

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

**APPENDIX
VOLUME VI**

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The State of South Carolina
In the Court of Appeals

Appeal from York County
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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Estate of Steven R. Stewart,.....Respondent

v.

Scapa Waycross, Inc.,.....Defendant/Appellant

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STATEMENT OF ISSUES ON APPEAL

1. The trial court erred in denying Appellant's motion for judgment n.o.v. because the plaintiff failed to introduce any legally sufficient evidence of specific causation.
2. The trial court abused its discretion in granting additur because the jury's damage awards were not actuated by passion, caprice, or prejudice and the trial court failed to pay substantial deference to the jury's awards.
3. The trial court abused its discretion in accepting the plaintiff's proposed allocation of settlement proceeds.
4. The trial court abused its discretion in excluding evidence of Plaintiff's claims for compensation from bankrupt entities.

STATEMENT OF THE CASE

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

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

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

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

Following the verdict, Scapa filed a Motion for Setoff, (R. pp. 141-145), a Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors, (R. pp. 164-170), and a Motion for Judgment Notwithstanding the Verdict on liability issues, but did not ask for a new trial. (R. pp. 171-174).

Stewart filed a Motion for a New Trial *Nisi Additur*, (R. pp. 175-183), arguing that the verdict should be raised to \$2,630,000 for Stewart's survival claim and \$600,000 for Stewart's wrongful death claim, for a total verdict of \$3,230,000, more than six times the jury's verdict. Scapa filed its Brief in Support of Motion for JNOV. (R. pp. 184-193). Scapa also filed a response to Plaintiff's Motion for New Trial *Nisi Additur*. (R. pp. 194-198).

The Circuit Court held a hearing on the parties' post-trial motions and heard arguments on Stewart's Motion for New Trial *Nisi Additur* and granted it, adding \$400,000 to the jury's survival award of \$600,000 to bring the total survival award to \$1,000,000. (7/11/18 Post-Trial Motions Transcript, p. 25, l. 7 – p. 27, l. 1, R. pp. 1671-1673). The Circuit Court did not alter the wrongful death damages awarded by the jury. (7/11/18 Post-Trial Motions Transcript, p. 24, l. 22 – p. 25, l. 6, R. pp. 1670-1671).

The Circuit Court also heard argument on Scapa's Motion for Production of Plaintiffs Settlements and Payments with all Third Party Tortfeasors or, in the alternative, Scapa asked that the Court review the settlements *in camera*. (7/11/18 Post-Trial Motions Transcript, p. 27, l. 2 – p. 29, l. 12, R. pp. 1673-1675). Scapa's counsel acknowledged that Stewart had produced the settlement numbers just before the hearing, but not the settlement documents. (7/11/18 Post-Trial Motions Transcript, p. 32, l. 11–25, R. p. 1678).

The disclosure revealed that Stewart had received or would receive \$1,036,000 in prior settlements, and that Stewart had uniformly allocated the previous settlement amounts by putting 80% on the wrongful death claim and 20% on the survival claim. (7/11/18 Post-Trial Motions Transcript, p. 32, l. 11–25, R. p. 1678; p. 36, l. 21 – p. 37, l. 16, R. p. 1682-1683). Due to that recent disclosure, counsel for Scapa asked for time to move to reallocate those settlements, which the Circuit Court granted. (7/11/18 Post-Trial Motions Transcript, p. 33, l. 1-6, R. p. 1679; p. 35, l. 9-11, R. p. 1681).

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

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

Scapa timely appealed. (Notice of Appeal, R. pp. 210-232).

STATEMENT OF FACTS

Mr. Stewart was employed at the Bowater Paper Mill in Catawba, South Carolina from 1963 to 2002. (2/28/13 Stewart Depo., p. 25, l. 1-7, R. p. 2102).¹ He was originally hired as a utility man performing clean up on Paper Machine 1. (2/28/13 Stewart Depo., p. 25, l. 24 – p. 27, l. 16, R. p. 2102-2104). He was promoted to several different positions at Bowater, but Mr. Stewart testified that he worked his entire career on Paper Machine Number 1. (2/28/13 Stewart Depo., p. 27, l. 23 – p. 30, l. 20, R. pp. 2104-2107).

The paper machines at Bowater used dryer felts to keep the paper against the dryer drums, which dried the paper, and the felts would also

¹ Mr. Stewart's discovery deposition taken on February 28, 2013 was read into the record at trial on February 2, 2018. (1 Tr. 570-571, R. pp. 977-978).

absorb moisture from the paper sheets. (1 Tr. 269-270, R. pp. 676-677; 2 Tr. 84-85, R. pp. 1236-1237). Bowater purchased dryer felts from Scapa from 1963 until around 1981. (See Plaintiff's Trial Exhibit No. 56, R. pp. 2095-2096 (showing the first purchase of Scapa felt in 1963, installed in 1964)). During Mr. Stewart's career, Bowater used 288 dryer felts on Paper Machine 1, but only 3.8% of those dryer felts were Scapa asbestos-containing dryer felts. (2 Tr. 92-93, R. pp. 1244-1245).

Mr. Stewart did not know which dryer felts contained asbestos and could not tell from looking at the dryer felts. (2/28/13 Stewart Depo. p. 168, l. 20 – p. 169, l. 7, R. pp. 2114-2115; p. 169, l. 21 – p. 170, l. 2, R. pp. 2115-2116; p. 171, l. 16-23, R. p. 2117; p. 179, l. 9-18, R. p. 2118; p. 181, l. 5-10, R. p. 2119). Similarly, Mr. Stewart's co-workers were unable to identify asbestos-containing Scapa dryer felts that Stewart worked with. (7/17/13 George Hegler Depo., p. 68, l. 20 – p. 69, l. 18, R. pp. 2205-2206;² 1 Tr. 337-38, R. pp. 744-745 (testimony of co-worker Fred Steele)).

Because there were no fact witnesses tying Mr. Stewart to exposure to asbestos-containing Scapa dryer felts, Plaintiff relied on so-called "Mastercards," which Scapa maintained to track the manufacture, sale, shipment, and use of Scapa dryer felts at Bowater, to demonstrate theoretical exposure to the Scapa felts. (1 Tr. 661-662, R. pp. 1068-1069). According to the Mastercards introduced at trial, Bowater started receiving dryer felts

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

from Scapa in 1964. (See Plaintiff's Trial Exhibit No. 56, R. pp. 2095-2096). However, the Mastercards also show that Scapa did not send any asbestos-containing dryer felts to Bowater until 1969. (Plaintiff's Trial Exhibits No. 26, R. pp. 2051-2052 (earliest Mastercard referencing asbestos)).

Before 1968 and the introduction of asbestos-containing Scapa dryer felts, Mr. Stewart had worked as a utility man, a fifth hand, and a fourth hand. In 1968, Mr. Stewart was promoted from fourth hand to third hand. (1 Tr. 262, 267, R. pp. 669, 647 (Co-Worker Fred Steele testified that he started working with Mr. Stewart in 1968 at which time Mr. Stewart was a third hand)). After 1968, Mr. Stewart only worked as a third hand, a backtender, and a machine tender. (2/28/13 Stewart Depo., p. 30, l. 5-16, R. p. 2107).

Significantly, those more senior positions did not involve cutting the dryer felt or cleaning the paper machine by blowing out the dryer. (1 Tr. 278, R. p. 685; 2/28/13 Stewart Depo. p. 59, l. 14 – p. 62, l. 18, R. pp. 2109-2112). The third hand's primary job was to watch the paper machine and supervise other workers. (1 Tr. 266, 334, R. p. 673, 741; 2/28/13 Stewart Depo., p. 59, l. 1-10, R. p. 2109). In fact, Mr. Stewart admitted that a machine tender did not have regular contact with dryer felts in any capacity. (3/4/13 Stewart Depo., p. 54, l. 13-20, R. p. 2173). Rather, it was primarily up to the utility man and fifth hand to clean out the machine. (1 Tr. 278, R. p. 685). Fifth

hands and fourth hands were primarily involved in cutting the dryer felt. (1 Tr. 289, R. p. 696).

Mr. Stewart's transition from fourth hand to third hand in 1968 is important because Plaintiffs' own experts recognized that the dryer felt would not release any fibers unless it was being cut or otherwise manipulated by the worker. (Testimony of Plaintiffs' expert Christopher DePasquale, 1 Tr. 470-471, R. pp. 877-878). Thus, by the time that Scapa was shipping asbestos-containing dryer felt to Bowater in 1969, Mr. Stewart's positions no longer directly involved cutting or manipulating the dryer felts. As such, Mr. Stewart was never exposed to fibers from an asbestos-containing Scapa dryer felt.

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

ARGUMENT

Introduction

The trial and post-trial proceedings in this case were palpably unfair to Scapa. During trial, the lower court permitted the Plaintiffs' experts—over Scapa's objections—to base their specific-causation opinions on a theory that has been widely condemned, by courts around the nation, as utter junk science. The court also excluded relevant, admissible evidence of Plaintiffs' claims for compensation from bankrupt entities that he insisted were re-

sponsible for exposing Mr. Stewart to asbestos and causing his disease. Excluding this evidence was extremely harmful to Scapa's defense that if Stewart was exposed to any asbestos from its dryer felts, the exposure was *de minimus* and incapable of causing his disease.

This Court has admonished that compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages. Yet following trial, the court, acting as a thirteenth juror, decided the jury had not awarded enough money. Without any compelling reason to do so, the court took the extraordinary step of increasing the already-sizeable award of \$600,000 in survival damages to \$1,000,000.

Compounding her error in unjustifiably invading the province of the jury to grant additur, the court then deprived Scapa of its right to a just and fair reduction in the amount of its liability based on Plaintiff's pre-trial settlements. The court did so by rejecting Scapa's request for a reallocation of settlement proceeds. Despite the survival damages representing 90% of the recovery, Plaintiff allocated only 20% of the settlement proceeds to the survival claim. The trial court was fine with this allocation of 80% of the settlement proceeds to the wrongful death claim even though, on the one hand, it found no reason to increase the jury's award of \$100,000 for the wrongful death damages, while on the other hand, it concluded that the evidence warranted a 67% increase in the amount of survival damages.

For the reasons set forth below, this Court should reverse the trial court's judgment.

1. The trial court erred in denying Scapa's motion for J.N.O.V.

The trial court should have granted Scapa's motion for judgment n.o.v. because Plaintiff failed to prove causation in compliance with South Carolina law. On a motion for judgment n.o.v., the trial court must view the evidence and all reasonable inferences in the light most favorable to the non-movant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). If, however, no reasonable jury could have reached the challenged verdict, the court must grant a motion for judgment n.o.v. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). On appeal, this Court applies the same standard. *RFT Mgmt. Co.*, 399 S.C. at 331-32, 732 S.E.2d at 171.

A. "Cumulative exposure" testimony does not establish specific causation under South Carolina law.

A plaintiff seeking damages for injuries caused by asbestos exposure must prove he had "actionable exposure" to the specific defendant's product that was a substantial cause of the injuries. *See Henderson v. Allied Signal*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To prove actionable exposure, a plaintiff must meet the "frequency, regularity, and proximity" standard (the "*Henderson/Lohrmann* standard") articulated in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727; *see also Pace v. Air & Liquid Sys. Corp.*, 642 Fed. App'x 244 (4th Cir. 2016) (claimant must prove that he or she was (i) exposed with frequency, regularity, and proximity to

(ii) asbestos-containing products (iii) that were placed into the stream of commerce by defendant).

Where medical causation is at issue and is not within common knowledge—such as the relationship between a particular asbestos exposure and mesothelioma—a plaintiff must prove both general and specific causation through expert testimony. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). “General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual’s injury.” *Id.*

Furthermore, if an expert’s testimony is scientific in nature, then the trial court must determine its reliability under the factors set forth in *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). *Graves v. CAS Med. Sys.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012). To determine reliability, the court must look to the following factors: (i) the publications and peer review of the technique; (ii) prior application of the method to the type of evidence involved in the case; (iii) the quality control procedures used to ensure reliability; and (iv) the consistency of the method with recognized scientific laws and procedures. *Id.*; *Council*, 335 S.C. at 19, 515 S.E.2d at 517.

In a toxic tort case, since “the main tenet of toxicology is the ‘dose-response’ relationship” and “most chemically induced adverse health effects clearly demonstrate ‘thresholds,’ there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of ‘causation’ can be inferred.” David L. Eaton, *Scientific Judgment and Toxic Torts-A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & POL’Y 5, 39 (2003). More specifically, in mesothelioma cases:

To prove that a given injury was “caused by exposure to a specified substance,” a plaintiff must demonstrate “the levels of exposure that are hazardous to human beings generally,” and “the plaintiff’s actual level of exposure.” [*Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999)] (quotations omitted). Moreover, there must be a showing that the plaintiff’s level of exposure is comparable to the levels of exposure that are hazardous as a general matter. *See id.* (“[S]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to *such quantities*, are minimal facts necessary to sustain the plaintiffs’ burden in a toxic tort case.”) (emphasis added) (quoting *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)); *see also Zellars v. NexTech Northeast, LLC*, 895 F. Supp. 2d 734, 742 (E.D. Va. 2012) (“‘Ruling in’ exposure to a particular substance as a possible cause of a patient’s medical condition requires (1) a reliable determination of the level of exposure necessary to cause the condition and (2) a reliable determination that the patient was exposed to the substance at this level.”).

Yates v. Ford Motor Co., 113 F. Supp. 3d 841, 850 (E.D.N.C. 2015).

As will be detailed below, at trial Plaintiff employed the “each and every exposure” or “cumulative dose” theory of causation—a theory

rejected by most court that have addressed it. As the court in *Yates* explained:

The theory that “each and every exposure to asbestos products results in injury to the person so exposed” has made repeat appearances in the realm of asbestos litigation. *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 749-50 (N.D. Ill. 2014); see William L. Anderson, “The ‘Any Exposure’ Theory Round II-Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008,” 22 KAN. J.L. & Pus. PoL’Y 1 (2012). Also referred to as “any exposure” theory, or “single fiber” theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury. See *Krik*, 76 F. Supp. 3d at 749-50; *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013). Numerous courts have excluded expert testimony or evidence grounded in this theory, reasoning that it lacks sufficient support in facts and data. E.g., *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 632-33 (E.D. La. 2015); *Krik*, 76 F. Supp. 3d at 752-53; *Anderson*, 950 F. Supp. 2d at 1225; *Sclafani v. Air & Liquid Sys. Corp.*, No. 2:12-CV-3013, 2013 WL 2477077, at *5 (C.D. Cal. May 9, 2013); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1166 (E.D. Wash. 2009).

Yates, 113 F. Supp. 3d at 846.

Courts reject the “every exposure” or “cumulative dose” theory (by whatever name) because it is irreconcilable with the “substantial factor” causation rule long used in South Carolina and almost all other jurisdictions. See *Schwartz v. Honeywell Int’l Inc.*, No. 2016-1372, 2018 WL 793606, at *3 (Ohio Jan. 24, 2018) (finding it “impossible” to reconcile a 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.”); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005). The theory would impose “precisely the sort of unbounded liability that the substantial factor test was developed to limit.” *Mcindoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016). It is also irreconcilable with the requirement that a plaintiff prove the amount, duration, and frequency of exposure. *In re New York City Asbestos Litigation*, 48 N.Y.S.3d 365 (N.Y. App. Div. 2017). Thus, the “cumulative dose” theory is inconsistent with the *Henderson/Lohrmann* standard.

B. Plaintiff failed to establish specific causation through relevant, reliable expert testimony that would assist the jury in reaching a verdict.

Plaintiff failed the *Henderson/Lohrmann* standard. His experts employed the misguided “cumulative dose” theory. Further, they did not provide scientifically reliable evidence of either the amount of asbestos Mr. Stewart was exposed to from Scapa dryer felts or the threshold exposure to asbestos above which he had an increased risk of developing mesothelioma.

Plaintiff presented his causation case through three experts. Dr. Arnold Brody, Ph.D limited his testimony to the issue of general causation—whether asbestos is capable of causing mesothelioma. He testified that chrysotile asbestos fibers can cause the disease. (Tr. 242, l. 13-24, R. p. 649).

He did not have any opinions specific to Mr. Stewart (Tr. 244, l. 21-24, R. p. 651), and he did not testify that asbestos fibers from Scapa dryer felts caused Mr. Stewart's disease.

Industrial hygienist Christopher DePasquale testified that Mr. Stewart had significant occupational exposure to asbestos fibers from Scapa dryer felts and that this exposure put Stewart at "a greater risk of developing mesothelioma. (Tr. 456-58, R. pp. 863-865). Mr. DePasquale admitted that he had "not calculated what I would expect his dose of asbestos would be from Scapa dryer felts." (Tr. 478, l. 15-23, R. p. 885).

In his deposition, which was played at trial, Dr. Arthur Frank admitted he made no effort to quantify Mr. Stewart's asbestos exposure and further admitted his causation testimony was based on the cumulative dose theory:

Q. And you certainly didn't make any calculation as to – or reach any opinion with respect to a specific dose of asbestos that Mr. Stewart might have inhaled solely from Scapa asbestos felts?

A. I made no such calculation.

...

Q. And again, I apologize if this was asked. But you have not made any efforts to quantify Mr. Stewart's asbestos exposure, have you?

A. That is correct.

...

Q. [I]s it your opinion that every exposure that contributes to a person's cumulative dose contributes to the development of a mesothelioma?

A. It is the cumulative dose which is clearly made up of all the exposures they've had over their lifetime. And yes, they all contribute. That doesn't mean that each exposure was the one that caused the mesothelioma, because we never know which fiber on which day from which product did it. But they all certainly increase the risk and ultimately have to be said to be contributory to that individual getting the disease.

Q. Does it matter to you if any particular exposure is above background or not?

A. Well, any exposure has to be at least at background level; and it doesn't matter how much above background that any additional exposures are. Some will clearly contribute more, some will contribute less. Scientifically that's how you look at it. Obviously there are jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that. That said, scientifically, you can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

(4/9/15 Dr. Arthur Frank Depo., p. 35, l. 22 – p. 36, l. 1, R. pp. 2210-2211; p. 52, l. 1-4; R. p. 2212; p. 52, l. 11 - p. 53, l. 11, R. pp. 2212-2213).

Plaintiff's attempt to prove causation through the "cumulative dose" theory requires reversal for several reasons:

First, the *Henderson/Lohrmann* standard requires defendant-specific opinions. The substantial causation test is contradicted by "a theory that says every defendant that contributed to the overall exposure is a substantial cause." *Schwartz*, 2018 WL 793606, at *3. Liability is not imposed

unless the product or conduct of the particular defendant under consideration is itself a substantial contributing factor.

Courts presented with the identical approach Plaintiff used here have rejected it. See *Krik v. Owens-Illinois, Inc.*, 2015 WL 5050143, at* 1 (N.D. Ill. 2015) (barring Dr. Frank's testimony because "To find a defendant liable, plaintiff must prove causation attributable to that defendant. It would be misleading and confusing for an expert to opine—particularly using the legal terminology of 'substantial contributing factor'—that (plaintiff's) cancer was caused by defendants and the foundation for the opinion was that every exposure (without regard to dosage) contributes to cause cancer."); *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011) (if Dr. Frank's opinion that every exposure is substantial was "sufficient for plaintiff to meet his burden, the Sixth Circuit's 'substantial factor' test would be meaningless" (citing *Lindstrom*, 424 F.3d at 493). The "cumulative dose" theory makes a mockery of the word "substantial." Plaintiff seeks, in effect, to create a new standard of causation: that *any contribution whatsoever* to a dose of asbestos exposure subjects one to liability. This is simply not the law in South Carolina.

Second, this theory of causation has not only been rejected by other courts, each of Plaintiff's experts' opinions have been excluded in other cases as either unreliable or contrary to the plaintiffs' burden of proof. The "cumulative dose" theory is not reliable scientific evidence as required by South

Carolina law. As set forth above, the court in *Yates, supra*, cited numerous authorities for the proposition the theory “lacks sufficient support in facts and data” and rejected Dr. Brody’s opinion that exposure at levels “above background” contribute to the development of mesothelioma. *Yates*, 113 F. Supp. 3d at 846-47. The court further found the “no safe level/every exposure/cumulative exposure” opinion of Dr. Frank did not satisfy the types of factors required by *Council*; there are no quality control procedures or other methods used to ensure its reliability; it is wholly inconsistent with recognized scientific laws and procedures; and it “cannot be tested, has not been published in peer-reviewed works, and has no known error rate.” *Yates*, 113 F. Supp. 3d at 846.

Similarly, the court in *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 849, 850 (D. Md. 2017), noting that “Dr. Frank’s ultimate opinion is not tied to any specific quantum of exposure that is attributable to defendant,” concluded it was not based on reliable principles and methods. *See also Haskins v. 3M Company*, 2017 WL 3118017 (D.S.C. 2017) (excluding the “each and every exposure” opinion under Rule 403 because it was directly at odds with substantial causation requirements); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 544 (Ga. Ct. App. 2011) (excluding “cumulative dose” opinion for its lack of scientific validity and other factors); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (refusing to rely on Frank’s testimony, citing its numerous methodological shortcomings).

Third, an aspect of the “cumulative dose” theory that is particularly unfounded is that there is “no safe level” of exposure. This contradicts the fundamental principle of science, often expressed as “the dose makes the poison,” that there is a “dose-response” relationship between exposures and disease, and thresholds needed to produce disease. *Eaton, supra*. The concept that there is “no safe level” of asbestos exposure is based on the purported absence of evidence of a “threshold” level of exposure necessary to cause disease, rather than affirmative evidence of a particular hazardous level of exposure. *Yates*, 113 F. Supp. 3d at 857 (rejecting expert’s “no safe level” opinions).

Fourth, the cumulative dose approach is also at odds with the requirement that a claimant account for other potential exposures. *Martin*, 561 F.3d at 443 (explaining that defendant’s liability for mesothelioma must be evaluated in the context of other exposures); *Schwartz*, 2018 WL 793606, at *4 (citing 2 Restatement (Second) of the Law of Torts § 433, at 432 (1965)). Because of their adherence to the belief that *any* exposure constituted a “substantial” one, Plaintiff’s experts made no effort to address the role played by Mr. Stewart’s exposures to other products.

Fifth, even if Plaintiff had offered sufficient expert testimony addressing causation, there was an insufficient factual predicate for expert causation testimony. Mr. Stewart did not testify to having worked with a Scapa asbestos-containing felt. Nor did his co-workers:

Co-worker Hegler

Q. Okay. Do you recall ever seeing a Scapa dryer felt taken out of the box?

A. No.

Q. And if you didn't see a Scapa dryer felt taken out of a box, would you know whether or not you've ever seen anyone replacing a Scapa dryer felt?

A. I would not know.

Q. Okay. So you can't offer any testimony today that you saw Mr. Stewart work with or around a Scapa dryer felt?

A. I cannot.

Q. And you can't offer any testimony that you saw Mr. Stewart cut a Scapa dryer felt?

A. I cannot.

Q. Do you have any knowledge regarding any section of Paper Machine 1 where a Scapa dryer felt would have been used?

A. I don't know where they were used or which section.

Q. Okay. So would it be fair to say that you have a general recollection of seeing boxes of Scapa dryer felts, but you don't recall ever seeing them being used in the plant?

A. That's correct.

7/17/13 George Hegler Depo., p. 68, l. 20 – p. 69, l. 18, R. pp. 2205-2206).

Co-worker Steele

Q. So when a felt was installed on a paper machine unless you saw the box that it came out of you wouldn't know who made the felt just by looking at it would you?

A. That's correct.

Q. When a felt is removed from the paper machine you wouldn't be able to tell who manufactured that particular felt that was being removed could you?

A. That's correct.

Q. And you wouldn't be able to tell whether a felt contained asbestos just by looking at it would you?

A. I wouldn't have, no.

* * *

Q. Sir you can't testify that a Scapa felt ever tore off of the paper machine can you?

A. I cannot tell you specifically, no.

(1 Tr. 337, l. 6 – 16, R. p. 744; 1 Tr. 338, l. 4 – 6, R. p. 745).

Similarly, co-worker Harold Ward testified Mr. Stewart was not present in December 1972 when a Scapa dryer felt allegedly ran off the paper machine. He explained that Mr. Stewart was assigned to a different shift and was not on either of the crews that dealt with the situation. (1 Tr. 511-512, R. pp. 918-919).

Additionally, Plaintiff's experts could not and did not provide testimony supporting a finding that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where he actually worked. The evidence showed that by the time Scapa first supplied an asbestos-containing dryer felt to Bowater, Mr. Stewart was no longer serving as a utility man, fifth hand, or fourth hand—the jobs that involved cutting felts. *See supra.*, pp. 5-7. And Plaintiff's expert DePasquale conceded he could not testify that asbestos fibers were released during papermaking operations not involving any cutting of felts:

Q. I talked to Dr. Millette a little bit about this yesterday, but we can agree -- you can agree as an industrial hygienist that it is actually there has to be some interaction of force

on the dryer felt for there to be a potential for fiber release, correct?

A. Yes, I would generally agree with that statement.

Q. You don't have any information that when they're just going through and making paper, nothing else is going on, that there's any fiber release; is that correct?

A. There's a potential for fiber release, but whether it occurs or not, I'm not sure.

(1 Tr. 470, l. 23 – 471, l. 8, R. pp. 877-878).

Likewise, Dr. Millette admitted that his glove-box test did not simulate actual mill conditions. During his test, no paper was being made (1 Tr. 399-400, R. pp. 806-807), no water was involved, there was no movement of the felt, there was no ventilation, and the test did not replicate the humidity of a paper mill. (1 Tr. 397-98, R. pp. 804-805). He also admitted his post-it note and finger test did not cause respirable asbestos to be released into the air. (1 Tr. 409, R. p. 816). Furthermore, each worker testified that during a blow down, he would blow air across the felt, not at the 90 degree angle used in Dr. Millette's test. All of the experts agreed that blowing air across the felt did not cause any fiber release.

In short, there was no direct evidence that Mr. Stewart had a regular, frequent, and proximate exposure to asbestos from Scapa dryer felts. No witness could testify that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where Mr. Stewart actually worked.

Nor was there any circumstantial evidence of regular, frequent, and proximate exposure. Although causation may be established by circumstantial evidence, *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992), and is usually a question for the jury, *Mims v. Florence County Ambulance Service Comm'n*, 296 S.C. 4, 370 S.E.2d 96 (Ct. App. 1988), it nonetheless must be based on probabilities not mere possibilities. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993). Causation based on a possibility rather than a probability is not sufficient for a plaintiff to recover in a products liability case. *Harris* held that because the cause of the plaintiff's injuries could be as reasonably attributed to an act the defendant was not liable for as to one it was liable for, the plaintiff did not meet her burden of proof in establishing her injuries were proximately caused by the defendant's negligence. *Id.*, 315 S.C. at 346-47, 433 S.E.2d at 907.

