

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Apr 10 2023

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2022-000272

Beverly Dale Jolly and Brenda Rice Jolly, Respondents,
v.
General Electric Company, et al., Defendants,
Of whom Fisher Controls International LLC and Crosby
Valve, LLC are the..... Petitioners.

REPLY BRIEF OF PETITIONER

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

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

Table of Contents

Table of Authorities ii

Arguments 1

 I. The Court of Appeals Erred By Affirming the Circuit Court’s Order For A
 New Trial *Nisi Additur*..... 2

 A. The Perceived Inadequacy Of A Jury’s Verdict Cannot, In Itself,
 Provide A Compelling Reason For Granting A New Trial *Nisi*
 Additur 2

 B. The Circuit Court Abused Its Discretion And Committed Legal
 Error, Because It Speculated Regarding The Jury’s General Verdict
 3

 C. *Riley v. Ford Motor Co.* Does Not Support Plaintiffs’ Position..... 7

 II. The Court of Appeals Erred By Affirming the Circuit Court’s Setoff Order,
 Which Gave Effect To Plaintiffs’ Unilateral Internal Allocation of
 Settlement Proceeds For A Non-Existent Future Wrongful Death Claim..... 10

Conclusion 16

Table of Authorities

	Page(s)
Cases	
<i>Armstrong v. Collins</i> , 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005)	4
<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010).....	9
<i>Bowers v. Bowers</i> , 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991).....	11
<i>Builders Mut. Ins. Co. v. Island Pointe, LLC</i> , 431 S.C. 93, 847 S.E.2d 87 (2020)	4
<i>Craven v. Cunningham</i> , 292 S.C. 441, 357 S.E.2d 23 (1987)	2, 10
<i>Estate of Stokes v. Pee Dee Family Physicians, L.L.P.</i> , 389 S.C. 343, 699 S.E.2d 143 (2010).....	13, 14
<i>Glenn v. 3M</i> , 2023 S.C. App. LEXIS 34 (Ct. App. 2023) (rehearing pending).....	13
<i>Green v. Fritz</i> , 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003), <i>aff'd</i> , 385 S.C. 421, 685 S.E.2d 595 (2009)	2
<i>Gruber v. Santee Frozen Foods, Inc.</i> 309 S.C. 1, 419 S.E.2d 795 (Ct. App. 1992).....	3, 10
<i>Harleysville Grp. Ins. v. Heritage Cmtys., Inc.</i> , 420 S.C. 321, 803 S.E.2d 288 (2017), 420 S.C., 803 S.E.2d	4
<i>Harry L. Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc.</i> 134 S.C. 191, 132 S.E. 173 (1926)	5
<i>Jenkins v. Few</i> , 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010).....	4
<i>Jolly v. GE</i> , 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021).....	6, 7, 9
<i>Mr. T v. Ms. T</i> , 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008).....	6
<i>Owens v. Stirling</i> , 438 S.C. 352, 882 S.E.2d 858 (2023).....	11
<i>Riley v. Ford Motor Co.</i> , 414 S.C. 185, 777 S.E.2d 824 (2015).....	7, 8, 9, 10, 12
<i>Smith v. Widener</i> , 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012)	12
<i>Toole v. Toole</i> , 260 S.C. 235, 195 S.E. (2d) 389 (1973).....	3
<i>Welch v. Epstein</i> , 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).....	13, 14
<i>Whisenant v. James Island Corp.</i> , 277 S.C. 10, 281 S.E.2d 794 (1981)	9

Statutes

S.C. Code Ann. § 15-38-30.....11

S.C. Code Ann. § 15-38-50.....1, 11, 12, 13, 15

Other Authorities

S.C. Const. Article I, § 14.....3

Wrongful Death Act.....13

Arguments

Fisher and Crosby brought this appeal to clarify important issues in South Carolina law related to a defendant's constitutional right to have a jury determine the amount of damages. Rather than meaningfully engaging with those issues, Plaintiffs' brief merely recounts the evidence Plaintiffs contend support the trial court judge's decision to increase the jury's award of damages from \$200,000 for Mr. Jolly to \$1,580,000, and \$100,000 for Mrs. Jolly to \$290,000. But the jury heard the exact evidence Plaintiffs cite, and – as Plaintiffs admit – was fully and properly instructed regarding the categories of damages that were part of the verdict. The jury's damages award therefore represents the jury's determination of the disputed issues related to Plaintiffs' damages, a determination that - given the constitutional right to a jury trial - the circuit court cannot lightly disregard, and certainly cannot disregard over its mere disagreement with the jury's conclusion, as Plaintiffs argue.

