THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from York County
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2022-001574

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

v.

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

BRIEF OF PETITIONER

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INTRODUCTION

The Court of Appeals' rulings in this asbestos case conflict with prior decisions of this Court and several courts around the nation in significant ways. It is the institutional role of this Court to provide guidance where, as here, South Carolina's common law has been, with respect, impermissibly expanded and misapplied below.

For example, during trial, the circuit court permitted the Plaintiffs experts—over Scapa's objections—to testify to a "cumulative dose" theory that has not been recognized by this Court and has been widely condemned by courts around the nation as inappropriate. Relatedly, in analyzing whether Mr. Stewart presented legally sufficient evidence to prove substantial factor causation, the Court of Appeals impermissibly relied on Pennsylvania law—which differs significantly from South Carolina law. The majority view among courts throughout the United States is that the "cumulative dose" or "cumulative exposure" testimony of Mr. Stewart's experts is inconsistent with the legal requirements under *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), adopted by this Court in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179 (2007) for specific substantial factor causation in cases of this nature. When this Court addresses more fulsomely how the *Lohrmann* test should be applied in cases such as the one here, this Court should specifically and expressly reject the Pennsylvania Supreme Court's decision in *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016)—not adopt it as the Court of Appeals has done.

The circuit court's *additur* ruling is also erroneous, as it was not properly tethered to the *compelling reasons* that this Court has directed must be given to justify invading the jury's province by granting additional damages. Following trial, the circuit court increased the already-sizeable award of $600,000 in survival damages to $1,000,000. The Court of Appeals' affirmance effectively granted the circuit court unfettered discretion to grant *additur*, regardless of whether a compelling reason exists for *additur*. *Additur* was improper because the damage awards below

were not "unduly conservative" under this Court's settled precedent. *Riley v. Ford Motor Co*., 414 S.C. 185, 192 (2015).

The Court of Appeals further erred by affirming the circuit court's ruling on the issue of allocating settlement proceeds and setoff. As a matter of law, Respondent's 80% wrongful-death-claim/20% survival-claim allocation was not reasonable under the facts. Respondent allocated 80% of the settlement proceeds to the wrongful death claim even though the circuit court found no reason to increase the jury's award of $100,000 for the wrongful death damages, given Mr. Stewart's limited relationship with his children. Only 20% of the proceeds were allocated to the survival claim even though the trial court believed the evidence concerning Mr. Stewart's survival damages warranted a 67% increase in survival damages—from $600,000 to $1,000,000. Among other reasons, given the circuit court's findings concerning the damages evidence, allocating just 20% of the settlement proceeds to the survival claim is not reasonable. The allocation should have instead been 10% for the wrongful death claim and 90% for the survival claim for set off purposes.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by affirming the trial court's ruling denying Petitioner's motion for judgment n.o.v. because Respondent did not introduce any legally sufficient evidence of causation.

2. Whether the Court of Appeals erred by affirming the trial court's order granting additur because the jury's damage awards were not actuated by passion, caprice, or prejudice, and the trial court failed to pay substantial deference to the jury's awards.

3. Whether the Court of Appeals erred by affirming the trial court's abuse of discretion in accepting Respondent's allocation of settlement proceeds.

STATEMENT OF THE CASE

1. Procedural history.

Steven Stewart initiated this asbestos products liability matter by a Complaint filed in February 2013. Complaint, Record on Appeal ("R"), pp. 30–56. Mr. Stewart filed an Amended Complaint in May 2013 adding Defendant-Petitioner Scapa Waycross, Inc. (Amended Complaint, R. 57-71).

Mr. Stewart died in August 2013. (Suggestion of Party's Death, R. 72-75). Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart, filed a Motion to Substitute Party and Motion to File a Second Amended Complaint, which was granted, (Order, R. 1-5), and Mr. Stewart filed a Second Amended Complaint in November 2013, (Second Amended Complaint, R. 76-92). Scapa filed an Answer to the Second Amended Complaint. (Scapa Answer, R. 93-102).

Mr. Stewart settled with all other defendants before trial. Trial was conducted from January 29, 2018 to February 2, 2018 and then continued from February 7, 2018 to February 9, 2018 against Scapa alone. (Trial Transcripts, R. 408-1646).

The jury returned a verdict in favor of Mr. Stewart on his negligence claim, and awarded actual damages of $600,000 for Mr. Stewart's survival claim and $100,000 for Mr. Stewart's wrongful death claim for total damages of $700,000. (Verdict Form, R. 26-29). The jury did not find that Scapa's conduct was willful, wanton or reckless. *Id.*

Following the verdict, Scapa filed a Motion for Setoff, (R. 141-45), a Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors, (R. 164-70), and a Motion for Judgment Notwithstanding the Verdict on liability issues, but did not ask for a new trial, (R. 171-74).

Mr. Stewart filed a Motion for a New Trial *Nisi Additur*, (R. 175-83), arguing that the verdict should be raised to $2,630,000 for Mr. Stewart's survival claim and $600,000 for Mr. Stewart's wrongful death claim, for a total verdict of $3,230,000, more than four times the jury's verdict. Scapa filed its Brief in Support of Motion for JNOV. (R. 184-93). Scapa also filed a response to Plaintiff's Motion for New Trial *Nisi Additur*. (R. 194-98).