Here, the evidence established nothing more than a speculative possibility that Mr. Stewart had the requisite degree of exposure to asbestos from a Scapa dryer felt. Again, under *Henderson*, the plaintiff must show "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. A mere showing that an asbestos-containing product was at the jobsite is insufficient evidence to reach a jury on the issue of exposure. Instead, there has to be evidence of regular exposure to a particular product in proximity to the plaintiff. Here, that evidence is entirely absent.

As noted, there is no testimony, either by Mr. Stewart or any of his coworkers, establishing his work with or around an asbestos-containing Scapa product on a regular basis over some extended period of time. Further, both Mr. Stewart and his coworkers testified that the paper-making process was hot and humid. Millions of gallons of water were used in this process. Moreover, the dryer felts in the dryer section were completely enclosed by hoods that were down all the way to the floor while the paper machine was running. (1 Tr. 324, 329, R. pp. 731, 736). The hoods included ventilation systems to remove any excess heat, moisture, and debris from the dryer section of the machine. (1 Tr. 492, R. p. 899).

Scapa representative Mr. Doherty and the co-workers testified there was significant build up on the dryer felt from the paper making process (1 Tr. 667, R. p. 1074), and all experts agreed this build up, the water usage, the ventilation, and the humidity would significantly decrease the opportunity for any fiber release from the felt. (*See, e.g.*, 1 Tr. 396, R. p. 803). And Mr. Doherty testified that when asbestos-containing dryer felts were returned to the factory after use, they were not thinner or shedding fibers of any type. (1 Tr. 656, R. p. 1063). Accordingly, Plaintiff did not establish that, even if Scapa dryer felts were used, and even if they contained asbestos, the use of such dryer felts releases any asbestos whatsoever, much less anything greater than a *de minimus* exposure.

Finally, Plaintiff's experts' opinions were also inadmissible under Rule 403 of the South Carolina Rules of Evidence, which mandates that

testimony be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. The opinions were rooted in the idea that any miniscule exposure to asbestos in association with Scapa's products contributed to the cumulative result of Mr. Stewart contracting mesothelioma and, therefore, the exposure was a cause of his injury. These opinions are inconsistent with the *Henderson/Lohrmann* legal standard because they effectively shifted the burden to Scapa to prove that it did not expose Mr. Stewart to any asbestos. Thus, the opinions served merely to confuse or mislead the jury as to the standard it should apply to Mr. Stewart's claims by implying that any exposure was sufficient to render Scapa liable to Mr. Stewart for causing his mesothelioma and should have been excluded.

In sum, Plaintiff failed to introduce legally sufficient evidence of specific causation. The trial court therefore erred in denying Scapa's motion for judgment n.o.v., and this Court should reverse the judgment below and render judgment that Plaintiff take nothing.

2. The trial court abused its discretion in granting Plaintiff's motion for a new trial nisi additur.

After almost five hours of deliberation, the jury returned a verdict, finding in favor of Plaintiff. The jury awarded \$600,000 in damages for Mr. Stewart's survival claim. Throughout trial, the Court noted that the jury was highly-educated, diverse, and attentive. After the verdict, the Court stated: "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, R. p. 895). Nevertheless, the trial court invaded the jury’s province and adjusted its damage award, increasing the survival damages from \$600,000 to \$1,000,000.00. The court abused its discretion in so ruling.

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial to adjust damages.” *Wright v. Craft*, 372 S.C. 1, 35, 640 S.E.2d 486, 505 (Ct. App. 2006). When considering a motion for a new trial based on the inadequacy of the jury’s verdict, the trial court must distinguish between awards that are merely unduly conservative and awards that are actuated by passion, caprice, or prejudice. *Id.* Courts must give substantial deference to a jury’s determination of damages. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003).

Trial judges are not empowered to simply substitute their judgment for that of the jury. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984). Awards for noneconomic damages are particularly within the jury’s province to weigh and determine because such damages are indeterminate in character. *Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994). Here, the jury’s damage awards were not “so grossly . . . inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015).

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, 536 S.E.2d 408, 420-21 (Ct. App. 2000). Here, the jury's \$600,000.00 award in damages for the survival claim is not unduly conservative based on the evidence. Mr. Stewart's treating physician testified that in addition to mesothelioma, Mr. Stewart had a number of co-morbidities. (1 Tr. 612, R. p. 1019). He suffered from a prior heart attack, hypertension, bypass surgery, chronic obstructive pulmonary disease, bladder cancer, prostate cancer, and skin cancer. (1 Tr. 611-12, R. pp. 1018-1019). He had a lengthy smoking history. As such, his physician could not give the jury a life-expectancy estimate for Mr. Stewart had he not contracted mesothelioma. (1 Tr. 613, R. p. 1020).

The jury was entitled to take this evidence into account in determining the amount of conscious pain, suffering, and mental distress attributable to Mr. Stewart's mesothelioma, and substantial deference must be paid to its calculation of the appropriate damage amount. *Harrison*, 354 S.C. at 140, 580 S.E.2d at 115. Given this evidence, \$600,000 is not so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.

The trial court's citations to damage awards in other cases do not support additur here. "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The meas-

ure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Bertero v. Nat'l Gen. Corp.*, 13 Cal.3d 43, 65 n. 12, 529 P.2d 608 (Cal. 1974).

In sum, this trial court's discretion to grant additur was not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. The jury's award for survival damages was nearly three times the amount of Mr. Stewart's medical expenses. Furthermore, pain and suffering damages are indeterminate in character, are not capable of exact measurement, and there is no fixed standard whereby such damages can be determined. Thus, the trial court should have left the amount of damages to be awarded for pain and suffering to the judgment of the jury, *Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962).

3. The trial court abused its discretion in allocating settlement proceeds.

An allocation of settlement proceeds between survival and wrongful death claims "must yield to fairness and justice." *Welch*, 342 S.C. at 313, 536 S.E.2d at 426. Thus, under its equity powers, the trial court had the discretion to reallocate settlement funds between the two causes of action asserted in this case. See *Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

A plaintiff's agreement with a settling party to allocate settlement proceeds in a certain manner may not be disturbed "solely because the apportionment may have been advantageous to the Estate." *Riley*, 414 S.C. at 196, 777 S.E.2d at 831. Here, however, Scapa is not complaining that Plaintiff's proposed allocation was unreasonable based solely on the fact that it is advantageous to Plaintiff. Rather, the 80% wrongful-death-claim/20% survival-claim allocation was not reasonable under the facts.

The trial court's additur findings support this conclusion. The court found no reason to increase the jury's award of \$100,000 for the wrongful death damages, given the Stewart's limited relationship with his wrongful death beneficiaries. On the other hand, the court concluded that the evidence concerning the Stewart's survival damages warranted a 67% increase in the amount of damages the jury awarded—from \$600,000 to \$1,000,000. In short, the court was of the view that the evidence supported a finding that it was reasonable and appropriate for 10% of the total damages to be awarded for the wrongful death claim and reasonable and appropriate for 90% of the total damages to be awarded for the survival claim.

Given the court's findings concerning the damages evidence, an allocation of just 20% of the settlement proceeds to the survival claim is not reasonable under the facts. On the contrary, the allocation should have been 10% for the wrongful death claim and 90% for the survival claim. This allocation would be entirely consistent with Plaintiff's own arguments concerning the extent and

nature of Mr. Stewart's survival damages, as contrasted with nature of the wrongful death beneficiaries' losses as a result of his death. Plaintiff's counsel urged the Court to multiply the survival damages by a factor of ten, while asking for an increase in the wrongful death damages only by a factor of four. Plaintiff's counsel had very little to say about the wrongful death beneficiaries' losses, and a great deal to say about Mr. Stewart's suffering before his death. In fact, the 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?

(7/11/18 Post-Trial Motions Transcript, p. 34, l. 11-17, R. p. 1680).

In sum, the allocation of settlement proceeds between survival and wrongful death claims approved by the trial court does not reflect "fairness and justice." *Welch*, 342 S.C. at 313, 536 S.E.2d at 426. The court therefore abused its discretion by refusing to reallocate the settlement funds in a manner reasonable under the facts.

4. The trial court abused its discretion when it denied admission of Mr. Stewart's bankruptcy claims against other manufacturers of asbestos-containing products.

In June 2013, Plaintiff filed various claims with bankruptcy trusts established by companies that manufactured asbestos-containing products. Two of those claim forms alleged that Mr. Stewart was exposed to asbestos-containing products manufactured by Leslie Controls Inc. and A.P. Green while working at Bowater. (Defendant's Exhibits No. 1 and 2, R. pp. 1710-1716).

In addition, Plaintiff produced approximately 37 partially-filled-out bankruptcy trust claim forms that he had also filed. Plaintiff has claimed that the partially filled out bankruptcy trust claims were only made as "placeholder" claims to avoid a statute of limitations issue. Scapa filed a Motion to Compel Complete Bankruptcy Forms as evidence of additional exposures. (Defendant's Motion to Compel Complete Bankruptcy Forms, R. pp. 146-153). The filing of those forms implicitly or explicitly indicate that Stewart was exposed to asbestos-containing products from numerous other entities.

Scapa also filed a pretrial motion *in limine* to admit all of these bankruptcy claim forms. (Defendant SCAPA Waycross, Inc.'s Motion *In Limine* to Admit Bankruptcy Claim Forms as Admissions of a Party-Opponent.) Scapa *did not seek to introduce the amount of the claims or to put these entities on the verdict form*. Rather, Scapa only wanted to introduce evidence that Plaintiff filed the claims and that those claims asserted exposure to other entities' asbestos-containing products as an admission by a party-opponent, which is not considered hearsay under Rule 801(d)(2), South Carolina Rules of Evidence.³ (1/9/18 Pretrial Hearing Transcript, pp. 90, l. 23 – 92, l. 7, R. pp. 322-324).

In a drastically broad ruling, the trial judge excluded all evidence of Mr. Stewart's exposure to other asbestos-containing products, including his bankruptcy claims, essentially denying Scapa the ability to put on an "empty chair"

³ The forms could also be admitted as a statement against interest, which is an exception to the hearsay rule when the party is not available. Rule 804(b)(3), SCRE.

defense. (1/9/18 Pretrial Hearing Transcript, pp. 93, l. 21 – 99, l. 6, R. pp. 325-331). The trial judge also refused to compel Plaintiff to produce complete claim forms in the other bankruptcy matters. (1/9/18 Pretrial Hearing Transcript, pp. 99, l. 8 – 100, l. 25, R. pp. 331-332). Scapa proffered the bankruptcy claim forms and testimony regarding same, and the judge reiterated the exclusion of the bankruptcy claim forms both before trial and during Defendant's case. (1 Tr. 109-111, R. pp. 516-518; 1 Tr. 113-114, R. pp. 520-521; 2 Tr. 318-324, R. pp. 1470-1476; Defendant's Exhibits No. 1, 2, 5, and 12, R. pp. 1710-1714, 1715-1716, 1717-2020, 2021-2030).

Scapa's proffered, but disallowed, expert report from Marc Scarcella set forth Mr. Stewart's admitted exposure to A.P. Green and Leslie asbestos-containing products, explaining:

In the A.P. Green trust [proof of claim], Mr. Stewart is alleged to have been exposed to asbestos-containing refractory and castable products at the Bowater Paper Mill while working in close proximity to other workers engaged in the handling of raw asbestos fibers, fabricating asbestos-containing products, or altering, repairing, or otherwise working with an asbestos-containing product on a regular basis. Likewise, the Leslie Controls trust [proof of claim] identified asbestos-containing valves as a source of occupational exposure for Mr. Stewart while working on a *regular basis in close proximity to workers engaged in the activity of handling, fabricating, altering, or repairing asbestos-containing products.*

(Scarcella Report, Page 6, Exhibit No. 12, R. 2021-2030 (proffered) (emphasis in original)).

Thus, the bankruptcy forms and Mr. Scarcella's testimony demonstrated that Mr. Stewart himself admitted to being exposed to a wide array of asbestos-

containing products while he worked at Bowater. The trial court erred in excluding the claim forms and related testimony because the forms contained admissions of a party, admissible under Rule 801(d)(2), SCRE. More to the point, both South Carolina law, S.C. Code § 15-38-15(D), and the Supreme Court's rulings in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), and *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017), allow the admission of such documents in support of the "empty chair" defense. The trial court's exclusion of all evidence of Mr. Stewart's regular exposure to asbestos-containing products manufactured by other entities resulted in tremendous prejudice to Scapa, which was denied a key defense that is explicitly guaranteed under South Carolina law. S.C. Code § 15-38-15(D).

First, the claim forms are admissions of a party-opponent. Under South Carolina's Rule of Evidence 801(d)(2), a statement is not hearsay if:

The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 801(d)(2), SCRE.

South Carolina's courts have held time and again that admissions of party-opponents are relevant and admissible. *See, e.g., State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (holding that the defendant's statement

which provided financial motive for his crime was admissible against him at trial); *State v. Tucker*, 334 S.C. 1, 12-13, 512 S.E.2d 99, 105 (1999) (holding that the defendant's testimony from a previous trial was admissible as an admission by party-opponent).

Furthermore, whether this Court considers Plaintiff to be the "party" in this case or merely the "representative" of Mr. Stewart's estate, his admissions on the bankruptcy claim forms must be admissible. *Jackson v. Speed*, 326 S.C. 289, 305, 486 S.E.2d 750, 758 (1997) ("[A]s an agent for [defendants], Speed's statements were admissible as admissions of a party-opponent.").

Plaintiff's statements in the bankruptcy claim forms that Mr. Stewart was exposed to other entities' asbestos-containing products is an admission by a party opponent under Rule 801(d)(2), SCRE. Plaintiff, acting as Stewart's agent, made the statements on behalf of Stewart's estate. Plaintiff has alleged that Stewart's illness and death were caused by Scapa's dryer felts, but in the bankruptcy filings Plaintiff alleged that Stewart's illness and death were caused by other entities' products. Since the statements are against Stewart's interests in this action, they are admissible under Rule 801(d)(2), SCRE.

Second, such statements are relevant under the rulings of *Smith v. Tiffany* and *Machin v. Carus Corporation*. South Carolina's Rules of Evidence have a broad definition of relevancy:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 401, SCRE.

The primary fact in question is causation of Stewart's illness and death. Evidence of exposure to other products, most of which contained vastly greater amounts of asbestos, is clearly relevant to the issue of causation. This is especially true in light of the minimal evidence of Stewart's exposure to Defendant's products in contrast to his massive and regular exposure to the other entities' products.

Both the South Carolina legislature and South Carolina's Supreme Court have made very clear that a defendant is allowed to present evidence of other potential tortfeasors, whether they are named as defendants or not. First and foremost, South Carolina's Contribution Among Tortfeasors Act makes clear that a defendant can introduce evidence that other entities are responsible for plaintiff's losses, even entities that have settled with plaintiff:

A defendant shall retain the right to assert that *another potential tortfeasor, whether or not a party*, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

S.C. Code Ann. § 15-38-15(D) (emphasis added).

Likewise, in the very opinions relied on by the trial judge in excluding this evidence, the South Carolina Supreme Court made clear that evidence of exposure to other entities' products is admissible, even if those entities are not defendants, under the so-called "empty chair" defense. As explained by the Supreme Court in *Smith v. Tiffany*:

[T]he General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) . . . Thus, a critical feature of the statute is the codification of the empty chair defense – a defendant “retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages” – which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being “empty”).

Smith, 419 S.C. at 557, 799 S.E2d at 484.

On the same day it decided *Smith v. Tiffany*, the Supreme Court reiterated the validity of the empty-chair defense and the admissibility of evidence supporting same in *Machin v. Carus Corporation*:

A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff's employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers' compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff's injuries to the plaintiff's employer, the defendant shall, under the well-established “empty chair” defense, have the right to present such evidence and require the fact-finder to consider whether the employer's actions were the cause of the plaintiff's injuries.

* * *

A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Machin, 419 S.C. at 542-43, 799 S.E.2d at 476.

The trial court's exclusion of evidence regarding Stewart's other exposures essentially made it impossible for Scapa to try its empty-chair defense, even though the legislature was keenly interested in protecting that defense. The legislature certainly did not intend to provide defendants a right without a remedy, but that is what the trial court has done.

Finally, Scapa undoubtedly suffered prejudice by this exclusion. Plaintiff's causation evidence was already tenuous at best, as argued throughout this brief. Indeed, the evidence indicated that Scapa did not sell or deliver any asbestos-containing dryer felts to Bowater until 1969. (Plaintiff's Trial Exhibits No. 26, R. pp. 2051-2052 (earliest Mastercard referencing asbestos)). By 1969, Mr. Stewart had already been promoted to third hand, a position that was supervisory in nature and provided little or no opportunity to interact with the dryer felt in a manner that might release asbestos fibers. (1 Tr. 262, 267, R. pp. 669, 674). During Mr. Stewart's career, Bowater used 288 dryer felts on Paper Machine 1, but only 3.8% of those felts were Scapa asbestos-containing felts. (2 Tr. 92-93, R. pp. 1244-1245).

In light of Mr. Stewart's minimal—at best—exposure to Scapa's asbestos-containing dryer felt products, his regular exposure to other asbestos-containing products was an important part of Scapa's defense. The trial court abused its discretion when it excluded this evidence.

CONCLUSION

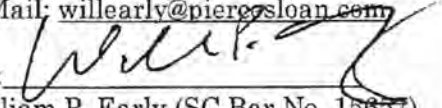
The Court should reverse the trial court's judgment and render judgment

that Plaintiff take nothing. Alternatively, the Court should reverse the trial court's additur ruling and reinstate the jury's damage awards. In the further alternative, the Court should remand the case for a reallocation of the settlement proceeds.

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**The State of South Carolina
In the Court of Appeals**

Appeal from York County
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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

v.

Scapa Waycross, Inc., ...Appellant.

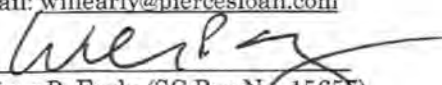
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The undersigned hereby certifies that the Final Brief of Appellant complies with Rule
211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
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Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649

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

v.

Scapa Waycross, Inc.,.....Appellant.

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COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether Scapa preserved issues as to the cumulative exposure theory and expert testimony when it failed to make a contemporaneous objection or argue the issues in its directed verdict motion.
- II. Whether the lower court correctly denied Scapa's JNOV motion based on its proper decision to admit cumulative exposure testimony and ample evidence of specific causation.
- III. Whether the lower court correctly granted Mr. Stewart's motion for new trial *nisi additur* as to survival damages where the jury's verdict was unduly conservative given the uncontroverted evidence of his mental and physical pain and suffering.
- IV. Whether the lower court correctly denied Scapa's motion to reallocate the settlement proceeds where Scapa does not dispute evidence of wrongful death and survival, and Mr. Stewart received only one recovery.
- V. Whether Scapa preserved an issue as to bankruptcy claims forms when it did not argue the issue in its directed verdict motion or post-trial motions.
- VI. Whether the lower court correctly excluded the bankruptcy claims forms and whether any error was harmless given the substantial empty chair evidence introduced by Scapa.

STATEMENT OF THE CASE

This is an appeal from an asbestos product liability trial that resulted in a jury verdict for Respondent Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart ("Mr. Stewart"). On February 5, 2013, Mr. Stewart filed a Complaint against Appellant Scapa Waycross, Inc., ("Scapa") and numerous other entities whose businesses involve the manufacturing, use, or sales of 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). On May 31, 2013, Mr. Stewart filed a First Amended Complaint removing one defendant and adding two others. (R. pp. 58-61).

On August 23, 2013, Mr. Stewart died from malignant mesothelioma. (R. p. 72). On November 21, 2013, following his death, Mr. Stewart filed a Second Amended Complaint substituting his personal representative as the plaintiff and adding wrongful death and survival

actions. (R. pp. 76-89). On December 18, 2013, Scapa filed an Amended Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint. (R. pp. 93-102).

The trial of the case occurred on January 29 - February 2 and February 7-9, 2018, before the Honorable Jean H. Toal. The lower court denied both parties' motions for a directed verdict. (R. pp. 1488-98). The jury returned a verdict for Mr. Stewart on the negligence cause of action and awarded \$600,000.00 for survival and \$100,000.00 for wrongful death. (R. pp. 28-29, 1638-39).

On February 16, 2018, Scapa filed a motion for judgment notwithstanding the verdict ("JNOV"), a motion for setoff of settlement proceeds, and a motion for production of Mr. Stewart's settlements with third party tortfeasors. (R. pp. 160-74). Mr. 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). On February 29, 2018, Mr. Stewart filed a motion for a new trial *nisi additur*. (R. pp. 176-82). After a hearing on July 11, 2018, at which the lower court indicated its intent to grant *additur*, Scapa filed a motion to reallocate Mr. Stewart's settlement proceeds. (R. p. 203). The lower court held another 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 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. (R. pp. 14-15). After accounting for setoff, the lower court entered judgment for \$792,800.00 for survival and \$0.00 for wrongful death. On April 17, 2019, Scapa filed a notice of appeal. (R. p. 210).

FACTS

Asbestos exposure caused Mr. Stewart's mesothelioma and death. (R. p. 2245 lns. 9-11, p. 2264 lns. 22-23, p. 2269 lns. 2-7). He worked for 40 years at the Bowater paper mill in Catawba, South Carolina, where he worked with asbestos-containing products. (R. pp. 2132-33). Scapa manufactured asbestos-containing dryer felts used at Bowater during Mr. Stewart's employment. Scapa used chrysotile asbestos fibers in its dryer felts sold to Bowater. (R. pp. 783-84, 800-01, 863, 1075). Chrysotile asbestos can cause mesothelioma. (R. pp. 2245-48).

Mr. Stewart worked on paper machine one for his entire career. (R. p. 2132). Machine one occupied a whole 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). Machine one used at least 23 Scapa asbestos-containing dryer felts from 1969-1981.¹ (R. pp. 2132 lns. 15-16, 478-79, 576-78, 1056, 1545, 2032-35, 2051-56, 2071-98). 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 160 feet long by 19 feet wide. (R. pp. 2032-35, 2051-56, 2071-94). As an illustration of the amount of asbestos in a Scapa dryer felt, Dr. James Millette, Mr. Stewart's expert in material sciences with a specialty in asbestos, testified about two Scapa dryer felts used on machine one during Mr. Stewart's employment. (R. pp. 769, 792-95, 2032-35). One felt contained 1,088 pounds of asbestos, which is 99 quadrillion² asbestos fibers, and another

¹ The Scapa records of its asbestos-containing dryer felts used at Bowater are called "Master Card." A Master Card states how the felt was made, including its yarn type (indicating whether it contained asbestos fibers), dimensions, position on machine one, and a record of the dates the felt shipped and went on and off machine one. 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).

contained 752 pounds of asbestos, which is 69 quadrillion asbestos fibers. (R. pp. 793-95, 2032-35).

Mr. 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). His job positions on machine one included, in ascending order of seniority, 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, Mr. Stewart "regularly" worked "closely" with and around dryer felts. (R. pp. 2173-74). He specifically recalled the use of Scapa dryer felts on machine one and testified that dryer felts arrived in a box with the vendor's name and usually the size written on the box. (R. pp. 2171-72).

Many aspects of Mr. Stewart's jobs and Bowater's use of dryer felts released breathable asbestos dust and fibers into the air Mr. Stewart regularly breathed in and around machine one. To get the felts onto the machine, Bowater employees, including Mr. Stewart, used a crane to put the felts in place while some physically held the felts in place and others seamed them together. (R. p. 688 lns. 20-21, pp. 699-702). A co-worker testified the seaming process got so much felt dust on workers' clothes that they hosed themselves off or blew it off of each other. (R. pp. 700-01). Dryer felts deteriorate over time and require replacement. (R. pp. 689, 692-93, 787-88). Employees, including Mr. 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). The process required at least two, and as many as five, men to cut the dryer felts and quickly move them. (R. p. 698). Cutting the felts released asbestos fibers. (R. p. 695; p. 781 lns. 3-5, p. 790 lns. 5-7, pp. 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). A worn out dryer felt sometimes tore off during manufacturing,

causing the machine doors to open and releasing felt dust into the room. (R. pp. 690-92). The removal and replacement of a felt could involve at least six people such that, regardless of a person's job, they helped. (R. pp. 739-41).

Employees used "high pressure hoses" with compressed air to hose off the entire machine during a down time. (R. pp. 681-82, 2147, 2154-55). "[F]elt hairs" or "dust" blew off during this process, contributing to the dust build-up. (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, Mr. Stewart hosed off the machines and the dryer felts. (R. pp. 685-86, 2154-57). Even in his final position as machine tender, Mr. 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).

Mr. Stewart's dryer felt asbestos exposure is supported by the testimony of his co-workers. Fred Steele worked at Bowater from 1963-2001 and worked on machine one with Mr. Stewart. (R. pp. 666-67, 674 lns. 10-11). Like Mr. Stewart, Mr. Steele moved up the ladder of seniority on machine one. (R. pp. 673-74). He specifically recalled Scapa dryer felts. (R. p. 676). A machine blow down with compressed air produced visible dryer felt hairs or dust. (R. pp. 682-83). A utility or fifth hand usually performed a blow down, which took an hour or more. (R. pp. 684-85). "[A] lot of the dust would settle on the felts", requiring men to blow the felts with compressed air. (R. p. 686). When removing a torn or old dryer felt, employees cut the felt, releasing felt dust. (R. p. 695). Utility, fifth hand, fourth hand, and third hand positions carried a knife on their belt because they used them so often. (R. p. 696). Cutting a felt "was an entirely manual process." (R. p. 698).

George Hegler worked at Bowater for 37 years and knew Mr. Stewart. (R. pp. 2194-95). He testified air hoses used to blow dust out of the machine drums were used "across the dryer felts." (R. pp. 2198-99). After using the hoses "[o]n the shutdown, your floor would be about four or six inches deep with [dust]." (R. p. 2199). Mr. Hegler saw Mr. 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). Employees cut the removed dryer felts with a knife to "fold them up and stack them on pallets." (R. p. 2201). "[T]he ends [of a cut dryer felt] would be kind of frazzled. You'd see some dust in the air." (R. p. 2203). Mr. Hegler specifically remembered Mr. Stewart doing this. (R. p. 2204 lns. 9-11). The cut dryer felts were "dropped" or "rolled off into the basement", where they stayed "until somebody needed it or wanted it." (R. p. 2200 lns. 1-7, p. 2203 lns. 21-24). A "man cooler" fan in the basement below machine one sucked air out of the basement and blew it onto the machine floor. (R. pp. 2197, 737, 856-60, 910). Bowater used cut felt "all over the mill" as a fire or spark shield and to control steam leaks. (R. pp. 2201-03, 697).