Plaintiffs' brief also fails to address the key distinction between the set-off issues raised by this appeal compared to prior South Carolina cases: that the allocation between causes of action that Plaintiffs rely on was not done in the settlement agreements or releases, but rather by Plaintiffs unilaterally and after-the-fact. Under the plain language of South Carolina statutes, because there was no “amount stipulated by the release or covenant” for each cause of action, Plaintiffs' claim must be set off by “the amount of consideration paid for it,” not some amount later chosen by Plaintiffs for their own purposes. S.C. Code Ann. § 15-38-50. Plaintiffs' citation to case law upholding allocations favorable to plaintiffs *when such allocations were agreed upon in the settlement agreements* therefore does not support their position.

Rather than addressing the issues Fisher and Crosby raise head-on, Plaintiffs repeatedly chide Fisher and Crosby for allegedly failing to acknowledge the evidence presented at trial, or the

law. But the reality is that Fisher and Crosby are well aware of the evidence and the law, and are merely asking this Court to give effect to what the jury – as the trier of fact pursuant to Fisher and Crosby’s constitutional rights – determined was the proper outcome in this case. The circuit court and court of appeals erred in not giving proper deference to the jury’s determination in this case, and their decisions should be reversed.

I. The Court of Appeals Erred By Affirming the Circuit Court’s Order For A New Trial *Nisi Additur*.

A. The Perceived Inadequacy Of A Jury’s Verdict Cannot, In Itself, Provide A Compelling Reason For Granting A New Trial *Nisi Additur*.

Plaintiffs agree that the only reason the trial judge provided for granting the new trial *nisi additur* was her disagreement with the jury’s damages award, and contend that this perceived inadequacy of a jury’s verdict alone provides the necessary compelling reason to override the jury’s assessment of damages and grant a new trial *nisi additur* in South Carolina. This argument lacks merit.

This Court has concluded that the “[i]nadequacy of a jury’s verdict *will not*, per se, entitle litigants to a new trial or a new trial additur.” *Craven v. Cunningham*, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) (emphasis added). Courts “will not interfere with the amount of a verdict unless the verdict is either *so grossly excessive or inadequate* that *it must be deemed the result of the jury’s disregard of the facts and the court’s instructions*.” *Id.* (emphasis added). Such rule exists for good reason: “The credibility of witnesses is for *the triers of the facts*,” which here was the jury, *not* the trial judge. *Id.* (emphasis added). Thus, “[w]hile the granting of such a motion rests within the sound discretion of the [circuit] court, *substantial deference must be afforded to the jury’s determination of damages*.” *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003), *aff’d*, 385 S.C. 421, 685 S.E.2d 595 (2009) (emphasis added). For “substantial

deference” to mean anything, a trial judge must do more than cite his or her perceived inadequacy of the jury’s verdict before granting a new trial *nisi additur*. Rather, in accord with these governing principles and defendants’ constitutional right to a trial by jury, an order granting a new trial *nisi additur* must contain **compelling** reasons for overriding the jury’s determination of damages, not a mere disagreement with the jury’s conclusion. S.C. Const. Art. I, § 14 (“The right of trial by jury shall be preserved inviolate”); *Gruber v. Santee Frozen Foods, Inc.* 309 S.C. 1, 19, 419 S.E.2d 795, 798-99 (Ct. App. 1992).

The applicable standard of review consequently has more nuance than Plaintiffs posit. While *nisi additur* is a discretionary ruling, the standard of review contains special and necessary guard rails to protect a jury’s verdict and a defendant’s constitutional rights whenever possible. The record must therefore contain compelling reasons - in light of the institutional deference accorded to the jury’s verdict - specifically illustrating how and why a verdict was **unduly inadequate or conservative** on damages, considering the particular evidentiary showing below. *Gruber* 309 S.C. 1, at 19, 419 S.E.2d at 799. A trial judge’s discretion is appropriately tempered by these features to ensure that additur remains an extraordinary remedy in South Carolina, and that damages are generally determined by juries, not trial judges. The appellate courts thus have a critical duty to review an additur order to determine whether there has been an abuse of discretion amounting to error of law. *Toole v. Toole*, 260 S.C. 235, 195 S.E. (2d) 389 (1973). Proper application of such standard confirms that the Court of Appeals’ opinion should be reversed.

