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

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

v.

Scapa Waycross, Inc.,……....Appellant.

RETURN TO PETITION FOR REHEARING

Pursuant to Rules 220 and 240(e), SCACR, and the Court's September 15, 2022 letter requesting a return to Appellant Scapa Waycross, Inc.'s petition for rehearing, Respondent Stephen R. Edwards, individually and as personal representative of the Estate of Steven Redfearn Stewart ("Stewart"), submits this return.

On August 3, 2022, the Court issued unanimous Opinion No. 5931 affirming the decision of the lower court in favor of Stewart. The law and record support the Court's Opinion, and Scapa fails to show any point overlooked or misapprehended by the Court. Therefore, the Court should deny the petition for rehearing.

For brevity, Stewart incorporates the Final Brief of Respondents, arguments made at the oral argument in this case, and the arguments in opposition to the petition for rehearing filed in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021).

ARGUMENT

I. The Court correctly held Stewart established specific causation.

This Court affirmed the lower court's decision to deny Scapa's JNOV motion on the basis that Stewart presented sufficient evidence of specific causation. Scapa's main contention on rehearing is that the Court "failed to appreciate" that the cumulative dose and each-and-every-exposure theories are really the same thing. (Pet. pp. 2-3). This is incorrect.

The Court recognized that cumulative dose is "a means to describe the medical reasoning as to how humans develop mesothelioma from asbestos exposure." *Edwards v. Scapa Waycross, Inc.*, Op. No. 5931 p. 11 (Ct. App. 2022). The Court relied on its recent decision in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 865 S.E.2d at 819 (Ct. App. 2021), in which it held that testimony "that a certain exposure contributes to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation." *Id.* at 635-36, 865 S.E.2d at 26-27. *Jolly* is correct, controlling law, and Scapa provides no legal basis to overturn it in this case.

Scapa cannot ask this Court to overturn *Jolly* now when it did not make a motion under Rule 217, SCACR, to argue against precedent at the oral argument of this case and did not even argue that the Court should overturn *Jolly* or that Stewart's case differs from *Jolly* on this issue.

The Court correctly rejected Scapa's legal argument and mischaracterization of the evidence presented by Stewart. Stewart presented evidence to satisfy the *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), specific causation standard requiring evidence of frequency, regularity, and proximity to Scapa's product. The evidence of cumulative exposure is medical background to explain to the jury how mesothelioma develops.

Factually, Scapa alleges that Stewart did not provide "some qualitative analysis comparing Mr. Stewart's exposures from Scapa with his exposures from other sources" and suggests that Stewart did not show product-specific exposure evidence. (Pet. pp. 3-4). Regardless of whether that is legally required, Scapa's allegation is factually inaccurate and legally disingenuous. It is factually inaccurate because Stewart's experts considered the other potential exposures to asbestos and still concluded that the specific Scapa dryer felts were a substantial cause of Mr. Stewart's mesothelioma. Christopher DePasquale considered dryer felts, thermal insulation on piping, and gaskets and packing related to valves. (R. p. 848 lns. 9-14). He discounted thermal insulation on piping because his investigation showed the "vast majority" of the pipes were cladded. (R. pp. 849-50). He discounted gaskets because Mr. Stewart did not remember working with gaskets or packing. (R. p. 894). Stewart accounted for other potential exposures. This Court found the evidence showed that only two of the twenty-three Scapa dryer felts on machine while Mr. Stewart worked there contained over 1,700 pounds of asbestos and close to 170 quadrillion asbestos fibers. *Edwards*, Op. No. 5931 pp. 2, 8.

Scapa's argument is legally disingenuous because its defense theory was that Mr. Stewart's mere presence (and not physical or direct work) around other asbestos-containing products caused his mesothelioma.[1] Based on its own defense theory of Mr. Stewart's alleged exposure to asbestos from other products, Scapa cannot credibly deny that Stewart's evidence, viewed in a light most favorable to him, supports a reasonable inference of a substantial causative exposure to Scapa dryer felts "on a regular basis over some extended period of time in proximity to where the plaintiff

[1] *See, e.g.*, R. pp. 723 lns. 21-24, 726-27, 747-48, 801-02, 819-22, 877, 880-82, 884, 890-94, 946-48, 953, 958-60, 963, 1045-46, 1056-57, 1076, 1136, 1149-50, 1168-70, 1240-41, 1244-45, 1248-49, 1259-65, 1268-69, 1283, 1355, 1362-65, 1371-72, 1392-93, 1460-64, 1568, 1572, 1574-75, 1577-79, 1588.

actually worked." *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (internal quotation marks omitted).

