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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2022-000272

Beverly Dale Jolly and Brenda Rice Jolly, ...Respondents,

vs.

General Electric Company, et al., ...Defendants,

Of whom Fisher Controls International LLC
and Crosby Valve, LLC are the..... Petitioners.

RETURN IN OPPOSITION TO PETITIONERS' JOINT MOTION TO CONSOLIDATE APPEALS FOR ORAL ARGUMENT AND CONCURRENT DECISIONS

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INTRODUCTION

Respondents Beverly ("Dale") and Brenda Jolly oppose the joint motion to consolidate appeals filed by Petitioners Fisher Controls International LLC and Crosby Valve, LLC in Appellate Case No. 2022-000272 and Petitioner Scapa Waycross, Inc. in Appellate Case No. 2022-001574. Petitioners' motion should be denied because they have failed to show that the same question is involved in these separate appeals of two different cases, as is required by Rule 214, SCACR.

The one and only similarity between the Jollys' case and the case brought by Stephen R. Edwards is that they involve jury verdicts in asbestos exposure cases. Yet the questions the Court is reviewing in *Jolly* are not at all related to the fact that it is an asbestos case. This one surface similarity does not overcome the many important differences in these two separate cases, differences which make consolidation both impractical and unfair to the Jollys. The parties are completely different, briefing is not complete in both cases, and the legal issues do not, in fact, overlap. Consolidating these cases for argument and "concurrent decisions" would shortchange each case and cause more confusion, not less.

Significantly, the *Edwards* case involves review of an expert causation issue on which review was denied in *Jolly*. Petitioners emphasize this causation question that is *not common* between the two appeals, expressing disagreement with the Court's decision to deny review of this question in *Jolly*. Petitioners are essentially asking this Court to revisit its denial of certiorari review of the causation question,

which is inappropriate under this Court's rules and precedent.

ARGUMENT

I. The legal issues differ significantly in these two appeals.

The premise of Petitioners' motion is flawed. The legal questions accepted for review are not overlapping, but are highly case-specific and should be considered separately on their own merits.

In *Jolly*, review was granted on January 12, 2023, on two questions: (1) whether the trial court abused her discretion in granting a new trial *nisi additur*, and (2) whether the trial court erred in granting a setoff for the Jollys' settlements of their future wrongful death claim, a claim that was not tried against Petitioners Fisher and Crosby because Mr. Jolly was living at the time of trial. Review was denied, however, on the question of whether the trial court should have granted judgement notwithstanding the verdict, including Petitioners' argument that the Jollys lacked admissible expert causation testimony.

A. New Trial *Nisi Additur*

The *Jolly* case was tried in August 2017, while Dale Jolly was still living and was able to testify at trial. *Jolly v. General Electric Co.*, 435 S.C. 607, 621-22, 869 S.E.2d 819, 827 (Ct. App. 2021). The jury returned a verdict for the Jollys and against Fisher and Crosby on negligence and breach of implied warranty, and awarded $200,000 in personal injury damages to Mr. Jolly and $100,000 in loss-of-

consortium damages to Mrs. Jolly. Upon the Jollys' motion, the circuit court granted a new trial *nisi additur* and increased the verdict to $1,580,000 for Mr. Jolly and $290,000 for Mrs. Jolly. *Id.* at 622, 869 S.E.2d at 827. After applying a setoff for pre-trial settlements, judgment was entered against Fisher and Crosby for $823,333.33. *Id.* at 664, 869 S.E.2d at 850.

The case comes to this Court with all issues regarding Fisher and Crosby's liability settled. The jury found that they sold asbestos-containing valves that caused Mr. Jolly to develop a fatal cancer, a disease that experts on both sides of this case stated was an exceptionally painful cancer that affects the delicate nerve endings in the lining of the lung. By the time of trial, Mr. Jolly had lived with mesothelioma for a year and a half and undergone a major surgery to remove the lining of his lung, but experts agreed that Mr. Jolly would die of mesothelioma.

