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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2022-001574

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

v.

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

BRIEF OF RESPONDENT

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INTRODUCTION

This is an appeal from an asbestos product liability trial where the jury returned a verdict for Respondent Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart ("Stewart"). The lower court denied Appellant Scapa Waycross, Inc.'s ("Scapa") post-trial motion for JNOV, granted Stewart's motion for additur, and applied setoff using Stewart's allocation of settlement proceeds with other defendants.

On August 3, 2022, the Court of Appeals issued unanimous opinion *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 878 S.E.2d 696 (Ct. App. 2022), affirming the decisions of the lower court and judgments entered in favor of Stewart. The law and record fully support the Court of Appeals' Opinion, and this Court should affirm.

Scapa's chief complaint is an allegation that the Court of Appeals "adopted" new law. The Court of Appeals did not adopt any new law but simply applied existing South Carolina law to the specific testimony given and facts presented in this case. Further, this Court already approved the Court of Appeals' analysis in this case when it denied in part a petition for writ of certiorari in *Jolly v. GE*, 435 S.C. 607, 865 S.E.2d 12 (Ct. App. 2021)—the opinion the Court of Appeals cited to in this case.

Jolly is also an asbestos-mesothelioma case that included an appellate challenge to the lower court's denial of the defendant's JNOV motion based on the substantial causation standard and cumulative exposure testimony. *Jolly*, 435 S.C. at 620, 865 S.E.2d at 18. The Court of Appeals decided those issues in the plaintiff's favor and, during oral argument of this case, Scapa did not ask to argue against precedent or argue that this case is distinguishable from *Jolly*. The appellant in *Jolly* filed a petition for writ of certiorari. Because this Court denied the *Jolly* petition as to the JNOV motion on substantial causation, the analysis in that case is final law. *Jolly v. GE*, Appellate Case No. 2022-000272, Order (Sup. Ct. Jan. 12, 2023).

The Court of Appeals correctly affirmed the lower court's decision to grant additur based on the undisputed evidence of Stewart's intense pain and suffering, which Scapa largely ignores. The lower court gave compelling reasons for additur, and this Court should not disturb its discretionary decision.

The Court also correctly affirmed the lower court's decision to deny Scapa's motion to reallocate the settlement proceeds in line with this Court's precedent in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015).

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether Scapa preserved issues as to the cumulative exposure principle and expert testimony when it failed to make a contemporaneous objection or argue the issues in its directed verdict motion?

II. Whether the Court of Appeals correctly affirmed the lower court's decision to deny Scapa's motion for JNOV based on ample evidence of specific, substantial causation and the proper use of cumulative exposure testimony as the medical explanation for how mesothelioma develops from asbestos exposure?

III. Whether the Court of Appeals correctly affirmed the lower court's decision to grant additur?

IV. Whether the Court of Appeals correctly affirmed the lower court's decision not to reallocate the settlement proceeds?

COUNTER STATEMENT OF THE CASE

I. Stewart's job positions and work with Scapa asbestos products at Bowater

Stewart died from mesothelioma caused by asbestos exposure during his 40-year career working at the Bowater paper mill in Catawba, South Carolina. (R. pp. 2132-33, 2245, 2264, 2269). Stewart worked in various jobs on paper machine one for his entire career at Bowater. (R. p. 2132). Scapa manufactured asbestos-containing dryer felts used on paper machine one during Stewart's employment. Scapa used chrysotile asbestos fibers in its dryer felts sold to Bowater, and chrysotile asbestos can cause mesothelioma. (R. pp. 783-84, 800-01, 863, 1075, 2245-48).

That Stewart was exposed to Scapa asbestos-containing products is not in dispute. The dispute at trial was whether Stewart presented evidence that exposure to Scapa's asbestos substantially contributed to his mesothelioma and, conversely, whether Scapa proved its central defense that other asbestos-containing products in Bowater represented a substantial contribution such that Scapa should not be liable for Stewart's mesothelioma and death. (Br. of App. pp. 16-25).

There was ample factual testimony about Stewart's exposure to asbestos while Scapa dryer felts were on machine one. Machine one used at least 23 Scapa asbestos-containing dryer felts from 1969-1981, and Stewart worked on machine one during that entire time.[1] (R. pp. 2132, 478-79, 576-78, 1056, 1545, 2032-35, 2051-56, 2071-98, 2102). Machine one occupied an entire building. (R. p. 2196). It had four dryer sections and used eight dryer felts—a top and bottom felt for each dryer section. (R. p. 676 lns. 14-16, p. 2138). The dryer felt held the paper against the dryers as it traveled through the machine and dried the paper. (R. pp. 676-77). Dryer felts are heavy and large, measuring approximately 19 feet wide by 160 feet long (over half the length of a football field). (R. pp. 2032-35, 2051-56, 2071-94). Dr. James Millette, Stewart's expert in material sciences with a specialty in asbestos, testified about two Scapa dryer felts used on machine one during Stewart's employment—one felt contained 1,088 pounds of asbestos, which is 99 quadrillion[2] asbestos fibers, and another contained 752 pounds of asbestos, which is 69 quadrillion asbestos fibers. (R. pp. 792-95, 2032-35).

[1] The records of Scapa's asbestos-containing dryer felts used at Bowater are called "Master Card." Each one states the felt's yarn type (indicating whether it contained asbestos fibers), dimensions, position on machine one, and a record of the dates the felt went on and off the machine. *See*, e.g., R. pp. 1068, 1096, 2032-35.

[2] A quadrillion is "a number with 15 zeros behind it." (R. p. 794 lns. 22-25). One linear inch is the equivalent of 850,000 - 1,400,000 asbestos fibers. (R. p. 2241).

During his career, Stewart performed all of the jobs involved in putting on, cleaning, removing, and disposing of dryer felts. (R. pp. 704 lns. 14-22, 2140-65). He worked—in ascending order of seniority—as utility man, fifth hand, fourth hand, third hand, back tender, and machine tender. (R. pp. 2149-65, 669-70). In every position up to machine tender, Stewart "regularly" worked "closely" with and around dryer felts. (R. pp. 2173-74).

An understanding of the regular work involving dryer felts is necessary to understand that many aspects of Stewart's jobs released breathable asbestos dust and fibers into the air that Stewart regularly breathed. To get the felts onto the machine, Bowater employees, including Stewart, used a crane to put the felts in place while some employees physically held the felts in place and others seamed them together. (R. p. 688 lns. 20-21, pp. 699-702). The seaming process got so much felt dust on workers' clothes that they hosed off themselves or each other. (R. pp. 700-01). When a felt required replacement, employees, including Stewart, cut the old dryer felts, using their hands and a knife, to remove them from the machine and drop them into the basement, where they later cut the felts into smaller pieces. (R. pp. 695-96, 698, 2140-44). Cutting the felts released asbestos fibers. (R. pp. 695, 781, 790, 854-55, 2144-46). Utility, fifth hand, fourth hand, and third hand positions worked on dryer felt changes to cut and then clean up dryer felts in the basement. (R. pp. 2148, 2159-60). When a worn-out dryer felt tore off during manufacturing, the machine doors opened and released felt dust. (R. pp. 690-92). Because removal and replacement of a felt could involve at least six people, everyone helped regardless of a person's job title. (R. pp. 739-41).

