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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2022-000272

Beverly Dale Jolly and Brenda Rice Jolly, ..... Respondents,

v.

General Electric Company, et al., ..... Defendants,

Of whom Fisher Controls International LLC and Crosby  
Valve, LLC are the..... Petitioners.

BRIEF OF PETITIONER

C. Mitchell Brown  
A. Mattison Bogan  
James B. Glenn  
Nicholas A. Charles  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

*Attorneys for Fisher Controls International LLC and  
Crosby Valve, LLC*

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### **Statement of Issues Presented**

- I. Whether the Court of Appeals erred in affirming the trial court's granting of a new trial *nisi additur*.
- II. Whether the Court of Appeals erred in affirming the trial court's setoff calculation based on Plaintiffs' improper, unilateral allocation of settlement proceeds to avoid a complete setoff, including an allocation of settlement funds to a nonexistent claim.

### Statement of the Case

After a jury trial related to the claims of Plaintiffs Beverly Dale Jolly (“Mr. Jolly”) and Brenda Rice Jolly (“Mrs. Jolly”) (together, “Plaintiffs”) related to Mr. Jolly’s alleged asbestos exposure, the jury rendered a verdict in favor of Plaintiffs on their negligence and breach of warranty claims and awarded \$200,000 to Mr. Jolly and \$100,000 to Mrs. Jolly. (R. 52). This amount was dwarfed by Plaintiffs’ pre-trial settlements, which totaled \$2,270,000. Nonetheless, as a result of the trial court’s post-trial rulings adding \$1,570,000 to the jury’s damages award and denying a full setoff, the trial court ordered Petitioners Fisher Controls International LLC (“Fisher”) and Crosby Valve, LLC (“Crosby”) to pay Mr. Jolly \$823,333.33. (R. 55). As a result, under the trial court’s ruling, Plaintiffs would ultimately recover over \$3 million (\$2,270,000 in settlements plus a judgment of \$823,333.33) for claims the jury determined were worth only \$300,000.

Plaintiffs filed a complaint on April 5, 2016, against sixty-three defendants, asserting claims for negligence, strict liability, breach of implied warranty, fraudulent misrepresentation, and loss of consortium based on Mr. Jolly’s alleged exposure to asbestos while working for Duke Power Company (“Duke”). (*Id.*). Mr. Jolly alleged exposure to asbestos from external flange gaskets on valves. (R. 490, 517–18). Neither Fisher nor Crosby manufactured, sold, or otherwise provided those external gaskets, and Fisher and Crosby supplied only a fraction of the valves that Mr. Jolly worked around during his employment with Duke. (R. 530, 877, 1062–63, 1123, 1312–13, 1343–44, 1428).

Prior to trial, Plaintiffs settled with various defendants for a total of \$2,270,000. (R. 44–47). Although the settlement agreements did not include any allocation of the settlement amounts, (R. 2513), Plaintiffs claimed that they “internally” allocated one-third of the settlements to Mr.

Jolly’s personal injury claim, one-third to Mrs. Jolly’s loss of consortium claim, and one-third to “future wrongful death claims.” (*Id.*; R. 4868 n.2). None of the settlements were approved by the trial court or made available to the defendants for review. (R. 2491, 2507–10). Further, no explanation was given as to the reason for Plaintiffs’ purported “internal” allocation of the settlement proceeds.

Trial began on July 24, 2017, before Judge Jean H. Toal. (R. 336). At the conclusion of the trial, the trial court granted a directed verdict in favor of Fisher and Crosby on Plaintiffs’ fraudulent misrepresentation claim. (R. 1588–1619). The jury then rendered a verdict in favor of Plaintiffs on their negligence and breach of warranty claims. (R. 52). The jury found in favor of Fisher and Crosby as to Plaintiffs’ strict liability claim, and further rejected Plaintiffs’ claim for punitive damages. (*Id.*). Ultimately, the jury awarded \$200,000 in damages to Mr. Jolly and \$100,000 in damages to Mrs. Jolly. (*Id.*).

On August 11, 2017, Plaintiffs filed a motion for new trial *nisi additur*. (R. 4696). Fisher and Crosby moved for judgment notwithstanding the verdict (“JNOV”) on August 14, 2017. (R. 4770, 4773). Fisher and Crosby also filed a motion to set off Plaintiffs’ pretrial settlement proceeds against the judgment amount. (R. 4758). The trial court denied Fisher and Crosby’s motion for JNOV on all grounds, granted Plaintiffs’ motion for new trial *nisi additur*, and granted Fisher and Crosby’s motion for setoff, but only as to the portions of the settlements that Plaintiffs allocated to Mr. Jolly’s personal injury claims and Mrs. Jolly’s loss of consortium claims. (R. 11).

Fisher and Crosby appealed, and the Court of Appeals affirmed the trial court’s rulings in a published opinion issued on September 1, 2021. *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 662, 869 S.E.2d 819, 849 (Ct. App. 2021).

This Court granted a writ of certiorari as to the new trial *nisi additur* and setoff rulings.

## Statement of Facts

### **I. Background**

Mr. Jolly worked for Duke from 1979 to 2003 at facilities in South Carolina and North Carolina. (R. 64). Between 1980 and 1984, Mr. Jolly worked as a mechanical inspector at the Oconee, McGuire, and Catawba Nuclear Stations, as well as other facilities. (R. 497–508, 533–34). Mr. Jolly worked around other tradesmen tearing out asbestos insulation and gaskets, which released asbestos fibers into the air. (*Id.*). Mr. Jolly was diagnosed with mesothelioma in late 2015. (R. 471).

Fisher, which has its headquarters in Marshalltown, Iowa, manufactures and sells process control valves used in industrial facilities, including nuclear power plants like Oconee, McGuire, and Catawba. (R. 1300–01). During the time period at issue, Fisher built its valves to Duke’s specifications, incorporated the type of internal gaskets and packing specified by Duke, and shipped the valves to Duke. (R. 1302–05). Although some Fisher valves had flange connections that required gaskets when connected to a pipe, Fisher did not manufacture or sell flange gaskets (also referred to by Fisher’s corporate witness as “line gaskets”) and did not incorporate them into its valves. (R. 1123, 1312–13, 1343–44).

Crosby manufactured safety-related valves for industrial facilities, including nuclear power plants. (R. 1379–80). Like Fisher, Crosby built safety valves pursuant to Duke’s specifications—including Duke’s specifications for the internal components—and shipped those valves to Duke. (R. 1483–85). Crosby, like Fisher, did not manufacture, sell, or otherwise provide external gaskets to Duke or its other customers. (R. 1428).

## II. Trial and Verdict

At trial, Plaintiffs focused their exposure evidence on Mr. Jolly's work at Oconee, McGuire, and Catawba from 1980 through 1984. (R. 485–86). Mr. Jolly's only trial testimony alleging exposure to asbestos in connection with Petitioners' valves related to flange gaskets, which Duke workers placed on the exterior of the valves to connect the valves to piping systems. (R. 490, 517–18). Mr. Jolly claimed that he stood near other tradesmen who used tools to grind gasket material from valve flanges. (R. 497–500). He did not testify as to how many of those valves were Fisher or Crosby valves. (R. 503–04). However, Plaintiffs' own proof revealed that Crosby and Fisher manufactured at best only a small fraction of the valves Mr. Jolly worked around: there were ten other makers of valves present at the Duke sites, and the number of Crosby and Fisher valves on site was roughly the same as at least eight of the other ten makers. (R. 530, 877, 1062–63).

