THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Judge

Appellate Case No. 2017-002611

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..... Petitioner.

APPENDIX – VOLUME XIII

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APPENDIX
INDEX

Volume 1

Volume II

Volume III

Volume IV

Volume V

Volume VI

Volume VII

Volume VIII

Volume IX

Volume X

Volume XI

Volume XII

Volume XIII

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PETITION FOR REHEARING

Pursuant to 221(a) and 240 of the South Carolina Appellate Court Rules, Appellants Fisher Controls International LLC ("Fisher") and Crosby Valve, LLC ("Crosby") request rehearing of the Court's opinion issued September 1, 2021, affirming the trial court's rulings in favor of Beverly Dale Jolly ("Mr. Jolly") and Brenda Rice Jolly ("Mrs. Jolly") (together, "Plaintiffs"). *See Jolly v. Gen. Elec. Co.*, Op. No. 5858 (S.C. Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 139). Fisher and Crosby further request rehearing *en banc* pursuant to Rule 219(b) of the South Carolina Appellate Court Rules.[1]

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[1] Consideration by the full court is necessary to maintain uniformity of decisions and because the case involves questions of exceptional importance—including, among others, the standard of proof required in mesothelioma cases, whether South Carolina law allows the "every exposure" causation opinion, and whether a court can speculate about the allocation of a general verdict and grant a new trial *nisi additur* based on that speculation.

The Court incorrectly chose to adopt the Pennsylvania Supreme Court's 4-2 *Rost* decision as the law controlling this matter, rather than deciding the case on South Carolina law. In doing so, the Court relied on evidence actually never presented to the jury, and overlooked expert testimony espousing the "every exposure" opinion. The Court improperly shifted the burden of proof on Plaintiffs' design defect claims from Plaintiffs to Fisher and Crosby. The Court disregarded the trial court's expressed basis for its new trial *nisi additur* award, instead supplying this Court's own rationale for the award despite lacking the power to grant *additur*, and otherwise overlooked and misapprehended binding precedent and the record on appeal, as set forth herein.

The Court should grant rehearing and reverse the trial court's rulings based on the arguments below and all arguments raised by Fisher and Crosby in their briefing and at oral argument, which Fisher and Crosby incorporate into this petition.

Argument

I. The Court overlooked or misapprehended the law on substantial factor causation and the testimony by Plaintiffs' experts.

The Court's decision to affirm the trial court's proximate causation ruling is based on several errors. First, the Court applied the law adopted by the Supreme Court of Pennsylvania in a 4-2 decision, which is erroneous. Second, the Court misapprehended the record and relied on statements in Dr. Frank's affidavit—which were never published to the jury—to distinguish his opinions from the "every exposure" opinion, despite his clear testimony that any exposure to Fisher or Crosby valves was a substantial factor in causing Mr. Jolly's mesothelioma. Finally, the Court misconstrued the factual evidence to the extent it found Mr. Jolly's testimony alone is sufficient to establish substantial factor causation.

A. The Court incorrectly relied upon *Rost v. Ford Motor Co.* to lower the standard of proof required in mesothelioma cases and justify Plaintiffs' expert testimony.

In affirming the trial court's proximate causation rulings, this Court relied primarily on Pennsylvania law by citing *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), a 4-2 Pennsylvania Supreme Court decision, and a predecessor to *Rost*, *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 30 (Pa. 2012). The Court improperly applied those cases and overlooked the differences between South Carolina law and Pennsylvania law generally, and those cases specifically. The Court's reliance on *Rost* caused two errors: first, the Court erroneously recognized a lower causation standard for mesothelioma cases than for asbestosis cases, and second, the Court erroneously distinguished the "cumulative dose" opinion from the "every exposure" opinion.

Pennsylvania law differs due to the origin of its substantial factor causation standard. The Pennsylvania Supreme Court adopted the substantial factor causation test set forth by the Seventh Circuit in *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992). *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 226 (Pa. 2007) (adopting the *Tragarz* test). *Tragarz* applied Illinois proximate cause law, which allows for a "less rigid" frequency, regularity, and proximity test in cases of mesothelioma. 980 F.2d at 420–21. Moreover, the majority in *Rost* rejected any need for a comparative assessment of differing exposures on the ground that "[i]n *Tragarz*, the Seventh Circuit specifically rejected any notion that its test requires a comparative analysis of different exposures to asbestos, and instead made clear that the focus must be on the level of exposure to the defendant's product." *Rost*, 151 A.3d at 1051 n.13. *Rost* (and Pennsylvania law more generally) is contrary to core principles of substantial factor causation under South Carolina law and should not be relied upon as persuasive authority.

i. The causation standard must not be lowered in mesothelioma cases.

There is no basis in South Carolina law for lowering the amount of evidence required in a mesothelioma case compared to an asbestosis case. On the contrary, the South Carolina Supreme Court adopted the "frequency, regularity, and proximity" test (from *Lohrmann*,[2] an asbestosis case) *in a mesothelioma case* and has never held or even suggested the standard differs depending on which asbestos-related disease is at issue. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). This Court is not empowered, based on an expert's opinion, to adopt a lower standard in mesothelioma cases where the Supreme Court has not. Op. No. 5858 (Howard Adv. Sh. No. 30 at 147 n.11) ("However, the present case does not concern asbestosis, which, *according to Dr. Frank*, requires higher exposure levels than the exposure levels that can cause mesothelioma. Therefore, the facts in *Lohrmann* do not lend themselves to a valid comparison with the facts in the present case." (emphasis added)).

Further, whether to lower the *Henderson/Lohrmann* standard in mesothelioma cases is not at issue, and this Court should not make such a consequential statement especially considering the question is not before the Court. *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 339 (Tex. 2014) ("More fundamentally, if we were to adopt a less demanding standard for mesothelioma cases and accept that any exposure to asbestos is sufficient to establish liability, the result essentially would be not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime."). Essentially, the Court should not take the step of excepting mesothelioma cases from *Henderson/Lohrmann*, while leaving *Henderson/Lohrmann* applicable for other diseases, because Plaintiffs' expert Dr. Frank says it should.

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[2] *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1158 (4th Cir. 1986).

Importantly, the substantial factor causation test—created by the Fourth Circuit in *Lohrmann* and adopted for mesothelioma cases by the South Carolina Supreme Court in *Henderson*—is a thoughtful effort to balance fairness to plaintiffs *and* defendants. Recognizing the potential unfairness of depriving persons with latent diseases of any recovery because they cannot prove certain causation, the *Lohrmann* test provides an avenue for those persons to recover without throwing the law of proximate causation to the wind and permitting those persons to affix liability against any party for whom there is a mere possibility of causation. *See, e.g.*, David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008) ("This [*Lohrmann*] test attempts to reduce the evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs' injuries."). After the creation of the test by the Fourth Circuit, the *Lohrmann* test has enjoyed wide adoption and application for decades by numerous courts, many of which adopted the test precisely because it ensures fairness to both plaintiffs and defendants.[3]

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[3] *See, e.g.*, *Slaughter v. Southern Talc Co.*, 949 F.2d 167 171 (5th Cir. 1991) (noting that the *Lohrmann* test is the most frequently used test for causation in asbestos cases); Charles Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 AM. J. TRIAL ADVOC. 571, 572 (2008) ("The majority of the federal circuits and state courts addressing this question have chosen to apply the *Lohrmann* test to determine whether the plaintiff has satisfied his burden of showing that a specific defendant's products caused his disease.").

Courts adopting *Lohrmann* have said the purpose behind its test is to establish a standard for substantial factor causation. *See, e.g.*, *Chism v. W.R. Grace & Co.*, 158 F.3d 988, 992 (8th Cir. 1998) (describing the test as a "standard for proximate causation in asbestos cases"); *Gorman-Rupp Co. v. Hall*, 908 So.2d 749, 755 (Miss. 2005) (describing the *Lohrmann* test in the context of causation principles); *Chavers v. Gen. Motors Corp.*, 79 S.W.3d 361, 367 (Ark. 2002) (describing the *Lohrmann* test as a standard for proof of causation); *Horton v. Harwick Chem. Corp.*, 653 N.E.2d 1196, 1206 (Ohio 1995) (Wright, J., concurring in part and dissenting in part) (dissenting from the majority's rejection of the *Lohrmann* test and noting that it "is not a test which is distinct from the substantial factor standard; rather, it is a tool to enable a court to determine whether the plaintiff in an asbestos case has put forth sufficient evidence against a defendant to show that a reasonable jury could find that the defendant's conduct was a substantial factor in

The Court should grant rehearing, follow *Henderson* as it is bound to do, and clarify that the causation standard is the same in both asbestosis and mesothelioma cases under South Carolina law.

ii. There is no basis in South Carolina law for differentiating between the "cumulative dose" and "every exposure" opinions.

This Court misapprehended the "cumulative dose" testimony of Plaintiffs' experts. Relying on *Rost* and *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017), the Court maintained that "cumulative dose" testimony is reliable and is different from "each and every exposure" testimony. *See generally* Op. No. 5858 (Howard Adv. Sh. No. 30 at 147–57). The Court further held the "cumulative dose" theory does not run afoul of the *Henderson* or *Lohrmann* causation tests. *Id.* The Court's holdings misapprehend the nature of the "cumulative dose" theory—which does not differ from the "each and every exposure" theory—and the law of substantial factor causation. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (rejecting a cumulative exposure theory of causation because it was effectively the same as an each and every exposure theory); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar seeks to base his causation opinion not on the thin reed that he cannot rule any exposure out, but on the opposite: he rules all exposures 'in,' boldly stating that Mr. Smith's mesothelioma 'was caused by his total and cumulative exposure to asbestos, with all exposures and all products playing a contributing role.' This asks too much from too little evidence as far as the law is concerned.").

Unlike the Pennsylvania Supreme Court in *Rost*, the South Carolina Supreme Court has never rejected the principle that the substantial factor causation test requires a comparative analysis

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causing the plaintiff's harm"), *overturned due to legislative action* (Sept. 2, 2004) (adopting the *Lohrmann* test).

of different exposures to asbestos. *See Rost*, 151 A.3d at 1051 n.13. South Carolina's substantial factor causation test derives from the Fourth Circuit's adoption of the test in *Lohrmann. Henderson*, 373 S.C. at 185, 644 S.E.2d at 727. Courts in the Fourth Circuit, applying South Carolina law, have found substantial factor causation requires more than proof a decedent had "occupational" or "above background" exposures from a defendant's product. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) ("[T]he mere fact that 'occupational' or 'above-background' exposures contribute to the total cumulative dose fails to explain why [a plaintiff's expert] views them as more causative than non-occupational or below-background exposures."). It also requires a *contextual analysis*—causation experts must evaluate the relative significance of a decedent's exposures. *See Haskins*, 2017 WL 3118017, at *8 ("[A] robust concept of 'substantial causation' should account for the broader context in which a particular exposure occurs—including the defendant's relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract."). Thus, although short exposures ***may*** perhaps satisfy the standard if they are the ***only*** exposures, a plaintiff cannot satisfy her burden by merely showing "above background" exposure to a particular product if significant evidence of other exposures exists. *See id.*[4]

[4] The Court rejected the analysis of Judge David Norton of the U.S. District Court for the District of South Carolina in *Haskins* regarding expert testimony and relied, instead, on an unsigned case comment written by second-year law students reflecting the students' opinions as to what the causation standard in toxic tort cases should be. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 144, 145 n.7, 156) (relying on *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound*, 131 HARV. L. REV. 658 (2017)); *see also About*, HARV. L. REV. ("Most student writing takes the form of Notes, Recent Cases, and Recent Legislation. . . . Recent Cases and Recent Legislation are normally 8 pages and are written mainly by second-year students. Recent Cases are comments on recent decisions by courts other than the U.S. Supreme Court, such as state supreme courts, federal circuit courts, federal district courts, and foreign courts. . . . All student writing is unsigned."), https://harvardlawreview.org/about (last visited September 22, 2021). The Court should give the case comment no weight. Moreover, the

Similarly, Fisher and Crosby do not argue that Plaintiffs "must exclude every other possible cause" of Mr. Jolly's mesothelioma or that "a precise quantification of the number of asbestos fibers to which [Mr. Jolly] was exposed" is required. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 151). Rather, Fisher and Crosby plainly argued, consistent with Fourth Circuit law from which the substantial factor causation test derives, that some qualitative analysis comparing Mr. Jolly's exposures from Fisher or Crosby with his exposures from other sources is necessary to determine whether Fisher or Crosby exposures were a substantial factor in Mr. Jolly's cumulative dose which caused his disease. *See* (App. Br. 11–12, 20); (Reply Br. 8) ("Appellants are not arguing that Plaintiffs had to exactly quantify Mr. Jolly's exposure to asbestos."); *Haskins*, 2017 WL 3118017, at *8. Plaintiffs' experts cannot reliably opine that exposure to Fisher valves or Crosby valves was a substantial factor in causing Mr. Jolly's disease by pretending the Fisher or Crosby exposures were Mr. Jolly's only exposures and ignoring context.[5] The Court's ruling and Plaintiffs' expert testimony, in effect, creates strict liability for any above-background exposures. The substantial factor test was designed to avoid this unbounded liability. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016).

