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S.C. SUPREME COURT

The State of South Carolina
In the Supreme Court

Appeal from York County
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2022-001574

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

v.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

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

This Court passed on the opportunity in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021), to address the Court of Appeals' adoption of the *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016) analysis regarding substantial factor causation in asbestos-related diseases (which Petitioner argues is at odds with this Court's substantial factor causation test in asbestos-related disease cases in *Henderson v. Allied Signal*, 373 S.C. 179 (2017)). It should take up the opportunity here. This issue that will come up repeatedly in future cases until this Court provides the guidance urgently needed now.

Respondent takes the position that this Court is powerless to grant certiorari on this issue and its related points because it denied certiorari in *Jolly* on a like issue there. This is meritless. Denial of a writ of certiorari imports no expression of an opinion on the merits of the case. *Teague v. Lane*, 489 U.S. 288 (1989) (denial of writ of certiorari carries no precedential value); *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) ("[A]s all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." (opinion of Frankfurter, J., regarding denial of petition for certiorari.).

The Court of Appeals' agreement with the split decision in *Rost* that cumulative exposure theory is not the same as "each and every exposure" theory for purposes of causation is, respectfully, wrong. *See, e.g., Krik v. Exxon Mobil Corp.*, 870 F.3d 669 (7th Cir. 2017)(cumulative exposure theory is effectively the same as each and every exposure theory). "Proof of exposure is not, by itself, sufficient to prove medical causation." FEDERAL JUDICIAL

CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 403 (2000) "A plaintiff must also prove that he was exposed to a sufficient amount, or dose, of a particular toxin to cause a particular disease." This Court should grant certiorari and determine for the bench and bar whether a plaintiff under South Carolina law is permitted to establish that exposure to asbestos fibers from a particular defendant's product was a *substantial* factor in causing his mesothelioma without quantifying, *to any extent*, (i) the dose needed to cause the disease, (ii) the dose the plaintiff inhaled from that defendant's product; and (iii) the context for plaintiff's other exposures? The answer to these questions should be "no."

The case against the interchangeable "any exposure" and "cumulative dose" theories was first crystallized by Pennsylvania Court of Common Pleas Judge Robert J. Colville in the case of *In re Toxic Substance Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006), *affirmed sub nom., Betz v. Pneumon Abex LLC*, 44 A.3d 27 (Pa. 2012). Justice Colville's reasoning, as further developed by equally prescient and talented jurists in the ensuing years, is unassailable. And it is crucial that the Court not allow the bogus cumulative dose theory to set down roots in South Carolina, which would effectively make it an outlier among American jurisdictions. The failure of Stewart's experts to provide any sort of reliable scientific expression of the dose necessary to cause mesothelioma and Mr. Stewart's alleged dose of asbestos from a Scapa product is conclusive.

Not every exposure, nor every dose of asbestos, substantially contributes to a person's development of mesothelioma. Plaintiffs' experts in asbestos litigation have effectively been forced to admit this, given their unanimous concession that everyone of us is exposed to at least the background level of asbestos present in the air, and not all of us develop mesothelioma. This necessarily means that if a plaintiff's exposure to asbestos from

a defendant's product was at or below background levels, then it could not have been a cause of the plaintiff's disease.

Thus, to establish specific causation, the plaintiff's expert must establish (i) the approximate level of airborne, respirable asbestos that is sufficient to cause mesothelioma, and (ii) the plaintiff was exposed to at least that level[1] of asbestos from *the defendant's* product (in such a manner to meet this Court's regularity, proximity and frequency test in *Henderson*), and (iii) the jury should be allowed to consider the context of other exposures in considering the question of "substantial factor" causation.

With regard to this last point, the question for Stewart's expert Dr. Frank was which exposures from which products were *substantial* contributors to Stewart's cumulative dose (and, by the same token, which exposures were ***in****substantial* contributors). But again, Frank made no effort whatsoever 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. [Y]ou 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.

[1] If the plaintiff's exposure(s) relative to the defendant's product was below the causative level, then just like the background levels each of us breathe every day, it cannot have been a cause of the plaintiff's mesothelioma.

> 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. * * * [Y]ou can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

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

The long and short of it is that because Stewart's experts could not (or perhaps did not want to) rule out any exposure, they just ruled every exposure *in*. Under that approach, *every* exposure Mr. Stewart had to asbestos, not matter how miniscule, contributed to causing his mesothelioma—unless of course it was the background level of asbestos each of us is exposed to—that apparently doesn't count. This decidedly unscientific theory is directly at odds with, among other things, *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179 (2007)—which requires proof of frequent, regular and proximate exposure to a specific defendant's products. *Id.* at 185.