B. The Circuit Court Abused Its Discretion And Committed Legal Error, Because It Speculated Regarding The Jury’s General Verdict.

Plaintiffs’ brief approves of the circuit court’s order which tried to “to make sense” of how the jury reached its general verdict. (Resp. Br. pp. 26-27). But the circuit court did more than this; it specifically parsed the verdict - by conjecture - in the absence of a special verdict form. The

circuit court found that despite only a \$200,000 general verdict awarded to Mr. Jolly and nothing on the verdict form indicating the reason for the jury's award of that amount, “[t]he jury only awarded Mr. Jolly medical expenses in the amount of \$142,000 plus \$58,000 for pain and suffering.” (R.11 (emphasis added).) The circuit court based this conclusion on its own assessment of the evidence and the credibility of the witnesses. The circuit court then proceeded order *additur*: increasing the award to \$1 million for medical expenses, and to \$580,000 for pain and suffering. (R.18.) Such parsing created a threshold error which spoiled the circuit court's additur analysis. And the Court of Appeals failed to follow its own published authorities which prohibit parsing a general verdict. As such, the circuit court's additur order cannot stand.

South Carolina law prohibits a court's parsing of a jury's general verdict because such parsing is speculation. *See e.g. Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) (finding “[b]ecause the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages.”); *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 462 (Ct. App. 2010) (“We will not speculate as to how the jury allocated damages.”). In *Builders Mutual*, this Court recently confirmed that allocating a general verdict into covered and non-covered damages was improper, “because that allocation requires some degree of speculation as to what the jury may have intended when issuing its verdict.” *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 108, 847 S.E.2d 87, 95 (2020). *Cf., e.g., Harleysville Grp. Ins. v. Heritage Cmty., Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017), 420 S.C. at 332, 803 S.E.2d at 294 (explaining the Special Referee found “it would be improper and purely speculative to attempt to allocate the [] general verdict[] between covered and non-covered damages”) (emphasis added).

Thus, any attempt to parse a general verdict in the absence of a special verdict form constitutes improper conjecture. No court could opine with reasonable certainty what the jury

intended when issuing its general verdict, because the jury's deliberations are secret and unique in each case (thus making comparisons with other cases of limited value). And here, Plaintiffs waived any right to a special verdict form by failing to request one. *Harry L. Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc.* 134 S.C. 191, 197, 132 S.E. 173, 174-75 (1926) ("It does not appear that the defendant made any objection to the form of the verdict which might have been corrected before the jury dispersed, nor that their motion for a new trial was based upon such ground.").

Plaintiffs largely bypass this issue, contending that the \$200,000 the jury awarded to Mr. Jolly could not possibly cover all of this past and future medical expenses. But the medical damages at trial were disputed, and the jury was not required to believe Plaintiffs' evidence, particularly given that Plaintiffs failed to enter a single medical bill into evidence, and Plaintiffs' own expert did not testify that future medical damages would be \$1 million with reasonable certainty. (R.2306 (emphasizing the lack of evidence during Plaintiffs' closing argument, stating, "There are no medical records. No medical bills. . . . You have to wonder why."); R.845-46 (Plaintiffs' expert Dr. Frank clarifying that his testimony was not that future medical damages would be a million dollars, but rather "it would not be unreasonable" for the medical damages to be a million dollars, and agreeing that the medical bills would be the best data).) Without a special verdict form, the circuit court, court of appeals, and this Court have no way to know whether the jury only awarded \$142,000 in medical damages as the circuit court guessed, determined that the Plaintiffs failed to prove any medical damages with reasonable certainty due to their failure to submit a single medical bill into evidence, or something in between. It is this guess work that tainted the circuit court's analysis, and that makes its *additur* an abuse of discretion.

The same speculation was involved in granting *additur* with regard to non-economic damages. Plaintiffs also contend that *additur* is warranted “when a jury has awarded medical expenses but not damages for pain and suffering” (Resp. Br. at 19), but without a special verdict form, there is no way to know how much, if any, of the damages awarded were to compensate for Mr. Jolly’s pain and suffering. The circuit court again guessed that the jury awarded \$58,000 in pain and suffering damages (a corollary of the improper guess regarding the jury’s medical damages award), but this is just one possibility. The jury could have awarded all \$200,000 in pain and suffering based on the lack of medical damages data, or awarded some other amount in between. There is simply no way to know what the jury awarded without a special verdict form, something Plaintiffs did not seek.