Employees used "high pressure hoses" with compressed air to hose off the entire machine. (R. pp. 681-82, 2147, 2154-55). "[F]elt hairs" or "dust" blew off during this process. (R. pp. 682-84, 686, p. 789 lns. 7-23, p. 795, p. 2148 lns. 6-9, pp. 2156-57). The "blow down process" included blowing the dryer felts with compressed air directly on the felt and to the side. (R. p. 686). In his

jobs as fifth hand, fourth hand, and third hand, Stewart hosed off the dryer felts. (R. pp. 685-86, 2154-57). Even in his final job as machine tender, Stewart checked the dryer section of the machine for problems, used dryer felt scraps to fix leaky gaskets, and helped to change dryer felts. (R. pp. 2166-67).

Scapa disputes that Stewart worked closely with dryer felts after 1968, a year prior to Bowater's use of Scapa dryer felts on machine one. (Br. of Pet. pp. 7-8). The evidence shows otherwise. Stewart testified that third hands could be in the basement to cut old felts and clean, used hoses to blow down the felts, and controlled the crane to put on a new felt. (R. p. 2189, video min. 24, 32-33, 40). A co-worker testified that third hands carried a knife on their belt for frequent use to cut felts and that, as third and fourth hands, he and Stewart worked "side by side, day in and day out." (R. pp. 696, 707, 724). Stewart testified that a back tender went through dryer sections to check for problems or felt seam issues. (R. p. 2189, min. 42-44). Further, cut felts that released large amounts of breathable asbestos fibers sat in the basement, where fans pulled air from the basement and blew it out onto the operating floor where every man worked. (R. p. 737, 750-51).

George Hegler worked at Bowater for 37 years and knew Stewart. (R. pp. 2194-95). He testified that, after using hoses to blow felt dust out of the machine, the "floor would be about four or six inches deep with [dust]." (R. p. 2198-199). Mr. Hegler saw Stewart "covered with dust, from head to toe, from blowing" the machine down. (R. p. 2207). That dust contained "everything that came off the paper, out of the felts, whatever was hanging in there." *Id.* The employees blew that dust "out on the operating floor" where it stayed for everyone to breathe until they hosed it off. (R. p. 2208).

There was ample expert testimony that Scapa's asbestos-containing dryer felts were a substantial contributing factor in Stewart's mesothelioma. Dr. Millette, Stewart's expert in

material sciences with a specialty in asbestos, studied and tested Scapa and other dryer felts for asbestos fibers release. He found that Stewart's work with dryer felts, including physical handling, blowing, and cutting, released breathable asbestos fibers. (R. pp. 759-60, 789-90, 795). Numerous experts also testified that, even after falling on the ground, asbestos fibers are resuspended into the air by cleaning activities or simply walking through them. (R. pp. 760-61, 856, 2243). A small, resuspended fiber may remain in the air for hours or even days. (R. pp. 762, 2243).

Dr. Arnold Brody testified as Stewart's expert in cellular biology. (R. p. 605). He explained that mesothelioma is "a cancer of the mesothelial cells", which are found outside of a membrane surrounding the lungs, inside the ribcage, and on the cavity that holds the stomach and intestines. (R. pp. 610, 983-84). When a person inhales asbestos fibers that get into the lungs, some fibers are taken into the lymph fluid flow of the lung that flows around the surface of the membrane. (R. pp. 618-19, 625, 631-32). Those fibers interact with the mesothelial cells and cause mesothelioma cancer. (R. pp. 632-33).

Dr. Arthur Frank testified as Stewart's expert in occupational diseases with a specialty in asbestos. (R. p. 555 lns. 19-24). For 50 years he has studied, researched, treated, taught, and published papers about asbestos. (R. pp. 2219-24). He explained that no one can point to a particular exposure as the sole cause of mesothelioma because each exposure is an inhalation of a number of asbestos fibers that may go to different places in the body. (R. p. 2256). Dr. Frank described the cause of mesothelioma as

> the cumulative exposure that someone had from any and all products, from all fiber types that they may have been exposed to that ultimately gave them the disease. It doesn't mean that every fiber did it. It doesn't mean that we even know how many fibers exactly it takes to give someone mesothelioma. We don't understand the mechanism. But we know that, as the amount accumulates in somebody's body and goes up and up and up, you're more likely to get disease than if it was at a lower level.

Id. He testified that mesothelioma caused Stewart's death, asbestos exposure caused the mesothelioma, and "his exposures from the Scapa dryer felts was a substantial contributing cause of his illness and ultimately his death." (R. pp. 2268-71).

Mr. DePasquale, Stewart's industrial hygienist expert, conducted a retrospective asbestos exposure analysis of Stewart's work. (R. p. 842). Scapa dryer felts contained approximately 20-70% chrysotile asbestos, and DePasquale testified a felt with 30-70% asbestos creates "more opportunity" for exposure. (R. pp. 784, 793, 852, 863). He testified that Stewart's work for 12 years with 23 Scapa asbestos-containing dryer felts that contained 20-70% chrysotile asbestos fibers created a substantial occupational exposure to asbestos that caused a greater risk of Stewart developing mesothelioma. (R. pp. 863, 865). DePasquale also considered the presence of other asbestos-containing products at Bowater, but still concluded that Scapa's dryer felts substantially contributed to Stewart's mesothelioma. He considered dryer felts, thermal insulation on piping, and gaskets and packing related to valves. (R. p. 848 lns. 9-14). He discounted thermal insulation on piping because his investigation showed the "vast majority" of the pipes were cladded. (R. pp. 849-50). He discounted gaskets because Stewart did not remember working with gaskets or packing. (R. p. 894).

Stewart was diagnosed with mesothelioma in the fall of 2012.[3] (R. p. 2181). He started feeling pain in 2012. (R. p. 2182). After visits to several doctors and several procedures, he was diagnosed with mesothelioma. (R. pp. 2182-83). The excess lung fluid made breathing harder and made him exhausted and unable to do regular tasks around the house and yard or to walk his dog. (R. pp. 2184-85). Stewart lost sleep and could not drive to spend time with his children. (R. p.

[3] Scapa's brief is notably silent on Stewart's treatment, pain, and suffering.

2186). In October 2012, he began treatment with Dr. David Harpole, a cardiothoracic surgeon at Duke University. (R. pp. 979, 983).

On February 5, 2013, Stewart filed a Complaint against Scapa and other entities whose businesses involve asbestos. (R. pp. 34-36). He asserted causes of action for strict liability, negligence, and breach of the implied warranty of merchantability. (R. pp. 37-40).

In March 2013, Dr. Harpole performed a pleurectomy surgery that involved removing Stewart's rib and opening his heart sack to take the tumor off of the lung. (R. pp. 982, 998-1000). Dr. Harpole also removed "very large" pleural plaques from Stewart's lungs. (R. p. 1000). One expert described the plaques as larger than his hand. (R. p. 1177). The plaques show Stewart "had significant asbestos exposure." (R. p. 1001). Dr. Harpole testified "asbestos exposure from his work with the paper mill" caused Stewart's mesothelioma. (R. p. 1006 lns. 13-17).

Stewart "had a life expectancy of an additional 13.99 years." (R. p. 1628). Stewart suffered through chemotherapy with two types of drugs, one that Dr. Harpole described as a "sledge hammer." (R. pp. 988-89). One of the drugs "is a really difficult drug" and is "noxious to the kidneys" and causes neuropathy. (R. p. 989). The chemotherapy "killed" his appetite and "locked" his bowels. (R. p. 2187). During chemotherapy, Stewart's tumor continued to make too much fluid, necessitating a painful thoracentesis procedure once or twice a week in which a needle is put in the chest to drain the fluid. (R. pp. 991-92). Dr. Harpole said he could not "imagine having it done once or twice a week for three months." (R. p. 992).