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case comment argues, in circular fashion, that courts should ignore the legal causation standard adopted by the South Carolina Supreme Court in *Henderson* and, instead, allow plaintiffs to tell the jury it is "feasible" that a defendant caused the plaintiff's mesothelioma if there is any evidence of exposure to the defendant's product. 131 HARV. L. REV. at 665. The case comment's suggestion is incompatible with South Carolina law.

[5] Finally, the Court's footnote suggesting the admissibility of Plaintiffs' experts may be the law of the case is erroneous. Op. No. 5858 (Howard Adv. Sh. No. 30 at 157 n.18). A party is not required to set forth every single *argument* in the statement of issues on appeal. Fisher and Crosby's statement of *issues* is broad enough encompass the sub-arguments that they are entitled to JNOV because, if the experts' testimony is inadmissible, Plaintiffs lack specific causation evidence and cannot satisfy their burden of proof as a matter of law. *See Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019).

Rost was, apart from being wrongly decided, grounded in the differences between South Carolina law and the law of other states. Thus, by applying *Rost*, this Court is applying a different standard than that adopted by the South Carolina Supreme Court, and the Court's holding in this case therefore conflicts with binding precedent.[6]

Lastly, *Lohrmann*, adopted by *Henderson*, is a product-specific test, which asks whether the evidence would permit a reasonable jury to conclude that a specific manufacturer's product was a substantial cause of the plaintiff's disease. *Lohrmann*, 782 F.2d at 1162–63. A plaintiff cannot meet her burden under *Lohrmann* by simply showing that general asbestos exposure cumulatively caused her disease. *See, e.g.*, *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 482 (Ohio 2018) (collecting cases from across jurisdictions); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (rejecting the "any exposure" test as contrary to principles of substantial factor causation); *Yates v. Ford Motor Co.*, 115 F. Supp. 3d 841, 847 (E.D.N.C. 2015); Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479, 480 (2008).

B. The Court misconstrued Dr. Frank's testimony.

The Court also misapprehended the testimony and legal standard when it relied on the word "contributing" as somehow distinguishing Dr. Frank's testimony. Op. No. 5858 (Howard Adv. Sh. No. 30 at 154 n.17). "Substantial factor" and "substantial contributing factor" have the same

[6] The Court also relied on *Bobo* but overlooked the distinguishing facts in that case. The *Bobo* court, in a "take home" exposure case against the Tennessee Valley Authority, noted the plaintiff wife was exposed an estimated two thousand times to asbestos dust from the Tennessee Valley Authority which she inhaled in visible "fog[]" like quantities by cleaning her husband's clothes, which were covered with asbestos dust from his job. 855 F.3d at 1298. The evidence of exposure in this case is categorically different. Further, the South Carolina Supreme Court has not had occasion to consider "take home" exposure liability, and for this further reason this Court should not rely on *Bobo*.

meaning. Courts regularly refer to the standard as requiring proof that a defendant's product was a "substantial contributing factor"—including the *Betz* case this Court quoted and relied upon in its opinion. *See Betz*, 44 A.3d at 30 ("The civil action underlying this appeal was selected as a test case for the admissibility of expert opinion evidence to the effect that each and every fiber of inhaled asbestos is a *substantial contributing factor* to any asbestos-related disease." (emphasis added)); *see also, e.g.*, *Haislip v. Owens-Corning Fiberglas Corp.*, 86 F.3d 1150 (4th Cir. 1996) ("To prevail on a product liability asbestos action under North Carolina law, the estate needed to establish that OCF–Kaylo was a *substantial contributing factor* to Elmore's contraction of mesothelioma." (emphasis added)); *Pace v. John Crane, Inc.*, No. 2:11-CV-02688-BM, 2014 WL 12638334, at *1 (D.S.C. Nov. 25, 2014) ("The exposure to John Crane, Inc. products was a *substantial contributing factor* in the development of William Pace's mesothelioma." (emphasis added)), *aff'd sub nom. Pace v. Air & Liquid Sys. Corp.*, 642 F. App'x 244 (4th Cir. 2016); Op. No. 5858 (Howard Adv. Sh. No. 30 at 152) (quoting *Betz*). Thus, Dr. Frank testified about the legal standard, and the Court must evaluate his testimony as he gave it, rather than focusing in on certain key words.

The Court emphasized Dr. Frank's testimony that mesothelioma is caused by a person's cumulative dose. The question for Dr. Frank at trial, therefore, was which exposures were *substantial* contributors to the cumulative dose and which exposures were *insubstantial* contributors. Dr. Frank repeatedly testified that ***every*** exposure is a *substantial* contributing factor, thus telling the jury every exposure is a legal proximate cause of Mr. Jolly's mesothelioma:

- Dr. Frank agreed that if somebody is exposed to gasket removal and "gets mesothelioma decades later," that exposure was "an *important and substantial part of the cause* of that mesothelioma." (R. 714–15) (emphasis added).
- Dr. Frank agreed that exposure to the removal of asbestos-containing gaskets "on one occasion" "*would be a substantial contributing factor.*" (R. 723–24) (emphasis added).

- When asked how his opinion would be affected if a person had multiple exposures, he explained "*[t]hey all were substantial factors*." (R. 725–26) (emphasis added).

- Dr. Frank testified, "If Mr. Jolly was, in fact, exposed to Fisher Control valves and had exposure to asbestos, they would have been a *substantial contributing cause* to his mesothelioma." (R. 733) (emphasis added).

- Dr. Frank testified, "*Whatever can be documented that he actually had*, I would be sitting here telling you it *was a substantial contributing cause* to his disease." (R. 791) (emphases added).

When asked to assume a person was exposed to removal of an asbestos-containing gasket one time, Dr. Frank used an analogy to reinforce his opinion that every exposure to asbestos is a substantial factor in causing a person's mesothelioma:

> What we have to say at the end of the day, if someone gets a mesothelioma, is that the cumulative exposure they have had to asbestos from whatever products over whatever time is what gave it to them. So I could give you, you know, an analogy about small amounts of things. If we argue, for example, that one cigarette won't give you lung cancer and somebody decides to -- and there is a million brands of cigarettes. Now, there aren't. But let's say there is a million brands of cigarettes. Somebody decides to smoke. They smoke one each of the million cigarettes and they get lung cancer. Do you throw out one cigarette because each cigarette is inconsequential, or do you say the totality is what gave someone their lung cancer? The same thing applies to asbestos. Some products contribute more; some contribute less, but you can't leave any of them out because it is a cumulative exposure, the totality of what people were exposed to that gave them their disease. So all of them have to be included.

(R. 715–16).

Respectfully, the Court's casting of Dr. Frank's testimony as something different—namely that each exposure was a contributing factor to Mr. Jolly's cumulative dose but not, in the Court's view, a substantial contributing factor in causing Mr. Jolly's disease—is contradicted by Dr. Frank's plain testimony. Dr. Frank testified that every exposure to asbestos was a substantial

contributing factor in causing Mr. Jolly's disease, and thus offered the inadmissible and unreliable "each and every exposure" opinion.[7]

The Court also erred by repeatedly relying on Dr. Frank's affidavit, particularly for the proposition that Dr. Frank was not applying a legal causation standard, as a critical factor separating his opinions from the "each and every exposure" opinion. Op. No. 5858 (Howard Adv. Sh. No. 30 at 148–49, 154 n.17, 158–59); (R. 2944–45). Importantly, Dr. Frank's affidavit was admitted as demonstrative evidence only and was not supplied to the jury for use during deliberations. (R. 781–82). Thus, any statement in the affidavit not read aloud at trial was never presented to the jury. The Court overlooked this fact, instead holding statements in Dr. Frank's affidavit that were *not read to the jury* somehow clarified to the jury that Dr. Frank was not offering an opinion as to the legal causation standard. Op. No. 5858 (Howard Adv. Sh. No. 30 at 159). Contrary to the Court's misapprehension, Dr. Frank never told the jury he was not applying a legal causation standard, and the jury never saw or heard the statements in the affidavit this Court relies upon as distinguishing his "medical and scientific" opinions from legal causation opinions. The issue here is what Dr. Frank told the jury, not what Dr. Frank wrote in a "learned treatise" that he prepared in 2016 which contained no opinions specific to Mr. Jolly's case or any case. *See generally* (R. 781–82, 2734–2949). The affidavit is not a specific causation opinion at all and, therefore, is not relevant to the issue before the Court. The Court overlooked and misapprehended the evidence presented at trial. It should grant rehearing and reverse the trial court's JNOV ruling.[8]

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[7] The opinions of Plaintiff's other expert witnesses are also inadmissible "every exposure" opinions for the reasons stated above and the reasons Fisher and Crosby explained in their briefing and at oral argument.

[8] Contrary to the Court's holding, Fisher and Crosby's Rule 403 argument is preserved. The trial court ruled on the argument at trial. (R. 783–84) (denying Fisher and Crosby's renewal of their motion to exclude Dr. Frank's testimony based on the grounds stated in their written motion, which

C. The Court misapprehended the factual evidence and overlooked causation requirements to the extent it found Mr. Jolly's testimony alone is sufficient to establish substantial factor causation.

The Court appears to hold that Mr. Jolly's testimony alone establishes specific causation such that exclusion of the experts' testimony may not be fatal to his case. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 147). In so holding, the Court both misapprehends the fact testimony and overlooks the requirement of expert medical causation testimony.

The Court's misapprehension of the fact testimony pervades its analysis. Although the Court acknowledges that Fisher and Crosby were just two of a dozen valve brands present at the Duke facilities where Mr. Jolly worked, the Court fails to recognize that if Fisher and Crosby valves each accounted for less than 10% of the valves, then Fisher and Crosby valves may account for less than 10% of Mr. Jolly's valve-related exposure. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 156). Instead, the Court recites several paragraphs' worth of general "valve" testimony before concluding that all such general valve-related testimony was in fact evidence of exposure to Fisher valves and Crosby valves. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 146–47). This is simply not what the evidence reflects. By repeating Plaintiffs' and the trial court's error in reciting testimony about valves generally, then making a logical leap and assuming all of the valve testimony related to Fisher or Crosby valves, the Court overlooked and misapprehended the evidence.

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included a Rule 403 argument); (R. 4390). The Court ruled in its final order that the expert testimony was "supported by the scientific literature as well as the facts of this case, and was relevant and helpful to the jury," (R. 42), thus rejecting Fisher and Crosby's Rule 403 argument. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, or *misleading the jury* . . . ." (emphases added)).

The Court also misapprehended the use of the term "flange gasket." Participants in asbestos litigation, including witnesses, commonly use "flange gaskets" to refer to gaskets applied to the external flange connecting a valve to piping and use "internal gaskets" or "internal components" to refer to gaskets inside the valve. *See, e.g.*, (R. 1487) (showing the trial court cross-examining Crosby's corporate representative and differentiating between "internal gaskets" and "flange gaskets," which Crosby did not sell to Duke). Thus, this Court's statement that "the term 'flange gasket' should encompass these internal gaskets that [Fisher and Crosby] undoubtedly sold to Duke," Op. No. 5858 (Howard Adv. Sh. No. 30 at 146), is inconsistent with common usage and the parties' and even the trial court's usage in this case. Hence, to the extent this Court construed "flange gaskets" to include internal gaskets in holding that Mr. Jolly's testimony alone satisfied the substantial factor test, the Court misapprehended the record and common usage of those terms in asbestos litigation.

Finally, and regardless, Plaintiffs still must present reliable, admissible medical causation testimony to assist the jury in understanding whether exposures from Fisher and Crosby valves caused Mr. Jolly's mesothelioma. *See* Rule 702, SCRE; *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446–47, 699 S.E.2d 169, 175–76 (2010). The Court itself acknowledged the need for expert testimony in its opinion. Op. No. 5858 (Howard Adv. Sh. No. 30 at 144). Plaintiffs failed to present reliable, admissible expert testimony, for the reasons Fisher and Crosby have stated throughout this appeal. This failure is fatal to their claims, and the Court should grant rehearing and reverse the trial court's denial of JNOV.

II. This Court incorrectly shifted the burden to Fisher and Crosby in several respects.

This Court erroneously shifted the burden of proof on Plaintiffs' design defect claim, finding the claim was a jury question because "there was no evidence that a metal gasket was more expensive than an asbestos gasket." Op. No. 5858 (Howard Adv. Sh. No. 30 at 168). The Court is correct that the record contains no evidence as to the cost of using a metal gasket as a purported alternative design. However, *Plaintiffs* bore the burden of proving the costs of the alternative design. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010) ("In sum, in a product liability design defect action, *the plaintiff must present evidence of a reasonable alternative design.* The *plaintiff* will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. *This presentation of an alternative design must include consideration of the costs*, safety and functionality *associated with the alternative design.*" (emphases added)).