Since the circuit court’s *additur* was based upon the parsed-out damages calculations that were extrapolated from the general verdict, the *additur* is grounded upon a threshold legal error that requires reversal. The circuit court abused its discretion by increasing the purported \$142,000 medical expense award to \$1 million, and increasing the alleged \$58,000 in non-economic damages awarded ten-fold to \$580,000.

The Court of Appeals also erred by failing to adhere to this clear rule of law. *See Mr. T v. Ms. T*, 378 S.C. 127, 131, 662 S.E.2d 413, 415 (Ct. App. 2008) (“[T]his court, sitting as a three judge panel, lacks the authority to rule against prior published precedent without en banc review.”) The Court of Appeals rejected Fisher and Crosby’s arguments regarding speculation, making its own conclusion that the jury was “more likely” to have awarded \$142,000 in medical expense damages than to have rejected Dr. Frank’s testimony altogether. *Jolly v. GE*, 435 S.C. 607, 657, 869 S.E.2d 819, 846 (Ct. App. 2021). But even this language is that of suppositions and guesses: one option being “more likely” than another does not rule out the second option altogether. Further,

that there was evidence supporting the circuit court’s guess about what the jury meant does not take the circuit court’s conclusion out of the realm of guesswork. *See id.* at 658, 869 S.E.2d at 846. Guesses based on evidence are still guesses, and absent a special verdict form there is no way to know whether the jury credited the Plaintiffs’ damages evidence or not. The Court of Appeals erred in affirming the circuit court’s *additur*, which was based on speculation, and therefore an abuse of discretion.

C. *Riley v. Ford Motor Co.* Does Not Support Plaintiffs’ Position

Plaintiffs’ brief also contends that the instant case “is on all fours” with this Court’s opinion in *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). Not so.

In *Riley*, the decedent, a local sheriff, was killed in a car accident in which he was ejected from the vehicle due to a defectively designed door latch. *Id.* at 189, 777 S.E.2d at 826-27. The plaintiffs presented expert testimony of \$228,000 in economic damages, and so much evidence regarding non-economic damages that the trial judge excluded further evidence on the grounds that it had become cumulative. *Id.* at 193, 777 S.E.2d at 829. The trial court judge observed: “I’ve been doing this a long time and I can’t remember a trial that I was either involved in as a lawyer or as a judge where I’ve heard more glowing testimony and genuine testimony about the person’s life and his service to his family and to the community.” *Id.* at 193, 777 S.E.2d at 829. Further, the defendant did not actively contest the damages evidence, instead challenging only liability. *Id.* at 190, 777 S.E.2d at 827.

In affirming the trial court’s *nisi additur* adding \$600,000 to the damages award (less than half of the *additur* awarded in this case), this Court observed that the trial judge gave “a thorough recitation of the *uncontested* and emotionally compelling evidence, including testimony *and supporting exhibits* that demonstrated. . . .the pecuniary losses suffered by the Riley family”

Id. at 194, 777 S.E.2d at 829 (emphasis added). This Court therefore concluded, “[i]n light of the trial judge’s correct application of the law and the *extensive evidence on the proper elements of damages* in a wrongful death action, the trial court did not abuse its discretion in granting the *nisi additur*.” *Id.* (emphasis added).

The evidentiary record here paints a very different picture. Unlike *Riley*, the damages evidence was neither undisputed nor extensive. There were no damages exhibits, because Plaintiffs did not admit a single medical bill into evidence. Plaintiffs’ expert Dr. Frank even conceded he failed to review all of the medical bills, testifying that he did not know why the records were not available for his review, and agreeing that the medical bills would be the best data regarding Mr. Jolly’s economic damages. (R.845-46.) Fisher and Crosby’s counsel emphasized that issue during closing argument, reminding the jury: “There are no medical records. No medical bills. . . . You have to wonder why.” (R.2306.)