Dr. Millette, Mr. Stewart's expert in material sciences with a specialty in asbestos, studied and tested Scapa and other dryer felts for asbestos fibers release and found that Mr. Stewart's work with dryer felts released breathable asbestos fibers. (R. pp. 759-60). Three tests—pushing a post-it note across the felt, touching the felt with a wet finger, and blowing compressed air across the felt—all produced breathable chrysotile asbestos fibers. (R. pp. 770-86). The air compression test released over 30 fibers per cubic centimeter ("cc") of breathable asbestos fibers. (R. pp. 776, 785). Physical handling and installation of a dryer felt released breathable asbestos fibers. (R. p. 789 lns. 1-6, p. 790 lns. 8-14, p. 795). Blowing the dryer felts with compressed air released breathable

asbestos fibers. (R. pp. 789, 795). Cutting a dryer felt released breathable asbestos fibers. (R. pp. 789-90, 795). In addition to evidence of asbestos fibers from Scapa dryer felts in Mr. Stewart's work environment, numerous experts 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. p. 762 Ins. 1-2, p. 2243).

Dr. Arnold Brody testified as Plaintiff's expert in cellular biology and the effects of asbestos. (R. p. 605). He explained how asbestos causes diseases, *i.e.*, how the fibers enter and move through the body to cause mesothelioma. (R. p. 608). Mesothelioma is "a cancer of the mesothelial cells", which are found outside of the pleura 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, many of them are caught in the nose and throat without entering the lungs. (R. pp. 614-15). Chrysotile asbestos fibers can be wavy or straight but constantly break down into smaller and thinner fibers, making them "more likely to be able to be transported to various areas of the lung including the pleura." (R. pp. 621-24). When a fiber gets into the lungs, some fibers are eaten by other cells that clean the lungs and some are taken into the lymph fluid flow of the lung that flows around the surface of the pleura. (R. pp. 618-19, 625, 631-32). This is how an asbestos fiber gets to the pleura to interact with the mesothelial cells and cause mesothelioma cancer. (R. pp. 632-33).

Dr. Arthur Frank testified as Mr. Stewart's expert in occupational diseases with a specialty in asbestos. (R. p. 555 Ins. 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 a different place 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 to a reasonable degree of medical certainty that mesothelioma caused Mr. 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, Mr. Stewart's industrial hygienist expert, conducted a retrospective asbestos exposure analysis of Mr. Stewart's work. (R. p. 842). He testified that Mr. Stewart's work installing, cutting, blowing out, and cleaning felts exposed him to asbestos fibers. (R. pp. 851-56, 861-62). Scapa dryer felts contained approximately 20-70% chrysotile asbestos, and Mr. DePasquale testified a felt with 30-70% asbestos creates "more opportunity" for exposure. (R. pp. 784, 793, 852, 863). He testified that Mr. 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 Mr. Stewart developing mesothelioma. (R. pp. 863, 865).

Mr. Stewart was diagnosed with mesothelioma in the fall of 2012, (R. p. 2181). In October, he began treatment with Dr. David Harpole, a cardiothoracic surgeon at Duke University. (R. pp. 979, 983). In March 2013, Dr. Harpole performed a pleurectomy surgery on Mr. Stewart that involved removing a rib and opening the heart sack to take the tumor off of the lung. (R. pp. 982, 998-1000). Dr. Harpole also removed "very large" pleural plaques from Mr. Stewart's lungs. (R.

p. 1000). One expert described the plaques as larger than his hand. (R. p. 1177). The plaques show Mr. Stewart “had significant asbestos exposure.” (R. p. 1001). Dr. Harpole testified “asbestos exposure from his work with the paper mill” caused Mr. Stewart’s mesothelioma. (R. p. 1006 lns. 13-17). On August 23, 2013, five months after surgery, Mr. Stewart died from mesothelioma. (R. p. 72).

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 Mr. 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 also presented evidence of the hot and humid environment in the location of the dryer felts, arguing this decreased the likelihood the felts released breathable fibers, and that chrysotile asbestos is less likely than other types to cause mesothelioma. *See, e.g.*, R. pp. 802-03, 1141-42.

At the close of evidence, Scapa made a motion for a directed verdict arguing Mr. 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 Mr. Stewart presented no direct evidence of exposure and only speculative circumstantial evidence. (R. pp. 1483-84). The court denied the motion. (R. p. 1495). It found undisputed evidence of 23 Scapa asbestos-containing dryer felts at Bowater during Mr. Stewart’s employment, which comprises approximately 10% of the felts used. (R. pp. 1489-90). It found circumstantial evidence from Mr. 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 Mr. 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 lower court charged the jury as to the required proof of specific causation in this case.

[B]efore you can hold the Defendants liable, the Plaintiffs must prove that the Plaintiff's exposure to that Defendant's asbestos product was of such frequency, regularity and duration that it was a substantial factor in bringing about the disease or injury. . . .

For the Plaintiff to prove actual exposure to the Defendant's product, Plaintiff must present evidence of exposure to asbestos from the Defendant's product on a regular basis, over some extended period of time, in proximity to where the Plaintiff worked. This evidence must show more than a casual or minimal contact to asbestos from the Defendant's product.

Evidence was presented of other parties contributing to Mr. Steven Stewart's contraction of mesothelioma. It's proper for you to consider the action of those other parties, but only insofar as you assess and determine whether this Plaintiff has met his burden of proving the elements of the claim necessary to recover against this Defendant.

(R. p. 1610). The jury returned a verdict for Mt. 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).

Scapa filed a JNOV motion arguing (1) Mr. Stewart did not prove exposure to its asbestos-containing product on a regular basis over an extended period of time in proximity to where he worked, and (2) the testimony of Mr. Stewart's experts as to causation is legally insufficient. (R. pp. 184-92). Scapa specified that it "does not seek a new trial." (R. p. 173). Scapa also filed a motion for setoff of settlement proceeds and production of the settlement documents. (R. pp. 160-70).

Mr. Stewart filed a motion for new trial *nisi additur* asking the lower court to increase the survival and wrongful death damages. (R. pp. 176-82). After the Court indicated at a post-trial hearing the likelihood of granting *additur*, Scapa filed a motion to reallocate the settlement

proceeds. (R. pp. 1672, 199-202). 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 court held another post-trial hearing on October 10, 2018. The Court denied Scapa's JNOV motion, motion for production of settlement documents, and motion to reallocate. (R. pp. 8-24). The Court granted Mr. Stewart's motion for new trial *nisi additur* in part by adding \$400,000.00 to the survival action for a total of \$1,000,000.00 survival damages and left undisturbed the \$100,000.00 wrongful death award. (R. pp. 14-15). The Court granted Scapa's motion for setoff, resulting in a setoff of \$207,200.00 for survival and \$828,800.00 for wrongful death. (R. p. 22). After applying setoff, the court entered judgment for \$792,800.00 for survival and \$0.00 for wrongful death. (R. pp. 22-24). Scapa appealed.

ARGUMENT

The facts outlined above demonstrate that Mr. Stewart presented a preponderance of evidence of his exposure to Scapa dryer felts and that such exposure substantially contributed to his mesothelioma and death. As explained below, Mr. Stewart presented ample lay and expert testimony of specific causation to satisfy the requirement to show the frequency, regularity, and proximity of his exposure to Scapa's asbestos-containing dryer felts. Scapa presented evidence of exposure to other asbestos products and attempted to refute that its asbestos could have caused mesothelioma. The jury simply rejected the empty chair defense and found that Scapa dryer felts substantially contributed to Mr. Stewart's mesothelioma.

The lower court properly exercised its discretion to grant *additur* for survival damages given the uncontroverted testimony of Mr. Stewart's intense mental and physical pain and suffering from mesothelioma. 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 Mr. Stewart's full recovery. Finally, the lower court correctly excluded bankruptcy claims forms as improper evidence of claims with settling tortfeasors and in light of the extensive empty chair defense the court permitted Scapa to present. In sum, the lower court's decisions are fully supported by the law and the record, and the jury simply believed and found that Scapa's dryer felts substantially contributed to Mr. Stewart's mesothelioma.

I. SCAPA'S JNOV ISSUES AS TO THE "CUMULATIVE EXPOSURE" THEORY AND EXPERT TESTIMONY ARE NOT PRESERVED

Scapa did not make any arguments in its directed verdict motion about the "cumulative exposure" theory or the reliability of Mr. 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). An "issue [] not raised as a ground for a directed verdict during the liability stage of the trial and 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. Brody and Dr. Frank's testimony. (R. pp. 122-24). The lower court ruled "I am not going to take the position that experts who testify about every exposure and cumulative effect are going to be stricken from being able to testify." (R. p. 348). Scapa then failed to make an objection to expert 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 marks omitted). Scapa's failure to make any

objection or a contemporaneous objection to the testimony it now challenges on appeal makes the issues unpreserved.

Finally, it is unclear what specific expert(s) and testimony Scapa challenges. Its argument section 1.A. on the cumulative exposure theory does not cite to a single page of trial testimony or mention an expert. (Br. of App. pp. 9-13). Scapa's argument section 1.B. addressing the evidence of specific causation references the testimony of Dr. Frank, Dr. Brody, and Mr. DePasquale but does not ask the Court to exclude any specific testimony. (Br. of App. pp. 13-17). There is no challenge as to the qualifications of the experts to testify. Scapa appears to challenge the substance of some of their testimony but does not specify to this Court, and did not specify to the lower court, what it seeks to exclude or on what basis it seeks exclusion. It cites to the expert reliability factors (Br. of App. p. 10), but does not articulate how any expert's opinion was unreliable except to disagree with the cumulative exposure theory which, as explained below, is a scientific principle and not a causation theory Mr. Stewart used at trial.

As a last-ditch effort, Scapa argues "Plaintiff's experts' opinions" are inadmissible under Rule 403, SCRE, again based on the cumulative exposure argument. (Br. of App. pp. 23-24). Scapa never made this argument at any phase of the lower court proceedings. It also does not specify which "experts" or which portions of testimony it is referring to for this argument. There is no mention of Rule 403 in Scapa's motion for a directed verdict or JNOV motion. (R. pp. 1479-88, 173, 184-92). There is no Rule 403 ruling in the lower court's order, and Scapa did not file a motion to reconsider. (R. pp. 8-24).

The Court should find all of these issues are unpreserved.

II. THE LOWER COURT CORRECTLY DENIED SCAPA'S MOTION FOR JNOV

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

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (internal quotation and alteration marks omitted). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 (internal quotation marks and citation omitted).

Scapa misstates the law as well as Mr. Stewart's theory and proof of specific causation. The admissible evidence presented, including the opinions of Mr. Stewart's experts, satisfy the required proof for specific causation in South Carolina.

A. The Lower Court Correctly Admitted Cumulative Exposure Testimony

Assuming the Court finds this issue preserved, the lower court correctly admitted Mr. Stewart's experts' testimony as to specific causation.³ 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). Mr. Stewart's case theory and evidence presented are fully compliant with *Henderson*. The lower court held "Plaintiff's experts testified that mesothelioma can be caused by brief or low-level cumulative exposures. They should be permitted to rely on this basic medical fact in reaching their opinion []. That does not mean that they concluded that 'each and every exposure' that Mr. Stewart had was a substantial factor in causing his disease." (R. p. 19). After citing to other reported decisions admitting similar opinions, the lower court explained "it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion." (R. p. 20). This Court should affirm.

It is not scientifically possible to point to a particular asbestos exposure as the sole cause of an asbestos-related disease because the numerous fibers ingested on each inhalation go to

³ As noted above, there is no preserved issue as to the admissibility of any expert testimony. Scapa does not even include in its brief a standard of review as to the admissibility of expert testimony. "The qualification of an expert witness and the admissibility of an expert's testimony are matters within the trial court's discretion and will not be overturned absent a finding of abuse of that discretion." *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 635, 760 S.E.2d 399, 407 (2014). The lower court did not abuse its discretion but made a decision based on the applicable law and the substance of the experts' opinions in this case. Further, Scapa vigorously cross-examined Dr. Frank about cumulative exposure. (R. pp. 2318-20).

various places in the body and have differing physical effects. (R. pp. 2255-56). Scientists and doctors do not know how many asbestos fibers it takes to cause mesothelioma. (R. p. 2256). For these reasons, doctors describe the cause of mesothelioma as "the cumulative exposure that someone had from any and all [asbestos-containing] products." *Id.* Mesothelioma is a dose response illness, meaning that, as the dose of or exposure to asbestos goes up, the likelihood of a biological response such as getting a disease goes up.⁴ (R. pp. 2254-55).

Scapa's argument on this issue is essentially that a plaintiff cannot rely on the theory that each and every or the cumulative exposure to asbestos is a substantial contributing cause to prove specific causation but must present proof of a level of exposure to the defendant's asbestos product and that such exposure is a substantial contributing cause. (Br. of App. pp. 9-13). Mr. Stewart agreed to this premise during a pre-trial hearing. "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). Scapa's appellate argument is misplaced because Mr. Stewart did not rely on an each-and-every or cumulative exposure theory at trial, he relied on the *Henderson* specific causation standard proven by evidence of frequency, regularity, and proximity to Scapa's product. Mr. Stewart's expert testimony as to "cumulative exposure" is admissible and, along with other testimony, satisfies *Henderson*.

⁴ Mr. Stewart's experts testified that mesothelioma is a dose response illness. See Dr. Brody at R. pp. 653-54; Dr. Millette at R. p. 758; and Dr. Harpole at R. p. 986.

The cumulative exposure testimony is a general scientific principle that all exposures to asbestos contribute to a person's total dose. It is offered as part of the scientific explanation for how asbestos exposure causes mesothelioma. It is not offered for the purpose of establishing specific causation and is not the causation theory Mr. Stewart used in this case. The ultimate specific causation opinions of Mr. Stewart's experts are that, based on the evidence in this case, the amount of Mr. Stewart's exposure to Scapa asbestos-containing dryer felts substantially contributed to his mesothelioma. *See* R. p. 20 ("The specific causation opinions of Drs. Frank and Brody were firmly grounded in the exposure evidence presented at trial."). Stated another way, 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." *Dugger v. Union Carbide Corp.*, 2019 U.S. Dist. LEXIS 171168, *36 (D. Md. Sept. 30, 2019). In *Dugger*, the defendant sought to exclude Dr. Frank's opinion as an impermissible each-and-every or cumulative exposure theory. *Id.* at * 34. The court disagreed,

Dr. Frank has considered the frequency, regularity, and proximity of [plaintiff]'s exposure to asbestos as a result of his use of Bendix brakes in order to come to his conclusion regarding causation. 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 [plaintiff]'s exposure to Bendix brakes when coming to his conclusion.

Id. at *37 (internal quotation marks omitted). The same is true in this case. Mr. Stewart's experts considered the frequency, regularity, and proximity of Mr. Stewart's exposure to Scapa asbestos-containing dryer felts to come to their specific causation opinions.

Dr. Frank's description of the cause of mesothelioma as "the cumulative exposure that someone had from any and all products" is simply another way of saying the dose response principle that "as the amount accumulates in somebody's body and goes up and up and up, you're

more likely to get disease.” (R. p. 2256). Dr. Frank does *not* “believe that each and every is the same as cumulative [exposure].” (R. p. 2321 Ins. 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 Ins. 1-5) (emphasis added).

The specific causation standard is qualitative, not quantitative as Scapa suggests. Quantification of an exact dose is not required. *Lohrmann* describes the frequency, regularity, and proximity standard as “a *de minimis* rule since a plaintiff must prove more than a casual or minimum contact with the product.” 782 F.2d at 1162. Several of Mr. Stewart’s experts provided specific causation testimony. 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. “[D]ryer felts had . . . 30 to maybe 70 percent asbestos, and if you had enough dust for the air to get cloudy, you’re dealing with a lot of asbestos.” (R. p. 2264). Dryer felt testing showed asbestos fibers release “from single to low double digits in terms of fibers per cc.” (R. p. 2281). Dr. Millette’s compressed air test released over 30 asbestos fibers per cc. (R. p. 777). Dr. Frank testified that 0.1 to 15 fibers per cc of release 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). Even one year’s exposure to .1 fibers per cc, the legally allowable limit, makes a person four times more likely to get an asbestos-related disease. (R. pp. 2307-08). Mr. DePasquale testified the facts of this case, specifically including the number of Scapa dryer felts used during Mr. Stewart’s employment and his work with dryer felts, show a significant occupational exposure to Scapa dryer felt asbestos that puts an individual at a great risk of

developing mesothelioma. (R. pp. 863, 865). This testimony, viewed in a light most favorable to Mr. Stewart, is evidence of much more than a *de minimis* exposure to asbestos from Scapa dryer felts.

In addressing the same argument Scapa makes, the Supreme Court of Pennsylvania held Dr. Frank's testimony admissible. *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016). In that case, fifty-eight physicians and scientists filed an *amicus* brief describing "the fundamental notion that each exposure to asbestos contributes to the total dose and increases the person's probability of developing mesothelioma or other cancers as an 'irrefutable scientific fact.'" *Id.* at 1045. "According to these physicians and scientists, cumulative exposure is 'merely an extension of the ancient concept of dose-response,' which is the 'oldest maxim in the field.'" *Id.* Considering the whole of Dr. Frank's causation testimony, the *amicus* brief, and the desire to not "preclude expert witnesses from informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation", the court admitted the testimony. *Id.* at 1045-47. The same result is warranted here. There is no cumulative dose or exposure theory issue in this case. The Court should affirm the lower court's admission of the experts' testimony.

B. The Lower Court Correctly Held Mr. Stewart Established Specific Causation

Viewing the evidence and all inferences in a light most favorable to Mr. Stewart, the Court should affirm the lower court's decision to deny Scapa's JNOV motion as to specific causation and uphold the jury's findings on this issue.

Mr. Stewart fully satisfied the *Henderson* standard to present "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to" where he actually worked. 373 S.C. at 185, 644 S.E.2d at 727 (internal quotation marks omitted). The

circumstantial evidence “need only establish that [the plaintiff] was in the same vicinity as witnesses who can identify the products causing the asbestos dust that all people in that area, not just the product handlers, inhaled.” *Roehling v. Nat’l Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225, 1228-29 (4th Cir. 1986) (overturning summary judgment where the plaintiff and witnesses were in the same area of the same plant “and thus breathed the same air, which was filled with defendants’ products’ dust”). “The plaintiff himself need not remember product names or have worked directly with the defendant’s products.” *Andrews v. 3M Co.*, 2015 U.S. Dist. LEXIS 175864, *24 (D.S.C. May 22, 2015) (citing *Roehling*) (denying summary judgment where “Plaintiff estimates that he was exposed to the internal, asbestos-containing packing of valves more than ten to twenty times a year for nineteen years” and “specifically recalls working with Copes-Vulcan valves”).

The facts section above details the volume and extent of Mr. Stewart’s frequent, regular, and proximate exposure to Scapa asbestos-containing dryer felts. At least 23 Scapa asbestos-containing felts were used on machine one while Mr. Stewart worked on it. (R. pp. 2132 Ins. 15-16, 478-79, 576-78, 1056, 1545, 2032-35, 2051-56, 2071-98). He began work in November 1963, and the first Scapa asbestos-containing dryer felt shipped to Bowater in January 1969, while Mr. Stewart still worked as a utility man with frequent and regular physical handling of dryer felts.⁵ (R. pp. 2081-82, 2105 Ins. 4-12). Mr. Stewart worked in proximity to and/or physically with a dryer felt every work day during the entire twelve years machine one used Scapa’s asbestos-containing dryer felts. Four of Mr. Stewart’s five jobs required close proximity to and physical handling of dryer felts. (R. pp. 2173-74). His job duties involved work with the entire life of a

⁵ Scapa’s assertion to the contrary (Br. of App. p. 20) is factually false and contrary to the standard of review.

dryer felt at Bowater—from unpacking the felt and putting it on the machine to cleaning it and eventually cutting it up and disposing of it in the basement. (R. pp. 2140-65, 704). All of these dryer felt activities—regular installation, handling, maintenance, and cleaning—released breathable asbestos fibers into the air that were also resuspended and likely stayed for days in the air Mr. Stewart breathed. (R. pp. 759-62, 770-86, 789-90, 795).

Dr. Harpole testified he considered Mr. Stewart's asbestos exposure a "moderately high dose over a long period of time." (R. pp. 985-86). Dr. Frank testified Mr. Stewart's "exposures from the Scapa dryer felts was a substantial contributing cause of his illness and ultimately his death." (R. pp. 2268-71). Mr. DePasquale testified that Mr. Stewart's 12 years of work with 23 Scapa asbestos-containing dryer felts that each contained 20-70% chrysotile asbestos fibers created a substantial occupational exposure to asbestos that caused a greater risk of Mr. Stewart developing mesothelioma. (R. pp. 863, 865).

The evidence presented is much more than *de minimis* exposure or simply that Scapa dryer felts were at Bowater while Mr. Stewart worked there. (Br. of App. p. 22). The evidence fully supports the lower court's holding that circumstantial and direct evidence were "introduced tending to show asbestos-containing dryer felts manufactured by Scapa were regularly and frequently used on the machines where Mr. Stewart worked on and around during the time he worked on said machines." (R. pp. 16-18). Scapa has not presented any evidence disputing the testimony of the co-worker witnesses and Mr. Stewart. Rather, it merely asserts that the evidence is not enough to place Mr. Stewart in close proximity to Scapa identifiable asbestos products. This is not required by law and, regardless, is incorrect. The United States District Court for the District Court of South Carolina, interpreting and applying *Henderson* and *Lohrmann*, specifically rejected the argument that a plaintiff must recall specific instances of work with a particular product.

Andrews v. CBS Corp., 2015 U.S. Dist. LEXIS 184537, *6-7 (D.S.C. June 18, 2015). Mr. Stewart testified to working with Scapa dryer felts. (R. pp. 2171-72). Given that four of his job positions required physical work with dryer felts that released breathable asbestos fibers and his fifth job required work in proximity to dryer felts, all while Scapa asbestos-containing dryer felts were used on machine one, there is more than enough evidence to support an inference of frequent, regular, and proximate exposure to Scapa's asbestos product.

Scapa's arguments as to the humid environment and build up on the dryer felts are unavailing. (Br. of App. p. 23). The moisture content of the paper by the end of the drying process is approximately 5%, (R. pp. 805-06). Dr. Millette conducted a test with 60% humidity that showed a release of breathable asbestos fibers. (R. pp. 778-79). Another one of his tests used humidity values reported for paper mills in general. (R. p. 804). Scapa's corporate representative and a co-worker testified a paper mill would want to clean a dryer felt to keep it clear of build up to run them longer and avoid down time. (R. pp. 681, 1111). A co-worker also testified that blowing build up off of the dryer felts would blow off "felt hairs" or "felt dust," (R. pp. 682-83). This evidence, viewed in a light most favorable to Mr. Stewart, supports the lower court's decision to deny JNOV.

Scapa's argument as to the sufficiency of the evidence is also contrary to its defense theory. Throughout the entire trial, Scapa tried to prove that asbestos-containing insulation and other products caused Mr. Stewart's mesothelioma. *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). Scapa argued to the jury that Mr. Stewart's mere presence (and not physical or direct work) around these other asbestos-

containing products caused his mesothelioma.⁶ If Scapa wanted the jury to believe its theory, it cannot deny the same logic applies to Mr. Stewart's evidence, especially when viewed in a light most favorable to him. "As the old saying goes, what's good for the goose is good for the gander." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917 (2017). Based on its own defense theory of Mr. Stewart's alleged exposure to asbestos from other products, Scapa cannot credibly deny that Mr. Stewart's evidence, viewed in a light most favorable to him, supports a reasonable inference of 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 S.E.2d at 727 (internal quotation marks omitted).

Scapa's remaining arguments on this issue are simply misstatements of Mr. Stewart's theory and proof presented at trial. As to Scapa's cumulative exposure arguments (Br. of App. pp. 15-18), Mr. Stewart incorporates the preceding argument section explaining that he did not use a cumulative exposure specific causation theory. As is apparent from the evidence discussed in this brief, he presented plaintiff-specific evidence of specific, substantial causation in accordance with *Henderson*. Scapa's argument as to "no safe level" of exposure is similarly misplaced. (Br. of App. p. 18). Mr. Stewart never argued he proved specific causation because there is no safe level of asbestos exposure. Rather, Dr. Frank testified he (and others) believe there is no safe level of

⁶ By way of example, Scapa asked Dr. Frank "if [Mr. Stewart] had time frames where he was simply a bystander around others using asbestos-containing pipe covering, that would have been a substantial contributing factor to his mesothelioma?" (R. p. 2290). Scapa asked Dr. Millette about gaskets and packing used at Bowater during Mr. Stewart's employment, "And you would anticipate that when those products were manipulated by the workers that there would be fiber released into the air", "And if Mr. Stewart was in the area of that work he would have breathed that asbestos, correct?" (R. p. 801). Scapa asked Mr. DePasquale about the installation of pipe insulation: "when they cut it, when they put it on, when they tear it off, that all creates dust, correct? . . . Mr. Stewart was around that work, correct? . . . And that's certainly something that would have significantly increased his risk of mesothelioma, right?" (R. p. 890).

asbestos exposure to explain that simply because there is a legally allowable limit “doesn’t mean it’s safe.” (R. p. 2307). That is not the basis for and is separate from his specific causation opinion that Scapa asbestos-containing dryer felts substantially contributed to Mr. Stewart’s mesothelioma. Scapa’s argument that Mr. Stewart did not address other asbestos-containing products is also incorrect. (Br. of App. p. 18). Based on his review of the testimony and the Bowater plant, Mr. 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 on piping because his investigation showed the “vast majority” of the pipes were cladded. (R. pp. 849-50); *see Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (agreeing that “presence in the vicinity of static asbestos is not exposure to asbestos”). He discounted gaskets because Mr. Stewart did not remember working with gaskets or packing but a coworker thought he saw Mr. Stewart use packing. (R. p. 894). Mr. Stewart accounted for other potential exposures.

Finally, it is significant that Scapa did not seek a new trial. Any alleged evidentiary errors, if prejudicial, are remedied by a new trial and not a JNOV motion. As noted above, Scapa fails to articulate which expert(s)’ testimony it challenges. Dr. Frank, Mr. DePasquale, and Dr. Harpole gave specific causation opinions. (R. pp. 2268-71, 863, 865, 1006). Scapa does not mention Dr. Harpole. Therefore, even if the Court found the issue preserved and meritorious, it would not matter because there is still expert evidence that, viewed in a light most favorable to plaintiff along with all of the other admitted evidence, supports a jury verdict for Mr. Stewart on specific causation.

Mr. Stewart introduced admissible evidence that, when viewed in a light most favorable to him, establishes specific causation in accordance with *Henderson*. The Court should affirm the lower court’s decision to deny Scapa’s motion for JNOV.

III. THE LOWER COURT CORRECTLY GRANTED *NISI ADDITUR* AS TO SURVIVAL DAMAGES

The lower court properly exercised its discretion in evaluating the adequacy of the survival damages verdict in light of the evidence presented and finding the verdict amount unduly conservative. The court articulated compelling and numerous reasons for granting *additur*, and this Court should affirm.

“Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge. His exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192-93, 777 S.E.2d 824, 828-29 (2015) (internal quotation marks and citations omitted).

Mr. Stewart filed a motion for new trial *nisi additur* asking the lower court to increase the survival damages from \$600,000.00 to at least \$2,630,000.00. (R. p. 181). At a hearing on the motion, counsel for Mr. Stewart suggested *additur* of at least four times and up to ten times the amount of the medical bills. (R. pp. 1653-54). The lower court stated its intention to grant *additur* of \$400,000.00, for a total of \$1,000,000.00 survival damages. (R. p. 1672). It noted that no treating physician testified Mr. Stewart’s other medical conditions shortened his life expectancy and that both parties’ experts testified mesothelioma “is a terrible death and a very painful death.” (R. pp. 1671-72). At a second post-trial hearing, the lower court explained its *additur* ruling “was based very much on what I heard in testimony and particularly the amount of medical expenses but also the – the amount of pain and suffering and loss of enjoyment of life,” (R. p. 1697, Tr. p. 32).

On March 25, 2018, the lower court issued an order granting *additur* of \$400,000.00 for the survival claim. (R. p. 14). The court “read the jury’s \$600,000 survival damages verdict as

awarding the stipulated medical damages of \$241,000 plus about \$359,000 for non-economic damages. That is both inadequate and unduly conservative.” (R. p. 13). It found the jury’s verdict inadequate in light of the evidence presented at trial and gave compelling reasons for this finding.

The Plaintiff introduced extensive evidence as proof for non-economic damages, resulting in a well-developed record detailing the physical pain Mr. Stewart lived in for over one-year, including how he endured multiple chemotherapy treatments, thoracentes[i]s, a major invasive surgery, and ultimately died a very painful death from mesothelioma.

... Mr. Stewart’s life was torn apart by mesothelioma. ... Prior to getting sick, he was enjoying retirement, traveling, gardening, and spending time with his children and grandchildren. He lost a substantial amount of weight. The severe pain and limitations of his disease prevented Mr. Stewart from doing the things he loved.

... determined to delay his impending death[,] ... He opted to undergo a pleurectomy, which his surgeon, Dr. Harpole, described as a “maximally invasive” procedure which involved removing his rib and scraping out the tumor.

(R. pp. 10-11). Because the damages verdict failed “to accord with the evidence and f[ell] inexplicably short of providing fitting compensation for the magnitude of Mr. Stewart’s losses”, the court granted *additur*. (R. pp. 13-14).

“[T]he consideration of a motion for a new trial *nisi additur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.” *Patterson v. Reid*, 318 S.C. 183, 187, 456 S.E.2d 436, 438 (Ct. App. 1995). “When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (internal quotation marks omitted). “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.” *Id.* at 192, 777 S.E.2d at 828 (emphasis and alteration in original). “Compelling reasons, however, must be given to justify invading the jury’s province

in this manner.” *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). “The requirement is imposed to balance the wide discretion given to a trial judge in ruling on a new trial motion with the substantial deference courts must give to a jury’s determination of damages.” *Luchok v. Vena*, 391 S.C. 262, 264, 705 S.E.2d 71, 72 (Ct. App. 2010).

The evidence at trial supports the lower court’s discretionary decision that the survival damages verdict was unduly conservative. “Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased.” *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 384, 827 S.E.2d 183, 198 (Ct. App. 2019) (internal quotation marks omitted). The parties stipulated to the amount of Mr. Stewart’s medical bills as \$241,822.70. (R. p. 575). The lower court charged the jury Mr. Stewart “had a life expectancy of an additional 13.99 years.” (R. p. 1628). Scapa did not contest Mr. Stewart’s evidence of pain and suffering, loss of enjoyment of life, or mental anguish from mesothelioma. (R. p. 10). The lower court noted, “[d]amages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million.” (R. pp. 5-6, listing cases and verdict amounts). The survival damages award of \$1,000,000.00 in this case is on the low end of similar cases.

Mr. 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). During chemotherapy, Mr. 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). Mr. 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 Mr. 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 provide a cure. (R. p. 1004). After surgery, Mr. Stewart “limped along” with pain and “was just too debilitated” to complete the “long rehab program.” (R. pp. 1007-08). He died five months after surgery.

A comparison of Mr. Stewart’s appearance in his pre-surgery video deposition on March 4, 2013, and the 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 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). Mr. Stewart lost sleep and could not drive to spend time with his children. (R. p. 2186). The chemotherapy “killed” his appetite and “locked” his bowels. (R. p. 2187). He testified “I never imagined my life would come to what it is.” *Id.* When asked about his concern or worry about surgery, Mr. Stewart explained his belief that “it’s in God’s hands” and then began to cry. (R. p. 2188; Video of Depo. R. p. 2189)

Scapa’s arguments on *additur* are legally and factually wrong. Legally, Scapa argues the wrong standard. It argues the award is “not so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.” (Br. of App. pp. 25-26). The lower court did not find the award shockingly

disproportionate, which is the standard for a new trial absolute not a new trial *nisi additur*, it found the award “inadequate and unduly conservative.” R. p. 13; *Riley*, 414 S.C. at 192, 777 S.E.2d at 282 (stating the court must set aside the verdict when the award is “so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, . . .”). Scapa’s factual arguments on this issue are that the Court commented on the jury’s attentiveness during trial and Mr. Stewart had co-morbidities. (Br. of App. pp. 24-26). Neither is a basis to reverse the lower court’s discretionary decision to grant *additur*. The jury’s attentiveness or inattentiveness is not part of the consideration of “the adequacy of the verdict in light of the evidence presented.” *Patterson*, 318 S.C. at 187, 456 S.E.2d at 438. Scapa cites to no authority that juror attentiveness is relevant to a motion for new trial *nisi additur*. As to co-morbidities, the only evidence is that they existed and could potentially have affected his life expectancy. (R. p. 469 Ins. 6-9, p. 1019). However, there is no evidence of an actual effect on life expectancy and Scapa agreed to the jury charge on the statutory life expectancy of 13.99 years. (R. pp. 1017-20, 1028, 1506-07, 1628). Existence of co-morbidities is the only way Scapa challenged Mr. Stewart’s non-economic damages and the challenge is meaningless because there is no evidence of his pain and suffering from them, no evidence they contributed to or affected his mesothelioma, and no evidence as to an actual effect on life expectancy. This muddying-the-water-type argument with no actual proof is not a basis to reverse the lower court’s compelling reasons for granting *additur*.

As in *Riley*, the lower court here “was well aware that the jury verdict included an award of noneconomic damages, yet [s]he articulated compelling circumstances that [s]he believed warranted the *nisi additur*.” *Riley*, 414 S.C. at 194-95, 777 S.E.2d at 830. The lower court followed the applicable law in its consideration of this issue, and this Court should affirm.

IV. THE LOWER COURT CORRECTLY DENIED SCAPA'S MOTION TO REALLOCATE THE SETTLEMENT PROCEEDS

The lower court correctly denied Scapa's motion to reallocate the settlement proceeds because there is evidence to support both causes of action, there is no allegation of bad faith in Mr. Stewart's allocation, and Mr. Stewart did not receive a double recovery.

“‘[T]he jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties.’” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (quoting *Rookard v. Atlanta & Charlotte Air Line Ry. Co.*, 89 S.C. 371, 71 S.E. 992, 995 (1911) (“Such motions are, therefore, addressed to the discretion of the Court,—a discretion which is not arbitrarily or capriciously exercised . . .”)). Reallocation of a settlement is an equitable issue within the trial court's discretion. See *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (referring to “equitable reallocation” and stating “the trial court acted within its discretion by reallocating the settlement funds”).

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). Mr. 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 90% for survival and 10% for wrongful death, which would result in \$932,400.00 for survival and \$103,600.00 for wrongful death. (R. pp. 199-202, 1709). Relying on the Supreme 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 to reallocate. (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 of the lower court's order is that the total amount Mr. Stewart received from all tortfeasors for survival is \$1,000,000.00—the exact amount of the judgment.

Scapa argues the lower court erred because the allocation percentages are “not reasonable under the facts.” (Br. of App. p. 28). This argument is based solely on the lower court's decision to grant *additur* and the resulting percentage breakdown of damages under the *additur* ruling. (Br. of App. p. 29) (“Given the court's findings concerning the damages evidence, an allocation of just 20% of the settlement proceeds to the survival claim is not reasonable under the facts.”). As a practical matter, there is no law or logic to support a ruling that pre-trial settlements with third parties must reflect the same damages allocations as those reached by the jury and/or trial court against the remaining defendant(s). For example, Scapa certainly would not argue that the percentages should be the same if the pre-trial settlement allocations turned out to be favorable to it.

As a legal matter, the Supreme Court already squarely rejected Scapa's percentage-based reallocation argument in *Riley*. *Riley* is a product liability action in which the decedent's estate settled with the at-fault driver for \$25,000.00, allocating \$20,000.00 to survival and \$5,000.00 to wrongful death, and then proceeded to trial against Ford. 414 S.C. at 188, 777 S.E.2d at 826. During the trial, the plaintiff withdrew the survival claim, and the jury returned a verdict for \$300,000.00 for wrongful death. *Id.* at 189, 777 S.E.2d at 827. The trial court granted *additur* of \$600,000.00, for a total judgment of \$900,000.00 and denied Ford's motion for setoff and reallocation of the settlement. *Id.* at 189-90, 777 S.E.2d at 827. The Court of Appeals reversed the denial of reallocation, “flipping the allocation the settling parties reached and the allocation the trial court approved” based not on “the actual amount (\$20,000) originally allocated to the survival action but [on] only the percentage breakdown.” *Id.* at 191, 777 S.E.2d at 828. The Court of

Appeals held the lower court “should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable” *Id.* (quoting *Riley v. Ford Motor Co.*, 408 S.C. 1, 16, 757 S.E.2d 422, 430 (Ct. App. 2014)). The Supreme Court reversed and rejected that framework.

We find the court of appeals erred in reapportioning the settlement proceeds on the sole basis that the particular agreed-upon allocation between the survival and wrongful death claims did not seem to be, in the court of appeals’ view, *proportionately reasonable*. . . . we believe it was error to disturb the settling parties’ agreed-upon allocation solely because the apportionment may have been advantageous to the Estate.

Riley, 414 S.C. at 196, 777 S.E.2d at 830-31 (emphasis added). The Court held the fact that a settlement allocation is advantageous to a plaintiff and disadvantageous to a defendant is not a basis to reallocate it “for the sole purpose of benefitting” the defendant. *Id.* at 197, 777 S.E.2d at 831. “Ford’s effort to invalidate the allocation of settlement proceeds based on a ‘percentages’ analysis is manifestly without merit under these circumstances.” *Id.*

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 that the allocation percentages are not reasonable under the facts because the ultimate judgment amount is a different percentage breakdown than the pre-trial settlements with third parties is simply another way of saying the ultimate judgment allocation percentages are more advantageous to Scapa than the settlement allocation percentages. It is the same argument rejected by *Riley*—“the purported impropriety of an apportionment favoring the” plaintiff. *Id.* at 191, 777 S.E.2d at 831.

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. Such a rule would treat a

plaintiff and defendant differently because a plaintiff cannot ask for reallocation of his own settlement if the court grants a *remittitur*. “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 reallocated. The issues are separate, and the lower court correctly considered them separately.

The “reasonable under the facts” standard Scapa argues to the Court is a second, and more defendant-friendly, bite at the apple than arguing against *additur*. Notably, Scapa does not argue that there is insufficient evidence to support survival and wrongful death causes of action. Rather, it argues the amounts allocated to those causes of action are not reasonable under the facts, a standard for which there is no legal authority and which is much more lenient than the new trial *nisi* standard. (Br. of App. p. 28); *cf. 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, 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)). The flaws in Scapa’s argument are apparent from the fact that it is based on an *additur* ruling that Scapa argues is incorrect and should be reversed. Scapa’s proposed standard is contrary to *Riley*’s

holding that “[s]ettling parties are naturally going to allocate proceeds in a manner that serves their best interests”, and the Court should reject it. 414 S.C. at 197, 777 S.E.2d at 831.

Finally, it is significant in the analysis of this issue that Mr. 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)).

The lower court properly exercised its discretion to deny reallocation, and this Court should affirm.

V. SCAPA FAILED TO PRESERVE AN ISSUE AS TO BANKRUPTCY CLAIMS DOCUMENTS

Scapa’s issue as to the admission of bankruptcy claims documents is not preserved. Scapa filed a motion *in limine* to admit two bankruptcy claims forms filed by Mr. Stewart, arguing the forms, which allege asbestos exposure to two manufacturers’ products, are an admission by a party opponent. (R. pp. 105-08). At a pre-trial hearing, the lower court denied the motion based on *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), and made no ruling on whether the claims forms are an admission by a party-opponent. (R. pp. 322-30). At the end of Scapa’s case, it proffered the report of an expert in bankruptcy trusts. (R. p. 1471). Scapa did not mention the bankruptcy documents or the empty chair defense during its directed verdict motion. (R. pp. 1479-88). Scapa filed only a post-trial JNOV motion, not a motion for a new trial. (R. p. 173). The

JNOV motion does not mention bankruptcy documents or the empty chair defense. (R. pp. 173, 184-92). The lower court's post-trial order does not contain a ruling on bankruptcy documents or the empty chair defense. (R. pp. 8-24).

"In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). An "issue [] not raised as a ground for a directed verdict during the liability stage of the trial and is not preserved for this Court's review." *Jamison v. Morris*, 385 S.C. 215, 226, 684 S.E.2d 168, 173 (2009). Scapa failed to raise the issue in its directed verdict or JNOV motions, failed to file a new trial motion, and failed to file a Rule 59(e), SCRCP, motion asking for a post-trial ruling on the issue. *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions . . . are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). Therefore, the entire issue is unpreserved.

VI. THE LOWER COURT CORRECTLY EXCLUDED THE BANKRUPTCY CLAIMS FORMS

In the event the Court finds this issue preserved, there are four independent reasons for the Court to affirm. Scapa's argument (1) is procedurally deficient, (2) based on a false recitation of the record, (3) legally meritless, and (4) fails to show harm or prejudice from the exclusion of the claims forms considering the extensive empty chair evidence and argument it presented at trial. "[T]he admission or exclusion of evidence in general is within the sound discretion of the trial court. [T]he trial court's decision will not be disturbed on appeal absent an abuse of discretion." *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005).

A. Scapa's Procedural Choices Preclude Relief on this Issue

Scapa specified in its JNOV motion that it "does not seek a new trial." (R. p. 173). A successful JNOV motion "terminates the case and takes it away from the jury." Flanagan, *South*

Carolina Civil Procedure § 50.A. Therefore, even if the Court rules in Scapa's favor on this issue, it cannot grant a new trial during which a court could admit this evidence. Based on the procedure it chose, there is simply no avenue for Scapa to receive relief on this issue.

B. The Lower Court Admitted Empty Chair Evidence

Scapa's assertion that "the trial judge excluded *all evidence* of Mr. Stewart's exposure to other asbestos-containing products" is false and contrary to the record on appeal. (Br. of App. pp. 30, 32) (emphasis added). From Scapa's opening through its closing, its main defense at trial was the "empty chair" of Bowater and other asbestos products at Bowater that Scapa alleged caused Mr. Stewart's mesothelioma. Scapa fully presented this defense but the jury rejected it.

In its opening, Scapa argued to the jury:

- there was some Scapa dryer felts there but not a lot, there are four other manufacturers of dryer felts, but the thermal insulation was there the whole time. . .
- Bowater bought that thermal insulation, Scapa didn't have a single thing to do with that. . . .
- It's Bowater that allowed the thermal insulation to be used, it's also Bowater that bought our felts.' But ladies and gentlemen, at the close of the case we're going to submit to you that the fault here lies with Bowater and thermal insulation and not Scapa. Nothing Scapa would have done would have prevented Mr. Stewart to be exposed to asbestos from thermal insulation and it caused his illness.

(R. pp. 461-62, 468-69). During trial, Scapa questioned twelve witnesses about other asbestos-containing products at Bowater and Bowater's use of them:

- Dr. Arthur Frank: R. pp. 2288-90, 2293-95, 2301-03, 2325-26
- Dr. Arnold Brody: R. p. 660
- Mr. Fred Steele: R. pp. 723-24, 726-28, 733-35, 739, 747-48
- Dr. James Millette: R. pp. 801-02, 818-21
- Mr. Christopher DePasquale: R. pp. 875, 877, 880-82, 884, 890-94
- Mr. Harold Ward, Jr.: R. pp. 945-48, 953, 957-60, 962-63

- Dr. David Harpole: R. p. 1015
- Mr. Jim Doherty: R. pp. 1045-46, 1056-57, 1075-76
- Dr. Tim Oury: R. pp. 1136, 1149-50, 1168-70
- Mr. Paul Carlson: R. pp. 1240-41, 1244-45, 1248-50, 1253-55, 1259-65, 1268-69, 1283
- Dr. James Crapo: R. pp. 1355, 1362-65, 1371-72, 1392-93
- Mr. Steven R. Stewart: R. pp. 1460-63

Scapa named thirteen manufacturers or suppliers of other asbestos-containing products at Bowater:

(1) Mount Vernon: R. pp. 2303, 723-24, 739, 821, 877, 884, 953, 1245; (2) Asten-Hill: R. pp. 2303, 821, 1245; (3) Lockport: R. pp. 2316, 723-24, 739, 821, 877, 1245; (4) Albany: R. pp. 723-24, 739, 821, 877, 953, 1045, 1245; (5) Daniel: R. pp. 726-28, 957-59; (6) Aspen: R. pp. 723, 739, 953; (7) Goulds: R. pp. 747, 960, 2113; (8) Industrial Holdings: R. p. 877; (9) Drytech: R. p. 953; (10) PPM: R. pp. 957-58; (11) Ingersoll Rand: R. p. 960; (12) Nash: R. p. 960; (13) Johns-Manville: R. p. 1248. All three of Scapa's experts directly testified that other manufacturer's products caused Mr. Stewart's mesothelioma. (R. pp. 1170, 1283, 1365). In its closing argument, Scapa used the word "insulation" 34 times and told the jury:

[I]t's not a secret that our defense is that we don't believe that Scapa dryer felts caused or substantially contributed to Mr. Stewart's mesothelioma. We believe the thermal insulation that Mr. Jekell never mentioned in his opening statement, but we showed you and brought you full evidence of it was the cause. . . .

We're not blaming anything on Lockport, Mt. Vernon, Asten, or Albany, but the truth of the case is, ladies and gentlemen, which we told you, not the Plaintiff, there were five dryer felt suppliers at Bowater. And the workers all said Mt. Vernon was the major supplier. . . . [Plaintiff] didn't even tell you that those manufacturers were there until we brought it out in the evidence. . . .

So what was the substantial contributing factor to Mr. Stewart's mesothelioma? We brought you evidence, three quarters of a mile of thermal insulation connected to paper machine number one. . . .

Do we blame Bowater? Yes, we do, ladies and gentleman. . . . they were required by law to remove the asbestos products at their mill We had no control over

that. We had no control over all this insulation and this insulation work and this insulation exposure.

[Bowater] had an obligation to provide them a safe workplace. . . . Scapa was not in charge of Bowater. Bowater was.

(R. pp. 1568, 1572, 1574-75, 1577, 1588). Scapa was not denied “the ability to put on an ‘empty chair’ defense” (Br. of App. p. 30) but fully presented an empty chair defense in accordance with S.C. Code Ann. § 15-38-15(D) (Supp. 2018). Its contention to the contrary misstates the plain evidence in the record on appeal and the lower court’s ruling. The jury simply rejected its defense and found Scapa’s dryer felts substantially contributed to Mr. Stewart’s mesothelioma and death. (Verdict form). The Court should affirm on this issue because there is nothing for Scapa to complain about given the extensive empty chair evidence and argument it presented.

C. The Lower Court Correctly Excluded the Claims Forms

Scapa fully presented an empty chair defense as to at least thirteen specific manufacturers, Bowater, and thermal insulation. It complains on appeal about the lower court’s decision to exclude one piece of empty-chair evidence it sought to admit—bankruptcy claims forms in which Mr. Stewart alleged exposure to other entities’ asbestos products. (Br. of App. p. 30). It should not go without notice that Scapa’s answer does not assert an affirmative defense for the negligence of others.⁷ (R. pp. 93-102). At the hearing on Scapa’s motion *in limine* as to the bankruptcy claims forms, the lower court ruled:

⁷ The affirmative defenses include: (1) statute of limitations, (2) lack of privity for warranties, (3) plaintiff’s own negligence, (4) plaintiff’s assumption of the risk, (5) plaintiff’s improper use of the product, (6) plaintiff’s use of the product not for its intended purpose, (7) fault of plaintiff’s employer, (8) fault of plaintiff’s labor union, (9) statutory bar in S.C. Code Ann. § 15-73-20 (1976), (10) workers’ compensation as the sole remedy, (11) strict liability under S.C. Code Ann. § 15-73-10 (1976) did not exist at the time of plaintiff’s injuries, (12) no notification of the defect, (13) product complied with government specifications, (14) judicial estoppel, (15), Scapa’s predecessor was unaware of a defect and product was state-of-the-art, (16) product complied with regulations, and (17) sophisticated user defense. (R. pp. 96-101).

This is a direct attempt to put before the jury the fact that a bankruptcy claim was made on the altar of saying that it's an admission of a party opponent, and I don't regard that as proper under the dictates of *Smith v. Tiffany*. . . .

I do not regard it as appropriate to get into other litigation in which the plaintiff engaged with other parties. If you have direct evidence of the activities of another defendant or another entity that caused exposure, then that's what's called the empty chair defense and that you can go into, but this is not an attempt to do that. That is an attempt to put in the claim form from the bankruptcy claim, and I'm not going to allow that.

(R. pp. 328-29). This ruling expressly follows the Supreme Court's ruling in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), and this Court should affirm.

A nonsettling defendant has the "right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party," S.C. Code Ann. § 15-38-15(D) (Supp. 2018). However, a jury may apportion liability "among only the parties to a lawsuit—not against nonparties." *Machin v. Carus Corp.*, 419 S.C. 527, 546, 799 S.E.2d 468, 478 (2017). "[T]he General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts." *Smith*, 419 S.C. at 557, 799 S.E.2d at 484. These cases only reaffirmed what § 15-38-15(D) already stated—that the empty chair defense is available. The lower court permitted extensive evidence and argument of the defense in compliance with the law.

Scapa argues that *Machin* and *Smith* allow the admission of documents supporting an empty chair defense. (Br. of App. pp. 32, 34). This assertion misses a key distinction. *Machin* and *Smith* allow a defendant *to assert* an empty chair defense but do not *mandate* that *all* supporting documentation of that defense is automatically admissible. Scapa's argument is overly broad and would, as the lower court ruled, allow a defendant to "put before the jury the fact that a

bankruptcy claim was made on the altar of saying that it's an admission of a party opponent." (R. p. 328).

The lower court correctly allowed only "direct evidence of the activities of another defendant or another entity that caused exposure" and not a "claim form from the bankruptcy claim" because, as the Supreme Court pointed out in *Machin*, the difference in "cause in fact and proximate cause is not merely an exercise in semantics." R. pp. 328-29; *Machin*, 419 S.C. at 541, 799 S.E.2d at 475. Direct evidence of another defendant's conduct goes to cause in fact, "the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss." *Machin*, 419 S.C. at 541, 799 S.E.2d at 475 (quoting *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 n.6 (Tenn. 1997)). Whereas an allegation in a claims form relates to "proximate cause, or legal cause, [] a determination of whether legal liability should be imposed where cause in fact has been established." *Machin*, 419 S.C. at 541-42, 799 S.E.2d at 475 (quoting *Snyder*, 955 S.W.2d at 256 n.6). The lower court correctly admitted empty chair evidence but excluded the bankruptcy claims forms.

Scapa also argues the statements in the bankruptcy claims forms are admissible as an admission by a party opponent or a statement against interest under Rule 801(d)(2), SCRE. (Br. of App. pp. 31-33). Scapa does not cite to a single authority for the admission of a bankruptcy claims form as an admission by a party opponent or statement against interest. *Id.* Mr. Stewart's allegation in a bankruptcy claims form is merely that—an allegation submitted to preserve a claim. A bankruptcy claimant is generally subject to a much lower burden of proof than in civil litigation and the burden may differ for each bankruptcy claim depending on the terms of the trust. (R. p. 156). A claims form is not a pleading. Rule 7(a), SCRPC (listing as pleadings "a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim . . . [and]

a third-party complaint”). However, under Scapa’s logic, all pleadings would be admissible as evidence of an admission by a party opponent. That is not and never has been the law in South Carolina. See *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) (“Allegations in a Complaint denied in answer are evidence of nothing.”); Rule 43(g), SCRCP, Note (stating the prohibition on submitting pleadings to the jury is “a needed change to avoid the jury treating pleadings as evidence”).

Underlying Scapa’s argument on this issue is that this is really a back-door attempt to put settlements with other parties in front of the jury. The suggestion is that the plaintiff already received compensation or is trying to get more than he or she should from multiple entities. This is highly prejudicial and irrelevant to the issue of whether Scapa’s asbestos-containing dryer felts substantially contributed to Mr. Stewart’s mesothelioma.

The lower court correctly followed the Supreme Court’s rulings in *Machin* and *Smith* and exercised its discretion to exclude the bankruptcy claims forms.

D. Scapa Failed to Show Harm or Prejudice from the Exclusion of the Claims Forms

Even if the issue is preserved and successful on the merits, the Court may still affirm because Scapa failed to show harm or prejudice from the exclusion of the claims forms. “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *Fields v. Reg’l Med. Ctr.*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Scapa’s only argument that it “suffered prejudice by this exclusion” is that Mr. Stewart’s “causation evidence was already tenuous at best.” (Br. of App. p. 36). The alleged weakness of Mr. Stewart’s causation evidence is not a basis to find Scapa suffered harm or prejudice.

When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, *inter alia*, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; . . .

Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, *i.e.*, the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence.

Fields, 363 S.C. at 31-33, 609 S.E.2d at 512-13; *see also* Rule 103, SCRE, Note ("This is equivalent to South Carolina law holding that reversal is not required unless an error is prejudicial and not harmless."). Scapa proves neither harm nor prejudice.

There is no harm because the bankruptcy claims forms are cumulative to the evidence of Mr. Stewart's exposure to other asbestos products. *See, e.g.*, Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of . . . needless presentation of cumulative evidence."). As detailed in section VI.B. above, at trial Scapa questioned 12 witnesses about other asbestos-containing products at Bowater and Bowater's use of them, named 13 manufacturers or suppliers of other asbestos-containing products at Bowater, and admitted testimony from 3 experts that other manufacturer's products caused Mr. Stewart's mesothelioma. Given the volume of the admitted evidence of other exposures, the bankruptcy claims forms are merely cumulative and Scapa still accomplished its primary objective to argue that its contribution to Mr. Stewart's mesothelioma was minimal and other entities' asbestos products and conduct caused his mesothelioma. The exclusion of the claims forms is not harmful.