Mr. Jolly's former coworker David Taylor testified that although he worked with Mr. Jolly at Oconee and worked on Fisher and Crosby valves, he did not know if the internal components of Crosby valves contained asbestos, did not know how many times the valves may have been previously maintained, and did not know who made replacement flange gaskets used next to Crosby valves. (R. 889, 1038–39, 1048–50). Mr. Taylor did not know what kind of valves Crosby manufactured. (R. 1033–34). He also did not recall how often he worked on Fisher valves; he only estimated it was more than once every four months. (R. 911). Both Mr. Jolly and Mr. Taylor testified that they received warnings from Duke about the hazards of asbestos in the early 1980s. (R. 507–08, 1025–31).

Tracy Pavlish—Mr. and Mrs. Jolly's daughter—and Mrs. Jolly each testified about their relationships with Mr. Jolly and their experiences since Mr. Jolly was diagnosed with

mesothelioma. (R. 567–93). Mrs. Jolly and Ms. Pavlish testified that Mrs. Jolly suffered a heart attack a few weeks before trial and speculated, without any supporting medical evidence or expert testimony, that it may have been related to Mr. Jolly’s illness. (R. 575, 580–81).

Plaintiffs did not present any of Mr. Jolly’s medical bills or medical records at trial or present testimony from Mr. Jolly’s treating doctors or family members about the amount of his medical expenses. Instead, the only evidence of Plaintiffs’ economic damages was the testimony of Dr. Frank, Plaintiffs’ “expert in the field of asbestos,” (R. 690), that he had seen “*some* of the medical bills” related to Mr. Jolly’s treatment, which he said totaled \$142,000. (R. 759, 845). Over Fisher’s and Crosby’s objection, Dr. Frank also gave his opinion “as to what would be the cost of medical care for Mr. Jolly for the care and treatment of his mesothelioma through the time that he might pass away,” testifying that Mr. Jolly could incur hundreds of thousands of dollars in treatment and “[c]ases even go to a million dollars or more.” (R. 760–61). Dr. Frank later clarified his testimony when challenged during cross-examination:

Q: . . . You were asked about the cost of Mr. Jolly’s treatment?

A: Yes, sir.

Q. And you said about a million dollars?

A. I said *it would not be unreasonable to be a million dollars*.

. . . .

Q. You said you had not seen many or all of the bills, correct?

A. I have not seen what I understand are all of the bills. I have seen some of them.

Q. How much have you seen?

A. \$142,000.

Q. Is there any reason that [\$]900,000, in your estimation, is missing?

A. I don’t know why they were or were not available to show me, but I was asked questions about what, for example, a surgical procedure might cost.

Q. But the best opinion on that would be . . . the medical bills, right?

A. That would be the best data.

(R. 845–46) (emphasis added). Fisher and Crosby’s counsel emphasized the lack of evidence of Mr. Jolly’s medical expenses during closing argument, stating, “There are no medical records. No medical bills. . . . You have to wonder why.” (R. 2306).

The trial court granted a directed verdict in favor of Fisher and Crosby on Plaintiffs’ fraudulent misrepresentation claim. (R. 1588–1619). The jury returned a verdict in favor of Plaintiffs on their negligence and breach of implied warranty claims and awarded \$200,000 in damages for Mr. Jolly and \$100,000 for Mrs. Jolly’s loss of consortium claim. (R. 52). Plaintiffs did not request a special verdict form, and the jury did not allocate the damages awards between medical expenses or pain and suffering. (*Id.*). The jury rejected Plaintiffs’ claim for punitive damages. (*Id.*).

### **III. Post-Trial Motions and Rulings**

Fisher and Crosby moved for JNOV, arguing Plaintiffs failed to present reliable, admissible specific causation evidence. (R. 4793–4803). The trial court denied Fisher’s and Crosby’s motion for JNOV on all grounds. (R. 11).

Plaintiffs moved for new trial *nisi additur*, arguing the jury’s verdict was inadequate and asking the trial court to increase the damages award. (R. 4696). The trial court granted Plaintiffs’ motion. (R. 11). Despite the lack of a special verdict form, the trial court assumed that the jury’s \$200,000 verdict for Mr. Jolly consisted of \$142,000 for medical expenses—because Dr. Frank testified that he had seen \$142,000 in medical bills—and \$58,000 for pain and suffering. (R. 11). The trial court then stated that Dr. Frank’s testimony that “cases like this” can incur medical bills of “a million dollars or more” was “undisputed,” and awarded Mr. Jolly \$1,000,000 in damages for medical expenses. (R. 18; R. 755, 759–62). The trial court also increased Mr. Jolly’s noneconomic damages to \$580,000, or ten times the \$58,000 the trial court assumed that the jury

awarded for those damages. (R. 18). In total, the trial court increased the jury's damages award to Mr. Jolly by \$1,380,000, to a total of \$1,580,000.

The trial court then increased the \$100,000 jury award to Mrs. Jolly for loss of consortium to \$290,000. (R. 19–20). In support, the trial court recited certain elements of Mrs. Jolly's claimed damages. (R. 19–20).

Prior to trial, Plaintiffs had settled with various defendants for \$2,270,000. (R. 44–47). None of the settlements were approved by the Court or made available to Fisher or Crosby for review. The trial court declined to compel Plaintiffs to produce the settlement agreements, instead reviewing the agreements *in camera* and informing Fisher and Crosby that Plaintiffs had received \$2,270,000 in settlements. (*Id.*). There is no dispute that the settlement agreements did not contain any allocation of the settlement amounts between the different released claims.

After trial, Fisher and Crosby moved to set off Plaintiffs' pretrial settlements against the verdict amounts. (R. 4758). The trial court granted the motion, in part. The court accepted Plaintiffs' counsels' representation that they had "internally" allocated the \$2,270,000 in settlement funds one-third to personal injury claims, one-third to loss of consortium claims, and one-third to "future wrongful death claims." (R. 44–47). Plaintiffs did not provide any explanation for why they made this "internal" allocation. Nonetheless, based on Plaintiffs' "internal" allocation, the trial court offset Mr. Jolly's personal injury claims and Mrs. Jolly's loss of consortium claims by \$756,666.67 each. (*Id.*). The trial court refused to set off any of the \$756,666.67 Plaintiffs allocated to "future wrongful death claims" on the basis that those claims had not been tried. (*Id.*). This resulted in an award of \$823,333.33 for Mr. Jolly, even though the jury determined his damages were only \$200,000.

Fisher and Crosby appealed. The Court of Appeals affirmed the trial court on all issues.

## Argument

What Petitioners seek before this Court is simple: reinstatement of the jury's verdict, consistent with the constitutional right to a jury and South Carolina law. In granting a new trial *nisi additur*, the trial court improperly invaded the province of the jury by speculating as to the composition of a general verdict, substituting its judgment and credibility determinations for the jury's, and construing evidence in the light most favorable to the moving party. The Court of Appeals erred in affirming the trial court's analysis, improperly supplying its own basis for *additur*, and improperly giving greater deference to the trial court than to the jury. South Carolina law requires more than a judge's mere disagreement with the jury regarding the import of the evidence to provide a compelling reason to increase the jury's damages award, particularly by the \$1,570,000 the trial court awarded in excess of the jury's determination of damages here.

If this Court does not reverse the *additur* ruling, it should reverse the trial court's and Court of Appeals' improper setoff analysis. South Carolina law is clear that settlements reduce the claim against the remaining defendants "to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is greater." S.C. Code Ann. § 15-38-50. The trial court and Court of Appeals erred by giving binding effect to Plaintiffs' unilateral, "internal" allocation of settlement proceeds, including an allocation of funds to a nonexistent "future" wrongful death claim. The allocation should be rejected, and the entire amount of settlement proceeds should be set off against the total judgment in a lump sum. In the alternative, the Court should reallocate the settlement proceeds in the interests of fairness and justice.

