked." *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727. A mere showing that an asbestos-containing product was at the jobsite is insufficient evidence to reach a jury on the issue of exposure. Instead, there has to be evidence of regular exposure to a particular product in proximity to the plaintiff. Here, that evidence is entirely absent.

As noted, there is no testimony, either by Mr. Stewart or any of his coworkers, establishing his work with or around an asbestos-containing Scapa product on a regular basis over some extended period of time. Further, both Mr. Stewart and his coworkers testified that the paper-making process was hot and humid. Millions of gallons of water were used in this process. Moreover, the dryer felts in the dryer section were completely enclosed by hoods that were down all the way to the floor while the paper machine was running. (1 Tr. 324, 329, R. pp. 731, 736). The hoods included ventilation systems to remove any excess heat, moisture, and debris from the dryer section of the machine. (1 Tr. 492, R. p. 899).

Scapa representative Mr. Doherty and the co-workers testified there was significant build up on the dryer felt from the paper making process (1 Tr. 667, R. p. 1074), and all experts agreed this build up, the water usage, the ventilation, and the humidity would significantly decrease the opportunity for any fiber release from the felt. (*See, e.g.,* 1 Tr. 396, R. p. 803). And Mr. Doherty testified that when asbestos-containing dryer felts were returned to the factory after use, they were not thinner or shedding fibers of any type. (1 Tr. 656, R. p. 1063). Accordingly, Plaintiff did not establish that, even if Scapa dryer felts were used, and even if they contained asbestos, the use of such dryer felts releases any asbestos whatsoever, much less anything greater than a *de minimus* exposure.

Finally, Plaintiff's experts' opinions were also inadmissible under Rule 403 of the South Carolina Rules of Evidence, which mandates that

testimony be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. The opinions were rooted in the idea that any miniscule exposure to asbestos in association with Scapa's products contributed to the cumulative result of Mr. Stewart contracting mesothelioma and, therefore, the exposure was a cause of his injury. These opinions are inconsistent with the *Henderson/Lohrmann* legal standard because they effectively shifted the burden to Scapa to prove that it did not expose Mr. Stewart to any asbestos. Thus, the opinions served merely to confuse or mislead the jury as to the standard it should apply to Mr. Stewart's claims by implying that any exposure was sufficient to render Scapa liable to Mr. Stewart for causing his mesothelioma and should have been excluded.

In sum, Plaintiff failed to introduce legally sufficient evidence of specific causation. The trial court therefore erred in denying Scapa's motion for judgment n.o.v., and this Court should reverse the judgment below and render judgment that Plaintiff take nothing.

2. The trial court abused its discretion in granting Plaintiff's motion for a new trial nisi additur.

After almost five hours of deliberation, the jury returned a verdict, finding in favor of Plaintiff. The jury awarded $600,000 in damages for Mr. Stewart's survival claim. Throughout trial, the Court noted that the jury was highly-educated, diverse, and attentive. After the verdict, the Court stated: "I've seen a lot of juries. I don't believe I've seen a jury in my time that was any more attentive

or committed to their job than this jury has been." (Tr. 488, R. p. 895). Nevertheless, the trial court invaded the jury's province and adjusted its damage award, increasing the survival damages from $600,000 to $1,000,000.00. The court abused it discretion in so ruling.

"Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." *Wright v. Craft*, 372 S.C. 1, 35, 640 S.E.2d 486, 505 (Ct. App. 2006). When considering a motion for a new trial based on the inadequacy of the jury's verdict, the trial court must distinguish between awards that are merely unduly conservative and awards that are actuated by passion, caprice, or prejudice. *Id.* Courts must give substantial deference to a jury's determination of damages. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003).

Trial judges are not empowered to simply substitute their judgment for that of the jury. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984). Awards for noneconomic damages are particularly within the jury's province to weigh and determine because such damages are indeterminate in character. *Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994). Here, the jury's damage awards were not "so grossly . . . inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015).

Actual damages in a survival action are those for medical bills, conscious pain, suffering, and mental distress of the deceased. *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420-21 (Ct. App. 2000). Here, the jury's $600,000.00 award in damages for the survival claim is not unduly conservative based on the evidence. Mr. Stewart's treating physician testified that in addition to mesothelioma, Mr. Stewart had a number of co-morbidities. (1 Tr. 612, R. p. 1019). He suffered from a prior heart attack, hypertension, bypass surgery, chronic obstructive pulmonary disease, bladder cancer, prostate cancer, and skin cancer. (1 Tr. 611-12, R. pp. 1018-1019). He had a lengthy smoking history. As such, his physician could not give the jury a life-expectancy estimate for Mr. Stewart had he not contracted mesothelioma. (1 Tr. 613, R. p. 1020).

