THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge



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Appellate Case No. 2019-000649

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

v.

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

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# FINAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**



**Rules**

## COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether Scapa preserved issues as to the cumulative exposure theory and expert testimony when it failed to make a contemporaneous objection or argue the issues in its directed verdict motion.

II. Whether the lower court correctly denied Scapa's JNOV motion based on its proper decision to admit cumulative exposure testimony and ample evidence of specific causation.

III. Whether the lower court correctly granted Mr. Stewart's motion for new trial *nisi additur* as to survival damages where the jury's verdict was unduly conservative given the uncontroverted evidence of his mental and physical pain and suffering.

IV. Whether the lower court correctly denied Scapa's motion to reallocate the settlement proceeds where Scapa does not dispute evidence of wrongful death and survival, and Mr. Stewart received only one recovery.

V. Whether Scapa preserved an issue as to bankruptcy claims forms when it did not argue the issue in its directed verdict motion or post-trial motions.

VI. Whether the lower court correctly excluded the bankruptcy claims forms and whether any error was harmless given the substantial empty chair evidence introduced by Scapa.

## STATEMENT OF THE CASE

This is an appeal from an asbestos product liability trial that resulted in a jury verdict for Respondent Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart ("Mr. Stewart"). On February 5, 2013, Mr. Stewart filed a Complaint against Appellant Scapa Waycross, Inc., ("Scapa") and numerous other entities whose businesses involve the manufacturing, use, or sales of asbestos. (R. pp. 34-36). He asserted causes of action for strict liability, negligence, and breach of the implied warranty of merchantability. (R. pp. 37-40). On May 31, 2013, Mr. Stewart filed a First Amended Complaint removing one defendant and adding two others. (R. pp. 58-61).

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

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

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

On February 16, 2018, Scapa filed a motion for judgment notwithstanding the verdict ("JNOV"), a motion for setoff of settlement proceeds, and a motion for production of Mr. Stewart's settlements with third party tortfeasors. (R. pp. 160-74). Mr. Stewart did not oppose the motion for setoff. He produced the settlement amounts for survival and wrongful death to Scapa and produced the settlement documents to the lower court for *in camera* review. (R. pp. 1674-79). On February 29, 2018, Mr. Stewart filed a motion for a new trial *nisi additur*. (R. pp. 176-82). After a hearing on July 11, 2018, at which the lower court indicated its intent to grant *additur*, Scapa filed a motion to reallocate Mr. Stewart's settlement proceeds. (R. p. 203). The lower court held another hearing on October 10, 2018. (R. pp. 1687-1700).

On March 25, 2019, the lower court entered an order granting *additur* and setoff but denying Scapa's motions for JNOV, discovery of settlements, and reallocation of settlement proceeds. (R. pp. 6-25). The court increased the survival damages from $600,000.00 to $1,000,000.00 but left the jury's $100,000.00 wrongful death award undisturbed. (R. pp. 14-15). After accounting for setoff, the lower court entered judgment for $792,800.00 for survival and $0.00 for wrongful death. On April 17, 2019, Scapa filed a notice of appeal. (R. p. 210).

## FACTS

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

Mr. Stewart worked on paper machine one for his entire career. (R. p. 2132). Machine one occupied a whole building. (R. p. 2196). It had four dryer sections and used eight dryer felts, a top and bottom felt for each dryer section. (R. p. 676 lns. 14-16, p. 2138). Machine one used at least 23 Scapa asbestos-containing dryer felts from 1969-1981.[1] (R. pp. 2132 lns. 15-16, 478-79, 576-78, 1056, 1545, 2032-35, 2051-56, 2071-98). The dryer felt held the paper against the dryers as it traveled through the machine and dried the paper. (R. pp. 676-77). Dryer felts are heavy and large, measuring approximately 160 feet long by 19 feet wide. (R. pp. 2032-35, 2051-56, 2071-94). As an illustration of the amount of asbestos in a Scapa dryer felt, Dr. James Millette, Mr. Stewart's expert in material sciences with a specialty in asbestos, testified about two Scapa dryer felts used on machine one during Mr. Stewart's employment. (R. pp. 769, 792-95, 2032-35). One felt contained 1,088 pounds of asbestos, which is 99 quadrillion[2] asbestos fibers, and another

[1] The Scapa records of its asbestos-containing dryer felts used at Bowater are called "Master Card." A Master Card states how the felt was made, including its yarn type (indicating whether it contained asbestos fibers), dimensions, position on machine one, and a record of the dates the felt shipped and went on and off machine one. *See*, e.g., R. pp. 1068, 1096, 2032-35.