**I. The Court of Appeals erred by affirming the trial court’s granting of a new trial *nisi additur*.**

The constitutional right to a jury trial is guaranteed in every case and includes the right to have the jury determine damages. S.C. CONST. art. I, § 14 (“The right of trial by jury shall be preserved inviolate.”); *Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963). South Carolina law is clear that juries—not trial courts—are “the sole judge of issues of fact, including the issue of damages.” *Vinson v. Hartley*, 324 S.C. 389, 408, 477 S.E.2d 715, 725 (Ct. App. 1996); *Gillis v. Atl. Coast Line R. Co.*, 175 S.C. 223, 179 S.E. 62, 64 (1934) (“[T]he jury is the sole judge of issues of fact under our system of jurisprudence.”); *Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963); S.C. CONST. art. I, § 14 (“The right of trial by jury shall be preserved inviolate.”). A jury’s determination of damages “is entitled to substantial deference,” and trial courts cannot substitute their judgment for that of the jury without articulating a **compelling reason** for doing so. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 140 (2003); *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). An appellate court must reverse an *additur* ruling if the trial court abused its discretion. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995).

Because a trial court’s power to grant an *additur* motion conflicts with the constitutional right to a jury trial as to the amount of damages, trial courts must “offer *compelling* reasons for invading the jury’s province.” *See Riley*, 414 S.C. at 193, 777 S.E.2d at 829 (emphasis added). These *compelling* reasons must be something other than the trial court’s mere disagreement with the jury’s verdict. To hold otherwise would impermissibly undermine the right to a jury trial, and make the trial court—not the jury—the ultimate arbiter of damages. If that is the standard, the right to a jury trial on damages would mean nothing at all.

The trial court abused its discretion in granting a new trial *nisi additur*, because its decision to override the jury's damages award was not based on any compelling reason for doing so, but rather speculation and a disagreement about the import of the evidence presented. The Court of Appeals compounded this error by unduly deferring to the trial court's assessment of the facts and award of damages, rather than that of the jury. *See id.*; *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004) ("An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support."). The Court of Appeals acknowledged in a footnote the "seemingly inconsistent standards for reviewing the granting of a new trial *nisi*," and then restrained its review by deferring to the trial court's assessment of the evidence and award of damages, rather than assessing whether the trial court actually applied the proper standard of giving substantial deference to the jury's determination of damages. *Jolly*, 435 S.C. at 654–64, 869 S.E.2d at 843–50; *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) ("While the granting of such a motion rests within the sound discretion of the [trial] court, substantial deference must be afforded to the jury's determination of damages."). By failing to recognize the errors of law the trial court committed and instead essentially giving the trial court absolute discretion to revoke the jury's power to determine damages, the Court of Appeals failed to follow binding precedent. *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691. This Court should reverse and reinstate the jury's verdict.

**A. The trial court abused its discretion by increasing Mr. Jolly's damages award based on speculation regarding the general verdict, and by failing to give any deference to the jury.**

Using a general verdict form, the jury in this case awarded Mr. Jolly \$200,000 in damages on his negligence and breach of implied warranty claims. Rather than paying deference to the jury's assessment of the evidence, the trial court granted Plaintiffs' motion for *additur*, increasing

this award to \$1,580,000. The trial court's decision was based on speculation regarding the jury's intent in the general verdict, and the trial court's disagreement with the jury's conclusion regarding the weight and import of the evidence, not any compelling reason for overruling the jury's assessment of damages. This was an abuse of discretion, and it should be reversed.

**i. The trial court's speculation regarding the composition of the jury's general verdict does not provide a compelling reason for granting *additur*.**

The jury's general verdict form in this case provided for an award of \$200,000 to Mr. Jolly, with no allocation between medical expenses or pain and suffering. South Carolina precedent prohibits courts from speculating about any allocation within such a general verdict because it is impossible to determine such an allocation. *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010) ("Few contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action. Because the verdict was a general verdict, *it is impossible to determine how the jury allocated damages* between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages." (emphasis added)); *Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) ("Further, the jury's verdict of \$1.8 million was declared a general verdict by the trial court and was well within the range of damages shown by Armstrong. Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages."); *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004) ("The jury in this case returned a general verdict for Respondent in the amount of \$30,000.00. Appellant did not request the trial court to submit a special verdict form to determine whether the actual damages were for lost profit or some other measure. *Without a special verdict form, we cannot speculate as to what*

*portion of the award the jury attributed to lost profit as opposed to other tort damages.*” (emphasis added)).<sup>1</sup>

This Court recently clarified that “it is not for the trial court to say what it thinks the verdict should be.” *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 132, 866 S.E.2d 542, 554 (2021). In *Stoneledge*, confusion arose as to the jury’s allocation of damages among three causes of action. *Id.* at 128–29, 866 S.E.2d at 553. The trial court determined the jury intended to award \$5,000,000 (the aggregate of the amounts written on the verdict form for the three causes of action) for each cause of action and entered its judgment accordingly. *Id.* This Court found no authority supporting “the trial court’s reformation of the jury’s verdict” and repeated the well-settled principle that courts cannot speculate about the jury’s intent:

Did the jury find the HOA proved damages of \$5,000,000 for each cause of action, as the HOA claims? Perhaps, but perhaps not. Did the jury find the HOA proved damages of \$4,000,000? Perhaps, but perhaps not. Absent further dialogue with the jury, ***there was simply no way for the trial court to tell without speculating what the jury intended.***

*Id.* at 132, 866 S.E.2d at 554 (emphasis added).

Here, the trial court parsed the jury’s general verdict of \$200,000 to Mr. Jolly into a \$142,000 “award” of medical expenses and a \$58,000 “award” of pain and suffering damages, found each “award” was inadequate, and issued separate *additur* rulings for each by increasing “the medical expenses award to \$1,000,000” and increasing “the jury’s award of \$58,000 for Mr. Jolly’s pain and suffering” to \$580,000. (R. 18–19). Nothing in the jury’s general verdict form

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<sup>1</sup> See also *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 153, 810 S.E.2d 41, 46 (Ct. App. 2018) (comparing an arbitrator’s general award to a jury’s general verdict and finding “it is impossible to determine whether, and to what extent, the arbitrator’s award included damages for D.R. Horton’s own negligence”).

indicated that it made this allocation between medical damages and pain and suffering. The trial court's reasoning to the contrary was based on speculation about a general verdict prohibited by South Carolina law.

The Court of Appeals appeared to reject the existence of a rule prohibiting courts from speculating about the composition of a general verdict, stating, "Neither *Jenkins* nor *Moore* created a generalized rule of law applicable to circuit courts in reviewing the suitability of a jury verdict. . . . [T]his court's conclusions in *Jenkins* and *Moore* were case-specific. If any general rules may be gleaned from these conclusions, it is the time-honored rule that no factual or legal determination may be based on speculation." *Jolly*, 435 S.C. at 657, 869 S.E.2d at 846. Contrary to the Court of Appeals' attempt to distinguish *Jenkins* and *Moore*, each of those cases established that a court cannot speculate, assume, or even "reasonably infer" any allocation from or within a general verdict because it is *impossible* to determine such an allocation, *Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463; *Armstrong*, 366 S.C. at 227, 621 S.E.2d at 379; *Moore*, 360 S.C. at 257, 599 S.E.2d at 475, a principle recently reaffirmed by this Court in *Stoneledge*, 435 S.C. at 132, 866 S.E.2d at 554. The Court of Appeals therefore failed to follow binding precedent in affirming the trial court's speculative ruling.