Fisher and Crosby do not bear the burden to prove a supposed alternative is more expensive in the absence of any proof supporting Plaintiffs' claims. *See id.* Thus, the absence of any evidence showing the cost of a metal gasket is a failure of Plaintiffs' proof; it cannot be a basis to affirm the trial court's failure to grant JNOV. *See Newbern v. Ford Motor Co.*, 428 S.C. 310, 318–19, 833 S.E.2d 861, 866 (Ct. App. 2019) (affirming a directed verdict after failing "to find evidence of both defective design and a feasibly alternative design that would have made the airbag system safer"); *see also Hulsizer v. Magline, Inc.*, No. 4:17-CV-00415-RBH, 2018 WL 5617873, at *4 (D.S.C. Oct. 29, 2018) ("[T]he district court must determine whether there is evidence tending to create genuine issues of material fact on *each of the factors (safety, costs, and functionality)* relevant to the risk-utility analysis and its required showing of an alternative feasible design, in accordance with *Branham.*"). To the extent the Court relies on section 2 of the Restatement (Third)

of Torts: *Products Liability* for the proposition that a plaintiff is not required to prove each factor of the risk-utility test, that proposition conflicts with binding precedent, and is erroneous. *Branham*, 390 S.C. at 225, 701 S.E.2d at 16.

While improperly shifting the burden to Fisher and Crosby, the Court acknowledged the lack of any evidence supporting an element of Plaintiffs' design defect claim. The Court overlooked or misapprehended these facts and Plaintiffs' burden of proof. Accordingly, the Court should grant rehearing, reverse the trial court, and find Fisher and Crosby are entitled to JNOV on Plaintiffs' design defect claim.

III. The Court's *additur* ruling overlooks and misapprehends binding precedent.

This Court failed to properly apply binding precedent in affirming the trial court's erroneous new trial *nisi additur* ruling. Based on this Court's holding, a trial court considering a new trial *nisi additur* motion in the future may now (1) accept disputed evidence as true in favor of the *moving* party, and (2) *speculate* about the formulation of the jury's verdict. The Court's holding conflicts with South Carolina law. Moreover, by finding the trial court's own basis for the *additur* award was "inconsequential" or not "critical," this Court substituted its own basis for the *additur* award and exercised power it does not have.

First, a trial court reviewing a new trial motion must construe the evidence and all reasonable inferences in the light most favorable to the *nonmoving* party. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). Thus, the trial court (and this Court) was required to construe the evidence in the light most favorable to Fisher and Crosby when it considered Plaintiffs' Motion for New Trial *Nisi Additur*. Instead, both the trial court and this Court characterized, then accepted as true, Dr. Frank's testimony regarding Mr. Jolly's medical bills, and then increased the actual damages award based on that improper construction of the

evidence. But as this Court acknowledges, the jury was not required to believe Dr. Frank's testimony. Op. No. 5858 (Howard Adv. Sh. No. 30 at 178 & n.1) (citing *Steele v. Dillard*, 327 S.C. 340, 343–44, 486 S.E.2d 278, 280 (Ct. App. 1997)). If the jury was not required to believe the testimony, a construction of the evidence in the light most favorable to the *nonmoving* party compels a determination that the jury found Dr. Frank's testimony was not credible, and precludes an *additur* award based on a finding that Mr. Jolly's medical bills were $1,000,000.

Second, in rejecting consideration of *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010), and *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004), this Court overlooked a key principle of law espoused by both opinions: 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, as this Court held in opinions authored by Chief Judge Lockemy, current Chief Justice Beatty, and former Chief Judge Anderson. *Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463 ("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*, 360 S.C. at 257, 599 S.E.2d at 475 ("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.* Accordingly, the trial court committed no error in submitting the claim to the jury." (emphasis added)).[9] The Court's incorrect attempt to distinguish the principle from *Jenkins* and *Moore* as case-specific is a misapprehension of both cases.

This Court relies on a dictionary definition of "speculate," but overlooks the application of that definition to the facts of the trial court's ruling. If it is impossible to determine the allocation of the verdict, any attempt to do so is "to take to be true on the basis of insufficient evidence." *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 173) (relying on the Merriam-Webster Dictionary). However one defines "speculation," the trial court's ruling—and this Court's opinion—satisfies the definition. For example, *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 trial court and this Court theorized about the allocation of the verdict without any certain knowledge. The *Cambridge English Dictionary* provides the following definition of "speculate": "to guess possible answers to a question when you do not have enough information to be certain."[10] The trial court and this Court guessed a possible verdict allocation when neither court has enough information to be certain.

Although the record may contain some evidence that Mr. Jolly incurred $142,000 in medical bills, the Plaintiffs chose not to submit the medical bills into evidence. Regardless, it is

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[9] *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").

[10] *Speculate*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/speculate.

speculation that the jury allocated $142,000 of its $200,000 award to medical expenses. Any such conclusion is not a "reasonable inference" based on "concrete information," Op. No. 5858 (Howard Adv. Sh. No. 30 at 174); it is an unfounded guess which is not permitted under South Carolina law. *See 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. It is impossible to know how the jury allocated its general verdict. Thus, this Court and the trial court are prohibited from speculating as to the allocation of the verdict.

Finally, this Court misapprehended its own scope of review. The Court stated, despite the trial court expressly grounding its *additur* award on its finding that the jury awarded only $142,000 in medical bills, that this Court "do[es] not view [that] particular observation as critical to the circuit court's discretionary determination that the jury verdict was inadequate." Op. No. 5858 (Howard Adv. Sh. No. 30 at 174–75). By referring to the language in the trial court's order as "inconsequential language" and performing a lengthy analysis of the trial evidence (an analysis the trial court did ***not*** perform, *see* (R. 14–20)), this Court affirmed the *additur* ruling on a basis not stated by the trial court. However, as this Court acknowledged, it has no power to grant *additur*. Op. No. 5858 (Howard Adv. Sh. No. 30 at 171) (citing several cases for the proposition that "the [circuit court] ***alone*** has the power to [alter] the verdict by the granting of a new trial nisi" (alterations in original) (emphasis added)).

The trial court's ruling was either proper or improper according to the reasons it stated in its order, which—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 the linchpin of its ruling. The trial court expressly separated that verdict into a $142,000 verdict for medical expenses, which it increased to $1,000,000, and a $58,000 verdict for noneconomic damages, which it increased to $580,000. (R. 18–19) ("Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, the Court will increase *the medical expenses award* to $1,000,000. The Court also finds that the jury's *award of $58,000 for pain and suffering* [is] inadequate. . . . The Court will increase Mr. Jolly's noneconomic damages award by a factor of ten, and award $580,000." (emphases added)).

Any suggestion that the trial court's improper allocation of the general verdict was "inconsequential" is thus contradicted by the trial court's own order issuing *separate additur* rulings for each purported component of the verdict. By ignoring the trial court's express statement that it granted *additur based on its allocation of the general verdict* and affirming the *additur* award on grounds not stated by the trial court, this Court exceeded its powers of review by supplying its own reasoning in place of the trial court's express basis for its ruling. The Court therefore misapprehended its scope of review and exceeded its powers. The Court should grant rehearing and reverse the *additur* ruling.

The trial court is not permitted to resolve conflicts in evidence and use that resolution as a "compelling" reason to alter the jury's verdict. *See Luchok v. Vena*, 391 S.C. 262, 265, 705 S.E.2d 71, 73 (Ct. App. 2010) ("We interpret the judge's order to set forth two reasons for invading the jury's province. First, the verdict did not cover all the chiropractic bills. In the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion. Second, the 'charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary.' The judge is not entitled to make that determination as a matter of law when the evidence is conflicting. Therefore, there is no compelling reason and the trial judge's improper invasion of the province of the jury amounts to an abuse of discretion."). This Court credited the trial court's "determination that the verdict should adequately reflect Dr. Frank's reliable opinion on the enormous past and future expenses of [Mr. Jolly's] disease" as a "compelling" reason to invade the jury's province and revoke the jury's power to determine the amount of damages. Op. No. 5858 (Howard Adv. Sh. No. 30 at 178). But this is not what the trial court said was its reason for the *additur*, and even if it was, such would have been improper. This Court's decision thus overlooked precedent and misapprehended the trial court's, and its own, *additur* power. Neither the trial court nor this Court is empowered to find Dr. Frank's testimony was "reliable" as a matter of law and thus require the damages award to reflect his testimony. *See Luchok*, 391 S.C. at 265, 705 S.E.2d at 73; *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297. As Fisher and Crosby explained in their briefs and at oral argument, Dr. Frank's testimony was speculative and in any event the jury was not required to believe it. Although this Court acknowledges the jury was not required to believe Dr. Frank's testimony, the Court allowed the trial court to form its own belief as to Dr. Frank's credibility and impose that belief on the parties as a purported "compelling" reason to take the damages

calculation away from the jury. The Court should grant rehearing and reverse the trial court's granting of new trial *nisi additur*.

IV. The Court of Appeals should grant rehearing and reverse the trial court's setoff and subpoena rulings.

Finally, the Court of Appeals overlooked or misapprehended Fisher and Crosby's arguments as to the setoff and trial subpoena rulings, and it should reverse both rulings for the reasons stated by Fisher and Crosby in their briefing and at oral argument and the reasons stated below.

A. Setoff

The Court rightly 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." Op. No. 5858 (Howard Adv. Sh. No. 30 at 181). Despite acknowledging the statute, the Court approved the unilateral allocation because South Carolina case law "favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" *Id.* at 182. The plain language of section 15-38-50, however, contradicts this holding: "[A] release or a covenant not to sue or not to enforce judgment . . . reduces the claim against the others to the extent of any *amount stipulated by the release* or the covenant, or in the *amount of the consideration paid for it.*" S.C. Code Ann. § 15-38-50 (emphases added). The Court recognized elsewhere in its opinion that 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.'" Op. No. 5858 (Howard Adv. Sh. No. 30 at 188) (quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). Yet, the Court failed to apply that governing principle to its review of the setoff statute.

Courts in other jurisdictions applying setoff statutes similar to section 15-38-50 have 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. *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (applying Fla. Stat. Ann. § 768.31(5)); *see also Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980) (applying Cal. Civ. Proc. Code § 877 and holding, absent good faith allocation of settlement consideration between causes of action in which joint tortfeasor status was alleged, defendants were entitled to setoff of entire settlement figures); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000) (finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid a full setoff). These cases are consistent with South Carolina law and policy.

In *Dionese*, two plaintiffs—a husband and wife—sued various defendants for the wife's personal injuries and the husband's loss of consortium arising from a motor vehicle accident. 500 So. 2d at 1348. The plaintiffs settled with the at-fault driver and his insurer, but the settlement agreement did not allocate the money between the two plaintiffs. *Id.* at 1348, 1349. The plaintiffs then proceeded to trial and obtained a verdict against a non-settling defendant. *Id.* at 1348. When the non-settling defendant moved to set off the settlement funds received by the plaintiffs, the plaintiffs "notified the court of a private unilateral agreement to apportion $10,000 of the $45,000 settlement proceeds to [the wife's] claim for personal injuries, and the remaining $35,000 to [the husband's] claim of loss of consortium." *Id.* The Florida Supreme Court held the plaintiffs' private, unilateral allocation of settlement proceeds should be ignored by a court in determining setoff. *Id.*

The court distinguished cases in which plaintiffs and defendants agree 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,

> The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award. . . . The rights of both the settling and non-settling joint tort-feasors would be adversely affected if we were to allow plaintiffs to privately and unilaterally apportion the proceeds of a settlement agreement containing a general release.

Id.

The same analysis applies to this case. 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 claim which could not be tried, thus removing those funds from the setoff calculation—to minimize a setoff and recover more than the total amount of damages the jury determined they suffered. This allocation and the trial court's denial of a complete setoff undercuts the jury's role and duty to determine the total damages suffered by a plaintiff. The law does not give plaintiffs a right to unilaterally manipulate settlement allocations to minimize setoff and obtain a double recovery. Rather, to effectuate the policy against double recovery and give meaning to the language of section 15-38-50,[11] the Court should reverse the trial court and direct a complete setoff against the total jury award.

[11] *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

B. Subpoenas

The Court overlooked or misapprehended several points in affirming the trial court's subpoena rulings. First, the Court appears to approve the trial court's finding that Fisher and Crosby "submitted to the court's jurisdiction by making a general appearance and litigating the case to trial." Op. No. 5858 (Howard Adv. Sh. No. 30 at 186–87). A "general appearance" is an antiquated concept which is no longer recognized by South Carolina law. Under prior law, a party who made a general appearance waived his right to challenge the court's personal jurisdiction or raise any defects in service of process. *Stickland v. Consol. Energy Prod. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."). However, Rule 12 of the South Carolina Rules of Civil Procedure abrogated the former process in which a party challenging the court's personal jurisdiction was required to make a "special appearance" for the limited purpose of challenging jurisdiction. *See* Rule 12(b), SCRCP, Note ("This important Rule 12(b) . . . eliminates the necessity of the awkward 'special appearance to object to jurisdiction' under present State practice."). Thus, Fisher and Crosby did not "submit[] to the court's jurisdiction by making a general appearance."