The record likewise fails to establish with reasonable certainty that the total cost of Mr. Jolly’s medical care would be \$1,000,000. Plaintiffs’ brief confirms that Dr. Frank’s testimony on medical expenses was weak and equivocal at best. Dr. Frank’s testimony provided only that “[c]ases *like this* with the kind of extensive treatment and surgery he’s had, clearly hundreds of thousands. *Cases* even go to a million dollars or more.” (R. 760; Resp. Br. p. 16) (emphasis added)). When asked for clarification during cross-examination, Dr. Frank confirmed that he was not testifying with reasonable certainty that Mr. Jolly’s medical care would cost \$1,000,000, but only that “*it would not be unreasonable* to be a million dollars.” (R.845.) Saying it “would not be unreasonable” for damages to equal a certain amount is far from opining with reasonable certainty as to what projected future damages will be. The record is therefore bereft of any competent evidence illustrating that *Mr. Jolly’s medical care* actually totaled or would total

\$1,000,000. This evidence is far from the “concrete information” the Court of Appeals opined was before the circuit court. *Jolly*, 435 S.C. at 658, 865 S.E.2d at 846. Moreover, it is nothing like the undisputed and extensive evidence (including supporting exhibits) that supported the additur in *Riley*. Given the disputed, equivocal, and scant evidence regarding economic damages, it was well within the jury’s purview to determine that Plaintiffs had not met their burden to establish damages with reasonable certainty. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135 (2010) (“Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.”) (quoting *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). Nothing in this case justifies the circuit court’s extraordinary action of disregarding the jury’s general verdict and concluding that Plaintiffs were entitled to \$1,000,000 in economic damages *as a matter of law*.

The circuit court’s (and Plaintiffs’) general survey comparing various jury awards in other mesothelioma cases does not change this outcome. It is only the instant evidentiary record that is of importance for purposes of considering whether this jury’s general verdict rendered below was unduly conservative and must have resulted from the jury’s disregard of the actual facts presented. The jury was not presented and could not consider the verdicts awarded in other mesothelioma cases, because each of those cases featured different facts regarding both liability and damages. In particular, Plaintiffs fail to inform the Court whether the plaintiffs in those case likewise failed to admit a single medical bill or whether their damages experts failed to review all appropriate medical bills. The evidentiary record cannot support the circuit court’s *nisi additur* order and failing to reverse it based upon the ambiguous evidence below would chart a perilous course in South Carolina. Additur could morph from a rare remedy reserved for the clearest of cases to

routine relief ordered where trial judges simply had a different take on disputed evidence. When examined through the appropriate lens, the circuit court erred by concluding that the jury's general verdict was *unduly conservative or grossly inadequate*. *Gruber* 309 S.C. 1, at 19, 419 S.E.2d at 799; *Craven* 292 S.C. at 443, 357 S.E.2d at 25. The credibility of Dr. Frank and other witnesses was for the jury to assess, not for the circuit court to reevaluate based on the modest and disputed evidentiary showing. On this record, the circuit court failed to give appropriate deference to the jury's assessment of the witnesses' credibility and the lack of documentary and other evidence supporting Plaintiffs' claimed damages. Unlike in *Riley*, where the damages evidence was both extensive and undisputed, the relative lack of damages evidence here provides sufficient reason why the jury chose not to award a larger verdict. Plaintiffs' case-in-chief did not present the type of unassailable evidentiary showing on damages that might make a new trial *nisi additur* appropriate. The jury's award should have been left undisturbed.

Accordingly, the circuit court erred by concluding - *as a matter of law* - that the jury's general verdict rendered below was unduly conservative or grossly excessive *and must* have resulted from the jury's disregard of the evidence. The Court of Appeals' opinion affirming the new trial *nisi additur* order should be reversed and this cause remanded to the circuit court with instructions to enter judgment consistent with the jury's general verdict.

II. The Court of Appeals Erred By Affirming the Circuit Court's Setoff Order, Which Gave Effect To Plaintiffs' Unilateral Internal Allocation of Settlement Proceeds For A Non-Existent Future Wrongful Death Claim.

Regardless of how this Court rules on the additur issue, Plaintiffs should not be able to avoid having to set off the \$2,270,000 in settlements they received, which is \$1,970,000 more than the jury determined the Plaintiffs suffered in damages, and \$400,000 more than even the trial court found after its *additur*. (R.44.) The circuit court refused to set off one-third of the total amount of

the settlements *solely due to Plaintiffs' purported internal allocation* of those proceeds to a future wrongful death claim which, for the reasons stated below, does not and will not ever exist. Plaintiffs contend that the circuit court properly recognized the Plaintiffs' unilateral internal allocation of their settlement proceeds to refuse a credit for the total settlement amount paid by the settled defendants. This argument lacks merit on several fronts.