Further, the Court of Appeals engaged in speculation itself to support its holding. *Jolly*, 435 S.C. at 657, 869 S.E.2d at 846. The Court of Appeals quoted the dictionary definition of "speculate"—"to take to be true on the basis of insufficient evidence"—then held the trial court's "observation about the jury's award of medical costs" was not speculative because it "was based on Dr. Frank's testimony that he had seen some of the medical bills and the amount he saw was \$142,000," and the trial court's observation was therefore "a reasonable inference from that evidence." *Id.* The Court of Appeals then found "it is highly unlikely that the loss of consortium

verdict, which was only \$100,000, included medical expenses, given the medical bill Dr. Frank saw was for \$142,000,” and “[i]t is more likely that the jury awarded Dale \$142,000 for medical expenses and the remainder of the \$200,000 (\$58,000) for non-economic damages.” *Id.*

However one defines “speculation,” the trial court’s ruling and Court of Appeals’ opinion satisfy the definition. *Black’s Law Dictionary* defines “speculation” as “the practice or an instance of theorizing about matters over which there is no certain knowledge.” *Speculation*, BLACK’S LAW DICTIONARY (11th ed. 2019). The *Cambridge English Dictionary* defines “speculate” as: “to guess possible answers to a question when you do not have enough information to be certain.”<sup>2</sup> The trial court and Court of Appeals’ guess regarding what the jury “likely” meant in the general verdict is speculation: even if it is consistent with one view of the evidence, the trial court and Court of Appeals simply have no way to determine whether their “reasonable inference” about what the jury “likely” believed is actually correct. Consistent with substantial South Carolina precedent, without a special verdict form, any attempt to allocate the jury’s general damages award—even if that attempt is reasonable or otherwise based in the evidence—is improper speculation. *See Stoneledge*, 435 S.C. at 132, 866 S.E.2d at 554; *Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463; *Armstrong*, 366 S.C. at 227, 621 S.E.2d at 379; *Moore*, 360 S.C. at 257, 599 S.E.2d at 475.

The Court of Appeals also deviated from the stated reasoning for the *additur* expressed by the trial court in the order’s plain language. The trial court expressly based its *additur* ruling on its speculation as to the composition of the verdict. However, the Court of Appeals did not give this express ruling weight. *Jolly*, 435 S.C. at 658, 869 S.E.2d at 847 (“Moreover, we do not view this particular observation [as to the composition of the general verdict] as critical to the circuit

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<sup>2</sup> *Speculate*, Cambridge English Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/speculate>.

court's discretionary determination that the jury's overall verdict was inadequate. . . . The essence of the circuit court's ruling was the inadequacy of the overall verdict in light of the evidence presented at trial. Inconsequential language included in that ruling is not a valid basis for reversal." Although the Court of Appeals attempted to distinguish the "essence" of the trial court's ruling, the express basis for the ruling by the trial court was the speculation as to the components of the verdict. See (R. 14–20); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

Generally, a trial court order, like a contract, must be interpreted according to its plain meaning. See *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) ("As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989))); *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) (same). The trial court's express finding that the \$200,000 verdict for Mr. Jolly consisted of \$142,000 in medical expenses and \$58,000 in noneconomic damages was its stated ruling.

By referring to the language in the trial court's order as "inconsequential language" and performing a lengthy analysis itself of the trial evidence, the Court of Appeals affirmed the *additur* ruling on a basis not stated or ruled upon by the trial court. However, as the Court of Appeals acknowledged, an appellate court has *no power* to grant *additur*. See *Riley*, 414 S.C. at 192, 777

S.E.2d at 828 (“When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial [court] alone has the power to [alter] the verdict by the granting of a new trial nisi.” (second alteration in original) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993))).<sup>3</sup> The trial court, and only the trial court, has the power to issue the *additur* order, but if it fails to do so for an appropriate reason, the order fails and cannot be “saved” or affirmed for a different reason by the appellate courts. To do so would improperly constitute an appellate court wielding the *additur* power. See *Green*, 356 S.C. at 570, 590 S.E.2d at 41 (“[I]f inapplicable grounds are given for granting *additur*, the order fails by error of law.”).

Finally, although the Court of Appeals relies on four cases to support its and the trial court’s speculation as to the amount of medical expenses “awarded” by the jury, each case is distinguishable. In three of the cases, the jury’s damages award equaled the exact amount of economic damages, *to the penny*, suffered by the plaintiff. See *Waring v. Johnson*, 341 S.C. 248, 260, 533 S.E.2d 906, 912 (Ct. App. 2000) (“The jury’s award of *exactly the amount of Waring’s medical expenses, to the penny*, is an attempt to reimburse her for those very expenses.” (emphasis

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<sup>3</sup> *Riley* does not support the Court of Appeals’ *additur* ruling here. *Riley* stands for the proposition that the standard of appellate review of a new trial *nisi additur* order is abuse of discretion. Fisher and Crosby do not quarrel with that. Here, there was an abuse of discretion for the reasons stated herein. Further, the *Riley* Court did not throw out the requirement that compelling reasons be provided by the trial court in issuing an *additur* order, see *Riley*, 414 S.C. at 193, 777 S.E.2d at 829 (citing *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691), nor did it say that trial courts can substitute their judgment for that of the jury’s view, see *id.*; see also *Harrison*, 354 S.C. at 140, 580 S.E.2d at 115 (“The jury’s determination of damages . . . is entitled to substantial deference.”). *Riley* does stand for the rejection of a “categorical rule” prohibiting *additur* if any noneconomic damages are awarded. *Riley*, 414 S.C. at 194, 777 S.E.2d at 830. Petitioners are not advancing such a categorical rule. *Riley* does not overrule the law that a witness need not be believed, *Steele v. Dillard*, 327 S.C. 340, 343–44, 486 S.E.2d 278, 280 (Ct. App. 1997); *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991), nor does it overrule the prohibition on parsing or speculating about a general verdict, see *Stoneledge*, 435 S.C. at 132, 866 S.E.2d at 554; *Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463; *Armstrong*, 366 S.C. at 227, 621 S.E.2d at 379; *Moore*, 360 S.C. at 257, 599 S.E.2d at 475.

added)); *Williams v. Robertson Gilchrist Constr. Co.*, 301 S.C. 153, 154, 390 S.E.2d 483, 484 (Ct. App. 1990) (addressing a verdict awarding “the exact figure as set forth by the economist for economic loss of \$170,590”), *overruled on other grounds by O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993); *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 493, 361 S.E.2d 775, 777 (Ct. App. 1987) (addressing a damages award of \$150, the exact amount of liquidated damages proved by the plaintiff), *overruled on other grounds by O’Neal*, 314 S.C. 525, 431 S.E.2d 555. Here, the damages award did not match Plaintiffs’ proffered evidence of Mr. Jolly’s medical expenses, which were unclear and in dispute in any event. Further, none of the four cases relied upon by the Court of Appeals addressed whether a trial court may make speculative findings as to the composition of a general verdict. It cannot do so. *See id.*; *see also Riley*, 414 S.C. at 193–94, 777 S.E.2d at 829.

**ii. The trial court improperly substituted its judgment for the jury’s and improperly construed the evidence in the light most favorable to the moving party, and the Court of Appeals should have reversed.**

After the trial court improperly speculated that the jury awarded \$142,000 in medical expenses, the trial court’s stated basis for increasing the medical expenses “award” to \$1,000,000 was its finding that Dr. Frank credibly and reliably testified, “without dispute,” that Mr. Jolly’s medical expenses “would reasonably be \$1,000,000.” (R. 18). The trial court committed an error of law by substituting its own credibility determination for that of the jury and by construing Dr. Frank’s testimony in the light most favorable to the moving party—Plaintiffs—rather than the nonmoving party. *See Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297.

