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

REPLY BRIEF OF PETITIONER

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I. Respondent's Arguments That The Court Of Appeals Properly Affirmed The Circuit Court's Denial Of Scapa's Motion For JNOV Because Stewart Sufficiently Established Substantial Factor Causation Are Uncompelling And if Accepted Would Damage South Carolina Law.

Respondent's brief offers a series of contentions regarding the substantial factor causation issue that miss the mark. The Court of Appeals' opinion affirming the denial of Scapa's motion for JNOV should consequently be reversed and remanded for further proceedings.

Respondent first contends that this "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 this issue] 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." (Resp. Br. p. 14). This argument lacks merit. It misconstrues- on a fundamental level- the significance of a court of last resort's denial of an extraordinary writ within its discretionary docket. The denial of a writ of certiorari "***does not*** mean that . . . [the Supreme] Court has determined that the decision of the Court of Appeals is correct." *Peaseley v. Va. Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 139 (1973) (emphasis added); *see also Teague v. Lane*, 489 U.S. 288 (1989) (denial of writ of certiorari carries no precedential value). *Jolly*, therefore, is not determinative since the highest court of a state may necessarily overrule precedents established by decisions of intermediate appellate courts, as it is in no way bound by them. While this Court denied certiorari in *Jolly*, such denial does not constitute approval of the decision of the Court of Appeals or bar this Court from later evaluating the substantial factor causation issue appearing in later matters. *Peaseley*, 282 N.C. 585 at592, 194 S.E.2d at 139.

The opinion below in this case applied and reaffirmed *Jolly's* specific causation analysis which principally relied upon *Rost v. Ford Motor Co.*, 637 Pa. 625, 151 A.3d 1032, 1044 (Pa.

2016). However, only this Court is equipped, as South Carolina's court of last resort, "to say what law is." *Abbeville County Sch. Dist.* v. 410 S.C. 619, 632 (2014), quoting *Marbury v. Madison*, 5 U.S. 137, 138, 2 L. Ed. 60 (1803). In fulfilling that role, this Court has the prerogative to overturn *Jolly's* erroneous substantial factor causation principles here because the Court of Appeals applied *Jolly's* causation principles to affirm JNOV here. Thus, the challenged substantial factor causation analysis established in a prior lower court opinion *is* subject to this Court's merits review here.

Respondent next contends that certain related issues are not preserved for review here. These contentions fail. Respondent first argues that Petitioner's JNOV arguments as to the "cumulative exposure" theory and expert testimony are unpreserved. This argument is not new- it was rejected earlier by the Court of Appeals and again by this Court during the certiorari review**.** Petitioner did not waive its substantial factor causation arguments**.** The reason South Carolina courts have held that a pre-trial ruling on admissibility of evidence (*i.e.,* a ruling on a motion *in limine*) does not generally preserve error is that it is a preliminary ruling "and is subject to change based on developments at trial." *State v. Hill*, 331 S.C. 94, 100 n.1 (1998). Here, however, Respondent's unreliable cumulative-exposure testimony did not change from the pre-trial motions stage and was grounded on an unacceptable legal basis, which Petitioner challenged and unfortunately lost.

This point is important here. Like South Carolina, its sister courts hold that when it comes to an argument "that scientific evidence is unreliable, and is no evidence, a party must object to the evidence *before trial* ***or*** *when the evidence is offered.*" *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998) (emphasis added). A pre-trial objection suffices because, unlike testimony that might later become admissible based on developments at trial, scientifically unreliable testimony can never become probative. Thus, an objection and ruling before trial is sufficient to preserve error. *Id.*

The law in the Fourth Circuit is the same. *See United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996) ("Motions in limine preserve issues that they raise without any need for renewed objections at trial, just so long as the movant has clearly identified the ruling sought and the trial court has ruled upon it.") The law consequently does not require a pointless act, such as renewing a challenge to the scientific reliability of expert testimony at trial after the trial court has already ruled that it will admit that testimony and has already rejected the challenge. Scapa's motions to exclude the causation testimony of Stewart's experts raised the same challenges Scapa has raised on appeal—that Stewart did not introduce legally sufficient evidence of causation. Those motions, and the trial court's ruling denying those motions (01/09/18 Tr. at 117), as well as the denial of the JNOV motion here, sufficiently preserved the trial court's error for appeal.