[2] A quadrillion is "a number with 15 zeros behind it." (R. p. 794 lns. 22-25). One linear inch is the equivalent of 850,000 - 1,400,000 asbestos fibers. (R. p. 2241).

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

Mr. Stewart performed all of the jobs involved in putting on, cleaning, removing, and disposing of dryer felts. (R. pp. 704 lns. 14-22, 2140-65). His job positions on machine one included, in ascending order of seniority, utility man, fifth hand, fourth hand, third hand, back tender, and machine tender. (R. pp. 2149-65, 669-70). In every position up to machine tender, Mr. Stewart "regularly" worked "closely" with and around dryer felts. (R. pp. 2173-74). He specifically recalled the use of Scapa dryer felts on machine one and testified that dryer felts arrived in a box with the vendor's name and usually the size written on the box. (R. pp. 2171-72).

Many aspects of Mr. Stewart's jobs and Bowater's use of dryer felts released breathable asbestos dust and fibers into the air Mr. Stewart regularly breathed in and around machine one. To get the felts onto the machine, Bowater employees, including Mr. Stewart, used a crane to put the felts in place while some physically held the felts in place and others seamed them together. (R. p. 688 lns. 20-21, pp. 699-702). A co-worker testified the seaming process got so much felt dust on workers' clothes that they hosed themselves off or blew it off of each other. (R. pp. 700-01). Dryer felts deteriorate over time and require replacement. (R. pp. 689, 692-93, 787-88). Employees, including Mr. Stewart, cut the old dryer felts, using their hands and a knife, to remove them from the machine and drop them into the basement, where they later cut the felts into smaller pieces. (R. pp. 695-96, 698, 2140-44). The process required at least two, and as many as five, men to cut the dryer felts and quickly move them. (R. p. 698). Cutting the felts released asbestos fibers. (R. p. 695; p. 781 lns. 3-5, p. 790 lns. 5-7, pp. 854-55, 2144-46). Utility, fifth hand, fourth hand, and third hand positions worked on dryer felt changes to cut and then clean up dryer felts in the basement. (R. pp. 2148, 2159-60). A worn out dryer felt sometimes tore off during manufacturing,

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

Employees used "high pressure hoses" with compressed air to hose off the entire machine during a down time. (R. pp. 681-82, 2147, 2154-55). "[F]elt hairs" or "dust" blew off during this process, contributing to the dust build-up. (R. pp. 682-84, 686, p. 789 lns. 7-23, p. 795, p. 2148 lns. 6-9, pp. 2156-57). The "blow down process" included blowing the dryer felts with compressed air directly on the felt and to the side. (R. p. 686). In his jobs as fifth hand, fourth hand, and third hand, Mr. Stewart hosed off the machines and the dryer felts. (R. pp. 685-86, 2154-57). Even in his final position as machine tender, Mr. Stewart checked the dryer section of the machine for problems, used dryer felt scraps to fix leaky gaskets, and helped to change dryer felts. (R. pp. 2166-67).

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

George Hegler worked at Bowater for 37 years and knew Mr. Stewart. (R. pp. 2194-95). He testified air hoses used to blow dust out of the machine drums were used "across the dryer felts." (R. pp. 2198-99). After using the hoses "[o]n the shutdown, your floor would be about four or six inches deep with [dust]." (R. p. 2199). Mr. Hegler saw Mr. Stewart "covered with dust, from head to toe, from blowing" the machine down. (R. p. 2207). That dust contained "everything that came off the paper, out of the felts, whatever was hanging in there." *Id.* The employees blew that dust "out on the operating floor" where it stayed for everyone to breathe until they hosed it off. (R. p. 2208). Employees cut the removed dryer felts with a knife to "fold them up and stack them on pallets." (R. p. 2201). "[T]he ends [of a cut dryer felt] would be kind of frazzled. You'd see some dust in the air." (R. p. 2203). Mr. Hegler specifically remembered Mr. Stewart doing this. (R. p. 2204 lns. 9-11). The cut dryer felts were "dropped" or "rolled off into the basement", where they stayed "until somebody needed it or wanted it." (R. p. 2200 lns. 1-7, p. 2203 lns. 21-24). A "man cooler" fan in the basement below machine one sucked air out of the basement and blew it onto the machine floor. (R. pp. 2197, 737, 856-60, 910). Bowater used cut felt "all over the mill" as a fire or spark shield and to control steam leaks. (R. pp. 2201-03, 697).

