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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 RESPONSE IN OPPOSITION TO BRIEF OF *AMICUS CURIAE* AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND AMERICAN COATINGS ASSOCIATION

Kathleen C. Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

William M. Graham
Mona Lisa Wallace
WALLACE & GRAHAM, P.A.
525 North Main St.
Salisbury, NC 28144
704-633-5244

Gregory Hyland
Thomas H. Hart, III
HART, HYLAND, SHEPHERD, LLC
207 East 1st North Street
Summerville, SC 29483
843-410-0711

Frederick "Fritz" Jekel
LEVENTIS & RANSOM
P.O. Box 11067
Columbia, SC 29211
803-765-2383

Attorneys for Respondent

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INTRODUCTION

This Court is presented with a decision to either affirm the jury's verdict or declare that Scapa is not liable as a matter of law.

Scapa did not move for a new trial. It argues only that expert testimony that it did not object to at trial violates a causation standard, and the result of that violation should mean it is not liable as a matter of law. It is a bold but meritless argument. It fails procedurally. It fails legally.

No party or Amici in this appeal even argues that any evidence improperly reached the jury or affected its verdict.

There simply is no basis to overturn the verdict, and this Court should affirm it.

ARGUMENT

Amici attack the verdict and the Court of Appeals' decision as allowing liability for an asbestos defendant with an alleged "minimal or trivial" contribution to Mr. Stewart's exposure. (Amici Br. p. 6). More specifically, they argue that Dr. Arthur Frank's testimony about cumulative exposure is not sound science and does not satisfy the *Henderson/Lohrmann*[1] substantial causation standard. Scapa did not object to Dr. Frank's testimony or argue it as a basis for a directed verdict.

Amici's proposed direct evidence dose quantification requirement would overturn the *Henderson/Lohrmann* circumstantial evidence substantial causation standard. The Court should reject Amici's arguments as unpreserved and meritless.

I. <u>This is not a low dose exposure case.</u>

Amici argue that the only asbestos litigation left are low dose or trivial exposure cases—accusing Stewart of going after Scapa for recovery only because of its solvency. This is not only insulting; it is factually false.

[1] *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986).

Respondent highly doubts that anyone would voluntarily expose themselves to the alleged low dose of Scapa dryer felt asbestos that Stewart was exposed to in this case. There is a large area between a background exposure and undisputed exposures that occur on a regular basis in known high doses. This case is in that area—and this is exactly what *Henderson* is intended to address. 373 S.C. at 185, 644 S.E.2d at 727 ("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." (internal quotation marks omitted)). The *Henderson* test was used in this case, and the jury properly applied it to the facts.

Contrary to Amici's statements, a review of the actual record shows that Stewart did in fact, "clean[], cut, or handle[] an asbestos-containing dryer felt" manufactured by Scapa. (Br. of Amici pp. 2, 14). At least 23 Scapa asbestos-containing felts were used on machine one while Mr. Stewart worked on it. (R. pp. 2132, 478-79, 576-78, 1056, 1545, 2032-35, 2051-56, 2071-98). He began work at Bowater in November 1963, and the first Scapa asbestos-containing dryer felt shipped to Bowater in January 1969. (R. pp. 2081-82). Stewart began work as a utility man and stayed in that position for up to seven years, meaning he was still a utility man when Scapa's asbestos felts were first put on machine one. (R. p. 2105). Stewart spent three to five years in his next job as fifth hand. (R. pp. 2105-06). He then spent "several years" in each subsequent, ascending position—fourth hand, third hand, backtender, and machine tender. (R. pp. 2106-07).

Four of his 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 dryer felt—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 that Stewart breathed. (R. pp. 759-62, 770-86, 789-90, 795). Viewing this evidence in a light most favorable to Stewart, he worked in proximity to and/or physically with a dryer felt during the entire twelve years that machine one used Scapa's asbestos-containing dryer felts.

This is not a case where, for example, someone worked in an enclosed office near asbestos, or worked in a production plant near insulated asbestos that was changed once a year. Stewart physically worked touching and manhandling dryer felts while Scapa's asbestos felts were on machine one. One of Scapa's dryer felts used on machine one during Stewart's employment contained 1,088 pounds of asbestos, which is 99 quadrillion asbestos fibers, and another contained 752 pounds of asbestos, which is 69 quadrillion asbestos fibers. (R. pp. 769, 792-95, 2032-35).

When Dr. Harpole did surgery on Mr. Stewart, he found "very large" pleural plaques on his lungs—plaques that were larger than a man's hand and showed "significant asbestos exposure." (R. pp. 1000-01, 1177). When Mr. Stewart gave the doctor an explanation for asbestos exposure, he said that he "was in an area where the dryer felts that were used to dry the paper were composed of asbestos and the air would be completely full of asbestos fibers to the point where it looked cloudy." (R. p. 2262). The asbestos source he thought of was dryer felts.