Second, Fisher and Crosby did not abandon any arguments. Fisher and Crosby's assertion that its counsel did not know what was in the FedEx packages when he signed for them is a ***fact*** supporting the argument that acknowledging receipt of a FedEx package, without knowing the package contains a subpoena for service, cannot be acceptance of service under Rule 4(j). Fisher and Crosby included a record cite supporting that fact. (R. 332). The abandonment doctrine allows the Court to avoid ruling on an ***issue*** raised by a party in a conclusory statement unsupported by any authority. *See, e.g., S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276,

283, 651 S.E.2d 622, 626 (Ct. App. 2007) ("[W]e note this issue is abandoned because Mother makes a conclusory argument without citation of any authority to support her claim."). It does not allow the Court to ignore a ***fact*** supported by the record. Thus, the Court should not overlook this fact. Nor should the Court overlook the effect of the new rule it endorses. Pursuant to this Court's ruling, all attorneys are authorized to accept service on behalf of their clients, and if an attorney signs for a FedEx package, she risks accepting service on behalf of her client regarding the unknown contents of the package, regardless of whether she has her client's authorization to do so. The Court should grant rehearing and reverse the trial court's failure to quash the trial subpoenas.

V. The Court should grant rehearing and reverse the trial court on Fisher and Crosby's arguments regarding whether the dangers to Mr. Jolly were open and obvious, the sophisticated intermediary doctrine, and lack of evidence of the standard of care.

The Court overlooked or misapprehended Fisher and Crosby's arguments regarding the open and obvious doctrine, the sophisticated intermediary doctrine, and the lack of evidence of the standard of care. First, the Court overlooked or misapprehended evidence showing the alleged dangers posed by asbestos-containing gaskets were open and obvious to Mr. Jolly. The only reasonable inference is that Mr. Jolly knew asbestos was hazardous but did not heed warnings about asbestos hazards. *See* (App. Br. 27–28; Reply Br. 14–15). Moreover, "[t]he plaintiff has the burden of showing that a warning would have made a difference in the conduct of the person warned." *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 432, 505 S.E.2d 354, 359 (Ct. App. 1998). The Court speculates that Mr. Jolly may have heeded a warning different than the ones he received, had he received one. But no evidence supports this conclusion. Accordingly, the Court overlooked the evidence and misapprehended the issue.

Second, the Court overlooked or misapprehended the burden of proof as to Fisher and Crosby's sophisticated intermediary doctrine defense. Although the Court correctly observes that the sophisticated intermediary doctrine is an affirmative defense and defendants generally have the burden of proof for affirmative defenses, Fisher and Crosby cannot be required to identify and disprove at trial every possible method of warning. It is unreasonable for this Court to affirm on the ground that Fisher and Crosby failed to refute a manner of warning devised by Plaintiffs and the Court during the appeal, which was not raised at trial. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 163–64). This Court may affirm on any ground in the record, Rule 220(c), SCACR, but the record contains no evidence that Fisher and Crosby could have effectively warned end users like Mr. Jolly by placing a warning on the outside of their valves. The only reasonable inference in the record is that Fisher and Crosby reasonably relied on Duke to warn its employees and are therefore protected from liability by the sophisticated intermediary doctrine.

Finally, the Court overlooked or misapprehended Plaintiffs' failure to present evidence showing the standard of care for negligence or evidence that Fisher or Crosby deviated from that standard of care. The Court's analysis is based entirely on the existence of OSHA and Dr. Frank's opinions. The scientific community's establishment, according to Dr. Frank, of a "causal connection between asbestos exposure and mesothelioma" is not evidence of a tort standard of care. Op. No. 5858 (Howard Adv. Sh. No. 30 at 170). Dr. Frank's theorizing that Fisher and Crosby "could have advised Duke to caution employees," *id.*, is not evidence that tort law imposed a duty on Fisher and Crosby to do so. Moreover, federal health and safety regulations—enacted based on forward-looking evaluations performed by regulatory agencies—are not related to the standard of care for tort claims. *See Yates*, 113 F. Supp. 3d at 847; *see also, e.g.*, *In re Garlock Sealing Tech., LLC*, 504 B.R. 71, 81 (Bankr. W.D.N.C. 2014); *Glastetter v. Novartis Pharm.*

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2017-002611

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..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail, pursuant to Supreme Court Order 2021-08-25-02, and a copy of the sent electronic mail is attached to this certificate:

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2016-002611
Case No. 2016-CP-42-1592

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

vs.

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

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

RETURN TO PETITION FOR REHEARING

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INTRODUCTION

Appellants Fisher Controls International LLC and Crosby Valve, LLC have requested rehearing on every single issue decided unanimously by the panel in its 57-page opinion. *Jolly v. Gen. Elec. Co.*, ---- S.E.2d ----, No. 2017-002611, 2021 WL 3889962 (S.C. Ct. App. Sept. 1, 2021). Although Fisher/Crosby contend that the Court overlooked or misapprehended virtually every point raised on appeal, they have only succeeded in identifying their many disagreements with the Court. They do not show that the Court was incorrect or offer any compelling reasons for the Court to reconsider its reasoning and conclusions.

Fisher/Crosby have also asked for rehearing *en banc*, but they have made no effort to meet the standard for *en banc* review set forth in Appellate Court Rule 219(b). They have not identified any contradiction between the panel's opinion and the prior opinions of this Court. Nor have they explained how any of the legal issues presented are of exceptional importance. As Fisher/Crosby have failed to offer any legitimate basis for the Court to rehear this case, their petition should be denied.

ARGUMENT

I. The Court properly decided the causation issues in this case.

A. The Court did not lower the standard of proof in mesothelioma cases.

i. The Court properly applied the Henderson/Lohrmann *causation standard while also distinguishing* Lorhmann *on its facts.*

Fisher/Crosby mischaracterize the Court's opinion regarding the "frequency, regularity, proximity" causation standard applicable in asbestos cases. The Court

did not depart from this standard, nor did it "lower" this standard in asbestos cases involving the disease mesothelioma. The Court cited and followed the Supreme Court's decision in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), which in turn adopted the substantial factor standard utilized in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986). *Jolly*, 2021 WL 3889962, at *4. To wit: "'To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.'" *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (quoting *Lohrmann*, 782 F.2d at 1162-63).

The panel found that Dale Jolly's exposure to Fisher/Crosby valves met the *Henderson/Lohrmann* substantial factor test because his duties as a mechanical inspector "regularly brought him within close proximity to his co-workers' removal of asbestos gaskets from valves," including "a 'good many' Crosby valves and '[a] lot of' Fisher valves." *Jolly*, 2021 WL 3889962, at *5. Dale saw and inhaled visible asbestos dust from Fisher/Crosby valves and those exposures occurred regularly and consistently over 4 years at three Duke power stations where Dale worked shutdowns. *Id.*

Fisher/Crosby urged the Court to find that Dale's asbestos exposure from their valves was comparable to the 10 to 15 exposures that failed to establish substantial factor causation in *Lohrmann*, but the panel noted that the facts of this case are distinguishable from *Lohrmann*. *Id.* at *5 n.11. *Lorhmann* involved

asbestosis, which, according to the Jollys' evidence, requires much higher exposures:

> [T]he present case does not concern asbestosis, which, according to Dr. Frank, requires higher exposure levels than the exposure levels that can cause mesothelioma. Therefore, the facts in *Lohrmann* do not lend themselves to a valid comparison with the facts in the present case.

Id.

This factual distinction between the exposure levels that can cause asbestosis and mesothelioma has been recognized by the Fourth Circuit, which decided *Lohrmann*. During the pendency of this appeal, the Middle District of North Carolina acknowledged that the nature of the disease process was a consideration in *Lohrmann*. In *Finch v. Covil Corp.*, 388 F. Supp. 3d 593 (M.D.N.C. 2019), *aff'd*, 972 F.3d 507 (4th Cir. 2020), the district court noted that "*Lohrmann* stated the test in light of the evidence in that case about asbestosis and the requisite level of exposure, evidence which was quite different from the evidence in this mesothelioma case." *Id.* at 618. *Lohrmann* "upheld a sufficiency of the evidence standard that was tailored to the specific disease at issue in the case, the medical testimony on the degree of exposure required to produce that disease, and the characteristics of the place where the plaintiff was exposed to asbestos that bore on causation of the disease." *Id.* at 619.

In *Finch*, the defendant appealed to the Fourth Circuit, contending "that the district court's jury instruction on substantial factor causation impermissibly reduced Mrs. Finch's evidentiary burden" because it allowed the jury to consider that mesothelioma is caused by relatively low exposure levels. 972 F.3d at 512. The

Fourth Circuit disagreed. *Id.* at 513-14. It found that the causation instruction gave proper guidance to the jury in that it "required the jury to consider how much asbestos-containing insulation 'sold by Covil' was in close proximity to Mr. Finch's daily work, whether this insulation actually created significant amounts of asbestos dust, and how long Mr. Finch worked at the plant." 972 F.3d at 514. In a footnote, the Fourth Circuit acknowledged the difference between the exposure levels needed for asbestosis and mesothelioma:

> As the [trial] court detailed, asbestos exposure can result in two distinct diseases: asbestosis and mesothelioma. Greater exposure to asbestos is required to contract asbestosis as compared with mesothelioma. Therefore, an evidentiary instruction on asbestosis theoretically requires proof of greater exposure than mesothelioma.

Id. at 514 n.2. The Fourth Circuit found, however, that the jury instructions "clearly comport[ed] with *Lohrmann*, regardless of the disease." *Id.*

Indeed, *Lohrmann* upheld a sufficiency of the evidence standard that was tailored to the specific disease at issue in the case (asbestosis), the medical testimony on the degree of exposure required to produce that disease (substantial), and the characteristics of the place where the plaintiff was exposed to asbestos (a shipyard), that bore on causation of the disease:

> To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked. **Such a rule is in keeping with the opinion of the plaintiff's medical expert who testified that even thirty days exposure, more or less, was insignificant as a causal factor in producing the plaintiff's disease.**

782 F.2d at 1162-63 (emphasis added).

The panel's opinion is in absolute alignment with the substantial factor causation standard of *Henderson/Lohrmann*. The jury, the circuit court, and all three members of the panel agreed that that standard was met by the facts of Dale's exposure to asbestos gaskets from Fisher/Crosby valves. The panel's acknowledgement of the factual distinctions between *Lohrmann* and this case do not undermine its causation analysis. Rather, the panel's conclusions are consistent with the principles set forth in *Lohrmann* and recent cases like *Finch*. This Court's affirmance of the trial court should not be disturbed.

ii. The Court properly declined to conduct a comparative analysis of Dale Jolly's asbestos exposures.

Fisher/Crosby complain about the Court's determination that substantial factor causation does not require the Court to consider and compare Dale's exposures to other asbestos products. While they accuse the Court of adopting Pennsylvania law, the Court has once again followed *Lohrmann* itself.

The frequency, regularity, and proximity factors were adopted as the standard for demonstrating substantial factor causation in a multiple-defendant asbestos case. *Lohrmann*, 782 F.2d at 1158 (the plaintiff "claims that he now has asbestosis resulting from exposure to various asbestos-containing products of nineteen named defendants"); *see also id.* at 1162 (explaining that asbestos cases typically involve a lot of defendants that are resolved through settlement, summary judgment, and trial). *Lohrmann* therefore provides the standard for a plaintiff "[t]o

support a reasonable inference of substantial causation from circumstantial evidence" when there are many defendants alleged to have caused the plaintiff's disease. *Id.* That standard does not involve counting up the number of defendants or comparing exposures to different types of asbestos products. Rather, it is that "there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-63.

As noted by the panel, Fisher/Crosby's comparative exposure argument is "based on the faulty premise that a 'but-for' standard of causation applies to mesothelioma cases when all *Lohrmann* requires is substantial causation shown by frequent, regular, and proximate exposure to the defendant's products." *Jolly*, 2021 WL 3889962, at *10. Indeed, the substantial factor test is an alternative to the but-for causation standard. Under the but-for standard, "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." Keeton, *Prosser and Keeton on The Law of Torts* 266, § 41 (5th ed. 1984); *see also Goodman v. Wenco Foods, Inc.*, 423 S.E.2d 444, 452 (N.C. 1992) ("The cause producing the injurious result must be in a continuous sequence, without which the injury would not have occurred . . . ."); *Bramlette v. Charter-Med.-Columbia*, 393 S.E.2d 914, 916 (S.C. 1990) ("Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence.").

The "but-for" test fails, however, where "the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them . . .." Prosser & Keeton, at 268. Therefore, when there are multiple causes, a "defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." *Id.* at 267.