To reiterate what Scapa has been arguing throughout this litigation, Dr. Frank's theory—*every* exposure to asbestos was a substantial contributing factor in causing Mr. Stewart's disease, no matter the extent, dose, or quantity of the exposure—is junk science. He is effectively propagating the equivalent of the idea "that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011). Courts reject this approach because it can't be reconciled with the "substantial factor" causation rule long used in South Carolina and almost all other jurisdictions. The Ohio Supreme Court, for example, found it impossible to reconcile the 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." *Schwartz v. Honeywell Inc.*, 102 N.E.3d 477, 481-83 (Ohio 2018).

This Court should thus grant certiorari and reject the Court of Appeals' analysis regarding substantial factor causation and its related adoption of *Rost*.

Scapa did not waive its specific causation arguments. Stewart's waiver argument should be rejected. The reason South Carolina courts have held that a pre-trial ruling on admissibility of evidence (*i.e.*, a ruling on a motion *in limine*) does not generally preserve error is that it is a preliminary ruling "and is subject to change based on developments at trial." *State v. Hill*, 331 S.C. 94, 100 n.1 (1998). Here, however, plaintiff's unreliable cumulative-exposure testimony did not change, and was grounded on an unacceptable legal basis, which Scapa challenged and unfortunately lost.

Like South Carolina, Texas courts hold that a ruling on a motion *in limine* does not preserve error; and a party must generally object again, at trial, to the challenged testimony to preserve error. *In re Toyota Motor, U.S.A., Inc.*, 407 S.W.3d 746, 760 (Tex. 2013). But the Texas Supreme Court has held that when it comes to a complaint "that scientific evidence is unreliable, and is no evidence, a party must object to the evidence *before trial* ***or*** *when the evidence is offered*." *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998) (emphasis added). A pre-trial objection suffices because, unlike testimony that might later become admissible based on developments at trial, scientifically unreliable testimony can never become admissible. Thus, an objection and ruling before trial is sufficient to preserve error. *Id.*

The law does not require a pointless act, such as renewing a challenge to the scientific reliability of expert testimony at trial after the trial court has already ruled that it will admit

the testimony. Scapa's motions to exclude the causation testimony of Stewart's experts raised the same challenges Scapa has raised on appeal—that Stewart did not introduce legally sufficient evidence of causation. Those motions, and the trial court's ruling denying those motions (01/09/18 Tr. at 117), preserved the trial court's error in denying Scapa's motion for judgment n.o.v.

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

By Stewart's logic regarding the Court's certiorari ruling in *Jolly*, the Court would be *required* to grant review on this issue because it did so in *Jolly*. While that is incorrect, this Court *should* grant certiorari on this question, just as it did in *Jolly*. On its face, this case presents a strong basis for reversal on the *additur* issue, as does *Jolly.* Alternatively, and at the very least, the Court should grant certiorari, and this case should—after *Jolly* is decided—be remanded for the Court of Appeals to consider the effect of the Court's *Jolly* decision on the *additur* question.

After deliberating for almost five hours, the jury returned its verdict in this case, awarding $600,000 for Stewart's survival claim. Throughout trial, the court noted the jury was comprised of highly-educated, diverse, and attentive persons. "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). Nevertheless, the court ordered an increase of the survival damages from $600,000 to $1,000,000.00.

Trial judges may not substitute their own judgment for the jury's. *Graham v. Whitaker*, 218 S.C. 393, 402 (1984). This is especially true for noneconomic damage awards because those types of damages are indeterminate in character. *Kalchthaler v. Workman*, 316 S.C. 499, 503 (Ct. App. 1994).

The jury's $600,000.00 survival damages award in this case is not unduly conservative. 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 (Ct. App. 2000). Mr. Stewart's physician testified that in addition to mesothelioma, he suffered from a wide array of serious diseases: a prior heart attack; hypertension; bypass surgery; chronic obstructive pulmonary disease; bladder cancer; prostate cancer; and skin cancer. (1 Tr. 611-12). He also had a lengthy smoking history. Consequently, his physician could not give the jury a life-expectancy estimate for Mr. Stewart had he not contracted mesothelioma. (1 Tr. 613).

The jury was entitled to consider this evidence when deciding how much to award for conscious pain, suffering, and mental distress attributable to Mr. Stewart's mesothelioma, as opposed to all his other serious and debilitating medical conditions. The trial court was required to pay substantial deference to the jury's calculation of the damage amount. *Harrison*, 354 S.C. at 140. The trial court failed to base its increase on compelling reasons and thus its ruling should be reversed. The trial court's reference to the speculative reason for the jury's award – Scapa's "empty chair" defense, does not constitute a compelling reason as a matter of law. *ClearOne Commc'n, Inc. v. Biamp Sys.*, 653 F.3d 1163 (10th Cir. 2011)(courts have declined to indulge in speculation that a jury has not properly apportioned damages).