The Court of Appeals committed the same error. The Court of Appeals acknowledged “the jury was not required to believe Dr. Frank’s testimony,” *Jolly*, 435 S.C. at 662 & n.25, 869 S.E.2d at 849 & n.25 (citing *Steele*, 327 S.C. at 343–44, 486 S.E.2d at 280), but held the trial court “was

not precluded from exercising its discretion to consider this testimony credible.” *Id.* at 662, 869 S.E.2d at 849. The Court of Appeals thus found it proper for the trial court to substitute its own credibility determination for the jury’s credibility determination. This ruling is an error of law.

The trial court making a different decision than the jury regarding a witness’s credibility and what testimony to believe also does not provide a compelling reason for overturning the jury verdict. That is particularly true here, where the evidence regarding medical expenses that the jury apparently chose not to credit was both weak and disputed. The only evidence of Mr. Jolly’s medical expenses was Dr. Frank’s testimony that he had seen \$142,000 in medical bills and that “it would not be unreasonable” for Mr. Jolly’s total medical care “to be a million dollars.” (R. 845–46). Plaintiffs did not present any medical bills or offer any supporting evidence. Instead, Plaintiffs showed their expert Dr. Frank \$142,000 in unidentified medical bills and asked him to speculate regarding Mr. Jolly’s total medical bills. During his direct examination, Dr. Frank testified, “Cases like his with the kind of extensive treatment and surgery he’s had, clearly hundreds of thousands. Cases even go to a million dollars or more.” (R. 760–61). Dr. Frank clarified that he was not saying the medical bills *would* be a million dollars, only that a million dollars was within a *possibility*:

Q. And you said about a million dollars?

A. I said *it would not be unreasonable to be a million dollars*.

....

Q. You said you had not seen many or all of the bills, correct?

A. I have not seen what I understand are all of the bills. I have seen some of them.

Q. How much have you seen?

A. \$142,000.

Q. Is there any reason that [\$]900,000, in your estimation, is missing?

A. I don’t know why they were or were not available to show me, but I was asked questions about what, for example, a surgical procedure might cost.

Q. But the best opinion on that would be . . . the medical bills, right?

A. That would be the best data.

(R. 845–46) (emphasis added). Thus, Dr. Frank himself did not consider the \$1 million in medical damages to be reasonably certain, and the trial court erred as a matter of law in crediting his testimony as “undisputed.” See *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 298 (explaining a court “must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party”); *Black*, 306 S.C. at 198, 410 S.E.2d at 596 (“The fact that testimony is not contradicted directly does not render it undisputed.”). The jury’s refusal to award medical damages based on Dr. Frank’s conjecture does not provide a compelling reason justifying *additur*. *Luchok v. Vena*, 391 S.C. 262, 263–64, 705 S.E.2d 71, 72–73 (Ct. App. 2010) (finding a jury verdict not covering medical bills was not a compelling reason to grant *additur* in light of conflicting evidence); *Tarrants v. Owens-Corning Fiberglass Corp.*, No. 97-6043, 2000 WL 977375 at \*4 (6th Cir. 2000) (refusing to set aside a jury’s damages award when plaintiff “failed to produce any written documentation to support her claims for out-of-pocket medical and funeral expenses”).

Ultimately, a determination of the amount of Mr. Jolly’s total medical expenses turned on whether the fact finder believed Dr. Frank’s testimony. The credibility of a witness is for the jury to decide. See *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997); *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984). Petitioners disputed Dr. Frank’s testimony and, in any event, the jury is not required to believe even undisputed evidence. See (R. 2306) (emphasizing the lack of evidence during Petitioners’ closing argument, stating, “There are no medical records. No medical bills. . . . You have to wonder why.”); *Steele*, 327 S.C. at 343–44, 486 S.E.2d at 280; *Black*, 306 S.C. at 198, 410 S.E.2d at 596 (“Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no.”).

A trial court is not permitted to resolve disputed evidence, take credibility determinations away from the jury, construe evidence in the moving party's favor, or substitute its view of the evidence for the jury's. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984) (noting the trial court is not empowered to simply substitute its judgment for that of the jury); *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297. Yet, under the trial court and Court of Appeals' decisions awarding Mr. Jolly \$1,000,000 in medical expense damages, the jury was required to believe Dr. Frank's testimony, and the issue of the proper award of damages was taken away from the jury when they did not credit that testimony. This is not the law, and the trial court and Court of Appeals erred in failing to give proper deference to the jury's determination.

**B. The trial court and Court of Appeals violated Petitioners' right to a trial by jury by failing to give any deference to the jury's damages award.**

Ultimately, the trial court abused its discretion by granting *additur* of \$1,570,000, because there was no compelling reason to take the assessment of damages away from the jury in this case. The evidence regarding medical damages was disputed and not supported by documentary evidence. Moreover, awards of non-economic damages are particularly within the province of the jury to determine because they are unfixated. *See Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994) ("We particularly note her claim for pain and suffering was one that peculiarly fell within the province of the jury to weigh and determine."). In support of *additur*, the trial court merely recited the evidence—the same evidence that the jury heard and assessed when making its damages award. The trial court's determination that Mr. Jolly's pain and suffering were worth more than the jury believed is not a compelling reason to take away Petitioners' constitutional right to a jury trial. Under that reasoning, every trial court would be permitted to substitute its decision for that of the jury in every personal injury case. That cannot be the law.

The trial court also did not offer a compelling reason for nearly tripling the loss of consortium award to Mrs. Jolly. It found that \$100,000 was inadequate “[g]iven everything that the Jollys have endured and that [Mrs. Jolly’s] time with Mr. Jolly will be cut short by at least ten years.” (R. 20). The trial court must articulate compelling reasons for finding a verdict is unduly conservative; it cannot merely substitute its judgment for that of the jury. *See Riley*, 414 S.C. at 193, 777 S.E.2d at 829. But that is exactly what the trial court did here: it merely recited the facts that were presented to the jury, and then came to a different conclusion than the jury regarding the amount of damages to award based on those facts. A disagreement about the import of the evidence is not a compelling reason to invade the province of the jury. *Green*, 356 S.C. at 571, 590 S.E.2d at 41 (“Where, as here, the evidence of damages is disputed, the mere listing of Green’s claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury’s province.”); (R. 19–20); *Jolly*, 435 S.C. at 663–64, 869 S.E.2d at 849–50. This is particularly true with regard to loss of consortium damages which, as the trial court recognized in its jury charge, are inherently subjective and cannot be easily quantified. (R. 2368). By substituting its subjective view of the evidence for that of the jury, the trial court abused its discretion.

**II. The Court of Appeals erred in giving effect to Plaintiffs’ impermissible, unilateral allocation of settlement proceeds—including the improper allocation of proceeds to nonexistent “future wrongful death” claims—thereby denying Fisher’s and Crosby’s right to a complete setoff.**

The Court of Appeals erred in accepting and implementing Plaintiffs’ private, unilateral, non-binding allocation of settlement proceeds to avoid a complete setoff. Plaintiffs received \$2,270,000 in settlements from other defendants, which is \$1,970,000 more than the jury awarded in total damages, and \$400,000 more than the trial court awarded after its *additur*. (R. 44). The settlement agreements were not approved by the trial court and did not allocate the amounts paid

between various causes of action. Rather, Plaintiffs represented that they had “internally” allocated the settlements one-third each to Mr. Jolly’s claim, Mrs. Jolly’s claim, and a “future” wrongful death claim. (R. 2501; R. 46). The trial court and Court of Appeals refused to reallocate Plaintiffs’ “internal” allocation, resulting in Petitioners owing \$823,333.33 to Mr. Jolly. (R. 45). This refusal to apply a complete setoff is an error of law.