Finally, Scapa takes issue with the Court's use of the word "contributing" in the following sentence[2] of its opinion: "Based on a degree of medical certainty, Dr. Frank testified that Stewart died from mesothelioma caused by his exposure to asbestos and that his exposure from Scapa's asbestos-containing dryer felts was a substantial contributing factor to his illness and subsequent death." *Edwards*, Op. No. 5931 p. 10; Pet. for Rehearing pp. 4-6. Scapa misinterprets the Court's use of the word "contributing." The Court did not misapprehend the legal standard. It used the word "contributing" in the section of the opinion addressing the existence of evidence of specific causation, not the section addressing the cumulative dose theory. The sentence, in proper context, stands for the proposition that Dr. Frank did consider and render an expert opinion on whether Mr. Stewart's exposure to Scapa dryer felts substantially contributed to his mesothelioma, and the Court's conclusion that such testimony (viewed in a light most favorable to Stewart) satisfies the specific causation test.

Scapa quotes a portion of Dr. Frank's testimony as supposedly showing that Dr. Frank did not try to distinguish between "substantial" and "insubstantial" contributing factors. (Pet. pp. 5-6) (emphasis omitted). Regardless of whether that is legally required, it is an incorrect characterization of the testimony. Dr. Frank simply stated that he could not "quantify" or make a "calculation" of the **specific** does of Scapa asbestos fibers that Mr. Stewart inhaled. (Pet. pp. 5-6). That does not mean that he could not testify, based on the testimony about Mr. Stewart's exposure to and work with Scapa dryer felts, that Scapa's asbestos was a substantial contributing factor to Mr. Stewart's mesothelioma.

[2] This is the only place that the word "contributing" appears in the opinion.

Scapa's rehearing arguments on this issue amount to an improper attempt to argue against *Jolly* as precedent and a mere disagreement with the Court's view of the evidence. Neither is a basis for rehearing, and the Court should deny the petition on this issue.

II. The Court correctly affirmed the lower court's decision to grant *additur*.

The Court conducted a thorough analysis of the evidence in this case to find that the trial court did not abuse its discretion in granting *additur*. Because "the record is replete with evidence of [Mr. Stewart's] pain and suffering, which was unrefuted by Scapa, [the Court found] the trial court was well within its discretion in granting Stewart a new trial *nisi additur*." *Edwards*, Op. No. 5931 p. 14). The Court also found "that the trial court provided ample justification for increasing Stewart's survival award" based on the law and its "meticulous[]" analysis of the evidence. *Id.* Scapa provides no legal or factual basis for rehearing on this issue.

Scapa argues that additur is only "justified" if the jury does not award all medical expenses or does not "account for", *i.e.* award any amount for, pain and suffering. (Pet. p. 6). That is not the law in South Carolina. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 194, 777 S.E.2d 824, 829-30 (2015) ("While the presence of some amount of noneconomic damages may be a factor mitigating against the granting of a new trial *nisi additur*, there is no categorical rule prohibiting a *nisi additur* where a jury verdict includes some measure of noneconomic damages.").

Scapa argues that when the original damages award "exceeds the medical expenses by nearly three times, there is no compelling reason" to grant *additur*. (Pet. p. 6). Again, there is no law stating a bright-line rule on a permissible amount of damages for intangible, non-economic damages based on the amount of medical expenses. The Supreme Court already squarely rejected that argument in *Riley*.