The circuit court held a hearing on the parties' post-trial motions and heard arguments on Mr. Stewart's Motion for New Trial *Nisi Additur* and granted an additional $400,000 to the jury's survival award of $600,000 to increase it to $1,000,000, (7/11/18 Post-Trial Motions Transcript, pp. 25-27, R. 1671-73), but did not alter the wrongful death damages awarded by the jury. (7/11/18 Post-Trial Motions Transcript, pp. 24-25, R. 1670-71).

The circuit court also heard argument on Scapa's Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors or, in the alternative, Scapa asked that the Court review the settlements *in camera*. (7/11/18 Post-Trial Motions Transcript, pp. 27-29, R. 1673-75). Scapa's counsel acknowledged that Mr. Stewart had produced the settlement numbers just before the hearing, but not the settlement documents. (7/11/18 Post-Trial Motions Transcript, p. 32, R. 1678).

The disclosure revealed that Mr. Stewart had received or would receive $1,036,000 in prior settlements, and that Mr. Stewart had uniformly (and unilaterally) allocated the previous settlement amounts by allocating 80% to the wrongful death claim and 20% to the survival claim. (7/11/18 Post-Trial Motions Transcript, pp. 32, 36-37, R. 1678, 1682-83). Due to that recent disclosure, counsel for Scapa asked for time to move to reallocate those settlements, which the circuit court granted. (7/11/18 Post-Trial Motions Transcript, pp. 33, 35, R. 1679, 1681).

Scapa filed a Motion to Reallocate Settlement Proceeds and a Brief in Support of same. (R. 199-204). The circuit court held a hearing on Scapa's Motion to Reallocate Settlement Proceeds. (10/10/18 Motion Transcript, R. 1687-1708).

On March 25, 2019, the circuit court issued its Order on Post-Trial Motions, granting Mr. Stewart's Motion for New Trial *Nisi Additur*, denying Scapa's Motion for JNOV, denying Scapa's Motion for Production of Plaintiff's Settlements and Payments with all Third-Party Tortfeasors, granting Scapa's Motion for Setoff, and denying Scapa's Motion to Reallocate Settlement Proceeds. (Order Re: Post-Trial Motions, R. 6-25).

Scapa timely appealed. (Notice of Appeal, R. 210-32). The Court of Appeals affirmed the circuit court's judgment and all related post-trial motions. Scapa timely filed a Petition for Rehearing with the Court of Appeals on September 14, 2022, which was denied on October 26, 2022. Scapa then petitioned this Court for certiorari on December 19, 2022. The Petition was allowed, in full, by order entered May 23, 2023.

2. Facts

Mr. Stewart was employed at the Bowater Paper Mill in Catawba, South Carolina, from 1963 until 2002. (2/18/13 Stewart Depo., p. 25, R. 2102).[1] He was originally hired as a utility man performing clean up on Paper Machine 1. (2/18/13 Stewart Depo., pp. 25-27, R. 2102-04). He was promoted to several different positions at Bowater, but he worked his entire career on Paper Machine Number 1. (2/18/13 Stewart Depo., pp. 27-30, R. 2104-07).

The paper machines used dryer felts to keep the paper against the dryer drums, which dried the paper, and the felts would also absorb moisture from the paper sheets. (1 Tr. 269-270, R. 676-77; 2 Tr. 84-85, R. 1236-37). Bowater purchased dryer felts from Scapa from 1963 until around

[1] Mr. Stewart's discovery deposition taken on February 18, 2013 was read into the record at trial on February 2, 2018. (1 Tr. 570-571, R. 977-78).

1981. *See* (Plaintiff's Trial Exhibit No. 56, R. 2095-96) (showing the first purchase of Scapa felt in 1963, installed in 1964). During Mr. Stewart's career, Bowater used 288 dryer felts on Paper Machine 1, but only 3.8% of those dryer felts were Scapa asbestos-containing dryer felts. (2 Tr. 92-93, R. 1244-45).

Mr. Stewart did not know which dryer felts contained asbestos and could not tell from looking at the dryer felts. (2/18/13 Stewart Depo. pp. 168-71, 179, 181, R. 2114-19). Similarly, Mr. Stewart's co-workers were unable to identify any asbestos-containing Scapa dryer felts that Mr. Stewart worked with. (7/13/13 Hegler Depo., pp. 68-69, R. 2205-06);[2] (1 Tr. 337-38, R. 744-45) (testimony of co-worker Steele).

Because there were no fact witnesses tying Mr. Stewart directly to exposure to asbestos-containing Scapa dryer felts, Plaintiff relied on so-called "Mastercards," which Scapa maintained to track the manufacture, sale, shipment, and use of Scapa dryer felts at Bowater, to demonstrate theoretical exposure. (1 Tr. 661-662, R. 1068-69). According to the Mastercards introduced at trial, Bowater started purchasing dryer felts from Scapa in 1963. *See* (Plaintiff's Trial Exhibit No. 56, R. 2095-96). However, the Mastercards also show that Scapa did not send any asbestos-containing dryer felts to Bowater until 1969. (Plaintiff's Trial Exhibit No. 26, R. 2051-52) (earliest Mastercard referencing asbestos).