As a preliminary matter, the circuit court's order also contains no sufficient factual finding to support Plaintiffs' purported allocation. At the post-trial motion hearing, Plaintiffs' counsel asserted that Plaintiffs had unilaterally asserted one-third of the settlement proceeds to a wrongful death claim, but offered no evidence of such internal allocation. The circuit court then flipped the burden to Fisher and Crosby to prove why Plaintiffs' counsel's assertion was inaccurate, which was impossible, given that Fisher and Crosby had no ability to review the settlement agreements, or seek or obtain any evidence regarding the supposed internal allocation of proceeds. As a result, the circuit court's order only recited that it accepted Respondent's counsel's statement that the allocation was as so stated at the post-trial motion hearing. (R. 46) This constitutes reversible error. This Court "cannot rely on the arguments of counsel to fill in the record," since "[t]he arguments of counsel are not evidence." *Owens v. Stirling*, 438 S.C. 352, 359, 882 S.E.2d 858, 862 (2023); *see also Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (observing mere allegations are not evidence, and "[a]rguments of counsel are also not evidence").

Even if there were actual evidence that the settlement proceeds were allocated as Plaintiffs claim, the plain language of section 15-38-50 does not permit the unilateral, after-the-fact allocation of settlement proceeds as a means to avoid set off. Under that statute, a settlement reduces a claim against other tortfeasors "to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is greater." S.C. Code Ann.

§ 15-38-30. This reduction is not a matter of discretion; rather, the right of set-off arises as an operation of law. *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). It is undisputed that there is no amount stipulated in the Plaintiffs' releases allocating the settlement amounts between various claims. Under the plain language of section 15-38-50, then, the set-off is equal to the full amount of consideration paid, or \$2,270,000, and the damages found by either the jury or the trial judge must be totally set off.

Plaintiffs ignore this statutory language, instead relying on the general principle that settlements are favored, and therefore parties can allocate settlements in their own favor. However, the cases Plaintiffs cite for that principle involve allocations of stipulated amounts within the settlement, not purported unilateral allocations after-the-fact. For example, Plaintiffs repeatedly cite *Riley*, but there this Court concluded that the Court of Appeals erred by reapportioning settlement proceeds under circumstances where there was a particular *agreed-upon settlement* allocation contract specifically dividing money between the survival and wrongful death claims between the settling parties. *Riley*, 414 S.C. at 192, 777 S.E.2d at 831. Nothing in *Riley* supports the proposition that unilateral allocations may be treated as amounts "stipulated by the release or covenant" for purposes of set off under section 15-38-50. This does not conflict with any public policy in favor of settlement, as Plaintiffs appear to argue, because the statutes of South Carolina *are* the public policy of this state, and the plain language of the statute must be followed.

A post-settlement unilateral allocation, like the one created below, also allows a plaintiff to reverse engineer an allocation to which the other settling party did not assent. Such unilateral allocation is subject to improper manipulation and mischief, whether under section § 15-38-50 or the common law. For example, the plaintiff in a personal injury case could settle a meritless or non-existent claim with one defendant, unilaterally allocate all those settlement funds to that

purported claim, and then only proceed to trial against other defendants on other, meritorious claims, guaranteeing there would be no setoff on a later judgment. Such a system would allow gamesmanship, deprive defendants of any meaningful ability to investigate or challenge a purported allocation, and lead to windfalls for plaintiffs by permitting them to recover amounts in excess of those awarded by juries (such as what occurred in this case). The Court of Appeals recently expressed some of these same reservations but stopped short of clarifying the law to declare unilateral internal allocations impermissible. *Glenn v. 3M*, 2023 S.C. App. LEXIS 34, 60 fn 28 (Ct. App. 2023) (rehearing pending). But this Court is institutionally equipped to address this issue here and should do so by re-affirming the plain language of section 15-38-50: if the releases themselves contain no agreed-upon allocation, the set-off must equal the total amount of consideration paid.