Respondent next argues that Scapa did not use the phrase "scientific fact" in its Petition For Rehearing so Scapa cannot argue that the Court of Appeals' erroneously opined, in reliance on *Jolly* and *Rost*, that every exposure contributes to a person's mesothelioma is a disputable fact. But as Respondent concedes, only issues need be raised- not magic words or phrases. *See Sloan v. DOT*, 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005). The issue here is the denial of JNOV, and Respondent's failure to present proper substantial factor evidence. Neither "cumulative dose" nor "each and every exposure" testimony, regardless of how it is described (i.e., as background "science" or as specific proof regarding the product at issue) is consistent with the required proof required in South Carolina respecting substantial factor causation, as was set forth as the standard in *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179 (2007).

On the merits, Respondent does not dispute that Dr. Frank deployed the cumulative dose theory during his expert causation testimony at trial. To that end, Dr. Frank explained to the jury that an individual's risk of mesothelioma increases as his dose increases through each exposure.

For the Court of Appeals and Respondent, such testimony regarding a plaintiff's cumulative dose is merely "background information essential for the jury's understanding of medical causation. . . ." *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, (Ct. App. 2022). Respondent's position is that this represents an impermissible attempt to alter South Carolina substantial factor causation jurisprudence.

The cumulative dose theory and each and every exposure theory are equivalents. Respondent, echoing the Court of Appeals' analysis, argues that Scapa improperly conflates these two theories and claims, and posits that they are different concepts. The attempt to distinguish these concepts should be rejected, as it has been in other courts. The Court of Appeals' agreement below with the split decision in *Rost* that cumulative exposure theory is not the same as "each and every exposure" theory for purposes of causation is, respectfully, wrong. *See, e.g.*, *Krik v. Exxon Mobil Corp.*, 870 F.3d 669 (7th Cir. 2017) (cumulative exposure theory is effectively the same as each and every exposure theory). "Proof of exposure is not, by itself, sufficient to prove medical causation." FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 403 (2000) "A plaintiff must also prove that he was exposed to a sufficient amount, or dose, of a particular toxin to cause a particular disease."

In South Carolina, a plaintiff should not be permitted to establish that exposure to asbestos fibers from a particular defendant's product was a *substantial* factor in causing his mesothelioma ***without contextualizing and quantifying:*** (i) the dose needed to cause the disease, (ii) the dose the plaintiff inhaled from that defendant's product; and (iii) the context respecting the plaintiff's other exposures. Not every exposure, nor every dose of asbestos, substantially contributes to a person's development of mesothelioma. All experts in asbestos litigation have effectively been forced to admit this, given their unanimous concession that everyone of us is exposed to at least the

background level of asbestos present in the air, and not all of us develop mesothelioma. This necessarily means that if a plaintiff's exposure to asbestos from a defendant's product was at or below background levels, then it could not have been a cause of the plaintiff's disease.

Thus, to establish specific causation, the plaintiff's expert must establish (i) the approximate level of airborne, respirable asbestos that is sufficient to cause mesothelioma, and (ii) the plaintiff was exposed to at least that level of asbestos from *the defendant's* product (in such a manner to meet this Court's regularity, proximity and frequency test in *Henderson*), and (iii) the context of other exposures in considering the question of "substantial factor" causation, in particular, how those exposures are quantified and contextualized to the exposure that is the subject of the underlying complaint. This last point is not insignificant. Absent a contextual and quantitative analysis for purposes of establishing substantial factor causation, the purported testimony cannot be legally sufficient, because it does not represent the real world exposures of the individual involved, but instead is testimony regarding a hypothetical exposure to a singular source in a vacuum.

Here, Respondent's expert Dr. Frank was unable to contextualize and quantify which products were *substantial* contributors to Stewart's cumulative dose and, by the same token, which exposures were ***in****substantial* contributors. (4/9/15 Frank Depo., p. 35, R. pgs. 2210-11; R. p. 2212; R. Pgs. 2212-13). ***Respondent concedes this deficiency but argues that such contextual differentiation and quantification should not be legally required***. But, Dr. Frank, by being unable to explain to the jury which exposures were substantial and which were insubstantial contributing factors, logically confirms that his testimony regarding the cumulative dose theory could be nothing other than equivalent to the each and every exposure theory. Instead, Respondent argues, for the first time, that Dr. Frank and Mr. DePasquale's testimony provided such contextual

analysis, but the record belies this assertion. (Resp. Br. pp. 19, 21). Dr. Frank and Mr. DePasquale's testimony merely touched upon other potential sources of exposure in broad based and summary terms. Such testimony was not an effort to contextually distinguish between substantial and insubstantial contributing factors and render opinions quantifying those exposures in relation to the dryer felts at issue here.