Stewart's pleurectomy surgery in March 2013 involved two hours of pre-surgery preparation that included a catheter outside of the spine for pain control, a "very large IV in the neck that goes down in the heart", an arterial line in a wrist artery, and a catheter in the bladder. (R. p. 993). During the "maximally invasive" surgery, Dr. Harpole removed Stewart's rib, took

off his heart sack, collapsed his lung, removed the tumor from his lung, reinflated his lung, and then reconstructed his diaphragm and heart sack. (R. pp. 999, 1002). Because mesothelioma is "a death sentence," the surgery is only an effort to prolong life and not to cure it. (R. p. 1004). After surgery, Stewart "limped along" with pain and "was just too debilitated" to complete rehabilitation. (R. pp. 1007-08). He died on August 23, 2013, just five months after surgery. (R. p. 72).

A comparison of Stewart's appearance in his pre-surgery video deposition on March 4, 2013, and a day-in-the-life video taken on August 20, 2013, illustrates his rapid and painful deterioration to death. *Compare* R. p. 2189 *with* R. p. 2190. He testified "I never imagined my life would come to what it is." *Id.* When asked about his concern or worry about surgery, Stewart explained his belief that "it's in God's hands" and then began to cry. (R. pp. 2188-89).

On November 21, 2013, following his death, Stewart filed a Second Amended Complaint substituting his personal representative as the plaintiff and adding wrongful death and survival actions. (R. pp. 76-89). The trial of the case occurred on January 29 - February 2 and February 7-9, 2018, before the Honorable Jean H. Toal.

II. Trial procedure in the lower court

Scapa's main defense at trial was an empty chair—that asbestos at Bowater from other manufacturers' dryer felts or other asbestos-containing products such as insulation caused Stewart's mesothelioma. *See, e.g.*, R. pp. 461-62, 468-69, 723 lns. 21-24, 726-27, 747-48, 801-02, 1568, 1572, 1574-75, 1577, 1588. Scapa argued as a *complete* defense to liability that Stewart's mere presence (and not physical or direct work) around other asbestos-containing products caused his mesothelioma.[4]

[4] *See, e.g.*, R. pp. 723 lns. 21-24, 726-27, 747-48, 801-02, 819-22, 877, 880-82, 884, 890-94, 946-48, 953, 958-60, 963, 1045-46, 1056-57, 1076, 1136, 1149-50, 1168-70, 1240-41, 1244-45, 1248-

At the close of evidence, Scapa made a motion for a directed verdict arguing Stewart did not present sufficient evidence of substantial causation of his mesothelioma by exposure to Scapa's dryer felts. (R. pp. 1479-85). Scapa argued Stewart presented no direct evidence of exposure and only speculative circumstantial evidence. (R. pp. 1483-84). The lower court denied the motion. (R. p. 1495). It found undisputed evidence of 23 Scapa asbestos-containing dryer felts at Bowater during Stewart's employment, which comprised approximately 10% of the felts used. (R. pp. 1489-90). It found circumstantial evidence from Stewart and his co-workers that he regularly handled the felts while dry and the work created a lot of visible dust, all of which experts testified put breathable asbestos into the air that substantially contributed to Stewart's mesothelioma. (R. pp. 1490-92). Addressing the evidence of exposure to other asbestos-containing products, the court held, "more than one exposure does not preclude the finding that Scapa meets the *Lo[h]rman[n]* test in terms of its contribution to the mesothelioma." (R. p. 1495).

The jury returned a verdict for Stewart as to negligence and for Scapa as to strict liability and breach of implied warranty. (R. pp. 28-29). The jury awarded $600,000.00 for survival and $100,000.00 for wrongful death. (R. p. 29).

On February 16, 2018, Scapa filed three post-trial motions—a motion for JNOV, a motion for setoff of settlement proceeds, and a motion for production of Stewart's settlements with third party tortfeasors. (R. pp. 160-74). Scapa did "not seek a new trial." (R. p. 173).

Stewart did not oppose the motion for setoff. He produced the settlement amounts for survival and wrongful death to Scapa and produced the settlement documents to the lower court for *in camera* review. (R. pp. 1674-79).

49, 1259-65, 1268-69, 1283, 1355, 1362-65, 1371-72, 1392-93, 1460-64, 1568, 1572, 1574-75, 1577-79, 1588.

On February 29, 2018, Stewart filed a motion for new trial *nisi* additur. (R. pp. 176-82). After the court indicated at a post-trial hearing it would likely grant additur, Scapa filed a motion to reallocate Stewart's settlement proceeds. (R. pp. 199-203, 1672). The settlements totaled $1,036,000.00 and allocated 80% to wrongful death and 20% to survival. (R. p. 205). Scapa asked the court to reallocate the settlements 90% to survival and 10% to wrongful death. (R. p. 201).

The lower court held another post-trial hearing on October 10, 2018. (R. pp. 1687-1700). On March 25, 2019, the lower court entered an order granting additur and setoff but denying Scapa's motions for JNOV, discovery of settlements, and reallocation of settlement proceeds. (R. pp. 6-25). The court added $400,000.00 to the survival judgment for a total of $1,000,000.00 for survival but left the jury's $100,000.00 wrongful death award undisturbed. (R. pp. 14-15). After accounting for setoff of $207,200.00 for survival and $828,000.00 for wrongful death, the lower court entered judgment for $792,800.00 for survival and $0.00 for wrongful death.

III. Court of Appeals' opinion affirming in favor of Stewart

In the Court of Appeals, Scapa raised four issues: (1) the denial of its JNOV motion, (2) the decision to grant additur, (3) the allocation of settlement proceeds to the judgment, and (4) the exclusion of bankruptcy claim documents. (Br. of App.). The Court of Appeals affirmed on all issues, and Scapa did not seek certiorari on the fourth issue.

As to JNOV, Scapa argued that the testimony of Dr. Frank about cumulative dose was really an each-and-every exposure theory of causation that allegedly contradicts the substantial contribution specific causation standard in *Henderson/Lohrmann*. (Br. of App. pp. 10-19). Scapa (incorrectly) portrayed Stewart as arguing that a defendant is liable for "any contribution whatsoever" to his asbestos exposure rather than a substantial contribution. (Br. of App. p. 17) (original emphasis omitted).

The Court of Appeals disagreed with Scapa's arguments. It held "Stewart provided sufficient evidence for the jury to determine Scapa's dryer felts were a specific cause and substantial factor in Stewart's development of mesothelioma." *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 414, 878 S.E.2d 696, 706 (Ct. App. 2022). The Court outlined numerous pieces of "undisputed" evidence, including that "[a]ll but one position Stewart held while at Bowater required him to participate in cleaning the felts or manually handling the felts" and expert testimony that "Stewart was significantly exposed to asbestos fibers during the time Bowater utilized Scapa asbestos-containing dryer felts." *Id.* at 414-15, 878 S.E.2d at 706.

The Court recognized that cumulative dose is "a means to describe the medical reasoning as to how humans develop mesothelioma from asbestos exposure." *Id.* 418, 878 S.E.2d at 708 (citing *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 635-36, 865 S.E.2d at 834 (Ct. App. 2021) (holding testimony "that a certain exposure contributes to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation.")). The Court found that Scapa "conflates" the each-and-every-exposure theory with Dr. Frank's cumulative exposure testimony, and that Dr. Frank "expressly rejected the conflation" of them. *Id.* at 417, 878 S.E.2d at 707-08. Because Dr. Frank properly explained and used the cumulative dose theory and Stewart provided sufficient evidence that Scapa's asbestos products substantially contributed to his mesothelioma, the Court of Appeals affirmed the lower court's decision to deny Scapa's JNOV motion.