Before 1968 and the introduction of asbestos-containing Scapa dryer felts, Mr. Stewart had worked as a utility man, a fifth hand, and a fourth hand. In 1968, Mr. Stewart was promoted from fourth hand to third hand. (1 Tr. 262, 267, R. 669, 674) (Co-Worker Fred Steele testified that he started working with Mr. Stewart in 1968 at which time Mr. Stewart was a third hand). After 1968,

[2] Mr. Hegler's deposition testimony was read into the record. (1 Tr. 158, R. 565).

Mr. Stewart only worked as a third hand, a backtender, and a machine tender. (2/28/13 Stewart Depo., p. 30, R. 2107).

Significantly, those higher level, more senior positions did not involve cutting the dryer felt or cleaning the paper machine by blowing out the dryer. (1 Tr. 278, R. 685; 2/28/13 Stewart Depo. pp. 59-62, R. 2109-12). The third hand's primary job was to watch the paper machine and supervise other workers. (1 Tr. 266, 334, R. 673, 741; 2/28/13 Stewart Depo., p. 59, R. 2109). A machine tender did not have regular contact with dryer felts in any capacity. (3/4/13 Stewart Depo. p. 54, R. 2173). It was primarily up to the utility man and fifth hand to clean out the machine. (1 Tr. 278, R. 685). Fifth hands and fourth hands were primarily involved in cutting the dryer felt. (1 Tr. 289, R. 696).

Mr. Stewart's transition from fourth hand to third hand in 1968 is important because Plaintiff's own experts recognized that the dryer felt would not release any fibers unless it was being cut or otherwise manipulated by the worker. *See* Testimony of Plaintiff's expert Christopher DePasquale, (1 Tr. 470-471, R. 877-78). Thus, by the time that Scapa was shipping asbestos-containing dryer felt to Bowater in 1969, Mr. Stewart's positions no longer directly involved cutting or manipulating the dryer felts. Consequently, Plaintiff presented no evidence that Mr. Stewart worked closely enough to others cutting or manipulating asbestos-containing Scapa dryer felts to be exposed to asbestos from those dryer felts after becoming a third hand in 1968.

Mr. Stewart was diagnosed with malignant pleural mesothelioma on October 24, 2012. (1 Tr. 168, R. 575). He incurred $241,822.70 in medical costs associated with that diagnosis. *Id.*

ARGUMENT

1. The Court Of Appeals Erred By Affirming The Circuit Court's Denial Of Scapa's Motion For JNOV, Thereby Concluding That Stewart Sufficiently Established Specific Causation Below.

The Court of Appeals committed error by affirming the circuit court's denial of Scapa's motion for JNOV. Mr. Stewart failed to offer competent record evidence of specific causation below sufficient to connect his workplace exposure to the asbestos-containing subject dryer felts (under "friable" fact settings[3]) and Mr. Stewart's illness under *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), adopted by *Henderson v. Allied Signal, Inc.*, 373 S.C. 179 (2007). In South Carolina, JNOV should be granted when no competent evidence was admitted that could have reasonably supported the jury's verdict. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). A reversal of the lower court's denial of JNOV is proper "when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)).

In affirming the circuit court's denial of JNOV, the Court of Appeals improperly relied on and adopted *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), and overlooked the important differences between South Carolina law and Pennsylvania law regarding specific causation. At its core, the Court of Appeals' decision conflicts with prior rulings by this Court and many courts elsewhere.

A. The Court Of Appeals Exceeded The Permissible Boundaries Of Its Institutional Capacity As A South Carolina Error Correcting Court By Improperly Adopting Pennsylvania Law.

South Carolina is undisputedly a *Lohrmann* jurisdiction. This Court has never accepted *Rost* as the common law of this state, but the Court of Appeals unilaterally adopted its core specific

[3] In such context, the exposure to the felt is unimportant unless the felt is being cut or otherwise manipulated.

causation principles below. It is well-settled in South Carolina that "the Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court. The decisions of the Supreme Court bind the Court of Appeals." Toal, Vafai & Muckenfuss, *Appellate Practice in South Carolina*, at 12 (2d ed. 2002). *See also* S.C. Const., art. V. § 9 (establishing the jurisdiction of the Court of Appeals and explaining the binding effect of Supreme Court opinions on the Court of Appeals); *Daniels v. City of Goose Creek*, 314 S.C. 494, 498, 431 S.E.2d 256, 260 (Ct. App. 2003) (holding that any modification of Supreme Court case law must be undertaken by the Supreme Court). It is only "within this Court's purview to change the common law." *Marcum v. Bowden*, 372 S.C. 452, 458 (2007). It is the institutional role of this Court of last resort to provide guidance and clarification where, as here, the Court of Appeals has significantly altered South Carolina's existing common law.

B. The "Cumulative Dose" Theory Is Indistinguishable From The Junk Science "Every Exposure" Theory Rejected By Dozens Of Jurisdictions And Should Be Conclusively Rejected Here.

A products liability plaintiff must prove that the product defect was the proximate cause of the injury, regardless of the plaintiff's theory of recovery. *Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 461, 242 S.E.2d 671, 675 (1978). To prove proximate cause in an asbestos case, the plaintiff must prove the decedent's asbestos exposure attributable to a particular defendant constitutes substantial causation by satisfying the "frequency, regularity, and proximity" test. *Henderson*, 373 S.C. at 185, 644 S.E.2d. ("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 Plaintiffs actually worked.") (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)).