Scapa argues that the lower court did not provide compelling reasons because the court noted that the jury's verdict may have been affected by the empty chair defense. (Pet. pp. 6-7). That argument is not preserved because Scapa raised it for the first time in a reply brief. *See Harbin v. Williams*, 429 S.C. 1, 9, 837 S.E.2d 491, 495 (Ct. App. 2019) (declining to address an "issue because it was raised for the first time in the reply brief"). Regardless, it is legally meritless because the lower court's mention of a possible reason for an inadequate award does not prohibit the court from finding other, compelling reasons to grant *additur*.

It is the law of the case that Scapa did not dispute (1) the amount of medical bills, (2) "that Stewart suffered greatly as he attempted to treat his disease", and (3) that none of Mr. Stewart's comorbidities "interacted with or amplified the pain and suffering Stewart felt from the mesothelioma." *Edwards*, Op. No. 5931 p. 13; *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). Scapa does not even argue on rehearing that the co-morbidities affect the *additur* decision, despite that being a central argument in its briefing.

The undisputed testimony is that Mr. Stewart endured **daily** pain for **years** before and after his diagnosis. The undisputed testimony is that, after he began treatment described as unimaginably painful and a sledge hammer, Mr. Stewart had no appetite, could not go to the bathroom, could not sleep, could not drive, and could not walk a short distance, just to name a few things.

A $1,000,000.00 award for medical expenses and such extreme pain and suffering is not an abuse of discretion. It is actually too low for the agony that Mr. Stewart endured and tried so bravely to fight in order to spend more time with his family. The Court should deny Scapa's petition on this issue.

III. The Court correctly affirmed the lower court's refusal to reallocate the apportionment of settlement proceeds.

Scapa's sole argument on rehearing of the allocation issue is that the Court's decision infringes on S.C. Code § 15-38-50 because it accepts a settlement allocation agreed to by a plaintiff and a settling defendant. (Pet. pp. 8-10). The Court must reject this argument as unpreserved and contrary to controlling precedent.

First, the argument is unpreserved because Scapa did not raise it in its briefing. "A party may not raise an issue for the first time in a petition for rehearing." *Duke Energy Carolinas, LLC v. S.C. Office of Regulatory Staff*, 434 S.C. 392, 412 n.19, 864 S.E.2d 873, 884 n.19 (2021) (internal quotation and alteration marks omitted). There is no citation to or argument about § 15-38-50 in either of Scapa's briefs. Therefore, the issue is unpreserved, and this Court does not need to consider or address it.

Second, Scapa's unpreserved argument is really an improper attempt to overturn *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), when Scapa failed to make that argument in briefing or to move to argue against precedent at oral argument. In *Riley*, the Supreme Court squarely considered the language of § 15-38-50 and that the plaintiff and settling defendants agreed to the allocations, but still upheld using them for setoff. "Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the non-settling defendant]. Here, the trial court-approved allocation is unquestionably reasonable under the facts." *Riley*, 414 S.C. at 197, 777 S.E.2d at 831. This Court correctly applied the law to the facts of this case in holding that it did "not perceive the effect of setoff based on Stewart's internal allocation as improper, unreasonable under the facts of this case, or unfair simply because it

favored Stewart and did not reflect percentages that corresponded with the percentages of each award." *Edwards*, Op. No. 5931 p. 17.

The Court should deny Scapa's petition on this issue.

Scapa does not challenge the Court's ruling on the bankruptcy documents and, therefore, that is the law of the case.

CONCLUSION

The Court should deny Scapa's petition for rehearing in its entirety.

Respectfully submitted,

September 22, 2022

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PROOF OF SERVICE

The undersigned certifies that a copy of Respondent's *Return to Petition for Rehearing* has been served upon counsel for Appellant on September 22, 2022, via electronic mail at the email addresses set forth below.

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Via E-mail Only

The Honorable Jenny Abbott Kitchings
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Re: *Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart v. Scapa Waycross, Inc.*
Appellate Case No. 2019-000649

Dear Ms. Kitchings:

Enclosed for electronic filing please find the Respondent's Return to the Petition for Rehearing in the above-referenced case. Also enclosed is a proof of electronic service.

By copy of this letter, I am serving all counsel of record via email only. Thank you.

With kind regards, I am,

s/Kathleen C. Barnes

Enclosure

cc: Mitchell Brown
William P. Early
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