Any error is also not prejudicial because there is no probability that the jury's verdict was influenced by the lack of the bankruptcy claims forms in evidence. Scapa does not even make this argument on appeal. (Br. of App. pp. 30-36). Scapa fully presented an empty chair defense and

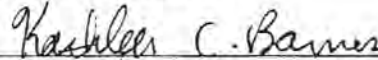
argued the defense in its opening and closing arguments. (R. pp. 461-62, 468-69, 1568, 1572, 1574-75, 1577, 1588). Viewing the case as a whole, the bankruptcy claims forms were not crucial or important in proving a defense theory already testified to by a dozen witnesses, including three experts.

CONCLUSION

The Court should affirm the lower court's denial of Scapa's post-trial motions and remand the judgment as stated in the order denying the post-trial motions.

February 7, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649

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SC Court of Appeals

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

v.

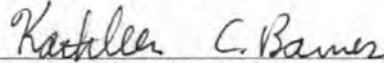
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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

February 7, 2020

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The State of South Carolina
In the Court of Appeals

Appeal from York County
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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SC Court of Appeals

Stephen R. Edwards, Individually and as Personal
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v.

Scapa Waycross, Inc., ... Appellant.

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**The State of South Carolina
In the Court of Appeals**

Appeal from York County
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Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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ARGUMENT

1. Scapa's challenge to the admissibility of the Plaintiff's experts' causation testimony is not waived.

Plaintiff's waiver argument is without merit. The reason South Carolina courts have held that a pre-trial ruling on admissibility of evidence does not to 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, 501 S.E.2d 122, 125 (1998). Here, the absence of a reliable scientific basis for Plaintiff's experts' causation testimony was not subject to change based on developments at trial. Their cumulative exposure testimony was either scientifically reliable, or it was not—no matter what developed at trial.

Like South Carolina, Texas courts hold that a ruling on a motion in limine does not preserve error; a party must object again, at trial, to the challenged testimony to preserve error. *In re Toyota Motor, U.S.A., Inc.*, 56 Tex. Sup. Ct. J. 1007, 407 S.W.3d 746, 760 (Tex. 2013). But the Texas Supreme Court has held that when it comes to a complaint "that scientific evidence is unreliable, and thus, no evidence, a party must object to the evidence *before trial or when the evidence is offered.*" *Maritime Overseas Corp. v. Ellis*, 41 Tex. Sup. Ct. J. 683, 971 S.W.2d 402, 409 (Tex. 1998). A pre-trial objection suffices because, unlike testimony that might later become admissible based on developments at trial, scientifically unreliable testimony can never become admissible. Thus, an objection and ruling before trial is sufficient to preserve error. *Id.*

The law does not require a pointless, vain 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 the testimony. Scapa's motions to exclude the causation testimony of Plaintiff's experts raised the same challenges Scapa is now raising on appeal—that Plaintiff 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), preserved the trial court's error in denying Scapa's motion for judgment n.o.v. despite the legally insufficient evidence of causation.

2. The scientifically-unreliable cumulative exposure testimony given by Plaintiff's experts amounts to no evidence of specific causation.

Dr. Frank and Mr. DePasquale relied on the cumulative exposure theory for their opinions that alleged exposure to asbestos from Scapa dryer felts caused Mr. Stewart's mesothelioma. These opinions are inadmissible under Rule 403 of the South Carolina Rules of Evidence. Further, Plaintiff's arguments fail to resolve two important deficiencies in his experts' opinions—first, the opinions were not connected to evidence of Mr. Stewart's actual exposure to asbestos from Scapa's products, and second, the opinions conflict with the legal standard for asbestos exposure cases in South Carolina.

At its simplest level, Plaintiff's expert testimony went as follows: (i) elicit testimony that there is no safe level of asbestos exposure, and that every exposure contributes to the development of mesothelioma; and (ii) ask whether Scapa was part of a cumulative dose that caused the disease. This expert testimony conflicts with the controlling legal standard. Plaintiff was required to prove that Scapa's

product was a *substantial* factor in Mr. Stewart's development of mesothelioma, not merely a factor. See *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). Thus, this Court should hold that the trial court improperly admitted the specific causation testimony of Plaintiff's experts. Without the expert opinions, Plaintiff failed to prove causation, and Scapa was entitled to JNOV.

A. Plaintiff's experts offered "any exposure" testimony under a different name—"cumulative exposure."

Plaintiff insists that that his experts did not espouse an "each and every exposure" theory of causation under the moniker of a "cumulative exposure" theory. Not so. Mr. DePasquale testified that Scapa's dryer felts were a cause of Mr. Stewart's disease even though he admitted that he had "not calculated what I would expect his dose of asbestos would be from Scapa dryer felts." (Tr. 478, l. 15-23, R.p.885). Dr. Frank likewise relied on an "each and every exposure" theory while referring to it in terms of a cumulative dose:

Q. And you certainly didn't make any calculation as to – or reach any opinion with respect to a specific dose of asbestos that Mr. Stewart might have inhaled solely from Scapa asbestos felts?

A. I made no such calculation.

...

Q. And again, I apologize if this was asked. But you have not made any efforts to quantify Mr. Stewart's asbestos exposure, have you?

A. That is correct.

...

Q. [I]s it your opinion that every exposure that contributes to a person's cumulative dose contributes to the development of a mesothelioma?

A. It is the cumulative dose which is clearly made up of all the exposures they've had over their lifetime. And yes, they all contribute. That doesn't mean that each exposure was the one that caused the mesothelioma, because we never know which fiber on which day from which product did it. But they all certainly increase the risk and ultimately have to be said to be contributory to that individual getting the disease.

Q. Does it matter to you if any particular exposure is above background or not?

A. Well, any exposure has to be at least at background level; and it doesn't matter how much above background that any additional exposures are. Some will clearly contribute more, some will contribute less. Scientifically that's how you look at it. Obviously there are jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that. That said, scientifically, you can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

(4/9/15 Dr. Arthur Frank Depo., p. 35, l. 22 – p. 36, l. 1, R. pp. 2210-2211; p. 52, l. 1-4, R. p.2212; p. 52, l. 11 – p. 53, l. 11, R. pp. 2212-2213).

In other words, because Plaintiff's experts cannot rule out any exposure, they choose to rule every exposure *in—thus, every* exposure contributes to causing mesothelioma. This is directly at odds with *Henderson*—which requires proof of regular, frequent, and proximate exposure to a specific defendant's products for that defendant to be liable. 373 S.C. at 185, 644 S.E.2d at 727. Further, Plaintiff's experts' views have been thoroughly rejected in numerous courts. *See, e.g., Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950,955 (6th Cir. 2011); *Krik v. Owens-Illinois, Inc.*, No. 10-CV-07435, 2015 WL 5050143, at *1 (N.D. Ill. 2015);

Smith v. Ford Motor Co., No.2:08-CV-630, 2013, WL 214378, at *2 (D. Utah Jan. 18, 2013).

Plaintiff argues that a foundational scientific principle is that every exposure to asbestos contributes to a person's cumulative dose, and that cumulative dose becomes a substantial factor in his development of mesothelioma. (Resp. Br. at 16). He insists this supposed scientific fact must be considered in determining causation. This supposed scientific fact, however, cannot be used to usurp the operative legal standard for causation. Plaintiff's approach is wrong as a matter of law because it focuses on the cumulative cause, not the responsibility of the individual defendant. Courts in South Carolina and elsewhere have repeatedly rejected attempts by plaintiffs to rely upon the "each and every exposure" opinion in a case.

In *Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017 (D.S.C. July 21, 2017), Judge Norton rejected this very argument about the scientific fundamentals of the "every exposure" theory. Judge Norton noted that the scientific theories that "mesothelioma may result from very small exposures" and that "there is no safe level of asbestos exposure" is "fairly uncontroversial." *Id.* at *5. He explained "the court is convinced that these basic principles find enough support in the scientific literature that any attempt to challenge them would not disturb their reliability." *Id.* Even if those statements are scientifically valid, however, that is not sufficient to establish the admissibility of an expert's opinion.

Id. at *6 (“Regardless of whether this is sound science, it is inconsistent with the law.”).

Judge Norton emphasized that causation must be analyzed on a defendant-specific basis and that “the basic assertion that ... exposure was significantly above ambient asbestos levels * * * did not speak to the severity of [the plaintiffs’] exposure to [the defendant’s product].” *Id.* (alterations in original). Because the expert’s opinions evaluated causation in a manner inconsistent with the legal standard, the opinions were “essentially irrelevant, and any probative value they may have is easily outweighed by their tendency to confuse or mislead the jury.”⁶ *Id.* Therefore, the expert’s opinions were inadmissible under Rule 403. *Id.* at *8; *see also Butler v. Union Carbide Corp.*, 310 Ga.App. 21, 29, 712 S.E.2d 537, 544 (2011) (excluding “cumulative dose” opinion for its lack of scientific validity and other factors); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (refusing to rely on Dr. Frank’s testimony, citing its numerous methodological shortcomings). This Court should likewise reject this effort to circumvent the proper legal causation standard.

Plaintiff contends that Scapa wants the Court to adopt a standard requiring a plaintiff to prove the exact dose of exposure. (Resp. Br. 16). This is a misrepresentation of Scapa’s arguments. Scapa is not arguing that Plaintiff had to exactly quantify Mr. Stewart’s exposure to asbestos. Plaintiff was, however, required to show—in accordance with the proper legal standard for causation—the connection between the amount of Mr. Stewart’s exposure *from Scapa dryer felts*

and Mr. Stewart's development of mesothelioma. See *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 850 (M.D. Fla. 2016) ("To prove that a given injury was caused by exposure to a specified substance, a plaintiff must demonstrate the levels of exposure that are hazardous to human beings generally, *and* the plaintiffs' actual level of exposure.") (emphasis added). Thus, Plaintiff was required to prove that Mr. Stewart's exposure to asbestos from Scapa dryer felts was within a range sufficient to cause his mesothelioma. *Id.* ("[T]here must be a showing that the plaintiffs' level of exposure is comparable to the levels of exposure that are hazardous as a general matter.").

The court in *Yates* explained that an exact quantification of a plaintiff's exposure is not required; instead, "qualitative" evaluations of asbestos exposures may also be used to establish the appropriate levels which science has shown to be hazardous, and which plaintiff has experienced." *Id.* at 851. The caselaw provides that plaintiffs have flexibility in establishing the "levels of exposure that are hazardous to human beings generally" and drawing comparisons with the levels of exposure experienced by the plaintiff. Yet the flexibility afforded to plaintiffs does not relieve them of the burden to establish these levels and comparisons through application of methodologies meeting the standards for reliable testimony." *Id.* at 852. Thus, Plaintiff had to prove a range of exposures that cause mesothelioma and prove that Mr. Stewart's exposure to Scapa dryer felts fell within that range. He did not do so.

Plaintiff is attempting to make an end run around this requirement by showing every exposure causes mesothelioma and, therefore, whatever exposure Mr. Stewart had to asbestos from Scapa dryer felts caused his mesothelioma. Plaintiff makes this attempted end run because he did not satisfy the proper causation standard. Plaintiff's experts' opinions are unreliable and inadmissible under Rule 403 of the South Carolina Rules of Evidence and should have been excluded. Without expert testimony, Plaintiff cannot meet his burden to prove causation, and Scapa was entitled to JNOV.

Plaintiff also attempts to collapse his experts' causation opinions into the *Henderson* standard. Expert causation and the *Henderson* standard, however, are separate standards. *Henderson* does not address expert testimony. The expert testimony requirement instead comes from the general and specific causation requirements in toxic tort cases generally. *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). Thus, two separate requirements exist. A plaintiff must prove: (i) regular, frequent, and proximate exposure, and (ii) general and specific causation.

In *Rost v. Ford Motor Co.*, a 3-2 decision that Plaintiff relies on as supporting the admissibility of his experts' opinions (Resp. Br. at 19), the majority found Dr. Frank's opinion admissible because—although he testified that every exposure contributes to a plaintiff's cumulative dose—he did not testify that every exposure is a “substantial factor” in causing the plaintiff's mesothelioma. 637 Pa. 625, 151 A.3d 1032, 1045-46 (2016). Two dissenting justices disputed the majority's

reasoning, explaining Dr. Frank's theory "is fundamentally inconsistent with the legal requirement of substantial-factor causation." *Id.* at 1058 (Saylor, C.J., dissenting). The dissenting justices explained that Dr. Frank's theory collapses the legal standard and the general and specific causation requirement into a confusing and speculative opinion that the defendant substantially caused the plaintiff's mesothelioma. *Id.* at 1059-63.

The *Rost* case demonstrates the confusing and misleading nature of the "cumulative dose" theory espoused by Dr. Frank. The experts explain to the jury that "every exposure counts" and "all exposures make up the cumulative dose" while carefully avoiding any statement that every exposure is the *legal* cause of a plaintiff's mesothelioma. *Id.* at 1060. However, the experts never explain how they determine whether a specific exposure is "substantial," and often—similar to this case—never attempt to calculate the amount of the plaintiff's exposure. *Id.* at 1060, 1062.

Instead, the experts simply respond to a general hypothetical question by asserting their belief that any exposure related to the defendant was substantially causative. *Id.* at 1060. The expert's hypothetical answer is, in the words of Chief Justice Saylor, a "reaffirmation[] of his other opinions on general and specific causation, i.e., that 'all [exposures] contributed.'" *Id.* (second alteration in original). Thus, "the basis for Dr. Frank's opinion concerning substantial-factor causation is not materially distinguishable from his other opinions concerning general and specific causation, i.e., that every exposure counts." *Id.* at 1063.

Here, Plaintiff's experts testified that every exposure contributes to a person's cumulative dose and is therefore a cause of his mesothelioma. The experts did not explain how they arrived at the decision that Mr. Stewart's exposure to asbestos from Scapa dryer felts was sufficient to be a substantial cause of his mesothelioma. Thus, they never materially distinguished their legal or specific causation opinions from their general causation opinions. The jury heard what Plaintiff wanted it to hear—every exposure to asbestos causes mesothelioma; therefore, any exposure Mr. Stewart had to Scapa's dryer felts caused his mesothelioma. This testimony is insufficient as a matter of law to affix liability. Thus, Scapa was entitled to JNOV.

3. The trial court abused its discretion in granting Plaintiff's motion for a new trial nisi additur.

Had the jury's award of survival damages been less than Mr. Stewart's medical expenses or failed to account for pain and suffering at all, then the trial court would have been justified in granting additur. *Nestler v. Field*, 426 S.C. 34, 41, 824 S.E.2d 461, 465 (Ct. App. 2019). For example, in *Waring v. Johnson*, this Court held that the trial court properly granted additur for a plaintiff injured in a car wreck where the jury's damage award was in the exact amount of the plaintiff's medical bills and there was evidence she suffered pain and her lifestyle was changed by the accident. 341 S.C. 248, 261, 533 S.E.2d 906, 913 (Ct. App. 2000). But when, as here, the original damage award exceeds the medical expenses by nearly three times, there is no compelling reason for a trial court to "impose its will on the parties and invade the jury's domain." *Nestler*, at 41.

Further, “if inapplicable grounds are given for granting additur, the order fails by error of law.” *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). Here, at the hearing on the motion for new trial nisi additur, the trial court speculated that the jury’s damage awards may have been affected by the “empty chair” evidence presented at trial:

Ladies and gentlemen, I have struggled mightily with this issue of additur. This was a very discerning jury, and I stand by the observations that were made at the time. I haven’t seen a more attentive jury in my very lengthy time in practice, both as a trial practitioner as well as an appellate judge and now a trial judge.

But one thing that presents some difficulty in this case is the empty chair, which was argued very, very heavily in this case. And, really, the empty chair, and I charged the jury this way, is not a doctrine that has any impact on the award of damages. The empty chair is a focus on who is responsible—what entity or who is responsible for the injury suffered by plaintiff. It’s a liability doctrine.

And the defendant, even when both parties are no longer in the case or never were in the case may argue it, if the evidence supports it, that entities mentioned during the course of the trial or discussed during the trial or evidence presented during the trial were responsible for the injury and not the defendant who is before the jury.

And that was argued, but the jury asked a lot of questions about this issue. And, again, I attempted to make a distinction between the empty chair as a function of liability and damages. And I tried to stick very close to what our court has said in that regard, and the charges that I gave are charges that reflect the language that the court has given us to use as trial judges.

(July 11, 2018 Post-Trial Motions Tr. p. 23, l. 15 – p. 24, l.21, R. pp. 1669-1670)

Speculation that a jury’s damage award may have been higher in the absence of a defendant invoking an “empty chair” defense is not a compelling reason for invading the jury’s province. See *ClearOne Commc’n, Inc. v. Biamp Sys.*, 653 F.3d 1163,

1179 (10th Cir. 2011) (observing that courts have refused to indulge speculation that jury improperly apportioned damages).

The trial court's discretion to grant additur here was not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. As courts elsewhere have concluded with respect to additur and remittitur, an adjustment of 70 percent is "so large as to destroy the jury's verdict." *Adams v. Leamon*, No. E2012-01520-COA-R3-CV, 2013 WL 6198306 (Tenn. Ct. App. 2013). The jury's award for survival damages was nearly three times the amount of Mr. Stewart's medical expenses. Furthermore, pain and suffering damages are indeterminate in character, are not capable of exact measurement, and there is no fixed standard whereby such damages can be determined. Thus, the trial court should have left the amount of damages to be awarded for pain and suffering to the judgment of the jury. *See Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962).

Finally, the Court should bear in mind that "[w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935). On the other hand, "where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict." *Id.* As such, a court-imposed increase of damages encroaches on the defendant's right to a jury trial. *ClearOne*

Comm’n, 653 F.3d at 1179. For that reason, a trial court’s decision to invade the jury’s province and grant additur should be rare and must be supported by extremely compelling reasons. The trial court’s additur here was a clear and palpable abuse of discretion.

4. The trial court abused its discretion in allocating settlement proceeds.

The allocation of settlement proceeds between survival and wrongful death claims in this case does not reflect “fairness and justice.” *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000). Plaintiff contends that Scapa’s argument that the allocation must be reasonable under the facts is a “standard for which there is no legal authority.” (Resp. Br. at 33). On the contrary, however, the court in *Riley* affirmed the allocation because it was “unquestionably reasonable under the facts.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015). The allocation here is not reasonable under the facts.

Scapa is not, as Plaintiff contends, relying on a pure “percentage analysis.” Rather, Scapa’s analysis is based on the facts of the case. The trial court found no reason to increase the jury’s award of \$100,000 for the wrongful death damages, given Stewart’s limited relationship with his wrongful death beneficiaries. But the court concluded that the evidence concerning Mr. Stewart’s pain and suffering warranted a 67% increase in the amount of survival damages the jury awarded—from \$600,000 to \$1,000,000. Thus, the court was of the view that the evidence supported a finding that it was reasonable and appropriate for a fraction of the total damages to be awarded for the wrongful death claim and reasonable and appropriate for the vast majority of the total damages to be awarded for Mr. Stewart’s medical bills and pain

and suffering.

Given the court's findings concerning the damages evidence, an allocation of just 20% of the settlement proceeds to the survival claim is not reasonable under the facts. After all, in *Riley*, the Supreme Court held that allocating 75% of the settlement to the plaintiff's survival claim was appropriate due to "the evidence in the record of Riley's conscious pain and suffering." *Id.* at 196. Here, too, given the trial court's own view of the evidence of Mr. Stewart's pain and suffering, a substantial majority of the settlement amount should be allocated to the survival claim, just as it was in *Riley*.

If the requirement that a settlement allocation reflect "fairness and justice"—as this Court stated in *Welch v. Epstein*—means anything, the allocation here must be adjusted. Courts should not wash their hands of reviewing settlement allocations with the rationalization that it is perfectly fine for a party to allocate in a manner that best serves their interests even when the evidence demands a different allocation.

5. The trial court abused its discretion when it denied admission of Mr. Stewart's bankruptcy claims against other manufacturers of asbestos-containing products.

As noted in Scapa's initial brief, the trial court ignored South Carolina statutory law, S.C. Code § 15-38-15(D), and the Supreme Court's rulings in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), and *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017), when the court broadly disallowed all evidence proffered by

Scapa in support of the “empty chair” defense. . . (1/9/18 Pretrial Hearing Transcript, pp. 93, l. 21 – 99, l. 6, R. pp. 325-331).

A. Scapa properly proffered the excluded evidence and preserved the issue for appeal.

Plaintiff’s first argument on this issue is that Scapa somehow failed to preserve the issue for appeal. Plaintiff’s Brief, Pages 34-35. In fact, Scapa did all that was required to preserve this issue for appeal and did so in every phase of the trial. Scapa filed a pretrial motion *in limine* to admit all of the bankruptcy claim forms. (Defendant SCAPA Waycross, Inc.’s Motion *in Limine* to Admit Bankruptcy Claim Forms as Admissions of a Party-Opponent.) The motion *in limine* argued that the evidence should be allowed as an admission of a party-opponent under South Carolina Rule of Evidence 803(d)(2). At the pretrial hearing, counsel for Scapa argued that the bankruptcy forms should be allowed as an admission against interest. (1/9/18 Pretrial Hearing Transcript, pp. 90, l. 13 – 92, l. 7, R. pp. 322-324).

In response, the trial court broadly excluded all evidence supporting Scapa’s “empty chair” defense, including bankruptcy forms filed by Plaintiff and expert testimony by Marc Scarcella explaining the meaning of the forms. (1/9/18 Pretrial Hearing Transcript, pp. 93, l. 21 – 99, l. 6, R. pp. 325-331). The trial judge also refused to compel Plaintiff to produce complete claim forms submitted to other bankruptcy trusts. (1/9/18 Pretrial Hearing Transcript, pp. 99, l. 8 – 100, l. 25, R. pp. 331-332).

The judge reiterated the exclusion of the bankruptcy claim forms both before trial and during Scapa’s case. (1 Tr. 109-111, R. pp. 516-518; 1 Tr. 113-114, R. pp. 520-521; 2 Tr. 318-324, R. pp. 1470-1476; Defendant’s Exhibits No. 1, 2, 5, and 12, R.

pp. 1710-1714, 1715-1716, 1717-2020, 2021-2030). During Plaintiff's case, the court ruled that the bankruptcy claim forms could not come in under the "empty chair" defense and also held "nor would [the claim forms] meet the test of admission of a party component [sic] sufficient to allow its admission into evidence to prove the empty chair as to Leslie or A.P. Green." (1 Tr. pp. 109, l. 24 – 110, l. 1, R. pp. 516-517). The forms and testimony were allowed as a proffer and offer of proof both during Plaintiff's case, (1 Tr. p. 113, l. 10 – 25, R. p. 520), and at the end of trial. . . (2 Tr. p. 318-324, R. pp. 1470-1476).

Similarly, at the end of the trial, the trial judge made clear that her exclusion of the bankruptcy trust forms was based on a broad array of law and legal issues as she understood them:

I excluded the witness on the motion in limine phase primarily because the bankruptcy trust information as I think precluded from introduction by *Smith v. Tiffany* and by other rulings that have been made about the propriety of the use of bankruptcy trust information even beyond *Smith v. Tiffany* in asbestos and mesothelioma litigation. It's not been viewed as proper, just as the information about worker's comp or insurance or other payments to other defendants is not appropriate because of a combination of our rulings by South Carolina Supreme Court and general rulings about the use of bankruptcy trust information all around the country.

(2 Tr. p. 320, l. 16 – 321, l. 2, R. pp. 1472-1473).

In order to preserve for appeal the trial court's exclusion of evidence, a party need only present the evidence and make a proffer of the excluded evidence. *See, e.g., State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 66, 777 S.E.2d 176, 193 (2015); *Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 37, 716 S.E.2d 337, 344 (Ct. App. 2011). Contrary to Plaintiff's contention,

there is no need to re-raise evidentiary issues in a post-trial motion when the court has already ruled on the issue. "Post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it." *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)).

In any event, Scapa did, in fact, argue in favor of the admission of the bankruptcy trust forms and make the proffer at the end of the trial. . . In addition, counsel for Scapa moved for a directed verdict and JNOV under Rule 50, SCRCP:

MR. EARLY: Thank you, Your Honor. If the Court will remember, we broke Friday afternoon. And under Rule 50, you summarily denied our directed verdict motion at that time, both myself and Mr. Jekell's directed motions we hastily made at that time for scheduling. So, again, I'm not waiving anything that could have been done Friday. We're here to close both of our cases now. Under Rule 50, I'm renewing that, renewing all objections we made for preservation and also making my full motion under Rule 50 at this time.

(2 Tr. p. 327, l. 15-24, R. p. 1479). This summary was followed by extensive argument concerning the elements of each cause of action Plaintiff had to prove, including causation. (2 Tr. pp. 327-333, R. p. 1479-1485). In short, Scapa adequately preserved this issue for review.

B. The trial court's exclusion of the bankruptcy claim forms and testimony of Scarcella was prejudicial.

Despite the trial court's clear ruling that "in no direct or indirect way am I going to allow other claims and other potential claimants," Plaintiff contends that the trial court did in fact allow evidence of Decedent's exposure. This is not the case.

Plaintiff cites to portions of the trial transcript where Scapa's counsel and various witnesses referenced Mr. Stewart's exposure to a multitude of asbestos-containing products, including insulation, but at no point was Scapa allowed to actually introduce documentary evidence of that exposure.

The transcript and arguments cited above amply demonstrate the trial court's position and ruling on this issue. Scapa was not allowed to present any documentary evidence of Mr. Stewart's exposure to other asbestos-containing products. Scapa was allowed to question witnesses about the presence of other products, but that was all.

The importance of the excluded documents, and in particular the bankruptcy claim forms, cannot be understated. The claim forms were filed by Plaintiff himself and admitted exposure to many other asbestos-containing products, including insulation products.¹ Scapa's excluded expert, Marc Scarcella, was Scapa's primary witness regarding Mr. Stewart's exposure to other asbestos-containing products and Plaintiff's 38 proof of claim forms submitted to a variety of bankruptcy trusts for recovery. Scarcella would have explained to the jury precisely what these claim forms meant, including testimony that Plaintiff had admitted exposure to asbestos-containing products manufactured by A.P. Green and Leslie Controls. (Scarcella Report, Page 6, Exhibit No. 12, R. 2021-2030 (proffered)). None of this evidence or testimony was allowed.

¹ It bears repeating that Scapa was not attempting to introduce evidence of the claim amounts made by Plaintiff, only that the claims were made. . . . Thus, the evidence did not invade set-off issues to be handled by the trial judge following the verdict.

In addition, Plaintiff's argument that the exclusion of this evidence was not prejudicial ignores the fact that Scapa's primary defense in this matter was the causation of Mr. Stewart's illness and death. Evidence of exposure to other products, most of which contained vastly greater amounts of asbestos and amphibole forms of asbestos, is clearly relevant to the issue of causation. This is especially true in light of the minimal evidence of Mr. Stewart's exposure to Scapa's products in contrast to his massive and regular exposure to the other entities' products.