This is not a low dose exposure case, and the Court should reject Amici's unfounded attempt to depict it in that manner.

II. Amici's argument is unpreserved.

Amici ignore that Scapa did not object to the testimony that they all complain about on appeal. *See State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[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." (internal quotation marks omitted)). No one now asks this Court to exclude the testimony or argues that it fails to satisfy Rule 702, SCRE. Instead, they argue that it does not comply with the substantial causation standard and should result in judgment for Scapa as a matter of law. If the testimony was actually that decisive, then surely Scapa would have objected to it at trial and argued it in its directed verdict motion.

But Scapa did not argue in a directed verdict motion that the testimony violated the substantial causation standard. *See Jamison v. Morris*, 385 S.C. 215, 226, 684 S.E.2d 168, 173 (2009) (stating 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"). Scapa and all Amici ignore the other substantial causation evidence in the record and, in doing so, ask this Court to view one piece of Dr. Frank's testimony in a vacuum to achieve the feat of reversing a jury verdict based on unobjected-to testimony. Even if this Court could address the admissibility of unobjected-to testimony and even if the Court found the testimony legally improper or inadmissible, the remainder of Dr. Frank's testimony is admissible. Practically viewing what happened at trial and properly considering **all** of the evidence presented, there is no basis to declare as a matter of law that Scapa is not liable because of Dr. Frank's testimony.

III. Even if the Court could consider Amici's argument, Dr. Frank's testimony was admissible and proper for the jury to consider.

Even if the Court could consider the merits of Amici's argument, they do not discuss Dr. Frank's testimony in this case but merely allege that it ignores science and is inconsistent with *Henderson*. (Amici Br. p. 6). Reviewing his actual testimony shows the contrary.

At trial, Stewart asked Dr. Frank, "how do physicians, occupational health practitioners such as yourself, describe the causes of the mesothelioma from the asbestos exposure?" (R. p. 2256). Dr. Frank answered:

> You simply have to say that it is 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 a 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.

(R. p. 2256). Dr. Frank's "cumulative exposure" testimony in this case is nothing more than his way of saying that every asbestos exposure adds up to a person's total, or cumulative, exposure to asbestos. It is another way of explaining dose response—the more cumulative exposure a person has, the more likely they will develop mesothelioma. That is neither a controversial nor a scientifically incorrect statement. It fits precisely within the *Henderson/Lohrmann* standard to acknowledge that there may be multiple sources of exposure but help the jury to determine which one or ones substantially contributed to a person's mesothelioma.

Amici accuse Dr. Frank of running afoul of the scientific concept of dose-response and, in allegedly doing so, not distinguishing "between inconsequential exposures and exposures that are sufficient to cause disease." (Amici Br. p. 4). Notably, Amici never quantify an exposure level that is generally accepted as "sufficient to cause disease." That is exactly why this Court adopted the *Henderson/Lorhmann* substantial causation standard. It is "a *de minimus* rule since a plaintiff must prove more than a causal or minimum contact with the product." *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). Regardless, Dr. Frank testified, and the jury heard, that he agrees with dose response. (R. p. 2305).

Amici mostly allege that Dr. Frank does not exclude background exposures from a person's total, cumulative exposure to asbestos. (Amici Br. p. 6). First, this argument is irrelevant to

Scapa's liability because Mr. Stewart's exposure to Scapa's dryer felt asbestos was much more than a "background exposure." Second, there is no law or science requiring an expert to exclude background exposure. Third, Amici's suggestion is irrelevant because Dr. Frank explained to the jury that background exposure alone does not cause mesothelioma. (R. p. 2321). When asked about cumulative exposure, Dr. Frank clearly explained:

> [A.] I don't believe that each and every is the same as cumulative.
>
> Q. And there are exposures, background and other exposures, that you would not be able to attribute to the causation of a mesothelioma?
>
> A. No. I've never said that. What I've stated many times was the background level contributes to someone's cumulative exposure. To be clear, what I've said is, if you'll give me a case where someone has only background level and nothing more, I couldn't attribute that individual's mesothelioma to only background exposure.
>
> So again, you know, let's keep it very clean and clear as to what I've said. I've never not said that background levels contribute to someone's overall exposure. The trouble is you get in a lifetime a background level what you can get in the workplace in one day.

(R. p. 2321). Amici and Petitioner ignore this. Their arguments about Dr. Frank's testimony ignore the actual testimony he gave in this case.

