Attachment

(Order Denying Post-Trial Motions filed 01/13/2016)

STATE OF SOUTH CAROLINA	§	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	§	
	§	Civil Action No. 2013-CP-42-03915
ANGIE KEENE, Individually and as Personal Representative of the Estate of DENNIS SEAY, Deceased, and LINDA SEAY, *Plaintiffs*	§	
v.	§	
CNA HOLDINGS, LLC *Defendant.*	§	

ORDER DENYING DEFENDANT CNA HOLDINGS, LLC'S POST-TRIAL MOTIONS

In this asbestos case, Defendant CNA Holdings, LLC ("Celanese") moves for relief from the jury's October 8, 2015 verdict. For the reasons set forth below, Celanese's motions for judgment notwithstanding the verdict, new trial absolute, and new trial nisi remittitur are DENIED.

I. The Evidence at Trial

Viewing the record in the light most favorable to Plaintiffs, sufficient evidence supports the jury's finding that Decedent Dennis Seay died from malignant pleural mesothelioma proximately caused by exposure to asbestos. Mr. Seay died in December 2014, at the age of 70. Mr. Seay's daughter and the representative of his estate, Angie Keene, and Mr. Seay's widow, Linda Seay, brought this premises liability action against Celanese, which owned the polyester fiber plant in Spartanburg, South Carolina where Mr. Seay was a full-time contract maintenance worker from 1971 to 1980. Mr. Seay's employer was Daniel Construction Company ("Daniel"), which contracted with Celanese to handle all maintenance at the Spartanburg facility. The evidence showed that Mr. Seay's regular duties as a millwright involved repairing and

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maintaining pumps, valves, condensers, and other equipment, which brought him into contact with asbestos gaskets, packing, and insulation materials at Celanese.

The uncontradicted evidence showed that Mr. Seay's only source of asbestos exposure was his work at Celanese. The exposure testimony came from Mr. Seay, who was deposed in a videotaped deposition prior to his death, and Mr. Seay's co-worker, Ronnie Thompson. Mr. Thompson worked side-by-side with Mr. Seay at Celanese from 1973 to 1975.

Celanese does not dispute that asbestos insulation, gaskets, and packing were used at its plant in the 1970s. There were "miles and miles of steam lines" at the Celanese plant. All of the steam lines and Dowtherm pipelines at Celanese were insulated with asbestos insulation. Celanese continued to use asbestos insulation until 1973, and asbestos insulation remained on many pipes and pieces of equipment throughout the 1970s.

Mr. Seay had to tear off a lot of exterior pipe insulation in order to access the equipment he needed to repair. Mr. Thompson estimated that they had to remove insulation about 50% of the time. The pipes were insulated all the way up to the flange connection, and the insulation covered the nuts and bolts on the equipment. Mr. Seay had to tear, chisel, saw, and brush the asbestos insulation off in order to get a wrench onto the nut to loosen the flange. He had to tear back the insulation just to change a gasket. The testimony established that it was dusty when Mr. Seay tore off asbestos pipe insulation, and that Mr. Seay had to clean up his work area after he removed the insulation.

In addition to his exposure through tearing off insulation, Mr. Seay sometimes worked around the insulators when they were installing insulation. When they were working on the same line, Mr. Seay would be within 10 feet of the insulators. There was dust generated by the insulators' work. It was a daily occurrence for him to be around the dust from pipe insulation

used by the insulator group. Most of the plant had grated floors and a vacuum fan system that drew air upwards, so if insulators were working on lower floors he would get a dose of asbestos insulation dust.

There were gaskets on most of the equipment that Mr. Seay maintained at Celanese. Every time Mr. Seay and Mr. Thompson worked together, they replaced gaskets. They both were able to identify asbestos gaskets and provided testimony that asbestos gaskets were used on the majority of pumps and valves at Celanese.

Mr. Seay usually had to make flange gaskets from sheet gasket material. He testified that all of the sheet gaskets he worked with were asbestos. He identified four brands of asbestos-containing sheet gaskets, including John Crane. The evidence showed that Mr. Seay cut John Crane asbestos sheet gaskets once or twice a week throughout the entire nine years of his employment at Celanese. One of the styles of John Crane asbestos gaskets used by Mr. Seay contained crocidolite asbestos, the most potent type of asbestos fiber.

When Mr. Seay was assigned to cut asbestos sheet gaskets, he would spend four to six hours cutting out a large supply because they used so many of them. Either Mr. Seay or another millwright had to cut gaskets once or twice a week. Sometimes it would take 30 or 40 minutes to cut out a gasket. Cutting gaskets from asbestos sheet gasket material was dusty.

When Mr. Seay removed gaskets, he usually had to scrape and work to get the gasket off. He had to scrape out the gaskets about 95% of the time because he was generally working on hot systems. He used a putty knife, wire brushes, and drill motors, depending on how badly the gasket was stuck. It would sometimes take at least an hour or longer to remove the gasket and clean the flange. There was "a whole lot of dust" created from the process of removing a gasket from a pump or valve.

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Mr. Thompson testified that every time Mr. Seay worked on the vacuum condensers, he had to remove and install a new gasket. Mr. Seay cleaned out a condenser about once a week. All the gaskets on the condensers were asbestos-containing. Mr. Seay cut John Crane asbestos sheet gaskets every time he had to replace a gasket on a condenser. Cutting the sheet gaskets created visible dust that Seay breathed. After he cut the sheet gaskets, Mr. Seay had to clean up his work area.

There were thousands of valves at the Celanese Spartanburg plant. Mr. Seay worked on valves once or twice a day, which he characterized as "pretty often." On valves, there were two asbestos gaskets on the flanges and one on the valve bonnet. There were about two-hundred pumps at Celanese. He worked on pumps and gearboxes, respectively, about once every week or two on average. There were times when he worked on the same pump or valve more than once.

Mr. Seay also worked in close vicinity to other millwrights when they were changing asbestos gaskets and packing on valves and pumps. He said it got "pretty dusty" when a lot of gasket and insulation repairs were going on at the same time.

Mr. Seay routinely worked with asbestos packing on valves, pumps, and degassers. Mr. Seay used square packing and rope packing, and it all had asbestos in it. When Mr. Seay removed the packing from a valve or pump, he used a screw-type tool or a packing puller. When he removed the old packing, it was often brittle and dried out. He used compressed air to completely remove all the old packing from the valve stem. It would take Mr. Seay about an hour or an hour-and-a-half for the whole process—remove the insulation, replace the packing, and clean up his work area. The removal of asbestos packing created dust.

Plaintiffs' medical experts, Dr. Richard Kradin and Dr. Edwin Holstein, both testified that Mr. Seay was exposed to asbestos at Celanese well above background levels, and that his

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exposure to asbestos insulation, gaskets, and packing at Celanese was a substantial factor in causing his mesothelioma. Celanese called no experts. The defense experts called by a co-defendant at trial, John Crane, Inc., agreed with Plaintiffs' experts on the causative role of Mr. Seay's asbestos insulation exposure at Celanese. Dr. Victor Roggli and Dr. James Crapo both testified that Mr. Seay had an asbestos-caused mesothelioma and that his exposure to insulating products at Celanese created his risk for mesothelioma.

A jury trial was held against Celanese and a co-defendant, John Crane, Inc., in September and October 2015. The jury found that Celanese had been negligent but that John Crane, Inc., was not negligent. The jury returned a verdict of $2 million in survival damages to Mr. Seay's estate, $5 million in loss of consortium damages to Linda Seay, and $5 million in wrongful death damages to Mr. Seay's heirs. After a bifurcated trial on punitive damages, the jury found Celanese had acted willfully and wantonly and awarded $2 million in punitive damages.

Celanese now seeks judgment notwithstanding the verdict, a new trial absolute, and a new trial nisi remittitur. It contends that there was no evidence to support any part of the jury's verdict, and challenges the amounts of the compensatory and punitive damages awards.

II. Standard of Review

In ruling on a motion for JNOV, the trial judge must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. JNOV should be granted when only one reasonable inference can be drawn from the evidence and no reasonable jury could have reached the challenged verdict. The trial judge does not have authority to decide credibility or resolve conflicts in the evidence. Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive, the trial judge is required to grant a new trial absolute. Cock-N-Bull Steak House v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).

A trial court has wide discretion to reduce an excessive verdict by granting a new trial nisi remittitur. The reduced judgment is a suggested settlement figure, which the plaintiff may accept, or reject and request a new trial. Ruling on a new trial nisi remittitur "requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). The touchstone for deciding whether to disturb a jury's verdict by granting a nisi motion is whether the award excessively compensates the injured party. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). A famous decision by Judge Medina drives home the point: "[t]he very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand." Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (2d Cir. 1961).