There are typically multiple sources of asbestos exposure that combine to produce a single asbestos-related disease, making the but-for causation test unworkable in the asbestos context. "Certainly, if the traditional but-for definition of proximate cause was invoked, the injured party would virtually never be able to recover for damages arising from mesothelioma in the context of multiple exposures, because injured parties would face the difficult if not impossible task of proving that any one single source of exposure, in light of other exposures, was the sole but-for cause of the disease." *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 729 (Va. 2013). Accordingly, the substantial factor test is used "in order that no supplier enjoy a causation defense solely on the ground that the plaintiff probably would have suffered the same disease from inhaling fibers originating from the products of other suppliers." *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684, 689 (Wash. App. 1997).

It is contrary to the substantial factor test to compare exposures in the manner advocated by Fisher/Crosby. A comparison of exposures from different products and different defendants creates a risk of absolving culpable defendants

merely because there were other concurrent causes of the disease. This same problem led courts to reject the but-for causation standard when there are multiple causes that combine to produce a single injury. Under Fisher/Crosby's preferred approach, the more asbestos exposures a person has, the less likely that *any* asbestos product manufacturer will be held responsible.

The panel correctly held that the "frequency, regularity, and proximity" test should not be used as a comparative test to distinguish between causative exposures. The panel did not follow other states' law in coming to this conclusion. Rather, the panel followed the logic of *Lohrmann*, as have other courts that have similarly concluded that comparing exposures is contrary to *Lorhmann*'s substantial factor standard. *See, e.g., Tragarz v. Keene Corp.*, 980 F.2d 411, 425 (7th Cir. 1992) (use of a comparative approach "does not promote the purposes of the substantial factor test, which is aimed at alleviating the inequities that result when applying the but-for test in a multi-defendant case, not at creating such inequities"); *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1051 n.13 (Pa. 2016) (the "frequency, regularity, and proximity" test is not "part of a comparative assessment of differing exposures"); *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 168 So. 3d 556, 564 (La. App. 2014) ("Simply because a plaintiff suffered asbestos exposure while working only a short period for an employer and had longer exposures while working for others, it cannot be said the relatively short asbestos exposure was not a substantial factor in causing his mesothelioma."); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 521 (Md. App. 2010) ("It is clear ... that substantial factor causation does not turn on

comparative faults. The question is whether each contributing cause, standing alone, is a substantial factor.").

B. The Court properly upheld the admission of Dr. Frank's causation testimony.

In protesting the panel's decision to uphold the admission of Dr. Frank's causation testimony, Fisher/Crosby fail to acknowledge the trial court's considerable discretion to admit or exclude expert testimony. Under South Carolina law, "[a] trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support, or "when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

The panel concluded that "the circuit court acted well within its discretion in admitting the experts' testimony into evidence." *Jolly*, 2021 WL 3889962, at *13. Fisher/Crosby do not challenge this conclusion or contend that Judge Toal abused her discretion in admitting Dr. Frank's causation opinions. They ignore the standard of review completely. Fisher/Crosby do not address the factual and scientific foundation for Dr. Frank's opinions or argue that it is lacking. Instead, they reiterate the same mischaracterizations of his testimony that the Court has already rejected, and fault the panel for relying on Dr. Frank's affidavit to evaluate his scientific methodology.

The panel correctly rejected Fisher/Crosby's inaccurate depictions of Dr. Frank's testimony. The panel examined Fisher/Crosby's contentions at length and found that they consistently mischaracterized his testimony. For example, the Court noted that while "Appellants alleged that under cross-examination, Dr. Frank testified each of approximately 60 exposures was a substantial cause of Dale's mesothelioma . . .. [w]e disagree with Appellant's characterization of Dr. Frank's testimony." *Jolly*, 2021 WL 3889962, at *9 n.17. The Court found that in context "[i]t is clear that Dr. Frank rejected the 'any' characterization and was clarifying that collectively, all of the exposures substantially caused Dale's mesothelioma." *Id.* The Court further determined that Dr. Frank distinguished between exposures that contributed to Dale's total dose of asbestos and exposures that were substantial factors in causing his mesothelioma. *Id.*

In addition, as the panel noted, "Respondents' experts were guided by the facts specific to Dale's exposure to Appellants' products in forming their opinions concerning causation." *Id.* at *10.[1] Indeed, Dr. Frank's scientific method focuses on evaluating all factual details of the plaintiff's exposure to the defendant's product, including the level, duration, frequency, and proximity of exposure. *Id.* As noted, those factors are remarkably similar to the *Henderson/Lohrmann* factors. *Id.* Dr. Frank also relied on "numerous peer-reviewed, published epidemiological studies, case series, and case reports," as well as other scientific criteria impacting

[1] To the extent Fisher/Crosby complain about Dr. Maddox's methodology and conclusions, the panel correctly found that his opinions were reliably based on the exposure evidence in this case and accepted criteria for attributing mesothelioma to asbestos exposure. *Id.* at *10-11.

causation of disease, and follows the weight-of-the-evidence methodology used by national and international public health organizations for evaluating the health effects of asbestos. *Id.* at *11-12.

The Court was entirely correct to consider Dr. Frank's explanation of his scientific approach in his affidavit. Fisher/Crosby suggest that this was improper because the jury did not rely on his affidavit during its deliberations. Dr. Frank's affidavit was, in fact, an exhibit at trial. (R. pp. 2734-2949). Moreover, the admissibility of Dr. Frank's causation opinion is a matter for the court, not the jury. Under Rule 702, SCRE, the trial court's gatekeeping function ensures that "the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686.

Fisher/Crosby have failed to show (or even contend) that there was any prejudicial abuse of discretion in the admission of Dr. Frank's testimony. The trial court properly analyzed the reliability of his opinion under the standards of Rule 702, SCRE, and *State v. Council*, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517-18 (1999). This Court agreed that his opinion met the reliability criteria for expert testimony set forth in South Carolina law. *Jolly*, 2021 WL 3889962, at *11-13. Fisher/Crosby's complaints about Dr. Frank were properly rejected by the panel.

C. The Court properly looked to the exposure evidence in evaluating the *Henderson* causation factors.

Fisher/Crosby also contend that expert testimony is necessary to meet the *Henderson* causation factors, attacking the Court's conclusion that the factual

evidence regarding Dale's exposure to asbestos from Fisher/Crosby valves—consisting of testimony from Dale and his co-worker and documents—"by itself, meets *Henderson*'s substantial factor test." *Jolly*, 2021 WL 3889962, at *5. Fisher/Crosby entirely ignore the Court's corollary statement that "the expert testimony is sufficient to show both general and specific medical causation." *Id.* The Court did require expert causation evidence and was satisfied that the Jollys had provided such evidence.

In arguing that Dale's testimony is insufficient to meet the *Henderson* causation factors, Fisher/Crosby's primary complaint is a reiteration of its contention that Dale's exposure to asbestos from other brands of valves is relevant to the causation analysis. Fisher/Crosby argue that Dale's general testimony about his exposure to asbestos gaskets on valves is somehow deficient because their valves account for only part of his valve exposure. Petition, at 13. This argument fails to account for the evidence that Dale worked around a large number of Fisher/Crosby valves. As the Court observed, "Dale recounted that he regularly and consistently worked in the vicinity of other workers removing asbestos gaskets from a 'good many' Crosby valves and '[a] lot of' Fisher valves." *Jolly*, 2021 WL 3889962, at *5. This evidence easily meets the *Henderson/Lorhmann* requirement that the plaintiff "show 'more than casual or minimum contact with the product.'" *Jolly*, 2021 WL 3889962, at *4 (quoting *Lohrmann*, 782 F.2d at 1162). Fisher/Crosby have no answer to this.

Fisher/Crosby further complain that the panel "misapprehended the use of

the term 'flange gasket'" as referring to an internal component of its valves. Petition, at 14. The evidence established, however, that Fisher/Crosby valves utilized internal asbestos gaskets and that Dale was present when those internal gaskets were removed from the valves. (R. pp. 488, 874, 877). Fisher's corporate representative verified that the internal gasket needed to be removed and replaced whenever the valve was opened for inspection or repairs. (R. pp. 1213-1214). The Court accurately noted that Dale had exposure to both internal and external asbestos gaskets on Fisher/Crosby valves.

Once again, Fisher/Crosby disregard the standard of review. Its arguments advance its preferred view of the evidence, ignoring that upon review of the denial of JNOV the evidence must be viewed in the light most favorable to the Jollys, as they are the nonmoving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). This Court will reverse the lower court's denial of directed verdict or JNOV only when there is no evidence to support the ruling below. *Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997) (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994)). Fisher/Crosby certainly have not shown that the fact witness testimony and documents establishing Dale's regular exposure to asbestos from Fisher/Crosby valves amounts to "no evidence." The panel correctly upheld the jury's determination that Dale had regular, frequent, and proximate exposure to asbestos from Fisher/Crosby valves such that these exposures were a substantial factor in causing his mesothelioma.

II. The Court did not shift the burden to Fisher/Crosby on design defect.

Fisher/Crosby fault the Court for its comment that "there was no evidence that a metal gasket was more expensive than an asbestos gasket," contending that this amounts to improperly shifting the burden of proof on the design defect claim. *Jolly*, 2021 WL 3889962, at *17. This argument takes the Court's statement completely out of context. The Court upheld the circuit court's "conclu[sion] that the evidence created a fact issue for the jury as to the existence of a reasonable alternative design" on the basis of Fisher's own testimony. The Court found that "a metal gasket was a candidate for the jury's consideration of a reasonable alternative design, given that Dumistra seemed to consider its functionality and safety to be equivalent to that of asbestos gaskets." *Id.*

Far from shifting the burden, the Court merely observed that there was nothing, such as cost, to prevent the jury from considering metal gaskets to be a reasonable alternative design to asbestos gaskets. Furthermore, any evidence of increased cost of metal gaskets would not have made a difference to the Court's opinion. "Even if there had been such evidence, a juror could have reasonably inferred from the expert testimony on causation that the risk of exposing Duke employees to deadly asbestos fibers was so grave that no economic cost savings would have been worth that risk." *Jolly*, 2021 WL 3889962, at *17 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 225 n.16, 701 S.E.2d 5, 16 n.16 (2010); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995); Restatement

(Third) of Torts: Prods. Liab. § 2 cmt. f (1998)). Fisher/Crosby do not dispute this legal conclusion.

The evidence of alternative reasonable design went even beyond metal gaskets and included gaskets made from graphite or Teflon. In fact, Dumistra agreed that there was *absolutely no reason* for Dale to be exposed to asbestos gaskets and packing from Fisher valves because "[s]omething else could have been selected." (R. p. 1134). Fisher/Crosby have failed to show that there was anything improper about the Court's opinion regarding the viability of the Jollys' design defect claim.

III. The Court properly determined that the circuit court did not abuse its discretion in granting a new trial *nisi additur*.

Fisher/Crosby again ignore the standard of review in arguing against a new trial *nisi additur*. This Court properly reviewed the circuit court's grant of a new trial *nisi* for abuse of discretion. *Jolly*, 2021 WL 3889962, at *19. Indeed, the panel quoted the Supreme Court's most recent guidance on this standard: "the court of appeals ignored the applicable abuse-of-discretion standard of review, instead focusing its inquiry on a de novo evaluation of whether, in its view, there was sufficient justification for 'invading the jury's province.' This was error." *Jolly*, 2021 WL 3889962, at *20 (quoting *Riley v. Ford Motor Co.*, 414 S.C. 185, 194, 777 S.E.2d 824, 829 (2015)).

Fisher/Crosby would have this Court commit the very reviewing error found in *Riley*. It asks the Court to second-guess the circuit court and find its conclusions

"speculative." This Court considered this argument and reviewed the circuit court's reasoning, particularly the reliance on Dr. Frank's undisputed testimony that he had seen partial medical bills of $142,000. The Court disagreed with Fisher/Crosby's characterization of the circuit court's reasoning as "speculative," and agreed with the circuit court that "[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" than that the jury simply ignored or failed to credit Dr. Frank's testimony. *Jolly*, 2021 WL 3889962, at *21.

As the panel discussed, the case law relied on by Fisher/Crosby does not establish that the circuit court speculated in analyzing the jury's damages award. The cases of *Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) and *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004), are distinguishable on their facts and at most stand for "the time-honored rule that no factual or legal determination may be based on speculation." *Jolly*, 2021 WL 3889962, at *21. The Court concluded that "unlike the posture of this court in *Jenkins* and *Moore*, the circuit court in the present case possessed concrete information from the evidence on which it could base its observation about the jury's award of medical costs." *Id.*

Further, this Court properly looked at the entirety of the circuit court's reasons for granting a new trial *nisi*. *Jolly*, 2021 WL 3889962, at *22. It upheld that reasoning as grounded in the evidence, noting that the circuit court "thoroughly summarized the evidence supporting an increased verdict" and that "[t]he essence of the circuit court's ruling was the inadequacy of the overall verdict in light of the

evidence presented at trial." *Id.* This is consistent with *Riley*, where there was no abuse of discretion in granting a new trial *nisi* to triple the jury's award when the decision was based on the evidence. 414 S.C. at 189, 194, 777 S.E.2d at 827, 829-30.