Amici next accuse Dr. Frank of espousing a theory that each and every "single" fiber causes disease but calling it by the name of "cumulative exposure." (Amici Br. pp. 7-12). In its entire argument, Amici **never once** cite to any actual testimony of Dr. Frank in this case. *Id.* Instead, they just air out general grievances with their perception of asbestos litigation. This is improper argument that the Court should not even consider.

On the merits, as noted above, Dr. Frank expressly testified in this case that background exposure—meaning a single fiber of asbestos—is not a cause of mesothelioma. (R. p. 2321). The testimony in this case is what matters to this appeal, and Amici blatantly ignore it. The law Amici cites to for this argument is adequately addressed in Respondent's other briefing to this Court and

not even worthy of response here because it ignores the actual evidence in this case. This is not a case about choosing or rejecting an exposure theory. It is about whether the actual evidence in this case was sufficient to create a jury question of substantial causation. *See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) ("[A] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." (internal quotation marks and citation omitted)).

IV. Amici's proposed dose-quantification requirement would overturn the *Henderson/ Lohrmann* standard.

Amici ask this Court to "provide instruction for future cases" with allegedly "minimal exposure." (Amici Br. pp. 15-16). Specifically, they ask for a "dose quantification" proof requirement. *Id.* at p. 16. But Amici provide the Court with no suggestion for a dose threshold or how such a requirement could be possible or workable in actual litigation. Amici's suggestion would actually overturn the *Henderson/Lohrmann* standard—based on "circumstantial evidence"[2]—and replace it with a direct evidence standard of specific, "quantified exposure, attributable to an individual defendant, consistent with epidemiology studies." (Amici Br. pp. 16-17). A point of *Henderson/Lohrmann* is that direct evidence of specific doses for an individual defendant are usually not possible, and it can take decades for mesothelioma to manifest. That is why the standard allows for causation based on **circumstantial** evidence. The standard already takes into account Amici's argument that "mere proof that the plaintiff and a certain asbestos product are at the [workplace] at the same time, without more, does not prove exposure to that product." *Lorhmann*, 782 F.2d at 1162. Scapa has never asked the Court to overturn *Henderson/Lohrmann*, and Amici cannot do so. Rule 213, SCACR.

[2] *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727.

V. The law and evidence support a verdict finding Scapa liable for Mr. Stewart's mesothelioma.

Amici's idea that Scapa should not be liable because another asbestos defendant is allegedly a larger source of asbestos exposure is contrary to tort law. This Court recently stated that one "of the defining principles of tort law in this State" is that "liability follows the tortious wrongdoer." *Ruh v. Metal Recycling Servs., LLC*, 889 S.E.2d 577, 580 (S.C. 2023) (internal citation and quotation marks omitted). That another asbestos defendant may have had as much or a greater contribution to a person's mesothelioma does not mean that Scapa's contribution is not also substantial. In other words, someone else's wrongdoing does not erase Scapa's wrongdoing. *See Wickersham v. Ford Motor Co.*, 432 S.C. 384, 394 n.4, 853 S.E.2d 329, 334 n.4 (2020) ("[T]here can be more than one proximate cause of an injury.").

Amici's recitation of the supposed evidence of Mr. Stewart's exposure to Scapa's dryer felts (Amici Br. pp. 14-15) ignores the actual evidence and the standard of review that this Court must "view[] 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). The Court of Appeals found:

> [T]he 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.

Edwards v. Scapa Waycross, Inc., 437 S.C. 396, 416, 878 S.E.2d 696, 707 (Ct. App. 2022). Scapa did not appeal that holding to this Court. Amici cannot dispute it. Rule 213, SCACR (Amicus "brief shall be limited to argument of the issues on appeal as presented by the parties . . . .").

CONCLUSION

Henderson/Lohrmann was (and remains) the law of South Carolina at the trial of this case. Mr. Stewart's evidence of substantial causation was admitted without objection and without complaint on appeal. The evidence, viewed in a light most favorable to Mr. Stewart, was sufficient to send the issue of substantial causation to the jury. Therefore, the Court should affirm the verdict.

September 25, 2023

Respectfully submitted,

s/Kathleen C. Barnes

Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

William M. Graham
Mona Lisa Wallace
WALLACE & GRAHAM, P.A.
525 North Main St.
Salisbury, NC 28144
704-633-5244

Gregory Hyland
Thomas H. Hart, III
HART, HYLAND, SHEPHERD, LLC
207 East 1st North Street
Summerville, SC 29483
843-410-0711

Frederick "Fritz" Jekel
LEVENTIS & RANSOM
P.O. Box 11067
Columbia, SC 29211
803-765-2383
Attorneys for Respondent