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

asbestos fibers. (R. pp. 789, 795). Cutting a dryer felt released breathable asbestos fibers. (R. pp. 789-90, 795). In addition to evidence of asbestos fibers from Scapa dryer felts in Mr. Stewart's work environment, numerous experts testified that even after falling on the ground, asbestos fibers are resuspended into the air by cleaning activities or simply walking through them. (R. pp. 760-61, 856, 2243). A small, resuspended fiber may remain in the air for hours or even days. (R. p. 762 lns. 1-2, p. 2243).

Dr. Arnold Brody testified as Plaintiff's expert in cellular biology and the effects of asbestos. (R. p. 605). He explained how asbestos causes diseases, *i.e.*, how the fibers enter and move through the body to cause mesothelioma. (R. p. 608). Mesothelioma is "a cancer of the mesothelial cells", which are found outside of the pleura membrane surrounding the lungs, inside the ribcage, and on the cavity that holds the stomach and intestines. (R. pp. 610, 983-84). When a person inhales asbestos fibers, many of them are caught in the nose and throat without entering the lungs. (R. pp. 614-15). Chrysotile asbestos fibers can be wavy or straight but constantly break down into smaller and thinner fibers, making them "more likely to be able to be transported to various areas of the lung including the pleura." (R. pp. 621-24). When a fiber gets into the lungs, some fibers are eaten by other cells that clean the lungs and some are taken into the lymph fluid flow of the lung that flows around the surface of the pleura. (R. pp. 618-19, 625, 631-32). This is how an asbestos fiber gets to the pleura to interact with the mesothelial cells and cause mesothelioma cancer. (R. pp. 632-33).

Dr. Arthur Frank testified as Mr. Stewart's expert in occupational diseases with a specialty in asbestos. (R. p. 555 lns. 19-24). For 50 years he has studied, researched, treated, taught, and published papers about asbestos. (R. pp. 2219-24). He explained that no one can point to a particular exposure as the sole cause of mesothelioma because each exposure is an inhalation of a

number of asbestos fibers that may go to a different place in the body. (R. p. 2256). Dr. Frank described the cause of mesothelioma as

> the cumulative exposure that someone had from any and all products, from all fiber types that they may have been exposed to that ultimately gave them the disease. It doesn't mean that every fiber did it. It doesn't mean that we even know how many fibers exactly it takes to give someone mesothelioma. We don't understand the mechanism. But we know that, as the amount accumulates in somebody's body and goes up and up and up, you're more likely to get disease than if it was at a lower level.

*Id.* He testified to a reasonable degree of medical certainty that mesothelioma caused Mr. Stewart's death, asbestos exposure caused the mesothelioma, and "his exposures from the Scapa dryer felts was a substantial contributing cause of his illness and ultimately his death." (R. pp. 2268-71).

Mr. DePasquale, Mr. Stewart's industrial hygienist expert, conducted a retrospective asbestos exposure analysis of Mr. Stewart's work. (R. p. 842). He testified that Mr. Stewart's work installing, cutting, blowing out, and cleaning felts exposed him to asbestos fibers. (R. pp. 851-56, 861-62). Scapa dryer felts contained approximately 20-70% chrysotile asbestos, and Mr. DePasquale testified a felt with 30-70% asbestos creates "more opportunity" for exposure. (R. pp. 784, 793, 852, 863). He testified that Mr. Stewart's work for 12 years with 23 Scapa asbestos-containing dryer felts that contained 20-70% chrysotile asbestos fibers created a substantial occupational exposure to asbestos that caused a greater risk of Mr. Stewart developing mesothelioma. (R. pp. 863, 865).