III. Ruling

A. Negligence

Celanese contends that there is "insufficient evidence" to support the jury's finding that Celanese was negligent and that its negligence was a proximate cause of Mr. Seay's mesothelioma. The Court disagrees. The evidence established that Celanese owed a duty to Mr.

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Seay as an invitee and that it breached that duty by requiring contract maintenance workers to utilize asbestos materials without warning them of the known dangers.

1. Duty

The parties agreed that Mr. Seay was an invitee on the premises owned by Celanese. Celanese therefore owed Mr. Seay a duty of utmost care. "The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." Sims v. Giles, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001). The landowner has a duty to warn an invitee of latent or hidden dangers of which the landowner has knowledge or should have knowledge. Id.

Celanese's duty was an active or affirmative duty. Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). "It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him." Id. Celanese did not have to foresee the precise manner in which the injuries were sustained, as long as there is a "reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range." Id.

2. Knowledge of the Danger

The record supports the jury's finding that Celanese failed to provide a reasonably safe premises to Mr. Seay. By the time Mr. Seay began working at the Celanese plant in 1971, Celanese knew or should have known that working with asbestos products could cause fatal disease. Celanese admits such actual knowledge as of the passage of the Occupational Safety and Health Administration (OSHA) asbestos regulations in 1971-72. Celanese specified and supplied asbestos insulation, gaskets, and packing for use in maintaining its equipment. Celanese did not, however, make any effort to warn contract workers like Mr. Seay who were using asbestos

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products at the Celanese plant. It also did not provide any type of personal protective equipment or instructions for reducing the risk of asbestos-related disease.

The evidence supports the jury's determination that Celanese knew or should have known about the danger of asbestos-related disease, including mesothelioma, prior to Mr. Seay's tenure as a contract worker at the Spartanburg plant. Dr. Holstein testified about the historical information available to Celanese regarding the dangers of asbestos exposure. By 1964, there were about 700 scientific and medical articles on the health effects of asbestos. The first article showing that asbestos could cause fatal illness was published in 1898. In 1930, Merewether and Price published the first epidemiological study showing an increased incidence of asbestos-related disease among textile workers in England. They wrote that asbestos-related disease could be prevented or diminished by reducing exposure to asbestos dust.

The 1930 Merewether and Price article was also significant because it outlined a number of simple methods for reducing the hazard, including the use of alternative materials where available, wet down methods, exhaust ventilation, isolating workers, providing respiratory protection, and educating workers about the nature of the danger and the need to take precautions. Dr. Holstein testified that all of the recommendations that Merewether and Price made in 1930 still remain the essential methods for reducing the risk of asbestos-related disease today. In a follow-up article by these same authors, gaskets (called "jointings") were among the products listed as potentially hazardous if abraded.

In 1938, an article published by the United States Public Health Service, based on a study of South Carolina textile workers, recommended that asbestos exposures be kept below a particular air concentration of 5 million particles per cubic foot (mppcf) of air. In the next ten years, a number of states adopted that standard as the limit for occupational exposure. By 1955,

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it was definitively established that asbestos exposure could cause lung cancer. By 1960, with the publication of a case series by Wagner, it was established beyond any reasonable doubt that asbestos exposure could cause mesothelioma.

There was also substantial evidence that Celanese had actual knowledge of the danger of asbestos-related disease from working with asbestos products, including asbestos insulation. In 1964, Celanese's medical director attended the 1964 Selikoff conference on asbestos-related diseases. One of the papers published in the Selikoff conference book was by W.C. Hueper, and it stated that workers who were even only intermittently exposed to asbestos were at risk. He listed a number of types of asbestos products that posed a risk, including block insulation, pipe covering, gaskets, and pump packings.

Bruce Bowyer, Celanese's corporate representative, testified that Celanese was founded in the 1930s. It was a large company, with about 2,000 employees at the Spartanburg plant alone. Celanese manufactured an asbestos-containing product called Celanex at its plant in Bishop, Texas, from 1971 until about 1980. Celanese was aware of all laws and regulations that applied to its plants. As of 1958, Texas had an occupational health regulation that limited asbestos exposures to 5 mppcf and distinguished asbestos from a nuisance dust. Celanese was also aware of 1958 asbestos regulations in the state of New York, where it maintained its headquarters.

The OSHA asbestos regulations applied to Celanese and Celanese was aware of them. In 1971, OSHA's first act was to pass an emergency asbestos standard. It required employers to keep asbestos exposures below an average threshold limit value (TLV) or permissible exposure limit (PEL) of 12 fibers per cubic centimeter of air (fibers/cc). That was lowered to 5 fibers/cc in 1972 and 2 fibers/cc in 1976. In addition, short-term exposures could never exceed 10 fibers/cc. In its regulations, OSHA stated that these exposure limits were not designed to protect against all

cancer and that some cancers would still occur at these exposure levels. The OSHA asbestos regulations also required warnings, dust measurements, medical examinations, showers, separate lockers, and other measures. Dr. Holstein testified that Mr. Seay would have been exposed to asbestos above both the time weighted average and ceiling limits for asbestos under OSHA.

Celanese also learned of the dangers of asbestos through its memberships in the National Safety Council (NSC) and Industrial Hygiene Foundation (IHF). Celanese received NSC publications, including the National Safety News and the Transactions of the NSC, which published numerous articles in the 1950s regarding the dangers of asbestos exposure. It similarly received the Industrial Hygiene Digest of the IHF, which published dozens of articles about asbestos-related diseases in the 1950s and 1960s.

Charles Laubly, who was employed as an industrial hygienist with Celanese from 1966 to 1979, testified that he received Industrial Hygiene Digest. He forwarded IHF publications to Celanese's corporate library where all employees would have access to them. The jury heard about the many abstracts of scientific articles published in the Industrial Hygiene Digest that stated that asbestos can cause asbestosis, lung cancer, and mesothelioma. Some of the abstracts published in 1964 and 1967 pertained to the risk of mesothelioma among insulators specifically. Mr. Laubly admitted that as early as 1949 he had personal knowledge that exposure to asbestos could cause asbestosis and that asbestosis could be fatal.

In 1970, Union Carbide sent a report to Celanese informing it that mesothelioma could "occur in individuals with histories of only slight exposures." (TT 10/7 PM, at 1358:16-1361:3). Further, "[f]rom the data available, it appears that the TLV of 5 million particles per cubic foot is not low enough to protect against mesothelioma, and it is quite possible that 2 million particles per cubic foot is not either." (TT 10/7 PM, at 1360:20-1361:3).

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In 1977, an internal Celanese memorandum acknowledged that research studies over the previous ten years had "raised serious questions concerning human exposure to cancer-producing agents," and that some researchers had suggested that, "there is no safe exposure to a human carcinogen." (TT 10/7 PM, at 1361:7-1363:25).

3. Failure to exercise reasonable care

There is substantial evidence that Celanese made the decision to use asbestos materials at the Spartanburg plant and purchased those materials for its contract workers to use in maintaining the plant equipment. Mr. Bowyer acknowledged that Celanese was the owner of the plant and everything in it, including the equipment and the pipelines, and the insulation, gaskets, and packing.

Celanese, not contractors, specified what materials were to be used for the insulation and gaskets in its plants. Mr. Seay's employer, Daniel, was hired to build the Celanese plant but Celanese designed the plant and specified all the equipment and materials that went into the plant. Daniel was obliged to follow Celanese's plant design specifications. The contracts between Daniel and Celanese specified that purchase orders for materials were issued in the name of Celanese.

Celanese chose asbestos gaskets over other, safer gasket materials. In 1949, Celanese tested several different gasket materials and determined that Teflon performed the best. However, for costs reasons, Celanese decided to use asbestos gaskets instead. Celanese was still using asbestos gaskets for high temperature applications in 1988, despite the existence of safer alternatives.

Spartanburg also used asbestos-containing calcium silicate pipe insulation. Celanese claims that it discontinued the use of asbestos insulation in 1973 due to OSHA regulations.

However, up until at least 1978, asbestos insulation was still present on many of the high temperature lines at Spartanburg.

Celanese had a huge supply room that stocked all the spare parts and materials needed for maintenance of the equipment at the plant. The supply room was run by Celanese and Celanese ordered all the parts and materials that were stocked for on-site use. Celanese supplied the asbestos insulation used at the plant. Mr. Seay got asbestos sheet gaskets (and other asbestos materials) from the Celanese supply room.

