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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2022-001574

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

v.

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

RESPONDENT'S RETURN IN OPPOSITION TO PETITIONERS' JOINT MOTION TO CONSOLIDATE APPEALS FOR ORAL ARGUMENT AND CONCURRENT DECISIONS AND TO ORALLY ARGUE AGAINST PRECEDENT

Respondent Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart, opposes the motion of Petitioners Scapa Waycross, Inc., Fisher Controls International LLC, and Crosby Valve, LLC, to consolidate the appeals for oral argument and concurrent decisions and to argue against precedent.

In the Court of Appeals, each case involved, *inter alia*, issues regarding JNOV, additur, and setoff. Without addressing any of the specific facts or legal arguments for these issues, Petitioners ask this Court to consolidate the cases for oral argument and to issue concurrent decisions. The issues in these cases are not the same. The facts and legal arguments are different and, as such, the cases are not appropriate for consolidation.

The trial court's rulings were made for different reasons based on each individual case and the different legal arguments made by the defendants in each case. It is wholly unfair to lump

them together simply because both cases involve mesothelioma and generally had appellate issues on JNOV, additur, and setoff.

Scapa Waycross never asked to consolidate the cases before the Court of Appeals. The Petitioners ask now only to try to revive the JNOV issue in *Jolly* (on which this Court denied certiorari) and use the unremarkable fact that two mesothelioma cases are pending at the same time to try to change the law. This is an improper use of consolidation, which is meant to help the Court and parties. Consolidation in this case will complicate the issues and decisions in each individual case and overly burden the attorneys attempting to argue for their individual clients.

Consolidation would unfairly take away from the individual facts and merits of each case and prejudice Respondent given how different and facts, procedure, and legal issues are in these cases. Each case stands on its own, and the arguments in each case are based not on general legal principles, but on the application of the law to specific, differing facts and procedure. These appeals also involve Plaintiffs in different occupations, using different asbestos containing products, and resulting in different occupational exposures to asbestos.

The Court should deny the motion in its entirety.

I. <u>The two appeals do not involve "the same question" as to any issue in either case.</u>

Under Rule 214, SCACR, the court "**may**, in its discretion," consolidate appeals that involve "the same question." (emphasis added). These cases do not involve the same question as to any issue on appeal in either case. To show the absence of similarity, it is necessary to briefly describe each case, the issues on appeal, and the bases for those issues.

The Jolly appeal.

Mr. Jolly worked as a mechanical inspector at Duke Power Company nuclear plants for about four years. *Jolly v. GE*, 435 S.C. 607, 620, 865 S.E.2d 12, 18 (Ct. App. 2021). Petitioners

Fisher Controls and Crosby Valve sold asbestos gaskets to Duke Power during Jolly's employment, and Jolly's work required him to be in close proximity to the removal and replacement of the gaskets such that he saw to and breathe in the dust released from them. *Id.* at 620-21, 865 S.E.2d at 18-19. About thirty years later, Jolly was diagnosed with mesothelioma and filed a product liability action against Fisher, Crosby, and others who settled before trial. *Id.* at 621, 865 S.E.2d at 19. Mr. Jolly was still alive at the time of trial.

A jury found in favor of Jolly against Fisher and Crosby, awarding $200,000 for survival to Mr. Jolly and $100,000 for loss of consortium to his wife. *Id.* at 622, 865 S.E.2d at 19. The lower court granted additur and increased both awards. *Id.* The court granted setoff of the settlement amounts allocated to survival and loss of consortium claims but not for the amounts allocated to a future wrongful death claim. *Id.*

Fisher and Crosby appealed the lower court's decisions as to JNOV, additur and setoff. The Court of Appeals affirmed, and this Court granted certiorari only as to additur and setoff. This means that either no Justices or only one Justice voted to grant certiorari as to JNOV and, therefore, at least four Justices saw no reason to disturb or address the Court of Appeals' decision on that issue. *See* Rule 242(a), SCACR (requiring the votes of at least two Justices to grant certiorari).