That is because Stewart's experts could not (or perhaps did not want to) rule out any exposure; they just ruled every exposure *in*. Under that approach, *every* exposure Mr. Stewart had to asbestos, no matter how miniscule, contributed to causing his mesothelioma as a part of his "cumulative dose"—unless it was the background level of asbestos—which doesn't count. This decidedly unscientific theory is directly at odds with, among other things, *Henderson* —which requires proof of frequent, regular and proximate exposure to a specific defendant's products. *Id.* at 185.

Dr. Frank's theory—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—cannot be the basis of a legally sufficient judgment under *Henderson*. Courts across this country appropriately reject this approach because it can't be reconciled with the "substantial factor" causation rule long prevailing in the majority of jurisdictions (including South Carolina). The Ohio Supreme Court correctly concluded that it is impossible to reconcile the requirement of "an individualized finding of substantial causation for each defendant" with a theory that says "every defendant that contributed to the overall exposure is a substantial cause." *Schwartz v. Honeywell Inc.*, 102 N.E.3d 477, 481-83 (Ohio 2018).

Scapa contends that evidence about exposures must be put in a sufficient context for the fact finder to properly and reliably assess legal (proximate) causation. The cumulative dose theory

advanced by Dr. Frank at trial fails to satisfy these important criteria. A contextual analysis quantitatively comparing Mr. Stewart's exposures from Scapa dryer felts with his exposures from other sources is necessary to determine whether Scapa exposures were a substantial factor contributing to Mr. Stewart's disease. Respondent concedes Dr. Frank failed to render such analysis in his purported expert opinion at trial, which Scapa contends is fatal. 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 not probative under the controlling legal standard – the *Henderson* 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. A reversal of the lower court's denial of JNOV is proper where, as here, "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).

II. The Court Of Appeals' Opinion Affirming The Additur Ruling Constitutes An Error Of Law For Lack Of Compelling Reasons Of Record To Support A 67% Increase In the Jury's Award.

Respondent's arguments on *additur* should be rejected. Respondent first broadly posits that- at core- there is and can be no common law limit in South Carolina on a circuit court's ability to grant *additur.* Next, Respondent contends that an *additur* based on speculation is also legally sufficient. Neither contention is correct.

South Carolina trial judges may not substitute their own judgment for the jury's. *Graham v. Whitaker*, 218 S.C. 393, 402 (1984). This is especially true for noneconomic damage awards, because those types of damages are indeterminate in character. *Kalchthaler v. Workman*, 316 S.C. 499, 503 (Ct. App. 1994). After deliberating for almost five hours, the jury returned its verdict in this case, awarding $600,000 for Stewart's survival claim. Throughout trial, the circuit court noted

the jury was comprised of highly-educated, diverse, and attentive persons. "I've seen a lot of juries. I don't believe I've seen a jury in my time that was any more attentive or committed to their job than this jury has been." (Tr. 488). Nevertheless, the court ordered an increase of the survival damages from $600,000 to $1,000,000.00.

The jury's $600,000.00 survival damages award in this case is not unduly conservative and the record supports no compelling reason to have awarded the 67% increase. As Respondent points out, the circuit 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. *Edwards*, 878 S.E.2d at 710. ***But ample justification is not a compelling reason***, and such support for its *additur* ruling constitutes an error of law and an abuse of discretion.

Actual damages in a survival action are those for medical bills, conscious pain, suffering, and mental distress of the deceased. *Welch v. Epstein*, 342 S.C. 279, 303 (Ct. App. 2000). Mr. Stewart's physician testified that, in addition to mesothelioma, he suffered from a wide array of serious diseases: a prior heart attack; hypertension; bypass surgery; chronic obstructive pulmonary disease; bladder cancer; prostate cancer; and skin cancer. (1 Tr. 61112). He also had a lengthy smoking history. Consequently, his physician could not give the jury a life-expectancy estimate for Mr. Stewart had he not contracted mesothelioma. (1 Tr. 613).