Mr. Seay's daily work assignments came from Celanese, either directly or via his Daniel supervisor who got his instructions from Celanese. Celanese decided what insulation work might need to be done on a given day. Celanese determined when the work was to be done, where it was to be done, and how it was to be done.

Celanese never warned Mr. Seay about the dangers of asbestos exposure even though Celanese agrees that contract workers should be told about hazardous substances in use on its premises. In the 1970s, Celanese did not warn contractors not to use abrasive techniques to remove asbestos gaskets, or provide that non-asbestos gaskets should be used when gaskets could not be removed without the potential release of asbestos fibers.

There were no asbestos warning signs posted anywhere at the Celanese plant. Celanese owned the walls at the plant and could have put up signs on its own walls at any time. If Mr. Seay's employer, Daniel, had wanted to put a sign on the wall, it would have had to get permission from Celanese. Nothing in the OSHA asbestos regulations prevented Celanese from posting warning signs in areas where they knew asbestos materials were present.

The evidence showed that Celanese made a conscious choice not to warn for fear of liability. As of 1963, Celanese had a policy of not putting information about hazardous products

in writing due to a concern that written evidence of its knowledge of the danger could later be used in lawsuits. Its policy, signed by the president of Celanese, was to only communicate hazard information orally so as to avoid a paper trail. Mr. Bowyer could not say whether that policy had been changed as of 1978. In the 1970s, Celanese had an official policy that it would not give workers written interpretive statements of asbestos sampling results. If an employee requested hazard information on a particular product, the plant supervisor was instructed to state that the data was inconclusive, no matter what the product was. Mr. Bowyer himself authored a memo in 1988 stating that because interpretive statements of exposure monitoring results were not required to be communicated to employees by law, the company would not require it.

Celanese could have disseminated information about asbestos to contractors during safety meetings. However, during Mr. Seay's years of employment at the Spartanburg plant, Daniel employees did not attend the safety meetings that Celanese held for its own workers. As of 1962, some Celanese plants did have a practice of requiring contract workers to attend regular plant safety meetings and that suggestion was circulated to other plants.

The evidence also showed that Celanese failed to take other precautions to protect contract workers. Charles Laubly, an industrial hygienist at Celanese in the 1960s and 1970s, had no knowledge of any measures being taken by Celanese to prevent maintenance employees from being exposed to asbestos. Mr. Bowyer testified that Celanese could have tested the pipe insulation to determine the areas where asbestos insulation was present, but it never did so. Celanese did not inform contract workers about the areas where asbestos pipe insulation was present. Celanese did not require the use of respirators or masks when working around asbestos dust.

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Celanese had a shared responsibility for worker safety. Celanese had a contractual obligation to audit Daniel's safety and health program at the Spartanburg plant. There is no evidence that Celanese ever performed those safety audits of Daniel at Spartanburg in the 1970s.

Mr. Bowyer agreed that it was good corporate policy to work with contractors to ensure the safety of contract employees. There is no evidence, however, that this policy was actually implemented by Celanese during Mr. Seay's years.

Celanese later implemented policies designed to protect contract workers like Mr. Seay. As of 1980, Celanese had a policy of protecting the health and safety of contract workers on its property. As of 1980, its hazard communication policy provided that contract employees would be given the same health and safety information about products and materials at Celanese that Celanese would provide to its own employees if they were performing the work. In 1991, Celanese had a contractor safety program providing that contractors could not remove insulation before finding out from Celanese whether the insulation was asbestos-free. Celanese was also responsible for evaluating insulation and determining how to and who would remove it. Removal of asbestos insulation was required to be done according to the plant asbestos removal procedure. Contractors were forbidden from removing asbestos insulation not identified and cleared for removal by Celanese. Mr. Bowyer agreed that those were all good corporate policies. Celanese could have put those policies in place in the 1960s and 1970s.

During the years of Mr. Seay's employment, Mr. Bowyer admitted that Celanese could have tagged lines that contained asbestos insulation and warned contractors not to touch lines and equipment in the tagged areas. Celanese could have put up signs stating that contractors should not touch insulation in tagged areas because asbestos can cause cancer, disability, and death. Celanese could have posted warning signs that gaskets may contain asbestos and that

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contractors should not begin work with gaskets until cleared by Celanese. Celanese could have put a sign stating that asbestos exposure could be deadly and that wet down methods, vacuums, and respirators should be utilized.

If Celanese had pertinent safety policies in place, Daniel employees were required to follow them. Dr. Holstein testified that if Celanese had implemented a policy that contract workers should avoid areas with asbestos insulation at the Celanese plant, that would have helped prevent Mr. Seay's mesothelioma. If Celanese had implemented any safety rules pertaining to areas of the plant where asbestos was present, then Daniel could have passed that policy information to Mr. Seay as it was required to do under the contracts between Daniel and Celanese.

The Court finds that the evidence supports the jury's finding that Celanese's failed to act with reasonable care to protect the health and safety of Mr. Seay. Celanese knew or should have known that asbestos exposure could cause fatal disease when Mr. Seay began working at the Spartanburg facility in 1971, and yet it purchased and required the use of asbestos insulation, gaskets, and packing. It continued to use asbestos gaskets even when alternative materials were available and more effective. Celanese had the authority and opportunity to warn of the dangers of asbestos through signage, safety meetings, or company policies and procedures, but did not warn in any way during Mr. Seay's tenure at the Spartanburg plant. Its later conduct showed the feasibility of such measures. The Court concludes that the jury reasonably found that Celanese was negligent.

B. Causation

Celanese contends that "Plaintiffs failed to establish causation." The Court cannot agree. It is undisputed that Mr. Seay had an asbestos-caused mesothelioma and that his exposure to

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asbestos at Celanese for nine years was his only known exposure. Plaintiffs presented sufficient evidence to support the jury's causation finding against Celanese.

The Supreme Court has adopted the Lohrmann causation standard for asbestos cases. See Henderson v. Allied Signal, Inc., 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). Under Lohrmann, "[t]o 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." *Id.* (quoting Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir.1986)). Owen recognizes that the Lohrmann standard for proving causation in asbestos cases is "a variant of the substantial-factor test." David G. Owen, Product Liability Law 778 (2d ed. 2008).

Plaintiffs offered expert testimony from Dr. Arnold Brody, a cellular biologist and experimental pathologist specializing in the biological mechanisms of asbestos-related disease; Dr. Kradin, a practicing physician board-certified in internal medicine, pulmonary medicine, and pathology; and Dr. Holstein, a physician board-certified in internal medicine and preventive and occupational medicine. Celanese has not challenged their expertise or the admissibility of their opinions.

Dr. Brody offered only general causation opinions. He testified that the only generally accepted cause of mesothelioma in the United States is asbestos exposure. He testified that mesothelioma is a dose-response disease, that mesothelioma is caused by a person's cumulative asbestos exposure, and that all asbestos exposures at an occupational level contribute to the cumulative dose and increase the risk of disease. Dr. Brody explained that scientists have not found a safe level of asbestos exposure above background level.

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Dr. Kradin testified that Mr. Seay had a history of substantial exposures to asbestos insulation, gaskets, and packing at Celanese. He testified that the scientific literature has shown that working with these asbestos products in the manner described by Mr. Seay releases asbestos fibers well in excess of background levels. Further, the epidemiological literature has established that even low levels of asbestos exposure increase the risk of developing mesothelioma. Dr. Kradin offered the opinion that Mr. Seay's exposures to asbestos insulation, gaskets, and packing at Celanese were all substantial factors in causing his mesothelioma.

Dr. Holstein testified about the range of asbestos fiber release that has been measured and reported in the scientific literature for the type of work practices with asbestos insulation that are at issue in this case, including removing, cutting, and bystander exposure. Dr. Holstein testified that measurements from work with asbestos insulation range from less than 1 fiber per cubic centimeter of air (fiber/cc) up to hundreds of fibers/cc. Dr. Holstein testified that, based on Mr. Seay and Mr. Thompson's descriptions of their work with and around asbestos insulation, Mr. Seay's range of exposure would be .1 fiber/cc to 100 fibers/cc. Because the average exposure for insulators has been reported to be 6 fibers/cc, and Mr. Seay was often only a bystander to insulation work, in Dr. Holstein's opinion Mr. Seay's average exposure to asbestos insulation at Celanese was 4 fibers/cc.

By comparison, Dr. Holstein testified that the background level of asbestos in the ambient air is only 0.00005 fibers/cc. Dr. Holstein explained that an exposure of 1 fiber/cc is thus 20,000 times above background. On many occasions, Mr. Seay's asbestos exposures were far in excess of the background levels.