So, even though Scapa's counsel was allowed to reference other manufacturers, Scapa was not allowed to present documentary evidence of Mr. Stewart's admitted exposure to other products and was not allowed to present Scapa's expert witness on Mr. Stewart's exposure to other products. . . . Given the central issue of causation in this trial, such exclusion of evidence was clearly prejudicial to Scapa, entitling Scapa to a new trial.

C. The trial court erred by excluding Plaintiff's bankruptcy claim forms and the testimony of Scarcella.

Both South Carolina law, S.C. Code § 15-38-15(D), and the Supreme Court's rulings in *Tiffany* and *Machin*, allow the admission of documents and expert testimony in support of the "empty chair" defense. The trial court's exclusion of all documentary evidence of Mr. Stewart's regular exposure to asbestos-containing products

manufactured by other entities and the exclusion of Scapa's expert on the issue² resulted in tremendous prejudice to Scapa, which was denied a key defense that is explicitly guaranteed under South Carolina law. S.C. Code § 15-38-15(D).

Like the trial court, Plaintiff's argument fundamentally misinterprets the South Carolina Supreme Court's rulings in *Tiffany* and *Machin*. Plaintiff argues that the two opinions allow the assertion of the empty chair defense, but somehow do not allow a party to present evidence in support of this defense. Needless to say, a right with a remedy is no right at all. The Supreme Court's allowance of the empty chair defense means nothing if it is not accompanied by the allowance of evidence in support of that defense. As much as Plaintiff would like to remove the evidentiary teeth of the empty chair defense, that is clearly not what the Supreme Court intended.

The South Carolina legislature has made clear that a defendant is allowed to present the empty chair defense. S.C. Code Ann. § 15-38-15(D) ("A defendant shall retain the right to assert that *another potential tortfeasor, whether or not a party*, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.") (emphasis added). Likewise, the South Carolina Supreme Court made clear that defendants are allowed to present the empty chair defense. *Smith*, 419 S.C. at 557, 799 S.E2d at 484.

² Plaintiff does not even attempt to justify the exclusion of Marc Scarcella's testimony in his Brief. . . Plaintiff's Appellate Brief, Pages 38-41.

More to the point, the Supreme Court in *Machin* explicitly rejects Plaintiff's argument that Scapa only has a right to "assert" the empty chair defense, but not present evidence in support of same:

A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff's employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers' compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff's injuries to the plaintiff's employer, the defendant shall, under the well-established "empty chair" defense, have the right to present such evidence and require the fact-finder to consider whether the employer's actions were the cause of the plaintiff's injuries.

* * *

A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Machin, 419 S.C. at 542-43, 799 S.E.2d at 476 (emphasis added).

By the same token, the trial court has excised Plaintiff's own admissions of exposure to other entities' asbestos-containing products, as well as Scapa's expert on the issue. In doing so, the trial court ignored the plain language of *Machin* which acknowledges that the empty chair defense is not "credible" unless the defendant is allowed to present evidence supporting the defense.

Plaintiff claims that the empty chair defense and the language in *Tiffany* and *Machin* "do not mandate that all supporting documentation of that defense is automatically admissible." Plaintiff's Brief, Page 40. . . But this argument ignores South

Carolina's Rules of Evidence. . . Rule 401 adopts a broad definition of relevancy, dictating that "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. . . Thus, any evidence tending to show Mr. Stewart's exposure to other asbestos-containing products is clearly "relevant" to the issue of causation.

More to the point, any such evidence bearing on any fact of consequence, such as causation, is admissible under Rule 402, SCRE, which states that "[a]ll relevant evidence is admissible." In other words, Scapa is certainly entitled to present all evidence that bears on the causation of Mr. Stewart's injuries, including evidence that a third party caused those injuries. . . When the trial court excluded that evidence, it committed reversible error.

CONCLUSION

The Court should reverse the trial court's judgment and render judgment that Plaintiff take nothing. Alternatively, the Court should reverse the trial court's additur ruling and reinstate the jury's damage awards. In the further alternative, the Court should remand the case for a reallocation of the settlement proceeds.

Respectfully submitted,

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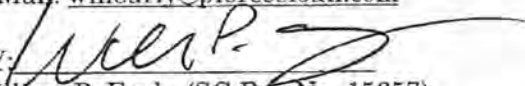
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Scapa Waycross, Inc., Appellant.

Appellate Case No. 2019-000649

Appeal From York County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 5931
Heard April 14, 2022 – Filed August 3, 2022

AFFIRMED

William Peele Early, of Pierce, Sloan, Wilson, Kennedy
& Early, LLC, of Charleston; Joseph C. Wilson, IV, of
Joseph C Wilson Law Firm LLC, of Folly Beach; S.
Christopher Collier, of Lewis Brisbois Bisgaard & Smith
LLP, of Atlanta, Georgia; and Robert B. Gilbreath, of
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Ransom, of Columbia; and William M. Graham, of Wallace & Graham PA, of Salisbury, North Carolina, all for Respondent.

WILLIAMS, C.J.: In this mesothelioma case, Scapa Waycross, Inc. (Scapa) appeals the trial court's (1) denial of its motion for judgment notwithstanding the verdict (JNOV); (2) granting a new trial *nisi* additur for Stephen Redfern Stewart's estate, represented by his son Stephen R. Edwards, regarding survival damages; (3) denial to reallocate Stewart's pretrial settlement proceeds; and (4) refusal to admit certain bankruptcy claim forms Stewart filed against other manufacturers of asbestos-containing products. Principally, Scapa contends Stewart failed to provide legally sufficient evidence to prove Stewart's workplace exposure to its products was a substantial factor that caused his mesothelioma. We affirm.

FACTS/PROCEDURAL HISTORY

Stewart was employed by Bowater Southern Paper Corporation from 1963 to 2002 in Catawba, South Carolina. During his employment, Stewart worked on only paper machine #1, a machine spanning roughly 150 yards that transformed wood pulp into paper. The machine was composed of four large dryer sections, or drums, and each section had a top and bottom dryer felt. Dryer felts were large, weighing well over one thousand pounds and measuring over 150 feet long and twenty feet wide. The wood pulp sat between the two dryer felts as the felts passed the pulp continuously over each dryer section; the felts kept the pulp against the dryer sections and absorbed moisture. A number of the dryer felts used by Bowater on machine #1 were supplied by Scapa. Of the seventy-two dryer felts Scapa sold Bowater between 1963 and 1981, twenty-three contained asbestos. Asbestos constituted between 30 and 70% of a dryer felt's total composition in that time period. An expert who tested two Scapa asbestos-containing dryer felts that Bowater used on machine #1 during Stewart's employment stated that one contained roughly 1,000 pounds of asbestos and the other contained roughly 752 pounds.

While at Bowater, Stewart's job responsibilities routinely involved installing, cleaning, removing, and disposing of dryer felts and cleaning the entire machine. Although Stewart and his coworkers were unable to identify which dryer felts contained asbestos using the naked eye, they all testified to the amount of dust the dryer felts released into the air during the installation, removal, and disposal process, and breathing in the dust. One coworker testified that after installing a

dryer felt, the employees would have to use an air hose to blow themselves off due to the amount of "lint" the dryer felt left on their clothes. They also discussed the felt removal process in which they used Stanley knives to cut the felts into smaller pieces, freeing the felts from the machine and allowing them to drop into the basement. This process also caused the felts to visibly release dust into the air. Dryer felts would also malfunction and tear off of the machine during the manufacturing process causing doors on the machine to open and release paper particles and dust into the air.

Stewart and his coworkers also testified about keeping machine #1 and its building clean—a process that required freeing large amounts of dust and paper particles from the machine and cleaning up the dust. To perform this task, the men would use high-pressure, compressed air hoses to release old dust from the machine. They also used the hoses to blow the dryer felts to release old, caked paper and dust from the felts. This process produced large amounts of dust, or felt hairs, into the air. One coworker testified that during a downtime for the machine, when the men cleaned it or replaced old dryer felts, the floor could be covered with as much as six inches of dust and old paper particles. That coworker also testified that he had seen Stewart covered from head to toe with felt dust and paper after cleaning machine #1 during a down time.

Stewart retired from Bowater in 2002, and in September of 2012 he was diagnosed with malignant pleural mesothelioma, an aggressive form of lung cancer caused by asbestos exposure and inhalation. In February 2013, Stewart initiated this lawsuit against several entities whose business involved producing, using, or selling asbestos containing products. He asserted claims for strict liability, negligence, and breach of the implied warranty of merchantability. In May 2013, Stewart filed an amended complaint that added Scapa to the lawsuit.

On August 23, 2013, at the age of sixty-nine, Stewart died from mesothelioma, and Edwards, individually and as personal representative of Stewart's estate, filed a motion to substitute party and a motion to file a second amended complaint. Edwards¹ filed the second amended complaint in November 2013, substituting Stewart's personal representative as the plaintiff and adding claims for wrongful death and survival. Prior to trial, Stewart settled with all defendants except for Scapa, which proceeded to trial. The jury returned a verdict for Stewart on the negligence claim and awarded \$600,000 in damages for the survival action and \$100,000 in damages for the wrongful death action.

¹ Hereinafter referred to as Stewart.

Following the verdict, Scapa filed motions for setoff, for production of Stewart's settlements and payments with all third-party tortfeasors, and for JNOV. Stewart did not oppose the motion for setoff, but he filed a motion for new trial *nisi* additur, asking the trial court to increase the verdict to \$2.3 million for the survival claim and \$600,000 for the wrongful death claim. After a hearing in which the trial court indicated its intent to grant the motion for additur, Scapa filed a motion to reallocate Stewart's settlement proceeds. Stewart had received \$1.036 million in prior settlements and he had uniformly allocated 80% of the proceeds towards the wrongful death claim and the remainder to the survival claim.

The trial court issued an order addressing each post trial motion. The trial court granted Stewart's motion for new trial *nisi* additur and increased the survival damages award from \$600,000 to \$1 million and did not adjust the wrongful death award. The court denied Scapa's motion for JNOV and its motion for production of Stewart's settlements and payments with all third-party tortfeasors. The court granted Scapa's motion for setoff and reduced the \$1 million survival damages by \$207,200 (20% of Stewart's prior settlement allocation) and the wrongful death award by \$828,000 (80% of settlement allocation), which exceeded the jury's award for wrongful death. After applying the setoff rules, the trial court entered judgment against Scapa in the amount of \$792,800, the amount remaining for Stewart's survival action. The court also refused to adjust Stewart's internal allocation of settlement proceeds. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err in refusing to grant Scapa's motion for JNOV?
- II. Did the trial court err in granting Stewart's motion for new trial *nisi* additur?
- III. Did the trial court err in refusing to reallocate Stewart's apportionment of settlement proceeds?
- IV. Did the trial court err in refusing to admit claims Stewart submitted against bankrupt manufacturers of asbestos-containing products that Bowater used during Stewart's employment?

LAW/ANALYSIS

I. JNOV

Scapa asserts the trial court abused its discretion in failing to grant its motion for JNOV because Stewart failed to prove specific causation between his workplace exposure to their dryer felts and his mesothelioma. Specifically, Scapa contends Stewart failed to meet the specific causation standard set forth in *Henderson v. Allied Signal, Inc.*² through scientifically reliable and relevant evidence because his experts (1) used the "cumulative dose" theory in formulating their opinions and (2) did not provide a specific amount of asbestos Stewart was exposed to from its dryer felts or the threshold exposure to asbestos above which he had an increased risk of developing mesothelioma. We disagree and affirm on this issue.

"A motion for a JNOV is 'merely a renewal of [a] directed verdict motion.'" *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 623, 869 S.E.2d 819, 827 (Ct. App. 2021) (alteration in original) (quoting *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012)), *petition for cert. filed* April 11, 2022. Appellate courts must follow the same standard as trial courts when ruling on a JNOV motion: courts must view the evidence and all inferences reasonably drawn from the evidence in a light most favorable to the nonmoving party. *Id.* at 623, 869 S.E.2d at 827–28. "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." *Id.* at 623, 869 S.E.2d at 828 (quoting *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012)).

In evaluating a motion for JNOV, trial courts are concerned with the existence of evidence, not its weight, and neither appellate nor trial courts have authority to resolve credibility issues or conflicts in the testimony or evidence. *Id.* Finally, a jury's verdict "must be upheld unless no evidence reasonably supports the jury's findings[.]" i.e., a trial court should only grant a motion for JNOV if no reasonable jury could have reached the verdict. *Id.* (quoting *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003)).

A. Causation

In products liability cases, a plaintiff seeking recovery under a theory of negligence must prove the proximate cause of his injury was the defendant's defective product. *Id.* at 624, 869 S.E.2d at 828. In South Carolina, plaintiffs must prove both causation in fact and legal causation, established through the foreseeability of the

² 373 S.C. 179, 644 S.E.2d 724 (2007).

injury, to sufficiently prove proximate causation. *Bray v. Marathon Corp.*, 356 S.C. 111, 116–17, 588 S.E.2d 93, 95 (2003). Proximate cause is a question of fact typically reserved for the jury; a trial court's sole inquiry regarding proximate cause is to determine whether only one reasonable interpretation of the evidence exists, and therefore, only one reasonable conclusion can be reached. *Jolly*, 435 S.C. at 624, 869 S.E.2d at 828.

Further, in toxic tort cases, medical causation requires a plaintiff prove (1) general causation, (2) specific causation, and (3) if there are multiple sources of exposure to a toxin, that the plaintiff's exposure to the defendant's product was a "substantial factor" in his development of a disease. *Id.* at 624–25, 869 S.E.2d at 828–29.

"General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* at 625, 869 S.E.2d at 828 (quoting *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011)). "General causation 'is generally not an issue in asbestos litigation' due to the parties' acknowledgment that exposure to asbestos causes mesothelioma." *Id.* at 625, 869 S.E.2d at 829 (quoting Recent Case, *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even If Legal Conclusions Are Scientifically Sound.* — *Haskins v. 3M Co.*, Nos. 2:15-cv-02086, 3:15-cv-02123, 2017 WL 3118017 (D.S.C. July 21, 2017), 131 HARV. L. REV. 658, 658 n.4 (2017)). Specific causation requires the plaintiff "do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997)). He must prove similarities between himself and the individuals in the studies, which includes proof that (1) he was exposed to the same toxin, (2) the exposure or dose level was comparable to those in the study, (3) the exposure to the toxin occurred before the onset of the injury, and (4) the latency period of the injury is consistent with the individuals in the study. *Id.*

Moreover, a plaintiff proves a specific product is a substantial factor in the development of his disease when the evidence shows the plaintiff was "expos[ed] to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 626, 869 S.E.2d at 829 (quoting *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727); *see also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986) (explaining exposure to a toxic product is actionable when the exposure is frequent, regular, and proximate). The substantial factor test requires the plaintiff to prove "more than a casual or minimum contact with the product" and introduce evidence that

would allow the jury to conclude that the plaintiff's exposure to the defendant's toxic product was a substantial factor in bringing about the injury. *Lohrmann*, 782 F.2d at 1162.

We find Stewart presented sufficient evidence to prove general causation. *See Jolly*, 435 S.C. at 625, 869 S.E.2d at 828 ("General causation is whether a substance is capable of causing a particular injury or condition in the general population."). Dr. Arnold Brody, Stewart's expert pathologist whose career focused on lung cell biology, explained that chrysotile asbestos fibers, the asbestos Scapa used to manufacture its dryer felts, are capable of reaching a human's lungs after a breath of air. He noted that chrysotile asbestos, like all other forms, is toxic and can cause mesothelioma once it reaches the pleural mesothelial cells surrounding the lungs. He also stated that individuals who are exposed to asbestos at levels above background (the amount in the air) for extended periods of time have an increased risk of developing mesothelioma.

Dr. David Harpole, Stewart's cardiothoracic surgeon who specialized in chest cancers, testified that asbestos exposure, over time, has been the number one cause of mesothelioma. He explained that exposure to asbestos fibers causes the mesothelial cells to lose their ability to quit regenerating new cells, causing the pleura to expand and produce significant amounts of fluid in the lungs. As the excess fluid builds up, it crowds the lungs making it difficult to breath and drowns the lungs with fluid. Dr. Harpole also stated, "[T]he longer and the more exposure [an individual has to asbestos] the more likely [he is] to have asbestos related lung diseases with mesothelioma being one of them."

Finally, Dr. Arthur Frank, a physician specializing in occupational medicine, testified via deposition that all types of asbestos, including chrysotile, and all types of exposures are toxic. He further explained that in North America, while it is a rare disease, mesothelioma is almost exclusively related to asbestos exposure. Dr. Frank also stated it is generally accepted in the scientific, medical, and industrial community that there is no known safe level of asbestos exposure. In explaining an individual's "dose response" to asbestos, a medical concept that spans to practically every known disease, he explained that as an individual's dose increases through exposure, the likelihood of a biological response, whether it be asbestosis or mesothelioma, also increases.

Based on the testimony of these three experts, we find Stewart presented sufficient evidence for a jury to find asbestos exposure can cause mesothelioma. *See id.* at 624, 869 S.E.2d at 828 ("In considering a JNOV, the trial court is concerned with

the existence of evidence, not its weight." (quoting *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274)); *see id* at 625, 869 S.E.2d at 828–29 (stating it is generally settled that asbestos causes mesothelioma in humans).

We also find 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. It was undisputed at trial that Scapa produced dryer felts that contained large quantities of asbestos, that twenty-three of those asbestos-containing dryer felts were used on paper machine #1 during Stewart's employment at Bowater, and that Scapa sold asbestos-containing felts to Bowater that were used on paper machine #1 from 1963 to 1981. Stewart and his coworkers testified regarding their job responsibilities, the extent their jobs required them to interact with dryer felts, and how they breathed in dryer felt dust. Stewart stated during his deposition that while he worked as a utility man, his main job responsibility was cleaning the machine and the building around the machine. He explained this involved cleaning a significant amount of dust and other materials off of the machine that were produced during the paper-making process. Other job responsibilities required him to handle the felts on a regular basis. This included installing, maintaining, and removing the old felts. One coworker stated that he remembered seeing Stewart covered from head to toe in dust and paper particles once after cleaning a dryer felt. Another coworker stated that employees had to use air hoses to blow the felt dust off of each other after the installation process. While removing old felts, which involved cutting through the thick, fibrous material with a Stanley knife, Stewart and his coworkers explained that the felts would release visible dust into the air. Stewart also explained that cleaning dryer felts with high pressure air hoses caused dust from the felts to become airborne. Another coworker stated that after cleaning paper machine #1 during a down time the floor could have as much as six inches of dust on it. All but one position Stewart held while at Bowater required him to participate in cleaning the felts or manually handling the felts.

Dr. James Millette, an expert in material sciences who specialized in asbestos, testified regarding two Scapa dryer felts that were used on paper machine #1. Dr. Millette stated one felt contained over 1,000 pounds of asbestos fibers (roughly 99 quadrillion fibers) and the other contained over 700 pounds of fibers (roughly 69 quadrillion fibers). He found that after testing the two felts, they both released breathable asbestos fibers into the air after being blown with compressed air or simply touched with a wet finger. After blowing compressed air across the felts as a test, Dr. Millette concluded the felts released thirty asbestos fibers per cubic

centimeter of air. He also concluded that physically handling the felts and cutting the felts with a knife released breathable asbestos fibers into the air.

Christopher DePasquale, a certified industrial hygienist, stated his job evolved around identifying, recognizing, evaluating, and controlling occupational health hazards. After visiting Bowater, DePasquale testified that based on Stewart's job responsibilities and dealing with Scapa dryer felts that contained between 20 and 70% chrysotile asbestos, Stewart was significantly exposed to asbestos fibers during the time Bowater utilized Scapa asbestos-containing dryer felts. He testified Stewart's levels of occupational exposure to asbestos from Scapa's felts placed Stewart at a greater risk of developing mesothelioma and estimated that he was exposed to 0.1 to 5.0 asbestos fibers per cubic centimeter during each felt-replacement process. He testified that the 20 to 70% asbestos composition of the Scapa dryer felts created a substantial possibility that asbestos fibers would be liberated from the felts during the paper-making process and breathed in by employees.

Dr. Frank testified that while science cannot point to one specific exposure as the sole cause of mesothelioma in an individual, he explained mesothelioma is caused by an individual's cumulative exposure to all types of asbestos from all types of asbestos-containing products the individual has encountered. This theory does not suggest that every fiber is a cause of the disease, or that science points to an exact number of fibers necessary to cause mesothelioma; however, it does suggest that "as the amount accumulates in somebody's body . . . , [he or she is] more likely to get disease than if it was at a lower level." Dr. Frank stated, based on a review of Stewart's records, that through his work at Bowater (spanning roughly forty years), Stewart was exposed to asbestos from Scapa's dryer felts. He explained that Stewart's testimony indicated that at times during his employment the air would be cloudy with dust from the dryer felts and because the felts contained 20 to 70% asbestos fibers, the air contained a substantial amount of asbestos. Based on a degree of medical certainty, Dr. Frank testified that Stewart died from mesothelioma caused by his exposure to asbestos and that his exposure from Scapa's asbestos-containing dryer felts was a substantial contributing factor to his illness and subsequent death.

We find the evidence presented above is sufficient for a jury to find Scapa's asbestos-containing dryer felts were a substantial factor in Stewart developing and dying from mesothelioma. In sum, the evidence showed that (1) dryer felts release large quantities of dust during the paper-making process; (2) Stewart worked closely with the dryer felts on a regular basis, and all but one of his positions at

Bowater required him to regularly handle the dryer felts; (3) Scapa asbestos-containing felts were used at Bowater from 1963 to 1981, roughly half of Stewart's employment; (4) there is not a known safe level of asbestos exposure; and (5) Stewart regularly breathed in dust created from the paper-manufacturing process, which included asbestos fibers from the dryer felts.

B. Cumulative Dose Testimony

Scapa argues the trial court erred in failing to grant its motion for JNOV because Stewart employed the "each and every exposure" theory of causation at trial. Scapa states that Dr. Frank explained the cumulative dose or "cumulative exposure" theory to the jury and utilized that theory in reaching his opinion as to whether Scapa's dryer felts were a substantial factor in causing Stewart's mesothelioma. Scapa conflates these two theories and claims they are inconsistent with the specific causation standard set forth in *Henderson*. We disagree.

"The 'each and every exposure' theory espouses the view that 'each and every breath' of asbestos is substantially causative of mesothelioma." *Jolly*, 435 S.C. at 633, 869 S.E.2d at 833 (quoting *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (2016)); see also *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) ("Also referred to as 'any exposure' theory, or 'single fiber' theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."). This court has recently refused to conflate the cumulative dose theory with the each and every exposure theory, concluding that an expert's opinion which states "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." *Jolly*, 435 S.C. at 635–36, 869 S.E.2d at 834. Rather, this court viewed testimony regarding a plaintiff's cumulative dose as "background information essential for the jury's understanding of medical causation, which must be based on science." *Id.* at 636, 869 S.E.2d at 834–35.

Here, Dr. Frank deployed the cumulative dose theory during his testimony, and he used it 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. Dr. Frank expressly rejected the conflation of the cumulative dose theory and the each and every exposure theory when he stated that all of an individual's exposures to asbestos contribute to his likelihood of developing disease, but "that does not mean that each exposure was the one that caused the

mesothelioma." He explained, "we never know which fiber on which day from which product did it. But they all clearly increase the risk and ultimately have to be said to be contributory to that individual getting the disease." The potential exists for an individual to develop lung disease from asbestos with every fiber that individual intakes, "even though they all do not actually cause the disease." The "cumulative dose" is simply how physicians and occupational health practitioners describe the cause of mesothelioma from asbestos exposure—as the amount accumulates in the body, the likelihood of disease increases. Dr. Frank testified that this is the medical reasoning behind the cause of all but two diseases—the AIDS virus and botulism. Because Dr. Frank used Stewart's cumulative dose as a means to describe the medical reasoning as to how humans develop mesothelioma from asbestos exposure, we find the trial court did not err in failing to grant Scapa's JNOV motion or in allowing Dr. Frank's testimony on the cumulative dose theory at trial. *See id.* at 635–36, 869 S.E.2d at 834 (providing an expert "[s]tating 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"). Therefore, we affirm on this issue.

II. New Trial *Nisi* Additur

Scapa claims the trial court erred in granting Stewart's motion for a new trial *nisi* additur and increasing his survival damages from \$600,000 to \$1 million. We disagree and affirm on this issue.

"The consideration of a motion for a new trial *nisi* additur requires the trial [court] to consider the adequacy of the verdict in light of the evidence presented." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993)). "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*." *Id.* (alteration in original) (quoting *Durham*, 314 S.C. at 531, 431 S.E.2d at 558). "Compelling reasons" must be given to justify the trial court invading the jury's province in this manner." *Id.* at 193, 777 S.E.2d at 829.

"The trial [court that] heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [an appellate court.]" *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723. "Motions for a new trial nisi 'are addressed to the sound discretion of the trial [court].'" *Jolly*, 435 S.C. at 654, 869 S.E.2d at 845 (quoting *Riley*, 414 S.C. at 192, 777 S.E.2d at 828). "However, the [trial] court's exercise of discretion 'is not absolute[,] and it is the duty of [appellate courts] in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law.'" *Id.* at 654–55, 869 S.E.2d at 845 (second alteration in original) (quoting *Riley*, 414 S.C. at 192–93, 777 S.E.2d at 828–29). Appellate courts will not disturb the trial court's decision to grant a new trial *nisi* additur unless the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). Damages in a survival action are awarded to the benefit of the decedent's estate and include damages for medical, surgical, and hospital bills, conscious pain and suffering, and mental distress of the deceased. *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420–21 (Ct. App. 2000).

In this case, the jury returned a verdict that awarded Stewart \$600,000 for his survival claim and \$100,000 for his wrongful death claim. After granting Stewart's motion for new trial *nisi* additur, the trial court issued an order that increased the survival award by \$400,000 to a total of \$1 million. As justification for the additur, the trial court stated that both parties stipulated to Stewart's medical bills and economic damages and Scapa did not contradict Stewart's evidence of noneconomic damages consisting of pain and suffering, loss of enjoyment of life, and mental anguish. The trial court also evaluated damages awarded for pain and suffering in comparable mesothelioma cases and determined that similar circumstances justified awards ranging from \$1.5 million to more than \$20 million. Based on the goal of compensatory damages in South Carolina, as stated in *Clark v. Cantrell*, "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred," the trial court decided the jury's award of survival damages was insufficient. 339 S.C. 369, 378–379, 529 S.E.2d 528, 533 (2000). The trial court then itemized the jury's \$600,000 survival award as being composed of \$241,000 for Stewart's stipulated medical bills and \$359,000 for his noneconomic damages. In conclusion, the trial court found that the noneconomic damages were insufficient and failed to accord with the stipulated evidence and fell "inextricably short of providing fitting compensation for the magnitude of [Stewart's] losses."