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

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

Scapa's main defense at trial was an empty chair—that asbestos at Bowater from other manufacturers' dryer felts or other asbestos-containing products such as insulation caused Mr. Stewart's mesothelioma. *See, e.g.*, R. pp. 461-62, 468-69, 723 lns. 21-24, 726-27, 747-48, 801-02, 1568, 1572, 1574-75, 1577, 1588. Scapa also presented evidence of the hot and humid environment in the location of the dryer felts, arguing this decreased the likelihood the felts released breathable fibers, and that chrysotile asbestos is less likely than other types to cause mesothelioma. *See, e.g.*, R. pp. 802-03, 1141-42.

At the close of evidence, Scapa made a motion for a directed verdict arguing Mr. Stewart did not present sufficient evidence of substantial causation of his mesothelioma by exposure to Scapa's dryer felts. (R. pp. 1479-85). Scapa argued Mr. Stewart presented no direct evidence of exposure and only speculative circumstantial evidence. (R. pp. 1483-84). The court denied the motion. (R. p. 1495). It found undisputed evidence of 23 Scapa asbestos-containing dryer felts at Bowater during Mr. Stewart's employment, which comprises approximately 10% of the felts used. (R. pp. 1489-90). It found circumstantial evidence from Mr. Stewart and his co-workers that he regularly handled the felts while dry and the work created a lot of visible dust, all of which experts testified put breathable asbestos into the air that substantially contributed to Mr. Stewart's mesothelioma. (R. pp. 1490-92). Addressing the evidence of exposure to other asbestos-

containing products, the court held, "more than one exposure does not preclude the finding that Scapa meets the *Lo[h]rman[n]* test in terms of its contribution to the mesothelioma." (R. p. 1495).

The lower court charged the jury as to the required proof of specific causation in this case.

> [B]efore you can hold the Defendants liable, the Plaintiffs must prove that the Plaintiff's exposure to that Defendant's asbestos product was of such frequency, regularity and duration that it was a substantial factor in bringing about the disease or injury. . . .
>
> For the Plaintiff to prove actual exposure to the Defendant's product, Plaintiff must present evidence of exposure to asbestos from the Defendant's product on a regular basis, over some extended period of time, in proximity to where the Plaintiff worked. This evidence must show more than a casual or minimal contact to asbestos from the Defendant's product.
>
> Evidence was presented of other parties contributing to Mr. Steven Stewart's contraction of mesothelioma. It's proper for you to consider the action of those other parties, but only insofar as you assess and determine whether this Plaintiff has met his burden of proving the elements of the claim necessary to recover against this Defendant.

(R. p. 1610). The jury returned a verdict for Mt. Stewart as to negligence and for Scapa as to strict liability and breach of implied warranty. (R. pp. 28-29). The jury awarded $600,000.00 for survival and $100,000.00 for wrongful death. (R. p. 29).

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

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

proceeds. (R. pp. 1672, 199-202). The settlements totaled $1,036,000.00 and allocated 80% to wrongful death and 20% to survival. (R. p. 205). Scapa asked the Court to reallocate the settlements 90% to survival and 10% to wrongful death. (R. p. 201).

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

## ARGUMENT

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

The lower court properly exercised its discretion to grant *additur* for survival damages given the uncontroverted testimony of Mr. Stewart's intense mental and physical pain and suffering from mesothelioma. It also properly denied Scapa's motion to reallocate the settlement

proceeds given the undeniable evidence of wrongful death and survival damages and the amount of Mr. Stewart's full recovery. Finally, the lower court correctly excluded bankruptcy claims forms as improper evidence of claims with settling tortfeasors and in light of the extensive empty chair defense the court permitted Scapa to present. In sum, the lower court's decisions are fully supported by the law and the record, and the jury simply believed and found that Scapa's dryer felts substantially contributed to Mr. Stewart's mesothelioma.

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

Scapa did not make any arguments in its directed verdict motion about the "cumulative exposure" theory or the reliability of Mr. Stewart's experts' opinions. (R. pp. 1479-96, 2256-57). Scapa did not argue that any expert lacked a sufficient factual predicate for his causation testimony. (Br. of App. pp. 18-20). An "issue [] not raised as a ground for a directed verdict during the liability stage of the trial and is not preserved for this Court's review." *Jamison v. Morris*, 385 S.C. 215, 226, 684 S.E.2d 168, 173 (2009). In its directed verdict motion, Scapa argued only that the substance of the admitted testimony did not satisfy the specific causation standard. (R. pp. 1479-85). Scapa filed a motion *in limine* as to portions of only Dr. Brody and Dr. Frank's testimony. (R. pp. 122-24). The lower court ruled "I am not going to take the position that experts who testify about every exposure and cumulative effect are going to be stricken from being able to testify." (R. p. 348). Scapa then failed to make an objection to expert testimony at trial. "[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (internal quotation marks omitted). Scapa's failure to make any

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

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

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

The Court should find all of these issues are unpreserved.