Setoff is equitable in nature and is reviewed de novo on appeal. *See Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011) (stating setoff is equitable in nature, and thus an appellate court may find facts in accordance with its own view of the preponderance of the evidence). A “settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” *Rutland v. S.C. Dep’t of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). This principle is codified in South Carolina Code section 15-38-50:

When a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others ***to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is greater.***

S.C. Code Ann. § 15-38-50 (emphasis added). Accordingly, “when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law” and “the circuit court *must* award a setoff.” *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012); *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2018). The purpose of a setoff is to prevent an injured person from obtaining a double recovery for any damages sustained, because it is “almost universally held that there can be only one satisfaction for an injury or wrong.” *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145; *Smith*, 397 S.C. at 472, 724 S.E.2d at 191. The trial court and Court of Appeals’ decisions violate this principle, and must be reversed.

**A. Courts cannot give effect to a unilateral or “internal” allocation of settlement proceeds for purposes of setoff under section 15-38-50.**

The sole reason that the trial court and Court of Appeals refused to set off the entire amount of Plaintiffs’ settlement proceeds is Plaintiffs’ purported “internal” allocation of those proceeds to three different causes of action. This was error. Under section 15-38-50, courts cannot give effect to a unilateral or “internal” allocation of settlement proceeds for purposes of setoff, and the entire amount of settlement proceeds must therefore be set off in a lump sum against the judgment amount. The plain language of the statute states that a plaintiff is entitled only “to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is greater.” S.C. Code Ann. § 15-38-50. Here, the Court of Appeals recognized statutes must be read “so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,’ for ‘[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’” *Jolly*, 435 S.C. at 673–74, 869 S.E.2d at 855 (quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). There is no dispute that the releases in this case do not stipulate to what amount of the settlement is allocated to any one cause of action. Therefore, under the plain language of section 15-38-50, the set off must be equal to the total amount of consideration paid.

Although the Court of Appeals questioned “whether section 15-38-50 contemplates the ‘internal allocation’ that was merely claimed by [Plaintiffs] post-settlement rather than designated by all parties to the settlement agreement,” *id.* at 666, 869 S.E.2d at 851, it ultimately failed to follow the plain language of section 15-38-50. The Court of Appeals approved the unilateral, non-binding allocation on the ground that South Carolina case law “favors a plaintiff’s ability to apportion settlement proceeds ‘in the manner most advantageous to it.’” *Id.* at 666–67, 869 S.E.2d at 851. But a statute is the General Assembly’s expression of public policy, *see Ackerman v. S.C.*

*Dep't of Corr.*, 415 S.C. 412, 420, 782 S.E.2d 757, 761 (Ct. App. 2016); *Perpetual Fed. Sav. & Loan Ass'n v. Willingham*, 296 S.C. 24, 28 n.2, 370 S.E.2d 286, 288 n.2 (Ct. App. 1988), and a general judicial policy favoring a plaintiff's ability to apportion settlement proceeds—if that policy even applies to internal apportionments versus apportionments made in the settlement documents themselves—cannot supersede the plain language of section 15-38-50. The Court of Appeals erred in disregarding the plain language of section 15-38-50.

Courts in other jurisdictions applying setoff statutes similar to section 15-38-50 have followed the plain language of such statutes and held that where a settlement agreement fails to allocate proceeds among separate and distinct causes of action, the total amount of the settlement must be set off from the entire verdict. *See 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 amount); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000) (finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid a full setoff). This is consistent with South Carolina law.

In *Dionese*, the Florida Supreme Court held the private, unilateral allocation of settlement proceeds between husband and wife plaintiffs should be ignored by a court in determining a setoff. 500 So. 2d at 1348. The court distinguished cases in which plaintiffs and defendants agreed to a particular 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, “[t]he 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.” *Id.*

The same analysis applies to this case under section 15-38-50 of the South Carolina Code. Plaintiffs entered into general settlement agreements that did not allocate settlement funds and instead provided for “undifferentiated lump sum” payments. *See id.* Plaintiffs then privately and unilaterally allocated the funds—including allocating one-third of the funds to a nonexistent “future wrongful death” claim which could not be tried, thus removing those funds from the setoff calculation—to minimize a setoff and recover millions more than the total amount of damages the jury determined they suffered. To effectuate the policy against double recoveries and give meaning to the language of section 15-38-50, this Court should reverse the trial court and Court of Appeals and direct a complete setoff against the total jury award.

The Court of Appeals and Plaintiffs rely heavily on this Court’s decision in *Riley*, particularly with respect to this Court’s citation of a quote from a division of the Appellate Court of Illinois in the case *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006 (Ill. Ct. App. 2009). The particular quote describes, in a general fashion, the positioning of a non-settling defendant with respect to questions of allocation between a plaintiff and a settling defendant. *Riley*, 414 S.C. at 197, 777 S.E.2d at 831 (quoting *Lard*, 901 N.E.2d at 1018–19). That is not the situation here: there was no allocation of settlement proceeds between Plaintiffs and any settling defendants, only the Plaintiffs’ after-the-fact internal allocation.

Further, this quote needs context. The *Lard* Court describes the case there as one involving “difficult and unique circumstances” because it arose from security personnel spraying mace or pepper spray into a crowded nightclub, creating panic and a pile-up on stairwells, leading to

twenty-one deaths and seventy personal injury claims. *Lard*, 901 N.E.2d at 1010, 1017. Several defendants declared bankruptcy, and a qualified settlement fund (“QSF”) was established involving the case. *Id.* at 1012–13. Some defendants settled by agreeing on the record in court to pay certain sums of money into the QSF in exchange for dismissals, and no allocation of those monies was made at the time to any particular plaintiffs. *Id.* at 1013–15. Responding to a non-settling defendant’s arguments that the money paid by the settling defendants was required to be allocated to particular plaintiffs at the time, the *Lard* court stated that ordinarily that would have been required, but due to the “unique” facts before the court there, the trial court’s acceptance of the settlement without the allocation would be affirmed. *Id.* at 1017–18.

This case is nothing like *Lard*. The *Lard* court made it known that it would have ruled in favor of the defendant’s arguments there, had it not been for the “unique circumstances” before the court, stating:

We agree with Clear Channel that a specific allocation among plaintiffs and their claims before a good-faith determination is generally the normal course for parties seeking a discharge from liability under the Contribution Act. This case, however, presents unusual obstacles because it involves mass tort litigation and the most culpable defendants have been discharged in bankruptcy. Moreover, any recovery from them is limited to their insurance policies, and that insurance coverage is being contested due to allegations of fraud in the application for the policies. Due to the difficult and unique circumstances present in this case, the settling parties submitted, and the trial court granted, a petition for a good-faith finding that structured the settlement to enable the insurance companies to deposit the policy limits into a QSF for future allocation among about 90 plaintiffs by an independent administrator, subject to the trial court’s retained jurisdiction and approval. Moreover, the settlement preserves the nonsettling defendant’s objections to the future allocation for purposes of double recovery or setoff.

*Id.* at 1017. In short, *Lard* was not the “normal case,” but instead was “unique” and presented unusual issues due to its nature.