Dr. Holstein testified that, according to the industrial hygiene literature, cutting new gaskets results in asbestos exposures from .1 fiber/cc to 2 fibers/cc. Removing asbestos gaskets

with the tools that Mr. Seay used, including putty knives, wire brushes, and power wire brushes, generates asbestos exposures between .1 fiber/cc and 31 fibers/cc. The high end of the range, 31 fibers/cc, is from power wire brushing, and that would be 622,000 times above background levels. On the lower end, a study funded by John Crane measured exposures from gasket removal at .166 fibers/cc, which is still 3,320 times above background levels.

In Dr. Holstein's opinion, when Mr. Seay was working with asbestos gaskets his exposures would have exceeded the short-term limits set by OSHA on many, but not all, occasions that he was using a power wire brush and even occasionally when he was using a hand wire brush to remove asbestos gaskets. Once the OSHA TLV dropped to 2 fibers/cc in 1976, it is possible that Mr. Seay was exposed in excess of OSHA limits.

Dr. Holstein has concluded that Mr. Seay's mesothelioma was caused by his asbestos exposures and that those exposures were limited to the period of time when he was working at Celanese. He relied on the fact witness testimony that Mr. Seay regularly breathed in asbestos fibers from working with and around asbestos insulation and gaskets for about a decade. In Dr. Holstein's medical opinion, Mr. Seay's work around asbestos insulation and gaskets were substantial factors in the development of his mesothelioma.

Celanese offered no expert testimony. Dr. Victor Roggli was a medical expert brought by a co-defendant at trial, John Crane, Inc. He is of the opinion that Mr. Seay's exposure to asbestos insulation was a substantial factor in causing his mesothelioma. John Crane's expert Dr. James Crapo similarly testified that Mr. Seay had an asbestos-caused mesothelioma and that his exposure to insulating products at Celanese created his risk for mesothelioma.

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Celanese does not really dispute that Plaintiffs have demonstrated substantial factor causation, and instead argues that Plaintiffs failed to show "but for" causation.[1] This contention has no merit. All of the testifying medical experts in this case agreed that Mr. Seay's exposures at Celanese caused his disease. This consistent medical causation testimony was uncontradicted by Celanese. As Mr. Seay's only source of asbestos exposure was at Celanese, the jury reasonably concluded that Mr. Seay would not have developed mesothelioma without his exposure at Celanese.

The evidence of Mr. Seay's exposure to asbestos at Celanese was more than sufficient to create a fact issue for the jury on the issue of causation.

C. Superior Knowledge

Celanese challenges the verdict based on its related contentions that the jury was improperly charged on premises liability law and that Plaintiffs failed to create a jury question on the superior knowledge requirement. Neither of these arguments is meritorious.

First, Celanese contends that the jury should only have been charged under the superior knowledge language of Lanier Constr. Co. v. Bailey & Yobs, Inc., 384 S.C. 275, 681 S.E.2d 909 (Ct. App. 2009) and that the standard premises liability law does not apply to independent contractors such as Mr. Seay.

Plaintiff contends this argument has been waived because Counsel for Celanese agreed to Plaintiffs' jury instructions on premises liability. The Court disagrees and finds that no such waiver occurred.

The Court does not agree, however, with Celanese's reading of the law. There is nothing in Lanier suggesting that a premises owner does not a duty of care to an invitee when a

[1]At trial, Celanese took the position that Plaintiffs did not have to show but-for causation in a premises liability case.

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contractor is involved. Lanier clearly holds, consistent with black letter South Carolina law, that a landowner owes a duty of care to its invitees. 384 S.C. at 279. "'A property owner owes an invitee or business visitor the duty or exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty.'" Id. (quoting Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004)). Lanier followed other South Carolina cases holding that a general contractor may also owe a duty of care to invitees. Id. at 279 (following Sides and Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). A general contractor only owes a duty to invitees, however, if it has superior knowledge of the danger. See id. at 279-80. In Lanier, a subcontractor invited onto the property by the general contractor was considered the general contractor's invitee and the property owner did not owe a duty because it lacked superior knowledge of the danger as compared to the general contractor. See id. at 281. The Lanier opinion also stated that the property owner had discharged its duty to warn by warning the general contractor. See id.

Here, there is absolutely no evidence that Celanese discharged its duty by warning Daniel, and Celanese has not even made that claim. Regardless of any duty that Daniel may have owed to Mr. Seay, Celanese owed a duty to Mr. Seay as an invitee. The general premises liability instruction regarding Celanese's duty to its invitees was a correct statement of the law.

Celanese also contends that there was "no evidence" that it had superior knowledge of the asbestos hazard compared to Daniel. The Court disagrees. Plaintiffs presented evidence that Celanese had earlier and far more extensive knowledge of asbestos hazards than Daniel—and there were no facts elicited at trial to contradict this. Celanese knew about the danger of asbestos-related disease long before Daniel did. The medical director of Celanese, Dr. Dixon, attended the 1964 Selikoff conference on asbestos-related diseases. At that conference, attendees

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learned that asbestos causes mesothelioma and that even slight exposures or non-occupational exposures created a risk of mesothelioma. On the other hand, an employee for Daniel, Dan Buck, testified that Daniel was not aware that in 1964 asbestos researchers at the Selikoff conference had stated that there is no safe level of asbestos exposure. As of 1970, Daniel did not even know that asbestos could cause mesothelioma.

In the 1950s and 1960s, Celanese learned about asbestos-related diseases, including mesothelioma, from its membership in the IHF. At the same time Celanese was receiving almost monthly updates from the IHF about asbestos-related diseases, including mesothelioma, Daniel was not a member of the IHF and did not receive the Industrial Hygiene Digest.

Documentary evidence showed that Celanese knew as of 1970 that mesothelioma could be caused by relatively small levels of exposure to asbestos, and that the PEL was not protective against cancer. As of 1970, Daniel did not know that only slight exposures could cause mesothelioma and was not aware that the published TLVs were not protective against mesothelioma. In fact, Daniel was under the impression that asbestos could be used safely if exposures were kept below the PEL. Daniel was not aware that PEL did not protect against cancer.

This evidence was sufficient for the jury to determine that Celanese had much earlier knowledge and more extensive knowledge than Daniel did about the specific danger of mesothelioma and the types of exposures that could cause this disease.

D. Statutory Employer

Celanese again raises the statutory employer defense that was decided in Plaintiffs' favor at the pre-trial stage. This Court previously determined that Mr. Seay was not a statutory employee of Celanese because, as a contract maintenance worker employed by Daniel, he was not engaged in work that was part of Celanese's regular business operations. The Court found the decision in Raines v. Gould, Inc., 288 S.C. 541, 543, 343 S.E.2d 655, 657 (Ct. App. 1986) to be dispositive. Raines held that construction work on behalf of a manufacturer will not be considered part of the manufacturer's trade or business unless the manufacturer had its own construction division or its own employees performed construction work. 288 S.C. at 543, 545. There, the plaintiff who helped install an electrical system in a plant being constructed by the defendant was not considered a statutory employee because, "[a]lthough [the defendant] has been involved with the construction of numerous facilities on the property which it owns or leases or manages, the record does not indicate that it had a construction division or that any construction work was performed by its regular employees." Raines, 288 S.C. at 547. Further, "[e]very manufacturer must have a plant, but this fact alone does not make the work of constructing a plant part of the trade or business of every manufacturer who engages a contractor to construct a plant." Id.

The facts at trial bore out that Mr. Seay is not a statutory employee of Celanese. The evidence was that Celanese plant manufactured polyester fibers. All Celanese employees were production workers who were making polyester fibers. Dr. Frederick Toca, who was the Director of Occupational Health and Safety for Celanese in the 1990s, testified that Celanese was, "the second largest chemical company in the world." (TT 10/6 AM, at 932:18-933:22). The purpose of the company was the production of fibers, chemicals, pharmaceuticals, and agrochemicals.

Celanese did not have its own maintenance division or its own construction division. All of the maintenance workers at Celanese were employed by Daniel. No Celanese employees ever did the type of maintenance work performed by Mr. Seay and other Daniel workers. The Daniel workers and the Celanese employees performed "significantly different" work.