But by adopting *Rost's* causation principles, the Court of Appeals failed to appreciate that the "cumulative dose" theory does not differ from the "each and every exposure" theory. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (rejecting cumulative exposure theory of causation because it is 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.").

Courts in the Fourth Circuit applying South Carolina law have concluded that substantial factor causation requires more than proof that a plaintiff 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, while short exposures *might* satisfy the standard if they are the *only* exposures, it is not enough to show "above background" exposure to a particular product if significant evidence of other exposures exists. *See id.*

Scapa does not contend that Mr. Stewart must exclude every possible cause of Mr. Stewart's mesothelioma or that Plaintiff must prove a precise quantification of asbestos fibers that Mr. Stewart was exposed to from Scapa dryer felts. Rather, Scapa has argued, consistent with Fourth Circuit law from which the substantial factor causation test derives, ***that some qualitative analysis comparing Mr. Stewart's exposures from Scapa with his exposures from other sources is necessary to determine whether Scapa exposures were a substantial factor contributing to Mr. Stewart's disease***. To that end, the Supreme Court of Ohio's opinion in *Schwartz v. Honeywell Int'l, Inc.* 153 Ohio St. 3d 175, 181 (2018) is instructive. *Honeywell* exemplifies a sister jurisdiction that does not follow a cumulative dose exposure theory and requires a contextual analysis with respect to other potential sources of asbestos exposure. The *Honeywell Court* explained, as a threshold matter, that the cumulative exposure theory is faulty since it "does not take into account other exposures that might have caused the harm." *Honeywell*, 153 Ohio St. 3d at 181. The Court then pointed to several other jurisdictions which adhere to this sound principle. *Id. citing, Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir.2009); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir.2005); *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1177 (9th Cir.2016); *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 290-291, 788 S.E.2d 421 (2016); *Holcomb v. Georgia Pacific, L.L.C.*, 128 Nev. 614, 628-629, 289 P.3d 188 (2012); *see also Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App. 2007), *aff'd*, 439 S.W.3d 332 (Tex. 2014). The *Honeywell* Court further explained that the correct causation analysis "***must*** consider [plaintiff's] exposures to asbestos from Bendix brakes ***in the context*** of her exposures to asbestos from the products of other manufacturers." *Id.* (emphasis added).

So too here. Mr. Stewart's experts cannot reliably opine that exposure to Scapa dryer felts was a substantial factor in causing Mr. Stewart's disease by pretending the Scapa exposures were

Mr. Stewart's only exposures and ignoring context. The Court of Appeals' ruling accepting Mr. Stewart's expert testimony, in effect, creates strict liability for any above-background exposures. The substantial factor test was designed to avoid such unbounded liability. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016).

Further, *Lohrmann*, adopted by *Henderson*, is a product-specific test, inquiring whether the evidence would permit a reasonable jury to conclude that a manufacturer's product was a substantial cause of the plaintiff's disease. *Lohrmann*, 782 F.2d at 1162–63. A plaintiff cannot meet his burden by simply showing that general asbestos exposure from any and all sources cumulatively caused his disease. *See, e.g Honeywell Int'l, Inc.*, 102 N.E.3d at 482; *Martin*, 561 F.3d at 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).

The Court of Appeals emphasized Dr. Frank's testimony that mesothelioma is caused by a person's cumulative dose. The question propounded to Dr. Frank at trial was which exposures were *substantial* contributors to the cumulative dose and which exposures were ***insubstantial*** contributors. But Dr. Frank admitted he made no effort at all to distinguish the two. The following colloquy is illustrative of this point:

> Q. And you certainly didn't make any calculation as to – or reach any opinion with respect to a specific dose of asbestos that Mr. Stewart might have inhaled solely from Scapa asbestos felts?
>
> A. I made no such calculation.
>
> Q. And again, I apologize if this was asked. But you have not made any efforts to quantify Mr. Stewart's asbestos exposure, have you?
>
> A. That is correct.

> Q. [I]s it your opinion that every exposure that contributes to a person's cumulative dose contributes to the development of a mesothelioma?
>
> A. It is the cumulative dose which is clearly made up of all the exposures they've had over their lifetime. And yes, they all contribute. That doesn't mean that each exposure was the one that caused the mesothelioma, because we never know which fiber on which day from which product did it. But they all certainly increase the risk and ultimately have to be said to be contributory to that individual getting the disease.
>
> Q. Does it matter to you if any particular exposure is above background or not?
>
> A. Well, any exposure has to be at least at background level; and it doesn't matter how much above background that any additional exposures are. Some will clearly contribute more, some will contribute less. Scientifically that's how you look at it. Obviously there are jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that. That said, scientifically, you can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

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

In short, Dr. Frank testified that *every* exposure to asbestos was a substantial contributing factor in causing Mr. Stewart's disease, no matter the extent, dose, or quantity of the exposure. He thus offered the unreliable "each and every exposure" opinion under the moniker "cumulative dose."