Further, the *Lard* court, in the citation relied upon by the Court of Appeals, was quoting from one of its own prior cases, *Muro v. Abel Freight Lines, Inc.*, 669 N.E.2d 1217 (Ill. Ct. App.

1996). A review of *Muro* shows it also does not help Plaintiffs. In *Muro*, the plaintiff and a defendant agreed to a settlement, but did not reach any allocation agreement between them in their agreement. *Id.* at 1217. Prior to any evidentiary hearing on the settlement, the trial court there asked for briefing on a proper allocation, and the trial court received briefing from the non-settling defendant and adopted the non-settling defendant's arguments on what the allocation should be. *Id.* at 1218. Plaintiff appealed this, and the Appellate Court of Illinois reversed, ruling that the trial court should have held an evidentiary hearing rather than simply adopting the non-settling defendant's arguments on allocation, stating:

We accordingly remand this matter for an evidentiary hearing on the allocation of the settlement proceeds. At this hearing, the trial court should evaluate the fairness and reasonableness of the allocation in view of the wrongful death and survival claims involved. In addition to the preceding good faith elements, this court has developed considerations which the trial court should contemplate when reviewing a proposed settlement and allocation in the context of wrongful death and survival claims. Expenses for loss of earnings and conscious pain and suffering of the decedent until his death should be apportioned to the survival action and the loss of benefits to the survivors should be apportioned to the wrongful death claim. *Foster v. Kanuri*, 608 N.E.2d 8 (1993). The computation and distribution of losses suffered among these causes of action should thus relate to the nature of each action.

*Muro*, 669 N.E.2d at 1219. *Muro* does not support the Court of Appeals' decision.

Thus, the Court of Appeals should be reversed. Its reliance on an out-of-context quote from *Riley*, which was in turn citing to inapposite Illinois cases,<sup>4</sup> cannot overcome the requirements of setoff mandated by state statute. The Court of Appeals should not have relied on this language from *Riley* to circumvent the setoff statutes and this Court's bedrock prohibition against double recoveries.

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<sup>4</sup> Illinois settlement law also appears to have different features not necessarily followed here in South Carolina regarding settlement approval hearings and related matters.

**B. In the alternative, the settlement proceeds must be reallocated in the interests of fairness and justice.**

Even if Plaintiffs’ “internal” allocation of settlement proceeds were proper (and it is not), South Carolina law is clear that “the . . . allocation must yield to fairness and justice.” *Welch v. Epstein*, 342 S.C. 279, 313–14, 536 S.E.2d 408, 426 (Ct. App. 2000). In *Welch*, the plaintiff settled a malpractice claim with one defendant for \$450,000, and allocated \$5,000 to the wrongful death claim and \$445,000 to the survival claim. 342 S.C. at 312, 536 S.E.2d at 425. The remaining defendant was not a party to the allocation, and the plaintiff did not have evidence of damages in the survival action other than the medical bills. *Id.* at 313–14, 536 S.E.2d at 426. The trial court reallocated the settlement so that \$28,535.88—the amount of medical bills—went to the survival action, and the remainder to the wrongful death action. *Id.* The trial court reasoned that reallocation of settlement funds to the wrongful death action that could not have been awarded in the survival action ensured “there is one complete satisfaction for the injury suffered by [plaintiff].” *Id.* at 314. The Court of Appeals affirmed the reallocation, stating “we agree with the trial judge the allocation between the survival and wrongful death claims must yield to fairness and justice.” *Id.* at 313.

This Court reached the same result in *Rutland*. There, the plaintiff settled with a defendant before trial, allocating \$138,000 to conscious pain and suffering in a potential survival claim, and \$167,000 for a wrongful death claim. 400 S.C. at 212, 734 S.E.2d at 143. The plaintiff only pursued a wrongful death claim against the remaining defendant and after the verdict the trial court re-allocated the entire settlement to offset the wrongful death damages. *Id.* at 213. This Court affirmed, noting there was no evidence to support a survival claim, so “the trial court properly reallocated that portion of the settlement to the wrongful death claim.” *Id.* at 217. The Court explained, “[c]ompensatory damages are intended to make the plaintiff whole, not to punish the

tortfeasor,” and therefore “[w]here reallocation of damages furthers that policy, we do not believe the result is inequitable.” *Id.*

In *Riley v. Ford Motor Co.*, the personal representative of the estate settled both a wrongful death claim and a survival claim based on the decedent’s conscious pain and suffering, and the settlement was approved by the trial court. 414 S.C. at 189, 777 S.E.2d at 827. Had the decedent not died before trial, he could have asserted his claim for conscious pain and suffering as part of a personal injury action, and therefore it “survived” to his estate. *See* S.C. Code Ann. § 15-5-90; *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002) (“Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative.”). The personal representative tried only the wrongful death claim to verdict. This Court upheld the trial court’s refusal to reallocate the settlement of the survival claim to offset the damages awarded in the wrongful death action. *Riley*, 414 S.C. at 196, 777 S.E.2d at 830. In *Riley*, as opposed to *Rutland* or *Welch*, the settlement agreement between plaintiff and the settling defendant explicitly allocated the settlement funds between two existing, viable claims, and thus the court declined to alter the allocation. *Id.* at 196–97.

Here, there was no allocation between Plaintiffs and the settling defendants in their settlement agreements, nor were those agreements court approved. Rather, Plaintiffs unilaterally and internally allocated one-third of the settlement to Mr. Jolly’s personal injury claims, one-third to Mrs. Jolly’s loss of consortium claims, and one-third to Mr. Jolly’s estate’s “future wrongful death” claim. That allocation—beyond lacking any force under South Carolina law because it was done unilaterally by Plaintiffs rather than as part of the settlement agreements with defendants—must be reallocated, because Plaintiffs’ purported “future” wrongful death claim is barred as a matter of law.

Consistent with the language of South Carolina Code section 15-51-10, South Carolina courts have repeatedly held “a claim under the Wrongful Death Act lies in the decedent’s estate only when the decedent possessed the right of recovery at his death.” *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010). Thus, if a living plaintiff executes a release of a personal injury claim, that same release extinguishes any wrongful death claim on his behalf. *Id.* at 349, 699 S.E.2d at 146. Accordingly, although wrongful death and personal injury claims are facially different, they seek redress for the same injury—here, Mr. Jolly’s mesothelioma and eventual death—and vary only in who brings the claims and whether the claims are brought before or after the injured person’s death. *See* (R. 2366–67) (instructing the jury to compensate Plaintiffs for their future damages because only one recovery can be sought); (R. 19–20) (citing Mr. Jolly’s expected death as a reason for *additur*).

In *Price v. Richmond & D.R. Co.*, 33 S.C. 556, 12 S.E. 413, 414 (1890), the decedent settled personal injury claims and released the defendant prior to death. The administrator of his estate filed a wrongful death claim against the same defendant. *Id.* This Court found:

the capacity of the deceased to maintain an action based upon the injury which caused his death is made the test of the right of the administrator to maintain the action provided for by the statute; hence if the deceased has debarred himself, by his contributory negligence, *or by any other cause*, from maintaining his action based upon the injury which caused his death, it follows necessarily that his administrator is likewise barred of his right of action, which would otherwise be secured to him by the statute.

*Id.* at 413–14 (emphasis added). Thus, the test is whether the decedent, *if he had not died*, could have maintained the action. *Id.* at 414. Because the decedent had already settled and released his personal injury claims, he could not have maintained another cause of action if he had not died, and his estate was barred from recovering on its wrongful death claim. *Id.*; *see also Reed v.*

*Northeastern R. Co.*, 37 S.C. 42, 16 S.E. 289, 291 (1892) (noting a valid release will “defeat the right of recovery . . . in case of his death”).