We find the trial court did not abuse its discretion in granting the additur. As the trial court noted, both parties stipulated that Stewart was diagnosed with malignant pleural mesothelioma and his medical bills associated with treatment were \$241,822.70. It was undisputed at trial that Stewart suffered greatly as he attempted to treat his disease. His rapid deterioration and ultimate death is well documented and uncontroverted in the record. Although he had several comorbidities—diabetes, a prior heart attack, skin cancer, bladder cancer, prostate cancer, hypertension, and chronic obstructive pulmonary disease—no evidence in the record showed suffering from those health problems interacted with or amplified the pain and suffering Stewart felt from the mesothelioma.

Stewart suffered from lung infections for several years prior to his diagnosis with mesothelioma. What caused Stewart to seek further medical evaluation immediately before his diagnosis was severe pain under his armpits—pain from even a slight touch. After his diagnosis in October 2012, Stewart endured several rounds of chemotherapy and several rounds of thoracentesis, a procedure in which doctors drain excess fluid produced by the tumor. Dr. Harpole, Stewart's cardiothoracic surgeon, explained thoracentesis is unpleasant and that he could not imagine having to withstand the procedure twice a week for three months because doctors stick a large needle through the ribs into the lung to drain the excess fluid. Dr. Harpole also stated that draining the fluid hurt because the tube creates a vacuum that sucks on the lung. Stewart's chemotherapy was administered through two drugs, one of which Dr. Harpole described as a "sledge hammer." Due to the chemotherapy, Stewart lost weight from a lack of appetite, and he testified that his digestive track was dysfunctional and that he was constantly constipated.

Stewart explained during his deposition that his life was very different after his diagnosis. He could barely walk his dog and got winded by walking down the street a short distance. He could no longer complete yard work, garden, clean his house; he could no longer sleep well and had to rely on sleeping pills; he could no longer drive to meet his family in Columbia, a destination where he and his grandchildren would share a meal, visit the zoo, or go to a museum. He described how he was too exhausted to do anything and swelling with emotions, stated, "I never imagined my life would come to what it is."

Despite mesothelioma being a death sentence, Stewart was adamant he prolong his life. He underwent the aforementioned rounds of chemotherapy and thoracentesis, and he opted for a maximally invasive pleurectomy, which Dr. Harpole described as a dissection of the mesothelioma tumor and surrounding plaques from the lung. This procedure required Dr. Harpole to remove one of Stewart's ribs, collapse his

lung, remove his pericardium (heart sack), scrape the tumor off his lung, reinflate the lung, and then reconstruct his diaphragm and heart sack.

In spite of these efforts, Stewart was unable to add any substantial amount of time to his life. He was unable to complete rehabilitation after his pleurectomy. According to Dr. Harpole, it was not from lack of effort; at that point he was "just too debilitated." In August 2013, five months after surgery, Stewart succumbed to mesothelioma at the age of sixty-nine, less than a year after diagnosis.

Because both parties stipulated to Stewart's economic damages (in the form of medical bills) and the record is replete with evidence of his pain and suffering, which was unrefuted by Scapa, we find the trial court was well within its discretion in granting Stewart a new trial *nisi* additur and increasing his survival damages to \$1 million. *See Riley*, 414 S.C. at 192, 777 S.E.2d at 828 ("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." (quoting *Durham*, 314 S.C. at 531, 431 S.E.2d at 558)). Further, 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, we find the trial court provided ample justification for increasing Stewart's survival award. *See id.* at 193, 777 S.E.2d at 829 ("Compelling reasons' must be given to justify the trial court invading the jury's province."). Accordingly, we affirm on this issue. *See Proctor*, 368 S.C. at 320, 628 S.E.2d at 518 (stating appellate courts will not disturb a trial court's decision to grant a new trial *nisi* additur unless the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law).

III. Reallocation of Settlement Proceeds

Scapa argues the trial court erred in failing to reallocate Stewart's internal apportionment of settlement proceeds between the wrongful death and survival actions, claiming the allocation did not reflect "fairness and justice." Scapa claims the trial court should have reallocated the settlement funds "in a manner reasonable under the facts." We disagree and affirm on this issue.

"A non[settlement] defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012); *see also Riley*, 414 S.C. at 195, 777 S.E.2d at 830 ("The right to setoff has existed at common law in South Carolina for over 100 years."). "The reason for allowing such a credit is to prevent

an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425. "In other words, there can be only one satisfaction for an injury or wrong." *Id.* In 1988, South Carolina codified these equitable principles as part of the South Carolina Contribution Among Tortfeasors Act.³

"The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Welch*, 342 S.C. at 313, 536 S.E.2d at 425. "Despite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any 'reduction in the judgment must be from a settlement for the same cause of action.'" *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (quoting *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non[settlement] defendant may be entitled to offset." *Id.*

Here, upon an in camera review of the releases signed by Stewart and the settling defendants, the trial court verified Stewart received \$1,036,000 in pretrial settlements. Stewart conceded Scapa was entitled to setoff and the trial court granted Scapa's motion for setoff. The trial court also determined that Stewart had internally allocated 20% of each settlement to the survival cause of action and 80% to the wrongful death cause of action. This corresponded with settlement totals of \$207,200 for the survival action and \$828,000 for the wrongful death action. The court then applied the setoff rules and reduced the survival award of \$1 million to \$792,800 and negated the wrongful death award.

³ In pertinent part, section 15-38-50 (2005 & Supp. 2021) reads as follows:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater

Scapa now requests this court to find the trial court erred in denying its request to reallocate Stewart's internal apportionment to 90% for the survival cause of action and 10% for the wrongful death cause of action as this would be more "reasonable under the facts" and not just advantageous to Scapa.⁴ We find this argument is without merit as Scapa points only to the fact that the trial court favored Stewart's survival action in granting the additur. *See In re Wells*, 43 S.C. 477, 485, 21 S.E. 334, 337 (1895) (finding the party seeking departure from the application of standard setoff rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just"). Scapa maintains the trial court finding that the evidence presented at trial warranted an increase of the survival claim to make it 90% of the total damages justified a reallocation of Stewart's settlement proceeds to match the respective award percentages—90% for survival and 10% for wrongful death.

Scapa's argument stands in contrast to the principle that plaintiffs who settle with defendants gain control and leverage in relation to nonsettling defendants—control that is often reflected in the plaintiff's ability to apportion settlement proceeds in a manner most advantageous to it. *See Riley*, 414 S.C. at 197, 777 S.E.2d at 831. As the *Riley* court noted,

Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of [settling] parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Id. (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1018 (Ill. App. Ct. 2009)).

Scapa's "percentages-based allocation" argument is an attempt to refashion a disadvantageous allocation of the settlement proceeds. Merely because Stewart's internal allocation of the proceeds is not in Scapa's best interests is "insufficient to justify [an] appellate reapportionment for the sole purpose of benefitting [a

⁴ Indeed, such a reallocation of the settlement proceeds would be greatly advantageous to Scapa and would result in a substantial discount, costing Scapa only \$67,600 in total damages to Stewart. A savings of roughly \$725,200.

nonsettling party]." *Id.* Because 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 corresponded with the percentage of each award, we find the trial court did not err in denying Scapa's motion to reallocate Stewart's settlement proceeds for the purpose of setoff. *See id.* ("If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." (quoting *Lard*, 901 N.E.2d at 1019)). Therefore, we affirm on this issue.

IV. Bankruptcy Claims

Scapa argues the trial court erred in refusing to admit claims Stewart filed with bankruptcy trusts established by companies that manufactured asbestos-containing products used at Bowater. Scapa asserts the claims were admissible as an admission of a party opponent and under *Smith v. Tiffany*.⁵ In holding the claims inadmissible, Scapa contends the trial court "made it impossible for Scapa to try its empty-chair defense." We disagree and affirm on this issue.

The admission or exclusion of evidence is within the sound discretion of the trial court, and the court's decision will not be disturbed absent an abuse of such discretion. *Fields v. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). An abuse of discretion occurs when the trial court's decision is based on an error of law or factual conclusion that lacks any evidentiary support within the record. *Id.* at 26, 609 S.E.2d at 509.

Here, during a pretrial motion, Scapa sought approval from the trial court to admit claims Stewart submitted to bankrupt companies' trusts. Scapa contended it only sought to admit the claims as a party admission of asbestos exposure to other companies' products, not to prove Stewart requested or may have received money from those companies. The trial court decided the issue under *Smith* and denied Scapa's request. In making its ruling under *Smith*, the court found that evidence showing the existence of settling defendants, "other pots of money," and claims against other parties was inadmissible during trial and was properly considered during the setoff portion of trial. In differentiating between Scapa's request to admit the bankruptcy claims with an attempt to establish an empty-chair defense, the court noted the empty chair defense is an attempt to introduce direct evidence

⁵ 419 S.C. 548, 799 S.E.2d 479 (2017).

of the liability of a bankrupt company for the injuries Stewart suffered—evidence the court would admit. The trial court determined Scapa attempted "to put before the jury the fact that a bankruptcy claim was made on the altar of saying that it's an admission of a party opponent."

Our appellate courts hold fast to the longstanding principle that evidence of conduct or statements made in compromise negotiations is inadmissible because the law favors compromise. See *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004). Under Rule 408, SCRE,

Evidence of . . . accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

We find Stewart's trust claims are analogous to an offer or promise to accept compensation for his contact with the bankrupt organizations' asbestos-containing products. In other words, Stewart's claims are an offer to compromise. These settlement trusts are unique in that Stewart's submission of a claim, if he is deemed qualified by the trustee, constitutes his acceptance of whatever amount the trust offers as settlement. See *Oddo v. Asbestos Corp. Ltd.*, 173 So. 3d 1192, 1217 (La. Ct. App. 2015) (holding the trial court did not err in excluding bankruptcy trust claims filed by a mesothelioma patient). Although these claims could amount to a party admission, this type of admission—made for the purpose of settling a claim—is precisely what Rule 408, SCRE, was designed to exclude at trial. The purpose of Rule 408 is to encourage free and unfettered negotiation while providing parties peace of mind that their negotiations—concessions, denials, admissions, and claim amounts—cannot be used against them *to prove liability for the disputed claims or its amount* at trial. See Rule 408, SCRE ("Evidence

of . . . accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."); *McCutcheon*, 360 S.C. at 209, 600 S.E.2d at 111 ("Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability."); *Hunter v. Hyder*, 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960) ("This Court has held that compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made."); *Fesmire v. Digh*, 385 S.C. 296, 307–08, 683 S.E.2d 803, 809 (Ct. App. 2009) ("[Rule 408, SCRE] contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations.").

Further, we find that Scapa's empty-chair defense argument fails to grasp the nature and purpose of these unique trusts and the empty-chair defense. "The empty-chair defense is the defendant's 'right to assert another potential tortfeasor, *whether a party or not*, contributed to the alleged injury or damages' and was codified in the Uniform Contribution Among Tortfeasors Act (the Act) at section 15-38-15 of the South Carolina Code (Supp. 2020)." *Dawkins v. Sell*, 434 S.C. 572, 590, 865 S.E.2d 1, 10 (Ct. App. 2021) (quoting *Smith*, 419 S.C. at 557, 799 S.E.2d at 484). In 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." *Machin v. Carus Corp.*, 419 S.C. 527, 542–43, 799 S.E.2d 468, 476 (2017). Here, the settlement claims Stewart filed would not provide evidence to the jury that is sufficient for it to determine if the bankrupt companies' products were the cause of Stewart's mesothelioma. The claims would only show that Stewart could have been exposed to their products and that he was seeking compensation from the trusts for his mesothelioma. The claims do not in themselves provide a link between Stewart's mesothelioma and the bankrupt companies' products.

Moreover, contrary to Scapa's argument on appeal, the trial court's ruling in no way "made it impossible for Scapa to try its empty-chair defense." The record is replete with instances of Scapa interrogating witnesses regarding other companies that produced asbestos-containing dryer felts, insulation, and valves used at Bowater. Scapa named thirteen manufacturers of asbestos-containing products used at Bowater during Stewart's employment at trial. Therefore, we find the trial

court did not err in refusing to admit the bankruptcy trust claims and did not prevent Scapa from trying its empty-chair defense.

CONCLUSION

Accordingly, the trial court's rulings are

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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

Respondent,

v.

Scapa Waycross, Inc.,

Appellant.

PETITION FOR REHEARING

In accordance with Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant Scapa Waycross, Inc. ("Scapa") requests rehearing of the Court's opinion issued August 3, 2022, affirming the trial court's rulings in favor of Respondent Stewart. *Edwards v. Scapa Waycross, Inc.*, Op. No. 5931 (S.C. Ct. App. filed August 3, 2022).

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

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SC Court of Appeals

ARGUMENT

1. The Court erred in affirming the trial court's finding that Plaintiff established specific causation.

In affirming the trial court's causation ruling, the Court relied on its prior holding in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021). The Court's causation ruling in the *Jolly* case is erroneous for the reasons stated by the appellants in that case in their briefing and petition for rehearing, incorporated herein by reference. Among other things, the Court in *Jolly* erred by (i) relying on *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), and (ii) overlooking the differences between South Carolina law and Pennsylvania law.

Here, as in *Jolly*, the Court failed to appreciate that the "cumulative dose" theory does not differ from the "each and every exposure" theory. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (rejecting a cumulative exposure theory of causation because it was effectively the same as an each and every exposure theory); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar seeks to base his causation opinion not on the thin reed that he cannot rule any exposure out, but on the opposite: he rules all exposures 'in,' boldly stating that Mr. Smith's mesothelioma 'was caused by his total and cumulative exposure to asbestos, with all exposures and all products playing a contributing role.' This asks too much from too little evidence as far as the law is concerned.").

Unlike the Pennsylvania Supreme Court in *Rost*, the South Carolina Supreme Court has never rejected the principle that the substantial factor causation test requires a comparative analysis of different exposures. *See Rost*, 151 A.3d at 1051 n.13. South Carolina's substantial factor causation test derives from the test in *Lohrmann v. Pittsburgh Corning Corp.*,

782 F.2d 1156 (4th Cir. 1986), which the South Carolina Supreme Court adopted in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, (2007).

Courts in the Fourth Circuit applying South Carolina law have found substantial factor causation requires more than proof a decedent had “occupational” or “above background” exposures from a defendant’s product. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) (“[T]he mere fact that ‘occupational’ or ‘above-background’ exposures contribute to the total cumulative dose fails to explain why [a plaintiff’s expert] views them as more causative than non-occupational or below-background exposures.”). It also requires a *contextual analysis*—causation experts must evaluate the relative significance of a decedent’s exposures. *See Haskins*, 2017 WL 3118017, at *8 (“[A] robust concept of ‘substantial causation’ should account for the broader context in which a particular exposure occurs—including the defendant’s relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract.”). Thus, although short exposures *might* satisfy the standard if they are the *only* exposures, it is not enough to show “above background” exposure to a particular product if significant evidence of other exposures exists. *See id.*

Scapa does not contend Plaintiff must exclude every possible cause of Mr. Stewart’s mesothelioma or that a precise quantification of asbestos fibers Stewart was exposed to is required. Rather, Scapa plainly argued, consistent with Fourth Circuit law from which the substantial factor causation test derives, that some qualitative analysis comparing Mr. Stewart’s exposures from Scapa with his exposures from other sources is necessary to determine whether Scapa exposures were a substantial factor in Stewart’s cumulative dose. Plaintiff’s experts cannot reliably opine that exposure to Scapa dryer felts was a substantial factor in

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

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

The Court also misapprehended the testimony and legal standard when it relied on the word “contributing” as distinguishing Dr. Frank's testimony. “Substantial factor” and “substantial contributing factor” have the same meaning. Courts regularly refer to the standard as requiring proof that a defendant's product was a “substantial contributing factor.” See, e.g., *Haislip v. Owens-Corning Fiberglas Corp.*, 86 F.3d 1150 (4th Cir. 1996) (“To prevail on a product liability asbestos action under North Carolina law, the estate needed to establish that OCF–Kaylo was a *substantial contributing factor* to Elmore's contraction of mesothelioma.” (emphasis added)); *Pace v. John Crane, Inc.*, No. 2:11-CV-02688-BM, 2014 WL

12638334, at *1 (D.S.C. Nov. 25, 2014) (“The exposure to John Crane, Inc. products was a *substantial contributing factor* in the development of William Pace’s mesothelioma.” (emphasis added)), *aff’d sub nom. Pace v. Air & Liquid Sys. Corp.*, 642 F. App’x 244 (4th Cir. 2016). Thus, Dr. Frank testified about the legal standard, and the Court must evaluate his testimony as he gave it, rather than focusing on key words.

The Court emphasized Dr. Frank’s testimony that mesothelioma is caused by a person’s cumulative dose. The question for Dr. Frank at trial, therefore, was which exposures were *substantial* contributors to the cumulative dose and which exposures were *insubstantial* contributors. But Dr. Frank admitted he made no effort to distinguish the two:

Q. And you certainly didn’t make any calculation as to – or reach any opinion with respect to a specific dose of asbestos that Mr. Stewart might have inhaled solely from Scapa asbestos felts?

A. I made no such calculation.

Q. And again, I apologize if this was asked. But you have not made any efforts to quantify Mr. Stewart’s asbestos exposure, have you?

A. That is correct.

Q. [I]s it your opinion that every exposure that contributes to a person’s cumulative dose contributes to the development of a mesothelioma?

A. It is the cumulative dose which is clearly made up of all the exposures they’ve had over their lifetime. And yes, they all contribute. That doesn’t mean that each exposure was the one that caused the mesothelioma, because we never know which fiber on which day from which product did it. But they all certainly increase the risk and ultimately have to be said to be contributory to that individual getting the disease.

Q. Does it matter to you if any particular exposure is above background or not?

A. Well, any exposure has to be at least at background level; and it doesn’t matter how much above background that any additional exposures are. Some will clearly contribute more, some will contribute less. Scientifically that’s how you look at it. Obviously there are

jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that. That said, scientifically, you can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

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

In short, Dr. Frank testified every exposure to asbestos was a substantial contributing factor in causing Mr. Stewart's disease. He thus offered the unreliable "each and every exposure" opinion. As a result, the trial court's judgment must be reversed.

2. The Court's additur ruling improperly afforded the trial court unfettered discretion and did not require compelling reasons required by law.

The Court should reverse the trial court's *nisi additur* ruling. Had the award of survival damages been less than Mr. Stewart's medical expenses or failed to account for pain and suffering at all, then the trial court would have been justified in granting additur. *See Nestler v. Field*, 426 S.C. 34, 41 (Ct. App. 2019). For example, in *Waring v. Johnson*, this Court held the trial court properly granted additur for a plaintiff injured in a car wreck where the damage award was in the exact amount of the medical bills and there was evidence the plaintiff suffered pain and her lifestyle was changed post-accident. 341 S.C. 248, 261 (Ct. App. 2000). But when, as here, the original damage award exceeds the medical expenses by nearly three times, there is no compelling reason for a trial court to "impose its will on the parties and invade the jury's domain." *Nestler*, 426 S.C. at 41.

Further, "if inapplicable grounds are given for granting additur, the order fails by error of law." *Green v. Fritz*, 356 S.C. 566, 570 (Ct. App. 2003). Here, at the hearing on the motion for new trial nisi additur, the trial court speculated the jury's damage awards may have been affected by the "empty chair" evidence presented at trial:

Ladies and gentlemen, I have struggled mightily with this issue of additur. This was a very discerning jury, and I stand by the observations that were made at

the time. I haven't seen a more attentive jury in my very lengthy time in practice, both as a trial practitioner as well as an appellate judge and now a trial judge.

But one thing that presents some difficulty in this case is the empty chair, which was argued very, very heavily in this case. And, really, the empty chair, and I charged the jury this way, is not a doctrine that has any impact on the award of damages. The empty chair is a focus on who is responsible—what entity or who is responsible for the injury suffered by plaintiff. It's a liability doctrine.

And the defendant, even when both parties are no longer in the case or never were in the case may argue it, if the evidence supports it, that entities mentioned during the course of the trial or discussed during the trial or evidence presented during the trial were responsible for the injury and not the defendant who is before the jury.

And that was argued, but the jury asked a lot of questions about this issue. And, again, I attempted to make a distinction between the empty chair as a function of liability and damages. And I tried to stick very close to what our court has said in that regard, and the charges that I gave are charges that reflect the language that the court has given us to use as trial judges.

(R. 1669-70).

Speculation that a jury's award may have been higher absent a defendant invoking an "empty chair" defense is not a compelling reason for invading the jury's province. *See ClearOne Commc'n, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1179 (10th Cir. 2011) (observing that courts have refused to indulge speculation that jury improperly apportioned damages). Thus, the trial court should have left the amount of damages to be awarded for pain and suffering to the judgment of the jury. *See Harper v. Bolton*, 239 S.C. 541, 548 (1962).

Finally, the Court should bear in mind that "[w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). On the

other hand, “where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.” *Id.* As such, a court-imposed increase of damages encroaches on the defendant’s right to a jury trial. *ClearOne Comm’n*, 653 F.3d at 1179. For that reason, a trial court’s decision to invade the jury’s province and grant additur should be rare and must be supported by extremely compelling reasons. The trial court’s additur here was a clear and palpable abuse of discretion.

3. The Court should grant rehearing and reverse the trial court’s settlement-proceeds allocation ruling.

Finally, the Court erred in its settlement-proceeds allocation analysis for the reasons stated by Scapa in its briefing and at oral argument and the reasons stated below.

The Court approved Plaintiff’s unilateral allocation in part because South Carolina case law favors a plaintiff’s ability to apportion settlement proceeds in the manner most advantageous to it. The plain language of § 15-38-50, however, contradicts the Court’s holding: “[A] release or a covenant not to sue or not to enforce judgment . . . reduces the claim against the others to the extent of any *amount stipulated by the release* or the covenant, or in the *amount of the consideration paid for it*.” S.C. CODE ANN. § 15-38-50 (emphases added). 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).

Courts elsewhere applying setoff statutes like § 15-38-50 have held that where a settlement agreement doesn’t allocate proceeds among separate claims, the settlement’s total amount must be set off from the entire verdict. *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (applying FLA. STAT. ANN. § 768.31(5)); *see also Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980) (applying CAL. CIV. PROC. CODE § 877 and holding, absent good faith allocation of settlement consideration between causes

of action in which joint tortfeasor status was alleged, defendants were entitled to setoff of entire settlement figures); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000) (finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid a full set-off). These cases are consistent with South Carolina law and policy.

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

The court distinguished cases where plaintiffs and defendants agree to an allocation. In cases where a “settlement agreement itself recognize[s] two separate and distinct causes of action and apportion[s] the proceeds accordingly,” a non-settling defendant may be entitled to set off only the funds paid in settlement for a specific cause of action. *Id.* at 1349. Private, unilateral allocation agreements, however, “are contrary to all concepts of fairness” and “would often result in a windfall recovery” for the plaintiffs. *Id.* at 1350. Thus,

The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award. . . . The rights of both the settling and non-settling joint tort-feasors would be adversely affected if we were to

allow plaintiffs to privately and unilaterally apportion the proceeds of a settlement agreement containing a general release.

Id.

The same analysis applies here. Plaintiff entered into general settlement agreements that did not allocate settlement funds and instead provided for “undifferentiated lump sum” payments. *See id.* Plaintiff then privately and unilaterally allocated the funds to minimize a setoff. This allocation is inconsistent with the controlling statutory mandates. The law does not give plaintiffs a right to unilaterally manipulate settlement allocations to minimize setoff and obtain a double recovery. Rather, to effectuate the policy against double recovery and give meaning to the language of section 15-38-50, the Court should reverse the trial court’s judgment and direct a complete setoff against the total jury award.

Conclusion

Based on the above, Scapa requests the Court grant rehearing and reverse the trial court’s judgment.

(Signature Page Follows)

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September 14, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
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Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

Stephen R. Edwards, Individually and as Personal
Representative of the Estate of Steven Redfearn
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v.

Scapa Waycross, Inc.,

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Scapa Waycross, Inc, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

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Petition for Rehearing

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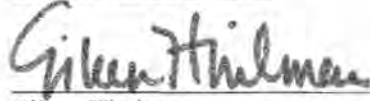
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A handwritten signature in dark ink, appearing to read "Eileen Hindman". The signature is written in a cursive, flowing style. It is positioned above a horizontal line.

Eileen Hindman
Administrative Assistant

September 14, 2022

Eileen Hindman

From: Eileen Hindman
Sent: Wednesday, September 14, 2022 2:32 PM
To: tom@thhpc.com; greg@hyland-law.com; fritz@j-dlaw.com;
mwallace@wallacegraham.com; bgraham@wallacegraham.com;
amartinez@wallacegraham.com; kbarnes@barneslawfirm.com
Cc: joe@follybeachlaw.com; rgilbreath@hpylaw.com; willearly@piercesloan.com; Mitch Brown
Subject: Stephen R. Edwards v. Scapa Waycross, Inc. - Appellate Case No. 2019-000649
Attachments: 2022.09.14 Scapa Petition for Rehearing (Edwards, Stewart).pdf; 2022.09.14 Proof of Service to Petition (Edwards, Stewart).pdf

Good afternoon,

Attached please find a Petition for Rehearing in the above matter. Service is made via email pursuant to the Supreme Court Order 2022-05-06-04.

Thank you.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649

RECEIVED

Sep 22 2022

SC Court of Appeals

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

v.

Scapa Waycross, Inc.,.....Appellant.

RETURN TO PETITION FOR REHEARING

Pursuant to Rules 220 and 240(e), SCACR, and the Court's September 15, 2022 letter requesting a return to Appellant Scapa Waycross, Inc.'s petition for rehearing, Respondent Stephen R. Edwards, individually and as personal representative of the Estate of Steven Redfearn Stewart ("Stewart"), submits this return.

On August 3, 2022, the Court issued unanimous Opinion No. 5931 affirming the decision of the lower court in favor of Stewart. The law and record support the Court's Opinion, and Scapa fails to show any point overlooked or misapprehended by the Court. Therefore, the Court should deny the petition for rehearing.

For brevity, Stewart incorporates the Final Brief of Respondents, arguments made at the oral argument in this case, and the arguments in opposition to the petition for rehearing filed in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021).

ARGUMENT

I. The Court correctly held Stewart established specific causation.

This Court affirmed the lower court's decision to deny Scapa's JNOV motion on the basis that Stewart presented sufficient evidence of specific causation. Scapa's main contention on rehearing is that the Court "failed to appreciate" that the cumulative dose and each-and-every-exposure theories are really the same thing. (Pet. pp. 2-3). This is incorrect.

The Court recognized that cumulative dose is "a means to describe the medical reasoning as to how humans develop mesothelioma from asbestos exposure." *Edwards v. Scapa Waycross, Inc.*, Op. No. 5931 p. 11 (Ct. App. 2022). The Court relied on its recent decision in *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 865 S.E.2d at 819 (Ct. App. 2021), in which it held that 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." *Id.* at 635-36, 865 S.E.2d at 26-27. *Jolly* is correct, controlling law, and Scapa provides no legal basis to overturn it in this case.