The question of statutory employment status turns on whether the work performed by the subcontractor is "part of the trade, business, or occupation" of the owner. Olmstead v. Shakespeare, 354 S.C. 421, 424, 581 S.E.2d 483, 484 (2003); Glass v. Dow Chemical Co., 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997); Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946); Raines, 288 S.C. at 543, 343 S.E.2d at 657. A worker is only engaged in part of the owner's trade or business if the activity is: (1) an important part of the owner's business or trade, (2) a necessary, essential, and integral part of the owner's business, or (3) has previously been performed by the owner's employees. Glass, 325 S.C. at 201, 482 S.E.2d at 50. The Supreme Court has held that there is no easy formula or bright-line rule for determining whether the work was part of the owner's trade or business, and that each case must be decided on its own facts. Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000); Glass, 325 S.C. at 201, 482 S.E.2d at 51.

The Supreme Court's approach to the question of whether work was important, necessary, or integral focuses on whether the work was part of the business of the owner. 526 S.E.2d at 163-64, 526 S.E.2d at 514. In Abbott, the Court of Appeals had found that the plaintiff, who drove a delivery truck for a common carrier, was a statutory employee of the retailer to whom he made a delivery. See id. at 162, 526 S.E.2d at 514. The worker was injured when he slipped and fell while unloading boxes on the retailer's premises. See id. The Court of Appeals reasoned that because the efficient delivery of goods was important to the business of the retailer,

whose business depended on such deliveries to restock its stores, the driver was a statutory employee. See id. at 163, 526 S.E.2d at 514. The Supreme Court disagreed, holding that, "[t]he fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of the Retailer's business." Id. Simply because such deliveries were important to the conduct of the business, "'that does not mean that the transportation of the goods is a part or process of the business.'" Id. at 164, 526 S.E.2d at 514 (quoting Caton v. Winslow Bros. & Smith Co., 309 Mass. 150, 154, 34 N.E.2d 638, 641 (1941)) (emphasis added).

Under Abbott, it is still necessary to conduct a case-specific analysis, but the focus must be on what type of business the defendant conducts. Olmstead, 354 at 426, 581 S.E.2d at 486. In Olmstead, the defendant was in the business of designing and manufacturing fiberglass products. See id. at 426, 581 S.E.2d at 486. The Court focused on the nature of the business in holding that a worker involved in transporting the company's fiberglass products was not a statutory employee:

> Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare's products arrive at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier . . . . Although delivery by common carrier was certainly important to Shakespeare's operation, it does not follow that such delivery was "part or process" of its manufacturing business.

Id. (emphasis added).

Cases involving construction workers illustrate that an evaluation of the nature of the defendant's business is dispositive of the statutory employer question. Where construction is a part of a company's documented business purpose, or the company has a construction division or has handled its own construction in the past, then construction contractors have been found to be statutory employees. See MacMullen v. South Carolina Elec. & Gas Co., 312 F.2d 662, 663 (4th

Cir. 1963); Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980); Fortner v. Thomas M. Evans Const. and Development. LLC, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013); Ewing v. A.W. Chesterton Co., No. 09-CP-40-8342, at p. 5 (Ct. Cmn. Pleas 2010). Conversely, if the defendant is not in the business of construction, and the construction work cannot fairly be characterized as part of the defendant's business, courts will not find the construction worker to be a statutory employee. See Glass, 325 S.C. at 202; Raines, 288 S.C. at 547, 343 S.E.2d at 659. For example, in Raines the court noted that, "the nature of [the defendant's] business, according to its application to transact business in South Carolina, is the 'manufacturing and selling [of] batteries of all kinds and related products.'" 288 S.C. at 547, 343 S.E.2d at 659. Further, "the record does not indicate that [the defendant] had a construction division or that any construction work was performed by its regular employees." Id. Therefore, the plaintiff's construction work was not part of the defendant's trade or business and he was not a statutory employee. Id.

The construction cases demonstrate that a determination that work is part of an owner's trade or business depends heavily on the company's stated business purpose. See MacMullen, 312 F.2d at 663; Parker, 275 S.C. at 73; Fortner, 402 S.C. at 431; *Raines*, 288 S.C. at 547; Ewing, at p. 5. Where the corporate documents, partnership agreements, state business filings, or plain language of the company name showed construction as a business activity, the business was found to be in the construction business. *MacMullen*, 312 F.2d at 663; Parker, 275 S.C. at 73; Fortner, 402 S.C. at 431; Ewing, at p. 5. Employees of construction contractors or subcontractors were therefore found to be statutory employees. Parker, 275 S.C. at 74; Fortner, 402 S.C. at 432; MacMullen, 312 F.2d at 671-72; and Ewing at 6. On the other hand, in Raines

where the stated business purpose was to manufacture batteries, the court could not find that construction was part of the company's business. 288 S.C. at 547.

The focus must thus be on the type of business that Celanese conducted. Celanese manufactures synthetic fibers. It is not in the maintenance business. It did not have a maintenance division and none of its employees ever conducted maintenance (until after Mr. Seay stopped working for Celanese). Generally, "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." Glass, 325 S.C. at 202, 482 S.E.2d at 51.

Although maintenance of the equipment in the plant may have been important to Celanese's operation, it does not follow that such maintenance was a "part or process" of its synthetic fiber manufacturing business. Celanese has presented no evidence that its corporate purpose included equipment maintenance. Mr. Seay was not its statutory employee under South Carolina law.[2]

E. Jury Conduct

Celanese contends that the jury engaged in "improper discussions" around the statement by Juror 16 that he worked at the same plant and in the same job as Mr. Seay. The Court finds, however, that Celanese has presented no evidence of any jury impropriety.

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[2] The Court does not need to reach Plaintiffs' arguments that even if Mr. Seay was determined to be a statutory employee of Celanese, they do not have a workers' compensation claim against Celanese and their remedy is in the tort system. Plaintiffs argue that occupational diseases are only compensable under the Workers' Compensation Act if they arise within one year of workplace exposure, or, in the case of pulmonary diseases, within two years of exposure. S.C. Code Ann. § 42-11-70. Mr. Seay did not develop malignant mesothelioma until 2013, 35 years after his last exposure to asbestos at Celanese. Plaintiffs additionally argue that Celanese has failed to prove that it complied with the Act's requirement that it obtain workers' compensation insurance or provide proof that it was financially able to self-insure. S.C. Code Ann. §§ 42-5-10, 42-5-20. An employer who fails to secure the payment of compensation as required by the Act loses its immunity under the Act's exclusive remedy provision and may be sued in tort. S.C. Code Ann. § 42-5-40; Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999).

When a party alleges irregularities in the jury's deliberations, "[t]he test is whether there is reason to suppose outside influences affected the jury's verdict." Parker v. Evening Post Publ. Co., 317 S.C. 236, 248, 452 S.E.2d 640, 647 (Ct. App. 1994). The trial court may evaluate such a claim based on its "opportunity to view the trial, the character and intelligence of the jurors, and to consider whether the verdict, in light of the evidence, has so little support as to indicate corrupt or improper influence." Id.

There is simply no evidence that any outside influences affected the jury's verdict in this case. Juror 16 stated in voir dire, in front of the entire jury panel, that he works at the Auriga Polymers plant that used to be the Celanese plant. When asked if he had any opinions about Celanese that would affect his ability to be fair and impartial, he said he did not. Later, on Day 4 of trial, Juror 16 approached the Court with a concern that he worked at the same plant as Mr. Seay and had the same maintenance job repairing equipment. He was ultimately dismissed.

Based on Juror's 16 explanation of the limited nature of what he had told the other jurors, the Court cannot conclude that there were any premature deliberations. The conversation that Juror 16 had with other jurors was limited to the fact that he worked at the former Celanese plant, and that had already been disclosed. Although one of the jurors asked him about the use of asbestos at the plant, he did not answer. There is every indication that the jury complied with the instruction not to discuss the case, and no evidence of premature deliberations. See State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999).

The Court cannot find that there was any prejudice to either side's right to a fair trial based on Juror 16's presence on the jury up to the point at which he was dismissed. Celanese has not offered any reason for the Court to find that outside evidence was offered by Juror 16 or improperly considered by the jury.

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F. Video Evidence

Celanese next complains that Plaintiffs' counsel published "unauthorized audio" to the jury. The video at issue was a five-second clip of Mr. Seay in obvious pain and begging Jesus for help. The Court cannot agree that this video clip was "unauthorized." Plaintiffs' counsel disclosed this video in pre-trial discovery and notified defense counsel that he planned to play a portion of the clip in which Mr. Seay mentioned Jesus.

The Court also finds that Celanese has waived this argument by failing to make a contemporaneous objection. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). If Celanese truly believed the video of Mr. Seay to be "unauthorized" or "severely prejudicial," it should have objected at the time the video was played. Counsel for Celanese claims that he did not object because he thought the video "had been cleared with someone else on the defense side," again suggesting that the video was not in fact particularly objectionable. Not only did Celanese fail to object at the time, it failed to object at any time on the day the clip was played. Celanese only decided to voice an objection four days later, after a long weekend break. It thus failed to preserve its objection.