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

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

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

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

### A. The Lower Court Correctly Admitted Cumulative Exposure Testimony

Assuming the Court finds this issue preserved, the lower court correctly admitted Mr. Stewart's experts' testimony as to specific causation.[3] When determining whether exposure to asbestos is actionable, South Carolina uses the "'frequency, regularity, and proximity test.'" *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007) (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)). "To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (internal quotation marks omitted). Mr. Stewart's case theory and evidence presented are fully compliant with *Henderson*. The lower court held "Plaintiff's experts testified that mesothelioma can be caused by brief or low-level cumulative exposures. They should be permitted to rely on this basic medical fact in reaching their opinion []. That does not mean that they concluded that 'each and every exposure' that Mr. Stewart had was a substantial factor in causing his disease." (R. p. 19). After citing to other reported decisions admitting similar opinions, the lower court explained "it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion." (R. p. 20). This Court should affirm.

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

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

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

Scapa's argument on this issue is essentially that a plaintiff cannot rely on the theory that each and every or the cumulative exposure to asbestos is a substantial contributing cause to prove specific causation but must present proof of a level of exposure to the defendant's asbestos product and that such exposure is a substantial contributing cause. (Br. of App. pp. 9-13). Mr. Stewart agreed to this premise during a pre-trial hearing. "The experts will say that each and every exposure above background, an occupational exposure, Your Honor, contributes. They don't say each and every is a substantial contributing cause. . . . I still need to prove it was an occupational exposure, it was substantial, and the exposures from specific Scapa asbestos-containing dryer felts were indeed a substantial factor in the causation of the mesothelioma." (R. pp. 345-46). Scapa's appellate argument is misplaced because Mr. Stewart did not rely on an each-and-every or cumulative exposure theory at trial, he relied on the *Henderson* specific causation standard proven by evidence of frequency, regularity, and proximity to Scapa's product. Mr. Stewart's expert testimony as to "cumulative exposure" is admissible and, along with other testimony, satisfies *Henderson*.

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

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

> Dr. Frank has considered the frequency, regularity, and proximity of [plaintiff]'s exposure to asbestos as a result of his use of Bendix brakes in order to come to his conclusion regarding causation. While a few of Dr. Frank's statements may recall the each and every exposure theory, the other parts of his reports that provide context to those statements show that Dr. Frank considered the specifics of [plaintiff]'s exposure to Bendix brakes when coming to his conclusion.

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

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

more likely to get disease." (R. p. 2256). Dr. Frank does ***not*** "believe that each and every is the same as cumulative [exposure]." (R. p. 2321 lns. 2-4). Rather, his opinion is that, while mesothelioma is not attributable to background asbestos exposure alone, in a case with additional exposure, the background level contributes to the cumulative exposure. (R. p. 2321). Dr. Frank "would ***not*** agree with" the statement that any exposure, regardless of dosage, is sufficient to cause asbestos-induced cancer. (R. p. 2330 lns. 1-5) (emphasis added).

The specific causation standard is qualitative, not quantitative as Scapa suggests. Quantification of an exact dose is not required. *Lohrmann* describes the frequency, regularity, and proximity standard as "a *de minimis* rule since a plaintiff must prove more than a casual or minimum contact with the product." 782 F.2d at 1162. Several of Mr. Stewart's experts provided specific causation testimony. Dr. Frank considered co-worker testimony about a cloud of felt dust in his opinion of the extent and amount of Mr. Stewart's exposure to Scapa asbestos-containing dryer felts. "[D]ryer felts had . . . 30 to maybe 70 percent asbestos, and if you had enough dust for the air to get cloudy, you're dealing with a lot of asbestos." (R. p. 2264). Dryer felt testing showed asbestos fibers release "from single to low double digits in terms of fibers per cc." (R. p. 2281). Dr. Millette's compressed air test released over 30 asbestos fibers per cc. (R. p. 777). Dr. Frank testified that 0.1 to 15 fibers per cc of release when compressed air is blown across a felt in someone's direction is a significant exposure that would significantly contribute to mesothelioma. (R. pp. 2332-34). Even one year's exposure to .1 fibers per cc, the legally allowable limit, makes a person four times more likely to get an asbestos-related disease. (R. pp. 2307-08). Mr. DePasquale testified the facts of this case, specifically including the number of Scapa dryer felts used during Mr. Stewart's employment and his work with dryer felts, show a significant occupational exposure to Scapa dryer felt asbestos that puts an individual at a great risk of