The panel properly concluded that "the circuit court acted well within its discretion in granting Respondents' motion for new trial *nisi additur*." *Jolly*, 2021 WL 3889962, at *24. Fisher/Crosby's critiques of the Court's opinion on this issue do not break any new ground. Its continued disagreement with both the circuit court and this Court about the propriety of a new trial *nisi* does not provide a proper basis for rehearing.

IV. The Court properly upheld the circuit court's rulings on setoff and trial subpoenas.

A. Setoff

The Court rejected all of Fisher/Crosby's setoff arguments at length. *Jolly*, 2021 WL 3889962, at *24-28. As grounds for rehearing, Fisher/Crosby argue only that the Court's opinion "contradicts" the so-called "plain language" of S.C. Code Ann. § 15–38–50 that a release with one defendant "reduces the claim against the others to the extent of any amount stipulated by the release . . . ." They claim that section 15–38–50 mandates that the entire amount of the release be setoff against the verdict regardless of how the Jollys have chosen to allocate the release among their personal injury, wrongful death, and loss of consortium claims.

Fisher/Crosby's argument relies on a selective quotation of section 15–38–50 that omits the rather crucial language that a setoff may only be had for the "same

injury or the same wrongful death" as the claims brought against the trial defendant. Fisher/Crosby would therefore have this Court grant a setoff for release of the Jollys' wrongful death claims that *were not tried* against Fisher/Crosby, as only Dale's personal injury claim and his wife's loss of consortium claim were considered by the jury.

The Court disagreed with Fisher/Crosby's view, explaining that under established law "'[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles *for the same cause of action*.'" *Jolly*, 2021 WL 3889962, at *25 (quoting *Riley*, 414 S.C. at 195, 777 S.E.2d at 830) (emphasis added by the Court)). Of course, "when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." *Id.* (quoting *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012)).

The circuit court properly recognized the Jollys' internal allocation of their settlement proceeds as one-third each to their personal injury, loss of consortium, and wrongful death claims. *Jolly*, 2021 WL 3889962, at *25, *28. Such internal allocations are permitted under section 15–38–50 because "our case law favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" *Id.* at *25 (quoting *Riley*, 414 S.C. at 197, 777 S.E.2d at 831).

The Court also "reject[ed] Appellants' argument that the amount Respondents allocated to a future wrongful death claim compensates for the same injuries at issue in the present case." *Id.* at *27. Recovery for personal injuries

sustained by the decedent during his lifetime (also recoverable through a survival claim after death) are distinct from wrongful death claims for damages sustained by the beneficiaries as a result of the death. *Id.* (citing S.C. Code Ann. § 15-5-90 (2005); *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000)). The Jollys' internal allocation did not result in a double-recovery because no damages suffered by Dale's beneficiaries were recovered from Fisher/Crosby at trial. *Id.* at *28.

Fisher/Crosby largely ignore the Court's reasoning and instead cite case law from Florida and California that they never cited in their opening or reply briefs. The Court should not consider Fisher/Crosby's new argument about the approach to setoff used in two other jurisdictions. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

Predictably, the newly cited cases do not address the factual scenario presented here in which plaintiffs have released *different* claims than those brought against the trial defendant. The only case discussed by Fisher/Crosby, *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347 (Fla. 1987), involved personal injury and loss of consortium claims brought by a husband and wife against multiple defendants. The wife's injuries were not fatal and there were no future or wrongful death claims released. Plus, the internal allocation of the settlements between the

husband's and wife's claims was unevenly divided and strangely weighted toward the husband's loss of consortium claims. *Id.* at 1348. This is not comparable to the Jollys' proportional allocation of one-third to each of their three claims. The holding of *Dionese* is also contrary to South Carolina's policy in favor of allowing plaintiffs to allocate settlement proceeds in accordance with their best interests. *Riley*, 414 S.C. at 196-97, 777 S.E.2d at 830-31.

The Court did not overlook or misapprehend arguments that Fisher/Crosby failed to make until now. In any event, their resort to other states' inapposite case law is unavailing and does not provide grounds for rehearing on the issue of setoff.

B. Subpoenas

Fisher/Crosby do not challenge the Court's opinion that the circuit court had authority to compel their corporate representatives to testify at trial under Rule 45, SCRCP. They merely complain that they did not make a "general appearance" by which they submitted to jurisdiction. While the Court mentioned that the circuit court had referenced their general appearance, the panel based its opinion on a close reading of the language of Rule 45 that only allows *non-parties* to quash a trial subpoena. *Jolly*, 2021 WL 3889962, at *29. The Court found that the subpoena power extends beyond South Carolina's borders with regard to parties in cases before the South Carolina circuit courts. *Id.* This conclusion is based on the text and the comments to Rule 45, which "confirms that the legislature intended for South Carolina circuit courts to have subpoena power over parties to proceedings over which those courts preside." *Id.* at *30. This power is not based on jurisdictional

principles, but on "the broad discretionary power a circuit court must exercise over parties to proceedings before it in order to effectively dispense justice." *Id.* (citing *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009); *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 85, 431 S.E.2d 625, 628 (Ct. App. 1993)).

With regard to service of the subpoenas, Fisher/Crosby protest that they did not abandon their argument that their counsel did not know that they were accepting subpoenas when they signed for the FedEx packages addressed to Fisher/Crobsy. The panel accurately noted, however, that this point was only raised in one sentence in a footnote, with no supporting authority, and that such cursory treatment amounts to abandonment under a long line of South Carolina authority. *Jolly*, 2021 WL 3889962, at *31. Fisher/Crosby contend that this point is only a "fact," not an argument, that their attorneys did not know the package contained trial subpoenas. This is a strange distinction given that they have, in their Petition, raised this point in an attempt to avoid effective service of the trial subpoenas. They still fail to explain the legal significance of this "fact," but to the extent that they complain that attorney signatures should not be sufficient to accept service when the contents of a package are unknown, this is an overlooked argument that cannot be raised on rehearing. *See* Toal et al., *supra*, at 309.

V. Fisher/Crosby have failed to show that the Court should grant rehearing on any of their points challenging the sufficiency of the evidence.

Fisher/Crosby raise three final issues under one heading, each of which have to do with the sufficiency of the evidence regarding the Jollys' failure-to-warn and negligence claims. They once again fail to acknowledge the deferential standard of review of JNOV rulings, which requires this Court to uphold the verdict "'unless no evidence reasonably supports the jury's findings.'" *Jolly*, 2021 WL 3889962, at *13 (quoting *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003)). "In other words, neither the circuit court nor this court may re-weigh the evidence in determining whether it is necessary to set aside a jury's verdict." *Id.*

First, Fisher/Crosby re-urge their view that the dangers of asbestos-containing gaskets were "open and obvious" to Dale. The jury disagreed and, as the circuit court and the panel found, the evidence supports their finding that the dangers of asbestos gaskets were not generally known in the early 1980s when Dale was around Fisher/Crosby valves at Duke. As the panel noted, "Duke distinguished between asbestos insulation, which it warned employees about, and asbestos gaskets, which Duke considered harmless." *Id.* at *15. Fisher/Crosby want the Court to hold that because Dale knew about some dangers of asbestos insulation, he would not have heeded a warning about asbestos gaskets. Not only does the evidence show that Duke was not warning about asbestos gaskets, *id.* at *15-16, and that Dale did not know about the dangers of asbestos gaskets, the jury also heard Dale's testimony that Dale *followed* Duke's warnings about asbestos

insulation and did not remove it himself. (R. p. 535, lines 1-8). The panel correctly held that the reasonable inferences supported the jury's findings and that "the circuit court properly upheld the jury's verdict on Respondents' failure-to-warn claims." *Jolly*, 2021 WL 3889962, at *16.

Second, with regard to their sophisticated intermediary defense, Fisher/Crosby claim that the Court imposed an unreasonable burden by requiring them to "identify and disprove at trial every possible method of warning" when there was supposedly no evidence that they could have warned on the outside of their valves. Petition, at 27. In fact, the evidence showed that there was already a place on the valve for the manufacturer name and serial number, *see* Respondents' Final Br., p. 29, raising a reasonable inference that an asbestos warning could have placed in the same location. However, this dispute over one method of warning is irrelevant given the Court's finding that Fisher/Crosby could have warned on the replacement gaskets and that "Dale would have seen a warning on a replacement gasket when verifying the number on that gasket." *Jolly*, 2021 WL 3889962, at *15. There were additional reasons that the panel found that Fisher/Crosby failed to prove that they "actually relied on the intermediary to convey warnings to end users." *Jolly*, 2021 WL 3889962, at *14. Because Fisher/Crosby "did not consider the gaskets in their valves to be dangerous[,] [t]his belies Appellants' claims that they relied on Duke to warn Dale of the dangers of asbestos gaskets." *Id.* at *15.

Third and finally, Fisher/Crosby contend that the Jollys lacked evidence to establish the standard of care for negligence. As discussed by the Court, Dr. Frank

testified that "by 1980, OSHA regulations required products containing asbestos to carry a warning label and Appellants were subject to these regulations." *Id.* at *19. While Fisher/Crosby challenge the use of OSHA regulations for establishing the standard of care, they rely on case law from other jurisdictions that contradicts South Carolina law that "'[e]vidence of industry standards, customs, and practices is 'often highly probative when defining a standard of care.'" *Id.* at *18 (quoting *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477, 534 S.E.2d 289, 290 (Ct. App. 2000)). Further, the standard of care is set by South Carolina law: "'A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.'" *Id.* at *19 (quoting *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009)). Fisher/Crosby fail to acknowledge this controlling law. And they have failed to show any lack of evidence regarding the standard of care or their deviation therefrom.

CONCLUSION

Fisher/Crosby have provided no reason for the Court to reconsider any issue in this case. They have failed to demonstrate that the Court overlooked or misapprehended anything in its opinion affirming the circuit court on all issues. Accordingly, their petition for rehearing should be denied.

Dated: December 1, 2021

Respectfully submitted,

s/Theile B. McVey

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2016-002611
Case No. 2016-CP-42-1592

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

vs.

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

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

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Jean H. Toal, Acting Circuit Court Judge

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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..... Appellants.

REPLY IN SUPPORT OF PETITION FOR REHEARING

This Court should grant rehearing and reverse the trial court's rulings. Plaintiffs primarily argue in their return that the Court should not apply a "but-for" causation test, that mesothelioma cases involve a different standard or proof as compared to asbestosis cases, and that courts should not analyze all the plaintiff's exposures in determining whether a particular exposure is a substantial factor in causing the plaintiff's disease. Plaintiffs' arguments are contrary to the law. Further, Appellants Fisher Controls International LLC ("Fisher") and Crosby Valve, LLC ("Crosby") do not advocate a "but-for" causation standard; rather, they argue the Court must apply the substantial factor causation standard adopted by the South Carolina Supreme Court for use in mesothelioma cases. Such a standard requires a comparative analysis to determine which exposures are substantial factors and which are insubstantial, and the standard is the same for all asbestos-related disease cases.

As for the remaining issues, rather than respond to the arguments raised by Fisher and Crosby, Plaintiffs largely repeat the findings in this Court's opinion. *See Jolly v. Gen. Elec. Co.*, Op. No. 5858 (S.C. Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 139). As Fisher and Crosby explained in their petition for rehearing, this Court, respectfully, overlooked and misapprehended the facts and applicable law. The Court should grant rehearing and reverse the trial court's rulings.

ARGUMENT

I. The substantial factor causation standard requires the same level of proof in asbestosis and mesothelioma cases and requires a comparative exposure analysis.

Plaintiffs assert that their proximate causation burden is satisfied because they presented some evidence that Mr. Jolly worked around valves and that the valves he worked around included Fisher valves and Crosby valves. Plaintiffs also assert that a comparative analysis—in which exposures to Fisher valves and Crosby valves are considered in the context of other exposures—is somehow incompatible with substantial factor causation. The Court should reject Plaintiffs' arguments. The substantial factor causation test adopted by the Fourth Circuit in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), and the South Carolina Supreme Court in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), requires more than the "any exposure" evidence presented by Plaintiffs in this case. Moreover, a comparative analysis is essential to determine which factors among many are "substantial factors" in disease causation. Accordingly, this Court should grant rehearing and reverse the trial court's denial of judgment notwithstanding the verdict ("JNOV").

A. The substantial factor causation standard regarding asbestos-related diseases is already a reduced evidentiary burden which should not be lowered further on the ground that mesothelioma purportedly develops from lower exposures than asbestosis.