As to additur, the Court of Appeals held, because the parties "stipulated" to Stewart's medical bills, "the record is replete with evidence of his pain and suffering," and Scapa failed to refute that evidence, "the trial court was well within its discretion in granting Stewart a new trial *nisi* additur and increasing his survival damages to $1 million." *Id.* at 421-22, 878 S.E.2d at 710.

The lower court used the correct legal analysis to justify an additur decision "by meticulously analyzing the details of Stewart's pain and suffering, loss of enjoyment of life, and mental anguish, and in analyzing other awards for similar cases." *Id.* As to Scapa's sole damages defense—Stewart's comorbidities—the Court held "no evidence in the record showed suffering from those health problems interacted with or amplified the pain and suffering Stewart felt from the mesothelioma." *Id.* at 420, 878 S.E.2d at 709.

As to reallocation of settlement proceeds, the Court of Appeals held Scapa's argument is "that the trial court favored Stewart's survival action in granting the additur" but that "argument stands in contrast to the principle that plaintiffs who settle with defendants gain control and leverage to nonsettling defendants." *Id.* at 423-24, 878 S.E.2d at 711. The Court disagreed with Scapa's contention that the allocation was unreasonable under the facts, holding: "we do not perceive the effect of setoff based on Stewart's internal allocation as improper, unreasonable under the facts of this case, or unfair simply because it favored Stewart and did not reflect percentages that correspond with the percentage of each award." *Id.* at 425, 878 S.E.2d at 711. The Court found "Scapa's 'percentages-based allocation' argument is an attempt to refashion a disadvantageous allocation of the settlement proceeds." *Id.*

Scapa filed a petition for rehearing arguing the Court of Appeals incorrectly decided *Jolly* as to cumulative dose theory, specific causation, and Dr. Frank's testimony. It argued the Court erred in affirming the additur award because the jury awarded more than the medical expenses and that the lower court's mention that the empty chair defense may have affected the jury's verdict is not a compelling reason to grant additur. (Pet. pp. 6-8). Finally, Scapa's sole argument as to allocation of settlement proceeds was that the Court's decision infringes on S.C. Code Ann. § 15-

38-50. (Pet. pp. 8-10). The Court of Appeals denied the petition for rehearing, and this Court granted Scapa's petition for writ of certiorari.

ARGUMENT

As an initial matter, the Court's recent decision to deny the petition for writ of certiorari in *Jolly* as to the JNOV issue regarding specific causation and the cumulative exposure theory is dispositive as to Question I in this appeal because it means that the *Jolly* opinion, which the Court of Appeals relied upon to affirm the denial of the motion for JNOV in this case, is final, controlling law. Scapa has never argued that this case is distinguishable from *Jolly*.

Regardless, the Court of Appeals' decision in this case is correct on the merits. When determining whether exposure to asbestos is actionable, South Carolina uses the "'frequency, regularity, and proximity test.'" *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007) (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)). "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 (internal quotation marks omitted). Stewart presented ample lay and expert testimony to show that he was frequently in close proximity to Scapa's asbestos-containing dryer felts on a regular basis. Scapa does not dispute the substance of the evidence or that there is evidence of frequency, regularity, and proximity.[5] Instead, it complains about one piece of Dr. Frank's testimony that it did not even object to at trial.

[5] For example, Scapa does not challenge on appeal that he "was significantly exposed to asbestos fibers during the time that Bowater utilized Scapa's asbestos-containing dryer felts." *Edwards*, 437 S.C. at 415, 878 S.E.2d at 706.

The lower court properly exercised its discretion to grant additur for survival damages given the uncontroverted testimony of Stewart's intense mental and physical pain and suffering. It also properly denied Scapa's motion to reallocate the settlement proceeds given the undeniable evidence of wrongful death and survival damages and the amount of Stewart's recovery.

The Court should affirm the Court of Appeals' decisions.

I. Scapa's JNOV arguments as to the "cumulative exposure" theory and expert testimony are not preserved.[6]

Scapa did not make any arguments in its directed verdict motion about the "cumulative exposure" theory or the reliability of Stewart's experts' opinions. (R. pp. 1479-96, 2256-57). Scapa did not argue that any expert lacked a sufficient factual predicate for his causation testimony. (Br. of App. pp. 18-20). When an "issue was not raised as a ground for a directed verdict during the liability stage of the trial . . . [it] is not preserved for this Court's review." *Jamison v. Morris*, 385 S.C. 215, 226, 684 S.E.2d 168, 173 (2009). In its directed verdict motion, Scapa argued only that the substance of the admitted testimony did not satisfy the specific causation standard. (R. pp. 1479-85).

Scapa filed a motion *in limine* as to portions of only Dr. Frank's testimony. (R. pp. 122-24). The lower court denied the motion (R. p. 348), and Scapa then failed to make an objection to the testimony at trial. "[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (internal quotation

[6] Stewart raised issue preservation to the Court of Appeals. (Br. of Resp't p. 12). The Court did not address preservation.

marks omitted). Scapa's failure to make any objection or a contemporaneous objection to the testimony it now challenges on appeal is a separate basis to find the issues unpreserved.

Finally, Scapa does not ask the Court to exclude any specific testimony. (Br. of App. pp. 13-17). It does not challenge the qualifications of any expert or the reliability of any testimony. Scapa dances around this lack of specificity by making bright-line legal arguments. However, it is notable that Scapa never moved for a new trial. Instead, it asks this Court to declare that it is not liable as a matter of law based on Dr. Frank's testimony that it did not object to at trial.

The Court should affirm the lower court's decision to deny Scapa's JNOV motion because all of its appellate arguments on the issue are unpreserved.

II. The Court of Appeals correctly affirmed the lower court's decision to deny Scapa's motion for JNOV where Stewart presented ample evidence of specific causation and his experts provided testimony that legally satisfies the causation standard.

The lower court correctly denied Scapa's motion for JNOV because Stewart presented ample expert and lay witness testimony and evidence that, viewed in a light most favorable to him, supports a reasonable inference of specific causation and shows his exposure to Scapa's asbestos-containing dryer felts on a regular basis over an extended period of time in proximity to where Stewart worked.

The point in this appeal is not the categorical labeling or banning of testimony as a certain theory (which is what Scapa wants the Court to do) but, instead, the consideration of the evidence and testimony presented in *this* case and whether that evidence, taken as a whole and viewed in a light most favorable to Stewart, reasonably supports the jury's finding of liability against Scapa. *See Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 570, 780 S.E.2d 252, 258 (2015) ("[O]n appeal, the jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." (internal quotation and alteration marks omitted)).

A. The Court of Appeals did not adopt any new law or change existing law.

Scapa argues that the Court of Appeals overstepped its authority by allegedly altering South Carolina law on substantial causation. (Br. of Pet. pp. 9-10). The Court of Appeals did not alter South Carolina law. Instead, it specifically relied on *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), and *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), in its substantial causation analysis. *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 878 S.E.2d 696 (Ct. App. 2022). The word "adopt" does not appear in the opinion. As explained more below, the Court of Appeals addressed the specific medical testimony given in this case and determined that the testimony about cumulative exposure was used to describe how a person develops mesothelioma and not as a specific causation opinion. That determination about the testimony is not a change in the law.