The circuit court found that the jury's damages award of $300,000 for past and future damages was clearly inadequate under the facts presented at trial, and the court of appeals agreed. *Id.* at 655-56, 664, 869 S.E.2d at 845, 850. This Court granted review of this issue, and Petitioners Fisher and Crosby have contended that the circuit court abused her discretion in speculating about the general verdict and failing to give sufficient deference to the jury. One of their main contentions is that the circuit court speculated as to the amount of Mr. Jolly's medical damages. *Id.* at 654-57, 869 S.E.2d at 844-46.

Unlike *Jolly*, *Edwards* is a wrongful death action. *Edwards v. Scapa*

Waycross, Inc., 437 S.C. 396, 409, 878 S.E.2d 696, 703 (Ct. App. 2022). It involves wrongful death and survival claims arising from the death of Stephen Stewart, whose estate is represented by his son, Stephen Edwards. Mr. Stewart spent decades working on a paper machine at Bowater Southern Paper Corporation, which exposed him to asbestos-containing dryer felts manufactured by Petitioner Scapa Waycross. He died of mesothelioma in 2013, at the age of 69. The case was tried to a jury, which returned a verdict for Mr. Stewart on the negligence claim and awarded $600,000 in survival damages and $100,000 in wrongful death damages. *Id.* The trial court granted Mr. Edwards'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. *Id.* In *Edwards*, the parties stipulated to Mr. Stewart's medical bills and economic damages. *Id.* at 419, 878 S.E.2d at 709.

The new trial *nisi additur* granted in each case was entirely based on the factual record established at each respective trial. In *Edwards*, the jury awarded more than twice the amount of damages as the jury did in *Jolly*. In *Edwards*, the medical bills are undisputed, whereas in *Jolly* this is a major point of contention and the focus of Petitioners' argument. In *Edwards*, the jury awarded damages for wrongful death and survival, whereas in *Jolly* the jury awarded damages for personal injury and loss of consortium. The trial court was able to see Mr. and Mrs. Jolly testify about their damages in person, whereas Mr. Stewart was deceased at the time of trial. These differences are significant and will affect this Court's review

of whether the trial courts discretion was properly exercised in each case. Each case deserves to be considered on its own merits and its own facts, even if the Court is deciding legal principles broadly applicable to consideration of motions for new trial *nisi additur*.

B. Setoff for Pretrial Settlements

The case-specific differences on the question of setoff are even more extreme. While both cases involve a question of setoff for pretrial settlements, the actual legal issue is very different in each case. In *Jolly*, the issue is that the claims settled by the Jollys with other defendants are not completely identical to the claims the Jollys tried to verdict against Fisher and Crosby. The Jollys' settlements were for personal injury, loss of consortium, and future wrongful death, whereas the claims tried to verdict were only for personal injury and loss of consortium. The Petitioners in *Jolly* have argued that the Jollys were not entitled to settle their future wrongful death claims or to allocate settlement funds to those future wrongful death claims for the purposes of setoff. *Edwards* does not have these issues and presents a relatively straightforward disagreement about whether it is "fair" to allocate pretrial settlements 20% to survival and 80% to wrongful death.

The question in *Jolly* is controlled by *Rutland v. S.C. Department of Transportation*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012), which established that trial defendants are only entitled to "credit for the amount paid by another

defendant who settles for the same cause of action." The circuit court determined that the Jollys' potential wrongful death claim is different, factually and legally, from the claims tried to verdict against Petitioners Fisher and Crosby, and therefore the amount that Plaintiffs received as compensation for the release of their future wrongful death claim was not applied in determining the setoff amount. The circuit court approved the Jollys' allocation evenly splitting the settlement proceeds one-third to each claim. 435 S.C. at 664, 869 S.E.2d at 850. The circuit court's authority to make this determination is supported by *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), which held that when a settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between" the claims. *Id.* at 473, 724 S.E.2d at 191.

A related issue in *Jolly* is the Jollys' right to settle their future claims for wrongful death. Petitioners insist that this claim does not "exist" and that allocating settlement proceeds to it amounts to a "double recovery." South Carolina law recognizes, however, the rights of parties to release contingent and future claims. *See S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005); *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005).