As to JNOV, the Court of Appeals made three, independent rulings to affirm on substantial causation.[1] First, the lay evidence of Dale's work exposure to the gaskets met *Henderson*'s substantial factor test. *Jolly*, 435 S.C. at 628, 865 S.E.2d at 22. Second, the expert testimony was sufficient to prove specific causation under *Henderson*. *Id.* at 628, 865 S.E.2d at 23. Third, Fisher

[1] Jolly had three additional arguments for JNOV regarding the failure to warn, design defect, and deviation from the standard of care. None of those issues are present in the *Edwards* case.

and Crosby "failed to show there is a reasonable probability the jury's verdict was influenced by any testimony" that they complained about on appeal. *Id.* at 641, 865 S.E.2d at 29-30.

In response to Fisher and Crosby's arguments, the Court of Appeals held that the substantial factor test does not require a precise quantification of the plaintiff's asbestos exposure and Dr. Frank's testimony about cumulative dose of asbestos is reliable as the "basic science" behind his opinion and is not testimony that every exposure "was a substantial factor in causing" Mr. Jolly's mesothelioma. *Id.* at 633-34, 865 S.E.2d at 25-26. Dr. Frank's testimony did not conflict with the *Henderson/Lohrmann* substantial factor standard because it is "background information essential for the jury's understanding of medical causation" and he was "guided by the facts specific to [Jolly]'s exposure to [Fisher and Crosby]'s products in forming" his opinions on causation. *Id.* at 635-37, 865 S.E.2d at 26-27. The substantial factor test does not require a comparison of exposures to other defendants' products. *Id.* at 637, 865 S.E.2d at 27-28.

As to additur, Fisher and Crosby argued the evidence of medical expenses was speculative. The Court of Appeals held the evidence came from an expert versed in costs for mesothelioma treatment and, while the jury did not have to believe it, the lower court acted within its discretion to find the testimony credible. *Id.* at 662, 865 S.E.2d at 41.

As to setoff, the lower court correctly accepted the Jollys' allocation of settlement proceeds as one-third to Mr. Jolly's survival claim, one-third to his future wrongful death claim, and one-third to Mrs. Jolly's loss of consortium. *Id.* at 664, 865 S.E.2d at 42.

This Court granted Fisher and Crosby's petition for certiorari only as to additur and setoff, it denied the petition as to JNOV. Specifically, this Court agreed to address these two issues: (1) "Whether the Court of Appeals erred in affirming the trial court's granting a new trial nisi additur," and (2) "Whether the Court of Appeals erred in affirming the trial court's setoff calculation based

on Plaintiffs' [alleged] improper, unilateral allocation of settlement proceeds to avoid a complete setoff, including an allocation of settlement funds to a nonexistent claim." (Pet. for Cert.).

As to additur, Fisher and Crosby argue to this Court that the lower court should not have "speculat[ed] as to the composition of a general verdict" or substituted its judgment and credibility decisions for the jury's decision. (Br. of Pet. p. 9). They ask the Court to reinstate the jury verdict.

As to setoff, they argue the lower court should not have accepted Jolly's allocation of settlement proceeds, specifically an allocation to a "nonexistent" future wrongful death claim. *Id.* They ask the Court to setoff all of the settlement proceeds "against the total judgment in a lump sum"—*i.e.*, for an allocation that does not take into account the existence of separate claims. *Id.*

The Edwards appeal.

For thirty-nine years Steven Stewart worked on paper machine one at a paper mill. *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 407 878 S.E.2d 696, 702 (Ct. App. 2022). The machine included four dryer sections that each used two dryer felts. *Id.* at 407, 878 S.E.2d at 702. Scapa Waycross manufactured asbestos-containing dryer felts, and 23 of them were used on machine one while Stewart worked on it. *Id.* at 407-08, 414, 878 S.E.2d at 702, 706. All of Stewart's jobs put him in close proximity to breathable asbestos fibers from the dryer felts. *Id.* Stewart was diagnosed with mesothelioma in 2012 and died in 2013. *Id.* at 409, 878 S.E.2d at 703. Stewart's estate filed a product liability action against several defendants, and settled with all of them except Scapa. *Id.*

A jury awarded Stewart $600,000 in survival damages and $100,000 in wrongful death damages. *Id.* The lower court granted additur as to survival only, increasing the award to $1,000,000. *Id.* at 410, 878 S.E.2d at 703. The court denied Scapa's motions for JNOV and to reallocate Stewart's settlement proceeds. *Id.* The Court of Appeals affirmed, and this Court granted certiorari as to JNOV, additur, and setoff.