B. The Court of Appeals correctly admitted Dr. Frank's testimony for medical background and substantial causation evidence.

Scapa's main contention is that the Court of Appeals incorrectly decided *Jolly*—an argument that this Court already rejected when it denied the *Jolly* petition for writ of certiorari on that issue. Scapa cannot ask this Court to overturn *Jolly* now when it did not move under Rule 217, SCACR, to argue against precedent at the oral argument of this case and did not even argue that the Court should overturn *Jolly* or that Stewart's case differs from *Jolly* on this issue.

Addressing the merits, Scapa's most direct statement of its argument on this issue is that "the Court of Appeals failed to appreciate that the cumulative dose theory does not differ from the each and every exposure theory." (Br. of Pet. p. 11) (internal quotation marks omitted). It attacks only Dr. Frank but never asked the trial court, and does not ask this Court, to exclude his testimony. To the extent Scapa does not seek exclusion of any evidence but only argues that the admissible evidence is legally insufficient for substantial causation, it fails to appreciate that the "cumulative

exposure" testimony in this case was not a theory used to prove specific causation. The testimony was a scientific explanation of how asbestos causes someone to develop mesothelioma.

Stewart's evidence directly contradicted the notion that cumulative exposure and each-and-every exposure are the same thing. Dr. Frank testified he does ***not*** "believe that each and every is the same as cumulative [exposure]." (R. p. 2321 lns. 2-4). Rather, his opinion is that, while mesothelioma is not attributable to background asbestos exposure alone, in a case with additional exposure, the background level contributes to the cumulative exposure. (R. p. 2321). Dr. Frank "would ***not*** agree with" the statement that any exposure, regardless of dosage, is sufficient to cause asbestos-induced cancer. (R. p. 2330 lns. 1-5) (emphasis added). Scapa ignores this testimony, and the Court should reject its attempts to misstate the scientific and opinion testimony he gave to the jury in this case.

Scapa focuses its argument on *Jolly*'s citation to *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016). This argument is misplaced. The Court of Appeals stated it found *Rost* persuasive as to distinguishing between cumulative exposure theory and each-and-every-exposure theory. *Jolly*, 435 S.C. at 635, 865 S.E.2d at 26. The Court did not cite to or follow substantive substantial causation law from Pennsylvania. Instead, in *Jolly* and in this case, the Court of Appeals correctly used South Carolina law stated in *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727.

Scapa's argument that the Court of Appeals' decision "in effect, creates strict liability for any above-background exposures" and removes the requirement that an exposure be substantial is patently false and an unfounded attempt to sensationalize the Court's well-reasoned and legally grounded decision. (Br. of Pet. p. 13). The facts addressed by the Court of Appeals in this case are exposure that is much more than barely above-background. They included the "undisputed" evidence that Scapa's dryer felts contained "large quantities of asbestos" and 23 of them were on

paper machine one during Stewart's career. *Edwards*, 437 S.C. at 414, 878 S.E.2d at 706. Significantly, "[a]ll but one position Stewart held while at Bowater required him to participate in cleaning the felts or manually handling the felts," and these jobs released breathable, visible, and accumulated asbestos fibers into the air, on the workers' bodies, and on the floor. *Id.* at 415, 878 S.E.2d at 706.

Further, Stewart's experts considered other potential exposures to asbestos and still concluded that the specific Scapa dryer felts were a substantial cause of Stewart's mesothelioma. Christopher DePasquale considered dryer felts, thermal insulation on piping, and gaskets and packing related to valves. (R. p. 848 lns. 9-14). He discounted thermal insulation because his investigation showed the vast majority of the pipes were cladded. (R. pp. 849-50). He discounted gaskets because Stewart did not remember working with gaskets or packing. (R. p. 894). Scapa ignores this evidence and views Dr. Frank's testimony in a vacuum as if it were the only causation evidence offered.

Perhaps more telling is that Scapa's argument on appeal directly contradicts its main defense at trial—that Stewart's mere presence around (not physical or direct work with) other asbestos-containing products caused his mesothelioma.[7] Based on its own defense theory of Stewart's alleged exposure to asbestos from other products, Scapa cannot credibly deny that Stewart's evidence, viewed in a light most favorable to him, supports a reasonable inference of a substantial causative exposure to Scapa dryer felts "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

[7] *See, e.g.*, R. pp. 723 lns. 21-24, 726-27, 747-48, 801-02, 819-22, 877, 880-82, 884, 890-94, 946-48, 953, 958-60, 963, 1045-46, 1056-57, 1076, 1136, 1149-50, 1168-70, 1240-41, 1244-45, 1248-49, 1259-65, 1268-69, 1283, 1355, 1362-65, 1371-72, 1392-93, 1460-64, 1568, 1572, 1574-75, 1577-79, 1588.

S.E.2d at 727 (internal quotation marks omitted). "[W]hat's good for the goose is good for the gander,"[8] and Scapa cannot argue for its defense that Stewart was merely near other asbestos-containing products while attacking Stewart's ample evidence of direct, physical exposure to Scapa's breathable asbestos fibers. The Court of Appeals correctly noted that "[i]n seeking to establish an empty-chair defense, a defendant must assign fault for the plaintiff's injury to another party by providing evidence to the fact-finder that is sufficient for it to determine whether the party's actions were the cause of the plaintiff's injuries." *Edwards*, 437 S.C. at 427, 878 S.E.2d at 713 (internal quotation marks omitted); *see also Youmans v. S.C. Dep't of Transp.*, 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) ("The defendant asserting an affirmative defense bears the burden of its proof."). To prove its affirmative defense, Scapa was required to show that another asbestos product was a substantial cause of Stewart's mesotheliom. Scapa tried to do that by showing that Stewart was merely near other asbestos-containing products. Its own attempted proof for an affirmative defense completely contradicts and undermines its argument about Stewart's evidence.

The testimony in this case is easily distinguishable from the cases that Scapa relies upon. In *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 674-75 (7th Cir. 2017), the testimony at issue was that "each and every exposure to asbestos, including the first exposure, no matter how de minimis is a substantial contribution to the cumulative total." (internal quotation marks omitted). As explained above, that is not what Dr. Frank testified to in this case. In *Smith v. Ford Motor Co.*, 2013 WL 214378, *8 (D. Utah Jan. 18, 2013), the expert wanted "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

[8] *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603 n.13, 799 S.E.2d 912, 917 (2017).

manufacturer of each asbestos containing product, without regard to dosage or how long ago the exposure occurred." Again, that is not what Dr. Frank testified to in this case.

Scapa now relies upon *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477 (Sup. Ct. Ohio 2018), for the argument that a "contextual analysis"—not a cumulative dose theory—is the correct analysis for substantial causation. (Br. of Pet. p. 12). It argues that the plaintiff must take into account other asbestos exposures. That is exactly what Stewart did in this case. Dr. Frank considered co-worker testimony about a cloud of felt dust in his opinion of the extent and amount of Mr. Stewart's exposure to Scapa asbestos-containing dryer felts. (R. p. 2264). He considered that dryer felt testing showed asbestos fibers release "from single to low double digits in terms of fibers per cc." (R. p. 2281). Dr. Frank testified that the amount of fibers released when compressed air is blown across a felt in someone's direction is a significant exposure that would significantly contribute to mesothelioma. (R. pp. 2332-34). He testified that, even one year's exposure to the legally allowable limit makes a person four times more likely to get an asbestos-related disease. (R. pp. 2307-08). Scapa cross-examined Dr. Frank about other asbestos products at the Bowater plant, and Dr. Frank still testified that Scapa dryer felts were a substantial cause of Stewart's mesothelioma.