The jury was entitled to consider this evidence when deciding how much to award for conscious pain, suffering, and mental distress attributable to Mr. Stewart's mesothelioma, as opposed to all his other serious and debilitating medical conditions. The trial court was required to pay substantial deference to the jury's calculation of the damage amount. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 140 (2003). The trial court's discretion to grant *additur* cannot be so broad as to permit a 67% increase in the jury's award for unliquidated survival

damages. The jury's survival damages award was nearly three times Mr. Stewart's medical expenses. At bottom, and with respect, the circuit court failed to base its increase on any ***compelling reason,*** and thus its ruling should be reversed.

Additionally, the circuit court's reference to the speculative reason for the jury's award – Scapa's "empty chair" defense - necessarily cannot constitute a compelling reason as a matter of law. *ClearOne Commc'n, Inc. v. Biamp Sys*., 653 F.3d 1163 (10th Cir. 2011) (courts have declined to indulge in speculation that a jury has not properly apportioned damages). Respondent makes no effort to refute or distinguish this instructive authority on the merits. Respondent instead argues that this speculation point was not preserved because it was raised first in a reply brief. This argument, like the preservation arguments before it, fails. Scapa raised the argument that the circuit court failed to provide compelling reasons for additur in its opening brief to the Court of Appeals, and has thereafter made the same point.

The circuit court should not have ordered additur since speculation necessarily cannot qualify as a compelling reason. *Harper v. Bolton*, 239 S.C. 541, 548 (1962). See *Harrison*, 354 S.C. at 140. H *(*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) (emphasis added); *Green v. Fritz*, 356 S.C. 566, 570 (Ct. App. 2003) ("[I]f inapplicable grounds are given for granting *additur*, the order fails by error of law."

III. Respondent's Arguments That The Court Of Appeals Correctly Affirmed The Circuit Court's Settlement Proceeds Allocation Ruling Should Be Rejected.

Respondent first argues that Scapa failed to preserve the argument at the Court of Appeals that the challenged internal reallocation of settlement proceeds infringes the plain statutory mandate codified at S.C. Code Ann. § 15-38-50. This argument lacks merit. The issues presented in Scapa's Court of Appeals brief on this point were broad enough to cover this argument regarding

internal apportionment since it was apparent from the brief's context. Even the Court of Appeals thought so since it expressly cited the statute in its opinion below. The plain textual command of Section 15-38-50 imposes a restriction on certain internal settlement allocations such as the one at bar, 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, at its core, equitable in nature and is reviewed *de novo* on appeal.

Scapa is not arguing that *Riley* should be overturned, but instead that on the particular facts at bar, §15-38-50 intervenes and compels a different result here. Under §15-38-50, courts cannot give effect to a unilateral or internal allocation 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 Respondent 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. Respondent makes no effort to distinguish the cases from South Carolina's sister jurisdictions, which applied setoff statutes like § 15-38-50 and 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.

The trial court's own *additur* findings also confirm that the allocation was unreasonable. The court saw no reason to increase the jury's award of $100,000 in wrongful death damages. Yet the court believed the evidence of Mr. Stewart's survival damages called for a 67% increase— from

$600,000 to $1,000,000. Thus, it was the court's view that the evidence supported an award of 10% of the total damages for the wrongful death claim and 90% for the survival claim. Yet, the court permitted an allocation of just 20% of the settlement proceeds to the survival claim based on Respondent's internal and unilateral allocation.

Stewart's counsel had little to say about the wrongful death beneficiaries' losses at trial, and much to say about Mr. Stewart's suffering before his death. In fact, the circuit court commented: "I understand, and let me just say this: I certainly understand the argument taking one position about the *additur* and then taking another position about how they want this thing allocated. The allocations, if you look at it from the standpoint of what I have just done with the *additur* is 90/10; is it not?" (7/11/2018 Tr. at 34). In sum, the allocation of settlement proceeds between survival and wrongful death claims approved by the circuit court does not reflect "fairness and justice." *Welch*, 342 S.C. at 313. Further and separately, the unilateral allocation is impermissible. The Court of Appeals therefore erred in affirming the trial court's abuse of its discretion by declining to reallocate the settlement funds in a manner reasonable under the facts and otherwise reverse.

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 set off rulings.

Respectfully submitted,

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