As to JNOV, Scapa complained about Dr. Frank's cumulative dose testimony and argued that Stewart did not quantify his asbestos exposure from Scapa's dryer felts. *Id.* at 410, 878 S.E.2d at 704. The Court of Appeals disagreed, finding Dr. Frank used the cumulative dose testimony to explain how humans develop mesothelioma and that Stewart presented sufficient evidence of substantial causation from Scapa's dryer felts. *Id.* at 414-18, 878 S.E.2d at 706-08.

As to additur, Scapa argued the lower court did not account for Stewart's co-morbidities and comparable verdicts did not justify additur. (Final Br. of App. pp. 27-28). The Court of Appeals found the evidence of Stewart's medical bills and suffering was "undisputed" and, specifically as to co-morbidities, "no evidence in the record showed suffering from those health problems interacted or amplified the" suffering from mesothelioma. *Edwards*, 437 S.C. at 419-20, 878 S.E.2d at 709. The lower court "meticulously" analyzed Stewart's pain and suffering, and "provided ample justification for increasing" the survival award. *Id.* at 421-22, 878 S.E.2d at 710.

As to setoff, the settlements were allocated 20% for survival and 80% to wrongful death. The additur resulted in a judgment allocated 90% for survival and 10% to wrongful death. Scapa asked the lower court and Court of Appeals to reallocate the settlements to match the damages awards—90% to survival and 10% to wrongful death—arguing that allocation was more reasonable under the facts. (Final Br. of App. p. 29). The Court of Appeals disagreed, and affirmed the setoff because "Scapa's percentages-based allocation is an attempt to refashion a disadvantageous allocation . . . for the sole purpose of benefitting a nonsettling party." 437 S.C. at 425, 878 S.E.2d at 711 (internal quotation and alteration marks omitted).

The issues are vastly different.

The issues and arguments in the two cases are vastly different. Consolidation is improper because the appeals do not involve the "same question" under Rule 214, SCACR.

First, *Jolly* does not involve a JNOV issue, and *Edwards* does. Therefore, the cases clearly do not involve "the same question" as to JNOV. Rule 214, SCACR; *Black's Law Dictionary* (8th ed. 2007) (defining "same" as "[t]he very thing just mentioned or described"). Respondent believes that the motivation behind Petitioners' motion to consolidate is an attempt to get the Court to reverse course on the JNOV issue in *Jolly*. This Court already denied certiorari on the JNOV issue in that case. Under S.C. Code Ann. § 14-8-210(a), "[t]he decisions of a panel of the court [of appeals] and of the court sitting en banc shall be final and not subject to further appeal, except by petition for review or by other exercise of discretionary review by the Supreme Court." The *Jolly* decision on JNOV is final and not subject to further appeal because the petition for review occurred and was denied. *State v. Rucker*, 321 S.C. 552, 553, 471 S.E.2d 145, 145 (1996).

Second, the additur issues are different. In *Jolly*, the additur issue is based on whether particular medical expense evidence in that case was speculative and whether the lower court speculated as to what damages the jury's award included. In *Edwards*, Scapa has abandoned its co-morbidity additur argument and now argues additur is not allowed unless the jury did not account for medical expenses and any amount of additur cannot be a 67% increase. Neither Scapa's original, preserved argument nor its new argument are "the same question" as that raised in *Jolly*.