In *Honeywell*, the Supreme Court of Ohio addressed the issue of "whether the 'substantial factor' requirement may be met through a 'cumulative-exposure theory,' which postulates that every nonminimal exposure to asbestos is a substantial factor in causing mesothelioma." 102 N.E.3d at 478. That is not the theory or evidence presented in this case. During a pre-trial hearing, Stewart explained: "The experts will say that each and every exposure above background, an occupational exposure, Your Honor, contributes. They don't say each and every is a substantial contributing cause. . . . I still need to prove it was an occupational exposure, it was substantial, and

the exposures from specific Scapa asbestos-containing dryer felts were indeed a substantial factor in the causation of the mesothelioma." (R. pp. 345-46). Stewart did not rely on an each-and-every or cumulative exposure theory of substantial causation at trial. He used the *Henderson* causation standard proven by evidence of frequency, regularity, and proximity to Scapa's product.

The cumulative exposure testimony in this case was a general scientific principle that all exposures to asbestos contribute to a person's total dose and was offered as part of the scientific explanation for how asbestos exposure causes mesothelioma. It was not offered for the purpose of establishing specific causation.[9] An expert may testify to the scientific principle that "every exposure increases the risk of mesothelioma" while also giving an opinion on specific causation that is based on the plaintiff's exposure "attributable to a specific product" of the individual defendant. *Dugger v. Union Carbide Corp.*, 2019 U.S. Dist. LEXIS 171168, *36 (D. Md. Sept. 30, 2019).

Finally, Scapa quotes a portion of Dr. Frank's testimony as supposedly showing that Dr. Frank did not try to distinguish between "substantial" and "insubstantial" contributing factors. (Br. of Pet. pp. 13-14) (emphasis omitted). Regardless of whether that is legally required, it is an incorrect characterization of the testimony. Dr. Frank simply stated that he could not "quantify" or make a "calculation" of the specific dose of Scapa asbestos fibers that Stewart inhaled. (Br. of Pet. pp. 13-14). That does not mean that he could not testify, based on the testimony about Stewart's exposure to and work with Scapa dryer felts, that Scapa's asbestos was a substantial contributing factor to Stewart's mesothelioma.

[9] For example, if Stewart actually used what Scapa labels the each-and-every exposure or cumulative exposure theory, then much of Stewart's evidence about frequency, proximity, and regularity would have been unnecessary.

C. Scapa failed to preserve its scientific-fact argument by not arguing it in the petition for rehearing and, regardless, its argument is based on a misreading of the Court of Appeals' opinion.

Scapa did not argue in its petition for rehearing that the Court of Appeals found as a "scientific fact" that every exposure contributes to a person's mesothelioma. (Pet. for Rehearing). Therefore, it is not preserved for this Court's consideration. *See Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 235, 797 S.E.2d 387, 393 (2016) ("[I]n order for an issue to be preserved for the Supreme Court's review, the issue must have been raised in a petition for rehearing before the Court of Appeals.").

Regardless, the Court of Appeals did not hold that the principle that "every exposure" contributes to a person's mesothelioma is an "irrefutable" scientific fact. (Br. of Pet. pp. 15-19, 22). The word "irrefutable" appears only in *Jolly* and not in the opinion in this case. Even within *Jolly*, the word appears in a block quote from the *Rost* case. After the quotation, the Court of Appeals states only that "*Rost* is particularly persuasive given that Dr. Frank" provided similar testimony in *Jolly*. *Jolly*, 435 S.C. at 635, 865 S.E.2d at 27. The Court never held it is an irrefutable scientific fact.

In deciding a JNOV motion, the point is not whether something is a "scientific fact" but, instead, whether there is evidence of something sufficient to submit it to a jury. Having held that Dr. Frank's testimony about the cumulative exposure theory is proper medical evidence for a jury to hear, it was up to the jury to decide what to believe. It did so in this case, and Scapa's misreading of *Jolly* provides no basis to overturn the denial of its JNOV motion.

Even if the Court addresses the merits of this argument, Scapa feebly relies almost exclusively on one decision of a court of common pleas in Pennsylvania, *Vogelsberger v. Owens-Illinois, Inc.*, 2006 WL 2404008 (Com. Pl. Ct. of Allegheny Cnty, Pa. Aug. 17, 2006). (Br. of Pet. pp. 15-18). That case involved a *Frye* hearing on the admissibility of expert methodologies. *Id.* at

*1. The proposed experts in that case intended to testify that "every single exposure to every asbestos product is a proximate cause of a subsequently diagnosed asbestos-related disease" and that, "if the evidence supports a single exposure, then causation can be opined and asserted." *Id.* at *3, 19. That is not the testimony given in this case. Scapa's argument on this point does not have any analysis whatsoever of the testimony and evidence in this case. Scapa fails to give this Court a legal or factual basis to make a declaration that something is not scientific fact.

It is not the role of this Court or the Court of Appeals to decide scientific fact. That is the jury's role, and it properly fulfilled that role in this case.

D. Scapa's incompatibility argument is improper and legally meritless; and the Court of Appeals properly cited to *Rost* as a case that analyzed similar testimony from the same expert.

There are numerous, independent reasons for the Court to reject Scapa's argument that the Court of Appeals' citation to *Rost* is incompatible with South Carolina law.

First, this argument is another attempt to have this Court overturn the Court of Appeals' JNOV ruling in *Jolly v. GE*, 435 S.C. 607, 634, 865 S.E.2d 12, 26, 869 S.E.2d 819, 26 (Ct. App. 2021). The Court of Appeals did not adopt *Rost* in *Jolly* or in this case. In this case, it cited to *Rost* one time in a parenthetical citation that is quoting the *Jolly* opinion. The sentence preceding the citation is simply a statement of the each-and-every exposure theory. It is not an adoption of or change in the law. Scapa's real complaint is with the *Jolly* opinion. However, it chose to accept that decision as law in the Court of Appeals by not moving under Rule 217, SCACR, to argue against precedent at the oral argument of this case. Scapa never even argued that the Court should overturn *Jolly* or that Stewart's case differs from *Jolly*.

Second, it is proper for one Court to cite another's court's decision on a similar issue as persuasive. That is the purpose of the Court of Appeals' citation to *Rost*. In *Jolly*, the plaintiff argued that his expert's testimony "that all exposures contribute to the cumulative dose that causes

disease, [] does not mean that every exposure rises to the level of a substantial factor." *Jolly v. GE*, 435 S.C. 607, 634, 865 S.E.2d 12, 26, 869 S.E.2d 819, 26 (Ct. App. 2021). The Court of Appeals cited *Rost* in its discussion about "distinguish[ing] between the 'each and every exposure' theory and the cumulative dose theory" because *Rost* it made a similar distinction about the testimony Dr. Frank gave in that case. *Id.* at 634-35, 869 S.E.2d at 26. *Jolly* did not adopt any reasoning in or law from *Rost*.

Third, the Court should reject Scapa's insistence on a bright-line, categorical rule banning all testimony about cumulative exposure. Scapa is essentially asking the Court to ban cumulative exposure testimony and adopt a "contextual analysis" for the first time on certiorari. (Br. of Pet. p. 20). The word "context" appears nowhere in Scapa's briefing to the Court of Appeals.[10] It appears for the first time in its petition for rehearing. "A party may not raise an issue for the first time in a petition for rehearing." *Duke Energy Carolinas, LLC v. S.C. Office of Regulatory Staff*, 434 S.C. 392, 412 n.19, 864 S.E.2d 873, 884 n.19 (2021) (internal quotation and alteration marks omitted). Up until this point, there has been no dispute in this case about an each-and-every versus contextual analysis. Instead, it is manufactured by Scapa on appeal, and this Court should reject it.