Even if South Carolina law permitted plaintiffs to make unilateral, internal allocations of their settlement proceeds to avoid set off, the purported allocation in this case “must yield to fairness and justice.” *Welch v. Epstein*, 342 S.C. 279, 313-314, 536 S.E.2d 408, 426 (Ct. App. 2000). Plaintiffs allocated one-third of their settlement proceeds to a future purported wrongful death claim that they assert cannot be set off because it is different than the claims tried in this case. However, by definition, a wrongful death claim cannot exist after termination of Mr. Jolly’s personal injury claim, either through those settlements or at trial. *Estate of Stokes v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143 (2010). In *Stokes*, this Court broadly reaffirmed that “that a claim under the Wrongful Death Act lies in the decedent’s estate only when the decedent possessed the right of recovery at his death.” *Id.* at 349, 699 S.E.2d at 146. Irrespective of a limitations period, the right to bring a wrongful death claim in South Carolina is conditioned upon the decedent’s right to maintain a claim, but one who is still alive does not qualify

Thus, Mr. Jolly's right to maintain a wrongful death claim did not exist at the time of his settlement, because he was still alive. Mr. Jolly therefore had no wrongful death claim to release.

Further, Mr. Jolly's settlement of his personal injury claim necessarily extinguished any potential future wrongful death claim by his estate, because the release of a plaintiff's personal injury claim extinguishes any future wrongful death claim on his or her behalf. *Stokes*, 389 S.C. at 347, 699 S.E.2d at 145 (“[I]f the decedent had no claim at his death, the estate has no claim.”). This is true even if the release does not mention the future wrongful death claim at all. Accordingly, even if Plaintiffs' releases had not mentioned releasing wrongful death claims, the result would have been the same: Mr. Jolly's estate would not have a wrongful death claim after he passed away, because he had released his personal injury claim during his life. Under those circumstances, purportedly allocating one-third of Plaintiffs' settlement proceeds to a “future” claim that neither Mr. Jolly at the time of the settlement nor Mr. Jolly's heirs after his death could pursue is unfair, and must yield to fairness and justice. *Welch*, 342 S.C. at 313, 536 S.E.2d at 426.

That unfairness is particularly evident when looking at the facts of this case. The jury here heard all of the evidence Plaintiffs cite regarding each category of damages: medical expenses, pain and suffering, future damages related to Mr. Jolly's death, and loss of consortium. After hearing that evidence and being fully instructed regarding South Carolina law on damages, the jury determined that Mr. Jolly was entitled to \$200,000 in damages, and Mrs. Jolly was entitled to \$100,000 in damages, for a total award of \$300,000. Even the trial court, after hearing the evidence and construing it more favorably to Plaintiffs, concluded that Mr. Jolly should be awarded \$1,580,000, and Mrs. Jolly should be awarded \$290,000, for a total award of \$1,870,000. Under either of these damages totals, the \$2,270,000 in settlements Plaintiffs obtained prior to trial – which in themselves made *no* allocation between causes of action – far outstrip the amount of

damages awarded by the trier of fact. Yet, under the current decision, Fisher and Crosby must pay Mr. Jolly an additional \$823,333.33, resulting in total compensation of \$3,093,333.33 for damages that the jury determined were worth \$300,000, and the trial court determined were worth \$1,870,000. Although Plaintiffs claim this is not a “windfall,” it is unclear how collecting millions of dollars in excess of the amount of one’s damages – as determined by two separate triers of fact – could be anything else.

The outcome Fisher and Crosby seek is a simple one: reinstatement of the jury’s verdict regarding damages and application of the plain language of section 15-38-50 to set off the amount of consideration Plaintiffs received in settlement of their claims with other tortfeasors. Such a result is not only necessary to achieve fairness in this case, but to ensure that future defendants’ constitutional and statutory rights are protected.

Conclusion

For the reasons stated herein, and in their principal brief, Petitioners respectfully request that this Court reverse the Court of Appeals' error of law which allowed the circuit court's additur order to stand and remand this cause with instructions to the circuit court to enter judgment consistent with the jury's general verdict. Further, Petitioners respectfully request that this Court reverse the Court of Appeals order affirming the circuit court's post-trial order declining to apply a complete setoff and remand the cause to the circuit court with instructions to do so.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
James B. Glenn
SC Bar No. 77731
E-Mail: jase.glenn@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Fisher Controls International LLC and Crosby
Valve, LLC

Columbia, South Carolina
April 10, 2023