As Dr. Frank admitted, "[o]bviously there are some jurisdictions where some exposures, for legal reasons, are said to be *de minimis* and are not part of lawsuits because of that." (4/9/15 Dr. Arthur Frank Depo., p. 35, R. 2210-11; R. 2212; R. 2212-13). Among those jurisdictions, until *Jolly v. GE*, 435 S.C. 607, 865 S.E.2d 12 (Ct. App. 2021) was decided, Scapa submits, was South Carolina. Now this case is added to *Jolly* as endorsing what even Dr. Frank admits many jurisdictions decline, for legal reasons, to permit by way of exposure testimony. Simply put, Dr. Frank makes no effort to distinguish between any exposures whatsoever. This eliminates "substantial factor" causation

as a principle, which this Court has never sanctioned. As a result, the Court of Appeals erred by failing to reverse the circuit court's judgment on that basis.

C. The Notion That "Every Exposure" Contributes To A Person's Mesothelioma Is Not A "Scientific Fact," As The Court Of Appeals Seemed To Believe.

Pennsylvania Court of Common Pleas Judge Robert J. Colville has given a compelling rebuttal of the notion that it is a "scientific fact" that "every exposure" necessarily contributes to a person's mesothelioma. *See In re Toxic Substance Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006), *affirmed sub nom.*, *Betz v. Pneumo Abex LLC,* 44 A.3d 27 (Pa. 2012).[4] Betz involved a group of auto mechanic cases in which the plaintiffs' experts declared that the specific exposure facts of each mechanic were essentially irrelevant because any exposure was sufficient to support causation. *Id.* at *1. The experts consequently shrugged off the need for any sort of dose assessment and opined that any level of mechanic work, regardless of duration, was sufficient to cause disease. *Id.* Judge Colville precluded this testimony, and in the process, addressed the any exposure theory's key underpinnings and found each one illogical and unsupported. *Id.* at *11-12.

First, Judge Colville focused on the serious inconsistency between the claim that any exposure to an asbestos fiber in an occupational setting causes disease, and the experts' candid, albeit incongruent, admission that a lifetime of background exposures to asbestos fibers does not cause disease. *Id*. In modern industrial society, urban and often even rural air has historically contained asbestos at low levels (some of this from natural asbestos outcrops), and thus most individuals over fifty will have millions of "background" fibers in their lungs even without any known occupational or other direct exposure to asbestos. *Id*. at *3. These levels have never been known to cause disease, mainly because the body is capable of ejecting, absorbing, or otherwise dealing with

[4] Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479 (2008).

these low exposures. *Id.* Plaintiffs' experts almost always readily admit this and exclude background exposures from their cumulative dose opinions. *Id.*

The fibers involved in these two types of exposures, however, are no different—only the dose distinguishes background exposures from occupational exposures, and even then a low occupational exposure can easily overlap or not exceed a higher background exposure. *Id.* Thus, there is no logic permitting these experts to categorically exclude background exposure, yet, at the same time, categorically include all occupational exposures as causative. *Id*. at *12.

Given the admission by plaintiffs' experts that background exposures were too *de minimus* to cause disease, Judge Colville recognized it was incumbent on the experts to identify what dose would be sufficient to cause disease:

> For instance, experts suggest that the average ambient exposure in Pittsburgh is approximately .0001 fibers per milliliter of air … . No one, including the plaintiff's experts, proffers an opinion that this level of exposure creates an increased risk of the development of any asbestos-related disease … . [The question is], how much greater quantity of exposure is necessary to permit the causal attribution of an asbestos-related disease to a particular asbestos-related exposure[?]

Id. at *3.

Plaintiffs' experts made no attempt to measure or even roughly quantify the mechanics' occupational doses or show how they were sufficient to cause disease when background exposures clearly are not. *Id*. at *6-7. Judge Colville rejected the experts' failure to quantify or assess the mechanics' dose in any way because the lack of any measurement made it impossible for them to accurately distinguish low level occupational exposures from background exposures. *Id*. at *6, *9, *11-13.

Second, Judge Colville rejected the experts' attempt to "extrapolate down" from high-dose asbestos studies to prove that occupational exposures at low doses, above background or not, also must cause disease. *Id*. at *6-7. The amphibole form of asbestos is widely recognized to cause

disease at significant doses (*e.g.*, in the shipyard, insulator, and asbestos factory professions), but there are no low-dose response curves for asbestos exposure and no studies demonstrating an increase in actual disease at very low doses, particularly for chrysotile. *Id.* at *6, *8

The experts in *Betz* used the "extrapolate down" methodology to assume, based on high-dose studies, that low-dose studies would also cause disease in a linear fashion. *Id.* at *7. Judge Colville rejected this approach, explaining that the fallacy of the "extrapolation down" argument is plainly illustrated by common sense and common experience with seemingly harmless substances, including water:

> Large amounts of alcohol can intoxicate, larger amounts can kill; a very small amount, however, can do neither. Large amounts of nitroglycerine or arsenic can injure, larger amounts can kill; small amounts, however, are medicinal. Great volumes of water may be harmful, … moderate amounts of water, however, are healthful. In short, the poison is in the dose.

Id.