Plaintiffs make a straw-man argument, contending "but-for" causation does not apply in asbestos litigation. (Return at 5–9). However, Fisher and Crosby have not argued the Court should apply a "but-for" causation standard. Rather, the Court should recognize that the substantial factor causation test created by the Fourth Circuit in *Lohrmann* and adopted by the South Carolina Supreme Court in *Henderson* was a compromise which maintained the requirement that asbestos plaintiffs prove substantial factor causation, but lowered the ordinary evidentiary burden for showing causation in asbestos-related disease cases. *Lohrmann* and *Henderson* require asbestos plaintiffs to present sufficient evidence from which a juror may find a reasonable probability that exposures attributable to a particular defendant were a substantial factor in causing the plaintiff's disease. Plaintiffs failed to meet their burden here. Instead, they rely on vague evidence that Mr. Jolly "regularly and consistently" worked around "valves" in general and that the valves included, for example, a "good many Crosby valves." (Return at 2, 12). Plaintiffs' arguments and the trial court's and this Court's rulings improperly lower an asbestos plaintiff's burden to prove causation to a mere possibility of causation due to "any exposure." These arguments and rulings are inconsistent with the requirement that Plaintiffs prove substantial factor causation.

The general substantial factor causation standard is not exclusively an asbestos litigation-specific standard. It is a widely-used tort causation standard applied where two or more forces combine to cause an injury. *See, e.g., J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (discussing substantial factor causation in a case arising from a train accident); *see also* Restatement (Second) of Torts §§ 431–33. The traditional substantial factor causation standard requires consideration of "the number of other factors which contribute in

producing the harm and the extent of the effect which they have in producing it" to "determin[e] whether the actor's conduct is a substantial factor in bringing about harm to another." Restatement (Second) of Torts § 433. It further requires a plaintiff to prove that a defendant's conduct was a *probable* cause of his injury, not merely a *possible* cause. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982); *see also State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 453 (D. Md. 2019) ("Under the substantial factor test, the requisite causation may be found if it is 'more likely than not' that the defendant's conduct was a substantial factor in producing the plaintiff's injuries.").

Recognizing that asbestos plaintiffs cannot prove their claims under traditional substantial factor causation requirements (since they cannot identify which fibers started the disease process), the Fourth Circuit created the "frequency, regularity, and proximity" test in *Lohrmann*. 782 F.2d at 1162–63. In doing so, the Fourth Circuit maintained the requirement under Maryland substantial factor causation law that a plaintiff prove a defendant was a *probable* cause of his disease: "[t]o establish proximate causation in Maryland, the plaintiff must introduce evidence which allows the jury to reasonably conclude that it is *more likely than not* that the conduct of the defendant was a *substantial factor* in bringing about the result." *Id.* at 1162 (emphases added).[1] The Fourth Circuit elaborated that *reasonable probability* is the proper test for assessing the sufficiency of circumstantial evidence in establishing proximate causation in asbestos cases. *Id.* at 1163 (explaining a causation finding must be based on "evidence of a reasonable and rational nature

[1] Maryland has adopted the traditional substantial factor causation standard in tort cases. *See Lohrmann*, 782 F.2d at 1162 ("To establish proximate causation in Maryland, the plaintiff must introduce evidence which allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. This is the standard set forth in the Restatement (Second) of Torts § 431 . . . ." (citing *Robin Express Transfer, Inc. v. Canton R.R.*, 338 A.2d 335, 343 (Md. Ct. Spec. App. 1975))).

upon which a jury can make the necessary inference there is a causal connection between a defendant's action and a plaintiff's injury" (citations omitted)).

The evidentiary standard advocated by Plaintiffs in this case—that evidence of "regularly and consistently" working around "a good many" Crosby valves is sufficient—reduces the causation standard to a mere possibility.[2] This proposed standard would impose "not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime," *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 339 (Tex. 2014). Indeed, Plaintiffs' arguments effectuate strict or absolute liability: because Mr. Jolly worked around valves in general and some unidentified portion of those valves were Crosby valves (only 15% of which had any asbestos-containing components[3]), they argue Crosby must be liable for causing Mr. Jolly's mesothelioma. But Plaintiffs have not shown that Crosby (or Fisher) was a *probable* cause of Mr. Jolly's disease.

The fact that Mr. Jolly has mesothelioma, not asbestosis, does not affect the evidentiary analysis. Plaintiffs mischaracterize the issue before the Fourth Circuit in *Finch v. Covil Corp.*, 972 F.3d 507, 512 (4th Cir. 2020). (Return at 3) (arguing the appellant in *Finch* "contend[ed] 'that the district court's jury instruction on substantial factor causation impermissibly reduced Mrs. Finch's evidentiary burden' ***because it allowed the jury to consider that mesothelioma is caused by relatively low exposure levels***." (emphasis added)). As the Fourth Circuit explained in its opinion, the issue raised by the appellants was whether the district court was required to repeat the

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[2] Plaintiffs had the burden to prove their claims against Fisher *and* against Crosby. Fisher and Crosby are different companies and separate defendants in this case. "Fisher/Crosby" is not an entity or a defendant, and the evidence must be evaluated as to each, not jointly as "exposure to Fisher/Crosby valves." *See* (Return at 2).

[3] (R. 1504) (Crosby's corporate representative testifying that "probably 85 percent" of Crosby valves sold to Duke "did not have" asbestos-containing components).

Lohrmann "frequency, regularity, and proximity" test ***verbatim*** in its jury instruction—not whether the jury instruction allowed the jury to consider whether mesothelioma may be caused by low exposures. *Finch*, 972 F.3d at 512 ("Covil maintains that in *Lohrmann* . . . , this court articulated a jury instruction that must be repeated verbatim in instructing a jury as to substantial factor causation in any case concerning diseases caused by asbestos.").

Moreover, contrary to Plaintiffs' arguments, the Fourth Circuit did not "acknowledge[] the difference between the exposure levels needed for asbestosis and mesothelioma." (Return at 4). Rather, the Fourth Circuit explained the district court's description of the purported different exposure requirements for each disease in a footnote but concluded, "***We need not reach this consideration because the instruction given in this case clearly comports with* Lohrmann, *regardless of the disease***." *Finch*, 972 F.3d at 514 n.2 (emphasis added). Thus, neither the Fourth Circuit nor any South Carolina appellate court has ever recognized a different evidentiary burden in mesothelioma cases compared to asbestosis cases, and this Court should not do so here. Further, *Henderson*, which adopted *Lohrmann*, was a mesothelioma case.

Finally, Plaintiffs' policy argument about avoiding "the risk of absolving culpable defendants merely because there were other concurrent causes of the disease," (Return at 7–8), is immaterial to substantial factor causation. That policy underlies an alternative causation standard applied by the Fifth Circuit in *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973). The *Borel* court considered whether each defendant's conduct was a substantial factor in bringing about the plaintiff's injury and held, "Where several defendants are shown to have each caused some harm, the burden of proof . . . shifts to each defendant to show what portion of the harm he caused. If the defendants are unable to show any reasonable basis for division, they are jointly and severally liable for the total damages." 493 F.2d at 1094–95. The court recognized the

impossibility of proving "with absolute certainty which particular exposure to asbestos dust resulted in injury to [the plaintiff]," *id.* at 1094, and, in a later case, articulated that the policy choice underlying this theory "seems to be that in the extreme case where one or more of a defined group unquestionably caused an injury and the choice is between exonerating all because the plaintiff cannot show which did so and holding all liable who cannot prove their innocence, the latter result is preferable." *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983).

The *Borel* test existed at the time the Fourth Circuit decided *Lohrmann*. By applying substantial factor causation and adopting the "frequency, regularity, and proximity" test, the Fourth Circuit necessarily rejected the *Borel* burden-shifting standard. Moreover, this argument exposes Plaintiffs' true motive—their proposed causation analysis imposes strict liability for all *possible* exposures to avoid the "risk" of "absolving culpable defendants." Plaintiffs' preferred policy of ensuring all possibly culpable defendants are held liable is antithetical to the requirement that they prove a particular defendant's actions were a *probable* cause of their injuries. Regardless, the choice is not simply between a standard which risks absolving culpable defendants and one which protects innocent defendants from possible liability. A proper application of the substantial factor causation standard allows the jury to determine which defendants substantially contributed to the plaintiff's injuries and which did not. Substantial factor causation thus requires a plaintiff to prove that his exposures from a particular defendant were a substantial factor in causing his disease, taking into account the context of other exposures.[4]

[4] If this Court disagrees with this point about other context exposures, and if this Court believes it is nonetheless following *Lohrmann* and *Henderson*, it should nevertheless excise and eliminate its differential treatment of causation evidence with respect to mesothelioma as compared to asbestosis. This differential treatment, and the following of *Rost v. Ford Motor Co.*, 151 A.3d

B. A comparative analysis is required to determine whether a causative factor is substantial.

Plaintiffs also incorrectly maintain that a comparative analysis of Mr. Jolly's exposures is "contrary to the substantial factor test." (Return at 7). Despite claiming this Court did not rely on other states' law in rejecting a comparative analysis, Plaintiffs cite only the law of other states—primarily the same cases based upon Pennsylvania and Illinois law which this Court incorrectly relied upon in its opinion. *See* (Return at 7–8) (citing *Tragarz v. Keene Corp.*, 980 F.2d 411, 425 (7th Cir. 1992), and *Rost*, 151 A.3d at 1051 n.13); *see also* (Petition for Rehearing at 2–6) (explaining that *Rost* and *Tragarz* are incompatible with South Carolina law).[5] Plaintiffs' arguments are incorrect in several respects. First, a comparison of exposures is not incompatible with the substantial factor causation standard. A court or jury cannot determine an exposure is a ***substantial*** factor in causing a disease without considering the other factors. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) ("If the total cumulative exposure causes mesothelioma, the court fails to see how a single exposure or set of exposures could be considered a 'substantial cause' of the disease unless that exposure or set of exposures had a substantial impact on the total cumulative exposure."). Second, although some courts have declined a comparative approach under the law of other states, federal courts in the Fourth Circuit require a contextual analysis. *See Connor v. Covil Corp.*, 996 F.3d 143, 155 (4th Cir. 2021) (applying North Carolina law which, like South Carolina law, requires application of

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1032 (Pa. 2016), and *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017), is inconsistent with South Carolina law for the reasons set forth in the petition and this reply.

[5] Plaintiffs also cite *John Crane, Inc. v. Linkus*, 988 A.2d 511 (Md. Ct. Spec. App. 2010), which, far from rejecting a comparative analysis, recognized that whether a defendant's product is a substantial factor depends on context, including other exposures. *See id.* at 522 (recognizing "the proposition that the defendant's product is not a substantial factor may be made more probable by evidence tending to prove that the claimant's disease was caused by the products of one or more non-parties." (quoting *ACandS, Inc. v. Asner*, 686 A.2d 250, 260 (Md. Ct. App. 1996))).

the *Lohrmann* substantial factor causation test); *see also Haskins*, 2017 WL 3118017, at *8 ("[A] robust concept of 'substantial causation' should account for the broader context in which a particular exposure occurs—including the defendant's relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract.").

In *Connor*, the Fourth Circuit found that the disparity between the plaintiff's asbestos exposures attributable to the defendant and his comparatively greater exposures attributable to a non-party was "material to [the Court's] assessment of causation." 996 F.3d at 155. The court held, "Because the record demonstrates that Mr. Connor was exposed to comparatively little asbestos at Fiber Industries versus his asbestos exposure at Norfolk Southern, Appellant cannot establish more than a *mere possibility* that Appellee's asbestos products were a substantial cause of Mr. Connor's mesothelioma." *Id.* Similarly, in *Haskins*, the district court found "the level of exposure necessary to establish 'substantial causation' in a multiple defendant asbestos case may depend on the other defendants' contributions to the total exposure" because a "brief, low level exposure may not be substantial if the plaintiff was also subjected to longer, more substantial exposures on a more frequent basis." 2017 WL 3118017, at *8. However, a "brief, low level exposure" may be substantial "if it was one of only a few exposures that made up the plaintiff's total cumulative exposure." *Id.* Thus, the district court recognized the common-sense notion that determining whether a particular exposure is "substantial" depends on how it compares to other exposures. *See id.* The district court grounded its conclusion in the required showing of *probability* to satisfy the substantial factor causation standard: "even if a plaintiff may show substantial causation by establishing some particular level of exposure in a vacuum, it is clear that

this threshold level cannot be defined as the level of exposure that may cause mesothelioma. This would render the substantial causation rule meaningless." *Id.*[6]

Other courts have similarly recognized the need to consider a particular exposure in context. *See, e.g., Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011) ("Given that the Plaintiff failed to quantify Robert's exposure to asbestos from Garlock gaskets and that the Plaintiff concedes that Robert sustained massive exposure to asbestos from non-Garlock sources, there is simply insufficient evidence to infer that Garlock gaskets probably, as opposed to possibly, were a substantial cause of Robert's mesothelioma. On the basis of this record, saying that exposure to Garlock gaskets was a substantial cause of Robert's mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." (citations omitted)); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) ("[O]ne measure of whether an action is a substantial factor is 'the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.'" (quoting Restatement (Second) of Torts § 433(a))); *Laney v. Celotex Corp.*, 901 F.2d 1319, 1321 (6th Cir. 1990) ("The substantial factor analysis cannot be made in a vacuum.").[7] Accordingly, a comparative analysis is required. Plaintiffs' experts failed

[6] *Cf. Krik v. Crane Co.*, 76 F. Supp. 3d 747, 752 (N.D. Ill. 2014) ("[T]he notion that it is theoretically possible that any amount of exposure could cause injury is different from an opinion that the particular level of dosage experienced by a plaintiff was sufficient to cause his or her particular injury."); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar wants to be allowed to tell a jury that all of the plaintiff's *possible* exposures to asbestos during his entire life were contributing causes of the plaintiff's cancer, and, therefore, sufficient to support a finding of legal liability as to the manufacturer of each asbestos containing product, without regard to dosage or how long ago the exposure occurred. Just because we cannot rule anything out does not mean we can rule everything in.").

