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 Redfearn Stewart, — Respondent,

v.

Scapa Waycross, Inc., — Appellant.

PETITION FOR REHEARING

In accordance with Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant Scapa Waycross, Inc. ("Scapa") requests rehearing of the Court's 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 should grant rehearing and reverse the trial court's rulings based on the arguments below and all arguments raised by Scapa in its briefing and at oral argument, which Scapa incorporates into this petition.

ARGUMENT

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

In affirming the trial court's causation ruling, the Court relied on its prior holding in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021). The Court's causation ruling in the *Jolly* case is erroneous for the reasons stated by the appellants in that case in their briefing and petition for rehearing, 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.

Here, as in *Jolly*, the Court 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 a cumulative exposure theory of causation because it was 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*, the South Carolina Supreme 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 the South Carolina Supreme Court adopted in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, (2007).

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 Plaintiff must exclude every possible cause of Mr. Stewart's mesothelioma or that a precise quantification of asbestos fibers Stewart was exposed to is required. Rather, Scapa plainly 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 in Stewart's cumulative dose. Plaintiff'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's ruling and Plaintiff'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).

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 under *Lohrmann* 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 also misapprehended the testimony and legal standard when it relied on the word "contributing" as distinguishing Dr. Frank's testimony. "Substantial factor" and "substantial contributing factor" have the same meaning. Courts regularly refer to the standard as requiring proof that a defendant's product was a "substantial contributing factor." *See, e.g.*, *Haislip v. Owens-Corning Fiberglas Corp.*, 86 F.3d 1150 (4th Cir. 1996) ("To prevail on a product liability asbestos action under North Carolina law, the estate needed to establish that OCF–Kaylo was a *substantial contributing factor* to Elmore's contraction of mesothelioma." (emphasis added)); *Pace v. John Crane, Inc.*, No. 2:11-CV-02688-BM, 2014 WL

12638334, at *1 (D.S.C. Nov. 25, 2014) ("The exposure to John Crane, Inc. products was a *substantial contributing factor* in the development of William Pace's mesothelioma." (emphasis added)), *aff'd sub nom. Pace v. Air & Liquid Sys. Corp.*, 642 F. App'x 244 (4th Cir. 2016). Thus, Dr. Frank testified about the legal standard, and the Court must evaluate his testimony as he gave it, rather than focusing on key words.

The Court 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 to the cumulative dose 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. pgs. 2210-11; R. p. 2212; R. Pgs. 2212-13).

In short, Dr. Frank testified every exposure to asbestos was a substantial contributing factor in causing Mr. Stewart's disease. He thus offered the unreliable "each and every exposure" opinion. As a result, the trial court's judgment must be reversed.

2. The Court's additur ruling improperly afforded the trial court unfettered discretion and did not require compelling reasons required by law.

The Court should reverse the trial court's *nisi 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 in granting additur. *See Nestler v. Field*, 426 S.C. 34, 41 (Ct. App. 2019). For example, in *Waring v. Johnson*, this Court held the trial court properly granted additur for a plaintiff injured in a car wreck 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 (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.

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 hearing on the motion for new trial nisi additur, the trial court speculated the jury's 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. The empty chair is a focus on who is responsible—what entity or who is responsible for the injury suffered by plaintiff. It's a liability doctrine.
>
> And the defendant, even when both parties are no longer in the case or never were in the case may argue it, if the evidence supports it, that entities mentioned the during the course of the trial or discussed during the trial or evidence presented during the trial were responsible for the injury and not the defendant who is before the jury.
>
> And that was argued, but the jury asked a lot of questions about this issue. And, again, 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). Thus, the trial court should have left the amount of damages to be awarded 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 that "[w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the 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 a clear and palpable abuse of discretion.

3. The Court should grant rehearing and reverse the trial court's settlement-proceeds allocation ruling.

Finally, the Court erred in its settlement-proceeds allocation analysis for the reasons stated by Scapa in its briefing and at oral argument and the reasons stated below.

The Court approved Plaintiff'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. Plaintiff entered into general settlement agreements that did not allocate settlement funds and instead provided for "undifferentiated lump sum" payments. *See id.* Plaintiff 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 trial court's judgment and direct a complete setoff against the total jury award.

Conclusion

Based on the above, Scapa requests the Court grant rehearing and reverse the trial court's judgment.

(Signature Page Follows)

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APPEAL FROM YORK COUNTY
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PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Scapa Waycross, Inc, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

Pleading(s): **Petition for Rehearing**

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September 14, 2022

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Subject: Stephen R. Edwards v. Scapa Waycross, Inc. - Appellate Case No. 2019-000649
Attachments: 2022.09.14 Scapa Petition for Rehearing (Edwards, Stewart).pdf; 2022.09.14 Proof of Service to Petition (Edwards, Stewart).pdf

Good afternoon,

Attached please find a Petition for Rehearing in the above matter. Service is made via email pursuant to the Supreme Court Order 2022-05-06-04.

Thank you.

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