Finally, Celanese has failed to show any undue prejudice from this clip. The jury heard other evidence in this case establishing that Mr. Seay died an agonizingly painful death from mesothelioma. This was an undisputed fact in this case. Celanese also fails to explain how invoking the name of Jesus makes the video clip objectionable or unduly prejudicial. The jury had already heard evidence that Mr. Seay was a Christian and relied on his faith during his

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illness. The Court cannot conclude that Celanese suffered any undue prejudice from this evidence.

G. Evidentiary Rulings

Celanese challenges two main categories of the Court's evidentiary rulings. First, Celanese contends that the admission of Plaintiffs' Exhibit 821 was "severely prejudicial" and "harmful error." This document is an internal Celanese memorandum from 1963 in which Celanese states its policy not to put any research about hazardous products in writing for fear of liability. Celanese has not established that this document is inadmissible under South Carolina law.

The standard is not whether evidence is "severely prejudicial," but whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. S.C. R. Evid. 403. The Court finds the 1963 Celanese memorandum to be highly probative of Celanese's attitude about warning of dangerous products on its property. Celanese has not argued that there is anything unfair about the admission of this 1963 memorandum, and nor could it. These are its own statements, signed and endorsed by the President of the company, about its own internal policies on providing warnings. The statements were presented in the context of the entire document. Celanese has failed to show that the admission of this document was erroneous.

Celanese also complains that Plaintiffs should not have been permitted to publish to the jury numerous documents regarding Celanese's knowledge about the hazards of asbestos exposure prior to and during Mr. Seay's employment. It again argues that it was error to allow publication because the documents are "severely prejudicial." This is not a reason to exclude relevant evidence: "Evidence cannot be excluded simply because it is prejudicial. Almost all

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evidence is prejudicial to somebody. Saying evidence is prejudicial is another way of saying it is relevant." State v. Bostick, 307 S.C. 226, 229, 414 S.E.2d 175, 177 (Ct. App. 1992).

The Court finds that evidence of Celanese's knowledge and conduct with regard to the dangers of asbestos exposure and the use of asbestos products on its premises is unquestionably relevant to Plaintiff's premises liability claims. "To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff 'must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.'" Pringle v. SLR, Inc., 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) (quoting Anderson v Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988)).

The South Carolina Supreme Court has recognized that evidence of constructive knowledge of the danger is relevant to a premises liability claim. See Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009) (reversing summary judgment for premises owner because "evidence show[ed] that Respondent knew or should have known that a dangerous condition existed on its premises and that invitees would have to encounter this condition"); JKT Co. v. Hardwick, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("documents prepared by Celotex employees ... constituted admissions which were decidedly relevant to the issue whether Celotex knew or should have known those materials were defective"); see also Williams v. CSX Transp., Inc., 176 N.C. App. 330, 341, 626 S.E.2d 716, 726 (N.C. Ct. App. 2006) (finding sufficient evidence of employer's constructive knowledge of asbestos risk from medical literature, defendant's membership in industrial organization "whose publications and

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annual meeting minutes acknowledged the danger of asbestos exposure beginning in 1937" and documents from defendant's files about asbestos risks).

The Court concludes that the documents at issue were highly probative of Celanese's knowledge and conduct regarding asbestos products on its premises. Celanese has failed to show that the probative nature of the documents was outweighed by any unfair prejudice.

H. Compensatory Damages

Celanese contends that there was insufficient evidence to support the jury's damages awards on Plaintiffs' claims for survival, loss of consortium, and wrongful death. In the alternative, it seeks a new trial nisi remittitur, asking for a reduction of the survival award from $2 million to $1.5 million, and a reduction of the loss of consortium and wrongful death awards from $5 million each to $1 million each. Given the substantial evidence that Mr. Seay and his family have suffered enormously as a result of his mesothelioma diagnosis and death, the Court does not find these awards to be excessive or unduly liberal, and finds no compelling reason to reduce them.

1. Survival

Damages in a survival action include recovery for the deceased's conscious pain and suffering and medical expenses. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000). The parties stipulated that Mr. Seay's medical bills were $280,457.91.

The jury's survival damages award of $2 million is supported by the evidence of substantial injuries suffered by Mr. Seay. Mr. Seay was diagnosed with cancer in August 2013. He had suffered with a lot of pain in his chest and lungs even before his diagnosis. He had to have fluid drained from his lungs eleven separate times, which involved cutting his side and

putting a drainage tube in. At the time of his deposition in January 2014, he had two broken ribs that could not be repaired because his doctors were concerned about cutting him open again.

In the months leading up to his mesothelioma diagnosis, Mr. Seay suffered a collapsed lung on three separate occasions. Each time required an operation to re-inflate his lung. After the first two surgeries he was told he did not have cancer. When Mr. Seay was diagnosed with mesothelioma after the third surgery, his doctor told him that he only had 12 to 18 months to live. Mr. Seay testified that the news "hit me like a tractor and trailer truck had run over me or something," because after the other two operations he had been told he was cancer free. He testified that, to be "hit with something like that afterwards and tell me my lifespan was that short, it was a terrific blow."

Mr. Seay underwent chemotherapy that made him so sick he had to discontinue the treatment. He had a lot of serious problems with dehydration after his diagnosis. He had to go to the hospital three times a week for fluids, and was even hospitalized several times for dehydration. After his third lung operation, Mr. Seay never really recovered physically. He testified that, "in the last couple of months, I haven't had no life other than sitting in this chair and going to the doctor and laying in the bed."

Mr. Seay testified that he stayed in pain all the time. He had completely lost his appetite and could not keep food down. He could not sleep and laid awake in pain most of the night.

Prior to his mesothelioma diagnosis, Mr. Seay led a very active life. Although he retired right before he turned 65, he came out of retirement almost immediately, worked another year, and then went to a schedule of working full-time about six months each year. After his mesothelioma diagnosis, he became too sick to work and had to quit. He testified that he had

planned to keep working indefinitely and that if he had not developed mesothelioma he would still be working.

Mr. Seay was strong and in very good physical shape before his mesothelioma diagnosis. He used to stay active with hobbies like fishing and working in his yard every day. When his physical condition deteriorated he felt the loss keenly. He testified that, "I enjoy getting out and working in the yard and – and all of that. And I just don't have that kind of life no more. And I miss it and I wished I had it back."

Every year Mr. Seay and his entire family, including children and grandchildren, took trips to the mountains and to the beach. He could no longer take those trips after he got sick. The whole family really missed taking those vacations together, and his grandchildren would even ask him when they were going to go on a trip to the mountains again.

Mr. Seay testified that the hardest part about having mesothelioma was knowing he was going to die soon. He also said that he was in pain 24 hours a day and that because of the constant pain it had been a "terrible, terrible year." At times he was in such agony that he was hoping and praying to die, but at the same time he wanted to be healed so he could have more a little more time with his family.

His daughter, Angie Keene, testified that Mr. Seay was in a lot of pain when his lung collapsed. She said that she had never seen her father cry, but that when his lung collapsed "he would be just screaming and crying." She described that when he had to go in for the third surgery, it was really terrible:

> The surgery was going to be excruciating. And they – where they cut him, they broke two ribs. And he had also cut through a lot of nerves that couldn't heal. And no pain medicine could help. And he had to endure that for another month or so before it collapsed again.

(TT 10/2, at 866:22-867:2).

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Dr. Kradin testified that Mr. Seay's disease was incurable. He was treated with a number of surgeries and chemotherapy, but those measures were not taken to cure him but to try to make him more comfortable for the little time he had left. Mr. Seay had at least 8 pneumothoraces, a condition where air accumulates around the lung. That is treated by inserting a chest tube to evacuate the air. Mr. Seay also had a decortication procedure that involved removing the lining of his lung.

Mr. Seay also had multiple thoracentesis procedures to remove fluid from the pleural space around the lungs. Dr. Kradin explained:

> Mesotheliomas, in addition to being a space-occupying mass, tend to produce an inordinate amount of fluid as they grow, and this often requires multiple procedures to remove the fluid in order to make it more comfortable for the patient to breathe as the fluid tends to collapse the underlying lung.
>
> So in this case, multiple thoracentesis were performed. Multiple efforts at evacuating air, which had ruptured into the pleural space had been performed, and ultimately there were efforts to close the pleural space by the talc pleurodesis.

(Kradin Video Depo., at 38:19-39:4).