Judge Colville recognized that when experts attempt this kind of extrapolation downward, they are engaged in both a logical falsehood and scientific error:

> Plaintiffs have not proffered any generally accepted methodology to support the contention that a single exposure or an otherwise vanishingly small exposure has, in fact, in any case, ever caused or contributed to any specific individual's disease, or even less so, that in this case such a small exposure did, in fact, contribute to this specific plaintiff's disease.

Id. at *8.

Finally, Judge Colville rejected the experts' reliance on the "no safe threshold" position. *Id.* He noted the very large difference between stating that the threshold is not known and claiming that there is no threshold at all. *Id.* at *8-9. He observed that such testimony improperly shifted the burden of proof to defendants when it is the plaintiff's burden to establish the known toxic level of a substance and that the plaintiff experienced a dose consistent with that level. *Id.* at *8.

In addition to Judge Colville's dismantling of the "every exposure/cumulative exposure/cumulative dose" theory, scientific studies confirm its unreliability. Studies cited in support of the theory are unreliable. *See* Mark G. Zellmer, *No Validity to No Safe Dose: Part II—The LNOT Model and 'Low Dose' Epidemiology*, Harris Martin Asbestos Reporter at p.4 (April 2021). And among other things, the theory fails to account for the phenomenon of DNA repair. *See* Mark G. Zellmer, *No Validity to No Safe Dose: Part III—Mechanisms of Repair*, Harris Martin Asbestos Reporter No. 3 at p.4 (March 2022). Further, while the older view of the pathogenesis of mesothelioma posited that asbestos penetrated the mesothelial cell causing genetic damage, which led to the uncontrolled cellular proliferation of mesothelioma, more recent work has called this theory into question. *Id*. at 7.

Studies show that human mesothelial cells invariably die 2-10 days after exposure. Considering mesothelioma's long latency, cells that die a short time after exposure cannot become malignant cells 20-50 years later. The answer is the occurrence of chronic inflammation due to the exposure to asbestos. A sufficient dose of asbestos, depending on type and fiber dimension, will cause oxidant creation and thereby chronic inflammation. If sustained long enough and severely enough, the inflammation will cause damage to DNA that is irreparable. *Id.* In other words, as Judge Colville explained, just as with water, alcohol, and arsenic, the dose is the key.

In sum, the notion that every exposure is a substantial factor in causing a person'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." *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011). It is not a scientific fact that "every exposure is causative," as the Court of Appeals appeared to accept, via the adoption of *Rost*. This Court should thus confirm South Carolina's alignment with the multitude of jurisdictions rejecting the notion that a plaintiff need

not provide some quantification of his or her exposure to asbestos from the defendant's product to establish substantial factor causation.

D. The Court of Appeals' Reliance On *Rost* Is Fundamentally Incompatible With South Carolina Law.

Reliance on *Rost* is misplaced due to meaningful differences between South Carolina law and Pennsylvania and Illinois law upon which *Rost* was grounded. One of the most significant distinctions relates to the origin of its substantial factor causation standard.[5] 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). In *Tragarz*, the Seventh Circuit 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*, *Tragarz*, and the

[5] Pennsylvania law differs from South Carolina law in material respects. First, the Pennsylvania Supreme Court disallows apportionment of fault in asbestos cases because experts agree "the individual contributions to the plaintiff's total dose of asbestos are impossible to determine" and "[b]ecause it is impossible to determine which actor caused the harm, it follows that it is impossible to apportion the amount of each defendant's liability on a percentage basis." *See Roverano v. John Crane, Inc.*, 226 A.3d 526, 541–42 (Pa. 2020). Second, the Pennsylvania Supreme Court also held the doctrines of comparative negligence and apportionment of fault do not apply to strict liability claims. *Id.* at 538–39. Thus, it appears Pennsylvania law allows a defendant to be held liable for a per capita share of the plaintiff's damages if it was merely ***possible*** that it caused the damages. This is inconsistent with South Carolina law, which does not allow liability to be affixed based on a mere possibility. Moreover, comparative fault principles apply in South Carolina even for strict liability. *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 14, 800 S.E.2d 479, 482 (2017).

Pennsylvania and Illinois law on which they are based are contrary to core principles of substantial factor causation under South Carolina law.

Unlike the Pennsylvania Supreme Court in *Rost*, The South Carolina Supreme Court has not rejected the principle that the substantial factor causation test requires a contextual analysis of different actual exposures to asbestos. *See Rost*, 151 A.3d at 1051 n. 13. Further, South Carolina prohibits liability based on possibility. *See, e.g., Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 346–47, 433 S.E.2d 905, 907 (Ct. App. 1993) (noting causation equally possible among options cannot create liability, and no evidence the fire was most probably caused by defendant). The Court of Appeals erred by failing to acknowledge the direct conflict between these foreign authorities and South Carolina law, and by altering this state's common law in line with those out of state authorities. *Rost* and *Tragarz* (and Pennsylvania law more generally) are thus contrary to core principles of substantial factor causation under South Carolina law and should not be relied upon here.