Recent cases reaffirm these principles. In *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 940 (D.S.C. 1988), an insulator with an asbestos-related disease sued and settled personal injury claims with numerous manufacturers; years later, after his death, his estate’s personal representative filed a wrongful death claim against a defendant who was not a prior party. *Id.* The statute of limitations on the insulator’s personal injury claims had run, but the wrongful death statute of limitations had not. *Id.* Judge Anderson analyzed the wrongful death statute and held that it “creates a new statutory right in the personal representative, the right exists only if the decedent could have maintained such an action had he lived. The right to bring a wrongful death claim is thus conditioned upon the decedent’s right to maintain a claim or action.” *Id.* Thus, since the insulator could not have maintained a personal injury claim at the time of his death due to the expiration of the statute of limitations, his estate could not maintain a wrongful death claim. *Id.*

This Court approved of this analysis in *Stokes*, 389 S.C. 343, 699 S.E.2d 143. Justice Kittredge—citing *Price*—explained, “Succinctly stated, if the decedent had no claim at his death, the estate has no claim.” *Id.* at 347, 699 S.E.2d at 145. The Court found Judge Anderson correctly decided *Quattlebaum* by “adher[ing] to the principle that a decedent’s estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.” *Id.* at 349, 699 S.E.2d at 146. Finally, the Court reaffirmed “that a claim under the Wrongful Death Act lies in the decedent’s estate only when the decedent possessed the right of recovery at his death.” *Id.*

In this case, under South Carolina law, release of the personal injury claims alone would have resulted in the termination of a “future” wrongful death claim, and without any required

additional payment. Here, Plaintiffs unilaterally allocated one-third of their settlement proceeds to a wrongful death claim that, after the release of the personal injury claims, no longer existed, and that Mr. Jolly's estate would never be able to pursue. (R. 2501; R. 46). That unilateral allocation of one-third of the total settlement amounts to "future" wrongful death claims was improper, and must cede to fairness and equity. As such, it was improper not to set off this amount.

Further, the facts here make this case more similar to *Rutland* and *Welch* than *Riley*, upon which the trial court and Court of Appeals relied. *Riley* rejected a reallocation argument as to two claims that then existed, instead deferring to the allocation in the settlement agreement between the parties which had been approved by the trial court. In *Rutland* and *Welch*, the court upheld reallocation of settlement amounts by trial courts from claims that failed as a matter of law (survival claims) to the existing wrongful death claims to prevent a double recovery. As in *Rutland* and *Welch* (and unlike *Riley*), Plaintiffs here unilaterally allocated \$756,666.67 in settlements to a wrongful death claim that did not exist as a matter of law at the time of the settlements (and may not have ever existed), does not exist now, and is barred as a matter of law in the future, thereby depriving Fisher and Crosby of the ability to set off those settlement amounts. Allowing plaintiffs to allocate funds to claims they cannot pursue defeats the intent of the setoff statute, and violates the rule that settlement allocations "must yield to fairness and justice." See S.C. Code Ann. § 15-38-50; *Welch*, 342 S.C. at 313–14, 536 S.E.2d at 426.

**C. The trial court's and Court of Appeals' setoff application improperly results in a double recovery.**

The trial court's and Court of Appeals' refusal to apply all settlement proceeds to the setoff, combined with the new trial *nisi additur*, also violates South Carolina law because it results in a double recovery for Plaintiffs. See *Smith*, 397 S.C. at 472, 724 S.E.2d at 190. The trial court

explicitly instructed the jury to consider Plaintiffs' future damages, because Plaintiffs would not be able to bring another action to recover those damages:

Damages – future damages. Now, in determining the amount of compensation for someone personally injured by another's misconduct, it's proper to consider past, present and future aspects of the injury. The injured party may recover for those future damages that are reasonably certain to result. ***The principal [sic] underlying compensation is that only one action can be brought, and therefore, only one recovery had.*** So it may be, depending on your view of the evidence, proper to include the estimate of future damages, future medical expenses, and pain and suffering that will with reasonable certainty result.

(R. 2366–67) (emphasis added). Therefore, regardless of how Plaintiffs titled their causes of action, the settlements and damages they received were all for the same injury, requiring setoff. *Smith*, 397 S.C. at 472, 724 S.E.2d at 190. The refusal to set off the amount Plaintiffs allocated to their non-existent future wrongful death claims creates a windfall.

Likewise, in the trial court's decision granting the new trial *nisi additur* and increasing the damages to \$1,580,000 for Mr. Jolly and \$290,000 for Mrs. Jolly, the court noted categories of *future* damages, including damages related to "Mr. Jolly's expected death," which the court noted would likely be "a bad death," and to Mrs. Jolly losing her husband. (R. 19–20). Even after the trial court's *additur* ruling, which was explicitly intended to include future damages related to Mr. Jolly's death from mesothelioma, Plaintiffs recovered \$400,000 more in *settlements* than the trial court's calculation their total damages. The trial court's refusal to set off Plaintiffs' full settlement amounts results in Plaintiffs receiving an additional \$823,333.33 from Fisher and Crosby, for a total of over \$1.2 million more than the trial court's *additur* damages award.

"Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor." *Rutland*, 400 S.C. at 217, 734 S.E.2d at 146; *see also Haselden v. Davis*, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2004) (the "central tenet of compensatory damages [that] awards are intended to make an injured person whole by placing him in the position enjoyed prior to the

injury and no more”).<sup>5</sup> Yet, for Plaintiffs’ injuries related to Mr. Jolly’s mesothelioma, Plaintiffs will receive \$3,093,333.33 in payments for claims that resulted in only \$300,000 in damages according to the jury, and \$1,870,000 in damages according to the trial court. That is not compensation; that is a double payment to the tune of over \$1.2 million. It is also an error of law, because it denies Fisher and Crosby the setoff to which they are entitled under section 15-38-50. Accordingly, setoff of the settlement proceeds is required both as a matter of law and public policy.

In short, even if this Court affirms the granting of new trial *nisi additur* (which it should not), this Court should reverse the trial court’s setoff and allocation ruling and order that all settlement funds be set off in a lump sum from the total judgment against Fisher and Crosby. In the alternative, the Court should order that all settlement funds allocated to personal injury claims and “future wrongful death claims”—a total of approximately \$1,513,333.34—be set off against the increased award to Mr. Jolly.

### **Conclusion**

This Court should reverse the Court of Appeals’ error of law in allowing the trial court’s *additur* ruling to stand. In the alternative, if the Court affirms the *additur* ruling, it should reverse the Court of Appeals’ and trial court’s failure to apply a complete setoff.

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<sup>5</sup> The jury rejected Plaintiffs’ request for punitive damages. (R. 52).

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *s/C. Mitchell Brown*

C. Mitchell Brown

SC Bar No. 012872

E-Mail: [mitch.brown@nelsonmullins.com](mailto:mitch.brown@nelsonmullins.com)

A. Mattison Bogan

SC Bar No. 72629

E-Mail: [matt.bogan@nelsonmullins.com](mailto:matt.bogan@nelsonmullins.com)

James B. Glenn

SC Bar No. 77731

E-Mail: [jase.glenn@nelsonmullins.com](mailto:jase.glenn@nelsonmullins.com)

Nicholas A. Charles

SC Bar No. 101693

E-Mail: [nick.charles@nelsonmullins.com](mailto:nick.charles@nelsonmullins.com)

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Fisher Controls International LLC and Crosby  
Valve, LLC

Columbia, South Carolina

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