This argument is another example of how Scapa argues law in this appeal but ignores the actual evidence because a contextual-type analysis was done in this case. Both Mr. DePasquale and Dr. Frank considered evidence of Stewart's exposure to other asbestos products and still opined that his exposure to Scapa's asbestos-containing dryer felts was a substantial cause of mesothelioma. (R. pp. 848-50, 894, 2264, 2281, 2332-34). Based on this evidence, Scapa's argument amounts to nothing more than a harmless error because it cannot affect the outcome of

[10] For example, Scapa unfairly argues to this Court that the Court of Appeals "erred by failing to acknowledge the [alleged] direct conflict between these foreign authorities and South Carolina law." (Br. of Pet. p. 20). Scapa never argued those authorities to the Court of Appeals.

the verdict and is irrelevant. *See Miller v. Dillon*, 432 S.C. 197, 211, 851 S.E.2d 462, 470 (Ct. App. 2020) (finding an error harmless and stating "'whatever doesn't make any difference, doesn't matter.'" (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987))).

Scapa is also incorrect on the merits because the evidence and testimony of individual cases will differ, and there is no universally accepted definition of each-and-every or cumulative exposure. This case is an example of how an expert may testify about cumulative exposure and give a substantial causation opinion based on the plaintiff's exposure to the defendant's product. *See, e.g.*, *Dugger v. Union Carbide Corp.*, C/A No. CCB-16-3912, 2019 U.S. Dist. LEXIS 171168, at *37 (D. Md. Sep. 30, 2019) ("While a few of Dr. Frank's statements may recall the 'each and every exposure' theory, the 'other parts of his reports that provide context to' those statements show that Dr. Frank considered the specifics of Mr. Dugger's exposure to Bendix brakes when coming to his conclusion."); *Dixon v. Ford Motor Co.*, 70 A.3d 328, 335 (Md. 2013) ("The major fallacy in Ford's contention that a *Frye/Reed* analysis is required is that it looks only to the 'every exposure to asbestos is a substantial contributing cause' statement and largely ignores the other parts of her testimony that provide a context to that one statement."). Each opinion must be analyzed within the facts of that case.

This is proven by the fact that many of the cases Scapa cites to involved facts of minimal exposure (in contrast to the undisputed exposure findings of the Court of Appeals in this case). *See, e.g.*, *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1176 (9th Cir. 2016) ("[E]ven if McIndoe was around asbestos dust several times, his heirs presented no evidence regarding the *amount* of exposure to dust from originally installed asbestos, or critically, the *duration* of such exposure during any of these incidents."); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) ("Plaintiff has not established that GM products contained asbestos or that

Plaintiff was ever exposed to any asbestos from GM products."); *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 483 (Ohio 2018) (stating the plaintiff "merely showed that Kathleen could have been exposed to asbestos from Bendix products when her father installed Bendix brakes on five to ten occasions."); *Smith v. Ford Motor Co.*, 2013 U.S. Dist. LEXIS 7861, at *9 (D. Utah Jan. 18, 2013) (stating plaintiff's expert failed to show that his "six alleged exposure to asbestos" over forty years earlier was a sufficient exposure to cause his mesothelioma).[11] In this case, the evidence and testimony was much more than the simple fact of exposure to Scapa asbestos.

To even address the merits of Scapa's argument, this Court would have to first find (1) the issue is preserved by objection to Dr. Frank's testimony at trial (which never occurred), (2) the issue was preserved by argument to the Court of Appeals in briefing (which never occurred), (3) the Court of Appeals incorrectly found Dr. Frank used cumulative dose "to explain how an individual's risk of developing mesothelioma or other lung disease increases as that individual's dose of asbestos increases through exposure" rather than as a substantial causation opinion[12] (which Scapa has never argued), and (4) no contextual analysis occurred in this case (which ignores Dr. DePasquale and Dr. Frank's testimony). There is simply no factual or legal basis for those rulings, most of which Scapa ignores in this Court.

In conclusion, Stewart presented ample evidence of the frequency, regularity, and proximity of his exposure to Scapa's asbestos-containing dryer felts. Scapa's JNOV argument ignores the actual evidence in this case. Instead, it tries to focus the Court away from the evidence in this case by misstating the Court of Appeals' decision. The law and the record in this case

[11] Two cases cited by Scapa—*Laney v. Celotex Corp.*, 901 F.2d 1319 (6th Cir. 1990), and *Allen v. Owens-Corning Fiberglas Corp.*, 571 N.W.2d 530 (Mich. Ct. App. 1997)—did not involve an each-and-every or cumulative exposure issue.
[12] *Edwards*, 437 S.C. at 417-18, 878 S.E.2d at 707-08.

amply support the lower court and Court of Appeals' rulings, and this Court should affirm the denial of Scapa's JNOV motion.

III. The Court of Appeals correctly affirmed the lower court's discretionary decision to grant additur.

The Court of Appeals conducted a thorough analysis of the evidence in this case to find that the trial court did not abuse its discretion in granting additur. Because "the record is replete with evidence of [Stewart's] pain and suffering, which was unrefuted by Scapa, [the Court found] the trial court was well within its discretion in granting Stewart a new trial *nisi additur*." *Edwards*, 878 S.E.2d at 710. The Court also found "that the trial court provided ample justification for increasing Stewart's survival award" based on the law and its "meticulous[]" analysis of the evidence. *Id.* Scapa provides no legal or factual basis for this Court to grant certiorari on this issue.

Scapa argues that additur is only allowed if the jury does not award all of the medical expenses or does not "account for", *i.e.* award any amount for, pain and suffering. (Br. p. 23). That is not the law in South Carolina. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 194, 777 S.E.2d 824, 829-30 (2015) ("While the presence of some amount of noneconomic damages may be a factor mitigating against the granting of a new trial *nisi additur*, there is no categorical rule prohibiting a *nisi additur* where a jury verdict includes some measure of noneconomic damages.").

Scapa argues that when the original damages award "exceeds the medical expenses by nearly three times, there is no compelling reason" to grant additur. (Br. of Pet. p. 23). Again, there is no law stating a bright-line rule on a permissible amount of damages for intangible, non-economic damages based on the amount of medical expenses. The Supreme Court already squarely rejected that argument in *Riley*.

Scapa argues that the lower court did not provide compelling reasons because the court noted that the jury's verdict may have been affected by the empty chair defense. (Br. of Pet. pp.

23-24). That argument is not preserved because Scapa raised it for the first time in a reply brief. *See Harbin v. Williams*, 429 S.C. 1, 9, 837 S.E.2d 491, 495 (Ct. App. 2019) (declining to address an "issue because it was raised for the first time in the reply brief"). Regardless, it is meritless because the lower court's mention of a possible reason for an inadequate award does not prohibit the court from finding other, compelling reasons to grant additur.

It is the law of the case that Scapa did not dispute (1) the amount of medical bills, (2) "that Stewart suffered greatly as he attempted to treat his disease", and (3) that none of Stewart's comorbidities "interacted with or amplified the pain and suffering Stewart felt from the mesothelioma." *Edwards*, 878 S.E.2d at 710. Scapa does not even argue any longer that the co-morbidities affect additur, despite that being a central argument in its briefing below.