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

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

**B. <u>The Lower Court Correctly Held Mr. Stewart Established Specific Causation</u>**

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

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

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

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

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

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

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

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

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

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

Scapa's argument as to the sufficiency of the evidence is also contrary to its defense theory. Throughout the entire trial, Scapa tried to prove that asbestos-containing insulation and other products caused Mr. Stewart's mesothelioma. *See, e.g.*, R. pp. 723 lns. 21-24, 726-27, 747-48, 801-02, 819-22, 877, 880-82, 884, 890-94, 946-48, 953, 958-60, 963, 1045-46, 1056-57, 1076, 1136, 1149-50, 1168-70, 1240-41, 1244-45, 1248-49, 1259-65, 1268-69, 1283, 1355, 1362-65, 1371-72, 1392-93, 1460-64, 1568, 1572, 1574-75, 1577-79, 1588). Scapa argued to the jury that Mr. Stewart's mere presence (and not physical or direct work) around these other asbestos-

containing products caused his mesothelioma.[6] If Scapa wanted the jury to believe its theory, it cannot deny the same logic applies to Mr. Stewart's evidence, especially when viewed in a light most favorable to him. "As the old saying goes, what's good for the goose is good for the gander." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917 (2017). Based on its own defense theory of Mr. Stewart's alleged exposure to asbestos from other products, Scapa cannot credibly deny that Mr. Stewart's evidence, viewed in a light most favorable to him, supports a reasonable inference of exposure to Scapa dryer felts "on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (internal quotation marks omitted).

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

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

asbestos exposure to explain that simply because there is a legally allowable limit "doesn't mean it's safe." (R. p. 2307). That is not the basis for and is separate from his specific causation opinion that Scapa asbestos-containing dryer felts substantially contributed to Mr. Stewart's mesothelioma. Scapa's argument that Mr. Stewart did not address other asbestos-containing products is also incorrect. (Br. of App. p. 18). Based on his review of the testimony and the Bowater plant, Mr. DePasquale considered dryer felts, thermal insulation on piping, and gaskets and packing related to valves. (R. p. 848 lns. 9-14). He discounted thermal insulation on piping because his investigation showed the "vast majority" of the pipes were cladded. (R. pp. 849-50); *see Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (agreeing that "presence in the vicinity of static asbestos is not exposure to asbestos"). He discounted gaskets because Mr. Stewart did not remember working with gaskets or packing but a coworker thought he saw Mr. Stewart use packing. (R. p. 894). Mr. Stewart accounted for other potential exposures.

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

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

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

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

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

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

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

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

> The Plaintiff introduced extensive evidence as proof for non-economic damages, resulting in a well-developed record detailing the physical pain Mr. Stewart lived in for over one-year, including how he endured multiple chemotherapy treatments, thoracentes[i]s, a major invasive surgery, and ultimately died a very painful death from mesothelioma.
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> . . . Mr. Stewart's life was torn apart by mesothelioma. . . . Prior to getting sick, he was enjoying retirement, traveling, gardening, and spending time with his children and grandchildren. He lost a substantial amount of weight. The severe pain and limitations of his disease prevented Mr. Stewart from doing the things he loved.
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> . . . determined to delay his impending death[,] . . . He opted to undergo a pleurectomy, which his surgeon, Dr. Harpole, described as a "maximally invasive" procedure which involved removing his rib and scraping out the tumor.