The jury was entitled to take this evidence into account in determining the amount of conscious pain, suffering, and mental distress attributable to Mr. Stewart's mesothelioma, and substantial deference must be paid to its calculation of the appropriate damage amount. *Harrison*, 354 S.C. at 140, 580 S.E.2d at 115. Given this evidence, $600,000 is not so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.

The trial court's citations to damage awards in other cases do not support additur here. "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The meas-

ure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Bertero v. Nat'l Gen. Corp.*, 13 Cal.3d 43, 65 n. 12, 529 P.2d 608 (Cal. 1974).

In sum, this trial court's discretion to grant additur was 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. 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 to be awarded for pain and suffering to the judgment of the jury. *Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962).

3. The trial court abused its discretion in allocating settlement proceeds.

An allocation of settlement proceeds between survival and wrongful death claims "must yield to fairness and justice." *Welch*, 342 S.C. at 313, 536 S.E.2d at 426. Thus, under its equity powers, the trial court had the discretion to reallocate settlement funds between the two causes of action asserted in this case. *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

A plaintiff's agreement with a settling party to allocate settlement proceeds in a certain manner may not be disturbed "solely because the apportionment may have been advantageous to the Estate." *Riley*, 414 S.C. at 196, 777 S.E.2d at 831. Here, however, Scapa is not complaining that Plaintiff's proposed allocation was unreasonable based solely on the fact that it is advantageous to Plaintiff. Rather, the 80% wrongful-death-claim/20% survival-claim allocation was not reasonable under the facts.

The trial court's additur findings support this conclusion. The court found no reason to increase the jury's award of $100,000 for the wrongful death damages, given the Stewart's limited relationship with his wrongful death beneficiaries. On the other hand, the court concluded that the evidence concerning the Stewart's survival damages warranted a 67% increase in the amount of damages the jury awarded—from $600,000 to $1,000,000. In short, the 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 court's findings concerning the damages evidence, an allocation of just 20% of the settlement proceeds to the survival claim is not reasonable under the facts. On the contrary, the allocation should have been 10% for the wrongful death claim and 90% for the survival claim. This allocation would be entirely consistent with Plaintiff's own arguments concerning the extent and

nature of Mr. Stewart's survival damages, as contrasted with nature of the wrongful death beneficiaries' losses as a result of his death. Plaintiff's counsel urged the Court to multiply the survival damages by a factor of ten, while asking for an increase in the wrongful death damages only by a factor of four. Plaintiff's counsel had very little to say about the wrongful death beneficiaries' losses, and a great deal to say about Mr. Stewart's suffering before his death. In fact, the Court commented:

> I understand, and let me just say this: I certainly understand the argument taking one position about the additur and then taking another position about how they want this thing allocated. The allocations, if you look at it from the standpoint of what I have just done with the additur is 90/10; is it not?

(7/11/18 Post-Trial Motions Transcript, p. 34, l. 11-17, R. p. 1680).

In sum, the allocation of settlement proceeds between survival and wrongful death claims approved by the trial court does not reflect "fairness and justice." *Welch*, 342 S.C. at 313, 536 S.E.2d at 426. The court therefore abused its discretion by refusing to reallocate the settlement funds in a manner reasonable under the facts.

4. The trial court abused its discretion when it denied admission of Mr. Stewart's bankruptcy claims against other manufacturers of asbestos-containing products.

In June 2013, Plaintiff filed various claims with bankruptcy trusts established by companies that manufactured asbestos-containing products. Two of those claim forms alleged that Mr. Stewart was exposed to asbestos-containing products manufactured by Leslie Controls Inc. and A.P. Green while working at Bowater. (Defendant's Exhibits No. 1 and 2, R. pp. 1710-1716).

In addition, Plaintiff produced approximately 37 partially-filled-out bankruptcy trust claim forms that he had also filed. Plaintiff has claimed that the partially filled out bankruptcy trust claims were only made as "placeholder" claims to avoid a statute of limitations issue. Scapa filed a Motion to Compel Complete Bankruptcy Forms as evidence of additional exposures. (Defendant's Motion to Compel Complete Bankruptcy Forms, R. pp. 146-153). The filing of those forms implicitly or explicitly indicate that Stewart was exposed to asbestos-containing products from numerous other entities.