Scapa now argues, for the first time to this Court, that "the discretion to grant additur is not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages." (Br. p. 24). Not surprisingly, it cites to no law for this proposition. That is because there is not a numerical or percentage-based limitation on the trial court's additur discretion. To the contrary, this Court in *Riley* affirmed a 50% additur without any mention of such a limitation. *Riley v. Ford Motor Co.*, 414 S.C. 185, 194, 777 S.E.2d 824, 830 (2015). Scapa's "categorical rule formulation would remove the discretion vested in trial court judges." *Id.* at 194, 777 S.E.2d at 830.

The undisputed testimony is that Stewart endured **daily** pain for **years** before and after his diagnosis. (Final Br. of Resp't pp. 27-28). The undisputed testimony is that, after he began treatment described as unimaginably painful and a sledge hammer, Stewart had no appetite, could not go to the bathroom, could not sleep, could not drive, and could not walk a short distance, just to name a few things. Stewart endured all of that physical suffering while mentally suffering with the undeniable fact that he would die from mesothelioma. After watching his video deposition,

the Court of Appeals wrote that Stewart, "swelling with emotions, stated, 'I never imagined my life would come to what it is.'" *Edwards*, 878 S.E.2d at 709. A $1,000,000.00 award for medical expenses and such extreme pain and suffering is not an abuse of discretion. It is actually too low for the physical and mental agony that Stewart endured and tried so bravely to fight in order to spend more time with his family.

The Court of Appeals held that Stewart's evidence of pain and suffering "was ***unrefuted*** by Scapa", and Scapa does not challenge that ruling. *Edwards*, 878 S.E.2d at 710 (emphasis added). What Scapa wants is to "play nice" in front of the jury by not disputing that Stewart suffered greatly but to come in the "back door" after a verdict and argue that his pain and suffering could only be a certain multiple of the amount of medical bills. This type of gamesmanship should not be allowed.

Finally, Scapa argues for the first time in this Court that "*additur* conflicts with the constitutional right to a jury trial as to the amount of damages." (Br. of Pet. p. 23). It does not cite to a case stating that proposition. Regardless, it is unpreserved and ignores that it received a jury trial on damages in this case.

The evidence and law wholly support the trial court's exercise of its discretion to grant additur, and this Court should affirm.

IV. The Court of Appeals correctly affirmed the lower court's denial of Scapa's motion to reallocate the settlement proceeds.

The Court of Appeals, relying on this Court's precedent, correctly affirmed the lower court's decision not to reallocate Stewart's settlement proceeds.

The lower court increased the survival damages from $600,000.00 to $1,000,000.00 but left the jury's $100,000.00 wrongful death award undisturbed, which amounts to 90% survival and 10% wrongful death damages. (R. pp. 14-15). Stewart's prior settlements totaled $207,200.00 for

survival and $828,800.00 for wrongful death, which amounts to 20% for survival and 80% for wrongful death. (R. p. 1695, Tr. p. 24, p. 1709). Scapa moved to reallocate the settlements to match the damages awards—90% to survival and 10% to wrongful death. (R. pp. 199-202, 1709). Relying on this Court's decision in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), the lower court denied the motion. (R. pp. 23-24, p. 1698 Tr. p. 37, p. 1699 Tr. pp. 41-42). After accounting for setoff, the lower court entered judgment for $792,800.00 for survival and $0.00 for wrongful death. (R. p. 24). The result is that the total amount Stewart received from all tortfeasors for survival is $1,000,000.00—the exact amount of the judgment.

Scapa's sole argument for reallocation is that the Court's decision infringes on S.C. Code Ann. § 15-38-50 because it accepts a plaintiff's settlement allocation. (Br. of Pet. pp. 25-28). The Court must reject this argument as unpreserved and contrary to controlling precedent.

First, the argument is unpreserved because Scapa did not raise it in its briefing in the Court of Appeals. "A party may not raise an issue for the first time in a petition for rehearing." *Duke Energy Carolinas, LLC v. S.C. Office of Regulatory Staff*, 434 S.C. 392, 412 n.19, 864 S.E.2d 873, 884 n.19 (2021) (internal quotation and alteration marks omitted). There is no citation to or argument about § 15-38-50 in either of Scapa's briefs. Therefore, the issue is unpreserved, and this Court does not need to consider or address it.

Second, Scapa's unpreserved argument is really an improper attempt to overturn *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), when Scapa failed to make that argument in briefing or move to argue against precedent at oral argument. In *Riley*, the Supreme Court squarely considered the language of § 15-38-50 and still upheld the plaintiff's allocations for setoff. *Id.* at 196, 777 S.E.2d at 830-31. "Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify

appellate reapportionment for the sole purpose of benefitting [the non-settling defendant]. Here, the trial court-approved allocation is unquestionably reasonable under the facts." *Riley*, 414 S.C. at 197, 777 S.E.2d at 831. The Court of Appeals correctly applied the law to the facts of this case in holding that it did "not perceive the effect of setoff based on Stewart's internal allocation as improper, unreasonable under the facts of this case,[13] or unfair simply because it favored Stewart and did not reflect percentages that corresponded with the percentages of each award." *Edwards*, 878 S.E.2d at 711. In this case, as in *Riley*, Scapa's effort to invalidate the settlement allocations based on a percentages analysis is manifestly without merit.

Scapa's argument conflates the standards for additur and reallocation, and "would in practice allow [the defendant] a second bite at the apple at arguing additur." (R. p. 1694 Tr. p 20). A finding of additur (or remittitur) by the trial court is not the equivalent of finding a basis to reallocate settlement proceeds and cannot be the basis for reallocation. "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial nisi." *Riley*, 414 S.C. at 192, 777 S.E.2d at 828 (emphasis and alteration in original). Finding a verdict is unduly liberal or conservative is different from finding settlement proceeds should be equitably reallocated.

Notably, Scapa does not argue that there is insufficient evidence to support survival and wrongful death causes of action. *Riley*, 414 S.C. at 196, 777 S.E.2d at 831-82 (noting as a basis for denying reallocation "the evidence in the record of Riley's conscious pain and suffering"); *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 217, 734 S.E.2d 142, 146 (2012) ("In the absence of ***any evidence*** for a survival action, we find the trial court properly reallocated that portion of the settlement to the wrongful death claim." (emphasis added)); *Ward v. Epting*, 290 S.C. 547,

[13] Scapa does not argue to this Court that the allocation is unreasonable under the facts.

559-60, 351 S.E.2d 867, 874-75 (Ct. App. 1986) (determining only whether there is "***any evidence***" of the survival cause of action where the defendant argued all settlement amounts should go to wrongful death because of "insufficient evidence" of a survival action (emphasis added)).

It is significant to the analysis of this issue that Stewart received, in total from all tortfeasors, $1,000,000.00, which is a single recovery for his survival damages. Setoff is the underlying goal of reallocation. *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 ("[W]here a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset."). The point of setoff is to prevent a double recovery. *Id.* at 196, 777 S.E.2d at 830 (stating the Contribution Among Tortfeasors "Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the settlement of disputes." (internal quotation marks omitted)). Stewart received a single recovery in this case.

The lower court and Court of Appeals correctly applied this Court's decision in *Riley* to deny Scapa's motion to reallocate the settlement, and this Court should affirm.

CONCLUSION

The Court should affirm the Court of Appeals' decision and remand to the lower court to enforce the judgment.

August 4, 2023

Respectfully submitted,

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