Scapa cannot ask this Court to overturn *Jolly* now when it did not make a motion 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.

The Court correctly rejected Scapa's legal argument and mischaracterization of the evidence presented by Stewart. Stewart presented evidence to satisfy the *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), specific causation standard requiring evidence of frequency, regularity, and proximity to Scapa's product. The evidence of cumulative exposure is medical background to explain to the jury how mesothelioma develops.

Factually, Scapa alleges that Stewart did not provide “some qualitative analysis comparing Mr. Stewart’s exposures from Scapa with his exposures from other sources” and suggests that Stewart did not show product-specific exposure evidence. (Pet. pp. 3-4). Regardless of whether that is legally required, Scapa’s allegation is factually inaccurate and legally disingenuous. It is factually inaccurate because Stewart’s experts considered the other potential exposures to asbestos and still concluded that the specific Scapa dryer felts were a substantial cause of Mr. 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 on piping because his investigation showed the “vast majority” of the pipes were cladded. (R. pp. 849-50). He discounted gaskets because Mr. Stewart did not remember working with gaskets or packing. (R. p. 894). Stewart accounted for other potential exposures. This Court found the evidence showed that only two of the twenty-three Scapa dryer felts on machine while Mr. Stewart worked there contained over 1,700 pounds of asbestos and close to 170 quadrillion asbestos fibers. *Edwards*, Op. No. 5931 pp. 2, 8.

Scapa’s argument is legally disingenuous because its defense theory was that Mr. Stewart’s mere presence (and not physical or direct work) around other asbestos-containing products caused his mesothelioma.¹ Based on its own defense theory of Mr. 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

¹ 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.

actually worked.” *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (internal quotation marks omitted).

Finally, Scapa takes issue with the Court’s use of the word “contributing” in the following sentence² of its opinion: “Based on a degree of medical certainty, Dr. Frank testified that Stewart died from mesothelioma caused by his exposure to asbestos and that his exposure from Scapa’s asbestos-containing dryer felts was a substantial contributing factor to his illness and subsequent death.” *Edwards*, Op. No. 5931 p. 10; Pet. for Rehearing pp. 4-6. Scapa misinterprets the Court’s use of the word “contributing.” The Court did not misapprehend the legal standard. It used the word “contributing” in the section of the opinion addressing the existence of evidence of specific causation, not the section addressing the cumulative dose theory. The sentence, in proper context, stands for the proposition that Dr. Frank did consider and render an expert opinion on whether Mr. Stewart’s exposure to Scapa dryer felts substantially contributed to his mesothelioma, and the Court’s conclusion that such testimony (viewed in a light most favorable to Stewart) satisfies the specific causation test.

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. (Pet. pp. 5-6) (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** does of Scapa asbestos fibers that Mr. Stewart inhaled. (Pet. pp. 5-6). That does not mean that he could not testify, based on the testimony about Mr. Stewart’s exposure to and work with Scapa dryer felts, that Scapa’s asbestos was a substantial contributing factor to Mr. Stewart’s mesothelioma.

² This is the only place that the word “contributing” appears in the opinion.

Scapa's rehearing arguments on this issue amount to an improper attempt to argue against *Jolly* as precedent and a mere disagreement with the Court's view of the evidence. Neither is a basis for rehearing, and the Court should deny the petition on this issue.

II. The Court correctly affirmed the lower court's decision to grant *additur*.

The Court 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 [Mr. 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*, Op. No. 5931 p. 14). 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 rehearing on this issue.

Scapa argues that *additur* is only "justified" if the jury does not award all medical expenses or does not "account for", *i.e.* award any amount for, pain and suffering. (Pet. p. 6). 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*. (Pet. p. 6). 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. (Pet. pp. 6-7). 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 legally 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 Mr. Stewart's comorbidities "interacted with or amplified the pain and suffering Stewart felt from the mesothelioma." *Edwards*, Op. No. 5931 p. 13; *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). Scapa does not even argue on rehearing that the co-morbidities affect the *additur* decision, despite that being a central argument in its briefing.

The undisputed testimony is that Mr. Stewart endured **daily** pain for **years** before and after his diagnosis. The undisputed testimony is that, after he began treatment described as unimaginably painful and a sledge hammer, Mr. 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.

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 agony that Mr. Stewart endured and tried so bravely to fight in order to spend more time with his family. The Court should deny Scapa's petition on this issue.

III. The Court correctly affirmed the lower court's refusal to reallocate the apportionment of settlement proceeds.

Scapa's sole argument on rehearing of the allocation issue is that the Court's decision infringes on S.C. Code § 15-38-50 because it accepts a settlement allocation agreed to by a plaintiff and a settling defendant. (Pet. pp. 8-10). 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. "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 to move to argue against precedent at oral argument. In *Riley*, the Supreme Court squarely considered the language of § 15-38-50 and that the plaintiff and settling defendants agreed to the allocations, but still upheld using them for setoff. "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. This Court 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, or unfair simply because it

avored Stewart and did not reflect percentages that corresponded with the percentages of each award.” *Edwards*, Op. No. 5931 p. 17.

The Court should deny Scapa’s petition on this issue.

Scapa does not challenge the Court’s ruling on the bankruptcy documents and, therefore, that is the law of the case.

CONCLUSION

The Court should deny Scapa’s petition for rehearing in its entirety.

September 22, 2022

Respectfully submitted,

s/Kathleen C. Barnes

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649

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Sep 22 2022

SC Court of Appeals

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

v.

Scapa Waycross, Inc.,.....Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of Respondent's *Return to Petition for Rehearing* has been served upon counsel for Appellant on September 22, 2022, via electronic mail at the email addresses set forth below.

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September 22, 2022

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September 22, 2022

Via E-mail Only

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
ctappfilings@sccourts.org

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Sep 22 2022

SC Court of Appeals

Re: *Stephen R. Edwards, Individually and as Personal Representative of
the Estate of Steven Redfearn Stewart v. Scapa Waycross, Inc.*
Appellate Case No. 2019-000649

Dear Ms. Kitchings:

Enclosed for electronic filing please find the Respondent's Return to the Petition for Rehearing in the above-referenced case. Also enclosed is a proof of electronic service.

By copy of this letter, I am serving all counsel of record via email only. Thank you.

With kind regards, I am,

s/Kathleen C. Barnes

Enclosure

cc: Mitchell Brown
William P. Early
Joseph C. Wilson, IV
S. Christopher Collier
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William M. Graham
Mona Lisa Wallace
Gregory Hyland
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Sep 29 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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

v.

Scapa Waycross, Inc., Appellant.

REPLY IN SUPPORT OF PETITION FOR REHEARING

Introduction

Respondent, in the Return to the Petition for rehearing, complains that Petitioner made no motion to orally argue against precedent, that the rehearing should be denied because the opinion was “unanimous,” and that Scapa “fails to support any point overlooked or misapprehended by the court.”

Scapa need not make a motion to be allowed to argue against precedent *in briefing*. In any event, *Jolly v. Gen. Elec. Co.*, 435 S.C. 607 (Ct. App. 2021) is not yet final¹. Scapa in its rehearing

¹ The certiorari petition regarding the decision in *Jolly* remains pending before the South Carolina Supreme Court as of this filing. The remittitur in that matter has not yet been released because it is not considered a final decision as yet.

petition noted many points and arguments it believes this Court overlooked and misapprehended. While it is true that the panel deciding this case was unanimous, such does not preclude rehearing. Rehearing should be granted.

Argument

I. The Court erred in affirming the trial court's finding that Plaintiff established specific causation.

"Junk science" cheapens all science. The South Carolina courts ought not to open their courthouse doors to the junk science "cumulative exposure" theory of causation for asbestos exposure cases. The Court should reconsider and follow the lead of courts around the nation that have rejected that theory.

In this state, a plaintiff seeking damages for injuries caused by asbestos exposure must prove he had "actionable exposure" to the specific defendant's product. *See Henderson v. Allied Signal*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To prove actionable exposure, a plaintiff must meet the "frequency, regularity, and proximity" standard (the "*Henderson/Lohrmann* standard") in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727.

The plaintiff must prove both general and specific causation through expert testimony. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). The trial court must determine the reliability of that expert testimony under the factors in *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999); *Graves v. CAS Med. Sys.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012). The court must look to the following factors: (i) the publications and peer review of the technique; (ii) prior application of the method to the type of evidence involved in the case; (iii) the quality control procedures used to ensure reliability; and (iv) the consistency of the method with recognized scientific laws and procedures. *Id.*; *Council*, 335 S.C. at 19, 515 S.E.2d at 517.

Because “the main tenet of toxicology is the ‘dose-response’ relationship” and “most chemically induced adverse health effects clearly demonstrate ‘thresholds,’ there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of ‘causation’ can be inferred.” David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol’y 5, 39 (2003). Thus, in mesothelioma cases:

To prove that a given injury was “caused by exposure to a specified substance,” a plaintiff must demonstrate “the levels of exposure that are hazardous to human beings generally,” and “the plaintiff’s actual level of exposure.” *Westberry*, 178 F.3d at 263 (quotations omitted). Moreover, there must be a showing that the plaintiff’s level of exposure is comparable to the levels of exposure that are hazardous as a general matter. *See id.* (“[S]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to *such quantities*, are minimal facts necessary to sustain the plaintiffs’ burden in a toxic tort case.”) (emphasis added) (quoting *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)); *see also Zellars v. NexTech Northeast, LLC*, 895 F. Supp. 2d 734, 742 (E.D. Va. 2012) (“‘Ruling in’ exposure to a particular substance as a possible cause of a patient’s medical condition requires (1) a reliable determination of the level of exposure necessary to cause the condition and (2) a reliable determination that the patient was exposed to the substance at this level.”).

Yates v. Ford Motor Co., 113 F. Supp. 3d 841, 850 (E.D.N.C. 2015).

Here, Respondent and his experts indisputably relied on the “each and every exposure” or “cumulative dose” theory of causation—a theory rejected by most courts that have addressed it. As the court in *Yates* explained:

The theory that “each and every exposure to asbestos products results in injury to the person so exposed” has made repeat appearances in the realm of asbestos litigation. *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 749-50 (N.D. Ill. 2014); *see* William L. Anderson, “The ‘Any Exposure’ Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008,” 22 KAN. J.L. & Pus. PoL’Y 1 (2012). Also referred to as “any exposure” theory, or “single fiber” theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury. *See Krik*, 76 F. Supp. 3d at 749-50; *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013). Numerous courts have excluded expert testimony or evidence grounded in

this theory, reasoning that it lacks sufficient support in facts and data. E.g., *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 632-33 (E.D. La. 2015); *Krik*, 76 F. Supp. 3d at 752-53, *Anderson*, 950 F. Supp. 2d at 1225; *Sclafani v. Air & Liquid Sys. Corp.*, No. 2:12-CV-3013, 2013 WL 2477077, at *5 (C.D. Cal. May 9, 2013); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1166 (E.D. Wash. 2009).

113 F. Supp. 3d at 846.

Courts reject the “every exposure” or “cumulative dose” theory (by whatever name) because it is irreconcilable with the “substantial factor” causation rule long used in South Carolina and almost all other jurisdictions. *See Schwartz v. Honeywell Int’l Inc.*, No. 2016-1372, 2018 WL 793606, at *3 (Ohio Jan. 24, 2018) (finding it “impossible” to reconcile a 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.”); *see also Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005).

The theory would impose “precisely the sort of unbounded liability that the substantial factor test was developed to limit.” *Mcindoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016). It is also irreconcilable with the requirement that a plaintiff prove the amount, duration, and frequency of exposure. *In re New York City Asbestos Litigation*, 48 N.Y.S.3d 365 (N.Y. App. Div. 2017). Thus, the “cumulative dose” theory is inconsistent with the *Henderson/Lohrmann* standard. Respondent’s attempt to prove causation through the “cumulative dose” theory requires reversal for several reasons:

First, the *Henderson/Lohrmann* standard requires defendant-specific opinions. The substantial causation test is contradicted by “a theory that says every defendant that contributed to the overall exposure is a substantial cause.” *Schwartz*, 2018 WL 793606, at *3. Liability should

not be imposed under *Henderson* unless the product or conduct of the particular defendant under consideration is itself a substantial contributing factor.

Courts presented with the same approach Respondent used here have forcefully rejected it. *See Krik v. Owens-Illinois, Inc.*, 2015 WL 5050143, at* 1 (N.D. Ill. 2015) (barring Dr. Frank's testimony because "To find a defendant liable, plaintiff must prove causation attributable to that defendant. It would be misleading and confusing for an expert to opine—particularly using the legal terminology of 'substantial contributing factor'—that (plaintiff's) cancer was caused by defendants and the foundation for the opinion was that every exposure (without regard to dosage) contributes to cause cancer."); *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011) (if Dr. Frank's opinion that every exposure is substantial was "sufficient for plaintiff to meet his burden, the Sixth Circuit's 'substantial factor' test would be meaningless" (citing *Lindstrom*, 424 F.3d at 493)). The "cumulative dose" theory makes a mockery of the word "substantial." Plaintiff seeks, in effect, to create a new standard of causation: that *any contribution whatsoever* to a dose of asbestos exposure subjects one to liability. This is simply not the law in South Carolina.

Second, this theory of causation has not only been rejected by other courts, each of Plaintiff's experts' opinions have been excluded in other cases as either unreliable or contrary to the plaintiffs' burden of proof. The court in *Yates, supra*, cited numerous authorities for the proposition the theory "lacks sufficient support in facts and data" and rejected Dr. Brody's opinion that exposure at levels "above background" contribute to the development of mesothelioma. 113 F. Supp. 3d at 846-47. The court further found the "no safe level/every exposure/cumulative exposure" opinion of Dr. Frank did not satisfy the types of factors required by *Council*; there are no quality control procedures or other methods used to ensure its reliability; it is wholly

inconsistent with recognized scientific laws and procedures; and it “cannot be tested, has not been published in peer-reviewed works, and has no known error rate.” 113 F. Supp. 3d at 846.

Similarly, the court in *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 849, 850 (D. Md. 2017), noting that “Dr. Frank’s ultimate opinion is not tied to any specific quantum of exposure that is attributable to defendant,” concluded it was not based on reliable principles and methods. *See also Haskins v. 3M Company*, 2017 WL 3118017 (D.S.C. 2017) (excluding the “each and every exposure” opinion under Rule 403 because it was directly at odds with substantial causation requirements); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 544 (Ga. Ct. App. 2011) (excluding “cumulative dose” opinion for its lack of scientific validity and other factors); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (refusing to rely on Frank’s testimony, citing its numerous methodological shortcomings).

Third, the “cumulative dose” theory rests on the unfounded notion that there is “no safe level” of exposure. This contradicts the fundamental principle of science, often expressed as “the dose makes the poison,” that there is a “dose-response” relationship between exposures and disease, and thresholds needed to produce disease. *Eaton, supra*. The concept that there is “no safe level” of asbestos exposure is based on the purported absence of evidence of a “threshold” level of exposure necessary to cause disease, rather than affirmative evidence of a particular hazardous level of exposure. *Yates*, 113 F. Supp. 3d at 857 (rejecting expert’s “no safe level” opinions).

Fourth, the cumulative dose approach is also at odds with the requirement that a claimant account for other potential exposures. *Martin*, 56 F.3d at 443 (explaining that defendant’s liability for mesothelioma must be evaluated in the context of other exposures); *Schwartz*, 2018 WL 793606, at *4 (citing 2 Restatement (Second) of the Law of Torts § 433, at 432 (1965)). Because

of their adherence to the belief that *any* exposure constituted a “substantial” one, Respondent’s experts made no effort to address the role played by Mr. Stewart’s exposures to other products.

Fifth, even if Respondent had offered sufficient expert testimony addressing causation, there was an insufficient factual predicate for expert causation testimony. Mr. Stewart did not testify to having worked with a Scapa asbestos-containing dryer felt. Nor did his co-workers:

Co-worker Hegler

Q. Okay. Do you recall ever seeing a Scapa dryer felt taken out of the box?

A. No.

Q. And if you didn’t see a Scapa dryer felt taken out of a box, would you know whether or not you’ve ever seen anyone replacing a Scapa dryer felt?

A. I would not know.

Q. Okay. So you can’t offer any testimony today that you saw Mr. Stewart work with or around a Scapa dryer felt?

A. I cannot.

Q. And you can’t offer any testimony that you saw Mr. Stewart cut a Scapa dryer felt?

A. I cannot.

Q. Do you have any knowledge regarding any section of Paper Machine 1 where a Scapa dryer felt would have been used?

A. I don’t know where they were used or which section.

Q. Okay. So would it be fair to say that you have a general recollection of seeing boxes of Scapa dryer felts, but you don’t recall ever seeing them being used in the plant?

A. That’s correct.

(See 1 Tr. 158) (noting that Mr. Hegler’s deposition testimony was read into the record).

Co-worker Steele

Q. So when a felt was installed on a paper machine unless you saw the box that it came out of you wouldn't know who made the felt just by looking at it would you?

A. That's correct.

Q. When a felt is removed from the paper machine you wouldn't be able to tell who manufactured that particular felt that was being removed could you?

A. That's correct.

Q. And you wouldn't be able to tell whether a felt contained asbestos just by looking at it would you?

A. I wouldn't have, no.

* * *

Q. Sir you can't testify that a Scapa felt ever tore off of the paper machine can you?

A. I cannot tell you specifically, no.

(1 Tr. 337-38).

Similarly, co-worker Ward testified Mr. Stewart was not present in December 1972 when a Scapa dryer felt allegedly came loose from the paper machine. He explained Stewart was assigned to a different shift. (1 Tr. 511-512).

Additionally, Respondent's experts did not provide testimony supporting a finding that Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period in proximity to where he worked. The evidence showed that by the time Scapa first supplied an asbestos-containing dryer felt to Bowater, Mr. Stewart was no longer serving as a utility man, fifth hand, or fourth hand—the jobs that involved cutting felts. And Respondent's expert DePasquale conceded he could not testify that asbestos fibers were released during papermaking operations not involving any cutting of felts:

Q. I talked to Dr. Millette a little bit about this yesterday, but we can agree -- you can agree as an industrial hygienist that it is actually there has to be some interaction of force on the dryer felt for there to be a potential for fiber release, correct?

A. Yes, I would generally agree with that statement.

Q. You don't have any information that when they're just going through and making paper, nothing else is going on, that there's any fiber release; is that correct?

A. There's a potential for fiber release, but whether it occurs or not, I'm not sure.

(1 Tr. 470-71).

Likewise, Dr. Millette admitted his glove-box test did not simulate actual mill conditions. During his test, no paper was being made (1 Tr. 399-400), no water was involved, there was no movement of the felt, there was no ventilation, and the test did not replicate the humidity of a paper mill. (1 Tr. 397-98). He also admitted his post-it note and finger test did not cause respirable asbestos to be released into the air. (1 Tr. 409). Furthermore, each worker testified that during a blow down, he would blow air across the felt, not at the 90 degree angle used in Dr. Millette's test.

In short, there was no direct evidence that Mr. Stewart had a regular, frequent, and proximate exposure to asbestos from Scapa dryer felts. No witness could testify that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period in proximity to where Mr. Stewart worked.

Nor was there any circumstantial evidence of regular, frequent, and proximate exposure. Causation must be based on probabilities not mere possibilities. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344 (Ct. App. 1993). Causation based on a possibility rather than a probability is not sufficient in a products liability case. Here, the evidence established nothing more than a speculative possibility that Mr. Stewart had the requisite degree of exposure to asbestos from a Scapa dryer felt.

Again, *Henderson* requires the plaintiff to show “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.” 373 S.C. at 185. A mere showing that an asbestos-containing product was at the jobsite is insufficient. There must be evidence of regular exposure to a particular product in proximity to the plaintiff. That evidence is entirely absent in this case. There is no testimony, either by Stewart or any of his coworkers, establishing his work around an asbestos-containing Scapa product on a regular basis over some extended period.

Finally, Respondent’s experts’ opinions were also inadmissible under Rule 403 of the South Carolina Rules of Evidence, which mandates that testimony be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. The opinions were rooted in the idea that any miniscule exposure to asbestos in association with Scapa’s products contributed to the cumulative result of Mr. Stewart contracting mesothelioma and, therefore, the exposure was a cause of his injury. These opinions are inconsistent with the *Henderson/Lohrmann* legal standard because they effectively shifted the burden to Scapa to prove that it did not expose Mr. Stewart to any asbestos. Thus, the opinions served merely to confuse or mislead the jury as to the standard it should apply to Mr. Stewart’s claims by implying that any exposure was sufficient to render Scapa liable to Mr. Stewart for causing his mesothelioma and should have been excluded.

In sum, Respondent failed to introduce legally sufficient evidence of specific causation. The trial court therefore erred in denying Scapa’s motion for JNOV and this Court should reverse the judgment below.

II. The Court's additur ruling improperly afforded the trial court unfettered discretion.

After almost five hours of deliberation, the jury returned its verdict, awarding \$600,000 in damages for Stewart's survival claim. Throughout trial, the court noted that the jury was highly-educated, diverse, and attentive. After the verdict, the court stated: "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 trial court invaded the jury's province and adjusted its damage award, increasing the survival damages from \$600,000 to \$1,000,000.00. The court abused its discretion in so ruling.

"Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." *Wright v. Craft*, 372 S.C. 1, 35 (Ct. App. 2006). When considering a motion for a new trial based on the inadequacy of the jury's verdict, the trial court must distinguish between awards that are merely unduly conservative and awards that are actuated by passion, caprice, or prejudice. *Id.* Courts must give substantial deference to a jury's determination of damages. *Harrison v. Bevilacqua*, 354 S.C. 129, 140 (2003).

Trial judges may not substitute their judgment for that of the jury. *Graham v. Whitaker*, 218 S.C. 393, 402 (1984). Noneconomic damage awards are within the jury's province to determine because such damages are indeterminate in character. *Kalchthaler v. Workman*, 316 S.C. 499, 503 (Ct. App. 1994). Here, the damage awards were not "so grossly . . . inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192 (2015).

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). Here,

the jury's \$600,000.00 award for the survival claim is not unduly conservative. Mr. Stewart's physician testified that in addition to mesothelioma, Mr. Stewart had a number of co-morbidities. (1 Tr. 612). He suffered from a prior heart attack, hypertension, bypass surgery, chronic obstructive pulmonary disease, bladder cancer, prostate cancer, and skin cancer. (1 Tr. 611-12). He had a lengthy smoking history. As such, 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 take this evidence into account in determining the amount of conscious pain, suffering, and mental distress attributable to Mr. Stewart's mesothelioma, and substantial deference must be paid to its calculation of the appropriate damage amount. *Harrison*, 354 S.C. at 140. Given this evidence, \$600,000 is not so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.

The trial court's citations to damage awards in other cases do not support additur here. "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Bertero v. Nat'l Gen. Corp.*, 13 Cal.3d 43, 65 (Cal. 1974).

In sum, the trial court's discretion to grant additur was not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. The jury's award for survival damages was nearly three times the amount of Mr. Stewart's medical expenses. Furthermore, pain and suffering damages are indeterminate in character, are not capable of exact measurement, and

there is no fixed standard whereby such damages can be determined. Thus, the trial court should have left the damages to be awarded for pain and suffering to the jury's judgment. *Harper v. Bolton*, 239 S.C. 541, 548 (1962).

III. The Court should grant rehearing and reverse the trial court's settlement-proceeds allocation ruling.

An allocation of settlement proceeds between survival and wrongful death claims "must yield to fairness and justice." *Welch v. Epstein*, 342 S.C. 279, 313 (Ct. App. 2000). True, a plaintiff's agreement with a settling party to allocate settlement proceeds in a certain manner may not be disturbed "solely because the apportionment may have been advantageous to the Estate." *Riley v. Ford Motor Co.*, 414 S.C. 185, 196 (2015). But Scapa is not complaining that Respondent's allocation was unreasonable for that reason. Rather, the 80% wrongful-death-claim/20% survival-claim allocation was not reasonable under the facts.

The trial court's additur findings support this conclusion. The court found no reason to increase the jury's award of \$100,000 for the wrongful death damages, given Stewart's limited relationship with his wrongful death beneficiaries. On the other hand, the court believed the evidence concerning the Stewart's survival damages warranted a 67% increase—from \$600,000 to \$1,000,000. In short, the court was of the view that the evidence supported a finding that it was reasonable and appropriate for 10% of the total damages to be awarded for the wrongful death claim and reasonable and appropriate for 90% of the total damages to be awarded for the survival claim.

Given the *trial court's findings on additur* concerning the damages evidence, Respondent's allocating just 20% of the settlement proceeds to the survival claim is not reasonable. On the contrary, the allocation should have been 10% for the wrongful death claim and 90% for the survival claim. This would be entirely consistent with Respondent's own arguments concerning

the extent and nature of Stewart's survival damages, as contrasted with the nature of the wrongful death beneficiaries' losses as a result of his death. Respondent's counsel urged the Court to multiply the survival damages by a factor of ten, while asking for an increase in the wrongful death damages only by a factor of four.

Respondent's counsel had very little to say about the wrongful death beneficiaries' losses, and a great deal to say about Mr. Stewart's suffering before his death. In fact, the trial 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 trial court does not reflect "fairness and justice." *Welch*, 342 S.C. at 313. The court therefore abused its discretion by refusing to reallocate the settlement funds in a manner reasonable under the facts.

Conclusion

Scapa requests the Court grant rehearing and reverse the trial court's judgment.

(Signature Page Follows)

Respectfully submitted,

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September 29, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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

Respondent,

v.

Scapa Waycross, Inc.,

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Scapa Waycross, Inc, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

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Reply in Support of Petition for Rehearing

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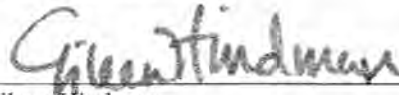
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A handwritten signature in dark ink, appearing to read "Eileen Hindman", written over a horizontal line.

Eileen Hindman
Administrative Assistant

September 29, 2022

Eileen Hindman

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Subject: Stephen R. Edwards v. Scapa Waycross, Inc. - Appellate Case No. 2019-000649
Attachments: 2022.09.29 FINAL Scapa Reply in support of petition for rehearing (Stewart).pdf;
2022.09.29 Proof of Service - Scapa Reply in Support of Petition for Rehearing.pdf

Good afternoon,

Attached please find a Reply in Support of Petition for Rehearing in the above matter. Service is made via email pursuant to the Supreme Court Order 2022-05-06-04.

Thank you.



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The South Carolina Court of Appeals

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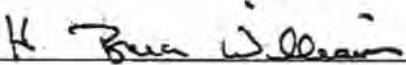
v.

Scapa Waycross, Inc., Appellant.

Appellate Case No. 2019-000649

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

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