Dr. Kradin testified that Mr. Seay's death from mesothelioma occurred primarily through suffocation when the tumor grows around the lung. The tumor encases and constricts the lung, making it difficult and painful to breathe. In addition, there is a wasting phenomenon with mesothelioma because the patient cannot eat very much, loses weight, and grows increasingly weaker. The mesothelioma tumor also encroaches on the large vessels of the chest, including the aorta and the vena cava, and interferes with circulation.

The evidence of Mr. Seay's continuous, intense pain for more than a year prior to his death certainly supports the jury's award for survival damages in this case. There was substantial evidence that Mr. Seay underwent great physical agony, as well as extreme emotional and mental distress. He lived with the knowledge that his disease was fatal and incurable, and suffered

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progressive physical disablement that prevented him from doing the things he loved. The evidence was more than sufficient to support the jury's $2 million award for survival damages.

The Court does not find any compelling reason to reduce the award by $500,000, as Celanese requests. The award of $2 million is at or below similar survival awards for plaintiffs who died from pleural mesothelioma. See, e.g., Bobo v. TVA, 2015 U.S. Dist. LEXIS 130741, at *111 (N.D. Ala. Sept. 29, 2015) (awarding the plaintiff $3 million for the decedent's physical pain and suffering when she died of mesothelioma at 71 years of age); In re New York Asbestos Litig., 847 F. Supp. 1086, 1096-97 (S.D.N.Y. 1994) (denying remittitur of an award of $7.5 million in pain and suffering to the estate of a mesothelioma victim who suffered with the disease for 18 months before death because his suffering was "continual, severe and unrelenting"); In re Joint E. & S. Dists. Asbestos Litig., 798 F. Supp. 925, 937-38 (E.D.N.Y 1992), rev'd on other grounds, 995 F.2d 343 (2d Cir.), and rev'd on other grounds, 995 F.2d 346 (2d Cir. 1993) (declining to reduce an award of $4.5 million in pain and suffering when the decedent suffered from the disease 11 months before succumbing).

As Celanese points out, in Garvin, this Court did remit the pain and suffering awarded to Mr. Garvin from $10 million to $1.5 million. But the cases are very different. Mr. Garvin was alive and cancer free at the time of his trial, whereas Mr. Seay suffered unrelenting pain until his mesothelioma killed him. Mr. Garvin was four years older at the time of trial than Mr. Seay was at his death, and Mr. Garvin's life expectancy was a number of years shorter. Mr. Garvin suffered from a testicular form of mesothelioma, while Mr. Seay suffered from pleural mesothelioma that caused his death by suffocation. The Court therefore finds that the award of $2 million to Mr. Seay's estate is not unduly liberal and should not be reduced.

2. Loss of Consortium

Damages for loss of consortium compensate the plaintiff for the loss of a spouse's "companionship, aid, society and services." S.C. Code Ann. § 15-75-20. "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996) (citing S.C. Code Ann. § 15-75-20).

The jury's loss of consortium damages award of $5 million is supported by the evidence that Linda Seay suffered extreme hardship and loss because of the illness and death of her husband. Linda and Dennis Seay met when they were young. They got married after only knowing each other for two days, and stayed married for 47 years. Their daughter described them as best friends. They did not have a lot of other friends and "[t]hey were just together, just the two of them." Linda Seay confirmed that, testifying that, "[w]e were just together all the time." When she was eight months pregnant she went on a fishing trip with Mr. Seay, "just to be with him."

Linda took care of him when he got mesothelioma. He always wanted her right beside him. He wanted to maintain a dignified appearance and asked her to shave him every day.

Toward the end, Mr. Seay's mind started to go and he was having such trouble breathing that he was convinced his breathing tube was crimped even though it was not. Every night, in the middle of the night, Linda Seay would have to crawl under his bed and tell him she was fixing the tubes, even though they were perfectly fine.

Linda Seay misses her husband terribly. She testified:

> I just miss talking with him. I mean, you know, we talked all the time. We had -- we would -- I mean, we were together for 48 years. We – I didn't have friends. He didn't have friends. We were just together all the time. And I miss talking to him.
>
> Sometimes I talk to him when I -- when --knowing he's not even there.

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(TT 10/2 at 893:16-23). She said they used to take drives into the country about every other Sunday, and that she really misses that. She said, "I just sit there at night. And it's terrible." Her whole life she always looked forward to telling her husband about anything that happened in her life, but now she thinks about wanting to do that and he's not there and "[it] is really terrible."

The jury's $5 million loss of consortium award is supported by the evidence and is not unduly liberal. Other widows in mesothelioma cases have received substantial awards for loss of consortium. For example, in Baccus v. Atl. Richfield Co., 2010 Phila. Ct. Com. Pl. LEXIS 8, *30-31 (Pa. C.P. 2010), the court denied remittitur in a mesothelioma case where the jury awarded $1 million on the survival action, $2.5 million on the wrongful death action, and $3.5 million on the wife's loss of consortium claim. The decedent had survived 11 months before succumbing to his disease. *Id.* at *28. Mrs. Seay took care of her husband through a significantly longer illness. Like Mrs. Seay, the widow in Baccus was awarded substantially more on the loss of consortium claim than the jury awarded on the survival claim. See also Schroeder v. Anchor Darling Valve Co., 2010 Phila. Ct. Com. Pl. LEXIS 283, *2, 16 Pa. D. & C.5th 449, 451 (Pa. C.P. 2010) (after a bench trial awarding $2 million in survival damages for a mesothelioma victim, $3 million in wrongful death damages, and $5 million for the widow's loss of consortium).

In Garvin, this Court found "no compelling reason to disturb" an award of $1 million for loss of consortium when there was none of the evidence the jury saw here—of a wife caring for her husband as he dies, shaving him every day, and comforting him through the loss of his mental faculties. The award was substantially higher in this case, and the evidence of Mrs. Seay's loss of consortium was likewise substantially greater.

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Celanese seems to suggest that, because Mr. Seay and his wife were older and had been married a long time, her loss of consortium should not be as high as a younger wife's loss might be. The Court does not agree with this reasoning. Mr. Seay and his wife were best friends, married for 47 years. They did not have a lot of other friends and relied almost entirely on one another. The loss of such an intensely intimate and all-encompassing relationship—the relationship Mrs. Seay had built her entire life around—represented an overwhelming loss. As Celanese points out, Mrs. Seay is not a young woman, prepared to rebuild her life. When Dennis Seay got sick, Linda Seay lost everything she had built with her husband. She lost his strength and ability to care for and protect her, and she became the caretaker. And then she lost even the chance to take care of him.

In light of the damages evidence presented to the jury, the loss of consortium award is not unduly liberal and will not be disturbed.

3. Wrongful Death

"Unlike a number of other states, South Carolina's Wrongful Death Act has been interpreted by this Court to extend beyond pecuniary damages to beneficiaries. Mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship are recoverable in a wrongful death action." Garner v. Houck, 312 S.C. 481, 487-88, 435 S.E.2d 847, 850 (1993) (citing Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972)).

The Court rejects Celanese's contention that there is insufficient evidence to support the jury's wrongful death award. Testimony about the losses of Seay's family came from his daughter, Angie Keene, and his widow, Linda Seay. Seay had three children—a daughter and two sons—and six grandchildren. His wife and daughter described a very rich family life and described what a loving husband and father he was. The family spent a lot of time together and

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always got along very well. Every year, they took a trip to the beach together with the kids and grandkids. When the grandchildren would come over to Mr. Seay's house, they always went straight to see him. His wife testified that he was really good to the grandchildren.

As adults, the children were best friends with each other and their parents. His daughter lived only 15 miles away. Mr. Seay was even close to his son-in-law, which Ms. Keene described as one of his best friends. That was a value that Mr. Seay instilled in the family: "it's something that Dad made us always know that we had one another and that we needed to put love first beyond any kind of feelings that we might would have."

Ms. Keene testified that even as adults, she and her brothers still went to their father for "every decision." He was always there for them and would help them with whatever they needed. Mr. Seay instilled his Christian faith in his family, which they all relied on in coping with his illness and death. Mr. Seay was also a role model for his children in terms of his generosity.

All of Mr. Seay's children helped take care of him. Ms. Keene stayed with her father throughout his illness. Mr. Seay's youngest son, Justin, moved back home to help take care of his father when he got sick. Mr. Seay's oldest son, Dennis, Jr., was also there for him.

Ms. Keene took her father to Emory for his many doctor visits and treatments, which sometimes required overnight stays. She had to take off work to do it, but she treasured the time she got to spend with him. Every night, Ms. Keene would come to see her father after she put her own family to bed. She would get into bed beside him and they would watch TV together. She would pet his hand until he went to sleep.