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

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

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

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

Mr. Stewart suffered through chemotherapy with two types of drugs, one that Dr. Harpole described as a "sledge hammer." (R. pp. 988-89). One of the drugs "is a really difficult drug" and is "noxious to the kidneys" and causes neuropathy. (R. p. 989). During chemotherapy, Mr. Stewart's tumor continued to make too much fluid, necessitating a painful thoracentesis procedure once or twice a week in which a needle is put in the chest to drain the fluid. (R. pp. 991-92). Dr. Harpole said he could not "imagine having it done once or twice a week for three months." (R. p. 992). Mr. Stewart's pleurectomy surgery in March 2013 involved two hours of pre-surgery

preparation that included a catheter outside of the spine for pain control, a "very large IV in the neck that goes down in the heart", an arterial line in a wrist artery, and a catheter in the bladder. (R. p. 993). During the "maximally invasive" surgery, Dr. Harpole removed Mr. Stewart's rib, took off his heart sack, collapsed his lung, removed the tumor from his lung, reinflated his lung, and then reconstructed his diaphragm and heart sack. (R. pp. 999, 1002). Because mesothelioma is "a death sentence", the surgery is only an effort to prolong life and not to provide a cure. (R. p. 1004). After surgery, Mr. Stewart "limped along" with pain and "was just too debilitated" to complete the "long rehab program." (R. pp. 1007-08). He died five months after surgery.

A comparison of Mr. Stewart's appearance in his pre-surgery video deposition on March 4, 2013, and the day-in-the-life video taken on August 20, 2013, illustrates his rapid and painful deterioration to death. *Compare* R. p. 2189 *with* R. p. 2190. He started feeling pain in 2012. (R. p. 2182). After visits to several doctors and several procedures, he was diagnosed with mesothelioma. (R. pp. 2182-83). The excess lung fluid made breathing harder and made him exhausted and unable to do regular tasks around the house and yard or to walk his dog. (R. pp. 2184-85). Mr. Stewart lost sleep and could not drive to spend time with his children. (R. p. 2186). The chemotherapy "killed" his appetite and "locked" his bowels. (R. p. 2187). He testified "I never imagined my life would come to what it is." *Id.* When asked about his concern or worry about surgery, Mr. Stewart explained his belief that "it's in God's hands" and then began to cry. (R. p. 2188; Video of Depo. R. p. 2189)

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

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

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

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

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

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

The lower court increased the survival damages from $600,000.00 to $1,000,000.00 but left the jury's $100,000.00 wrongful death award undisturbed, which amounts to 90% survival and 10% wrongful death damages. (R. pp. 14-15). Mr. Stewart's prior settlements totaled $207,200.00 for survival and $828,800.00 for wrongful death, which amounts to 20% for survival and 80% for wrongful death. (R. p. 1695, Tr. p. 24, p. 1709). Scapa moved to reallocate the settlements to 90% for survival and 10% for wrongful death, which would result in $932,400.00 for survival and $103,600.00 for wrongful death. (R. pp. 199-202, 1709). Relying on the Supreme Court's decision in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), the lower court denied the motion to reallocate. (R. pp. 23-24, p. 1698 Tr. p. 37, p. 1699 Tr. pp. 41-42). After accounting for setoff, the lower court entered judgment for $792,800.00 for survival and $0.00 for wrongful death. (R.

p. 24). The result of the lower court's order is that the total amount Mr. Stewart received from all tortfeasors for survival is $1,000,000.00—the exact amount of the judgment.

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

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

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

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

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

In this case, as in *Riley*, Scapa's effort to invalidate the settlement allocations based on a percentages analysis is manifestly without merit. Scapa's argument that the allocation percentages are not reasonable under the facts because the ultimate judgment amount is a different percentage breakdown than the pre-trial settlements with third parties is simply another way of saying the ultimate judgment allocation percentages are more advantageous to Scapa than the settlement allocation percentages. It is the same argument rejected by *Riley*—"the purported impropriety of an apportionment favoring the" plaintiff. *Id.* at 191, 777 S.E.2d at 831.

Scapa's argument conflates the standards for *additur* and reallocation, and "would in practice allow [the defendant] a second bite at the apple at arguing additur." (R. p. 1694 Tr. p 20). A finding of *additur* (or *remittitur*) by the trial court is not the equivalent of finding a basis to reallocate settlement proceeds and cannot be the basis for reallocation. Such a rule would treat a

plaintiff and defendant differently because a plaintiff cannot ask for reallocation of his own settlement if the court grants a *remittitur*. "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial nisi." *Riley*, 414 S.C. at 192, 777 S.E.2d at 828 (emphasis and alteration in original). Finding a verdict is unduly liberal or conservative is different from finding settlement proceeds should be reallocated. The issues are separate, and the lower court correctly considered them separately.