Scapa also filed a pretrial motion *in limine* to admit all of these bankruptcy claim forms. (Defendant SCAPA Waycross, Inc.'s Motion *In Limine* to Admit Bankruptcy Claim Forms as Admissions of a Party-Opponent.) Scapa *did not seek to introduce the amount of the claims or to put these entities on the verdict form.* Rather, Scapa only wanted to introduce evidence that Plaintiff filed the claims and that those claims asserted exposure to other entities' asbestos-containing products as an admission by a party-opponent, which is not considered hearsay under Rule 801(d)(2), South Carolina Rules of Evidence.[3] (1/9/18 Pretrial Hearing Transcript, pp. 90, l. 23 – 92, l. 7, R. pp. 322-324).

In a drastically broad ruling, the trial judge excluded all evidence of Mr. Stewart's exposure to other asbestos-containing products, including his bankruptcy claims, essentially denying Scapa the ability to put on an "empty chair"

[3] The forms could also be admitted as a statement against interest, which is an exception to the hearsay rule when the party is not available. Rule 804(b)(3), SCRE.

defense. (1/9/18 Pretrial Hearing Transcript, pp. 93, l. 21 – 99, l. 6, R. pp. 325-331). The trial judge also refused to compel Plaintiff to produce complete claim forms in the other bankruptcy matters. (1/9/18 Pretrial Hearing Transcript, pp. 99, l. 8 – 100, l. 25, R. pp. 331-332). Scapa proffered the bankruptcy claim forms and testimony regarding same, and the judge reiterated the exclusion of the bankruptcy claim forms both before trial and during Defendant's case. (1 Tr. 109-111, R. pp. 516-518; 1 Tr. 113-114, R. pp. 520-521; 2 Tr. 318-324, R. pp. 1470-1476; Defendant's Exhibits No. 1, 2, 5, and 12, R. pp. 1710-1714, 1715-1716, 1717-2020, 2021-2030).

Scapa's proffered, but disallowed, expert report from Marc Scarcella set forth Mr. Stewart's admitted exposure to A.P. Green and Leslie asbestos-containing products, explaining:

> In the A.P. Green trust [proof of claim], Mr. Stewart is alleged to have been exposed to asbestos-containing refractory and castable products at the Bowater Paper Mill while working in close proximity to other workers engaged in the handling of raw asbestos fibers, fabricating asbestos-containing products, or altering, repairing, or otherwise working with an asbestos-containing product on a regular basis. Likewise, the Leslie Controls trust [proof of claim] identified asbestos-containing valves as a source of occupational exposure for Mr. Stewart while working on a *regular basis in close proximity to workers engaged in the activity of handling, fabricating, altering, or repairing asbestos-containing products.*

(Scarcella Report, Page 6, Exhibit No. 12, R. 2021-2030 (proffered) (emphasis in original)).

Thus, the bankruptcy forms and Mr. Scarcella's testimony demonstrated that Mr. Stewart himself admitted to being exposed to a wide array of asbestos-

containing products while he worked at Bowater. The trial court erred in excluding the claim forms and related testimony because the forms contained admissions of a party, admissible under Rule 801(d)(2), SCRE. More to the point, both South Carolina law, S.C. Code § 15-38-15(D), and the Supreme Court's rulings in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), and *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017), allow the admission of such documents in support of the "empty chair" defense. The trial court's exclusion of all evidence of Mr. Stewart's regular exposure to asbestos-containing products manufactured by other entities resulted in tremendous prejudice to Scapa, which was denied a key defense that is explicitly guaranteed under South Carolina law. S.C. Code § 15-38-15(D).

First, the claim forms are admissions of a party-opponent. Under South Carolina's Rule of Evidence 801(d)(2), a statement is not hearsay if:

> The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 801(d)(2), SCRE.

South Carolina's courts have held time and again that admissions of party-opponents are relevant and admissible. *See, e.g., State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (holding that the defendant's statement

which provided financial motive for his crime was admissible against him at trial); *State v. Tucker*, 334 S.C. 1, 12-13, 512 S.E.2d 99, 105 (1999) (holding that the defendant's testimony from a previous trial was admissible as an admission by party-opponent).

Furthermore, whether this Court considers Plaintiff to be the "party" in this case or merely the "representative" of Mr. Stewart's estate, his admissions on the bankruptcy claim forms must be admissible. *Jackson v. Speed*, 326 S.C. 289, 305, 486 S.E.2d 750, 758 (1997) ("[A]s an agent for [defendants], Speed's statements were admissible as admissions of a party-opponent.").