As mentioned, *Edwards* does not have any issues related to future claims or

differences between the claims settled and the claims tried to verdict. The Petitioners in *Edwards* argue that a more "reasonable" allocation would be 90% to the survival cause of action and 10% to the wrongful death cause of action because more of the jury's damages were for survival. 437 S.C. at 422, 878 S.E.2d at 710. While this contention was rejected by both the circuit court and the court of appeals, it illustrates that the question of setoff is highly case-specific. Petitioners' request to consolidate these appeals simply because they both involve questions about setoff ignores that the particularities of each case will govern the outcome and that there are no efficiencies to be gained by consolidation.

C. Sufficiency of Expert Causation Testimony

The primary motive for Petitioners' motion appears to be an attempt to ask this Court to reverse its denial of certiorari in *Jolly* on the issue of the Jollys' expert causation testimony. In *Jolly*, this Court denied review of Question I regarding the admissibility of expert causation testimony, and granted review of Questions II and III regarding new trial *nisi additur* and setoff. Petitioners nevertheless present this question, not being reviewed in *Jolly*, as one of the reasons for consolidation, contending that it is an "additional feature[] of commonality that bolster[s] consolidation for oral argument." Motion, ¶ 2.

To the extent Petitioners are hoping the Court will change its mind about reviewing Question I in *Jolly*, this should be quashed. Once certiorari has been denied on a particular question, that issue is not before the Court when other

questions in the case are considered. *Bartley v. Allendale Cnty. Sch. Dist.*, 392 S.C. 300, 305 n.5, 709 S.E.2d 619, 621 (2011). Moreover, there is no rehearing permitted. "[A] petition for rehearing following the denial of a petition for a writ of certiorari to the Court of Appeals is not authorized by the South Carolina Appellate Court Rules." *State v. Rucker*, 321 S.C. 552, 553, 471 S.E.2d 145, 145 (1996).

Given that the sufficiency of the Respondents' expert causation testimony is an issue on review in *Edwards*, but not *Jolly*, this is hardly a factor in favor of consolidation. This is, in fact, a major difference between the two cases. Consolidation would confuse the issues before the Court and almost certainly take time and attention away from *Jolly*. The presence of this uncommon issue is another reason to deny consolidation.

II. Consolidation would cause delay and other prejudice to the Jollys.

The briefing in *Jolly* has been completed since April 2023 and the case is awaiting oral argument.[1] The briefing in *Edwards* is not complete, despite Petitioners' assertion to the contrary. In *Edwards*, an amicus brief was accepted by the Court on August 23, and with an extension Respondents' brief is not due until October 2. Thus, while *Jolly* has been fully briefed for five months, *Edwards* is still at the briefing stage. This is yet another important difference between these two

[1] The case was considered for oral argument on the Court's October term, October 24-25 in Greenville, but Petitioners' counsel has a conflict with those dates.

cases.

Because *Jolly* is about six months ahead of *Edwards* and is ready for argument, consolidation could cause substantial delay in *Jolly*. The Jollys' case should be considered as soon as possible considering that they obtained a verdict against Petitioners Fisher and Crosby in 2017 and have been waiting six years for final resolution of their claims. Unnecessary delays caused by consolidation would be unfair to the Jolly family.

The Jollys would also be prejudiced by consolidation given how vastly different the legal issues are in these two cases. The issues of new trial *nisi additur* and setoff are both highly dependent on factual context, which greatly varies between the two cases for many reasons discussed herein, including that *Edwards* was a wrongful death case whereas Mr. Jolly was alive and present to testify at trial. The Jollys are entitled to have their case considered on its own merits, according to its own facts and procedural history, and not those of a completely unrelated case. The many significant factual and procedural differences between these cases would make consolidation cumbersome and ultimately unfair to the Respondents in both *Jolly* and *Edwards*.

CONCLUSION

Because Petitioners have failed to show that the "same question" is involved in the *Jolly* and *Edwards* cases, consolidation is inappropriate under Rule 214, SCACR, and Petitioners' motion should be denied.

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Respectfully submitted,

s/Theile B. McVey

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