Third, the setoff issues are different. In *Jolly*, the setoff issue is based on an argument about allocation of a future wrongful death claim, and the *Jolly* defendants asked for a setoff of the total amount of the settlements against the total judgment, not taking into account individual claims. In *Edwards*, Scapa argued for a reallocation of settlement proceeds to each claim that matched the judgments. The additur questions are not the same.

Fourth, the Respondent in *Edwards* argues that the JNOV issue is not preserved because Scapa did not make any arguments in its directed verdict motion about cumulative exposure testimony or the reliability of Stewart's experts' opinions. (Br. of Resp't pp. 15-16). This Court will first have to conclude that the issue is preserved before it could address the merits. *Jolly* does not involve an error preservation issue.

There are no "same" questions in *Jolly* and *Edwards*. That each case has an additur and setoff issue does not make them appropriate for consolidation, not even when both are mesothelioma cases.[2] At the end of the day, the Court will have to address different arguments to rule on the issues. Because of the different factual and legal bases for each issue in these cases, counsel for each Respondent would still have to argue the individual merits of each case at oral argument. This would only confuse the issues before the Court and either prolong oral arguments or unfairly stop each Respondent from fully arguing the merits of his case.

II. Argument against precedent is improper.

This Court denied certiorari in *Jolly* as to the JNOV issue. That makes the Court of Appeals' decision final. *See Simpson v. Simpson*, 404 S.C. 563, 574, 746 S.E.2d 54, 60 (Ct. App. 2013) ("Moreover, our supreme court implicitly approved the ownership determinations in the Final Decree by denying Husband's petition for certiorari."); S.C. Code Ann. § 14-8-210(a) (stating a decision of the Court of Appeals is "final and not subject to further appeal, except by petition for review"). The *Jolly* JNOV decision was subject to "petition for review," and that petition was denied. § 14-8-210(a). That decision of the Court of Appeals already received its full and final appellate review. *State v. Rucker*, 321 S.C. 552, 553, 471 S.E.2d 145, 145 (1996).

[2] Respondent is aware of other cases pending in the appellate courts that involve additur issues, and Petitioners did not seek to consolidate those cases.

This Court fulfilled its responsibility and followed statutes and rules by considering the petition for writ of certiorari and denying it. There is no procedural mechanism or legal basis to undo what has been done. This Court does not have the authority now to revive the JNOV issue in *Jolly* any more than it would if it had denied certiorari as to the entire case. While this Court has a procedure for dismissing a case when it should not have granted certiorari—a dismissal as improvidently granted—there is no procedural mechanism for reviving an issue or regaining appellate jurisdiction over a legal issue for which the Court denied certiorari. Argument against precedent under Rule 217, SCACR, is improper under these circumstances.

It is important that Scapa has never distinguished this case from *Jolly*. By asking this Court to allow it to argue against the precedent, Scapa concedes that *Jolly* controls and favors Mr. Stewart. Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 471 (3rd ed. 2016). It has done so without ever trying to distinguish the precedent. Scapa's brief to this Court does not ask it to overrule *Jolly*. The joint motion filed by Scapa, Fisher, and Crosby is nothing more than an attempt to revive the JNOV issue in *Jolly*. This Court should deny it.

III. Petitioners' entire motion should be denied as too late.

Petitioners belatedly ask for consolidation and for concurrent decisions. Although both cases were pending in the Court of Appeals, Petitioners never sought to consolidate the cases in that court. Although both cases have been pending in this Court since November 2022, Petitioners waited nine months—until August 2023—to ask for consolidation.

Petitioners belatedly ask to argue against precedent. Scapa could have argued against precedent in its briefing to this Court but chose not to do so. The JNOV issue, as framed by Scapa, does not ask this Court to overrule *Jolly*. Instead, Scapa's briefing seems to accept *Jolly* as the law and takes a backdoor approach by criticizing the *Edwards* decision for citing to a Pennsylvania

decision. Having fulling petitioned and briefed in this case without asking the Court to overrule *Jolly*, Scapa should not now be allowed to do so.

IV. Conclusion

For all of these reasons, the Court should deny the motion in its entirety, and allow each case to be argued and decided on its own merits.

Respectfully submitted,

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