Plaintiff's statements in the bankruptcy claim forms that Mr. Stewart was exposed to other entities' asbestos-containing products is an admission by a party opponent under Rule 801(d)(2), SCRE. Plaintiff, acting as Stewart's agent, made the statements on behalf of Stewart's estate. Plaintiff has alleged that Stewart's illness and death were caused by Scapa's dryer felts, but in the bankruptcy filings Plaintiff alleged that Stewart's illness and death were caused by other entities' products. Since the statements are against Stewart's interests in this action, they are admissible under Rule 801(d)(2), SCRE.

Second, such statements are relevant under the rulings of *Smith v. Tiffany* and *Machin v. Carus Corporation*. South Carolina's Rules of Evidence have a broad definition of relevancy:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 401, SCRE.

The primary fact in question is causation of Stewart's illness and death. Evidence of exposure to other products, most of which contained vastly greater amounts of asbestos, is clearly relevant to the issue of causation. This is especially true in light of the minimal evidence of Stewart's exposure to Defendant's products in contrast to his massive and regular exposure to the other entities' products.

Both the South Carolina legislature and South Carolina's Supreme Court have made very clear that a defendant is allowed to present evidence of other potential tortfeasors, whether they are named as defendants or not. First and foremost, South Carolina's Contribution Among Tortfeasors Act makes clear that a defendant can introduce evidence that other entities are responsible for plaintiff's losses, even entities that have settled with plaintiff:

> A defendant shall retain the right to assert that *another potential tortfeasor, whether or not a party,* contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

S.C. Code Ann. § 15-38-15(D) (emphasis added).

Likewise, in the very opinions relied on by the trial judge in excluding this evidence, the South Carolina Supreme Court made clear that evidence of exposure to other entities' products is admissible, even if those entities are not defendants, under the so-called "empty chair" defense. As explained by the Supreme Court in *Smith v. Tiffany*:

> [T]he General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) . . . Thus, a critical feature of the statute is the codification of the empty chair defense – a defendant "retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages" – which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being "empty").

Smith, 419 S.C. at 557, 799 S.E2d at 484.

On the same day it decided *Smith v. Tiffany*, the Supreme Court reiterated the validity of the empty-chair defense and the admissibility of evidence supporting same in *Machin v. Carus Corporation*:

> A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff's employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers' compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff's injuries to the plaintiff's employer, the defendant shall, under the well-established "empty chair" defense, have the right to present such evidence and require the fact-finder to consider whether the employer's actions were the cause of the plaintiff's injuries.
>
> * * *
>
> A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Machin, 419 S.C. at 542-43, 799 S.E.2d at 476.

The trial court's exclusion of evidence regarding Stewart's other exposures essentially made it impossible for Scapa to try its empty-chair defense, even though the legislature was keenly interested in protecting that defense. The legislature certainly did not intend to provide defendants a right without a remedy, but that is what the trial court has done.

Finally, Scapa undoubtedly suffered prejudice by this exclusion. Plaintiff's causation evidence was already tenuous at best, as argued throughout this brief. Indeed, the evidence indicated that Scapa did not sell or deliver any asbestos-containing dryer felts to Bowater until 1969. (Plaintiff's Trial Exhibits No. 26, R. pp. 2051-2052 (earliest Mastercard referencing asbestos)). By 1969, Mr. Stewart had already been promoted to third hand, a position that was supervisory in nature and provided little or no opportunity to interact with the dryer felt in a manner that might release asbestos fibers. (1 Tr. 262, 267, R. pp. 669, 674). During Mr. Stewart's career, Bowater used 288 dryer felts on Paper Machine 1, but only 3.8% of those felts were Scapa asbestos-containing felts. (2 Tr. 92-93, R. pp. 1244-1245).

In light of Mr. Stewart's minimal—at best—exposure to Scapa's asbestos-containing dryer felt products, his regular exposure to other asbestos-containing products was an important part of Scapa's defense. The trial court abused its discretion when it excluded this evidence.

CONCLUSION

The Court should reverse the trial court's judgment and render judgment

that Plaintiff take nothing. Alternatively, the Court should reverse the trial court's additur ruling and reinstate the jury's damage awards. In the further alternative, the Court should remand the case for a reallocation of the settlement proceeds.

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The State of South Carolina
In the Court of Appeals

Appeal from York County
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

Stephen R. Edwards, Individually
and as Personal Representative of the
Estate of Steven R. Stewart, ...Respondent,

v.

Scapa Waycross, Inc., ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,

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