Instead, this Court should be guided by the sound principles of the many sister *Lohrmann* jurisdictions that have rejected the cumulative dose theory as synonymous with the each and every exposure doctrine, and appropriately require a contextual analysis. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *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.'"); *Laney v. Celotex Corp.*, 901 F.2d 1319, 1321 (6th Cir. 1990) ("The substantial factor analysis cannot be made in a vacuum."); *Schwartz*, 102 N.E.3d at 482. ("[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. . . .'" (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."); *Krik*, 870 F.3d at 675 (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."); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004); *In re W.R. Grace & Co.*, 355 B.R. 462, 476 (Bankr. D. Del. 2006); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 320–21 (Tex. App. 2007) ("The [plaintiffs'] experts failed to show, however, that the 'any exposure' theory is generally accepted in the scientific community—that *any* exposure to a product that contains asbestos results in a statistically significant increase in the risk of developing mesothelioma."); *Doolin v. Ford Motor Co.*, No. 3:16-CV-778-J-34PDB, 2018 WL 4599712, at *13 (M.D. Fla. Sept. 25, 2018); *Clarke v. Air & Liquid Sys. Corp.*, No. 2:20-CV-00591-SVW-JC, 2021 WL 1534975, at *5 n.3 (C.D. Cal. Mar. 18, 2021) ("The 'every exposure' theory would allow an expert to testify that a particular exposure is sufficient to cause mesothelioma simply because there is no evidence that it is insufficient. . . . [C]ourts have also rejected for the same reason the so-called 'cumulative exposure' theory – that every exposure which contributes to a plaintiff's cumulative exposure is a contributing cause to that plaintiff's asbestos-related disease."); *Barabin v. Scapa Dryer Fabrics, Inc.*, No. C07-1454JLR, 2018 WL 840147, at *12–13 (W.D. Wash. Feb. 12, 2018) (agreeing with the overwhelming precedent that the "every exposure" theory is unreliable, noting "the law is now

headed toward a consensus that the 'every exposure' theory is unreliable and inadmissible," and finding the "cumulative exposure" theory has the same reliability issues as the "every exposure" theory); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) ("Defendant contends that Dr. Frank's opinion, couched in terms of a person's 'cumulative exposure,' is no different from the 'any exposure' theory that plaintiff agreed he would not proffer at trial and therefore should be stricken. I agree.").

Whether testified to under the guise of alleged irrefutable scientific fact (it isn't) or as a basis for substantial factor causation, the "cumulative dose" approach is erroneous and not probative under the controlling legal standard – the *Lohrmann* test. The "cumulative dose" approach, coupled with the use of a hypothetical model devoid of necessary context of pertinent facts concerning other actual exposures of the plaintiff, should not be adopted. The Court of Appeals should thus be reversed.

2. The Court Of Appeals' *Additur* Ruling Improperly Afforded The Circuit Court Unfettered Discretion.

The constitutional right to a jury trial is guaranteed in every case and includes the right to have the jury determine damages. S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."); *Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963). South Carolina law is clear that juries—not trial courts—are "the sole judge of issues of fact, including the issue of damages." *Vinson v. Hartley*, 324 S.C. 389, 408, 477 S.E.2d 715, 725 (Ct. App. 1996); *Gillis v. Atl. Coast Line R. Co.*, 175 S.C. 223, 179 S.E. 62, 64 (1934) ("[T]he jury is the sole judge of issues of fact under our system of jurisprudence."); S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."). A jury's determination of damages "is entitled to substantial deference," and trial courts cannot substitute their judgment for that of the jury without articulating a ***compelling reason*** for doing so. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109,

140 (2003); *Riley*, 414 S.C. at 192, 777 S.E.2d at 828. An appellate court must reverse an *additur* ruling if the trial court abused its discretion. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995).

Because a trial court's power to grant an *additur* motion conflicts with the constitutional right to a jury trial as to the amount of damages, trial courts must "offer ***compelling*** reasons for invading the jury's province." *See Riley*, 414 S.C. at 193, 777 S.E.2d at 829 (emphasis added). These *compelling* reasons must be something other than the trial court's mere disagreement with the jury's verdict. To hold otherwise would impermissibly undermine the right to a jury trial, and make the trial court—not the jury—the ultimate arbiter of damages in South Carolina. If that is the standard, the right to a jury trial on damages would become meaningless.

The Court of Appeals should have reversed the circuit court's *additur* ruling. Had the jury's award of survival damages been less than Mr. Stewart's medical expenses or failed to account for pain and suffering at all, then the trial court's ruling might have been correct, depending on the evidence. *See Nestler v. Field*, 426 S.C. 34, 41 (Ct. App. 2019) However, this was not the case. For example, in *Waring v. Johnson*, the court approved *additur* in a car-wreck case where the damage award was in the exact amount of the medical bills and there was evidence the plaintiff suffered pain and her lifestyle was changed post-accident. 341 S.C. 248, 261 (Ct. App. 2000). But when, as here, the original damage award exceeds the medical expenses by nearly three times, there can be no compelling reason for a trial court to "impose its will on the parties and invade the jury's domain." *Nestler*, 426 S.C. at 41.