[7] *See also Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 482 (Ohio 2018) ("[A] major failing of the cumulative-exposure theory is that it does not consider the relationship that different exposures may have to the overall dose to which an individual is exposed. . . . When causation is

to provide any comparative analysis. The Court should grant rehearing and reverse the trial court's rulings to the contrary.

II. Dr. Frank's opinions, in his own words, espouse the "each and every exposure" opinion and are therefore inadmissible.

Plaintiffs' arguments about Dr. Frank's testimony largely repeat the Court's opinion and fail to meaningfully respond to Fisher and Crosby's arguments. *See* (Return at 9–11). Fisher and Crosby have fully explained in their briefing and their petition for rehearing the manner in which Dr. Frank's opinions are untethered from the facts of this case and from reliable science. *See* (Petition for Rehearing at 9–12; App. Br. 13–22; Reply Br. 4–10). Moreover, contrary to Plaintiffs' argument, Fisher and Crosby have not mischaracterized Dr. Frank's testimony. In fact, rather than characterizing Dr. Frank's testimony at all, Fisher and Crosby simply quoted Dr. Frank's opinions which, in his own words, espouse the unreliable and inadmissible "every exposure" opinion. *See* (Petition for Rehearing at 10–11). Plaintiffs and this Court improperly rely on a few key words to recharacterize Dr. Frank's opinions while failing to acknowledge the inadmissible opinions laced throughout his testimony. The trial court abused its discretion in admitting Dr. Frank's testimony—as Fisher and Crosby have argued throughout the trial court proceedings and this appeal—and the exclusion of Plaintiffs' expert's specific causation opinions leaves Plaintiffs with no evidence of specific causation, thus entitling Fisher and Crosby to JNOV. *See* (Petition for Rehearing at 9–12).

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premised on the total cumulative exposure, a single exposure or set of exposures cannot be 'considered a "substantial cause" of the disease unless that exposure or set of exposures had a substantial impact on the total cumulative exposure.'" (quoting *Haskins*, 2017 WL 3118017, at *7)); *Allen v. Owens-Corning Fiberglas Corp.*, 571 N.W.2d 530, 533 (Mich. Ct. App. 1997) ("[I]n order to determine whether a particular factor was a substantial factor in causing a plaintiff's injury, a jury should be permitted to weigh evidence of other contributing factors.").

Plaintiffs also assert the Court properly considered Dr. Frank's affidavit because the admissibility of expert testimony is for the court, not the jury, and Dr. Frank's affidavit "was, in fact, an exhibit at trial." (Return at 11). However, as Fisher and Crosby explained in their petition, this Court held Fisher and Crosby "failed to show there is a reasonable probability the jury's verdict was influenced by any testimony that could be reasonably characterized as espousing the each and every exposure theory" because "Dr. Frank's affidavit explicitly stated that his opinions were his 'medical and scientific opinions' and that he was 'not offering legal opinions about whether an exposure is "significant" or "substantial" within the meaning of the law.'" Op. No. 5858 (Howard Adv. Sh. No. 30 at 159). Dr. Frank's opinions misled the jury, as Fisher and Crosby explained in their briefing and petition. *See* (Petition for Rehearing at 9–12; App. Br. 13–21; Reply Br. 11–12). The existence of statements in the affidavit did not clarify his misleading testimony to the jury because the jury never saw or heard the purported clarifications.

Further, while Plaintiffs assert the affidavit "was, in fact, an exhibit at trial," and point to the affidavit in the record on appeal, *see* (Return at 11), the record is clear that the affidavit was deemed a "learned treatise" and admitted as a demonstrative exhibit only, and the jury never saw or heard the statements relied upon by this Court. (R. 781–82). Accordingly, the Court erred in relying on Dr. Frank's affidavit and should grant rehearing and reverse the trial court.

III. The Court improperly shifted the burden of proof on Plaintiffs' design defect claims.

The Court misapprehended the burden of proof in finding a jury question existed as to Plaintiffs' design defect claims. Plaintiffs have the burden of proving the elements of their design defect claims, including the element requiring consideration of the cost of any proposed alternative design. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010); *Newbern v. Ford Motor Co.*, 428 S.C. 310, 318–19, 833 S.E.2d 861, 866 (Ct. App. 2019); *see also Hulsizer v.*

Magline, Inc., No. 4:17-CV-00415-RBH, 2018 WL 5617873, at *4 (D.S.C. Oct. 29, 2018). This Court's finding that "there was no evidence that a metal gasket was more expensive than an asbestos gasket," properly construed in the context of the Court's holding, is an acknowledgement that Plaintiffs failed to prove their case, and instead the burden of proving a feasible alternative design was shifted improperly to Fisher and Crosby. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 168). Rather than point to evidence supporting their claims, Plaintiffs defend the burden shifting: "the Court merely observed that there was nothing, such as cost, to prevent the jury from considering metal gaskets to be a reasonable alternative to asbestos gaskets." (Return at 14). Plaintiffs' argument ***is*** burden shifting. They suggest the jury is free to decide an alternative design is reasonable unless the defendants present evidence to "prevent the jury" from doing so. Plaintiffs bore the burden to present evidence proving the existence of a reasonable alternative design. Their failure to do so is fatal to their design defect claims.

Plaintiffs also repeat the Court's statement that even in the absence of any cost evidence, "a juror could have reasonably inferred from the expert testimony on causation that the risk of exposing Duke employees to deadly asbestos fibers was so grave that no economic cost savings would have been worth that risk." (Return at 14). Like the Court, Plaintiffs fail to cite any South Carolina law supporting the proposition that cost evidence is not required if the danger is "grave" enough. The cases they rely upon, *Branham* and *Bragg*, provide the elements of the reasonable alternative design test, and do ***not*** allow a plaintiff to avoid consideration of the cost of a proposed alternative. *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16 ("The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. ***This presentation of an alternative design must include consideration of the costs***, safety and functionality ***associated with the alternative***

design." (emphases added)); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995). Comment f to section 2 of the Restatement (Third) of Torts: *Products Liability* has not been adopted by any South Carolina court and conflicts with binding precedent. *See* (Petition for Rehearing at 15–16) (citing cases refuting the Court's finding). Regardless, it does not support Plaintiffs' argument. The Court should grant rehearing, reverse the trial court, and grant JNOV in favor of Fisher and Crosby on Plaintiffs' design defect claims.

IV. The trial court does not have unlimited discretion to grant *additur* in violation of well-settled law prohibiting speculation as to the composition of a verdict.

The trial court's *additur* ruling is not shielded from appellate review. Plaintiffs advocate a framework in which a trial court has absolute discretion to grant *additur* so long as the trial court states that its ruling is "based on the evidence." (Return at 15–17). While a trial court has discretion to grant *additur*, discretion can be abused. The trial court abused its discretion here.

Contrary to Plaintiffs' arguments, the trial court's *additur* ruling was not based solely on "the evidence," and contrary to this Court's holding, the "essence" of the trial court's ruling was not simply that the verdict was inadequate. *See* (Return at 16–17); Op. No. 5858 (Howard Adv. Sh. No. 30 at 174). Rather, the express basis for the ruling was the trial court's improper speculation as to the components of the verdict and its improper finding that the jury was required to believe Dr. Frank's estimate that Plaintiffs incurred $1,000,000 in medical expenses, despite the requirement that it construe the evidence in the light most favorable to Fisher and Crosby. *See* (R. 14–20); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

Although Plaintiffs and this Court attempt to distinguish clear precedent forbidding speculation as to the composition of a general verdict in *Jenkins v. Few*[8] and *Moore v. Moore*,[9] the Supreme 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.*, Op. No. 28071 (S.C. Sup. Ct. filed December 8, 2021) (Howard Adv. Sh. No. 43 at 34). In *Stoneledge*, confusion arose as to the jury's allocation of damages among three causes of action. *Id.* at 30. 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.* at 31. The Supreme 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 what a jury intended:

> 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 34 (emphasis added).

The reaffirmation of this principle in *Stoneledge* is dispositive of the question whether the trial court in this case had the authority to guess that the jury's $200,000 award to Mr. Jolly included $142,000 in medical expenses and $58,000 for pain and suffering. As the Supreme Court observed in *Stoneledge*, perhaps the jury intended for its verdict in this case to break down as the

[8] 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010).

[9] 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004).

trial court guessed, but perhaps not. "There [is] simply no way for the trial court to tell without speculating what the jury intended." *Id.*

The trial court committed errors of law by speculating about the composition of the jury's verdict and granting *additur* based on that speculation and by improperly construing the evidence in the light most favorable to the moving party. An error of law is an abuse of discretion. *See 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 trial court therefore abused its discretion in granting a new trial *nisi additur*. This Court should grant rehearing and reverse the *additur* ruling.

V. This Court misapprehended several issues related to setoff and the service of Plaintiffs' trial subpoenas.

A. Setoff

Plaintiffs misconstrue the plain language of section 15-38-50 and the setoff issue before this Court. The statute provides,

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) 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 the consideration paid for it,*** whichever is the greater . . . .

S.C. Code Ann. § 15-38-50 (emphasis added). Although setoff applies to "the same injury or the same wrongful death," it does so only "to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it." *Id.* Thus, an allocation must be proper—i.e., stipulated by the release—before an analysis of whether the settlement was for the "same injury" is necessary. Plaintiffs and the settling defendants did not agree to allocate

settlement funds in this case. (R. 44–47, 2501). Rather, Plaintiffs admitted they created an "internal" allocation after the verdict. (*Id.*). Although Plaintiffs argue "internal allocations are permitted under section 15-38-50," (Return at 18), they cite no supporting authority, and the plain language of the statute contradicts their argument. A unilateral, non-binding, "internal" allocation is not permitted by the plain language of section 15-38-50.

As Fisher and Crosby explained in their petition, other jurisdictions with similar statutes interpret the statutes to require that the settling ***parties*** agree to a particular allocation. (Petition for Rehearing at 23–24) (citing *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987), *Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980), and *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000)). If the settling parties do not agree to an allocation, the plaintiffs cannot unilaterally create an allocation for purposes of avoiding setoff.[10] *See id.* Although Plaintiffs attempt to distinguish *Dionese* on the grounds that it did not involve a future wrongful death claim and that the attempted allocation was lopsided, those distinctions are immaterial to the key point: section 15-38-50, by its plain language, requires that an allocation be agreed to by the settling parties.

Plaintiffs also rely on a vague policy argument that South Carolina case law "favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" (Return at 18). However, 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

[10] Fisher and Crosby's citation to *Dionese* and other cases is properly before the Court. Fisher and Crosby are not making a new argument, they are offering further support for their prior arguments.

proceeds does not supersede the plain language of section 15-38-50. Plaintiffs' unilateral allocation is improper and should be disregarded. This Court should grant rehearing and reverse the trial court's setoff ruling.

B. Trial Subpoenas

Plaintiffs defend the Court's incorrect use of the abandonment doctrine to evade material facts. (Return at 21). Plaintiffs seek to avoid consideration of the practical consequences of this Court's ruling by casting aside the key fact illuminating the problem. A person must be authorized to accept service and must affirmatively accept the service. *See* Rule 4, SCRCP. The Court's ruling turns these principles on their heads by changing South Carolina law to now provide that if any attorney (even if she does not have her client's authorization to accept service) signs for a FedEx package without knowing the package contains a subpoena or other document for service, she has "accepted" service on her client's behalf despite never having authority to do so and never agreeing to accept service. This common-sense fact requires no citation to authority. The Court should grant rehearing, reverse the trial court's setoff ruling, and eliminate the negative, widespread, practical ramifications of its ruling.

CONCLUSION

This Court should grant rehearing and reverse the trial court. Fisher and Crosby further request that the Court consider this petition *en banc* for the reasons stated in their petition for rehearing.

(signature page attached)

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December 20, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2017-002611

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..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail, pursuant to Supreme Court Order 2021-08-25-02, and a copy of the sent electronic mail is attached to this certificate:

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The South Carolina Court of Appeals

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Re: Beverly Jolly v. General Electric Company
Appellate Case No. 2017-002611

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V Claire Allen

CLERK

cc: Theile Branham McVey, Esquire
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The South Carolina Court of Appeals

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 Appellants.

Appellate Case No. 2017-002611

ORDER

After careful consideration of the petition for rehearing, this court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams J.

J.

Stephenie P. McDonald J.

Columbia, South Carolina

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FILED
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