The "reasonable under the facts" standard Scapa argues to the Court is a second, and more defendant-friendly, bite at the apple than arguing against *additur*. Notably, Scapa does not argue that there is insufficient evidence to support survival and wrongful death causes of action. Rather, it argues the amounts allocated to those causes of action are not reasonable under the facts, a standard for which there is no legal authority and which is much more lenient than the new trial *nisi* standard. (Br. of App. p. 28); *cf. Riley*, 414 S.C. at 196, 777 S.E.2d at 831-82 (noting as a basis for denying reallocation "the evidence in the record of Riley's conscious pain and suffering"); *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 217, 734 S.E.2d 142, 146 (2012) ("In the absence of ***any evidence*** for a survival action, we find the trial court properly reallocated that portion of the settlement to the wrongful death claim." (emphasis added)); *Ward v. Epting*, 290 S.C. 547, 559-60, 351 S.E.2d 867, 874-75 (Ct. App. 1986) (determining only whether there is "***any evidence***" of the survival cause of action where the defendant argued all settlement amounts should go to wrongful death because of "insufficient evidence" of a survival action (emphasis added)). The flaws in Scapa's argument are apparent from the fact that it is based on an *additur* ruling that Scapa argues is incorrect and should be reversed. Scapa's proposed standard is contrary to *Riley*'s

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

Finally, it is significant in the analysis of this issue that Mr. Stewart received, in total from all tortfeasors, $1,000,000.00, which is a single recovery for his survival damages. Setoff is the underlying goal of reallocation. *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 ("[W]here a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset."). The point of setoff is to prevent a double recovery. *Id.* at 196, 777 S.E.2d at 830 (stating the Contribution Among Tortfeasors "Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the settlement of disputes." (internal quotation marks omitted)).

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

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

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

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

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

## VI. THE LOWER COURT CORRECTLY EXCLUDED THE BANKRUPTCY CLAIMS FORMS

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

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

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

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

**B. The Lower Court Admitted Empty Chair Evidence**

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

In its opening, Scapa argued to the jury:

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

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

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

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

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

> [I]t's not a secret that our defense is that we don't believe that Scapa dryer felts caused or substantially contributed to Mr. Stewart's mesothelioma. We believe the thermal insulation that Mr. Jekell never mentioned in his opening statement, but we showed you and brought you full evidence of it was the cause. . . .
>
> We're not blaming anything on Lockport, Mt. Vernon, Asten, or Albany, but the truth of the case is, ladies and gentlemen, which we told you, not the Plaintiff, there were five dryer felt suppliers at Bowater. And the workers all said Mt. Vernon was the major supplier. . . . [Plaintiff] didn't even tell you that those manufacturers were there until we brought it out in the evidence. . . .
>
> So what was the substantial contributing factor to Mr. Stewart's mesothelioma? We brought you evidence, three quarters of a mile of thermal insulation connected to paper machine number one. . . .
>
> Do we blame Bowater? Yes, we do, ladies and gentleman. . . . they were required by law to remove the asbestos products at their mill . . . . We had no control over

> that. We had no control over all this insulation and this insulation work and this insulation exposure.
>
> [Bowater] had an obligation to provide them a safe workplace. . . . Scapa was not in charge of Bowater. Bowater was.

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

### C. The Lower Court Correctly Excluded the Claims Forms

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

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

> This is a direct attempt to put before the jury the fact that a bankruptcy claim was made on the altar of saying that it's an admission of a party opponent, and I don't regard that as proper under the dictates of *Smith v. Tiffany*. . . .
>
> I do not regard it as appropriate to get into other litigation in which the plaintiff engaged with other parties. If you have direct evidence of the activities of another defendant or another entity that caused exposure, then that's what's called the empty chair defense and that you can go into, but this is not an attempt to do that. That is an attempt to put in the claim form from the bankruptcy claim, and I'm not going to allow that.

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

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

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

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

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

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

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

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

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

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

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

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

> When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, *inter alia*, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; . . . .
>
> Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, *i.e.*, the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence.

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

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

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

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

## CONCLUSION

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

February 7, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge



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Appellate Case No. 2019-000649

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

v.

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

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CERTIFICATE OF COUNSEL

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

February 7, 2020

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