The 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 survival damages award was nearly three times Mr. Stewart's medical expenses. Thus, the trial court should

not have tampered with the jury's assessment of the pain and suffering damages. *Harper v. Bolton*, 239 S.C. 541, 548 (1962).

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

And finally, as in *Jolly*, the Court of Appeals erred in refusing to reverse the trial court's settlement proceeds allocation. As it did in *Jolly*, the Court should grant certiorari to review the Court of Appeals' erroneous holding on this point. Alternatively, and at the very least, this Court should grant certiorari and this case—after *Jolly* is decided—should be remanded for the Court of Appeals to consider the effect of the Court's *Jolly* decision on the allocation question.

A. There is no waiver.

Respondent asserts Scapa's arguments regarding setoff allocation under Code Ann. § 15-38-50 are "unpreserved because Scapa did not raise it in its briefing." (Return p. 7), and Respondent states that "Scapa does not argue to this Court that the allocation is unreasonable under the facts." (Return, p. 25, fn. 9). Yet, Scapa's Motion for Setoff at trial included an argument titled "Setoff is Required by S.C. Code Ann. § 15-38-50." (R. 143-45). Further, the Court of Appeals specifically noted in its opinion that "Scapa claims the trial court should have reallocated the settlement funds "in a manner reasonable under the facts." *Edwards*, at 422, 878 S.E.2d at 710. Finally, the trial court in her Order Re: Post-Trial Motions addresses *Riley* and the application of S.C. Code Ann. § 15-38-50 for the issues of setoff and reallocation of settlement proceeds. (Order Re: Post-Trial Motions, R. 22-24). This order was appealed to the Court of Appeals and Scapa urged that it be reversed. The Court of Appeals ruled that Scapa's "percentages-based allocation" argument is an attempt to refashion a disadvantageous allocation of the settlement proceeds." *Edwards,* at 424, 878 S.E.2d at

711. Scapa respectfully disagrees with the Court of Appeals' set off rulings and has argued to this Court that the trial court and Court of Appeals' affirmance results in a double recovery and is contrary to § 15-38-50, and that *Riley* does not control this case. Thus, the issue of the propriety of the settlement-proceeds allocation in light of *Riley* and the plain language of S.C. Code § 15-38-50, including whether the allocation was reasonable under the facts and otherwise, is preserved. *See Duke Energy* Carolinas, *LLC v. S.C. Off. of Regul. Staff*, 434 S.C. 392, 425, 864 S.E.2d 873, 890 (2021), *reh'g denied* (Feb. 1, 2022); *see also Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 705, 869 S.E.2d 859, 867 (Ct. App. 2022) (noting "the need the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner") (citations omitted), *reh'g denied* (Feb. 25, 2022).

B. The trial court's allocation does not reflect "fairness and justice."

South Carolina law is clear that an allocation of settlement proceeds between survival and wrongful death claims "must yield to fairness and justice." *Welch v. Epstein*, 342 S.C. 279, 313 (Ct. App. 2000). True, 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 v. Ford Motor Co.*, 414 S.C. 185, 196 (2015). But Scapa is not complaining that Stewart's allocation was unreasonable for that reason. Rather, the 80% wrongful-death-claim—20% survival-claim allocation was not reasonable under the case facts, which are controlling on the issue of fairness and justice.

The trial court's own *additur* findings prove the allocation was unreasonable. The court saw no reason to up the jury's award of $100,000 in wrongful death damages. Yet the court believed the evidence of Mr. Stewart's survival damages called for a 67% increase—from $600,000 to $1,000,000. Thus, it was the court's view that the evidence supported an

award of 10% of the total damages for the wrongful death claim and 90% for the survival claim. *Yet, the court permitted an allocation of just 20% of the settlement proceeds to the survival claim.*

Under the facts, and in accordance with Stewart's requests and the trial court's findings, the allocation should have been 10% for the wrongful death claim and 90% for the survival claim. This would be consistent with Stewart's own arguments concerning Stewart's survival damages, as contrasted with the nature of the wrongful death beneficiaries' losses from his death. Stewart's counsel urged the trial 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.

Stewart's counsel had little to say about the wrongful death beneficiaries' losses, and much to say about Mr. Stewart's suffering before his death. In fact, the trial 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?" (7/11/2018 Tr. at 34).

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. The Court of Appeals therefore erred in affirming the trial court's abuse of its discretion by refusing to reallocate the settlement funds in a manner reasonable under the facts.

CONCLUSION

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

Respectfully submitted,

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