Further, "if inapplicable grounds are given for granting *additur*, the order fails by error of law." *Green v. Fritz*, 356 S.C. 566, 570 (Ct. App. 2003). Here, at the *additur* hearing, the trial

court—while praising the jury for its attentiveness—speculated that its damage awards may have been affected by the "empty chair" evidence presented at trial:

> Ladies and gentlemen, I have struggled mightily with this issue of additur. This was a very discerning jury, and I stand by the observations that were made at the time. I haven't seen a more attentive jury in my very lengthy time in practice, both as a trial practitioner as well as an appellate judge and now a trial judge.
>
> But one thing that presents some difficulty in this case is the empty chair, which was argued very, very heavily in this case. And, really, the empty chair, and I charged the jury this way, is not a doctrine that has any impact on the award of damages.
>
> * * *
>
> I attempted to make a distinction between the empty chair as a function of liability and damages. And I tried to stick very close to what our court has said in that regard, and the charges that I gave are charges that reflect the language that the court has given us to use as trial judges.

(R. 1669-70).

Regardless of the learned circuit court's intentions, opining that a jury's award may have been higher absent a defendant invoking an "empty chair" defense is not a compelling reason for invading the jury's province, because it is in essence speculation. *See ClearOne Commc'n, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1179 (10th Cir. 2011) (observing that courts have refused to indulge speculation that jury improperly apportioned damages).

Further, the discretion to grant *additur* is not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. The jury's award for survival damages was nearly three times the amount of Mr. Stewart's medical expenses which, because he was deceased, were fixed and no longer accruing. Furthermore, pain and suffering damages are indeterminate in character, are not capable of exact measurement, and there is no fixed standard whereby such damages can be determined. Thus, the trial court should have left the amount of damages for pain and suffering to the judgment of the jury alone. *See Harper v. Bolton*, 239 S.C. 541, 548 (1962).

Finally, the distinction between *remittitur* and *additur* highlighted by the United States Supreme Court is important to consider here. "Where the verdict is excessive, *remittitur* has the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). But "where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict." *Id.* As such, a court-imposed increase of damages encroaches on the defendant's right to a jury trial. *ClearOne Commc'n*, 653 F.3d at 1179. For that additional critical reason, a circuit court's decision to invade the jury's province and grant *additur* should be rare and must be supported by compelling reasons. That analysis was not followed below. *See Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) ("While the granting of such a motion rests within the sound discretion of the [trial] court, substantial deference must be afforded to the jury's determination of damages."); *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."). By failing to recognize the circuit court's errors of law, and instead affording the trial court virtually absolute discretion to revoke the jury's prerogative to determine damages, the Court of Appeals failed to follow this Court's binding precedent. *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691. This Court should consequently reverse and reinstate the jury's verdict, should it decide to not reverse the denial of JNOV.

3. The Court Of Appeals Erred By Refusing To Reverse The Circuit Court's Settlement Proceeds Allocation Ruling.

The Court of Appeals also erred in its analysis of the settlement proceeds allocation. The Court of Appeals approved Mr. Stewart's unilateral allocation in part because South Carolina case law favors under certain circumstances a plaintiff's ability to apportion settlement proceeds in the manner most advantageous to it. But the plain language of Section 15-38-50 imposes a restriction in this regard, and states: "[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). Statutes must be read so that no part shall be rendered surplusage, or superfluous. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Setoff is also equitable in nature and is reviewed *de novo* on appeal. *See Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011) (stating setoff is equitable in nature, and thus an appellate court may find facts in accordance with its own view of the preponderance of the evidence).

Under Section 15-38-50, courts cannot give effect to a unilateral or internal allocations of settlement proceeds for purposes of setoff, and as a result, the entire amount of settlement proceeds here must be set off in a lump sum against the judgment amount. Here, the allocation made by Plaintiff was internal and unilateral. (7/11/18 Post-Trial Motions Transcript, p. 32, l. 1125, R. p. 1678; p. 36, l. 21 - p. 37, l. 16, R. p. 1682-1683). The plain language of the statute demands that conclusion, and therefore the set off must be equal to the total amount of consideration paid.

Courts elsewhere applying setoff statutes like § 15-38-50 have held that where a settlement agreement doesn't allocate proceeds among separate claims, the settlement's total amount 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—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 agreement didn't allocate the money between the two plaintiffs. *Id.* at 1348, 1349. The plaintiffs then proceeded to trial and got 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 *Dionese* court distinguished cases where plaintiffs and defendants agree to an 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. But private, unilateral allocation agreements, however, "are contrary to all concepts of fairness" and "would often result in a windfall recovery" for the plaintiffs. *Id.* at 1350. Thus,

> [t]he only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award. . . . 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 here. Mr. Stewart entered into general settlement agreements that did not allocate settlement funds and instead provided for "undifferentiated lump sum" payments. *See id.* Mr. Stewart then privately and unilaterally allocated the funds to minimize a setoff.

This allocation is inconsistent with the controlling statutory mandates. South Carolina law does not grant plaintiffs the right to unilaterally manipulate settlement allocations to minimize setoff and obtain a double recovery. Rather, to effectuate the policy against double recovery and give proper meaning to the language of section 15-38-50, this Court should reverse the Court of Appeals and direct that there be a complete setoff consisting of all settlement funds paid.

CONCLUSION

This Court should reverse the Court of Appeals' affirmance of the circuit court's denial of Scapa's JNOV motion on the basis of the lack of competent evidence of specific causation. Failing that, if the Court affirms JNOV, it should reverse the portions of the Court of Appeals' opinion affirming the circuit court's *additur* and settlement proceeds rulings.

Respectfully submitted,

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