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Mr. Seay's family saw him in extreme pain during the course of his illness. When his lung collapsed, they saw him screaming and crying in pain. His daughter testified that he suffered "worse than I can imagine anybody suffering."

Even when Mr. Seay was very sick, he tried to reassure his family, especially his grandchildren. If Mr. Seay had not developed mesothelioma, he would have had a life expectancy of 13 years. Ms. Keene testified that the hardest part of losing her father is that she will have to live so long without seeing him again. She and her daughters wear necklaces with an impression of her father's fingerprint.

The jury's $5 million award for wrongful death damages is supported by the evidence presented to the jury in this case. The evidence showed that Mr. Seay's children were exceptionally close to him, even as adults, and that they continued to value his love, comfort, and advice up until the time of his death. They feel his absence acutely and have suffered tremendous grief. Mr. Seay's heirs have lost 13 additional years with their father due to his difficult and untimely death.

The Court also does not find the award to be unduly liberal. A relatively recent case from New Jersey provides a helpful point of comparison. In Buttitta v. Allied Signal, Inc., 2010 N.J. Super. Unpub. LEXIS 703, *2-3, 2010 WL 1427273 (App. Div. Apr. 5, 2010), a mesothelioma case in which a father had died, the jury awarded $3 million for each of three daughters for loss of parental care and guidance—or a total of $9 million solely for loss of parental care and guidance. Remittitur was denied.

As Celanese has not provided a compelling reason to reduce the wrongful death award to $1 million, the jury's award will not be disturbed.

I. Willful and Wanton Conduct

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Celanese next argues that Plaintiffs failed to introduce any evidence to support the jury's finding that it acted willfully, wantonly, or recklessly with regard to the safety of Mr. Seay. This argument is contradicted by the record at trial, which was more than sufficient to permit the jury's reasonable conclusion that Celanese's conduct warranted punitive damages.

Plaintiffs' evidence showed that Celanese knew or should have known about the dangers of the asbestos materials it purchased and required its contract workers to use on its property. Both categories of evidence are relevant in evaluating whether Celanese's conduct was willful, wanton, and reckless, and in assessing punitive damages.

There was evidence that Celanese had access to knowledge since the 1930s that asbestos exposure causes fatal disease. Celanese thus knew of asbestos hazards several decades before Mr. Seay went to work at its Spartanburg facility in 1971. Celanese's medical director, Dr. Dixon, attended an entire conference on asbestos-related diseases in 1964, where he learned about the danger of asbestosis, lung cancer, and mesothelioma. Celanese's industrial hygienist Charles Laubly had actual knowledge that asbestos could cause fatal disease when he started with Celanese in 1966. Celanese was receiving publications from the NSC and IHF throughout the 1950s and 1960s with numerous medical abstracts about mesothelioma and other asbestos-related diseases, and those publications were kept in Celanese's library. As of the 1950s, Celanese was required to follow the asbestos exposure limits in other states where it had plants, including Texas and New York. In 1970, Union Carbide told Celanese that mesothelioma was caused by slight exposure and the PEL was not protective. All of this was known to Celanese prior to Mr. Seay's work at the Spartanburg plant.

Celanese does not deny that it knew of the health hazards of asbestos exposure, including mesothelioma, as of the passage of the OSHA asbestos regulations in 1971. OSHA regulations

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were in existence the entire time Mr. Seay worked for Daniel on Celanese's premises. In 1971, Celanese knew that it had to follow OSHA exposure limits but that those limits would not protect against cancer, only asbestosis, and knew that multiple precautions had to be taken to reduce exposures. Celanese is aware of OSHA's position that there is no safe level of exposure to asbestos.

The jury was presented with evidence that Celanese required contract maintenance workers to use asbestos insulation, gaskets, and packing for many years after it had knowledge of the danger. With respect to gaskets, Celanese deliberately selected asbestos gaskets over other available gasket materials that offered superior performance but were more expensive. The jury could reasonably conclude that Celanese chose to save money on gaskets rather than to prevent asbestos exposures. Celanese also purchased and required contract workers to use asbestos sheet gaskets that contained crocidolite asbestos, long known to be the most carcinogenic asbestos fiber.

Plaintiffs presented evidence that Celanese did not warn contract workers about the hazards of asbestos exposure during Mr. Seay's tenure. The evidence showed that Celanese made a deliberate decision to conceal the hazards of asbestos exposures from those working on its property. Its policy was not to place any information about hazardous products in writing. This policy was continued throughout the 1970s, when Celanese decided not to give employees interpretive statements of sampling results, and to claim, as a matter of policy, that hazard information was inconclusive.

The jury heard evidence that even though Celanese required asbestos insulating materials, and knew working with those materials could cause fatal diseases, Celanese took no measures to protect contract workers like Mr. Seay who worked with those asbestos materials on a daily

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basis. Celanese had no work practice requirements for asbestos, and never audited Daniel to see if they were implementing measures to protect their workers from the asbestos products that Celanese purchased and required for use on Celanese property. Celanese never warned, even though it was the only one with the power to post warning signs on its premises. Celanese did not invite contract workers to safety meetings, even though some plants had implemented such a practice years before Mr. Seay went to work at Celanese. These failures continued throughout Seay's nine-year tenure at Celanese. Celanese's decision not to protect or warn Mr. Seay continued for many years after the OSHA asbestos regulations were the law of the land. Celanese admitted that it could have implemented numerous safety measures during the 1970s that it ultimately implemented in the 1980s and 1990s.

Plaintiffs also presented evidence that the magnitude of the risk was quite significant. OSHA has stated that there is an increased risk of mesothelioma even if exposures are kept at the current PEL of 0.1 fiber/cc. OSHA expects an additional 200 cases of mesothelioma each year at exposures at that level.

The evidence supports the jury's finding that Celanese's conduct rose to the level of knowing and conscious failure to exercise due care for the health and safety of contract workers on its premises.

J. Punitive Damages

Celanese challenges the jury's $2 million damages award as unsupported by the evidence and disproportionate to the injuries suffered and to its conduct. In the alternative, it asks that the reward by reduced to $50,000. Both of these motions will be denied, as the jury's relatively modest award is rooted in the factual record and is easily within constitutional limits.

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"[P]unitive damages serve at least three important purposes: punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights." Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000). Although reviewable for compliance with due process, James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006), a jury's punitive damages award is "entitled to a strong presumption of validity." TXO Production Corp. v. Alliance Res. Corp., 509 U.S. 443, 453 (1993). In Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) and BMW of North America v. Gore, 517 U.S. 559 (1996). See Mitchell, 385 S.C. at 587, 686 S.E.2d at 185.

The United States Supreme Court has noted that the degree of reprehensibility of a defendant's conduct is "perhaps the most important indicium of the reasonableness of a punitive damages award," *BMW of North America v. Gore*, 517 U.S. 559, 565 (1996), for the simple reason that some things are worse than others. In evaluating reprehensibility, a court should consider factors such as whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the

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conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

Substantial evidence supports the jury's determination that Celanese's conduct was reprehensible. That evidence included Celanese's decision to continue using asbestos products when there were available alternatives, and deliberately concealing the nature of the danger from contract workers like Mr. Seay. This was not isolated conduct, but continued for almost a decade, including many years after OSHA required warnings and precautionary measures from Celanese.

Also relevant is the ratio between the compensatory damages award, which represents the plaintiff's actual or potential harm, and the punitive damages award. Mitchell, 385 S.C. at 588. "[A] court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." Id. A single-digit ratio is generally thought to comport with due process.

The legislature has capped punitive damages at three times the compensatory award. S.C. Code Ann. §15-32-530. Such a cap is a public policy judgment that a 3:1 ratio is an inherently reasonable limit on punitive damages. The jury's award was well within this presumptively reasonable ratio. The award was only a fraction of the entire compensatory award of $12 million, and equal to the $2 million survival damages award alone.

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The Court finds that the jury's punitive damages award serves the punishment, deterrence, and compensatory purposes outlined by the South Carolina Supreme Court. The award is not unduly liberal and is consistent with due process.

IV. Order

The Court **DENIES** Celanese's motions for judgment notwithstanding the verdict, new trial absolute, and new trial nisi remittitur. The jury's verdict of $14 million against Celanese will stand. Plaintiffs are awarded costs in the amount of $3,047.50, as well as interest on the judgment as allowed by law.

IT IS SO ORDERED.

D. Garrison Hill
Circuit Judge

January 8, 2016
Greenville, South Carolina